

2008 SEP 19 AM 9:55

ENVIR. APPEALS BOARD

DOUGLAS H. WILKINS  
[dwilkins@andersonkreiger.com](mailto:dwilkins@andersonkreiger.com)  
Direct phone: 617-621-6580  
Direct fax: 617-621-6680

September 11, 2008

**VIA FEDEX**

U.S. Environmental Protection Agency  
Clerk of the Board, Environmental Appeals Board  
1341 G Street, N.W., Suite 600  
Washington, DC 20005

**Re: *In re: City of Attleboro, MA Department of  
Wastewater, Government Center,  
77 Park Street, Attleboro, MA 02703  
NPDES Permit No. MA 0100595  
NPDES Appeal No. 08-09***

Dear Sir/Madam:

Enclosed for filing in the above matter are the original and five copies of the Reply of the Permittee, City of Attleboro, to Region 1's Response to Petition for Review.

Very truly yours,

  
Douglas H. Wilkins

DHW:skc  
*enclosures*

cc: Carl Dierker, U.S. EPA, Region 1  
Samir Bukhari  
Susan B. Forcier, Esquire  
Client

RECEIVED  
U.S. E.P.A.

2008 SEP 19 AM 9:55

ENVIR. APPEALS BOARD

**UNITED STATES OF AMERICA  
ENVIRONMENTAL APPEALS BOARD  
ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

NPDES APPEAL No. 08-08

---

In re: )  
)  
)

City of Attleboro, MA Department of )  
Wastewater, Government Center, )  
77 Park Street, Attleboro, MA 02703 )  
NPDES Permit No. MA 0100595 )

---

**REPLY OF THE PERMITTEE, CITY OF ATTLEBORO,  
TO REGION 1'S RESPONSE TO PETITION FOR REVIEW**

Douglas H. Wilkins  
Mass. Bar No. 528000  
Anderson & Kreiger LLP  
One Canal Park, Suite 200  
Cambridge, MA 02141  
Telephone: (617) 621-6580  
Fax: (617) 621-6680

September 19, 2008

## TABLE OF CONTENTS

	Page
ARGUMENT .....	1
I. THE NEED FOR RELIABLE SCIENTIFIC EVIDENCE WAS RAISED BELOW. ....	1
II.. REGION 1 FAILS TO JUSTIFY ITS CONTRADICTIONARY STATEMENTS REGARDING MODELS, OR ITS CLEAR MISSTATEMENTS REGARDING THE FLUSHING TIMES. ....	4
<i>Kester Model</i> .....	4
<i>Flushing Rate</i> .....	5
III. REGION 1 HAS NOT ADDRESSED THE DEFECTS IN ITS TREATMENT OF INTERSTATE ISSUES. ....	7
IV. REGION 1 PROVIDES NO REASON TO DENY REVIEW REGARDING PHOSPHORUS LIMITS .....	10
V. THE REGION'S RESPONSE ON ATTENUATION, DILUTION AND WASTE LOAD ALLOCATION IS OFF-POINT. ....	12
VI. THE METALS LIMITS SHOULD BE REVIEWED. ....	14
CONCLUSION. ....	16

**UNITED STATES OF AMERICA  
ENVIRONMENTAL APPEALS BOARD  
ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**

NPDES APPEAL No. 08-08

\_\_\_\_\_ )  
In re: )

City of Attleboro, MA Department of )  
Wastewater, Government Center, )  
77 Park Street, Attleboro, MA 02703 )  
NPDES Permit No. MA0100595 )

Petition of Rhode Island Department of Environ- )  
Mental Management )  
\_\_\_\_\_ )

**REPLY OF THE PERMITTEE, CITY OF ATTLEBORO,  
TO REGION 1'S RESPONSE TO PETITION FOR REVIEW**

The permittee, City of Attleboro ("City") submits the reply to (1) assist the Board in focusing upon the points that really matter; (2) refute Region 1's repeated claims that certain issues were not raised below; (3) correct many misstatements of law or fact by the Region; and (4) rectify the most important instances where Region 1 seeks to prevail by distorting Attleboro's arguments instead of addressing them. The City has not addressed all points in the Region's 110- page response ("Response") and leaves those points to its original petition.

