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September 25, 2023

VIA EAB eFILING SYSTEM

Mr. Emilio Cortes
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1200 Pennsylvania Avenue N.W.
Mail Code 1103M
Washington, DC 20460-0001

Re: Massachusetts Port Authority – Logan International Airport
Petition for Review of NPDES Permit No. MA0000787

Dear Mr. Cortes:

Attached please find for filing Massachusetts Port Authority's Petition for Review of NPDES Permit No. MA0000787 issued to Massachusetts Port Authority and Co-Permittees for Logan International Airport. The Environmental Protection Agency, Region 1 issued this permit on August 24, 2023. It was received via electronic mail on August 24, 2023, therefore the petition deadline, pursuant to 40 C.F.R. § 124.19(a)(3), is September 25, 2023.

The petition has been prepared in compliance with the formatting and length requirements contained in 40 C.F.R. § 124.19 and the March 2023 "Guide to the U.S. Environmental Protection Agency's Environmental Appeals Board."

Also enclosed is a motion seeking additional time to prepare a supplemental petition. Massachusetts Port Authority requests that this motion be held in abeyance pending completion of the requested Alternative Dispute Resolution (ADR) process. If this matter is resolved through the ADR process, then no action on the motion will be required.

Thank you for your assistance with this filing.

Sincerely,

/s/ Carlos R. Rosende

Emilio Cortes, Clerk of the Board, Environmental Appeals Board
September 25, 2023
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Encs.

cc. David Cash, Regional Administrator, Environmental Protection Agency, Region 1 (*via U.S. first class mail*)
Erin Flannery Keith, Assistant Regional Counsel, Environmental Protection Agency, Region 1 (*via electronic mail*)
Richard S. Davis, Counsel for Co-Permittees, Beveridge & Diamond (*via electronic mail*)

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

_____))
In re:))
))
Massachusetts Port Authority))
Logan International Airport))
)) NPDES Appeal No. 23- ____
))
NPDES Permit No. MA0000787))
))
_____))

**PETITION FOR REVIEW OF
MASSACHUSETTS PORT AUTHORITY NPDES PERMIT
ISSUED BY REGION 1**

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Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 43,761 (Aug. 26, 1996), revised in 61 Fed. Reg. 57425 (Nov. 6, 1996)7
MassDEP Final Pathogen TMDL for the Boston Harbor, Weymouth-Weir, and Mystic Watersheds in October 2018 (Control Number CN 157.1) (Pathogen TMDL)7

I. INTRODUCTION

The Massachusetts Port Authority (Massport) owns and operates Logan International Airport (Logan) which serves as the gateway to the City of Boston and New England. U.S. Environmental Protection Agency (EPA) Region 1 issued a final National Pollutant Discharge Elimination System (NPDES) permit¹ to Massport and several co-permittees² for Logan on August 24, 2023 (Permit No. MA0000787 or the “2023 Logan Permit”).

The 2023 Logan Permit is the third individual NPDES permit issued for Logan; NPDES permits were previously issued in 1978 and in 2007. Massport has consistently complied with its prior NPDES permits and is committed to complying with the 2023 Logan Permit. The 2023 Logan Permit includes an array of new requirements, including bacteria effluent limitations, installation of blend-to-temperature technology for deicer usage reduction, whole effluent toxicity (WET) testing, per- and polyfluoralkyl substances (PFAS) sampling, best management practices for illicit discharge detection, and pH study. However, Massport submits this petition only with respect to the newly required numerical bacteria limits, specifically those contained in Part I.A.1 and Part I.A.2.

As more fully explained in Section IV, the 2023 Logan Permit prescribes an abrupt change in requirements related to fecal coliform and *Enterococcus*. The 2023 Logan Permit abandons the longstanding approach of monitoring and employing best management practices (BMPs), and it imposes rigid numerical limits (collectively, “the Bacteria Limits”). Despite this dramatic change, in issuing the 2023 Logan Permit EPA has deprived Massport of a reasonable opportunity to remain in compliance; EPA has provided no timeline during which Massport can

¹ See 2023 Logan Permit at <https://www3.epa.gov/region1/npdes/permits/2023/finalma0000787permit.pdf>.

² See Attachment B to the 2023 Logan Permit for a full list of co-permittees, at <https://www3.epa.gov/region1/npdes/permits/2023/finalma0000787attachb.pdf>.

prepare to meet the new Bacteria Limits, including time to evaluate options for addressing bacteria in its discharge.

