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In the Matter of: SCITUATE WASTEWATER TREATMENT PLANT NPDES PERMIT NO. MA0102695	NPDES Appeal No. 04-17

PETITIONER'S REPLY TO EPA'S RESPONSE

Now comes the Petitioner, the Town of Scituate and the Scituate Wastewater Treatment Plant ("Petitioner" or "Town"), and herby submits this written Reply to the Response brief submitted by the United States Environmental Protection Agency ("Respondent" or "EPA") in the above captioned matter. Petitioner filed its Petition for Review on December 22, 2004. The Respondent filed its Response ("Response") on February 7, 2005. Subsequent to these filings, the parties agreed to stay the proceedings while a settlement attempt was made. Both parties, however, reserved the right to file a reply to each other's initial filings with the Board in the event that a settlement was not reached. On or about June 10, 2005, it became apparent that, due to the inflexibility of the EPA on certain critical issues relating to the Town's appeal, a settlement could not be reached, and the parties requested that the stay of proceedings be lifted and the litigation in this matter re-commence. Accordingly, the Petitioner now requests that the Board grant leave to file a Reply to Respondent's Response in the above captioned matter. In submitting this Reply Brief, Petitioner states that the EPA's Response mischaracterizes

the facts of this matter and raises new issues that Petitioner did not previously have the opportunity to address as follows.

In its Response, the EPA has mischaracterized the extent of the comments submitted by the Town during the public hearings on the matter. Specifically, in its Response to the Town's Petition, where the Town challenges the EPA's determination that there is a "reasonable potential" for the Town's effluent discharges to cause or contribute to the exceedance of the State's water quality criteria on the basis that the EPA has failed to support its position with scientific fact, the EPA states that the Board should not consider the Town's position because it was not raised during the public comment period. Id. at 5-6. This narrow reading of the Town's comments during public hearing is not supported by the record. Comment 3 submitted by the Town clearly posits that the EPA and the Town had engaged in verbal discussions that resulted in a proposed solution to the mixing zone issue; whereby, it was proposed that the Town construct a pipe from the current discharge point to the Herring River.[1] As a result, in Comment 3, the Town quite clearly challenged the effectiveness and foundation for such a proposal by stating that "[c]onstruction of such a pipe would be costly and likely result in significantly more environmental impact during construction (if even allowed) than the current practice, with no change in water quality of the Herring River." Id. at 4. Accordingly, the Town did raise the issue of the State's water quality criteria and the data or lack thereof relied upon by EPA, and thus any argument relative to that issue is properly before the Board. EPA's assertion to the contrary is without merit.

[1] It has been conservatively estimated that relocating the outfall to the Herring River via directional drilling would, if such an option is possible, cost approximately $5.5-6 million. Other estimates have revealed a cost in excess of $10,000,000.00. It is also important to note that EPA has not given the Town any assurances that relocating the outfall to the Herring River would result in compliance with the challenged conditions of the 2004 permit. See Response at 13.

Moreover, the EPA now claims in its Response that the previous permit issued to Petitioner was erroneous in that it allowed the treatment of the man-made ditch as a mixing/dilution zone. This claim is made notwithstanding the failure of EPA to support any conclusion as to the propriety of the mixing/dilution zone with any evidence. Furthermore this admission is a belated attempt to justify applying general criteria of toxicity levels in its Response and warrants a reply by the Town. In its Response at pages 7-11, EPA argues that "it is not appropriate to treat the entire Tidal Creek as a mixing zone for . . . toxic pollutants. . . . [Because using said] Tidal Creek as a mixing zone would violate [the Massachusetts Water Quality Standards specified at 314 CMR 4.03(2)]." Response at 8. Notwithstanding these conclusory statements by EPA, the Town has been using the so-called tidal creek (which, in reality, is not a receiving water but rather is a simple man-made ditch that transports the treated affluent to the Herring River) for a significant period of time as a mixing zone with the approval of the Massachusetts Department of Environmental Protection. In fact, the Town, with the express consent of both the EPA and the DEP, designed and built a new treatment plan with the intent of using the tidal creek as a mixing zone.[2]

It was the EPA that unilaterally determined that the use of the mixing zone would be in violation of 314 CMR 4.03(2). A determination that was based on general criteria as defined in the EPA Water Quality Standards Handbook (2d edition), not by any

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[2] In 1997, the EPA, working in concert with the Massachusetts Department of Environmental Protection ("DEP"), issued NPDES permit for the Town's operation of a newly constructed wastewater treatment plant. The1997 permit was issued only after a thorough review by State, Federal and local officials. This review culminated in a well-reasoned conclusion, by the EPA, that the Town could discharge treated wastewater to a manmade ditch that would, in turn, safely discharge into the Herring River. The use of the manmade ditch for transport of fully treated wastewater was allowed pursuant to a longstanding policy that has been successfully implemented by the DEP. After a thorough review of this issue, the EPA's technical staff agreed that discharge in this manner would not harm the environment and, accordingly, the permit was issued to the Town.

location specific data collected at the site. Indeed, EPA has admitted that there is merely a potential for adverse impacts to aquatic organisms throughout the ditch. This admission and the underlying record is not accompanied by any data or evidence whatsoever that aquatic organisms even exist in the mixing zone. Response at 9. It is the Town's position that before such a wholesale and costly change to it permit is allowed, the EPA should have conducted a site specific analysis of the potential impact on the environment and at the very least explained its position in detail prior to the issuance of the permit. At present, the EPA is currently conducting site specific studies on certain projects in order to determine the propriety of permit conditions. The unsupported hypothesis reached by the EPA in this matter demands like treatment.