**ARGUMENT**

**I. THE NEED FOR RELIABLE SCIENTIFIC EVIDENCE WAS RAISED BELOW.**

Region 1's first argument seeks (Response at pp. 34-35) to avoid review of the need for reliable science by misstating Attleboro's argument. Attleboro has always argued, in detail, that Region 1 must use reliable science that actually applies to its discharge. Response to Comments

("RTC") exhibit 3 to Response ("Ex")<sup>1</sup>, pp. 2-5. The City's Petition cites – "for guidance" – the case of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. (1993). The Region cites authority of this Board confirming that Daubert provides "guidance" – the very proposition appearing at p. 5 of the Petition. In Re: Solutia, Inc., 10 E.A.B. 193, 211-212 n.22 (EAB 2001). Yet, Region 1 claims that the citation of one new case (Daubert) makes this a new argument. It cites no decision of this Board prohibiting a new case citation in support of an argument made below. Finally, it devotes pages (34-38) to discussing Daubert as though the City argued that Daubert was controlling (it does not), and explores aspects of that new case that have nothing to do with the issues. The Board should not be diverted from the basic point about reliable science, which the City raised extensively below.

The key question is whether Region 1 needs "credible science" to support site-specific water quality based effluent limits. The Response (at pp. 38 and 40) is troubling and confirms the City's concerns: the Region claims that the Clean Water Act imposes no duty to use materials that possess "'scientific validity' or 'scientific acceptance'" (or scientific "'reliability' or 'credibility'") when applied to the permittee's actual discharge and receiving waters. Where Congress went to great lengths to require scientific investigation and analysis in the Clean Water Act, this Board should reject the Region's mistaken legal position and require the Region to evaluate the scientific validity of its materials and methods. Any other approach would provide *carte blanche* for arbitrary but unreviewable administrative caprice.

Instead of addressing site-specific analysis, Region 1 proceeds with general statements about the regulations (at 40-42) and continues with general statements about the laboratory studies (at 42-44, 50-55). To be sure, the MERL experiments demonstrate general scientific

---

<sup>1</sup> References to "Ex." are to the exhibits attached to Region 1's Response.

principles. But all of this begs the question of whether and how these experiments can be applied to Attleboro's discharge and to these particular receiving waters which have (assertedly) defied modeling efforts. The Region's Response is simply not responsive. See Region 1 Response, p. 51. In fact, the Region confirms that it relied upon general principles, rather than site-specific analysis, when it says (at p. 51) that it "established that, '[b]oth the MERL tank experience and the data from the Providence/Seekonk River system indicate a clear correlation between nitrogen loadings, dissolved oxygen impairment and chlorophyll a levels[.]'" That says nothing about whether the City's specific discharge contributes to the claimed impairment, after considering dilution, attenuation and other factors at work in the real world. Applying the MERL data directly to a real-world discharge treats the MERL data as a model – just what Region 1 says cannot be done – despite conceding that the MERL data differ in material ways from actual conditions.

Nor does Region 1 respond to the City's argument that it should have adopted a "wasteload allocation approach", as required by the federal and local regulations and page 3 of RIDEM's own comments. Petition at p. 10-11. Instead, it again tries to justify use of the MERL experiments, which are not a wasteload allocation approach by any stretch. See Response, pp. 51-53, discussing "Att. Pet. at 10 [sic: 11]." Repeated invocation of the MERL experiments does not answer every comment, including the inconsistency between the Region's approach and the mandated wasteload allocation approach.

Finally, Region 1 proceeds by rhetorical excess. It claims that Attleboro has offered no alternative approach or that it favors "no limit at all." (Response, pp. 54-55, 66 n.23). In fact, Attleboro clearly proposed that the Region impose a limit by following MADEP's HBPT approach, which is a well-understood concept. Region 1's claim that HBPT "is not contained in

Rhode Island's water quality standards" applies equally to its 8 mg/l standard – which is also not contained in Rhode Island's standards. Its attempt (p. 54) to cite other facilities as evidencing an HPBT value of 8 mg/l (e.g. North Attleborough) is highly misleading and not fair. Those facilities were subjected to Region 1's methodology, not HBPT, and the fact that one did not appeal (North Attleborough) and that others are appealing to RIDEM (see RTC, p. and exhibits 4-7 of the City's Comments of September 14, 2006) provides no support for Region 1's controversial approach here. Moreover, Attleboro's suggestion to compare its actual contribution to those of Rhode Island dischargers offers another credible alternative to EPA's approach. See below, pp. 8-9.