Given that Massport cannot meet the new Bacteria Limits when the 2023 Logan Permit takes effect on November 1, 2023, this petition seeks the Board's narrow review of only the Bacteria Limits. In these particular circumstances, the new Bacteria Limits are overly burdensome, not required by law, and as further discussed below are based on clearly erroneous findings of fact or conclusions of law. *See* 40 C.F.R. § 124.19(a)(4)(i)(A).

II. PROCEDURAL REQUIREMENTS SATISFIED

U.S. EPA issued a draft NPDES permit under the Clean Water Act for wastewater and stormwater discharges from Massport's Logan International Airport on April 12, 2021. On July 12, 2021, Massport submitted extensive comments on EPA's draft 2023 Logan Permit and the accompanying Fact Sheet addressing, in part, the lack of factual or legal justification for EPA's proposed bacteria requirements. *See* 40 C.F.R. § 124.19(a)(2). By letter dated August 24, 2023, EPA Region 1 transmitted and issued the 2023 Logan Permit. In accordance with 40 C.F.R. § 124.19 and 40 C.F.R. § 124.20, Massport timely filed this petition for review within the appropriate thirty (30) day deadline. *See* 40 C.F.R. §§ 124.19(a)(3); 124.20. As set forth more fully below, this petition meets the requirements of 40 C.F.R. § 124.19(a)(4) and explains how the contested permit conditions are based on findings of fact and conclusions of law that are clearly erroneous.

III. FACTUAL BACKGROUND

The 2023 Logan Permit addresses stormwater associated with industrial activity, including from vehicle maintenance areas, equipment cleaning areas, and deicing and anti-icing

activities, which is discharged through a number of outfalls to Boston Harbor, Boston Inner Harbor, and Winthrop Bay. *See* 2021 Fact Sheet, p. 4.³

The 2023 Logan Permit represents the culmination of a lengthy collaborative regulatory process to revise and update the 2007 permit. Under the 2007 permit, Massport has monitored, and has consistently observed, bacteria levels in its industrial stormwater discharges. In consultation with EPA and with the Massachusetts Department of Environmental Protection (MassDEP), Massport has undertaken extensive efforts to investigate the sources of bacteria, including animal waste and illicit sewer connections.

Despite Massport's extensive efforts, the source (or sources) of bacteria in Massport's discharges remains unknown.⁴ EPA concedes the sources of bacteria "remain unclear" and are "inconclusive." *See* Response to Comments, at 12.⁵

Massport has historically employed a variety of BMPs and, therefore, it does not currently possess the type of disinfection technologies required to comply with the new Bacteria Limits. Indeed, to Massport's knowledge none of the available technologies has been proven for treatment of stormwater in the volumes discharged at Logan. Moreover, Massport estimates that years of extensive studies will be required prior to design and construction of a suitable stormwater treatment system at Logan, if required.

³ <https://www3.epa.gov/region1/npdes/logan/pdfs/finalma0000787fs.pdf>

⁴ Importantly, the data collected by Massport do not demonstrate the industrial activities at Logan are the source of the bacteria in Massport's discharge. The bacteria may be naturally occurring or may originate from non-point sources, as evidenced by the distinctive and consistent seasonal trends in bacteria counts, year after year. Of particular note, no variation in bacteria counts were noted during 2020 when aircraft operations and passenger traffic at Logan were significantly reduced due to the COVID pandemic.

⁵ <https://www3.epa.gov/region1/npdes/permits/2023/finalma0000787rtc.pdf>

IV. ISSUES PRESENTED AND ARGUMENT

A. EPA Region 1 Should Continue to Rely Upon BMPs and Other Non-Numeric Effluent Limitations.

Massport believes the new Bacteria Limits are unnecessary and the 2023 Logan Permit should instead prescribe continued monitoring and enforceable commitments to employ BMPs to manage bacteria in the stormwater discharges, especially given the unknown source(s) of bacteria in Massport's industrial stormwater discharge. Indeed, given the unpredictability of stormwater discharges, BMPs are commonly used in lieu of numerical limits, where, as here, they are reasonably necessary to carry out the purpose and intent of the Clean Water Act, including to ensure compliance with water quality standards. *See* 40 C.F.R. § 122.44(k)(4); *Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits*, 61 Fed. Reg. 43,761 (Aug. 26, 1996), revised in 61 Fed. Reg. 57425 (Nov. 6, 1996).

