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THE OFFICE OF APPEALS AND DISPUTE RESOLUTION

November 15, 2019

In the Matter of
Town of Marion

OADR Docket No. 2017-007
DEP File No. MA0100030
Marion, MA

RECOMMENDED FINAL DECISION

Introduction

This is an appeal by the Town of Marion (“the Petitioner”) challenging a Surface Water Discharge/National Pollution Discharge Elimination System Permit No. MA 0100030 (“the Permit”) that the Massachusetts Department of Environmental Protection (“MassDEP” or “the Department”) issued to the Petitioner on April 13, 2017. The Permit was issued concurrently by MassDEP and the United States Environmental Protection Agency (“USEPA”) pursuant to the Federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* and the Massachusetts Clean Waters Act, as amended, M.G.L. c. 21, §§ 26-53. See Exhibit A to Petitioner’s Notice of Claim. Among other things, the Permit required the Petitioner to line all twenty acres of unlined lagoons at its wastewater treatment facility (“WWTF”) located at 50 Benson Road in Marion, or cease using the lagoons within 48 months from the Permit’s effective date.



In its appeal, the Petitioner challenged the conditions relating to its operation of the lagoons, asserting that the conditions requiring it to cease using the lagoons and to remove sludge solids currently in the lagoons would have a significant impact on the functioning of the WWTF. Notice of Claim at p. 3. At the same time, the Petitioner appealed its federal permit to the USEPA's Environmental Appeals Board. As a result, this appeal was stayed on May 15, 2017 pursuant to 310 CMR 1.01(6)(h) while the appeal of the federal permit was pending. On July 11, 2018, in response to a Motion to Intervene or, alternatively, to Participate, I granted the Buzzard Bay Coalition and nine additional citizens ("the Coalition") Participant status pursuant to 310 CMR 1.01(7)(c), and afforded the Coalition an opportunity to file a brief in response to any settlement entered into by MassDEP and the Petitioner.¹

The federal appeal was resolved on December 1, 2017, with the Petitioner and USEPA entering into an Administrative Order on Consent ("the federal settlement"). Since that time, the Petitioner and MassDEP have been engaged in negotiations to resolve the disputes remaining between them, and they have now presented a Settlement Agreement by Administrative Consent Order ("ACO") for approval by the Department's Commissioner.² The Coalition filed a response to the proposed settlement, proposing certain amendments to the ACO.³ After reviewing the Settlement, and considering the comments of the Coalition, I recommend that the Department's Commissioner issue a Final Decision which incorporates the Settlement Agreement by Administrative Consent Order, and approves the dual Surface Water

¹ See Ruling on Motion to Intervene, 7/11/18. 310 CMR 1.01(7)(e) provides that permission to participate is limited to the right to argue orally at the close of the hearing and to file a brief.

² In addition to the Settlement Agreement by ACO, the parties submitted the Final NPDES permit, the USEPA Administrative Order on Consent, and a Motion to Approve the Settlement.

³ Because the Coalition is not a party to the appeal, the provisions of 310 CMR 1.01(8)(c) pertaining to settlements between and among parties does not apply. Regardless, the Coalition does not assert that the settlement should be rejected or is inconsistent with law.

Discharge/National Pollution Discharge Elimination System Permit No. MA 0100030
 (“SWD/NPDES Permit”).

Discussion

The WWTF discharges effluent into an unnamed brook which discharges into Aucoot Cove, an embayment of Buzzards Bay. Aucoot Cove is listed as impaired and requiring a Total Maximum Daily Load (“TMDL”)⁴ for total nitrogen, dissolved oxygen, fecal coliform and nutrient/eutrophication biological indicators. See EPA Fact Sheet at p. 6 of 34.

<https://www3.epa.gov/region1/npdes/permits/2017/finalma0100030permit.pdf>. The Permit authorizes the Petitioner to discharge pollutants from Outfall 001 subject to effluent limitations, monitoring requirements and other conditions. Three unlined lagoons are currently used for effluent treatment and equalization. The federal settlement requires the Petitioner to conduct certain activities, including lining Lagoon 1. The proposed settlement with MassDEP mirrors the requirements of the federal settlement and contains additional requirements for Lagoons 2 and 3.

The federal settlement required the Petitioner to develop and submit a scope of work (“SOW”) for a Lagoon Optimization Plan (“the Plan”). The Petitioner submitted the SOW on December 28, 2017, and after receiving comments on the SOW from USEPA and MassDEP, the Petitioner submitted its Plan to the agencies. The goal of the Plan is to maximize the use of

⁴ 314 CMR 4.02 defines TMDL as “The sum of a receiving 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 water quality, represents the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards in all seasons.”

Lagoon 1 for the receipt and storage of treated and untreated wastewater and to minimize to the extent reasonably practicable the Petitioner's use of Lagoons 2 and 3 for any wastewater.⁵

The ACO requires the Petitioner to address potential groundwater impacts from the lagoons and sets forth a process and establishes a schedule for doing so. ACO at ¶ 34. The intent of the ACO relative to the lagoons is to (a) have Lagoon 1 lined; (b) convert Lagoon 2 to be maintained in a dry condition; and (3) either maintain Lagoon 3 in a "pond" condition, convert Lagoon 3 to a dry condition, or repurpose all or part of the Lagoon 3 footprint to meet the Petitioner's infrastructure needs. The ACO requires the Petitioner to remove all sludge solids from Lagoon 1 and line Lagoon 1 by June 30, 2020. Preliminary modeling prepared by the Petitioner that analyzed the projected use of Lagoons 2 and 3 estimated, based on an assumption that Lagoon 2 will be dry in the future, that Lagoon 2 would be used for intermittent wastewater storage on average once every four years, and Lagoon 3 might not be needed for future wastewater storage. The ACO requires the Petitioner to submit a preliminary draft High Flow Management Plan ("HFMP") to address the future use of Lagoons 2 and 3. The ACO further requires the Petitioner to cease placing sludge and other treatment solids into Lagoons 2 and 3 except during the time when the required modifications to Lagoon 1 are being made.