## **II. REGION 1 FAILS TO JUSTIFY ITS CONTRADICTORY STATEMENTS REGARDING MODELS, OR ITS CLEAR MISSTATEMENT REGARDING THE FLUSHING TIMES.**

The Petition also cited two specific examples stemming from Region 1's rejection of scientific methods. Region 1's response is minimal:

*Kester Model:* Region 1 concedes (Response, p. 45) that the Region used the Kester model for Biochemical Oxygen Demand ("BOD") impacts. It then states, cryptically that "the fact that mathematical modeling has been performed for one pollutant does not mean that such modeling is actually feasible for all pollutants in a particular ecological setting." *Id.* This statement poses a question but does not answer it – how can a model be used for one pollutant when "the system is too complicated to simulate with available mathematical models?" Response, p. 45, quoting Ex 3 (RTC) at 7. Just as importantly, the Response does not come to grips with the City's fundamental point: either modeling is not possible as the RTC states (e.g. p. 7) in which case the Kester model should not be used, or modeling is possible and should be used (as use of the

Kester model for BOD would suggest). Nothing in the Region's RTC or Response explains **why** it believes that the Kester model is appropriate for one pollutant but not others.<sup>2</sup>

Nor does the record provide a ready explanation. The Kester model itself (Response, Exhibit 26) reflects more than DO. The model also concerns "nutrients," (Id. at pp. 132, 137) specifically including "nutrients associated with" WWTP "effluent" (p. 140) and specifically includes nitrogen ("nitrification, organic nitrogen oxidation") (Id. at p. 140). For instance:

In this study we used the box model to derive transport terms . . . and we used Version 4.2 of the EUTRO (eutrophication) module to examine the dynamics of oxygen, nutrients, and phytoplankton.

Id. at 137. The model itself appears to have evaluated nutrients and eutrophication in conjunction with oxygen, so there is no explanation or apparent reason why the Region would use this model for oxygen, but not for nitrogen. Other indirect inputs, such as flow and flushing (directly relevant to the mandatory factor of "dilution" see 40 C.F.R. § 122.44(d)(1)(ii)), are also part of the Kester model. See Exhibit 26 at pp. 138-139.

The City made clear its interest in having some real scientific basis, such as this model (if EPA views the model as reliable), to determine reliable and long-term limits, instead of being subject to varying requirements over time, caused by the lack of basic science applied to the permit.<sup>3</sup> Certainly, the Region's unanticipated use of this model for one parameter but not for other crucial parameters remains unexplained and inexplicable.

---

<sup>2</sup> In fact, the Region's reply exacerbates the problem created by its own reliance on the model in the first place. The Response (p. 46) states that "[t]here is no indication that the Kester Model, which pre-dates the RIDEM conclusion by more than a decade, adequately addresses, much less resolves, the central obstacle raised by the Rhode Island's [sic] subsequent modeling effort, resolution of which is beyond the reach of 'state of the art' numerical solution techniques state of the art numerical solution techniques [sic]." If so, then the "central obstacle" precludes Region 1's express reliance upon the Kester model for DO. But Region 1's actions in relying on the model point in the opposite direction.

<sup>3</sup> The Region distorts this argument and dismisses it as a concern over costs (which it considers irrelevant), for which it is not responsible. The Region *is* responsible for lack of science.



*Flushing Rate:* The Region also committed a second, clear error, which the Response disclaims with a false denial (at pp. 47-48): it claims that it never relied upon flushing rates in the Providence River to reject the City's criticism that flushing in the Seekonk River was faster than Region 1 assumed. Attleboro's Petition specifically quotes the Region's Response to Comments and cites chapter and verse documenting Region 1's erroneous reference to flushing rates in the Providence River, instead of the Seekonk River:

The average estimated flushing time in the Providence River during the May – October periods of 1995 and 1996 was 3.5 days, much faster than the rate of 27 days used in the MERL experiments. However, the flushing rate during the critical period of high temperatures and low tributary flow rates during dry summer conditions . . . would be slower than 3.5 days. RTC, p. 35.

