

# Antibacksliding/Clean Water Act: U.S. EPA Environmental Appeals Board Addresses Challenge to Ruidoso Downs, New Mexico, Nutrient Provisions



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The United States Environmental Protection Agency (“EPA”) Environmental Appeals Board (“EAB”) addressed in a March 12th Order a challenge to a Clean Water Act National Pollution Discharge Elimination System (“NPDES”) permit that had been issued to the City of Ruidoso Downs and Village of Ruidoso Wastewater Treatment Plant (collectively “Ruidoso”) by Region 6 of the agency.

The challenge was filed by Rio Hondo Land and Cattle Company (“Rio Hondo”) through a Petition to the EAB asking for review of the issuance of the NPDES permit.

EPA issued an NPDES permit to Ruidoso on July 25, 2017. The permit authorizes Ruidoso to discharge effluent from its wastewater treatment plant (“Treatment Plant”) into the Rio Ruidoso in Lincoln County, New Mexico. The issued permit is a renewal of an NPDES permit previously issued in 2012.

Rio Hondo challenged the issued permit on the basis that EPA violated the antibacksliding provision in the Clean Water Act. It argued that an exception to the antibacksliding provision was not applicable to revise the Ruidoso nitrogen and phosphorous limits from those in the 2012 permit.

The concentration limits for nitrogen and phosphorous were argued to have been revised through the removal of concentration limits and revising upward the mass-based nitrogen limit.

Rio Hondo further argued that the antibacksliding exception was not applicable because the 2012 permit’s concentration limits for nitrogen and phosphorous were not based on a total maximum daily load (“TMDL”). As a result, it contended that the NPDES permit limits would not assure attainment of the applicable water quality standards.

The Clean Water Act antibacksliding provision is found in Section 402(o) of the statute. As the EAB notes, backsliding “occurs when a renewed, reissued, or modified permit contains effluent limitations [that are] less stringent than those in the previous permit.

Section 402(o) contains three main provisions:

1. A prohibition on specific forms of backsliding
2. Exceptions to the prohibition

3. A safety clause that provides an absolute limitation or backstop on backsliding if the revised effluent limit would result in a violation of water quality standards

See EPA 2010 Permit Writers' Manual § 7.2.1, at 7-2.

The exception relevant to Rio Hondo's appeal is provided by Section 402(o)(1). This provision allows less stringent effluent limits if they comply with the language in Section 303(d)(4) which addresses the establishment and application of TMDLs. The exception is available if the cumulative effect of all such revised effluent limitations based on the TMDL waste load allocation will assure the attainment of the applicable water quality standard.

EAB concludes that EPA reasonably relied on the previously referenced exception to the antibacksliding provision when it removed the concentration limits for nitrogen and phosphorus and revised upward the mass-based limit for nitrogen. The decision is based on two conclusions.

First, EAB states that "the entirety of the record and the relevant statutory and regulatory provisions support the Region's conclusion that the concentration limits for those nutrients in the prior permit were based on the applicable 2006 TMDL for the Rio Ruidoso."

Second, EAB held that the Region acted reasonably in relying on the newly updated 2016 TMDL to revise the nutrient limits and conclude that the renewed permit would assure attainment of, and not result in a violation of, the applicable water quality standards. This was based on the fact that EPA had recently reviewed and approved the TMDL. Further, nothing was deemed to be found in the record referencing new information indicating the assumptions and requirements EPA relied on in approving the TMDL were inaccurate.

A copy of the EAB decision can be found [here](#).