In their Joint Motion to Approve the Settlement, the parties assert that the purpose of the ACO is to establish a reasonable timeline for the Petitioner to undertake a series of tasks that will minimize the use of unlined lagoons for the storage of untreated or partially treated wastewater. They further assert that the Permit, the ACO and the federal settlement establish reasonable

⁵ The Petitioner is also participating in an ongoing regionalization effort to determine whether it should connect its sewage collection system to the Wareham WWTF and eliminate its own WWTF. This process may take several years, and regionalization may not ultimately occur.

conditions and timelines for the WWTF to meet the requirements and to operate in a manner that is protective of the waters of the Commonwealth.

In their response to the proposed Settlement, the Coalition proposes a set of amendments which it asserts must be made to the ACO. First, the Coalition proposes that language be added to the ACO to make clear that Aucoot Cove is impaired. The parties counter that this information is included in USEPA's Fact Sheet for the Permit, and therefore does not need to be included in the ACO. I have noted both the condition of the receiving waters and a citation to the USEPA Fact Sheet above at p. 3.

Second, the Coalition recommends that the ACO explicitly require the Petitioner to evaluate lining Lagoon 2 as part of the HFMP, if the HFMP finds a more frequent use of Lagoon 2 or a lengthy holding time of wastewater in that lagoon. In response, the parties state that the Petitioner will be required to evaluate lining Lagoon 2 in the HFMP if the data indicate that the anticipated frequency of using Lagoon 2 for high flows from the collection system does not align with the preliminary model. The ACO requires a preliminary draft HFMP, followed by quarterly progress reports, and then a revised draft HFMP. It requires the revised HFMP to incorporate recommended modifications to Lagoon 2, including increased storage capacity in a lined lagoon, if monitoring indicates that implementation of the Lagoon 1 and associated treatment plant modifications result in substantial departure from the previously modeled predictions. See ACO at ¶ 34i.iii. Based on my review of this paragraph, the ACO already requires the Petitioner to evaluate lining Lagoon 2 in its revised draft HFMP under the circumstances described above.

Third, the Coalition asserts that the ACO at ¶ 34.d.i. must be clarified to state that Lagoon 2 should only be used when the high flow from the collection system cannot be accommodated by lined Lagoon 1 and the treatment plant. The language in that paragraph states

“...the [Petitioner] shall submit to [MassDEP]...a preliminary draft [HFMP] that will describe the operation of the treatment plant and lagoons in a future state where: i. Lagoon 2 is unlined and dry, other than when impacted by precipitation or on rare occasions when it receives high flows from the collection system that cannot be accommodated by the plant or Lagoon 1....” (emphasis added). In response, the parties assert that it was their mutual understanding when they drafted this language that the Petitioner’s use of a dry Lagoon 2 would be limited to those instances where high flows could not be accommodated by both the plant and lined Lagoon 1. MassDEP states in its response to the Coalition’s submittal that it will ensure that the final MassDEP-approved HFMP will make this abundantly clear.

Fourth, the Coalition suggests that language in the ACO pertaining to the required contents of the HFMP be changed from “should” to “shall” to strengthen MassDEP’s authority to determine what must be included in the HFMP. In its opinion, the language of the ACO is discretionary (“should”), not mandatory (“shall”). MassDEP asserts that the ACO makes clear that MassDEP retains authority over determining what must be included in the HFMP, and ultimate approval authority of the HFMP. Additionally, the word “should” was used intentionally when describing the HFMP development process to maintain a degree of flexibility in anticipation of potential unknowns. Based on these assertions, I do not recommend that a change in this language is warranted.

Finally, the ACO provides timelines for the Petitioner to implement the HFMP and eliminate the discharge of wastewater to groundwater through Lagoons 2 and 3 that are contingent on MassDEP providing feedback to the Petitioner within specified timelines. The Coalition urges MassDEP to act with all expediency “in order to compel [the Petitioner] to take the necessary corrective action to cure this legacy source of pollution.” MassDEP asserts that it

will do everything it can to expedite review and approval of the revised HFMP by February 2023 to facilitate the Petitioner's implementation of the HFMP by July 23, 2023.

Conclusion

Based on the parties' responses to the Coalition's comments, it is my recommendation that MassDEP's Commissioner issue a Final Decision which incorporates the Settlement Agreement by Administrative Consent Order, and approves the dual Surface Water Discharge/National Pollution Discharge Elimination System Permit No. MA 0100030 ("SWD/NPDES Permit").

Date: 11/15/2019

A handwritten signature in black ink, appearing to read "Jane A. Rothchild", written over a horizontal line.

Jane A Rothchild
Presiding Officer

SERVICE LIST

MATTER OF TOWN OF MARION

OADR Docket No. 2017-007

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