

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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December 22, 2015

In the Matter of
Town of Falmouth DPW

OADR Docket Nos. 2015-011
Groundwater Discharge Permit Nos. SE5-168
Falmouth, MA

FINAL DECISION

In April 2015, the Buzzards Bay Coalition, Inc. (“the Coalition”) brought this appeal challenging a Groundwater Discharge Permit (“the original Permit”) that the Southeast Regional Office of the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued on March 30, 2015 to the Town of Falmouth (“the Applicant” or “Falmouth”) pursuant to the Massachusetts Clean Waters Act (“MCWA”), G.L. c. 21, §§ 26-53, and the Groundwater Discharge Permit Regulations, 314 CMR 2.00 and 5.00.¹ The original Permit authorized Falmouth’s discharge of 710,000 gallons per day of effluent to the ground from its wastewater treatment facility (“WWTF”) at 154 Blacksmith Shop Road in Falmouth as follows: (1) 260,000 gallons per day of effluent was to be discharged to two new infiltration sand beds (Beds Nos. 14 and 15) to be constructed at Site 7 north of the existing sand beds of

¹ Falmouth residents Patricia and Matthew Handley (“the Handleys”) also filed an appeal challenging the original Permit but withdrew the appeal. See In the Matter of Town of Falmouth DPW, OADR Docket No. 2015-012, Final Decision (July 17, 2015).

Falmouth's WWTF (Beds Nos. 1-13); and (2) 450,000 gallons per day of effluent was to be discharged to the existing sand beds of Falmouth's WWTF (Beds Nos. 1-13).

The Coalition challenged the original Permit and requested that it be rescinded because, among other things, the effluent discharge authorized by the original Permit would purportedly be detrimental to the Herring Brook watershed and violate the Massachusetts Water Quality Standards. Coalition's Appeal Notice, pp. 3-4.² The Coalition contended that the effluent discharge would add additional nitrogen to the Herring Brook watershed, *Id.*, pp. 5-6; that nitrogen offsets to the Herring Brook watershed were necessary, *Id.*, pp. 6-7; and that nitrogen offsets were required in the absence of a Total Maximum Daily Load ("TMDL") for the Herring Brook watershed. *Id.*, p. 10.

Falmouth and the Department disputed the Coalition's claims contending that the original

² The Groundwater Discharge Regulations require all Groundwater Discharge Permits "[to] contain limits which are adequate to protect surface waters [of the Commonwealth] for their existing and designated uses and to assure the attainment and maintenance of the Massachusetts Water Quality Standards [at 314 CMR 4.00]." 310 CMR 5/10(3). To that end, the Department is required "[to] consider natural background conditions and any Total Maximum Daily Loads ("TMDL") established by the Department." *Id.* Under 314 CMR 5.02, a TMDL is:

the sum of a receiving surface water's individual waste load allocations and load allocations and natural background which together with a margin of safety that takes into account any lack of knowledge concerning the relationship between effluent limitations and surface water quality, represents the maximum amount of pollutant that a surface water body can receive and still meet the Massachusetts Surface Water Quality Standards in all seasons.

The Massachusetts Water Quality Standards "designate the most sensitive uses for which the various waters of the Commonwealth shall be enhanced, maintained and protected; . . . prescribe the minimum water quality criteria required to sustain the designated uses; and [set forth] regulations necessary to achieve the designated uses and maintain existing water quality including, where appropriate, the prohibition of discharges." 314 CMR 4.01(4). The Standards' Anti-degradation Provisions state that "[i]n all cases existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." 314 CMR 4.04(1). The Provisions require that "High Quality Waters" be protected; these Waters are "waters whose quality exceeds minimum levels necessary to support the national goal uses, low flow waters, and other waters whose character cannot be adequately described or protected by traditional criteria." 314 CMR 4.04(2). The Provisions require that "these waters . . . be protected and maintained for their existing level of quality unless limited degradation by a new or increased discharge is authorized by the Department pursuant to 314 CMR 4.04(5)." *Id.* "Limited degradation also may be allowed by the Department where it determines that a new or increased discharge is insignificant because it does not have the potential to impair any existing or designated water use and does not have the potential to cause any significant lowering of water quality." *Id.*

Permit was properly issued and requested that it be affirmed. Falmouth's Pre-Hearing Statement, at pp. 5-11; Department's Pre-Hearing Statement, at pp. 1-7.

