BEFORE THE ENVIRONMENTAL APPEALS BOARD

U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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ORAL ARGUMENT

IN THE MATTER OF:	
CITY OF TAUNTON DEPARTMENT OF PUBLIC WORKS	NPDES Appeal No. 15-08
Permit No. MA0100897	

Tuesday,
March 1, 2016

Administrative Courtroom
Room 1152
EPA East Building
1201 Constitution Avenue, NW
Washington, DC

The above-entitled matter came on for hearing, pursuant to notice, at 10:24 a.m.

BEFORE:

THE HONORABLE MARY KAY LYNCH
Environmental Appeals Judge

THE HONORABLE KATHIE A. STEIN
Environmental Appeals Judge

THE HONORABLE MARY BETH WARD
Environmental Appeals Judge

ORIGINAL

APPEARANCES:

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ALSO PRESENT:

Eurika Durr, Clerk of the Board

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

10:24 a.m.

THE CLERK: All rise. The Environmental Appeals Board of the United States Environmental Protection Agency is now in session for oral argument In Re: City of Taunton, Department of Public Works, Permit Number MA-0100897, NPDES Appeal Number 15-08; the Honorable Judges Kathie Stein, Mary Beth Ward, Mary Kay Lynch, presiding.

Please turn off all cell phones and no recording devices allowed. Please be seated.

JUDGE WARD: Good morning. We're hearing argument today in the matter of the City of Taunton. The City has filed an appeal of an NPDES permit issued by EPA Region I. Each side will have 30 minutes for argument.

Will counsel please introduce themselves for the record.

MR. HALL: Yes, Your Honor. My name is John Hall. I'm counsel for Petitioner, from Hall & Associates, and with me here today is Ben Kirby from Hall & Associates. I'd like to reserve five

minutes for rebuttal.

JUDGE WARD: Thank you. EPA?

MR. BUKHARI: Samir Bukhari, Office of Regional Counsel, Region I, representing the Region in this matter. I'm joined by Lee Schroer of the Office of General Counsel.

JUDGE WARD: And, Mr. Bukhari, you did receive a copy of the City's PowerPoint in advance of argument?

MR. BUKHARI: I did, Your Honor.

JUDGE WARD: Do you have any concerns or objections you wanted to raise to the Board at this time?

MR. BUKHARI: I don't.

JUDGE WARD: You do not?

MR. BUKHARI: I do not.

JUDGE WARD: Okay. And I'd also like to address the motion that the City filed yesterday at 5 p.m. to supplement the administrative record. At this time, we haven't yet heard from the Region a response. What I'd like to do is ask the Region to file its response to that motion by

this Friday, March 4th, and for the City to file any reply by next Tuesday, March 8th. And we won't be hearing argument today as to that motion.

Mr. Hall, you may proceed.

MR. HALL: Yes, thank you, Your Honor. With the Board's permission I'd like to do my presentation sitting which I would not normally do. We've had tremendous difficulties trying to get the laptop up and synced, and I can't use it from the podium. So with the Board's permission, if that would be acceptable?

JUDGE WARD: That's acceptable.

MR. HALL: Thank you very much.

Good morning. My name is John Hall. I'm counsel for Petitioner, City of Taunton. With me today is Fred Cornaglia, the Commissioner of Public Works for the City of Taunton; also, Dan de Abreu ---

JUDGE WARD: I'm sorry, Mr. Hall. Could you repeat the first name you said?

MR. HALL: Yes, Fred Cornaglia, and

then Assistant City Attorney, Dan de Abreu, and then Joe Federico, who's the City's consulting engineer. They have been involved in the process from the start and, of course, they're intimately familiar with the facts and the issues.

We're here today specifically to get justice from a series of abusive and patently illegal tactics that the City has suffered at the hands of EPA Region I, who over the past 18 months fabricated claims of severe eutrophic impairment of the Taunton estuary which, by the way, is a designated wild and scenic river and has never been classified as impaired by the State of Massachusetts.

JUDGE WARD: Mr. Hall, on that point, it's true that the river is not listed as impaired on the State's list, but did the State ever make an affirmative finding that the river was not nutrient impaired?

MR. HALL: That's what you do when you submit a 303(d) list.

JUDGE WARD: But in this instance did

the State make an affirmative finding? Is there any place in the record you can point us to where that finding has been made?

MR. HALL: I would point to the very 303(d) list itself as the evidence that the State concluded that the river is not impaired. They determined sections of the river upstream of Taunton should be considered nutrient impaired, and they identified sections of Mount Hope Bay that should be considered nutrient impaired. They have never at any time identified the Taunton estuary as nutrient impaired, and nor are they required to issue a separate independent analysis claiming that it's not nutrient impaired. That's what the 303(d) list is supposed to encompass, so I would suggest that the Board's question is misplaced on that point.

Other problems is that the Region repeatedly ignored requests for backup documentation on technical issues. And then upon admitting that many key issues had not been addressed, issued the permit anyway with

extensive new analyses and recommended that this Board, in fact, ignore the expert opinions confirming that the entire analysis is grossly incompetent.

JUDGE WARD: Mr. Hall, isn't it appropriate for the Region to respond to the comments filed by the City and others, and in responding those comments address the issues you put in contention?

MR. HALL: Well, Judge Ward, what is completely inappropriate is to issue a grossly deficient fact sheet that has no analysis in it whatsoever, and then at the end of the process produce 60 pages of new detailed assessments giving the public no opportunity. They may as well have issued us the permit for the City of Pittsburgh, Pennsylvania and then said oops, at the end of the process.

JUDGE STEIN: All of the hyperbole aside, this is a complicated permit with an extensive record. And as you well know, I presume, the Board has on numerous occasions

allowed as the regulations contemplate the Region to put in additional documents into the record at the time response to comment is issued. Why is that not allowed by Section 124.18?

