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ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	NPDES Appeal No. 04-17
SCITUATE WASTEWATER TREATMENT PLANT NPDES PERMIT NO. MA0102695	)	

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR REVIEW

I. BACKGROUND

This matter involves the NPDES permit No. MA0102695 (Attachment A hereto, Administrative Record item A1) reissued to the Town of Scituate, Massachusetts (the "Town") on November 22, 2004. This Memorandum is submitted in response to the Petition for Review dated December 22, 2004 filed by the Town. ("Petition for Review").

This Board should dismiss the Petition for Review. Petitions are granted only if the challenged permit limits are based on findings of fact or conclusions of law that are clearly erroneous, or involve an exercise of discretion or important policy consideration which this Board in its discretion should review. 40 C.F.R. § 124.19(a)(1), (2). Here the Region followed the procedural requirements in 40 C.F.R. § 124.15 when issuing the permit. The Region also properly applied the facts and law and exercised appropriate discretion when setting the permit limits for toxic metals. Finally, the Region correctly included the permit limits regarding carbonaceous biological oxygen demand (CBOD) and total suspended solids (TSS) which are required by the State's Clean Water Act section 401 certification. There are thus no grounds which justify the granting of review.

II. ARGUMENT

A. The Region Complied With 40 C.F.R. § 124.15 When Issuing the Permit

The Town claims that the Region violated 40 C.F.R. § 124.15 when issuing the permit because (i) the permit was not signed or issued by the Regional Administrator, (ii) the permit was not accompanied by a notice sent to the Town "from" the Regional Administrator, and (iii) neither the Permit nor its cover letter "contain a specific reference to 40 C.F.R. 124.19 as the procedures for appeal of the permit." Petition for Review at 6.

In fact, an examination of the regulations and the record makes clear that the Region complied with section 124.15. While section 124.15 requires that a NPDES permit be issued by the "Regional Administrator," that term is defined in 40 C.F.R. 124.2 to mean either the Regional Administrator personally or "the authorized representative of the Regional Administrator." Here the permit was signed and issued by the Director of the Region I Office of Ecosystem Protection ("OES Director"). See Attachment A, page 1. Pursuant to Region I Delegation No. 2-20 (dated Sept. 29, 1995), the authority to issue NPDES permits has been delegated by the Regional Administrator to the OES Director. See Attachment B, Administrative Record item D1. Thus the OES Director is the "authorized representative" of the Regional Administrator, and the permit was properly issued.

Section 124.15 also requires that the "Regional Administrator shall notify" the permit applicant of the final permit decision. That provision should be read reasonably to mean that the Regional Administrator or his authorized representative must ensure that notice is given, not that

he or she must personally give the notice.[1] In any event, here notice of the permit was given by sending the permit itself to the Town. The permit was signed by the OES Director, who had been authorized to act by the Regional Administrator. Thus notice of the permit was given to the Town by the "Regional Administrator," within the meaning of the regulations. Further notice of the permit was given to the Town by sending a cover letter. See Attachment C, Administrative Record item A2a. The cover letter was reviewed by the OES Director who ensured that it was signed and issued by a member of her staff.

Finally, the Region complied with the section 124.15 requirement that the notice "include reference to the procedures for appealing a decision on a ... NPDES permit under § 124.19 of this part." The cover letter informed the Town that, "[s]hould you desire to contest any provision of the permit, your petition should be submitted to the Environmental Appeals Board as outlined in the enclosure...." The enclosure in turn contained detailed information regarding such an appeal, including both a reference to and a copy of 40 C.F.R. § 124.19. See Attachment D, Administrative Record item A2b. It would be unreasonable to interpret the regulation to require that information must be provided only in a cover letter and may not be included in an enclosure.

B. The Toxic Metals Limits in the Permit Were Properly Set

In its Petition for Review, the Town contests the "permit condition eliminating the mixing zone." Id. at 7. While there actually is no such permit condition, the Region assumes that the Town intended to contest the effluent limitations in Part I.A.1. of the permit for copper, nickel and zinc, since these are the limitations challenged in the Town's public comments and

[1] These kinds of responsibilities are routinely carried out by the decision-maker's staff. For example, the attorney for the Town of Scituate gave notice to the Region of the Town's appeal to this Board by certifying that he had "caused" the Town's Petition for Review to be mailed to the EPA, presumably by his secretary.

since these limitations were set based on there being no dilution in the receiving water.[2] The Petition for Review asserts that these limitations were improperly set, and in particular that the Region abused its discretion by not setting less stringent limitations based on using a mixing zone. The Petition for Review further asserts that the Region should not have set toxic metals limits in its new permit which differ from the limits set in its prior permit and from limits which the Town contends were in effect approved in an Administrative Order and in governmental approvals of its treatment plant Facilities Plan.[3] These arguments will be addressed in turn.

1. The Toxic Metals Limits are Needed to Protect Water Quality

Pursuant to Clean Water Act subsection 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), the EPA is required to include in NPDES permits any limitations "necessary to meet" State water quality standards. In particular, whenever the EPA determines (e.g., by utilizing monitoring data) that a discharge causes, has the "reasonable potential" to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criterion within a State water quality standard, for an individual pollutant such as copper, nickel or zinc, the permit "must contain effluent limits for that pollutant." 40 C.F.R. § 122.44(d)(1)(iii).[4] The copper,

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[2] While this part of the Town's appeal could be summarily dismissed due to its failure to comply with the requirement in 40 C.F.R. 124.19(a) that it specify the permit conditions being challenged, the Region suggests that this Board analyze the merits of this matter and also dismiss the appeal for the substantive reasons discussed in this Memorandum.

[3] The permit issued Nov. 22, 2004 ("new permit") contains effluent limits for copper of 4 ug/l average monthly and 6 ug/l maximum daily compared to 41 ug/l average monthly and 41 ug/l maximum daily in the prior permit issued Jan. 30, 1997(Administrative Record item G1) ("prior permit"). The new permit contains effluent limits for nickel of 8 ug/l average monthly, and for zinc of 86 ug/l average monthly and 95 ug/l maximum daily, whereas there were no nickel and zinc limitations in the prior permit.

[4] One type of water quality standard is a criterion, defined as "constituent concentrations, levels or narrative statements, representing a quality of water that supports a particular use." 40 C.F.R. 131.3(b).

nickel and zinc limitations were included in the permit because, based on its review of monitoring data, the Region determined that there was such a "reasonable potential" for in-stream excursions in the Tidal Creek to which the Town's treatment plant discharges. See Fact Sheet pages 3 - 8 and 9 - 11, Attachment E, Administrative Record item A10.