Implementation of BMPs is consistent with the Region's NPDES permitting approach to address stormwater from other industrial sources and from municipal sources. For example, the Massachusetts Small Municipal Separate Storm Sewer (MS4) General Permit⁶ does not contain any numeric effluent limitations for bacteria, but relies on the series of BMPs, monitoring, and reporting to meet applicable Water Quality-based Effluent Limitations and MassDEP's *Final Pathogen TMDL for the Boston Harbor, Weymouth-Weir, and Mystic Watersheds* in October 2018 (Control Number CN 157.1) (Pathogen TMDL).⁷ Likewise, EPA very recently issued NPDES permits to a group of bulk petroleum storage facilities for their discharges into waters subject to the Pathogen TMDL. EPA proposed numerical effluent limitations for bacteria in the draft permits, but it later concluded such effluent limitations were unnecessary and perhaps

⁶ <https://www.epa.gov/npdes-permits/massachusetts-small-ms4-general-permit#newsupdates>

⁷ <https://www.mass.gov/doc/final-pathogen-tmdl-report-for-the-boston-harbor-weymouth-weir-and-mystic-watersheds/download>

detrimental, relying instead on BMPs and related non-numerical limitations to meet the local WQBELs and the Pathogen TMDL.⁸

In the absence of a known and controllable source of bacteria and without an identified means of meeting the Bacteria Limits, the 2023 Logan Permit should prescribe monitoring and use of BMPs. In fact, EPA's Response to Comments speculates as to the potential effectiveness of an array of BMPs. *See* Response to Comments, at 13. Instead, EPA disregards its use of BMPs in other permits and it acknowledges but disregards the particular circumstances at Logan. EPA's decision to apply inflexible, numerical limits is therefore based on clearly erroneous conclusions of law and findings of fact.

B. The 2023 Logan Permit Does Not Provide a Reasonable Opportunity for Massport to Achieve Compliance

The effect of the Bacteria Limits will be to cast Massport into immediate noncompliance when the 2023 Logan Permit takes effect, a consequence EPA did not address in its Fact Sheet or in its Response to Comments. The resulting enforcement and potential penalties will impose an undue financial burden. Significantly, the 2023 Logan Permit does not provide Massport with any reasonable opportunity to avoid this outcome.

If the Board concludes application of numerical bacteria limits may be appropriate at a point in the future, EPA's decision to immediately impose those requirements is unsupported by the factual record, is not required by law, and is therefore arbitrary and capricious. EPA has not justified its refusal to include a reasonable compliance schedule. *See* Response to Comments, at 9-14. At the very least, the 2023 Logan Permit should be remanded so EPA can revise it to

⁸ See <https://www3.epa.gov/region1/npdes/chelseacreekfuelterminals/pdfs/2022/2022-crbpsf-rtc.pdf> (Response to Comments for Chelsea Creek Fuel Terminals, at 135-136).

provide Massport with a reasonable schedule for evaluation, design and ultimately implementation of bacteria controls necessitated by the Bacteria Limits.

V. STAY OF CONTESTED AND NON-SEVERABLE CONDITIONS

Massport contests the following provisions of the 2023 Logan Permit: Part I.A.1 and Part I.A.2, only with respect to the numeric limits on fecal coliform and Enterococcus. The effect of those provisions must be stayed, along with any uncontested conditions EPA concludes are not severable from those contested, pending the Board's review and the resolution of this appeal. *See* 40 C.F.R. §§ 124.16(a) and 124.60(b).

VI. CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Massport respectfully seeks the Board's review of the specified terms and provisions of the 2023 Logan Permit. After such review, Massport requests the Board direct the parties to participate in alternative dispute resolution (ADR) to explore opportunities to resolve this dispute without further proceedings.

If ADR is not successful in resolving this dispute, Massport requests:

- A. The opportunity to present oral argument in this proceeding and a briefing schedule for this appeal to assist the Board in resolving the issues in dispute;
- B. A remand to EPA Region I with an order to issue an amended NPDES Permit conforming to the Board's findings on the terms and provisions appealed by Massport; and
- C. Such other relief as the Board may deem appropriate under these circumstances.

/s/ Carlos Rosende

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Massachusetts Port Authority

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify this petition for review, including all relevant portions and exclusive of attachments, contains less than 14,000 words.

/s/ Carlos Rosende _____
Carlos Rosende

September 25, 2023

CERTIFICATE OF SERVICE

I, Carlos Rosende, hereby certify that on this 25th day of September 2023 I served a copy of the foregoing Petition for Review and Statement of Compliance with Word Limitations on the parties identified below:

by U.S. first class mail:
David Cash, Regional Administrator
U.S. Environmental Protection Agency, Region 1
5 Post Office Square – Suite 100
Boston, MA 02109-3912

by electronic mail:
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