

BEFORE THE ENVIRONMENTAL PROTECTION APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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In the Matter of: :
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Town of North Attleborough : NPDES Appeal No. 07-02
Water Treatment Facility : NPDES Appeal No. 07-04
: :
NPDES Permit No. MA0101036 :
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ENVIRONMENTAL APPEALS BOARD

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U.S. EPA.

Washington, D.C.

Wednesday, August 15, 2007

The above-entitled matter came on
for VIDEO STATUS CONFERENCE at approximately
11:00 a.m. at the Environmental
Protection Agency, EPA East Building, 1201
Constitution Avenue, NW, Washington, D.C.

BEFORE:

HONORABLE SCOTT C. FULTON
Presiding Judge

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<p>1 APPEARANCES: 2 On behalf of Region: 3 SAMIR BUKHARI, ESQUIRE 4 U.S. EPA - Region I 5 I Congress Street 6 Suite 1100 (RAA) 7 Boston, Massachusetts 02174-2023 8 On behalf of Town of North Attleborough: 9 JEFFREY T. BLAKE, ESQUIRE 10 Kopelman and Paige, PC 11 101 Arch Street 12 Boston, Massachusetts 02110-1100 13 (617) 556-0007 14 (617) 654-1735 (FAX) 15 16 On behalf of Rhode Island Department of 17 Environmental Management ("DEM"): 18 SUSAN B. WILSON, ESQUIRE 19 Rhode Island Department of 20 Environmental Management 21 Office of Legal Services 22 235 Promenade Street Fourth Floor Providence, Rhode Island 02903 (401) 222-6607 (401) 222-3378 (FAX)</p>	<p>1 I note that the Region's response 2 in this case is due I believe on 3 September 28; is that correct? 4 MR. BUKHARI: That's correct. 5 JUDGE FULTON: So I think our 6 purpose here is really in trying to assess 7 what to expect come the end of September. Is 8 this going to be a case that will be settled 9 by then, is sufficiently likely to settle, 10 that some additional time may be needed to 11 produce that outcome, or is this a case with 12 respect to which the issues are sufficiently 13 complex that settlement is going to be 14 elusive. In which case, we would really like 15 to move this on to a track where it's headed 16 towards a resolution by the Board. 17 In hearing from you all, I guess I 18 would be interested possibly in hearing from 19 the Region first today, in that they have 20 really been the intermediary with the Board 21 in requesting additional time and in bringing 22 this question of settlement to our attention.</p>
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<p>1 PROCEEDINGS 2 CLERK: The Appeals Board of the 3 Environmental Protection Agency is now in 4 session for a status conference, In Re: Town 5 of North Attleborough Wastewater Treatment 6 Facility, Permit Number MA0101036, NPDES 7 Appeal Numbers 07-02 and 07-04, the Honorable 8 Judge Scott Fulton presiding. 9 JUDGE FULTON: Good morning. 10 MR. BUKHARI: Good morning. 11 MS. WILSON: Good morning. 12 MR. BLAKE: Good morning. 13 JUDGE FULTON: We are here today 14 pursuant to the Board's order of June 21 of 15 this year. The purpose of our status 16 conference is really twofold, I think, given 17 where things stand in this case. 18 One is to hear from the parties 19 regarding the current status of your 20 negotiations; and second is to help the Board 21 determine whether additional time is likely 22 to produce a settlement in this case.</p>	<p>1 So maybe we can start with the 2 region and then hear from the Town of North 3 Attleborough, followed by the Rhode Island 4 Department of Environmental Management. If 5 that sounds like a suitable order to you all, 6 can we proceed that way? 7 MR. BLAKE: That's fine, Your 8 Honor. 9 JUDGE FULTON: Okay. If you can, 10 if you would just for the record introduce 11 yourself as you present the views of the 12 party that you represent, I would appreciate 13 that. 14 So let's start first with the 15 Region. 16 MR. BUKHARI: Your Honor, my name 17 is Samir Bukhari. I am assistant regional 18 counsel in the Office of Regional Counsel for 19 Region 1, and I am representing the Region in 20 this matter. 21 Over the past several months, we 22 have made significant progress on some of the</p>