The permit's toxic metal limits were set specifically to meet the requirement in the State water quality standards that "[a]ll surface waters shall be free from pollutants in concentrations or combinations that are toxic to humans, aquatic life or wildlife." 314 C.M.R. § 4.05(c). The State implements that requirement by specifying, "[w]here the Department determines that a specific pollutant not otherwise listed in 314 CMR 4.00 could reasonably be expected to adversely effect existing or designated uses, the Department shall use the recommended limit published by EPA pursuant to Section 304(a) of the Federal Act as the allowable receiving water concentrations for the affected waters unless a site-specific limit is established." Id. Thus the permit limits were set by using the EPA's National Recommended Water Quality Criteria, 63 Fed. Reg. 68354 (Dec. 10, 1998), as updated November 2002 (EPA-822-R-02-047), which are the current recommended criteria published by the EPA pursuant to CWA section 304(a). See Fact Sheet, page 9.[5]

In its Petition for Review, the Town appears to challenge the EPA determinations that there is a "reasonable potential" for the Town's effluent discharges to cause or contribute to exceedances of the State's water quality criteria, and that the permit limits should be set based on the EPA recommended criteria. For example, the Town asserts that the "EPA has not provided

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[5] No alternative approach was available, since copper, nickel and zinc have not been "otherwise listed" in 314 CMR 4.00 and no site specific limits for the Tidal Creek have been developed.

any documentation that the town is discharging toxic materials in toxic concentrations or that water quality has been impacted." Id. at 7. The Town further asserts that "EPA's stance is based on Gold Book standards, which have been under continuous scrutiny regarding the impact of low level metal concentrations in highly treated effluents," and that the EPA therefore has "failed to support its position" with "scientific fact." Id. at 7 - 8. However, these issues were not raised by the Town during the public comment period. See Comments Regarding Draft NPDES Permit submitted on behalf of the Town, Attachment F, Administrative Record item B1. A Petitioner must demonstrate that "any issues being raised [on appeal] were raised during the public comment period to the extent required by these regulations...." 40 C.F.R. § 124.19(a). The NPDES regulations in turn require that commenters must "raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their positions" by the close of the public comment period. 40 C.F.R. § 124.13. These current issues being raised by the Town clearly were reasonably ascertainable during the public comment period. Indeed the Town has offered no explanation regarding why these issues were not raised. Thus this Board should follow its consistent practice by denying review of these issues on the ground that they were not timely raised during the public comment period. See In re New England Plating, 9 E.A.D. 726 (EAB 2001) and cases cited.[6]

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[6] In addition, the challenge to the use of the EPA recommended criteria is in effect a challenge to the State water quality regulations, which would have been untimely even if raised during the public comment period. Also, the conclusory statements made in the Petition for Review would not have provided any basis for overturning the Region's decisions even if they had been timely made. For example, the Petition for Review fails to show any error in the extensive EPA documentation in the Fact Sheet regarding the Town's discharges of toxic metals and their impact on water quality, but rather simply falsely claims that the EPA has not provided "any documentation" regarding these matters. Such "mere allegations of error" are insufficient to warrant review. In re Puerto Rico Elec. Power Auth., 6 E.A.D. 253, 255 (EAB 1995). Finally, the Region notes that it did not use the 1986 "Gold Book" numbers criticized by the Town in setting the permit limits, but rather used the more up to date numbers contained in the EPA's National Recommended Water Quality Criteria. See Administrative Record item D4.

The Dilution/Mixing Zone Issue

As explained in the Fact Sheet, the permit's toxic metals limits were set based on the appropriate conservative determination that there is no dilution in the receiving water, since the Town's treatment plant discharges into a tidal creek and since there is little or no dilution in the Tidal Creek during low tide. See Fact Sheet (Attachment E) at 4 and 7. The Tidal Creek is an approximately 2,000 foot surface water which is a tributary of the Herring River which in turn is a tributary of the North River which in turn empties into the Massachusetts Bay/Atlantic Ocean. Fact Sheet, page 3. Thus the Tidal Creek is a "water of the United States" entitled to protection under the Clean Water Act. See 40 C.F.R. § 122.1(b); 40 C.F.R. § 122.2 (definition); Pepperell Associates v. EPA, 246 F.3d 15 (1st Cir.2001) (tributary brook as well as adjoining river are "waters of the U.S."). Cf. Quivira Mining Co. v. EPA, 765 F.2d 126 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986) (even normally dry arroyo is "water of the U.S."). The Town has presented no argument to the contrary.[7] The Town also has failed to challenge the Region's determination that there is effectively no dilution in the Tidal Creek during low tide.[8] In the Fact Sheet, at page 7, the Region invited the Town to "explore additional dilution modeling" as a possible basis for changing the permit limits, but the Town has not to date submitted any data in response.

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[7] However, in its Petition for Review, pages 8 - 9, the Town erroneously characterizes the Tidal Creek as being the "current method by which effluent is transported to the receiving waters," whereas the Tidal Creek actually is the receiving water.

[8] Indeed, in its treatment plant Facilities Plan, the Town agreed that "at low tide, the effluent would account for most of the flow in the tidal ditch. Therefore, the level of treatment must meet or exceed the water quality criteria for Class SA waters." Final Facilities Plan and Environmental Impact Report for Wastewater Management, EOEA # 5512, March 1, 1995, page 1-7-3, Administrative Record item D2.

Thus on the current record, it seems clear that the toxic metals limits must be set based on there being no dilution in the receiving water. The Town argues, however, that the toxic metal limits instead should be set based on a "dilution factor of 13:1" by treating the entire Tidal Creek as a "mixing zone." Petition for Review at 3 and 7 - 9.

It is not appropriate to treat the entire Tidal Creek as a mixing zone for these toxic pollutants. The Massachusetts Water Quality Standards specify at 314 CMR 4.03(2) that:

> (a) Mixing zones shall be limited to an area or volume as small as feasible. The location, design and operation of the discharge shall minimize impacts on aquatic life and other beneficial uses.
> (b) Mixing zones shall not interfere with the migration or free movement of fish or other aquatic life. There shall be safe and adequate passage for swimming and drifting organisms with no deleterious effects on their populations.
> (c) Mixing zones shall not create nuisance conditions, accumulate pollutants in sediments or biota in toxic amounts or otherwise diminish the existing or designated uses of the segment disproportionately.