The use of a flushing time slower than 3.5 days is demonstrably false as applied to the Seekonk River. See Petition at 10, citing pages 21-28 of the 2004 Evaluation. Region 1 cannot legitimately deny that it used the “flushing time in the Providence River” as support for using the MERL experiments.

Moreover, Region 1 even claims (at 49) that “the City does not explain the significance of this fact.” That is not true. The City expressly tied its comment to the Region's duty to consider the correct “dilution,” as well as the defects in the application of the MERL experiments to the actual impact of the City's discharge upon the receiving waters:

The City's comments stressed the significant differences in flushing rates of the Seekonk River, compared to the so-called MERL experiments upon which EPA relied (1.2 days vs. 27 days, respectively). See RTC, p. 35. Flushing rates correlate directly with “dilution of the effluent in the receiving water,” which EPA must consider under the explicit directives of 40 C.F.R. § 122.44(d)(1)(ii). Here Region 1 concedes the City's general point that “[d]ifferences in flushing rates between the Providence/Seekonk River system” exist and weigh against “more stringent nitrogen load reductions at this time. RTC, p. 35. See also RTC, pp. 11, 36.

Petition, p. 9. The statement that flushing rates “would be slower than 3.5 days” (based upon the Providence River) appears in the key explanation of the Region's rationale for using the MERL

experiments and is offered to rebut the City's core criticism of that rationale. RTC, p. 35. Region 1 itself recites the differences between the MERL experiments and the ambient data as "one of the key factors." RTC, p. 35, last paragraph. It underestimated this key factor by discounting the real world flushing rate of the Seekonk River during low flows. The Region cannot seriously contend that it may rely upon the wrong data (i.e. data from a different river containing values prejudicial to the permittee) to discount the degree to which dilution and flushing rates undercut use of the MERL results to the City's real world discharge. Accepting the City's comment would have undermined the crux of the Region's rationale for applying the MERL data. Moreover, it should be obvious to Region 1 that the Region should use correct data for the correct water body (the Seekonk River), where available (as here). The Board has not hesitated to require Regions to correct such a basic error as relying upon the wrong data.

Washington Aqueduct Water Supply System, 11 E.A.D. 583, 586 (2004).

### **III. REGION 1 HAS NOT ADDRESSED THE DEFECTS IN ITS TREATMENT OF INTERSTATE ISSUES.**

The City's Petition cites inconsistencies between the level of contribution allowed by Rhode Island plants and the level allowed the City. It argues that the Region may not ignore "attenuation completely." Petition at 17.

The Region's response is to distort the City's argument. It claims that the City relies upon a "false premise that existing estimated levels of attenuation in the Ten Mile River will continue." Response at p. 56. Actually, the City only used the **same 1.4 dilution factor that the Region and RIDEM used**, allegedly after weighing countervailing factors suggesting either a higher or lower number (one of which was the future anticipated reduction in nutrients). Petition at 16, citing RTC, p. 16. The Response itself acknowledges this 40% factor. Response at p. 59. Ignoring the 1.4 dilution factor due to future reductions is double counting.

The Response further distorts the Petition by ignoring the alternative argument appearing at Petition, p. 16, which evaluates the Region's equation (using the Region's 90% instead of 70%). The Petition did not ignore the Region's prediction of decreased nutrients in the future. Rather, page 16 of the Petition assumes that the Region's analysis on p. 32 of the RTC is correct, for the sake of argument, and concludes that the effective discharge using Region 1's numbers is 4.3 mg/l, not 8.0 mg/l. The Region's analysis of this point (again, on p. 32 of the RTC) actually rounded its calculated factor of 54% up to 60% (to the detriment of the City) and **expressly considered the impact of future decreases in phosphorus**. RTC, p. 32, last sentence. To reuse that impact – already incorporated in the Region's analysis on RTC, p. 32 – by reducing attenuation to zero is double-counting and would justify virtually any speculative reduction.