<p style="text-align: right;">6</p> <p>1 more complex issues in this permit appeal. 2 On appeal are the permit's nutrients limits 3 and the metals limits. We believe that a 4 resolution of the nutrients limits is likely; 5 although, there is some additional due 6 diligence on the part of the Town of North 7 Attleborough before that can happen. The 8 Town of North Attleborough at the moment is 9 undergoing an engineering consultant study to 10 determine whether their existing treatment 11 capabilities will be sufficient to meet a 12 revised phosphorus ethanol limit of .1. 13 I will let the counsel for North 14 Attleborough speak exactly to where that is 15 and how long that is expected to be 16 completed. But that process is ongoing. 17 However, in principle, we believe that there 18 is broad agreement that North Attleborough 19 will build to whatever treatment level the 20 Region ultimately is going to require as a 21 result of the permit, and the Region has 22 concluded that a .1 will be sufficient to</p>	<p style="text-align: right;">8</p> <p>1 this issue. We understand that Rhode Island 2 would like to see some additional monitoring 3 or study of metals, particularly the 4 phosphorus -- the resuspension of metals, if 5 any, in the water column. 6 I think that as far as the timing, 7 additional time that is going to be required, 8 it is somewhat unclear at the moment. We 9 still need to hear back from the Town of 10 North Attleborough on whether their existing 11 capability, treatment capability, will be 12 sufficient to meet the .1, and if not, how 13 much additional time they will need. That is 14 going to inform whatever administrative 15 compliance order we put into effect to 16 resolve the appeal on the nutrient issue. 17 As far as the metals go, we 18 understand that some of the key personnel at 19 the Rhode Island DEM have been on vacation 20 for the past several weeks and haven't had 21 sufficient opportunity to focus in on the 22 question, the precise question of what</p>
<p style="text-align: right;">7</p> <p>1 ensure compliance with water quality 2 standards. 3 The metals limits are another open 4 issue on appeal, and again, the Region 5 believes that resolution of this is likely if 6 nothing else, for no other reason, than the 7 major issue and the contentious issue on 8 appeal really is the nutrient limits. And 9 the nutrient limits are really the driver in 10 terms of the upgrade and in terms of the cost 11 of the upgrade. 12 We believe the metals limits are 13 largely subsidiary, and we also believe that 14 the derivation of metal limit, metals limits 15 by the Region is fundamentally sound in that 16 it accounts for background, which is the 17 point of issue, the precise point of issue, 18 on appeal in that it incorporated a number of 19 very conservative assumptions in putting 20 together the final permit limits. 21 With that said, Rhode Island we 22 believe has some additional deliberations on</p>	<p style="text-align: right;">9</p> <p>1 precisely remains to be done either by the 2 Region or the Town of North Attleborough on 3 the metals issue. So we will need to hear 4 back from the State of Rhode Island, 5 hopefully, within the next little while to 6 see where they are on that, on that issue. 7 Once we have those two piece of information, 8 we will be able to provide the Board with a 9 clearer sense of how long exactly will be 10 required for final resolution of the appeal. 11 JUDGE FULTON: Okay. The .1 limit 12 that you mentioned before, is that the limit 13 that is currently in the permit that's on 14 appeal, or is that a modified limit? 15 MR. BUKHARI: That would entail a 16 modification, so the current limit is .2. 17 JUDGE FULTON: Okay. 18 MR. BUKHARI: That modification 19 process would entail at least a 90-day stay 20 to account for public notice and comment and 21 response to comments and any subsequent 22 appeals.</p>