As noted in the Response to Public Comments, Attachment G, Administrative Record item C1, treating the entire Tidal Creek as a mixing zone would violate these standards, "since doing this would continue to allow for the accumulation of toxic pollutants, in an extended area, at levels which have deleterious effects on aquatic organisms." Id. at 5.

While some exceedances of otherwise applicable criteria may be accepted within a mixing zone (if this does not impair the designated use of the waterbody as a whole), acutely toxic conditions that are lethal to aquatic organisms must be avoided. EPA Water Quality Standards Handbook (2d edition), Sept. 1993, pages 5-5 to 5-6, Attachment H, Administrative Record item H1 ("WQSH"). As documented in the Fact Sheet, allowing a mixing zone would result in allowing deleterious toxic conditions. For example, the acute aquatic life criteria for total copper in salt water is 5.8 ug/l. Fact Sheet, pages 9 - 10. Scituate has reported effluent total

copper concentrations as high as 86 ug/l. Id.. This results in potentially lethal conditions to aquatic organisms throughout the Tidal Creek. The acute aquatic life criteria for copper is based on a one hour exposure at 5.8 ug/l every three years. Discharge Monitoring Report data provided by Scituate indicate that the effluent concentration for copper continuously exceeds the acute criteria within the Tidal Creek, allowing no recovery period at sub-lethal copper concentrations for exposed sensitive organisms. Simply put, the three components of the water quality criteria - duration, frequency and concentration - are all grossly exceeded within the length of the Tidal Creek, resulting in potentially continuous lethal conditions to sensitive organisms throughout the Tidal Creek and into a portion of the Herring River. See Fact Sheet at 4 - 8 and 9 - 10. As documented in the Fact Sheet, there is a similar need to set an acute toxic limit (i.e., daily maximum limit) for zinc without using a mixing zone. See id. at 9 - 10.

According to the WQSH, lethality to passing organisms can be prevented in various ways. The first method "is to prohibit concentrations in excess of the CMC [criteria maximum concentration, a measurement of acute toxicity] in the pipe itself, as measured directly at the end of the pipe." Id. at page 5-6. According to the WQSH, this is an appropriate method to be used "whenever a continuous discharge is made to an intermittent stream." Id. This is the situation here. The Region acted consistently with this national guidance in determining that in order to avoid an ongoing toxicity problem, there should be no acute toxics metals mixing zone.

While the Region has determined that only a chronic toxic limit (i.e., average monthly limit) is needed for nickel, the Region believes that it not appropriate to treat the entire Tidal Creek as a mixing zone even for this chronic toxic limit (and the chronic toxic limits for copper and zinc), given the size of the creek, the absence of any documented "mixing" within the creek,

and the potential long term impacts from the accumulation of toxic pollutants within the creek. The Region's decision not to allow this large mixing zone with respect to chronic toxic metals limits also is consistent with the WQSH, which states, "Concentrations above the chronic criteria are likely to prevent sensitive taxa from taking up long-term residence in the mixing zone. In this regard, benthic organisms and territorial organisms are likely to be the greatest concern. The higher the concentration occurring within certain isopleths, the more taxa are likely to be excluded, thereby affecting the structure and function of the ecological community. It is thus important to minimize the zone and the size of the elevated concentration isopleths within the mixing zone." Id. at page 5-4.

Treating the entire Tidal Creek as a mixing zone could impair the integrity of the water body as a whole, contrary to the WQSH guidance. See id. at page 5-1. The Region's decision not to allow a mixing zone also is consistent with the Technical Support Document For Water Quality-Based Toxics Control, Attachment I, Administrative Record item H2, which emphasizes the need to minimize the size of mixing zones, both for acute and chronic toxic pollutants. See id. at 69 - 72.

Moreover, basing the toxic metals limits on there being 13:1 dilution actually would be more akin to treating the Tidal Creek as a pipe (i.e., as not part of the environment), rather than treating it as a mixing zone. There is no documented mixing in the Tidal Creek during periods of low tide. Thus to achieve the 13:1 dilution, the Tidal Creek would need to be written off with a portion of the Herring River actually being used as the mixing zone. The Region does not think it appropriate to classify an area as a mixing zone for toxic pollutants when there is in fact no

documented mixing within the zone.[9]

Claimed Inability to Meet Permit Limits

The Town claims that meeting the permit limits based on a 1:1 dilution factor "is a standard that is simply impossible to achieve." Petition for Review at 8. This claim does not provide grounds for this Board to grant review. It is well-settled law that cost and technological considerations are not factors in setting water quality based effluent limits. See In re Massachusetts Correctional Institution - Bridgewater, NPDES Appeal No. 00-9, slip. op. at 10 - 11 (EAB October 16, 2000) ("MCI-Bridgewater"), and cases cited. Thus in United States Steel Corp. v. Train, 556 F.2d 822 (7th Cir. 1977), the court rejected the company's assertion that water quality-based permit limits for six chemicals should be set aside because they were "impossible to achieve with present technology." Id. at 838. The court held that "[e]ven if this is true, it does not follow that [the permit limits] are invalid. Id. (footnote omitted). Similarly, in City of Fayetteville, 2 E.A.D. 594 (CJO 1988), the EPA's Chief Judicial Officer determined that even de minimis violations of water quality standards could not be allowed in a NPDES permit. The Chief Judicial Officer noted, "The meaning of [Clean Water Act section 301(b)(1)(C)] is plain and straightforward. It requires unequivocal compliance with applicable water quality standards, and does not make any exceptions for cost or technological feasibility." Id. at 600 - 601 (footnote omitted). In short, water quality standards and permit limits based on them may be set so as to force technological advances and environmental progress.

This instant case is quite similar to MCI-Bridgewater in that it involves the setting by this

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[9] While the Region does not contend that the toxic metals limits are "attributable to State certification," the Region further notes that the Town's new permit was issued jointly by the Region and State. Thus the Region's interpretation of the State water quality standards is fully consistent with the current interpretation of the State.