Moreover, the Response does not and cannot justify using a zero attenuation rate. Yet, it does so in making a direct comparison between the 8 mg/l effluent limits in the City's and the Rhode Island dischargers. In lieu of justification, it demeans the City's point by stating that the differences between 0% and 40% attenuation is "equal or within a few percentage points" and that Rhode Island dischargers also experience attenuation. Response, p. 57, 59.<sup>4</sup> This does not lead to the Region's conclusion for two reasons

First, the City cares about those "few percentage points" and EPA should as well, if it is to avoid unnecessarily strict limits. See Petition, pp. 13-14 (discussing standard). As shown by the City's Petition (at p. 16), subtracting those percentage points accounts for effective discharge limits that are approximately twice as strict as they should be, using 40% attenuation.

Second, the Region claims that the Rhode Island effluent limits "must also be discounted by the attenuation rates applicable to the Pawtuxet and Blackstone Rivers" – but then refuses to

---

<sup>4</sup> The Region even makes the disrespectful claim that the "City's demonstration is disingenuous" (p. 59). Ironically, the Region refuses to admit its own obvious error – that it cannot fairly ignore attenuation, but has done so.

do the calculation that its own theory requires. Such calculation would change only the numbers (to a value that includes at least some of those “few percentage points”) but would not refute the basic point that the City’s limits result in lower effective discharges into the relevant receiving waters than applied to the Rhode Island plants. That result flows mathematically from, among other things, the concession in Region’s Response (p. 59) that current attenuation is less than half of the Ten Mile River attenuation (40% versus 18%) for all four of the Rhode Island facilities that have the same 8.0 mg/l nitrogen limit as the City’s Permit – and is less than one-third for the Woonsocket POTW (40% versus 13%). Only by making the unsupportable assumption that attenuation is zero – precisely what the City has challenged in the Petition – can the Region justify its approach. By restating that assumption, the Response confirms the need for review and remand.

Finally, the Region’s repeated reliance upon reductions in anticipated downstream attenuation is further undercut by the extended timetables for nutrient reduction by downstream dischargers. Those timetables are a matter of record, regardless of whether they appear in permits or in consent decrees. Response, p. 62. There is no basis for requiring the City to achieve nitrogen reductions that are justified by the assumption (just cited) that downstream nutrient concentrations will decrease during the permit’s duration when those reductions are predicated upon downstream discharge permits that are stayed by administrative order. Those reductions will not occur any time soon.

The Region cannot refute that; rather than trying to do so, it assumes (presumably for the sake of argument) that down stream reductions in nitrogen will not occur. Response, p. 62. It then tries to justify ignoring the delay in downstream attenuation by arguing that each permit must stand on its own. To be sure, each discharger must comply with the Clean Water Act,

regardless of other dischargers' violations. The problem is that Region 1 did not calculate the City's permit limits in isolation from downstream dischargers. In writing the City's permit, the Region itself not only anticipated a reduction in downstream nutrients but has relied upon the reduction heavily in the RTC and has posited even more ways to take credit for that reduction in its Response. As argued in the Petition, pp. 17-19, the EAB should grant review to ensure consistent interstate treatment and to avoid imposing strict limits upon a Massachusetts facility based upon nominal downstream limits that are not presently operative.

#### **IV. REGION 1 PROVIDES NO REASON TO DENY REVIEW REGARDING PHOSPHORUS LIMITS**

Region 1's Response, like its RTC, contravenes language in Rhode Island's water quality standards and in RIDEM's written comments. Proceeding in that manner conflicts with the rule of law and essentially assumes that words mean what Region 1 says they mean. For example, Region 1:

- Interprets "**mean** water residence time" in RIDEM's comments RTC, p. 42 and in EPA's own nutrient guidance (Ex. 23 at 3-1) as meaning **extreme low flow** residence time (Response, pp. 68-69).
- Cites the definition of "lake pond or reservoir" to refute the proposition that residence time (a measure of flow) is relevant (Response p. 67), while acknowledging three pages later (p. 70) that the definition cannot be applied literally and does not apply to "bodies of water" that flow (such as brooks or streams). The RTC inexplicably rejects sensible flow criteria that RIDEM and EPA both used in their comments and guidance.
- Cites "ambiguity" in the same RIDEM definition as a basis for ignoring the definition adopted by EPA and RIDEM (see bullet one above), without explanation or substitute definition. Response p. 70.