10	<p>1 JUDGE FULTON: So in that event, 2 you would basically be reissuing the permit I 3 guess. 4 MR. BUKHARI: We would be 5 reissuing -- we would be partially modifying 6 the permit. 7 JUDGE FULTON: Okay. Okay, that's 8 just fine. Okay, thank you. Anything else 9 from the Region? 10 MR. BUKHARI: And I would just add 11 on to phosphorus limit, the agreement on 12 phosphorus is contingent both on the part of 13 North Attleborough and the Region on complete 14 resolution of the metals issue. 15 And if we are unable to reach a 16 resolution on the metals issue, the Region 17 will likely withdraw the entire permit and 18 take various steps with respect to the 19 administrative record before fully defending 20 it on appeal. 21 JUDGE FULTON: I want to make sure 22 that I'm hearing you correctly on that. In</p>	12	<p>1 enter. 2 MR. BLAKE: Good morning, Your 3 Honor. Jeffrey Blake for the Town of North 4 Attleborough. I think that the attorney for 5 the Region has accurately captured exactly 6 what the status of the matter is except for 7 one minor clarification, and that is, I would 8 like to let you know that we are currently 9 engaged in an upgrade of the plan. It is a 10 ten-phase upgrade. 11 We are right now at Phase VI, which 12 is the phase that will address the 13 phosphorus. We had, I believe, originally 14 designed the plant to meet slightly above a 15 .2, but with some tweaking we knew we could 16 get down to .2. 17 So when the permit was issued, we 18 appealed the permit on the .2, hoping that we 19 would also be able to get involved or enter 20 into a compliance schedule with Region 1, so 21 that we would have a little bit more time to 22 make those tweaks to get down to .2.</p>
11	<p>1 the event that it's not possible to resolve 2 all of the issues, the Region would 3 anticipate withdrawing the permit? 4 Is that what you said? 5 MR. BUKHARI: We would likely 6 withdraw the permit and supplement or more 7 fully articulate the rationale for the metals 8 limits and for the phosphorus limit -- 9 JUDGE FULTON: I see. 10 MR. BUKHARI: What will be the 11 revised phosphorus limit. Because while we 12 believe the basic approach is fundamentally 13 sound with respect to metals, we believe that 14 it would benefit from additional 15 clarification by the permit writer as to how 16 the metals limits were reached and why we 17 believe we have fundamentally addressed Rhode 18 Island's comments with respect to background 19 concentrations of metals. 20 JUDGE FULTON: Okay. Very good, 21 that's understood. Thank you, sir. 22 Now Mr. Blake, right, you can</p>	13	<p>1 As you can imagine, Rhode Island 2 came in, appealed, and is now requesting that 3 we get down to .2. It's my understanding 4 from my engineers and my consultants that 5 going from .2 to .1 is significantly 6 different. 7 So we need additional time right 8 now to study and figure out exactly what 9 needs to be done during Phase VI to get down 10 there, and that's where we're at right now. 11 We believe we can get there, and we 12 believe we will get there, but we just need 13 some additional time. That's why probably 14 the stay until September 28 will be 15 necessary. And I don't know, at that time 16 maybe we can address whether or not we need 17 some additional time to figure out exactly 18 where we need to go. 19 JUDGE FULTON: You think it's 20 within the range of possibility to reach 21 closure on this by the end of September? 22 MR. BLAKE: To be perfectly frank</p>

14	<p>1 with Your Honor, I don't believe that we will 2 reach absolute closure. I think at that 3 point, we probably will be able to understand 4 where we need to go and how much time we need 5 to get there, then it will be a matter of 6 probably negotiating the compliance schedule. 7 As you can imagine, we have another 8 party, Rhode Island, so it will be a 9 three-way negotiation, which always adds a 10 little bit to it. So to be frank with you, I 11 don't believe we will have complete 12 resolution, but I think we will be well on 13 the way to resolution by September 28. 14 JUDGE FULTON: Okay, very good. 15 MR. BLAKE: And that of course is 16 with the caveat that Rhode Island is going 17 to, for lack of a better term, back off on 18 their appeal of the metals limits. If the 19 metals limits, if Rhode Island will not 20 relent on those metal limits, I think we're 21 going to have some problems. 22 JUDGE FULTON: Understood. Okay,</p>	16	<p>1 difficult for the attorney when the client 2 goes on vacation. 3 MS. WILSON: It is. So I think our 4 discussions have been going well. I 5 appreciate the efforts of the Town and the 6 Region in reaching an agreement on the .1 7 phosphorus limit that we had originally 8 requested, and we do just have a few more 9 metals issues that we're trying to work out. 10 JUDGE FULTON: Okay, very well. 11 Thank you. Thank you, Ms. Wilson. 12 MS. WILSON: Thanks. 13 JUDGE FULTON: Mr. Bukhari, do you 14 think that we're okay with the schedule that 15 we currently have in place? Do we need to do 16 anything with respect to that schedule now? 17 I mean, what I hear the parties 18 saying is things are underway, there 19 continues to be optimism that a settlement 20 can be reached. It seems unlikely that we 21 are going to be in a position where you are 22 going to be filing a response to the appeal</p>
15	<p>1 thank you, Mr. Blake. 2 MR. BLAKE: Thank you, Your Honor. 3 JUDGE FULTON: For Rhode Island 4 DEM? 5 MS. WILSON: Good morning, Your 6 Honor. Susan Wilson for Rhode Island DEM. I 7 think that both of the other attorneys have 8 covered most all of the issues pretty 9 clearly. DEM does still have some internal 10 discussions that we need to have on where 11 we're going with, you know, a request on the 12 metals issues. As the attorney for the 13 Region indicated, a few of our key personnel 14 have been on vacation lately, so I'm hoping 15 to speak to them in the next week or two and 16 have some kind of response to the Region by 17 then. So from our point of view -- 18 JUDGE FULTON: It's always 19 difficult for -- 20 MS. WILSON: I think September 28 21 is doable. 22 JUDGE FULTON: It's always</p>	17	<p>1 at the end of September. Do you want to move 2 the Board for any relief from that 3 requirement or to substitute that requirement 4 with a status report requirement? What do 5 you think? 6 MR. BUKHARI: You Honor, I think 7 that that would be a good idea. I think that 8 by the September 28 deadline we will likely 9 know whether or not there is an agreement in 10 place, at least an agreement in principle, on 11 the nutrients issue and on the metals issue. 12 With respect to the metals issue 13 and with respect to the nutrients issue, we 14 will probably just begin the discussion at 15 that point regarding the compliance schedule 16 and the details of that based on North 17 Attleborough's investigation into the 18 engineering aspects of the limit. 19 For the Region's part, swapping out 20 the response to petition with a status report 21 along with a -- I suppose at that point we 22 would move for an extended stay and at that</p>