Region of toxic metals limits which are environmentally and legally necessary but difficult to meet due to lack of dilution in the receiving water. This Board promptly upheld this Region's decision in MCI-Bridgewater while noting, "not only was it not error for the Region to set Bridgewater's copper discharge limit without regard to its technological capacity, the Region was obligated to do so by law." Slip op. at 11. This Board similarly should uphold this Region in this case, since the Region again has simply done what is environmentally and legally required.[10]

Moreover, it is premature for the Town to be declaring that its new permit limits are impossible to meet. The Petition for Review falsely states that the Region in the Response to Public Comments "expressly acknowledged" that the permit terms are impossible to meet. Id. at 8. What the Region actually acknowledged was that the permit terms will be "difficult" to meet. See Attachment G, page 6, line 10. The Region has a program in place for working with municipalities to address the task of meeting toxic metals limitations in low (or no) dilution streams in a reasonable manner, through the issuance of Administrative Compliance Orders. Rather than setting invalid permit limits, the Region suggests that the appropriate course of action is for the Region, State and Town to work together to assess compliance options under the rubric of such an Order.[11]

Finally, one possible compliance option might be construction of a longer outfall to the

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[10] Even if this Board believes that the Region's decision to not allow a mixing zone was discretionary, it still should deny review since it is clear that the Region did not abuse its discretion.

[11] Contrary to the Town's assertion (Petition for Review at 8), there is nothing wrong with scheduling compliance steps in an Administrative Order using the procedures applicable to Administrative Orders, after setting the effluent limits which must be met through a permit process, using the procedures applicable to permits. If compliance measures are developed that require environmental review (e.g., under the Massachusetts Environmental Policy Act), they will of course undergo such review in accordance with applicable law, including any applicable public comment procedures.

Herring River, since this might allow for the setting of less stringent permit limits based on the dilution available there. Contrary to the Town's assertion (Petition for Review at 8), there is nothing "arbitrary" about the EPA making this suggestion. While moving the outfall would not significantly change the water quality in the Herring River, it would solve the problem resulting from toxics discharges without dilution into the Tidal Creek. The Town could seek permits for such construction, which would involve only a temporary disturbance of the wetlands area which could be followed by restoration, whereas continuing to discharge high levels of toxic metals to the Tidal Creek/wetlands area poses an ongoing environmental problem. As explained in the Response to Public Comments at page 6, however, building a longer outfall is not the EPA's "suggested alternative" but rather is only one of the alternatives that should be explored. See Attachment G, page 6.[12]

2. In the New Permit, it was Appropriate for the Region to Correct an Error in the Prior Permit

The Town complains that while the EPA accepted setting the toxic metals limits in the prior permit based on using a mixing zone, it did not continue these limits when issuing the new permit. Petition for Review at 7 - 9. The Region set tighter toxic metals limits in the new permit based on no longer utilizing a mixing zone for essentially three reasons. First, in the course of developing the new permit, the Region recognized that the correct approach was to set the toxic metals limits based on there being no dilution in the Tidal Creek and that the approach taken in the prior permit had been mistaken. Thus the Region corrected the mistake.

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[12] The Town also appears to be exaggerating the cost of building an approximately 2,000 foot outfall pipe to the Herring River as being in excess of twenty million dollars. Petition for Review at 7. According to the Town's Facilities Plan, twenty million dollars actually was the cost of building a pump station, plus a force main plus an off-shore outfall - totaling 16,700 feet, to the Atlantic Ocean. Final Facilities Plan and Environmental Impact Report for Wastewater Management, EOEA # 5512, March 1, 1995, page 1-8-50, Administrative Record item D2.

Second, as explained in the Response to Public Comments, "efforts by the Town to reduce toxics in its effluent have not been as successful as anticipated." Attachment G, page 5. As further explained in the Fact Sheet, "the [prior] permit was written prior to both the completion of (except for nutrient removal) the treatment plant in October of 2000 and the drinking water system corrosion control program, which was completed in phases between 1992-2000. Based on reasonable assumptions generated with the best data available, [the Town's consultant] Metcalf and Eddy, anticipated greater metals reductions in the effluent than were subsequently realized.... Recent Discharge Monitoring Report (DMR) data submitted by the permittee demonstrates higher concentrations of copper (and other metals) than were predicted prior to the implementation of corrosion control...." Attachment E, page 5. This change in circumstances provided further justification for changing the permit limits. Absent the tightening of the limits, there would have been no legal basis in the permit for addressing the unanticipated toxicity problem.

Third, as explained in the Response to Public Comments, setting tighter limits for Scituate, "is consistent with what EPA Region I has done in other similar cases (e.g., setting toxic limits for Saco and Biddeford Maine based on no dilution, for discharges to mud flats at low tide; setting toxic limits based on very low or no dilution for Brockton, Upper Blackstone, Milford, Gardner and Ipswich, MA and Hampton, NH)." Attachment G, page 6. Scituate's prior permit was aberrational, and it was changed to make it consistent with the approach generally being followed by the Region in similar cases (and consistent with the State's water quality standards and EPA's regulations at 40 C.F.R. § 122.44(d)).

There clearly is no basis for saying that the EPA may not put the correct permit limits into

a new NPDES permit because it has put different permit limits into a prior NPDES permit. The EPA revisits all aspects of NPDES permits at each five year permit reissuance, consistent with the goal of the Clean Water Act to restore and maintain the chemical, physical and biological integrity of the nation's waters. While section 402(k) of the Clean Water Act, 33 U.S.C. § 1342(k), provides some protection for permittees against having to comply with changes in requirements during a permit's term, the clear intent of the statute is that there can and indeed often must be such changes in requirements when new permits are issued after prior permit terms.

The Town complains, however, that the new permit limits also depart from what the Town claims were other EPA approvals of the plan to use a mixing zone. Specifically, the Town states that the EPA "issued an Administrative Order approving the mixing zone." Petition for Review at 7. The Town also claims that the EPA approved the Town's Facilities Plan, which the Town indicates contemplated the use of a mixing zone. See id.

