

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

RECEIVED
U.S. E.P.A.

2007 AUG 20 PM 1:39

ENVIR. APPEALS BOARD

-----x

In the Matter of: :

:

:

Town of North Attleborough : NPDES Appeal No. 07-02

Water Treatment Facility : NPDES Appeal No. 07-04

:

NPDES Permit No. MA0101036 :

-----x

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

1 APPEARANCES:

2 On behalf of Region:

3 SAMIR BUKHARI, ESQUIRE

U.S. EPA - Region I

4 I Congress Street

Suite 1100 (RAA)

5 Boston, Massachusetts 02174-2023

6 On behalf of Town of North Attleborough:

7 JEFFREY T. BLAKE, ESQUIRE

Kopelman and Paige, PC

8 101 Arch Street

Boston, Massachusetts 02110-1100

9 (617) 556-0007

(617) 654-1735 (FAX)

10

On behalf of Rhode Island Department of

11 Environmental Management ("DEM"):

12 SUSAN B. WILSON, ESQUIRE

Rhode Island Department of

13 Environmental Management

Office of Legal Services

14 235 Promenade Street

Fourth Floor

15 Providence, Rhode Island 02903

(401) 222-6607

16 (401) 222-3378 (FAX)

17

18

19

20

21

22

1 P R O C E E D I N G S

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.

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.

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

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

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

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

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.

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

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

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.

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

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,

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

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

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

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

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

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.

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

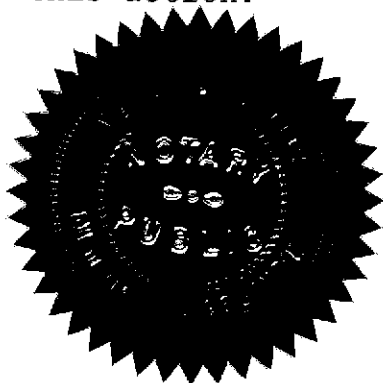
20

21

22

CERTIFICATE OF NOTARY PUBLIC

I, OVEDA V. HANCOCK, the officer before whom the foregoing deposition was taken, do hereby certify that the witness whose testimony appears in the foregoing deposition was duly sworn by me; that the testimony of said witness was taken by me via stenography, and thereafter reduced to typewriting under my direction; that said deposition is a true record of the testimony given by said witness; that I am neither counsel for, related to, nor employed by and of the parties to the action in which this deposition was taken; and, further, that I am not a relative or employee of any counsel or attorney employed by the parties hereto, nor financially or otherwise interested in the outcome of this action.



Oveda V. Hancock
OVEDA V. HANCOCK
Notary Public in and for the
District of Columbia

My Commission Expires:
June 29, 2009