MR. HALL: I didn't say it wasn't allowed if you're supplementing an otherwise acceptable permit record from the get-go. If you've got a permit record that's so deficient from the start, which this was, that we could not even figure out how or why they were doing what they were doing, you can't then provide the information at the entire end of the process. That's why you have provisions for reopening permit comment periods to allow the public to have input.

Now with regard --

JUDGE STEIN: My understanding is if -- in order to reopen a public comment period, which is within the Region's discretion, there are certain showings that need to be made. Did you make those showings?

MR. HALL: We believe we made every one

of those showings. We repeatedly requested an opportunity to provide new information. We asked that the period be reopened. We were told no.

Now you're suggesting that this is --

JUDGE WARD: Mr. Hall, I think in terms of the adequacy of the fact sheet, I think reviewing the fact sheet is fairly detailed and lengthy. I think that's a fair characterization of it. And with respect to the nitrogen analysis, it extends for 20 pages of detailed description of the basis for the nitrogen limit here, as well as the data on which the Region relied. I'm not sure I take your point that it was a plainly deficient fact sheet.

MR. HALL: Would the Board like to point out to the location in the fact sheet where they demonstrated that the nutrients were actually causing the adverse effect that they claimed? Could you please identify for me? You're the one that's saying it's a detailed fact sheet.

JUDGE WARD: Mr. Hall, the point of argument is for us to ask you questions, so

please proceed.

MR. HALL: Well, Your Honor, you just issued a declaratory statement to me that the fact sheet contained detailed analysis and, obviously, you believe it must, so I'm asking you where is it?

JUDGE WARD: Mr. Hall, I think you should proceed.

MR. HALL: Fine. Let's talk about the sentinel location. We had a series of issues associated with this permit that, quite frankly, even somebody with limited technical expertise would understand that this is not a scientifically defensible analysis.

First off, they claimed that the water quality achieved at Mount Hope Bay 16 had to be met in the Taunton estuary, and that was the only way DO standards would be met. There was no analysis in the fact sheet to verify or, by the way, response to comments to verify that this was a reasonable conclusion. There was no peer review of this approach that was used, and I've been

doing water quality analysis for 35 years, also as an environmental engineer I have never seen this approach before in my entire life. And no rational --

JUDGE WARD: Mr. Hall, I think the Region identified the nutrient criteria guidance issued by the Agency that describes this kind of a reference-based approach as a permissible means of setting a water quality standard.

MR. HALL: Actually --

JUDGE WARD: A limit that wasn't based on a water quality standard.

MR. HALL: Let's be a little more specific about that. The Region issued a declaratory statement that this approach was like the reference-based approaches, and we submitted the detailed analyses showing it most certainly was not. Even reference-based approaches require you to demonstrate that your reference location has some rational connection and capability of predicting what the water quality should be at the other location. That analysis is completely

absent and is still absent from the record.

So what did we do after we found that this methodology was utilized? We contacted a number of top experts. And Dr. Steven Chapra, who's the Director of the Tufts Environmental Law Program, he's an international --

JUDGE WARD: Mr. Hall, were these exhibits included with your comments filed June of 2013?

MR. HALL: No, these exhibits were included after we had repeated discussions back and forth with the Region who we asked to identify where is the basis analyses? And since they did not have said basis analyses but kept insisting they were correct we said well, why don't we try to get some experts and give more information to the Region? So the basic points of these expert opinions were all made in the opening comments. We just got more experts because, apparently, we couldn't find anybody who would otherwise listen to the points we were making.

Now I might note, the Region and EPA only has a presumption of technical expertise. It is not irrebuttable, and it never has been. The permit writer who wrote this document has resigned. We've gotten three top technical experts, including the architect of the very program that they said they're using all saying the analysis is grossly deficient.

Now I'd like to have an opportunity --

JUDGE WARD: As to that reference, you're referring to the -- is it Dr. Howes, who's the Director of the MEP?

MR. HALL: I'm referring to Steven Chapra, Dr. Craig Swanson, which was the next -- he also did the hydrogen dynamic model for Great Bay, and I'm referring to Dr. Howes. And I -- we would have, I believe, an opportunity to voir dire who is the expert at the Region who is capable of saying that these top experts in the country did not know what they were talking about. We don't know who this person is. What we have is conclusory responses saying oh, this is

all wrong, or I'm not going to consider it, or I've considered it but I'm going to ignore it. That is not a technical defense.

Now with regard to the response --

JUDGE WARD: I think that the Board's precedent does require the comments be filed during the public comment period, and that the Region is under no obligation to consider later submitted comments. So why are these properly before the Board at this time?

MR. HALL: Well, the Region did, in fact, consider the comments. They wrote detailed rebuttals on these comments, so this isn't a question of whether or not you -- the Agency considered it and decided to not look at it. They, in fact, looked at it and put comment responses simply claiming that these experts were wrong in a conclusory fashion. Actually, the response to comments is right in front of us. It's the next slide. Let's go to it.

JUDGE STEIN: Well, let me just -- before you go there, my understanding is the

Region's obligation is to respond to significant comments. That's what the regulations call for. Is it your position that they didn't respond to the significant comments? I understand you don't like the response, but didn't they, in fact, respond to those comments, and in so doing put in information into the record in support of the response to your very own comments?

MR. HALL: Well, actually, I guess -- well, I certainly -- the City of Taunton certainly didn't care for the response we received, but let's look at the response.

This one is -- these two responses are the classic examples. You can have a response but you have to have backup information to show it's correct, or else it's simply a conclusory statement, which is what vastly the majority of the responses are. So the Region responds, "We agree there are differences between the Taunton River and Mount Hope Bay, and that these differences are related to things unrelated to nutrients." Okay, fine. So what was the

conclusion? Well, but our approach is still consistent with the approach used in multiple TMDLs, so they created a new answer which, by the way, is why we went to Dr. Howes and said, "So what multiple TMDLs do we have here with the MEP Program" --

JUDGE WARD: Mr. Hall, in terms of the letter from Dr. Howes --

MR. HALL: Yes.