The Town's statements that the EPA issued the Administrative Order and that the EPA approved the Facilities Plan both are demonstrably false. The Administrative Order, submitted by the Town as part of its public comments, plainly was issued by the State Department of Environmental Protection. See Attachment J, Administrative Record item B4a. The various letters approving the Town's Facilities Plan, also submitted by the Town, also all were issued by State agencies. See Attachments K, L, M, N, O, P and Q, Administrative Record items B4b, B4e, B4f, B4g, B4h, B4i and B4j.[13] Other than making these inaccurate statements, the Town

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[13] The Town also submitted a letter from the EPA dated June 7, 1996 forwarding a first draft of its prior permit, but not addressing the Facilities Plan or the mixing zone. See Attachment R, Administrative Record item B4k.

points to no role that the EPA played in connection with the Administrative Order or the approval of the Facilities Plan. As the Town's current permit makes clear, NPDES permits in Massachusetts are issued jointly by the EPA and the Massachusetts Department of Environmental Protection, with each agency having the independent right to set permit terms. See Attachment A, page 11. The EPA was not a party to and was not bound by any State approvals contained in the Administrative Order or the State letters approving the Facilities Plan.[14]

An examination of the Administrative Order issued by the State also shows that it nowhere "approved" the mixing zone. See Attachment J. Rather, the Administrative Order specifies that upon completing its treatment plant, the Town must "comply with all approved DEP and EPA permits," thus correctly making it clear that the final decisions on effluent limits will be made when issuing those permits. Id. at 9 (par. 5.9(k)). Also, none of the State approval letters submitted by the Town expressly approve of the mixing zone. See supra. While the EPA recognizes that the Town developed its proposal for a mixing zone in its Facilities Plan,[15] mixing zones and permit limits are not established through approvals of Facilities Plans. To allow this would make both the State and federal permit public comment procedures meaningless. Thus any implicit and tentative DEP approval of the mixing zone in connection with its approval of the Facilities Plan did not bind the DEP in its later permit decisions, much less bind the EPA, much

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[14] Of course, the EPA joined with the State in 1997 in issuing a permit based in part on use of a mixing zone. But the mixing zone was allowed by the EPA only in connection with that permit. The EPA could have rejected the mixing zone approach proposed by the Town and State at that time. That the EPA instead made a mistake which in effect gave the Town a grace period does not diminish its authority to now require full compliance with the law.

[15] See Final Facilities Plan and Environmental Impact Report for Wastewater Management, EOEA #5512, March 1, 1995, page II-8-81, Administrative Record item D2.

less for all time.

It also is noteworthy that the Town has not made any showing that it detrimentally relied on any "approval" of the mixing zone. While the Town asserts that the new permit limits will necessitate a "massive reconstruction of the project"(Petition for Review at 7), this apparently refers simply to the possible need for building a longer outfall. The Town has made no showing that it actually built the wrong kind of treatment facility and will now need to tear it down and reconstruct it.[16] Rather, Scituate is like many other communities which have taken steps to comply with environmental requirements up to a certain level and may now need to do more. This provides no basis for this Board to grant review.

In similar circumstances, the courts consistently have upheld the right of the EPA to correctly implement the law, even when this involves departing from past errors. Thus in Southwestern Penn. Growth Alliance v. Browner, 121 F.3d 106 (3d Cir. 1997), the court upheld the EPA's decision not to redesignate the Pittsburgh area as being in attainment under the Clean Air Act based on new data received during the pendency of the action, even though the EPA had not considered such new data when redesignating the LaFourche Parish in Louisiana. The court stated, "[w]e accept the view that the EPA may not redesignate an area if the EPA knows that the area is not meeting the NAAQS. The EPA's redesignation of the LaFourche Parish ... was thus not proper. However, the fact that the EPA apparently acted contrary to law in a prior case did not permit, much less require, the EPA to disregard the law in the instant case." Id. at 115

[16] The Town also could explore utilizing additional treatment or other measures (e.g., pretreatment controls) as a means for the Town to comply with the new permit limits without needing to build a longer outfall. The Town has not shown that use of such added technologies or other measures would require the "reconstruction" of the existing facility.

(citations omitted).[17] In Puerto Rico Cement Co. v. EPA, 889 F.2d 292 (1st Cir. 1989), the court similarly determined that a single deviant interpretation is not a basis for overturning an otherwise consistently held EPA policy. The court noted that, "[n]o large agency can guarantee that all its administrators will react similarly, or interpret regulations identically, throughout the United States." Id. at 299 (citation omitted). More recently, the First Circuit has summarized the law in this area as being that, "agencies retain a substantial measure of freedom to refine, reformulate, and even reverse their precedents in light of new insights and changed circumstances." Davila-Bardales v. I.N.S., 27 F.3d 1, 5 (1st Cir. 1994) (citation omitted).[18] Taking account of new insights and changed circumstances is exactly what the Region has done in this case. The Region's action was proper and should be upheld.

C. The CBOD and TSS Mass Limits are Attributable to State Certification and Thus are Not Reviewable by This Board

In the Petition for Review, the Town challenges the permit's average monthly mass limits for CBOD and TSS. Id. at 9.[19] However, these limits were required by the State in its certification letter under section 401 of the Clean Water Act, 33 U.S.C. § 1341. See Attachment S, Administrative Record item A3. The State's letter specifically states that, "[t]he Massachusetts Department of Environmental Protection is requiring the following conditions in the permit as state certification requirements: ... 3. Mass monthly limits for BOD-5 and Total

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[17] At oral argument and in a letter to the court, the EPA committed to also correcting the LaFourche action.

[18] See also American Petroleum Institute v. EPA, 661 F.2d 340, 354 (5th Cir. 1980) ("Nothing in the Administrative Procedure Act prohibits an agency from changing its mind, if that change aids it in its appointed task").

[19] While the Petition for review and other documents use the term "BOD" in place of "CBOD," CBOD is the technically correct term.

Suspended Solids...." Id.[20]

It is well established that this Board lacks jurisdiction to review permit conditions that are attributable to State certification. 40 C.F.R. § 124.55(c); In re General Electric Company, Hooksett, New Hampshire, 4 E.A.D. 468, 470-472 (EAB 1993) ("It is well established that the Agency will not 'look behind' a State certification issued pursuant to section 401 of the Clean Water Act for the purpose of relaxing a requirement of that certification."); Roosevelt Campobello Int'l Park Commission v. EPA, 684 F.2d 1041, 1056 (1st Cir. 1982) ("[T]he proper forum to review the appropriateness of a state's certification is the state court and ... federal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification."). Thus this Board should deny review of these issues. If the Town wishes to challenge the CBOD and TSS limits, it must do so in a State forum.

