

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

In re:

STERLING SUFFOLK RACECOURSE, LLC,

NPDES Permit No. MA0040282

PETITION FOR REVIEW

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## INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), Sterling Suffolk Racecourse, LLC (“Suffolk”) petitions for review of the conditions of NPDES Permit No. MA0040282 (the “Permit,” attached hereto as Exhibit 1), which the U.S. Environmental Protection Agency, Region I (“Region I”), issued to Suffolk on September 30, 2015. The Permit authorizes Suffolk to discharge wastewater, stormwater and groundwater from Suffolk Downs, a horseracing facility in Revere and East Boston, MA, into a receiving water named Sales Creek and adjacent wetlands. Certain conditions of the Permit are based on clearly erroneous findings of fact and conclusions of law. The conditions challenged in this Petition are:

- I. **Part I.A.2.a.1., Stormwater associated with industrial activity and subsurface infiltration**, requiring that discharges through Outfall Serial Numbers 003, 006 and 006A to “1) be limited and monitored by the permittee as specified below; 2) not cause a violation of the Massachusetts Surface Water Quality Standards for the receiving water; and 3) be controlled by the best management practices (‘BMPs’) described in Part I.C of this permit,” despite the fact that such outfalls also carry discharges from sources other than Suffolk that are regulated under a NPDES general permit for small municipal separate storm sewer systems (“MS4”).
- II. **Part I.A.10., Other Effluent Limitations and Monitoring Requirements**, requiring Suffolk to propose a monitoring plan for evaluating “the extent of its contributions” to Outfalls 003 and 006 prior to the mixing of Suffolk’s flows with separately authorized MS4 flows.
- III. **Part I.A.3, Dry Weather Monitoring Program**, requiring costly testing of 29 “Additional Parameters”<sup>1</sup> not listed in Region I’s draft Permit, where previous dry-weather testing showed no traces of any of the Parameters, and the record contains no evidence of any potential for discharge of any such compounds.

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<sup>1</sup> The Additional Parameters are Nitrate/Nitrite, Total Polychlorinated Biphenols (PCBs), Total Petroleum Hydrocarbons (TPH), Cyanide (Total CN), Antimony, Arsenic, Cadmium, Chromium, Copper, Lead, Mercury, Nickel, Selenium, Silver, Zinc, Iron, Total BTEX (sum of benzene, toluene, ethyl benzene and total xylenes), Total Group I PAHs, Total Group II PAHs, Ammonia/ Ammonium, Ethylene Dibromide (EDB), DDD, DDE, DDT, Total Phenol, and Total Phthalates.

## THRESHOLD PROCEDURAL REQUIREMENTS

Suffolk satisfies the threshold requirements under 40 C.F.R. Part 124 for filing a petition for review:

1. Suffolk has standing to petition for review of the Permit because Suffolk submitted comments on the draft Permit during the public comment period. *See* 40 C.F.R. § 124.19(a). A copy of Suffolk's written comments ("SC") is attached at Exhibit 2.
2. Suffolk raised in the SC Issue I in this Petition, and therefore preserved Issue I for review. *See* SC at 10-11, 16-18. Issue II pertains to conditions that Region I imposed after the close of the public comment period, and thus Suffolk could not reasonably ascertain them prior to the close of that period. *See In Re: D.C. Water & Sewer Auth.*, 13 E.A.D. 714, 758-60 (EAB 2008).

## FACTUAL AND STATUTORY BACKGROUND

### *The Facility and its Discharge Streams*

Suffolk owns Suffolk Downs. Suffolk Downs is a 161-acre thoroughbred horse racetrack in East Boston and Revere, Massachusetts (the "Facility"). (Fact Sheet No MA0040282, 5 ("FS," attached hereto as Exhibit 3.) The Facility was constructed in 1935 and has hosted horse racing in all but two years since then. (FS at 5.) The Facility includes two racetracks, a grandstand, a clubhouse, ancillary buildings, and parking areas. (FS at 5.) From 2002 until 2014, more than 500 horses were stabled at the Facility for at least 199 days per year, thus making Suffolk Downs a "large concentrated animal feeding operation" ("CAFO") under 33 U.S.C. § 1362(14) and 40 C.F.R. § 122.23(b).