JUDGE WARD: -- we had -- the Board had directed you to file the communications that preceded that letter.

MR. HALL: Yes.

JUDGE WARD: At least, as I understand it, the communications were sent in March in the month before the permit and the response to comment document was issued, so how is the response to comment document the prompt for your asking for the letter from Dr. Howes?

MR. HALL: Because at verbal meetings, at meetings they told us that what they did was all consistent with the MEP Program. See, we had

a series of meetings, or we had one in September --

JUDGE WARD: Well, actually reading the emails themselves, I don't think that's reflected either. And, in fact, what you've attached is the fact sheet. And I think the other question I would have is, why wasn't the fact sheet, which at least refers to the MEP approach relating to TMDLs not sufficient to put you on notice that that was a question, that if you wanted to comment that was the time to comment on it and provide Dr. Howes' views?

MR. HALL: Your Honor, we plainly commented on this issue extensively. I mean, there's no question about that.

JUDGE WARD: I think my question was, why wasn't that enough for you to have been put on notice --

MR. HALL: Because if that --

JUDGE WARD: -- to seek the views of Dr. Howes at that time?

MR. HALL: At that point in time, they

were simply saying this approach was consistent with reference waters and, you know, other scientifically defensible things. It was like okay, we don't agree. Here's the analyses showing it's incorrect. Then after we sent a FOIA to EPA Headquarters asking was this ever peer reviewed, Headquarters said, "No." Then we had a meeting with the Region and they said "No, this is really all defensible and consistent with what's been done in the Massachusetts program. So no, your comments that you submitted to us before, we don't believe are sufficient."

At that point in time I decided to go to the person who wrote the procedures because of the claims being made to us. And I would suggest to the Board that the permit writers manual dictates that you have to consider this information.

JUDGE LYNCH: Mr. Hall --

MR. HALL: The purpose -- let me --

JUDGE LYNCH: Mr. Hall, tell me when was -- when were those meetings and where?

MR. HALL: When were those meetings and where? The first meeting where the Region claimed that they had responded to the key technical issues was in the City of Taunton in September of 2014. That was the meeting that I was excluded from. The Regional Administrator would not meet if I was present at the meeting. That's why we sent FOIA requests immediately thereafter.

The next meeting that we had was in February 2015 in the City of Taunton again. We presented one more time the list of technical deficiencies that were associated with the permit, and the Region said no, we've -- this is consistent with the Massachusetts program. So right after that meeting, and you'll see the overheads on the FOIA request, we asked for the backup information that showed these statements were, in fact, correct. That was withheld from us until --

JUDGE LYNCH: So is it your contention that this is inconsistent with the Massachusetts program?

MR. HALL: Oh, it's not simply my contention, the -- Dr. Brian Howes, who developed the Massachusetts program said, "Regarding the selection of Mount Hope Bay 16 as the sentinel station for the Taunton River estuary reaches the existing data and studies" -- remember they were his data and his studies, he's the one that collected all the information. He says, "It would not support its use as a valid sentinel site, particularly as it relates to the Massachusetts program." So in no uncertain words the top expert, matter of fact the only expert on the Massachusetts estuaries program expressly said what the Region is doing is wrong.

JUDGE LYNCH: So, Mr. Hall, did the State sign this permit in April of 2015?

MR. HALL: The --

JUDGE LYNCH: Did they issue an identical permit?

MR. HALL: Your Honor, I'm not here to challenge or otherwise deal with any identical permit by the State of Massachusetts. I'm only

concerned with the permit that EPA Region I has issued.

JUDGE LYNCH: Did the State sign this permit issued on April -- in April of 2015?

MR. HALL: I have no idea, and nor do I -- nor does it matter for our legal challenge.

JUDGE LYNCH: Do you know if they issued the 401 certification certifying that these discharges in the permit were in compliance with the State Water Quality Standards and with the Clean Water Act, including 303?

MR. HALL: Well --

JUDGE LYNCH: Or did they waive that?

MR. HALL: They --

JUDGE LYNCH: Did they issue a waiver?

MR. HALL: I think they just issued a short letter that said the permit is consistent with their standards, which basically means if it's more restrictive than it needs to be, they don't object. It doesn't --

JUDGE LYNCH: Was this under Section 401, the certification?

MR. HALL: I believe it was a 401 cert. I'm sure --

JUDGE LYNCH: All right, thank you.

MR. HALL: I'm sure it's in the record somewhere, Your Honor.

JUDGE WARD: Mr. Hall, in terms of the MEP approach, I think there may -- it appears to me on the record you may be conflating two different things. So the SMAST study refers to a more robust modeling and assessment and analysis that would be done following the SMAST study. And as the SMAST study itself states, as well as the fact sheet, that hasn't yet been done. That's different from the reference-based approach I think the Region used here, that the MEP has been using to set TMDLs as that need arises, so they're really two different things, and I think you're conflating the two. And it's true that no modeling was done here, but the Region never claimed that it was undertaking to do any kind of modeling of this system.

MR. HALL: Your Honor, we are

conflating nothing. Okay? They chose a location in Mount Hope Bay that had nothing to do with the Taunton River, and said it was consistent with the way the approach is used in the Massachusetts estuaries program. As an irrefutable fact, it's false. And if -- I don't see how there's any conflict with anything. Even as an irrefutable fact, it's false under a reference approach that none of the basic analyses required to do the reference approach were even used.

So if it is correct from the Region's perspective that none of this data were sufficient, and this is in their response to comments, none of the data are sufficient to show cause and effect or the impact of the nutrients, they should not have done this analysis in the first place because if the data are insufficient to show cause and effect from one location to another, they're insufficient to show cause and effect at Mount Hope Bay 16. They are insufficient to show cause and effect at Mount Hope Bay 19. You can't have it both ways.

