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ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY

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

RESPONDENT'S MEMORANDUM IN FURTHER OPPOSITION TO PETITION FOR REVIEW (SUR-REPLY)

This matter involves the NPDES Permit No. MA0102695 reissued to the Town of Scituate, Massachusetts (the "Town") on November 22, 2004. The Town filed a Petition for Review on December 22, 2004, and the Region filed its Memorandum in Opposition to Petition for Review ("Response Memorandum") on February 7, 2005. The Town has now filed a "Reply to EPA's Response" dated June 16, 2005 ("Reply Memorandum"), which raises some new issues and arguments. These will be responded to in turn.

I. ARGUMENT

1. The Board Should Not Allow the Town to Continue To Raise New Issues

In its Reply Memorandum, the Town continues to try to raise new issues about the Region's determinations that the toxic metals limits are needed to protect the water quality in the Tidal Creek. The Town argues that it did not waive the right to challenge the Region's determinations because it included in its comments filed during the permit public comment period the comment that moving the treatment plant outfall would bring about "no change in water quality of the Herring River." Reply Memorandum at 2. But the Town's public comment did not raise any of the issues that the Town is seeking to raise now. Whether outfall relocation will help the water quality in the Herring River and whether the permit limits are correctly

calculated to protect the water quality of the Tidal Creek obviously are different issues.[1]

Thus this Board should follow its consistent practice and deny review of the newly raised issues. This includes denying review of the Town's demand for a site specific study, raised for the first time in its Reply Memorandum (at 4), as well as denying review of the various issues already discussed at pages 5- 6 of the Region's Response Memorandum.

Although the Town has waived its right to raise this issue, the Region further notes that if the Town wishes to pursue a study to attempt to develop site-specific criteria, it may do so. But it should follow the example of other permittees by developing a detailed proposal and providing funding. Any new information developed from such a study could be presented to the Region and evaluated as possible grounds for a future permit modification. But unless and until site specific limits are established, setting the permit limits by using the EPA recommended national criteria is appropriate and indeed is required by 314 CMR 4.05(5)(e) of the State water quality standards.

2. The Town's Reply Memorandum Contains Numerous Mis-Statements

In its Reply Memorandum, the Town erroneously characterizes the Region's statement (in the Response Memorandum at 13) that the prior permit toxic metal limits were too lenient as a "belated" admission, which the Town now needs to answer. See id. at 3. Actually, there was nothing new about the Region's "admission." The Region made clear in the permit's Fact Sheet that it had "re-evaluated" the prior permit limits and was making a "significant departure" from the approach taken in the prior permit. See Attachment E to Response Memorandum, pages 4

[1] Indeed, whether the outfall should be relocated is not even a proper issue in this permit appeal. Rather, outfall relocation is only one of several potential compliance options. It may be possible for the Town to comply with its new permit without relocating the outfall, through less costly measures such as source reduction.

and 7. Throughout the permit renewal process, the Region consistently has taken the position that the prior permit limits were too lenient and need to be corrected.

The Board should not allow the Town to divert attention from the real issues. The key issue is not when the Region first "admitted" that the prior permit limits were mistaken, but rather whether the new permit limits are appropriate. This issue has been fully briefed by both parties and should now be ruled upon by the Board.

The Town also is in error in asserting that there was no change of circumstances justifying the new permit limits. See Reply Memorandum at 5. As explained in the Response Memorandum at 14, the Town's lack of success in reducing toxics in its effluent was a change in circumstance which made it important for the Region to correct the errors in the prior permit.

The Town also is in error in asserting that it detrimentally relied on the EPA approval of the prior permit limits/mixing zone. See Reply Memorandum at 6, n. 3. First, the EPA "approval" did not occur until after the Town had completed its Facilities Plan - thus any claim that the Town carried out its treatment plant planning process in reliance on the EPA "approval" simply is not credible. Second, the Town's planning process actually appears to have proceeded on the assumption that there might be no mixing zone. As stated in the Facilities Plan, "at low tide, the effluent would account for most of the flow in the tidal ditch.... Therefore, the level of treatment must meet or exceed the water quality criteria for Class SA waters." Final Facilities Plan and Environmental Impact Report for Wastewater Management, EOEA # 5512, March 1, 1995, page I-7-3, Attachment AA hereto, Administrative Record item D2. While the Town temporarily obtained approval of a mixing zone at the end of the planning process (for the term of the prior permit), the Town has submitted nothing to show that it relied during the