The Facility historically has discharged runoff into Sales Creek, a small (.008 sq. mi.) water body that runs through the Facility. (FS at 6.) Sales Creek enters the Facility through a

culvert, daylighters before passing through a second culvert, and surfaces in the infield of the racetrack before being culverted again and draining to Belle Isle Inlet. (FS at 6.) Belle Isle Inlet flows into Winthrop Bay, Boston Harbor, and Massachusetts Bay. (FS at 6.) Sales Creek is a “water of the United States” and of the Commonwealth of Massachusetts. Accordingly, discharges into Sales Creek are subject to the requirements of the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (the “Act”), and the Massachusetts Clean Waters Act, M.G.L. c. 21, §§ 21-53.

The Facility generates three wastewater streams. The Facility’s Production Area (horse stables, horse exercise area, temporary mortality holding shed, and manure storage areas) generates process wastewater. (FS at 5.) The Production Area also generates industrial stormwater. (FS at 5.) Prior to 2012, the Production Area’s two wastewater streams entered Sales Creek through NPDES Permit Outfalls 003, 005, 006 and 006A, as well as an outfall that has been terminated. (FS at 13-14.) Starting in 2012, Suffolk redirected all of its process wastewater to a newly constructed holding pond, prior to treatment via the Boston sewer system. (FS at 5.<sup>2</sup>) Finally, the Facility generates industrial stormwater outside of the Production Area. Such “Non-Production-Area” stormwater discharged into Sales Creek through or in the vicinity of NPDES Permit Outfalls 004 and 007-011. (FS at 14-15.) In addition to discharging Facility-generated wastewater, the Facility’s outfalls also intermittently discharge groundwater. (Response to Comments on Draft NPDES Permit No. MA0040282, 33 (“RTC,” attached hereto as Exhibit 4.)

In May 2008, the Agency issued an Administrative Order under § 309 of the Clean Water Act. The Order targeted the Facility’s unauthorized discharges of pollutants into Sales Creek. (FS at 8.) In compliance with the Order, Suffolk promptly implemented an interim pollution

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<sup>2</sup> The Permit allows Suffolk to discharge overflows of process water from the holding pond to Sales Creek via NPDES Permit Outfalls 001 and 002 in extreme weather. (FS at 5.)

prevention measures plan (the “IPPM Plan”). (Affidavit of Michael D. Vhay, Esq., ¶ 6 (“Vhay Affidavit,” attached hereto as Exhibit 5.) Suffolk also applied in September 2008 to Region I for a NPDES permit, and to the Massachusetts Department of Environmental Protection (“MassDEP”) for a surface-water discharge permit under M.G.L. c.21, § 43. The application sought approval for continued discharges from the Facility into Sales Creek. (FS at 5.)

On August 22, 2012, the United States (acting on behalf of the Agency) and Suffolk entered into a Consent Decree that addressed all of Suffolk’s alleged violations of Clean Water Act. (FS at 8.) Under the Consent Decree, Suffolk agreed to undertake various actions aimed at improving the treatment and quality of the Facility’s discharges. The construction measures associated with the Consent Decree were substantially completed by early 2012. (First Deshais Affidavit, ¶ 5 (attached hereto as Exhibit 6.)

Region I issued a draft NPDES permit for public comment on March 1, 2013. (RTC at 1.) Suffolk timely submitted comments on the draft permit. (RTC at 1.) The final Permit is dated September 30, 2015, and was mailed to Suffolk on October 2, 2015. (Vhay Affidavit at ¶¶ 4-5.)

This Petition requests review of only three of the Permit’s conditions: two dealing with off-site contributors to NPDES Permit Outfalls 003, 006 and 006A, all of which are separately regulated under a NPDES MS4 general permit; and those requiring costly, intensive sampling of the Facility’s dry-weather discharges. The facts pertaining to those issues are discussed below.

*Off-site MS4 Contributors to NPDES Permit Outfalls 003, 006 and 006A*

Outfalls 003, 006 and 006A lie in the portion of the Facility that is located in Revere, Massachusetts.<sup>3</sup> Each outfall serves not only the Facility but also stormwater systems outside of the Facility that are operated by the City of Revere (the “City”) and the Massachusetts Department of Conservation and Recreation (“DCR”). Both the City and DCR are subject to a NPDES general permit for small MS4s in Massachusetts. (SC at 17-18.)