JUDGE WARD: But the regulations speak to the potential to cause or contribute. Does it require a demonstration of causation to some certain degree of statistical proof? And I don't think they've claimed that they've done that, but that's not what the regulations or the Board precedent requires.

MR. HALL: I don't understand the point you're making, Your Honor.

JUDGE WARD: I think what I'm pointing out is that you're arguing that the Region failed to show cause and effect. And my question to you is, why were they required to given the regulatory standard?

MR. HALL: We briefed in our response whether or not the words "reasonable potential" allow the Region to simply make a wild guess as to whether one location in an estuary should be used to characterize an impact in another. And the short is, of course, it doesn't. It's got nothing to do with whether or not something has reasonable potential or not. Reasonable potential

-- actually, I developed those procedures when I was in EPA in the early 1980s. Reasonable potential is a statistical procedure that is used to project water quality from the effluent to determine if under a certain condition a violation might occur. It is not a basis to ignore whether or not you're using correct scientific procedures. It is not a basis to make wild unsupported guesses on the use of particular locations in an estuary to create a water quality criteria.

JUDGE STEIN: Okay. So, Mr. Hall, what is it that you want this Board to do --

MR. HALL: Well --

JUDGE STEIN: -- in a nutshell?

MR. HALL: In a nutshell, Your Honor, really the things that have gone on in this case are, in my view, astounding. We really want just several simple things to happen. One, the Region needs to be directed to have consistency between the State's determinations on the condition of the entire Taunton estuary under 303(d), and

their permitting action, number one. That's mandated by your rules, 130.12(a). Number two, the permit under -- as required by 122.44(d), the permit must reflect the billion plus dollars that was spent in this esturant system, throughout the system on reducing nutrients, reducing organic loads that happened since 2004, 2005. Remember that's when the data sets were collected in the system, a decade old. They shut down basically the Brayton Power Plant. As a matter of physics, that reduction in temperature had to improve the DO, and it had to reduce algal growth. That's a scientific fact.

Three, confirm please that the procedures being used, this sentinel method -- I have to tell you, I'm not anti a sentinel method. It's not the point, but if you're going to use that method, you have to show the relationship between the site you're using and the site you're projecting as its water quality condition. So you have to use a scientifically defensible method for doing that. Fine, if they want to use that,

give us a peer reviewed sentinel method that they applied.

And last but not least, given the Region's own claim that the data can't be used -- now remember we did dozens of graphs because they were missing from the Fact Sheet, the connections of nitrogen to Chlorophyll a, to DO. We did dozens of new graphs with the data they were using. In response, the Region said you can't use the data to show those relationships. Oh my, the Region said the data is simply insufficient to project how nitrogen affects DO and Chlorophyll a.

Well, okay, we agree, so let's go out and collect current data and develop those relationships. And if, in fact, the City of Taunton, if their discharge is causing or contributing to a true nutrient impairment problem when the connections are shown, the City will put in the treatment. So that's all we're asking for, is follow your rules.

JUDGE STEIN: Didn't the Court in Upper

Blackstone --

MR. HALL: I'm sorry, Your Honor?

JUDGE STEIN: Didn't the Court in Upper Blackstone indicate that -- I mean, there were similar arguments made in that case about holding up permit issuance to collect more data. The Board rejected that as did the First Circuit. Now, I understand there are some differences between the two cases, but what you seem to be suggesting is based on a permit that was last issued in 2001, that here we are 15 years later and we go out and collect more data?

MR. HALL: Oh, actually, the answer on that is very straightforward, Your Honor, and that -- by the way, it's a very good question. Not that you need kudos, but that's a perfect question.

In Upper Blackstone, the Narragansett Bay, that entire section coming down from the Blackstone River has a severe eutrophic impairment. It's designated as impaired, it's been designated as impaired for -- there were

fish kills up in that area back in 2003. So there was even a water quality model for the system, and the Court noted, as the Region itself had developed, there were correlations developed between nitrogen, Chlorophyll a, and the DO problem.

(Whereupon, the proceedings went off the record at 10:52 a.m., and resumed at 10:54 a.m.)

JUDGE WARD: Mr. Hall, apologize for the sound system here, and given the interruption give you another two minutes both to finish answering Judge Stein's question, as well as any additional wrap-up.

MR. HALL: That's fine. Thank you, Your Honor.

Judge Stein again, the recap on the difference between Upper Blackstone and this situation is actually quite distinct. In Upper Blackstone that was clearly listed impaired water that had major eutrophic problems. In this case, we don't have an impairment listing. Two, the

Agency, as the decision itself noted, they developed the detailed correlations showing nutrients affected the Chlorophyll a, which caused the low DO. The connections were made. In this case, they're not there. There are no connections made in the record.

The current data in that case was fairly recent. Matter of fact, I said there were fish kills in 2003. The State of Rhode Island then triggered a 50 percent reduction legislative mandate for all nitrogen sources, and Upper Blackstone was not in Rhode Island, but they were a major contributing load, so it was appropriate to take that action based on current data.

And last but not least there was, in fact, a water quality model that showed how nitrogen affected the system with the kind of impacts that would lead one to impose appropriately a nutrient limit even if you weren't positive what the requirement should be. In this particular instance we have none of those factors.

So in closing, and I didn't get a chance to make the points on any of the administrative procedural problems that we encountered, but the record is extraordinarily clear, the City of Taunton repeatedly asked the Region for the backup analyses that showed why they were doing what they were doing. We were repeatedly put off. I had to sue under the Freedom of Information Act to get that information which only showed up in my office seven days prior to the filing of the petition.

JUDGE WARD: But, Mr. Hall, you did have the opportunity to go to the Region's offices and examine the record, as the regulations provide. And I think that's all that's required.

MR. HALL: Excuse me, Your Honor. The fact of whether or not somebody says you're allowed to put a document in a record and I can come look at it does not mean the document is there. Under the Freedom of Information Act, they expressly claimed they could not understand the

request we had submitted, and did not provide the documents. And, in fact, they said they didn't know what we were looking for. So if they didn't know what they were looking for, how could you claim it was already in the administrative record? In short, they lied, period. And, in fact, I'll go one --

JUDGE WARD: Mr. Hall, I think your time is almost up here.

