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1 record that here are the limits. These limits,
2 along with other limits, will get us to water
3 quality standards on this water body. They don't
4 say that. And I think part of it is because
5 they don't know if they can really get there. And
6 under this statute, clearly, because the standard
7 needs to be attainable, that's the conclusion the
8 Agency needs to make. If they can't conclude that
9 those standards are attainable under this statute,
10 they're supposed to revisit and revise those
11 standards.

12 JUDGE SHEEHAN: But don't they say in
13 the fact sheet that the limit of five for nitrogen
14 will therefore achieve the water quality
15 standards? They say it.

16 MR. ANDES: And when that issue was
17 questioned in the response to the comments, the
18 standards are not nearly as unequivocal. The
19 standards in response to comments don't even say
20 in any word we really know that we're going to
21 attain the standard. If they don't know that,
22 they can't just impose requirements on discharge

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1 and say, well, it will get us there. That could
2 be under another statute, but under this statute,
3 that's not way it works.

4 JUDGE SHEEHAN: You seem to be saying
5 that unless there's some absolute bullet-proof
6 guarantee, which is probably impossible in any
7 scenario, the Region has to tie its hands and sit.

8 MR. ANDES: Well, we would say not that
9 there has to be a bullet-proof guarantee, we would
10 say nowhere in this record -- nowhere in this
11 record does the Agency say we're going to get the
12 water quality standards in this watershed and
13 here's how. Instead they say -- they say a lot of
14 times, well, it's a really big problem and Upper
15 Blackstone is a significant contributor. Granted,
16 something needs to be done. The issue we have
17 here is, is what they did -- something that has
18 rational support that it will result in a
19 attaining water quality standards. I simply don't
20 see where they concluded that, even with all this
21 information.

22 I would also point out as to aluminum,

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1 because to me the key issue there, as I think
2 we've seen this morning, is the Agency recognized
3 that they have the data. When they take out the
4 344, there's no limit. The rest of the data are
5 much, much lower than 344. I think we just need
6 to go back to the comments because it's clear that
7 what we did in comments was we said, first, that
8 the Agency has selectively used the District's
9 data, leaving out data from 2004, a portion of
10 2005, most of 2006, half of 2007, and most of
11 2008. That selective use of the data allowed them
12 to form an erroneous conclusion. So that
13 paragraph, we basically say go back, review your
14 dataset properly, and do a new analysis. Our
15 second paragraph then went on to say, by the way,
16 if you look at all the data, even with the 344, we
17 are always under -- consistently below the ambient
18 levels in the Blackstone River. And there's no
19 varying ambient conditions. A separate point
20 where we said, well, look at all the dataset,
21 we're under ambient levels, how could se be
22 causing to contributing to a violation?

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1 The first point we raised in the
2 comments was you selectively used data. Stop
3 that. So in their response to comments, they
4 said, fine, we're going to consider more data.
5 Here's a new analysis we've run, and we didn't mix
6 in the 344. And our response was, well, okay,
7 that's a new analysis. We didn't think to say, by
8 the way, when you do the new analysis, follow all
9 your own guidance. Don't include outliers. Do
10 the various other data manipulation techniques
11 which you ordinarily do. I guess if we had to put
12 that in context of the time, we would insert some
13 boilerplates saying follow their own guidance. We
14 didn't think we needed to do that. So we think we
15 did reserve the issue. They submitted a new
16 analysis. We reviewed it. It's clear that it
17 rests on one data point and that data point should
18 be excluded, and then there would be no limit.
19 Thank you.

20 JUDGE WOLGAST: Thank you very much for
21 your arguments. They were very helpful. The case
22 is now submitted.

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1 (Whereupon, at 11:55 a.m. the
2 proceedings were concluded.)

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1 CERTIFICATE OF NOTARY PUBLIC

2

3 I, CONSTANCE HUNT RHODES, the officer
4 before whom the foregoing oral argument was taken,
5 do hereby certify that the proceedings were taken
6 by me in stenotypy and thereafter reduced to
7 typewriting by me; that said transcription is a
8 true record of the proceedings; that I am neither
9 counsel for, related to, nor employed by any of
10 the parties to the action in which this deposition
11 was taken; and further, that I am not a relative
12 or employee of any attorney or counsel employed by
13 the parties thereto, nor financially or otherwise
14 interested in the outcome of the action.

15

16

Constance H. Rhodes

17

18

CONSTANCE HUNT RHODES

19

Notary Public in and for the

20

District of Columbia

21 My commission expires:

22 January 1, 2013



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