Suffolk argued to Region I that Suffolk should not be responsible for, nor be required to monitor, the City and DCR’s discharges through Outfalls 003, 006 and 006A. (SC at 17-18.) Region I’s responses to that argument differed somewhat by Outfall, but ended up ignoring the fact that all MS4 flows through Outfalls 003, 006 and 006A are separately regulated and permitted.

Outfall 003: NPDES Permit Outfall 003 is a submerged pit in a wetland adjacent to Sales Creek. (Permit, Table 1.) At least one drain line located outside of Suffolk’s property (the “003 Outside Line”), leading from a dead-end street called Washburn Avenue, joins a Suffolk-owned drain line (the “Suffolk 003 Drain”) and discharges through that line via Outfall 003. (SC at 10.)

Region I noted that the 003 Outside Line should be regulated pursuant to the City’s MS4 general permit. (RTC at 28.) Following Suffolk’s 2012 construction activities, Suffolk’s only contribution to the Suffolk 003 Drain is groundwater and roof runoff. (SC at 10.) Suffolk thus asked that it be responsible for, and required to test, only its contributions to Outfall 003, before the point at which the 003 Outside Line (containing MS4-regulated flows) joins the Suffolk 003 Drain. (SC at 17-18.) While Region I noted with respect to Outfall 003 that it did “not believe

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<sup>3</sup> Much of Sales Creek serves as the municipal border between East Boston and Revere. Outfalls 001-003, 005-006A, 009 and 010 are in Revere. Outfalls 004, 007, 008, and 011 are in East Boston. (Permit, Figure 1; FS, Map 1.)



additional monitoring is necessary to characterize flow that may include contributions from off-site sources, since such flows are regulated pursuant to the City of Revere's Municipal Separate Storm Sewer System (MS4) general permit," RTC at 28, Region I nevertheless denied Suffolk's request to monitor its discharges upstream of the City's regulated MS4 flows. (RTC at 51.)

Outfalls 006 and 006A: NPDES Permit Outfall 006 is a 24-inch pipe that discharges to an unnamed tributary stream that passes through wetlands adjacent to the eastern bank of Sales Creek. (Permit, Table 1.) NPDES Permit Outfall 006A is an 8-inch pipe that discharges to the same tributary stream. (Permit, Table 1.) The Suffolk-owned drain lines leading to Outfalls 006 and 006A also carry discharges from off-site MS4 lines. The MS4 lines convey road runoff generated by Revere Beach Parkway/Winthrop Avenue, Tomasello Way and a portion of Washburn Avenue. (SC at 11.) Those roads are maintained by the City and DCR, and are major through-ways. (SC at 11, 17-18; FS, Map 1.)

Following Suffolk's 2012 construction activities, Suffolk's only contributions to Outfalls 006 and 006A are roof runoff, overflows from BMPs Suffolk installed in 2012 (which capture runoff from certain parking areas in the Facility), and groundwater. (SC at 11.) Suffolk thus asked that it be responsible for, and required to test, only its contributions to Outfalls 006 and 006A, before the point at which City and DCR drains (containing regulated MS4 flows) join Suffolk-owned drain lines. (SC at 17-18.) Region I denied Suffolk's request, without discussing the separately regulated MS4 flows into Outfalls 006 and 006A. (RTC at 51.)

Region I not only refused Suffolk's request to monitor its discharges before they comingled with MS4 flows discharged through Outfalls 003, 006 and 006A, but also imposed after the close of the public comment period an additional requirement: that Suffolk prepare a plan for evaluating "the extent of its contributions" to Outfalls 003 and 006 prior to comingling

with MS4 flows (the “Offsite Plan”). (Permit, Part I.A.10; RTC at 51.) In order to prepare and implement that plan, Suffolk must identify appropriate sampling locations on the MS4 drain lines and perform dye-testing of the MS4 lines. (Second Affidavit of Kenneth Deshais, ¶ 8 (“Second Deshais Affidavit,” attached hereto as Exhibit 7.) Suffolk anticipates that such testing likely would have to occur on or through City or DCR catch basins or manholes, which are located in municipal streets. Such testing would require City and/or DCR permission and likely would require a police detail. (Second Deshais Affidavit at ¶ 9.) The cost of preparing the Offsite Plan is \$7,500, not including the cost of obtaining City or DCR permits. (Second Deshais Affidavit at ¶ 10.) The foregoing estimate also does not include the costs of implementing the Offsite Plan.