- Cites a regulation governing “average” concentrations to support imposition of concentrations calculated based upon extreme low flow concentrations.

In each case, the word play and the unexplained shift in position from the comment phase to the permit writing phase is striking, unexplained and arbitrary.

Nor does the plea for deference (Response, p. 70) save the day. This is not a case of a simple and consistent construction by the Region or RIDEM of a state water quality standard. The Region (Response, p. 68), resorts to citing RIDEM’s EAB petition (EAB No. 08-09) and even RIDEM’s silence (RTC, p. 7- n.23: “absence of comments”) in not commenting on the 0.1 mg/l phosphorus limit. No deference is owed to silence, allegations in an adversary’s petition and other alleged statements or omissions by RIDEM (about definitions of lakes or redefinitions of “average”) that are not even in the record (and may not be in writing) and that contradict prior express interpretations included in comments in this very matter and in approved for in-state TMDLs.<sup>5</sup> See, e.g., D.C. Water and Sewer Authority, 13 E.A.D. \_\_\_ slip op. at 30 (2008). See generally Indian Educators Federation of Local 4524 of the American Federation of Teachers, AFL-CIO v. Kempthorne, 541 F.Supp.2d 257 (D.D.C.2008) (“[a] statutory interpretation ... that results from an unexplained departure from prior [agency] policy and practice is not a reasonable one.’ ”), quoting Northpoint Tech. Ltd. v. Federal Communications Comm., 412 F.3d 145, 156 (D.C.Cir.2005)); Shalala v. St. Paul Ramsey Medical Center, 50 F.3d 522, 529 (8<sup>th</sup> Cir. 1995) (“The Secretary’s interpretation simply has sought to add a requirement to [a rule] that does not appear in the plain meaning of the rule. Accordingly, we cannot defer to the Secretary’s

---

<sup>5</sup> The Region acknowledges the inconsistent application of the Rhode Island Standards -- but provides no explanation or coherent rationale for advancing diametrically opposed positions in the same case -- when it articulates a sweeping principle that nullifies any attempt at a consistent definition of a “lake” or “average” values: “Rhode Island Standards do not demand a single approach to characterizing water bodies or to determining how a permit limit should be applied” Response, p. 69, n.25. A “single approach” to the same permit with the same case would seem to be mandatory.

interpretation, which reads unwritten and additional terms into the rule in question.”). On the contrary, the Region’s and RIDEM’S unexplained shift is arbitrary and deserves reversal, particularly where, as here, the shift here harms out-of-state interests but not in-state ones. Id. The EAB, not the Region, has EPA’s final word on whether sharp departures from regulatory language, formal comments, past interpretations and past practice can be so easily justified.

Compounding these errors, Region 1 goes beyond the record available for comment. It cites comments supposedly made by RIDEM regarding the interpretation of the standards, not made in writing and apparently applicable to no other discharger. RTC, p. 75. It also cites post-comment period events, such as a nutrient bloom for which the Facility cannot be blamed; (RTC, pp. 56, 86 see Petition at 25). Region 1 itself referred to documents not previously cited in the Fact Sheet (and therefore not available for comment) in order to justify its interpretive choices. See Petition at 12, citing such documents as quoted in RTC, pp. 8-9. It even cites (Response at p. 68) RIDEM’s petition for review (Docket 08-09) of the City’s permit to support the Region’s interpretation – a document that was filed too late to be considered in the permit writing if there ever was one.

Having done all this, Region 1 now tries (albeit somewhat half-heartedly and in a footnote (Response, p. 69 n.25)) to preclude consideration of RIDEM’s and EPA’s official regulatory application of the RIDEM standards, in the form of approved TMDLs. These materials bear upon interpretation of legal standards (i.e. RIDEM’s water quality standards), they are perfectly appropriate, just as citing legislative history, case law, EPA guidance or other interpretative materials would be. These are not the sort of historical or scientific facts that cannot be considered unless in the record. Massachusetts Medical Society v. Commonwealth of Massachusetts, 637 F. Supp. 684, 689-694 (D. Mass. 1986) (interpretive versus historical facts).