MR. HALL: My time is -- I'm going to finish on one last point. In fact, on March 6th, I sent an email to Regional Counsel asking for the documentation that the Regional Administrator said would be given to us. In our February meeting, I was told it was in the Brockton permit. That was another lie. It was not in that permit, it was not in the file, it was nowhere. It showed up when they issued the response to comments. This permit needs to be revoked, and it needs to be revoked hard. Thank you.

JUDGE WARD: Mr. Bukhari.

MR. BUKHARI: Good morning. I'd like to

reserve five minutes of my time for rebuttal. And I would like to very briefly raise three critical points from the administrative record that will directly address what we have just seen and heard from Petitioner. I'll only spend around a minute on each. I'd then like to move to Kirby, Howes, and Chapra in that order. These submissions are procedurally infirm. They do not help the Petitioner, they only repeat, on the merits they only repeat the substantive failings of the petition.

First, Your Honors, the Region's choice of scale in this permit proceeding. The Region evaluated the Taunton River and Mount Hope Bay as two parts of a single integrated estuarian system that share many common characteristics, and that have some differences like depth and width. MHB 16 and 19 are part of a continuous estuarian complex as the Region pointed out in RTC B-1, C-7, C-8, C-9, and C-19.

This choice of scale made sense, the particular approach that the Region adopted here.

Given that it was -- the permitting approach was a simplified one that was designed to use currently available information to identify gross watershed-wide reductions necessary to achieve water quality standards throughout the estuarian complex, including those of downstream states in accordance with the Act.

Petitioner opts for an alternative approach, first segmenting the estuary into smaller more discrete pieces, and then speculating about possible differences that might result based on a given nitrogen load, but this bona fide difference in technical approach and scientific opinion do not warrant review under this Board's precedents. Number two --

JUDGE WARD: Counsel, could --

MR. BUKHARI: Yes.

JUDGE WARD: -- you address and jump to the issue concerning the letter from Dr. Howes, and more broadly what the Region then by the reference to an MEP approach is contrasted with what at least I'm reading in the SMAST study

as more detailed modeling assessment, and that that's perhaps a different MEP approach?

MR. BUKHARI: As we explained in the response to comments, and in the Fact Sheet, we adopted an approach that was consistent with the MEP. We could not undertake more extensive modeling and more extensive analysis that was done in the SMAST studies because we didn't have the available information, and we didn't have the modeling capability. The record is very clear and it was clear from the outset from the Fact Sheet that we did not undertake a full-blown MEP approach. Here's what we did do, however.

We relied on the Critical Indicators Report, that's the -- that's SMAST 2003. SMAST 2003 identifies response indicators and causal indicators that are associated with eutrophication, culture eutrophication caused by nitrogen in southeastern Massachusetts waters. Accordingly, we look at the thresholds identified in that document for nitrogen, in-stream nitrogen, for dissolved oxygen, and that

intervening piece, Chlorophyll a. So the foundation of our analysis was based on that Critical Indicators Report. That's SMAST 2003. That report was in turn picked up by the State and credited, and noted with approval in the Mount COM document, for instance, and is a perfectly appropriate scientific document to use under 122.44(d)(1)(vi)(a), which we used to derive the permit limits here, and also 144(d)(1) to determine reasonable potential.

We also looked --

JUDGE LYNCH: Counsel, what did you use the SMAST data for?

MR. BUKHARI: What did we use the SMAST data for?

JUDGE LYNCH: Yes.

MR. BUKHARI: We used the SMAST data for two purposes. Number one, to determine whether the determination -- whether discharges from the nitrogen, from the Taunton's wastewater treatment plant had a reasonable potential to contribute to a water quality standards

violation. We found that it did, and we also then used it for the purposes of determining an in-stream threshold that would insure compliance, that would achieve all applicable water quality standards.

So the SMAST data, the overall approach that the Region adopted is consistent with what MEP did. What MEP did was -- in the SMAST report and Dr. Howes did was to -- was adopt broadly speaking a reference-based approach, a sentinel, what he refers to, what the documents refer to as a sentinel location approach. So determining a point of the estuary where water quality standards are met and then applying that value to an upper portion of the estuary on the theory that if water quality standards are met up in the upper portion of the estuary, water quality standards will be met below. That made sense from us from the standpoint of Section 301 as sought to assure compliance with water quality standards. We also looked at the transition from unimpaired to

impaired conditions in the estuary.

JUDGE WARD: Counsel, what do you make of Mr. Hall's argument that the conditions at MHB 16 are so different that you couldn't use that as the reference for purposes of setting a limit further upstream?

MR. BUKHARI: I think the flawed premise in that argument is that we only looked at MHB 16. We looked at a single point of the estuary, we looked at conditions there, and then we applied whatever in-stream target, or observed in-stream conditions we found there to another point in the estuary, and sort of hoped that things would react the same way. That's actually not what we did, and this is also consistent with the MEP.

We looked at water quality data, nitrogen impacts, and responses to nitrogen in terms of Chlorophyll a, in terms of DO at more than almost two dozen different points of the estuary. These points in the estuary all had different conditions, different bathymetry,

different velocity, different depths, different widths, but what we found looking at the system as a whole -- and, again, this goes to the issue of scale, we found that there was widespread and longstanding culture eutrophication based on the pattern of causal and response variables; that is to say, elevated nitrogen, elevated Chlorophyll a, and dissolved oxygen that's careening between supersaturated and even hypoxia at times. And given this pattern of observed in-stream conditions throughout the estuary, not only at MHB 16, EPA would determine that the entire estuary was suffering from nitrogen-driven culture eutrophication, and that it was appropriate but for that point in MHB 16. EPA, therefore, took that information, but again not in isolation, took that information, took that reference-based information and also compared it against a variety of information outside of SMAST. We looked at the scientific literature, we looked at other TMDLs, we looked at other permits, other actions that Massachusetts had

taken, and what we found was that the number that we have selected was at the very midpoint of all the values in the scientific literature, as well as the midpoint more or less of all the other values that had been derived in other regulatory actions in southeastern Massachusetts. We, therefore, on the basis of that found assurance within the context of Section 301(b)(1)(c) that we had determined a protective value.

