

## **Rio Hondo Land & Cattle Co., L.P. v. U.S. E.P.A.—Tenth Circuit rejects anti-backsliding challenge to NPDES permit**

The Clean Water Act prohibits the Environmental Protection Agency from issuing a National Pollutant Discharge Elimination System permit containing less stringent pollutant limitations than a prior permit. 33 U.S.C. § 1342(o). The general prohibition states that “a permit may not be renewed, reissued, or modified ... to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit ... except [for permits issued] in compliance with section 1313(d)(4) of this title.” *Id.* § 1342(o)(1). Section 1313(d)(4)(A) states in part that for waters “where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard[.]” The proper application of the anti-backsliding exclusion was the central issue in *Rio Hondo Land & Cattle Co., L.P. v. U.S. E.P.A.*, No. 19-9531, 2021 WL 1681733 (10th Cir. Apr. 29, 2021), a case before the Court of Appeals on petition for review from a decision by the Environmental Appeals Board rejecting a challenge to a 2017 NPDES permit issued with respect to discharges into the Rio Ruidoso River from a waste water treatment facility.

The New Mexico Environmental Department developed a total maximum daily load report for the River in 2006 to address a surplus of nitrogen and phosphorus resulting in algae. The TMLD contained concentration and mass limits for each nutrient, with the nitrogen limit set at ten times the phosphorus limit. In determining these nutrient levels, the Department estimated the lowest river flow rate under the “4Q3 regression model.” In 2016, it issued a revised TMLD that, *inter alia*, replaced that model with an annual median flow approach. Because of this and other changes in data and methodology, the Department

made an upward revision to the instream loading capacity for nitrogen. Even though NMED used the same concentration-based targets (1.0 mg/L for nitrogen and 0.1 mg/L for phosphorous) as the 2006 TMDL, the increased flow numbers resulting from using annual median flow as opposed to the 4Q3 flow meant that the Rio Ruidoso could accommodate a higher amount of pollutants and still meet that concentration-based target.

EPA approved the 2016 TMLD and, in 2017, issued an updated NPDES permit for the water treatment plant. It had issued such permits in 2002, 2007, 2012, and 2012 (interim), with the latter three containing both concentration and mass limits. The 2017 permit contained only the latter limit. Meanwhile, the petitioner initiated unsuccessful administrative proceedings challenging the 2016 TMLD on the ground that “the new critical flow methodology used in the 2016 TMDL (annual median flow versus 4Q3 flow) violated New Mexico’s Administrative Code.” The New Mexico Court of Appeals affirmed the administrative decision in an unpublished opinion. *Rio Hondo Land & Cattle Co v. N.M. Water Quality Control Comm’n*, No. A-1-CA-36039, 2019 WL 6728255 (N.M. Ct. App. 2019).

In addition to the state litigation, the petitioner sought review of EPA’s issuance of the NPDES permit before the EAB, arguing that “(1) that the 2017 permit constituted backsliding under the CWA, particularly because of the removal of concentration-based limits for both nitrogen and phosphorous and revising upward the mass-based nitrogen limit, (2) that the EPA could not rely

on any exclusion from the anti-backsliding rule, and (3) that the 2017 permit limits ‘will not assure attainment of the applicable water quality standards.’” The EAB rejected these contentions, as did the Tenth Circuit.

The Circuit panel held the permit not subject to the anti-backsliding prohibition because it complied with the exclusion provided under § 1313(d)(4)(A)(i):

First, the 2017 permit was based on a TMDL. The fact sheet accompanying the permit explained that the permit relied on the 2016 TMDL and adopted the assumptions and requirements for plant nutrients contained in that TMDL. ... [¶] The 2017 permit also satisfied § 1313(d)(4)(A)’s second requirement, because the permit assures attainment of the applicable water quality standards. The 2017 permit adopted the limitations in the 2016 TMDL. The 2016 TMDL acknowledged that it contained “less stringent permit limits for plant nutrients than the original 2006 TMDL.” ... But the 2016 TMDL explained that these limits reflected “revised waste load allocations” based on new data and a change in nitrogen modeling. ... Thus, the 2016 TMDL explained, “if the [new, less stringent] conditions in the TMDL are met, attainment of the water quality standard is assured” because the TMDL used protective in-stream pollutant targets designed to meet those water quality standards, and those were the same in-stream targets used in the prior TMDL.

It also found the “safety clause” in § 1342(o)(3) inapplicable not only because permits issued pursuant to § 1313(d)(4)(A) “do not come within § 1342(o)(1)’s general prohibition on backsliding” but also because “[t]he safety clause requires that a permit may not be issued ‘if the implementation of such limitation would result in a violation of a water quality standard’”—a violation absent here as evidenced by the otherwise valid TMDL and the fact that “the permit writer concluded that the limits contained in the permit would assure the Rio Ruidoso would meet its [water quality standards].”

The panel, finally, held that elimination of the concentration-based limitations for nitrogen and phosphorus was reasonable. “The 2016 TMDL explicitly encouraged the EPA ‘to include only loading [i.e. mass] (and not concentrations) in future permits.’ ... The TMDL made this request because concentration-based limitations would necessarily vary as the WWTP varied its daily discharge amount.” As a consequence, “the EPA’s reliance on the 2016 TMDL was reasonable and the exclusion to the CWA’s anti-backsliding rule found in 33 U.S.C. § 1313(d)(4) applies.”

Decision link: <https://www.ca10.uscourts.gov/opinions/19/19-9531.pdf>