Moreover, the City could not have ascertained the need to introduce these materials given RIDEM's (and EPA's) use of residence time and average values during the comment period (e.g. RTC, p. 42 and Ex. 23 at 3-1) until the about-face in the RTC (pp. 74-77). The City's comments fully addressed whether Turner Reservoir was a lake under the only known criteria cited by RIDEM, which included "a minimum mean water residence time of 14 days." RTC, p. 42.

**V. THE REGION'S RESPONSE ON ATTENUATION, DILUTION AND WASTE LOAD ALLOCATION IS OFF-POINT.**

The original proposed phosphorus limit was 0.2 mg/l. To get down to 0.1 mg/l, the Region had to sacrifice consistency in order to change attenuation, dilution and total load calculations. The Region's Reply does not refute the need for review on these points.

The Response claims that the Region could ignore downstream phosphorus levels that were lower than the Facility during low flow conditions, because phosphorus "settles to the bottom where it is available for further biological growth, or is subsequently transported to downstream impoundments during high flow events." Response at 85, citing RTC at 67.<sup>6</sup> This may be true, but it does not justify discarding the actual low flow phosphorus levels when calculating effluent limits on the basis of low flow conditions.

The low flow data already reflect the Region's point. The phosphorus is just as "available for biological growth" (and available for transport downstream) **now** as it **will be** in the future. See *Id.* Current low flow data reflect that availability, and, as the Region says, phosphorus levels are expected to improve (decrease) in the future. Only if that "availab[ility]

---

<sup>6</sup> The Response, p. 85 also says something that the RTC does not say: "the overall data, including high flow, showed no attenuation . . .". The Response cites p. 67 of the RTC, which states the contrary: "during low flow conditions [the plant's flow plus background plus the river's lead] exceed the loading estimated at the downstream sampling station, sometimes by a significant amount. . . . [W]hen the spring sampling even is included, there is only about 10 percent attenuation of the phosphorus load" RTC, p. 67. Adding a rationale and then faulting the City for not refuting it in the Petition is not legitimate argument and does not weigh against EAB review. See Response, p. 86, 2<sup>nd</sup> paragraph. Nor does the tautological statement (cited in Response, p. 86) that attenuation under future conditions will promote water quality compliance – so would shutting down all WWTPs, but that is no argument in favor of ignoring actual attenuation.



for future biological growth” were somehow expected to change for the worse would current phosphorus conditions during low flow conditions need to be supplemented. The Region does not so contend and indeed makes the opposite prediction. Ignoring low data favorable to the City and injecting higher flow data without basis into what is otherwise a calculation based upon low flows is arbitrary and capricious.

As to dilution, the Region asserts that “background currently *is* high and in the future *will be* low.” Response, p. 84 (italics in original). One problem, as just demonstrated, is that the Region assumes that the background is both high and low **now** – by using current high flows if the current low flow data do not support the Region’s desired phosphorus limit. Another problem is that the Region discounts the dilution improperly in the first place. It cites “an increase in the phosphorus load due to the Attleboro WPCF discharge that offsets any dilutive effect from the Sevenmile River flow.” RTC, p. 67. But those discharge data were under the existing permit, not the stricter originally proposed permit of 0.2 mg/l. The existing Facility does not meet the stricter proposed levels. RTC, p. 27, 47, 85. Therefore, the Region should not have looked to the Facility’s past discharge, but to the discharge that would be allowed under, for instance, a permit limit of .2 mg/l. The regulations require consideration of dilution, and dilution clearly occurs. 40 CFR § 22.44(d)(1)(ii). To ignore it based upon inapposite data is unlawful.

Finally, as to total load, the Response primarily changes the subject. The City quoted RIDEM’s comment urging “a waste load Allocation approach” (with a margin of safety). RTC, p. 69, quoting RIDEM Comments. Region 1’s RTC disagreed, without addressing RIDEM’s regulations. Citing both RIDEM’s regulations and comments, the City now urges the EAB to adopt its position, because ignoring the various sources of pollution results in an arbitrary and speculative limit.