Now what we --

JUDGE WARD: Counsel, I actually want to ask you a question kind of related to that, and it concerns, I think, an argument that the City makes in reply, and they provide a chart at page 14 of their reply, which I think is using, or it states is using the data from 2011, I guess drawn from the fixed monitoring station in Mount Hope Bay. They make this presentation and from there argue that that chart shows there is no correlation between high algal levels and low dissolved oxygen levels. What's your take on that chart?

MR. BUKHARI: We believe that, and as we've pointed out in the response to comments, that you can slice and dice these data sets in a variety of different ways. We lay out the way in which statistical analyses in our view have been misapplied by Petitioner and others in their comments.

We fully acknowledge that based on the available data set, we are not capable to run -- we are not capable of running statistically robust or defensible analyses that will show relationships over time between these eutrophic indicators. We, instead -- and I think that one thing that's missing on that chart from 14. I'm not sure I can find it quickly, is BR squared, reply 14, EPA TM Criterion Efficacy. Right.

JUDGE WARD: I think that's -- is that the Power -- in the PowerPoint, I think it's from the SMAST data. There's two charts on page 14 of the reply. The bottom chart concerns the --

MR. BUKHARI: Right, so here's an example. Here's an example of how statistical

analyses could potentially be misleading. And taking a snapshot of bottom DO and Chlorophyll a will not necessarily show a relationship -- show a particular relationship because the occurrence of DO and the occurrence of Chlorophyll a -- the occurrence of Chlorophyll a elevations and the occurrence of DO impacts will occur at different times during the day. And you will have elevated DO at certain portions of the day, you will have depleted DO at certain portions of the day based on that same high Chlorophyll a number. And that's because this system -- and it goes to the point of what the system is undergoing. This is a severely stressed system. This system is showing the classic signs of eutrophication as identified in our conceptual model where you have elevated DO, and you have depleted DO caused by elevated Chlorophyll a syndrome. And those will occur at different portions at different times of the day. That won't necessarily be reflected in a graph that doesn't identify when the sample was taken, and when the particular impacts are occurring,

and whether they're occurring in a corresponding -- corresponding in time.

So the overall point that we would make is that had we had information to undergo -- to conduct a statistical analysis, a full-blown stressor response analysis, we might have gone that route. But 122.44(d)(1)(vi) doesn't mandate that we take a particular approach to -- it is not prescriptive in terms of the type of approach that we can take to derive a protective limit. To the contrary, EPA in crafting that regulation was crystal clear both on its face, which refers to relevant information, and in the preamble that this was meant to provide maximum flexibility for the permit issuer to derive a protective permit limit and in-stream criteria based on all the information that's available at the time of permit issuance. And we were very clear throughout our response to comments, throughout our responsive briefings, throughout this record that the statistical analyses that will be presented here in the supplemental PowerPoint

presentation and all the briefing does not change the fact that over 12 years of in-stream water quality data is consistent both under -- sampled according to Mass DEP procedures, quality assured shows a consistent pattern over time, over a long period of time of elevated nitrogen, elevated Chlorophyll a, supersaturated DO, and hypoxic DO at times. And this corresponds, again, with our conceptual model that is the basis for this permitting, and that Petitioner himself, counsel for Petitioner himself in their petition characterize, and in their comments characterize as well recognized. We agree, there is no dispute over how these --

JUDGE WARD: So counsel, could you address why the State hasn't yet included the Taunton River on its list as impaired for nitrogen? And I think the point, at least as I read an argument that City makes in their brief, is that the TMDL regulations required the State to consider all reasonably existing and readily available information which presumably could have

included the same data that you looked at. So why isn't it on the list?

MR. BUKHARI: We identified in our response to comments the fact that the State undertakes their listing -- their listing process is subject to a cycle and they have a rotating watershed basis, rotating watershed system. And one can only speculate, but we presume that they simply due to significant resource constraints at the State were not able to assess the information that we had in front of us. That will change going forward.

Having said that, I think one important piece to bear in mind is that the State, when EPA issued its NPDES permit, the State not only certified that permit, the State also issued an identical State permit under Massachusetts Clean Waters Act that has similar language relating to culture eutrophication, nutrient impacts. And this is certainly not the posture of the State that does not believe issuing a permit, as it turns out a very

controversial permit, with the identical nitrogen limitation and adopting EPA's response to comments in that process that doesn't believe --

JUDGE WARD: Is that reflected in the record before us, the State's issuing the permit under State law incorporating your own response to comments? Is that in the record before us?

MR. BUKHARI: That, I believe, is on the face of the permit, and maybe in the certification letter itself. But the State signs the -- the State co-signs the permit, and we have under -- in Region I under the Memorandum of Agreement, we have a joint permitting process that is EPA issues a permit under federal law, and in the event that the State agrees with the determinations made pursuant to its State statutory and regulatory authority, they issue that same permit using the same piece of paper, the same instrument, and they're separately enforceable. They're two legal documents, but this is EPA, and this is Mass DEP moving forward in lockstep on these nitrogen issues as reflected

in this particular permit. Otherwise, they wouldn't have issued the permit. And in the past they haven't issued the permit, see e.g. Upper Blackstone.

JUDGE LYNCH: When is the last time that the State undertook an assessment under their 303 approved process that included the Taunton?