Finally, although the heading in the Petition for Review indicates that the Town is challenging only the CBOD and TSS limits, the text contains what now appears to be a challenge to the permit's total nitrogen concentration limit. See id. at 9 - 10. In addition, while the Town in its arguments indicates that it is only challenging the mass limits for CBOD and TSS, the introduction to the Petition for Review indicates that the Town is also challenging the concentration limits. Compare Petition for Review at 9 - 10 with id. at 1 - 2. However, the total nitrogen limits and the CBOD and TSS concentration limits were not challenged by the Town during the public comment period, and the Town has offered no explanation as to why these "reasonably ascertainable" issues were not raised at that time. Thus the Board should deny

[20] The State's reference to the "BOD" limit clearly was intended to be a reference to the "CBOD" limit, since the permit contains no "BOD" limit.

review. 40 C.F.R. §§ 124.19(a) and 124.13; In re New England Plating, 9 E.A.D. 726 (EAB 2001) and cases cited.[21]

III. CONCLUSION

For the reasons explained above, the Petition for Review should be denied.

Respectfully submitted,

Jeffry Fowley
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One Congress St.
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(617) 918-1094

Dated: 2/7/05

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Washington, D.C. 20460

[21] In addition, while the Board need not and should not reach the merits of these matters, these permit limits are entirely defensible. The total nitrogen concentration limit insures that the plant maintains treatment efficiency when plant flows are below the design flow. Thus the concentration limit supplements the mass limit and helps protect the State water quality standards. In particular, the Massachusetts Water Quality Standards state that: "Any existing point source discharge containing nutrients in concentrations which encourage eutrophication or growth of weeds or algae shall be provided with the highest and best practical treatment to remove such nutrients." 314 CMR 4.04(5). The State and EPA have defined 4.0 mg/l TN as being the "highest and best practical treatment." The CBOD and TSS concentration limits also serve to insure that the performance of the treatment plant is maintained when it is operating below the design flow, and thus also help to protect the State water quality standards. The effects of CBOD and TSS on water quality are more immediate than nitrogen. Therefore, while a annual rolling average was used for nitrogen, a tighter monthly average limits was used for CBOD and TSS.

ENVIRONMENTAL APPEALS BOARD
US ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC

In the Matter of:	)	NPDES Appeal No.
	)	04-17
SCITUATE WASTEWATER TREATMENT PLANT	)	
NPDES PERMIT NO. MA0102695	)	
	)	

CERTIFICATION OF THE INDEX TO THE ADMINISTRATIVE RECORD

I, Douglas M. Corb, hereby certify that the attached document entitled "Index of the Administrative record" constitutes the administrative record for the NPDES Permit No. MA0102695, issued November 22, 2004.

Dated this 4th day of February, 2005

Douglas M. Corb

Douglas M. Corb, EPA - Region I

INDEX TO THE ADMINISTRATIVE RECORD
SCITUATE WASTEWATER TREATMENT PLANT
NPDES PERMIT NO. MA0102695
APPEAL NUMBER NPDES 04-17

PERMIT FILE No. MA0102695

A.	**PERMIT DOCUMENTS**
1	Final National Pollutant Discharge Elimination System ("NPDES") Permit No. MA0102695 issued to the Town of Scituate, Department of Public Works for discharge from the Scituate Wastewater Treatment Plant, 161 Driftway, Scituate Massachusetts, 02066, dated November 22, 2004, including both Part I, Part II General Requirements, and Attachments (the "Final Permit")
2.a	Final Issuance Transmittal Letter dated January 23, 2004, from Roger Janson Director, Municipal Permits Branch, to Anthony Antoniello, Director of the Scituate Department of Public Works.
2.b	Final Issuance Transmittal Letter Enclosure: Appealing/Contesting NPDES Permits, Stays of Permits, and Frequently Asked Questions.
3	State 401(a)(1) Water Quality Certification, dated November 2, 2004.
4	Memo to File (MA0102695) from Doug Corb (EPA) regarding absence of chronic mixing zone, dated June 7, 2004.
5	Joint Public Notice of 2004 Draft Permit, dated December 22, 2003.
6	Written Correspondence from EPA to Director, Division Watershed Management, Bureau of Resource Protection, Massachusetts Department of Environmental Protection, transmitting the 2004 Draft Permit for CWA Section 401 certification, dated December 18, 2003.
7	Written Correspondence from Brian Pitt, Team Leader, NPDES Permits Unit to Anthony Antoniello, Director of the Scituate Department of Public Works with enclosed draft NPDES Permit and Fact Sheet for public notice, dated December 18, 2003.
8	Electronic Memo from Joseph Shepard, DEP - Southeastern Regional Office, to Doug Corb (EPA) requesting a copy of the most recent draft permit, dated, February 5, 2004.

9 Public Notice Draft, National Pollutant Discharge Elimination System ("NPDES") Permit No. MA0102695 issued to the Town of Scituate, Department of Public Works for discharge from the Scituate Wastewater Treatment Plant, 161 Driftway, Scituate Massachusetts, 02066, including both Part I, Part II General Requirements, and Attachments.

10 Fact Sheet for Public Notice Draft, National Pollutant Discharge Elimination System ("NPDES") Permit No. MA0102695, dated November 19, 2003, and Attachments.

11 Written Correspondence from Richard Agnew, Scituate Town Administrator to Doug Corb (EPA), re: comments pertaining to the Draft for Review (pre-draft), National Pollutant Discharge Elimination System ("NPDES") Permit No. MA0102695, dated September 30, 2003.

12 Draft for Review, National Pollutant Discharge Elimination System ("NPDES") Permit No. MA0102695 issued to the Town of Scituate, Department of Public Works for discharge from the Scituate Wastewater Treatment Plant, 161 Driftway, Scituate Massachusetts, 02066, including both Part I, and Part II General Requirements, and Attachments., undated.

13 Fact Sheet for Draft for Review, National Pollutant Discharge Elimination System ("NPDES") Permit No. MA0102695, dated September 2, 2003, and Attachments.

14 Electronic Memo from Paul Hogan, Commonwealth of Massachusetts, Executive Office of Environmental Affairs, Department of Environmental Protection (DEP) to Doug Corb (EPA), Review of the Final Facility Plan and Environmental Impact Report for the Town of Scituate, dated April 29, 2003.

15 Attendance List for repermitting meeting held at EPA offices, April 9, 2003.

16 Written Correspondence from Commonwealth of Massachusetts, Executive Office of Environmental Affairs, Department of Environmental Protection, Permit Renewal - Antidegration Statement: Nitrogen, for Town of Scituate, dated March 24, 2003

17 Electronic Memo from Doug Corb (EPA) to Paul Hogan, DEP Surface Water Permit Program, re: dilution calculations and metals limits, dated November 4, 2002.