#### *Dry-Weather Discharges*

The Draft Permit proposed to prohibit Suffolk from discharging into Sales Creek during dry weather. (RTC at 1.) Suffolk informed Region I that NPDES Permit Outfalls 003 and 004, and the “multiple pipes” comprising Outfall 006 (now designated as NPDES Permit Outfalls 006 and 006A), discharged during dry weather, likely on account of groundwater infiltration. (SC at 10-11.) Suffolk also informed Region I that NPDES Permit Outfalls 008-011, all of which are tied to sand-filter underdrains, were reasonably likely to pick up groundwater. (SC at 12.)

In response to Suffolk’s comments, Region I agreed to authorize discharges of subsurface infiltration, subject to a “discharge monitoring plan for these discharges.” (RTC at 1.) Part I.A.3 of the Permit contains that plan. The plan imposes unreasonably broad testing requirements. Part I.A.3 of the draft Permit called for testing of only eight “effluent characteristics” if Suffolk observed dry-weather discharges: Flow, Total Suspended Solids (TSS), pH, Aluminum (Total Recoverable), Fecal Coliform, *E. Coli*, Total Phosphorus, and Nitrogen-Ammonia. (Draft Permit, 7-8 (attached hereto as Exhibit 8.) In return for allowing groundwater discharges during

dry weather, but without seeking any additional information about the nature of those discharges (*see* RTC at 11), Region I added 30 additional parameters to the Permit's dry-weather testing program. Twenty-nine of those parameters (the "Additional Parameters"<sup>4</sup>) are unique to the dry-weather discharges: in other words, the Permit does not require Suffolk to test its wet-weather discharges for those same parameters.

Test results provided to Region I in November 2010 show that testing for the Additional Parameters is unnecessary. In June 2010, Region I asked Suffolk to obtain dry-weather samples from NPDES Outfalls 004 and 005 (Suffolk outfalls SD-4 and SD-5) and test them for all 126 NPDES Priority Pollutants. (FS at 8; Letter, Region I to Michael D. Vhay, Esq., 3 (June 29, 2010) (attached hereto as Exhibit 9.) In September 2010, Region I revised its sampling request and asked for dry-weather sampling for NPDES Outfalls 005 and 006 (Suffolk outfalls SD-5 and SD-10), "because sampling at these two outfalls is expected to be representative of other outfalls at the site and should provide EPA with adequate information with which to make a determination on appropriate permit limits and monitoring." (Letter, Region I to Michael D. Vhay, Esq., 2 (Sept. 10, 2010) ("2010 Region I Letter," attached hereto as Exhibit 10.)

Suffolk submitted the requested dry-weather sampling reports to Region I on November 30, 2010. The reports are attached as Exhibit 11 (the "October 2010 Testing"). The sampling requested for Outfall 006 occurred at the mixing zone of what the Permit describes as Outfalls 006 and 006A. (First Deshais Affidavit, ¶ 18.) The October 2010 Testing showed "no detect" for 28 of the 29 Additional Parameters. The 29<sup>th</sup> parameter, Iron, was not included in the October 2010 testing as it is not a NPDES Priority Pollutant.

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<sup>4</sup> See note 1 above, which lists the Additional Parameters. The Additional Parameters do not include Enterococci, the thirtieth new parameter introduced in Part I.A.3. Suffolk is not challenging Part I.A.3's requirement to test for Enterococci.

The October 2010 Testing provided Region I with a “worst case” view of groundwater discharges from the Suffolk site. That is because the October 2010 Testing occurred only two years into Suffolk’s implementation of its IPPM Plan (the precursor of the Nutrient and Stormwater Management Plan contained in the Permit, which has been in effect for seven years), and nearly eighteen months before Suffolk constructed the pollution control systems mandated under the Consent Decree. The October 2010 Testing also was “worst case” because it included any groundwater contributed to Outfall 006 from the City or DCR. (First Deshais Affidavit at ¶ 20.) If upheld, Part I.A.3’s testing program will cost Suffolk an estimated \$90,000 per year. (Second Deshais Affidavit at ¶¶ 4-6.)