MR. BUKHARI: I believe it's been some time. It may have been 2001, so it predated. Now this is important, it predated the SMAST 2003, it predated SMAST 2007. And as this Board knows, the Region has been engaged on nutrient permitting issues elsewhere in the Region largely in New Hampshire, and only more recently have we turned our attention to southeastern Massachusetts. We expect a corresponding re-engagement from the State on these issues because we have concluded based on the extensive record before us that the nitrogen issues are -- and the culture eutrophication impacts are severe, they're ongoing, and as we've identified in our

permitting documents once the eutrophication process begins, time is of the essence. We have to act based on all the information that's available to us, but we can't defer permitting, particularly where a -- there is no nitrogen limit in Taunton's permit. They are discharging untrammeled with no permit limit to control their nitrogen impacts. They are the second largest point source discharger to these receiving waters. We have presented -- Howes himself, to the extent that this is a conversation about Howes, Howes himself in SMAST 2003, in SMAST 2007 specifically identified water quality impacts due to nitrogen in the Taunton River estuary, in the Taunton/Mount Hope Bay estuarian complex. Again, we're looking at this as a single contiguous estuarian complex, and identified these waters as an excellent candidate for an MEP and development of the TMDL. And as Howes in his correspondence, his March correspondence, we think that Your Honor's observation about the timing of his interactions with Howes is on point here.

He identify -- he himself says it's about time that we address nitrogen issues in Mount Hope Bay/Taunton River, and we fully concur with Howes, at least on that point.

JUDGE WARD: I think counsel for the City also raised the issue of the Brayton Point thermal discharges. Would you like to address that argument?

MR. BUKHARI: Your Honor, this is a point of scientific dispute, and Petitioner has an alternative theory about why those impacts would make a material difference on the DO regime in the receiving waters. We disagree, and we have outlined our disagreement in our response to comments, we have outlined our disagreement in a Memorandum to File, we attached is to the response to petition. But in sum, we noted that, number one, the Taunton River is naturally warmer than Mount Hope Bay, and we wouldn't expect decreases in temperature in Mount Hope Bay to impact the thermal regime further up in the estuary.

But the proof is also in the pudding, so Petitioner can speculate all it wishes about what the conjectural impacts of Brayton Point going off line are, but here are the facts. Number one, the continuous data song in Mount Hope Bay continues even after Brayton Point went off line, that was in 2012-2013, we continue to see the impacts of eutrophication that are consistent with our conceptual model. We continued to see high Chlorophyll a numbers, some of the highest on record. We continued to see low DO impacts, violations of State Water Quality Standards. And this information was not viewed in isolation. We looked at Brayton Point's own annual reports that looked at the DO impacts in the receiving waters. They themselves identified continuing DO impacts even after the plant went off line. So, we don't dispute that this is an exceedingly complex permitting situation. The estuaries are very complex. Nitrogen impacts are very complex. They may be even more complex in the absence of --

JUDGE WARD: Counsel, I see you're running out of time. I wanted to ask another question in terms of the process. Counsel for the City has raised some concerns with their -- the fact that, or the argument that there was a fair amount of material added to the record at the end, and that they didn't have a chance to comment on that, perhaps even to see the record before the permit was issued. What's your response to that?

MR. BUKHARI: First of all, we would reject the suggestion that the permittee did not have the opportunity to examine the record. In correspondence that we have provided to the Board we very clearly invite on multiple occasions the permittees to examine the record, and that was consistent -- that's consistent with our obligation under the regulations. We had the administrative record and it was available for anyone to look at.

But as far as adding information to the record based on response to comments, under

124.17(b), and 124.18(b)(4) we very clearly have the authority, and indeed the obligation in so far as it's a response to comments, we are responding to comment and considering all the information in the record to add materials to the record. And the Board has been equally clear that every time you add a document to the record in response to comment and for another reason, that doesn't necessarily mean that you have to reopen the public comment period. That EPA under 124.14 has the ability to reopen if there are substantial new questions. We reject the view here that the new information was substantial. We reject that it was new. It was cumulative, it was based on -- it was rehashing information by and large that was already in the permit record, as we explained in our response to comment for the Fact Sheet. And if Petitioner's view is true, then every time we add records in order to respond to comments, we will trigger a reopening of the public comment period, the permit process would never end. But that's a problem

particularly in a case like this in general, but in a case like this where we truly have a pressing environmental harm that needs to be addressed. And, of course, Petitioner in their many filings before this Board, and extensive filings before this Board have availed themselves of making their grievances known, and there's certainly a process for that.

JUDGE WARD: Thank you, counsel. I think your time is up. You'll have five minutes for rebuttal. Mr. Hall?

MR. HALL: Thank you, Judge Ward, Board Members. I'm going to make a number of very quick points regarding the very last statement that you heard as to the records available. That was a nice dodge on your question.

The email from Mr. Bukhari, 3/6/15, Petition Exhibit 55 at 1. First, and this is Mr. Bukhari's words, "First, regarding the updated nutrient analysis an updated explanation by the Region of the basis of the total nitrogen limits has been included in the recently issued Brockton

Fact Sheet." Lie, not contained in there, none of the analyses put into the response to comment.

Number two, regarding Brayton Point and there being some type of alternative theory on the part of the City of Taunton. I will read a quote. This is the Region's own quote in issuing the Brayton Point facilities permit. "It's likely the thermal discharge directly and indirectly reduces dissolved oxygen in Mount Hope Bay." They talk about it increasing organic degradation, increasing respiration, increasing algal growth. This was not a theory on our part. This was the Region's own conclusion that they ignored when they issued the permit.

JUDGE WARD: I think EPA's response to that was that the issue really is focused on the Taunton River estuary, not necessarily Mount Hope Bay.

MR. HALL: Actually not true, because the selected sentinel site was out in Mount Hope Bay, so that's where they were drawing all their connections. So if the DO changes in Mount Hope

Bay and increases you get a different answer. Right?