18 Photographs (2) taken by Doug Corb (EPA) November 1, 2002 of treatment plant and tidal creek during facility tour with Robert Rowland, Supervisor Scituate Wastewater Treatment Plant.

19 Document titled Scituate Metals given to Robert Rowland, Supervisor Scituate Wastewater Treatment Plant (hand delivered), on November 1, 2002. The charts prepared by Doug Corb (EPA) include Scituate WWTP discharge data, proposed metals limits, and the dilution needed to achieve those limits.

20 Electronic Memo from Doug Corb (EPA) to Paul Hogan, DEP Surface Water Permit Program, re: dilution calculations and metals limits, dated October 18, 2002.

21 Facsimile from Paul Hogan, Commonwealth of Massachusetts, Executive Office of Environmental Affairs, Department of Environmental Protection (DEP), suggested fact sheet attachments for draft NPDES permit, Dated October 7, 2002.

B. COMMENTS

1 Written Correspondence, Public Notice Comment Letter sent to Doug Corb from Alvin C. Firman, P.E., Vice President Camp Dresser & McKee Inc. (CDM), Dated January 20, 2004

2 Written Correspondence, Public Notice Comment Letter sent to Doug Corb from Paul J. Diodati, Director Massachusetts Division of Marine Fisheries, coinsurance with draft permit, dated January 20, 2004.

3 Written Correspondence, Letter sent Alvin C. Firman, P.E., Vice President Camp Dresser & McKee Inc. from Roger Janson, Director, NPDES Permits Program (CDM), re: submission of Supporting Materials for Public Notice Comment, Dated January 29, 2004.

4 Written Correspondence, Supporting Materials for Public Notice Comment Letter sent to Roger Janson, Director, NPDES Permits Program from Richard Agnew, Scituate Town Administrator, Dated February 3, 2004., With enclosures:

a. Massachusetts Department of Environmental Protection Administrative Consent Order ACO-SE-94-1003, Dated December 12, 1994.

b. Certificate of the Secretary Executive Office of Environmental Affairs Executive Office of Environmental Affairs (EOEA) on the Supplemental Environmental Impact Report, dated May 1, 1996.

c. Written Correspondence, Notice to Proceed Agreement from Richard Agnew, Scituate Town Administrator to Kenneth T. Page, Vice President, CDM, dated May 8, 1996.

d. Written Correspondence, Letter from Keith K Davison to EOEA MEPA Unit, Dated April 22, 1996.

e. Written Correspondence, Letter from Glenn Haas, Deputy Asst. Commissioner, DEP to Trudy Coxe, Secretary EOEA, Re: Scituate Wastewater Facilities Plan SFEIR-EOEA #5512, dated April 24, 1996.

f. Written Correspondence, Letter from Peter C. Webber, DEP Commissioner to Trudy Coxe, Secretary EOEA, Re: Review of Supplemental Facilities Plan/EIR, dated April 24, 1996.

g. Memorandum, From Margaret M. Brady, Director of the Massachusetts Office of Coastal Zone Management to Jan Reitsma, Director, MEPA Unit, Re: EOEA # 5512 [Review of the] Supplemental Final Environmental Impact Report for Wastewater Management; Scituate.

h. Written Correspondence, Letter from Mike Gildesgame, Chief Planner, Office of Water Resources, EOEA to Richard Agnew, Town Administrator, re: Water Conservation Plan, Administrative Consent Order ACO-SE-94-1003, Agreement Condition # 1, dated February 16, 1996.

i. Written Correspondence, Letter from Brona Simon, State Archeologist to Trudy Coxe, Secretary EOEA, Re: Scituate Wastewater Collection and Treatment System, Scituate, MA MHC #5826, dated December 14, 1995.

j. Written Correspondence, Letter from Glenn Haas, Deputy Asst. Commissioner, DEP to Richard Agnew, Town Administrator, re: Scituate WPC Mass 887 EOEA #5512 Final Facilities Plan and Environmental Impact Report for Wastewater Management Approval, Dated May 7, 1996.

k. Final Issuance Transmittal Letter from Jane Downing, Director, EPA-Massachusetts Office of Ecosystem Protection to Richard Agnew, Town Administrator, dated June 7, 1996.

l. Agreement between the Town of Scituate and seven state agencies to abide by eleven conditions specified in Administrative Consent Order Number 94-1003, undated.

m. Guidance For States and Municipalities Seeking No-Discharge Area Designation for New England Coastal Waters, USEPA, Region I, dated June 24, 1991 as revised, January 22, 1992.

C. RESPONSE TO COMMENTS

1 EPA's Response to Public Comments, Scituate Wastewater Treatment Plant, November, 2004

2 Written Correspondence, from Roger Janson, Director, NPDES Permits Program to Alvin C. Firman, P.E., (CDM)regarding the submission of Supporting Materials for Public Notice Comment Letter, Dated January 29, 2004

D. TECHNICAL DOCUMENTS

1 Region I Delegation No. 2-20, dated September 29, 1995

2 Final Facilities Plan and Environmental Impact Report for Wastewater Management, Prepared for The Town of Scituate, Massachusetts by Metcalf and Eddy (M&E)

a. Volume I - Final Facilities Plan, March 1, 1995
b. Volume II - Environmental Impact Report, March 1, 1995
c. Volume III - Environmental Impact Report Appendices, March 1, 1995

3 Supplemental Environmental Impact Report for Wastewater Management, prepared for the Town of Scituate, Massachusetts, by Metcalf and Eddy (M&E), November, 1995.

4 National Recommended Water Quality Criteria as published in the Federal Register on December 10,1998 (63 FR 68354) and updated November 2002 (EPA-822-R-02-047)

5 Interim Final National Toxics Rule (60 FR 22233, May 4, 1995).

6 Design and Retrofit of Wastewater Treatment Plants for Biological Nutrient Removal, 1992- Randall, Barnard and Stensel

E. MASSACHUSETTS COASTAL ZONE MANAGEMENT FEDERAL CONSISTENCY REVIEW

1 Written Correspondence, Letter from Jane W. Mead, Project Review Coordinator, Massachusetts Office of Coastal Zone Management, to The Town of Scituate, re: Federal Consistency Review Town of Scituate WWTP, dated November 21, 2003.