#### ISSUES PRESENTED FOR REVIEW

- I. Whether the Agency may require an individual NPDES permittee to assume responsibility for, and monitor, the discharges of municipal entities that have received authorization under a NPDES general MS4 permit for discharges through an outfall also used by the individual permittee.
- II. Whether the Agency may require a NPDES permittee to test its discharge for contaminants not detected in prior discharge sampling, where the record contains no evidence that such discharges have a reasonable potential to contain such contaminants in the future.

#### ARGUMENT

- I. THE PERMIT’S PROVISIONS PERTAINING TO PERMITTED MS4 FLOWS THROUGH OUTFALLS 003, 006 AND 006A EXCEED THE AGENCY’S REGULATORY POWERS AND ARE CONTRARY TO ITS REGULATIONS.

The Clean Water Act prohibits “the discharge of any pollutant by any person” except “as in compliance with...section...1342 of this title....” 33 U.S.C. § 1311(a). To put it differently, a discharge allowed under a NPDES permit issued pursuant to 33 U.S.C. § 1342 does not violate § 1311. *See U.S. v. Tom-Kat Development, Inc.*, 614 F.Supp. 613, 614 (D. Alaska 1985); *see also* 40 C.F.R. § 122.5(a) (“compliance with a permit during its term constitutes compliance, for

purposes of enforcement, with sections 301, 302, 306, 307, 318, 403 and 405(a)-(b) of [the Act]”).

It is undisputed that Outfalls 003, 006 and 006A, post-Permit, carry two, separately regulated, discharge streams: the permitted MS4 discharges of the City and DCR, and Suffolk’s industrial discharges. Because it ignored the fact that the MS4 discharges through Outfalls 003, 006 and 006A were separately permitted, Region I introduced two erroneous requirements into the Permit: that (a) Suffolk perform end-of-pipe testing at Outfalls 003, 006 and 006A (and not test Suffolk’s discharges before they commingled with MS4 flows); and (b) Suffolk prepare and implement the “Offsite Plan.”

**A. End-of-pipe testing at Outfalls 003, 006 and 006A is contrary to 40 C.F.R. § 122.48(b). It also exposes Suffolk to liability for conduct by the MS4s that use those outfalls.**

Under 40 C.F.R. § 122.48(b), monitoring is not to be imposed for monitoring’s sake. Instead, the purpose of monitoring is to “yield data which are representative of the monitored activity....” End-of-pipe monitoring of Outfalls 003, 006 and 006A violates § 122.48’s precept. That is because by the time discharges from Suffolk’s monitored activity (discharges of roof runoff, BMP overflows and groundwater) reach Outfalls 003, 006 and 006A, those discharges have commingled with discharges from “unmonitored activity,” namely, discharges from the City and DCR’s MS4 wastewater streams.

Region I required end-of-pipe monitoring for Outfalls 003, 006 and 006A on the grounds that Suffolk’s drains were discharging both stormwater and groundwater. *See* RTC at 51. That observation is true both before and after the point at which the MS4 lines enter Suffolk’s lines, and has no bearing on whether § 122.48 dictates end-of-pipe testing. What makes end-of-pipe testing *uncharacteristic* of Suffolk’s monitored activity is the undisputed fact that, at the end of

the pipe, the discharge contains not just Suffolk's discharges, but stormwater and groundwater contributions from the City and DCR MS4 systems.

Coupled with Part I.A.2.a.1's requirement that "[s]uch discharges... not cause a violation of the Massachusetts Surface Water Quality Standards for the receiving water; and ... be controlled by the best management practices...described in Part I.C of this permit," end-of-pipe testing raises the possibility that Suffolk will be held liable for contaminants contained in MS4 discharges. That would be contrary to § 301 of the Act. Testing for discharges characteristic of Suffolk's "monitored activities" that contribute to Outfalls 003, 006 and 006A should occur prior to the point at which those contributions commingle with separately regulated MS4 flows (see note 5 below), and not at the end of those Outfalls.