Recently, the parties filed a Settlement Agreement for my review and approval to resolve the Coalition's appeal of the original Permit through the Department's issuance of a Modified Permit that addresses the Coalition's concerns. Motion of Parties to Approve Settlement Agreement; Settlement Agreement; Modified Permit. After reviewing the Settlement Agreement, I find that the Agreement is reasonable and furthers the statutory and regulatory interests of the MCWA, the Massachusetts Surface Water Quality Standards, 314 CMR 4.00, and the Groundwater Permit Program Regulations, 314 CMR 5.00 for the following reasons.

First, the Settlement Agreement and the Modified Permit are intended to prevent any potential further impairment of Herring Brook from nitrogen discharged at Site 7 of Falmouth's WWTF ("Site 7"). Settlement Agreement, ¶ 12.

Second, under the Settlement Agreement, Falmouth is required to conduct periodic testing for the purpose of monitoring any impact of the Site 7 discharge on groundwater that flows through Crocker Pond and flows toward Herring Brook. *Id.*, ¶ 13. If this monitoring program detects an increase in nitrogen flowing toward Herring Brook as a result of discharge from Site 7, Falmouth is required to develop a nitrogen offset plan ("Nitrogen Offset Plan"), in connection with the "Amount of Nitrogen Added to Herring Brook" that is to be calculated in accordance with procedures set forth in the Settlement Agreement. *Id.*, ¶ 14. If the resulting calculation shows an increase in nitrogen load to Herring Brook as a result of discharge from

Site 7, the parties are required to take the following actions:

(1) Falmouth is to develop a plan for offsetting the Amount of Nitrogen Added to Herring Brook at a ratio at or greater than 1:1 (“Nitrogen Offset Plan”) and is to submit the Plan to the Coalition for comment and to Department for its review and, if appropriate, approval, within 12 months after the Amount of Nitrogen Added to Herring Brook is first calculated or quantified; and

(2) after considering the Coalition’s comments, the Department is to develop, at its discretion, a schedule and process for Falmouth to implement and comply with the Herring Brook Nitrogen Offset Plan, either through amendment of the then current Groundwater Discharge Permit or in future permits for Falmouth’s WWTF.

Id., ¶ 15.

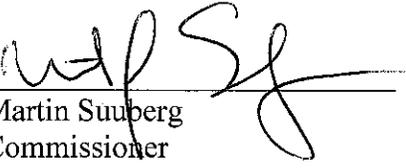
Third, the Settlement Agreement requires Falmouth and the Coalition to continue their collaboration in conducting ambient water quality sampling within the Herring Brook estuary for the life of the Modified Permit. Id., ¶ 16.

Fourth, the Settlement Agreement requires Falmouth to work with the Cape Cod Commission to develop watershed reports under the Cape Cod 208 Plan Update, to include Herring Brook, Megansett Harbor, Fiddlers/Rands Canal, Wild Harbor, Quissett Harbor, and West Falmouth Harbor, by September 30, 2016. Id., ¶ 17. These reports are to consider ocean outfall alternatives as wastewater discharge options for centralized and hybrid approaches, and out-of-watershed options for any potential sewerage. Id.

Lastly, the Settlement Agreement requires the parties to collaborate in designing a Nutrient Threshold Study (“NTS”) for Herring Brook that would provide data and analysis of a kind and quality that would be sufficient for the Department to utilize in developing a TMDL in the regular course of the Department’s regulatory practice. Id., ¶ 18. Specifically, (1) Falmouth and the Coalition are to submit a joint application for Community Preservation Act funds to

Falmouth's Community Preservation Committee ("CPC") to fund the NTS; (2) the Coalition is to provide a 1:1 match and in an amount not to exceed \$60,000, for any CPC funds that Falmouth obtains to fund a Herring Brook NTS; and (3) the Coalition and Falmouth are to collaborate on a scope of work for the NTS and are to seek the Department's input and feedback with the aim that (i) the NTS, when completed, will be equivalent to similar reports completed for the Department by the Massachusetts Estuaries Project; and (ii) the NTS will be completed before the end of 2019. Id. If and when funding is obtained, the Coalition is to manage the solicitation, selection and management of an independent contractor to conduct the NTS, with Falmouth having review and approval rights over, and the Department having the ability to review and provide technical input concerning, contractor selection. Id.

In sum, I issue this Final Decision: (1) approving and incorporating the parties' Settlement Agreement; (2) rescinding the original Permit; and (3) approving the issuance of the Modified Permit. The parties have agreed that upon the issuance of this Final Decision, all rights to additional administrative review before the Department and all rights to further appeal the issuance of the original Permit to any Court are waived. Id., ¶ 8.


Martin Suuberg
Commissioner

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