2 Electronic Memo from Todd Callaghan, Massachusetts Office of Coastal Zone Management to Doug Corb (EPA) regarding the absence of CZM Act consistency correspondence from the Town of Scituate, dated August 3, 2004

3 Electronic Memo from Doug Corb (EPA), to Jeffrey Fowley (EPA Counsel) regarding non-submission of a consistency letter to Massachusetts Office of Coastal Zone Management (CZM), dated August 3, 2004

4 Electronic Memo from Jeffrey Fowley (EPA Counsel) to Doug Corb (EPA) regarding CZM Act requirements, dated August 3, 2004.

5 Electronic Memo from Roger Janson Director, NPDES Permits Program, to Jeffrey Fowley (EPA Counsel) regarding telephone conversation with Anthony Antoniello, Director of the Scituate Department of Public Works regarding the submission of a consistency letter to Massachusetts Office of Coastal Zone Management (CZM), dated August 4, 2004

6 Facsimile from Roger Janson Director, NPDES Permits Program, to Anthony Antoniello, Director of the Scituate Department of Public Works regarding the submission of a consistency letter to Massachusetts Office of Coastal Zone Management (CZM), with attachments, sent and confirmed, August 24, 2004.

7 Facsimile and mailed Written Correspondence from Anthony Antoniello, Director of the Scituate Department of Public Works to Alex Strysky, Project Review Coordinator, Massachusetts Office of Coastal Zone Management (CZM), Federal Consistency Certification , NPDES Permit MA0102695; Scituate Wastewater Treatment Plant, dated September 2, 2004.

8 Written Correspondence from Alex Strysky, Project Review Coordinator, CZM to Anthony Antoniello, initiating CZM Federal Consistency Review Process for the Scituate Wastewater Treatment Plant, dated September 7, 2004.

9 Massachusetts Office of Coastal Zone Management (CZM) Federal Consistency Review: Scituate Wastewater Treatment Plant, NPDES Permit #MA0102695: Scituate Concurrence, Dated November 9, 2004.

F. PERMIT APPLICATION

1 Written Correspondence from EPA to Anthony Antoniello, Director of the Scituate Department of Public Works, application complete, dated Jan 11, 2002.

2 Written Correspondence from Anthony Antoniello, Director of the Scituate Department of Public Works to Olga Vergara (EPA), corrected application signature pages, transmittal letter, dated December 20, 2001.

3 Written Correspondence from EPA to Anthony Antoniello, Director of the Scituate Department of Public Works, application notice of deficiency, dated December 17, 2001

4 Written Correspondence from Michael McDonald, Project Manager CDM to Olga Vergara (EPA), Transmittal letter for NPDES Applications Forms, 2A and 2S with NPDES Applications Forms, 2A and 2S, dated December 12, 2001.

5 Written Correspondence from EPA to Richard Agnew, Scituate Town Administrator, reapplication requirements for reissued permits with application forms, dated July 31, 2001

G. PREVIOUS PERMIT

1 Final National Pollutant Discharge Elimination System ("NPDES") Permit No. MA0102695 issued to the Town of Scituate, for discharge from the Scituate Wastewater Treatment Plant, 161 Driftway, Scituate Massachusetts, 02066, dated January 30, 1997, and Attachments with accompanying Fact Sheet dated March 6, 1996, and Attachments.

2 Facsimile from Commonwealth of Massachusetts, Executive Office of Environmental Affairs, Department of Environmental Protection (DEP): Copy of August 30, 1995 letter from DEP to Richard Agnew, Scituate Town Administrator, Proposed Effluent Limitations (and suggested mixing zone), dated July 3, 2003.

H. GUIDANCE

1 U.S. EPA NPDES Permit Writers' Manual, US EPA, Office of Water, EPA-833-B-96-003, dated December 1996.

2 EPA Technical Support Document for Water Quality-Based Toxics Control, US EPA, Office of Water, EPA/505/2-90-001, dated March 1991.

3 "Massachusetts Water Quality Standards Implementation Policy for the Control of Toxic Pollutants in Surface Waters," dated February 23, 1990.

4 EPA Water Quality Standards Handbook: Second Edition, EPA-823-B-94a, August 1994.

5 Antidegradation Review Procedure for Discharge Requiring a Permit Under 314 CMR 3.03, Massachusetts Department of Environmental Protection, Revised 1993.

6 Massachusetts Surface Water Quality Standards Implementation Policy for Mixing Zones, Massachusetts Department of Environmental Protection, January 8, 1993

7 The U.S. Department of Commerce on March 3, 1999 approved Essential Fish Habitat (EFH) designations for New England

8 Massachusetts Surface Water Quality Standards 314 CMR 4.00...

9 Massachusetts 1998, CWA 303(d) list

10 Title 33 U.S.C. Clean Water Act (as amended)

11 Coastal Zone Management Act, 16 U.S.C. 1451 et seq. section 307(c) of the Act and implementing regulations (15 CFR part 930)

I. DISCHARGE MONITORING REPORTS

1 Scituate WWTP Discharge Monitoring Reports from January 2000 through October 2003.

2 Permit Compliance System Summary of Scituate WWTP Discharge Monitoring Report Data from January 1999 through September 2003.

J. WHOLE EFFLUENT TOXICITY REPORTS

1 Quarterly WET Test Reports submitted by the Town of Scituate from calendar year 2001 through November 2003

Attachments to
Respondent's
Memorandum
(Hard Copy Only)

In the Matter of Scituate Wastewater Treatment Plant, NPDES Appeal No. 04-17

CERTIFICATE OF SERVICE

I hereby certify that one original and five copies of the (i) Respondent's Memorandum in Opposition to Petition for Review; (ii) an Attachment containing relevant portions of the Administrative Record; (iii) the Certified Index to the Administrative Record; and (iv) Joint Report of the Parties Regarding Potential Settlement; were mailed by Federal Express on this day to the U.S. Environmental Protection Agency, Clerk of the Board - Environmental Appeals Board, 1341 G Street, N.W. - Suite 600, Washington, D.C. 20005, and that a copy of the foregoing was sent by First Class Mail to the following person:

Jason R. Talerman, Esq.
Kopelman and Paige, P.C.
31 St. James Ave.
Boston, MA 02116-4102

Dated: February 8, 2005

Sally A. Burt
Sally Burt, Admin. Asst., ORC