**B. Part I.A.10's requirement is contrary to 40 C.F.R. § 122.43. It also is impermissibly vague, costly, and requires Suffolk to evaluate the separately permitted City and DCR MS4s.**

The purpose of permit conditions is "to provide for and assure compliance with all applicable requirements of [the Act] and regulations." 40 C.F.R. § 122.43. Part I.A.10's requirement that Suffolk develop the Offsite Plan -- a monitoring plan for "evaluating the extent of its contributions to outfalls 003 and 006 prior to flows co-mingling" -- has no connection to any applicable requirement of the Act or the Agency's regulations.<sup>5</sup> The Permit itself contains no volumetric limits on Suffolk's discharges through outfalls 003 and 006. There are also no discharge characteristics or parameters that would distinguish Suffolk's permitted (or illegal) flows from the MS4s' permitted (or illegal) flows. The Offsite-Plan requirement thus is not tied

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<sup>5</sup> Region I characterized the Offsite Plan requirement as having been requested by Suffolk. See RTC at 51. What Suffolk requested was testing at two locations (a downspout that contributes to Outfall 003, and Drainage Manhole 8 (DMH-8), which is in a drain line leading to Outfall 006) *in lieu of* end-of-pipe testing, for the reasons discussed in section (A) above. See SC at 17-18 & nn. 13 and 15.

to anything that would assure Suffolk's compliance with the Act, the Agency's regulations, or the Permit.

Part I.A.10 also is impermissibly vague. While Part I.A.10 directs Suffolk to prepare a "monitoring plan," one with "locations, parameters and frequency of monitoring," the activity or characteristic Part I.A.10 seeks to monitor – the "extent of [Suffolk's] contributions to outfalls 003 and 006" prior to Suffolk's flows commingling with MS4 flows – is unclear. "Extent" could refer to the volume of Suffolk's discharges, or the volumes of discharge by type (surface flows versus groundwater). "Extent" could refer to the monitored effluent characteristics of Suffolk's discharges (TSS, pH, fecal coliform, *E. coli*, and enterococci). Or "extent" could mean something else altogether.

Developing a plan for monitoring the "extent" of Suffolk's contributions to Outfalls 003 and 006 (a \$7,500 exercise) also will require testing of the City and DCR MS4s, on City and/or DCR property (if the City and DCR agree). See Second Deshais Affidavit at ¶¶ 9-10.

Implementing the Offsite Plan likewise could require offsite testing of the MS4 flows before they commingle with Suffolk's flows.

Nothing in the Act or the Agency's regulations gives the Agency the power to direct an individual to monitor a regulated MS4's permitted flows as a condition of the individual's NPDES permit, or to require that individual to conduct flow studies of the MS4. Suffolk thus should be excused from Part I.A.10 of the Permit.

II. PRIOR DRY-WEATHER TESTING ESTABLISHES THAT THE CONTAMINANTS LISTED IN THE ADDITIONAL PARAMETERS ARE NOT PRESENT IN SUFFOLK'S GROUNDWATER. REGION I OVERLOOKED THAT TESTING IN FASHIONING THE PERMIT'S DRY-WEATHER DISCHARGE TESTING PROGRAM.

Region I permitting staff was unaware at the time of issuance of the draft Permit that flows from Outfalls 003 through 011 discharge groundwater. See RTC at 43. Suffolk's

Comments alerted staff to those discharges. After the public comment period closed, Region I determined that while groundwater discharges should be permitted, “[g]iven the specific operations and practices at Suffolk Downs, and the fact that it exists in an urban environment,” the dry-weather monitoring requirements of the Permit “should be more comprehensive than what was originally proposed in the Draft Permit *and designed to reveal the existence and concentration of the [Additional Parameters] in the flows discharged into the receiving waters....*” RTC at 43 (emphasis added).

Had Region I requested additional information from Suffolk concerning its groundwater discharges (which Suffolk offered to provide, *see* RTC at 11), Suffolk would have directed Region I to the reports of the dry-weather October 2010 Testing. Region I had specifically requested that testing, for NPDES Outfalls 005 and 006, “because sampling at these two outfalls is expected to be representative of other outfalls at the site and should provide EPA with adequate information with which to make a determination on appropriate permit limits and monitoring.” 2010 Region I Letter.

