

Victory for Benefit of Peoples of Glorious Sudbury-stan over Phosphorus-  
Discharging Imperialist Neighbor Marlborough-stan With Governments of  
United States-stan and Massachusetts-stan Left in Pickle



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# Key Legal Issue

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- State is required to certify that permit will comply with State water quality standards;
  - All NPDES permit applicants must obtain “a certification from the State . . . that any [permitted] discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316 and 1317.” CWA § 401(a)(1).
  - “Any [such] certification . . . shall set forth any effluent limitation and other limitations and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under [sections 1311, 1312, 1316 and 1317 of the CWA], and with any other appropriate requirement of state law set forth in such certification.” CWA § 401(d).
- EPA is required to make the provisions of the certification a condition of the federal permit:
  - “Any [such] certification shall become a condition on any Federal license or permit. CWA § 401(d).
- EPA is prohibited from issuing a permit which fails to comply with WQS:
  - “No permit may be issued: . . . (d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.” 40 CFR § 122.4(d).

# Important Facts

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- Facts in this case were clear that water quality standards could not be achieved in receiving waters by means of effluent limitations on the POTW discharge alone:
  - Stringent effluent limitations were necessary but not sufficient.
  - Sediment remediation would be necessary in addition to stringent effluent limitations to achieve water quality standards.
- EPA Responsiveness Summary admitted as much:
  - “The likelihood of achieving water quality standards, and therefore avoiding the need for additional treatment, would be enhanced by remediating the sediment sources of phosphorus.”
  - “EPA and DEP believe it may be possible to meet the numeric and narrative criteria and attain designated uses if the discharge is limited in summer months to 0.1 mg/l.”
  - “[T]he agencies believe that the 0.1 mg/l phosphorus limit in conjunction with the [VOLUNTARY] ‘adaptive management’ approach described in the fact sheet, may improve water quality to the point where achieving water quality uses is possible. . . . In the absence of sediment remediation, it may be necessary to further reduce the point source phosphorus limit [below 0.1 mg/l].

# Permit Provisions

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- Imposed 0.1 mg/l as the summer phosphorus effluent limitation to be achieved once an upgraded plant came online.
- Did not require Marlborough to undertake any “adaptive management “ actions in relation to the sediment, either by study or remediation. Described in Fact Sheet an approach to voluntary studies and remediation that Marlborough could undertake to provide the remediation component outside the requirements of the Permit.
- Lesser conditions appealed by Sudbury:
  - Phosphorus discharge measurement using 60 day rolling average;
  - Interim phosphorus discharge limit of 0.5 mg/l pending plant upgrade;
  - “Interim seasonal average” phosphorus discharge measurement;
  - Winter phosphorus discharge limit of 0.75 mg/l;
  - No winter limit for dissolved phosphorus;
  - No public participation in review of Permit deliverables.

# Appeals Filed

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- Marlborough appealed Federal permit, State permit and State Water Quality Certification;
  - Federal Petition for Review denied by U.S. Environmental Appeals Board (EAB); Denial of Petition for Review appealed to 1<sup>st</sup> Circuit; dismissed after EAB remand of Sudbury Appeal;
  - State Appeal did not progress; dismissed voluntarily after settlement of Federal appeals.
- Sudbury appealed Federal permit, State permit and State Water Quality Certification;
  - Federal Petition for Review Denied in Part and Remanded in Part by EAB;
  - State Appeal did not progress; dismissed voluntarily after settlement of Federal appeals.
- Conservation Law Foundation moved to intervene in Federal and State appeals.
  - Intervention allowed in Federal appeals.
  - Denied intervention in State appeals for lack of standing.

# Sudbury's Legal Position on Appeal

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- ❑ The record demonstrated that WQS could not be met without sediment remediation.
- ❑ A truthful State water quality certification should acknowledge this fact and certify that WQS can only be ensured through a combination of stringent effluent limitations and sediment remediation.
- ❑ The State certification should therefore be converted into DEP- and EPA-imposed permit conditions requiring remediation.
- ❑ The CWA should be read to require EPA to impose downstream remediation if that is necessary to ensure WQS.

# EAB Decision on Sudbury Appeal

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- On issue of ensuring water quality standards:
  - Under the circumstances of this case, the Region has failed to demonstrate, in response to specific comments on this issue, that the Permit will “ensure” compliance with applicable Massachusetts water quality standards. Accordingly, the Permit is remanded. On remand, the Region must either demonstrate that the Permit, as written, will ensure compliance with water quality standards, or make appropriate modifications to the Permit.
- On water quality certification:
  - Although . . . MADEP certified the Draft Permit in accordance with section 401(a) of the CWA, . . . when the Region reasonably believes that a state water quality standard requires a more stringent permit limitation than that reflected in a state certification, the Region has an independent duty under Section 301(b)(1)(C) to include more stringent permit limitations. Moreover, . . . the Region cannot rely exclusively on the state certification where, as here, there is countervailing evidence in the record. (citations omitted) EAB decision, n. 22, pa. 23.