Finally, the EPA now claims that an it was erroneously complacent in allowing the Town to expend significant amounts of taxpayer monies in constructing a Wastewater Treatment Plant based on an interpretation of 314 CMR 4.03(2) that has subsequently been unilaterally changed. The EPA was not erroneously complacent in its approval of the earlier permits but rather, the EPA simply changed its collective mind when it reviewed and revised the 2004 permit to the Town. This issue alone should cause the Board to pause and assess the propriety of the EPA's actions in this matter. At the very least it is grounds for review because this issue raises an important policy consideration that should be addressed before other municipalities are subjected to the same arbitrary and whimsical decision making by the permit granting authority as the Town has in this matter. See 40 C.R.R. § 124.19(a)(2) (review by the Board is appropriate where an exercise of discretion or an important policy consideration is implicated).

In its Response, the EPA stated that "it was [a]ppropriate for the Region to [c]orrect an [c]rror in the [p]rior [p]ermit," Response at 13, because "Scituate's prior permit was aberrational,"Id. at 14, and that it was merely "[t]aking into account new insights and changes to circumstances" when it radically changed the permit conditions. Id. at 18. Accordingly, the EPA asserts that the sudden and unexpected change in interpretation of 314 CMR 4.03(2) was justified because "the clear intent of the statute [, 33 U.S.C. § 1342(k),] is that there can and indeed often must be such changes in requirements when new permits are issued after prior permit terms." Response at 15. The EPA's position clearly ignores the true intent of the statute and the Clean Water Act which is to reduce or eliminate the discharge of pollutants into the waters of the United States.

Here, in reissuing the NPDES permit, EPA used the services of different staff unfamiliar with the circumstances surrounding the prior permit and the Town's prior financial commitments. There was no change in circumstances nor were any new scientific insights revealed during the renewal process. Rather than recognize the efficacy of the 1997 permit, the new staff ignored the extensive studies underlying the 1997 permit and arbitrarily decided to alter the methodology by which treated wastewater would be discharged to the Herring River. Without refuting the merits of the prior permit and without conducting any site specific studies, the EPA simply changed its mind and issued requirements that would require the Town to abandon use of the previously approved manmade ditch and, instead, construct a new system of pipes to the Herring River. Prior to the final issuance of the 2004 permit, the Town argued against the permit change, aptly informing the EPA that the change would not result in any increased

environmental benefits and, moreover, would require the expenditure of 10-20 million dollars of improvements to a nearly new state of the art sewer plant. Nevertheless, in callous disregard for the Town's fiscal and environmental welfare, the EPA plowed forward and issued the permit with the objectionable conditions. While the DEP consented to the new permit, it is noteworthy that the mixing zone policy of DEP which the prior permit utilized remains a perfectly acceptable means of treating and discharging wastewater and there is absolutely no evidence that discharging through an outfall pipe directly to the Herring River will result in any change to the water quality of the river.

While the EPA's position may have some merit in other circumstances, where there is an actual reduction in the discharge of pollutants to the receiving waters, there also must be some limits to the discretion allowed in altering conditions in a permit; especially where, as here, the permittee has expended significant funds in reliance upon the conditions of prior permits.[3] The EPA's assertion that "any implicit and tentative DEP approval of the mixing zone in connection with its approval of the [Town's Wastewater Treatment Plant] did not bind the DEP in its later permit decisions, much less bind the EPA, much less for all time," Response at 15-16, clearly demonstrates why the Board should grant review of the Town's petition. See 40 C.R.R. § 124.19(a)(2) (review by the Board is appropriate where an exercise of discretion or an important policy consideration is implicated). Municipalities must be able to have some level of certainty

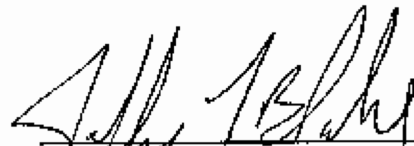
[3] The Respondent's outlandish claim that "the Town has not made any showing that it detrimentally relied on any 'approval' of the mixing zone," Response at 17, demonstrates the cavalier attitude of the EPA in this matter. The Town absolutely relied upon the approval of the mixing zone when it build its new facility. It is axiomatic that no reasonable municipality would undertake such a significant and costly project without the proper assurances that once the project was complete it would comply with the applicable state and federal permit requirements. Indeed, the plant did comply with all state and federal requirements until the EPA changed its mind with respect to the mixing zone. Conservative estimates for compliance with the current conditions of the 2004 permit range from $5.5- 6 million for the construction of an outfall pipe (provided such an option is permitted by state and federal agencies) to $29,000,000 for treatment costs to comply with the current affluent levels of the 2004 permit.

when expending significant amounts of taxpayer dollars in building treatment plants. As the EPA presently argues, and the facts of this matter clearly demonstrate, any permittee is left subject to the whims of the individual permit writers at the EPA and their subjective interpretations of the regulations unsupported by any site specific studies to support radical changes in the permit conditions.

Accordingly, for the foregoing reasons, the Board should grant the Town's Petition for Review.

PETITIONER,

By its attorneys,



Jason R. Talerman (BBO# 567927)
Jeffrey T. Blake (BBO# 655773)
Kopelman and Paige, P.C.
Town Counsel
31 St. James Avenue
Boston, MA 02116
(617) 556-0007

247952/SCIT/0157