The October 2010 Testing establishes that 28 of the 29 Additional Parameters were not present in Suffolk’s groundwater in 2010. (Region I did not to require testing in 2010 for the 29<sup>th</sup> parameter, iron.) The record contains no evidence of any changes since October 2010 to Suffolk’s “operations and practices,” or its “urban environment,” that would have resulted in the introduction of the Additional Parameters into Suffolk’s groundwater. Instead of considering the prior testing, Region I directed Suffolk to embark on a new testing program likely to cost at least \$270,000 (\$90,000 per year for three years). *See* Second Deshais Affidavit at ¶¶ 4-6.

“An agency action may be set aside...if the agency has relied on factors which Congress did not intend it to consider, entirely failed to consider an important aspect of the problem,



offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Necketopoulos v. Shalala*, 941 F.Supp. 1382, 1390 (S.D.N.Y. 1996). While the Fact Sheet mentions that Suffolk had submitted priority-pollutant testing from October 2010 (*see* FS at 8), and discusses the results of whole effluent toxicity tests taken at the same time (*see id.* at 24-25), neither the Fact Sheet nor the RTC discusses the results of the October 2010 Testing. This suggests the October 2010 Testing was overlooked in setting Part I.A.3’s dry-weather discharge monitoring plan. The Additional Parameters should be removed from Part I.A.3’s testing requirements or, in the alternative, the Permit should be remanded to Region I.

#### CONCLUSION

For the reasons set forth above, Sterling Suffolk Racecourse, LLC asks that this Board:

- A. Replace the first two words of the second sentence of Part I.A.2.a.1 of the Permit with “The permittee’s discharges...”;
- B. Replace the first sentence of footnote 1 of Part I.A.2.a.1 of the Permit with the following: “Samples taken in compliance with the monitoring requirements specified about shall be taken (a) with respect to Outfall 003, at any downspout that discharges to a Suffolk drain line leading to Outfall 003; and (b) with respect to Outfalls 006 and 006A, at Drainage Manhole 8.”;
- C. Delete the Additional Parameters from the Effluent Characteristics required to be monitored under Part I.A.3 of the Permit (or, in the alternative, remand the Permit to Region I for further review);
- D. Delete Part I.A.10 of the Permit; and

E. Grant such other relief as the Board deems just and proper.

/s/ Michael D. Vhay  
Michael D. Vhay, Esq.  
Valerie A. Moore, Esq.

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Attorneys for Sterling Suffolk Racecourse, LLC

Dated: November 4, 2015

**Statement of Compliance With Word Limits**

I hereby certify that the above document contains 4,133 words, in compliance with the 14,000 word limitation. *See* 40 CFR § 124.19(d)(1).

/s/ Valerie A. Moore  
Valerie A. Moore

**Certificate of Service**

I hereby certify that I have served a copy of the above document by U.S. Mail on the Regional Administrator this 4<sup>th</sup> day of November, 2015 at the following address:

Curtis Spalding  
Regional Administrator  
U.S. Environmental Protection Agency Region I  
5 Post Office Square, Suite 100  
Boston, MA 02109-3912

/s/ Valerie A. Moore  
Valerie A. Moore

**Certificate of Mailing**

I certify that the foregoing Petition for Review and Attachments are identical copies of the Petition for Review and Attachments electronically filed in this case with the Environmental Appeals Board on November 4, 2015.

/s/ Valerie A. Moore  
Valerie A. Moore

List of Attachments

1. NPDES Permit No. MA0040282
2. Written Comments of Sterling Suffolk Racecourse, LLC on Draft NPDES Permit No. MA 0040282
3. Fact Sheet No. MA0040282 (with maps and without attachments)
4. Response to Comments on Draft NPDES Permit No. MA0040282
5. Affidavit of Michael D. Vhay, Esq.
6. First Affidavit of Kenneth Deshais (without attachments)
7. Second Affidavit of Kenneth Deshais
8. Draft NPDES Permit No. MA0040282
9. Letter, Region I to Michael D. Vhay, Esq. (June 29, 2010)
10. Letter, Region I to Michael D. Vhay, Esq. (Sept. 10, 2010)
11. November 30, 2010 Dry Weather Sampling Reports

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