# EAB Decision on Sudbury Appeal

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- Knocked down lesser points like bowling pins, one after the other.
  - Failure to dispute rationale presented by Region in Responsiveness Summary (petitioners may not simply repeat objections during comment period but must demonstrate why the response to objections is clearly erroneous or otherwise warrants review).
  - Comments during Comment Period failed to address specific point argued in appeal (burden is on petitioner to establish that issues were raised during the comment period);
- Remanded interim seasonal average phosphorus discharge measurement for insufficient explanation of term in Responsiveness Summary.

# Appeals Practice Points (Nuts and Bolts)

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## □ Federal Appeals

- Appellant must have participated in Comment Period;
- Substantive bases for appeals must have been stated during Comment Period (not necessarily by appellant);
- Record on appeal may be considered complete and ripe for judgment upon filing of appeal papers so must be comprehensive and make all necessary arguments with all necessary support;
  - There will not necessarily be any further opportunity for argument or briefing after filing of initial papers.
- Insufficient to incorporate by reference comments made on previous draft permits;
- Permit conditions attributable to state certification requirements are not subject to federal review;
- Agency responses to points of appeal raised during Comment Period must be specifically challenged and rebutted with new arguments in appeals papers, demonstrating that agency transgressed decision making standard for appeal;
- Bases for appeal must be stated with specificity.

# Appeals Practice Points (Nuts and Bolts)

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## □ State Appeals

- Request for adjudicatory hearing may be filed by “any person aggrieved by the issuance of the permit”. 314 CMR 2.08.
- Standing to request a hearing governed by M.G.L. c. 30A and 314 CMR 1.00.
- Might be easier to request adjudicatory hearing than to intervene, based on CLF’s experience.

# Strategic Parallel Appeals Issue

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- How should parallel appeals of federal permit, state permit and state WQC be managed to enable rational decision-making?
- Who should stay what?
  - Usual practice: DEP stays appeal pending outcome of federal appeal.
    - Can't know if certification is adequate until substantive content of permit is known.
    - Must conclude federal appeal to determine substantive content of permit.
  - In Sudbury appeal, the argument was that state water quality standards should drive the federal permit and that the state improperly certified that state WQS were met.
    - Governing question, to be put in WQC appeal:
      - Will the limitations and conditions of the federal permit achieve WQS absent both stringent effluent limitations and sediment remediation?
    - Argument: State appeal should not be stayed pending outcome of federal appeal.
    - Both Sudbury and Marlborough agreed on this.

# Difficulty of Result for EPA and DEP

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- After many years, EPA and DEP were forced to acknowledge that 0.1 mg/l is a practicable phosphorus discharge limitation.
- EPA's position that it has no authority to require downstream remediation puts it in a pickle: How can EPA ensure water quality standards if remediation is required to do so and EPA believes it cannot require remediation?
  - Many waterways in Massachusetts face similar down stream sediment problems that will frustrate and perhaps render impossible attempts to reach WQS through effluent limitations alone;
  - Washington climate for aggressive interpretations of CWA is . . . negative;
  - Four permits on Assabet River were facing same issue at time of EAB decision on Sudbury permit.
- Straightforward solution is for DEP to issue certifications that will actually achieve WQS. DEP is also in a pickle:
  - No apparent resolve in DEP to require municipalities to incur expense of downstream remediation, notwithstanding whether legal authority is available to the State;
  - Close attention is warranted to the validity of state certifications.

# Settlement of Appeal – Key Questions Left Unanswered

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- Put the remediation issue off to the future but promise consequences if water quality standards are not achieved through voluntary studies and actions:
  - The Permittee and other interested parties are voluntarily participating in a feasibility study funded by MassDEP and conducted by the Army Corps of Engineer that will develop and evaluate effective and feasible alternative plans, and will present recommended options form among the alternative plans, to ensure compliance with water quality standards with respect to phosphorus in the Hop Brook. EPA and MassDEP will determine which recommended options, if any, will ensure compliance with water quality standards when implemented in combination with the total phosphorus effluent discharge limit contained in the permit (“Approved Options”).
  - EPA shall reopen the Permit prior to its expiration on January 16, 2010 and either modify or revoke and reissue the permit to include such limits and conditions . . . that are necessary to ensure compliance with water quality standards if EPA and MassDEP determine that the nonpoint source phosphorus reductions associated with selected Approved Option(s) have not been assured by October 1, 2009, either through voluntary agreements or activities and/or binding action or requirement of any governmental, regulatory or administrative body, agency or authority, or otherwise.