18	<p>1 point -- the reason I'm hesitating, Your 2 Honor, is that it's very, very difficult for 3 us to say at this point how much additional 4 time we will need by September 28. 5 What I would like to avoid is 6 imposing too long of a stay insofar as it 7 will take some of the pressure off of the 8 parties to reach a resolution in a timely 9 manner, and so I would propose a status 10 report by September 28 and we will probably 11 also motion at that time for an additional 12 period, an additional stay. 13 JUDGE FULTON: Okay. That sounds 14 fine. Maybe then under the circumstances it 15 makes sense for us to just wait and respond 16 to what you file at that time. I think just 17 from your own planning purposes I think you 18 could expect that the Board would provide 19 some relief to the requirement, file a 20 response on the 28th. 21 So if you file documentation with 22 us at the end of the month essentially asking</p>	20	<p>1 a proposed date for extension of the 2 requirement that you file a response to the 3 appeal. 4 MR. BUKHARI: I understand. Thank 5 you. 6 JUDGE FULTON: Okay. Does that 7 work? 8 MR. BUKHARI: Yes. 9 JUDGE FULTON: Very good. 10 Mr. Blake or Ms. Wilson, anything else? 11 MR. BLAKE: No, Your Honor. 12 MS. WILSON: No, Your Honor. 13 JUDGE FULTON: Okay. I want to 14 thank you all both for your attention to this 15 matter and your efforts to try to bring it to 16 resolution and for making yourselves 17 available this morning in this way. It is 18 actually quite helpful that you gathered as 19 you have. I wish you well in your continued 20 deliberations and work together, and we hope 21 to hear back from you that have successfully 22 worked through the remaining issues.</p>
19	<p>1 for a reprieve on that requirement and 2 submitting a status report letting us know 3 where things stand, I don't think you need to 4 worry about actually preparing the response 5 in that circumstance. 6 I would much rather that you spend 7 your time trying to resolve the remaining 8 issues in the settlement than having the 9 Region preoccupied with pulling the response 10 together. So we will just look to hear from 11 you in that form at the end of September. I 12 don't suppose we really need to issue another 13 order at this point in relation to this. Is 14 that consistent with your view? 15 MR. BUKHARI: It is, Your Honor. 16 JUDGE FULTON: Okay. 17 MR. BUKHARI: Just to clarify, Your 18 Honor, at the end of September, the Region 19 will be expected to file on the September 28 20 deadline or by the September 28 deadline a 21 status report? 22 JUDGE FULTON: A status report and</p>	21	<p>1 MR. BUKHARI: Thank you. 2 MS. WILSON: Thank you. 3 MR. BLAKE: Thank you. Have a nice 4 day, Your Honor. 5 JUDGE FULTON: Thank you and have a 6 good day. 7 (Whereupon, at approximately 8 11:16 a.m., the STATUS CONFERENCE 9 was adjourned.) 10 * * * * * 11 12 13 14 15 16 17 18 19 20 21 22</p>

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