The Response (p. 87) cannot responsibly claim that the City has merely repeated its comments below. Among other things, the City has expanded its discussion of the language of RIDEM's regulations, which the Region misread. Petition, p. 27 and n.11. The Region missed the import of RIDEM's regulations by relying so heavily upon federal regulations that actually turn on state water quality regulations. Compare Response, p. 88 with Petition, p. 27 and n. 11. The City has also appended CDM's comments and has reworked its argument to focus upon what the Region missed. To be sure, the City makes the same argument here as below, but that is a prerequisite of review.

#### **VI. THE METALS LIMITS SHOULD BE REVIEWED.**

The Response starts with an unfair procedural argument regarding metals. The City plainly asked the Region to recognize the site-specific water effects ratio for Aluminum and to strike the Aluminum limit. RTC, pp. 39-40. It specifically quoted Footnote L of the EPA guidance which gave "three major reasons why the use of Water-Effect Ratios might be appropriate." *Id.* Through the end of the comment period, neither EPA nor any other source had stated that Region 1 lacks authority to act upon the City's comments or upon Footnote L of the same EPA guidance incorporated into the water quality regulations. The Petition argues that the Region erred in refusing even to consider the totality of its own guidance, as incorporated in Massachusetts Water Quality Regulations. Since the Region disclaimed authority to do so, no issue arises over its exercise of that authority until a decision on remand.<sup>7</sup>

Nevertheless, the Response claims that the Region's overly restrictive, incorrect – and previously undisclosed – interpretation of the water quality regulations was "ascertainable." It

---

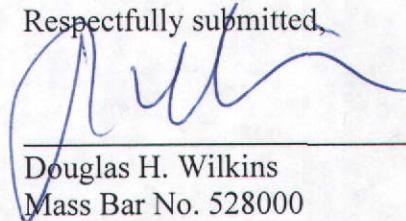
<sup>7</sup> The EAB should therefore ignore the Response's misstatement of the City's argument. The Response (at p. 90) asserts that the "City argues that the Region was mandated to apply footnote L" from the relevant EPA guidance. Instead, the City argues that the Region had authority to apply that footnote and should have decided whether to do so. On remand, the Region might exercise its authority to consider the footnote. The City will again urge it to do so. Only if the Region refused to do so would the issue posited by the Region even arise.

takes the City's Petition out of context (by refusing to acknowledge the City's true argument: the Region had the very authority that it disclaimed) and misstates the Massachusetts water quality criterion (which does not set a numeric criterion and does not adopt the numbers, excluding footnotes, in EPA's guidance). The Response is wrong to claim that this is a "challenge to the underlying water quality standard" (Response, p. 91). It is a challenge to the Region's incorrect interpretation of the water quality standard and of the Region's authority. The City raised its reliance upon footnote L, the Region said it had no authority to grant relief, and the Petition asks the EAB to rule that the Region has that authority.

### CONCLUSION

For the reasons stated in the Petition and this Reply, the EAB should grant review.

Respectfully submitted,



---

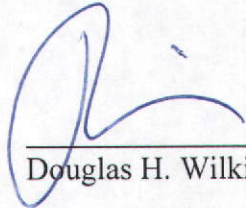
Douglas H. Wilkins  
Mass Bar No. 528000  
Anderson & Kreiger LLP  
One Canal Park, Suite 200  
Cambridge, MA 02141  
Telephone: (617) 621-6580  
Fax: (617) 621-6680

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2008, copies of the foregoing Response of the Permittee, City of Attleboro, to RIDEM's Petition for Review were sent to the following persons by first class mail, postage prepaid:

Carl Dierker  
Samir Bukhari  
Office of Regional Counsel  
U.S. EPA, Region 1  
1 Congress Street, Suite 1100  
Boston, MA 02114-2023

Susan B. Forcier, Esq.  
Department of Environmental Management  
Office of Legal Services  
235 Promenade Street, 4<sup>th</sup> Floor  
Providence, RI 02908



---

Douglas H. Wilkins