

NPDES Permit/Clean Water Act: Federal Appellate Court Addresses Anti-Backsliding Issue



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05/03/2021

The United States Court of Appeals for the 10th Circuit (“10th Circuit”) in an April 29th Opinion addressed a challenge to effluent limits placed in a Clean Water Act National Pollution Discharge Elimination System (“NPDES”) permit (“Permit”). See *Rio Hondo Land & Cattle Company, L.P., v. Village of Ruidoso; City of Ruidoso Downs*, No. 19-9531.

The Court addressed whether the issuance of the NPDES Permit constituted impermissible backsliding under the Clean Water Act.

The United States Environmental Protection Agency (“EPA”) issued an NPDES Permit to a wastewater treatment plant (“Plant”) that serves the Village of Ruidoso and City of Ruidoso Downs in New Mexico in 2017. The issued Permit was a renewal of a NPDES permit previously issued in 2012.

The reissued Permit did not include concentration-based limits for either nitrogen or phosphorus. It did include mass-based limits for nitrogen and phosphorus in accordance with a Total Maximum Daily Loading (“TMDL”) for a portion of a stretch of The Rio Ruidoso River (“Ruidoso”). The Ruidoso is classified under the Clean Water Act as marginally impaired for the nutrients nitrogen and phosphorus.

The Rio Hondo Ranch (“Rio Hondo”) filed a Petition for Review of the Permit with the U.S. EPA Environmental Appeals Board (“EAB”). It argued:

1. The Permit constituted backsliding under the Clean Water Act because concentration-based limits for both nitrogen and phosphorus were removed in revising upward the mass-based nitrogen limit
2. EPA could not rely on any exclusion from the anti-backsliding rule
3. The Permit limits would not assure attainment of the applicable water quality standards

The ranch contended that the Plant’s discharges reduced river water quality including causing algae blooms and harmed its ability to make critical use of the river water.

The EAB upheld the Permit stating that there was not a demonstration that the EPA clearly erred or abused its discretion in relying on a 2016 TMDL in determining the nutrient limits for both nitrogen and phosphorus in the Permit, or in determining that those limits assure attainment and do not violate New Mexico’s water quality standards.

Rio Hondo appealed EAB’s decision to the 10th Circuit.

33 U.S.C. § 1342(o) contains an anti-backsliding provision which prohibits and NPDES Permit from being issued with less stringent effluent limitations than the prior permit. An NPDES permit may not be:

. . . renewed, reissued, or modified . . . to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permits . . . except [for permits issued] in compliance with section 1313(d)(4) of this title.

The Clean Water Act anti-backsliding 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 had concluded EPA reasonably relied on the previously referenced exception to the anti-backsliding 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. It held 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 had held that EPA 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.

Rio Hondo had objected to the TMDL (addressing nutrients) arguing it was calculated using an erroneous critical low flow value. EPA had responded to Rio Hondo stating that the applicable regulations required it to implement the current TMDL in the new permit.

The 10th Circuit upholds the EAB stating that Rio Hondo presented no new information which would “cast doubt on the 2016 TMDL.” The Court further stated that Rio Hondo’s:

. . . challenge to the 2017 permit boils down to a challenge of that underlying 2016 TMDL. The record demonstrates that the EPA reasonably relied on the 2016 TMDL in issuing the 2017 permit, did not abuse its discretion in creating the permit limits, and appropriately applied a statutory exception to the anti-backsliding provisions of the CWA.

As a result, the Court denied Rio Hondo’s Petition.

A copy of the Decision can be downloaded [here](#).