Now with regard to the State's 303(d) action, nothing in the record shows the State's 303(d) action was not current, and that they did not use more updated information. In fact, an opposite position would be claiming that the Region has been allowing the State to violate Section 303(d), which mandates every 303(d) list must be based on current information. So were they violating it here, or were they violating it there? I don't think anybody was violating anything; it was all current.

With regard to the State's permitting action, that is evidence of nothing. This is not Fox News. One doesn't sit there on a panel, one person say something, the other person say yes, I agree, and all of a sudden it becomes facts. These things are supposed to be independently assessed and documented. It's not -- the analyses are not documented in this case.

Number four, regarding the claim that

12 years of data, quality assess data shows a consistent pattern of elevated TMDL in Chlorophyll a, that would be nice. I would love to see that analysis. It's not contained anywhere in the record. That, Judge Stein, was one of our major objections in using 2004 to 2005 data. You needed to update it to show what was happening currently. There is no such analysis that counsel just claimed he had. You know, the parade of just fictitious analyses go on. Oh, by the way, that's also why we filed the most recent motion, because we finally got a document from the Region --

JUDGE WARD: Counsel, I think I said at the outset we're not hearing argument on that motion. Thank you.

MR. HALL: Well, it's six times the load of -- it's relevant to what was just said. It's six times the load of the City of Taunton directly into Mount Hope Bay. It was ignored in their entire analysis, so it's relevant to a rebuttal point where they try to imply to you because we are, you know, a substantial load, we

must be regulated. We are not a substantial load.

JUDGE LYNCH: Mr. Hall, are you saying that a permit limit can never be imposed for a pollutant unless that pollutant is listed on a 303(d) list?

MR. HALL: Oh, most certainly not, Your Honor. I mean quite frankly, there are numerous instances when you would do it. The difference in this particular case is they didn't do a discharge specific like, you know, what's the copper limit at the point of discharge or something like that. Those things don't always get picked up on 303(d) lists. That's perfectly fine to do that at the time of permitting.

When you're claiming an entire estuary is nutrient impaired and it's inconsistent with the impairment determinations made by the State, you've got a problem. You've got to actually show there's some kind of mistake made in the record with that. Actually, it's a perfect lead into the claim that they use this Critical Indicators Report and the COM allows that. Oh, what load of

baloney. That report is nowhere mentioned in the COM. And, in fact, if you took those algal levels in that Critical Indicators Report, there wouldn't be an estuary in the State of Massachusetts that meets water quality standards. They're pristine numbers. They were not adopted by the State of Massachusetts, they have never been used by the State of Massachusetts. They did not apply the applicable requirements that are stated in the State's COM. That's why we got a different answer on them claiming widespread eutrophic conditions when, in fact, there's no such listing showing widespread eutrophic conditions.

JUDGE WARD: So, counsel, your time is up, but if you'd like to take just a brief moment to conclude. Thank you.

MR. HALL: I make one last point. Your Honor, Board Members, I'm here representing a City. They're part of the government. They're trying to do the right thing. They've got a lot of things to spend money on. For the Region to

come in and claim you shouldn't be looking at the technical analyses that show things are not being done properly and would make the City spend tens of millions of dollars is simply unconscionable. You've got a serious ethical problem here.

The permit writers guide says if you know there's an error, it's supposed to be brought to the attention and fixed, not buried in the back 40 where no one can find it. That is not acceptable behavior by anyone. I wouldn't come in and do it, I don't expect EPA to come in and do it, and I hope you would never support that kind of outcome simply on some type of procedural dodge that somebody raises. Thank you.

JUDGE WARD: Thank you, Mr. Hall.

MR. BUKHARI: Your Honor, as the City would have it, or the Petitioner would have it, the Region is out to impose unnecessary nitrogen reductions on the town where there's an absence of any evidence of any in-stream impacts. But one thing to bear in mind, I think, just to snap things back in focus is that the Region did not

stand alone on this permit. We were accompanied by the State of Massachusetts, we received supportive comments from the State of Rhode Island whose water quality is also impacted. We received comments from numerous NGOs, from sister federal agencies, in fact, all arrayed with the Region and contrary to Petitioner on this particular point.

And I would also note that to the extent that there has been an argument over the .45 in-stream target and whether there is any basis behind that, Petitioner in his own -- Petitioner's own comments included a scientific study commissioned by the State of Rhode Island, the Deacudis and Howes Study, that recommended in-stream numbers of between .35 and .4.

Again, we fall within a zone of reasonableness, and when making determinations we use the best information that we have at the time of permit issuance, the Upper Blackstone case, this case. This Board's decisions in Attleboro and in New Market all go to the point that we can

draw inferences and draw reasonable inferences even from the available data, even if that is less than certain, but is certainly sufficient within the context of the objectives of the Clean Water Act, and the implementing regulations to impose a protective nitrogen limitation. It's particularly important here because the Petitioner's permit is long overdue, long expired. They don't have a nitrogen limitation. They are currently discharging at an average concentration of around 11 milligrams per liter, at least they were at the time of the -- the Fact Sheet was prepared, based on the DMR data that was there. But the information -- but Petitioner's answer to that, their relief in effect is to wait to study the system more. But we under the Clean Water Act, and in accordance with Upper Blackstone's, very clear precedent in Upper Blackstone, in Attleboro, in New Market have a mandate to move forward and issue protective permits as expeditiously as possible, particularly where there's a pressing water

quality harm. Thank you.

JUDGE WARD: So again, just to remind the parties, as I said at the outset, I'd like to ask the Region to file any response to the motion to supplement filed by the City yesterday by this Friday, March 4th, and then for the City to file a reply, if any, by next Tuesday, March 8th.

Thank you for your arguments. This matter is submitted.

THE CLERK: All rise.

(Whereupon, the proceedings went off the record at 11:35 a.m.)

C E R T I F I C A T E

This is to certify that the foregoing transcript

In the matter of: City of Taunton Department of Public Works

Before: US EPA/EAB

Date: 03-01-16

Place: Washington, DC

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R Gross

Court Reporter