planning process on a commitment that the final permit would definitely provide a mixing zone. Third, while the treatment facilities built by the Town have been operated to meet the prior permit limits, they also will be needed to help meet the limits of the new permit. The suggestion that the Town's expenditures will have been wasted if the new permit is allowed to take effect simply has been manufactured. Finally, while the Town may need to incur additional expenditures to comply with the new permit limits, a major effect of the EPA's mistaken past leniency has been to delay the need for the Town to incur these expenditures. The Town has not shown that, on balance, its needing to take additional compliance steps now will cost it more than having had to comply with tighter permit limits sooner.

3. The Board Should Reject the Town's Assertion that the Tidal Creek is Not a Receiving Water

In the Reply Memorandum, the Town has raised for the first time the claim that the Tidal Creek is a "man-made ditch" and not a "receiving water." Reply Memorandum at 3. The Board should deny review of this issue pursuant to 40 C.F.R. §§ 124.19(a) and 124.13 because it was not raised by the Town during the public comment period. Instead, in its public comments, the Town argued that the Tidal Creek should be designated as a mixing zone. See Attachment F to Response Memorandum. Mixing zones are designated within receiving waters. See EPA Technical Support Document for Water Quality-Based Toxics Control, pages 69 - 70, Administrative Record item H2. Thus, by now saying that the Tidal Creek is not a receiving water, the Town is both contradicting itself and raising a new issue. The Town has offered no explanation for its failure to timely raise this issue in its public comments.

The Board also should deny review of this issue since it was not raised as part of the Town's initial appeal. Raising an issue for the first time in a Reply Memorandum is equivalent

to filing a late appeal. See In re Rohm and Haas Co., 9 E.A.D. 499, 512-513 (EAB 2000); In re Knauf Fiber Glass, GMBH, 8 E.A.D. 121, 126 n. 9 (EAB 1999); In re Cavenham Forest Industries Inc., 5 E.A.D. 722, 729 n. 12 (EAB 1995). The Town has not established that there are extraordinary circumstances justifying such a late appeal. See In re AES Puerto Rico L.P., 8 E.A.D. 324, 329 (EAB 1999), aff'd sub. nom., Sur Contra La Contaminacion v. EPA, 202 F.3d 443 (1st Cir. 2000); In the Matter of Heritage Environmental Serv., RCRA Appeal No. 93-8 (EAB Aug. 3, 1994). Indeed, the Town has offered no explanation for its failure to raise this issue in its initial appeal.

In any event, the Tidal Creek is a "water of the United States" within the scope of the NPDES program under 40 C.F.R. § 122.1(b). The Town's claim that the Tidal Creek is not a "water of the United States" rests solely on its assertion that it is man-made. However, the Town has provided no documentation for this late claim. A map in the Town's Facilities Plan shows the Tidal Creek to be a meandering water, which suggests it is not wholly man-made. Final Facilities Plan and Environmental Impact Report for Wastewater Management, EOEA # 5512, March 1, 1995, figure II-7-1, Attachment BB hereto, Administrative Record item D2. The map further shows that the Tidal Creek is located within a wetlands area, which is adjacent to the Atlantic Ocean and subject to Clean Water Act jurisdiction under part (g) of the definition of "waters of the United States" in 40 C.F.R. § 122.2. Even assuming that the Tidal Creek itself was man-made, its construction would have occurred within this natural wetlands area. Altering a natural wetlands area does not make the water "man-made."

Moreover even if the Tidal Creek was a man-made water, the law is clear that it would not be excluded from Clean Water Act jurisdiction on that basis. See, e.g., United States v.

Gerke Excavating, Inc., __ F.3d __, 2005 WL 1433882, Slip. op. No. 04-3941 (7th Cir. June 21, 2005); United States v. Newdunn Associates, 344 F.3d 407, 417 (4th Cir. 2003), cert. denied, 541 U.S. 972 (2004); Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 533 (9th Cir. 2001); Leslie Salt Co. v. United States, 896 F.2d 354, 358 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991); In re City of Marlborough, Massachusetts Easterly Wastewater Treatment Facility, NPDES Appeal No. 04-12 (EAB March 11, 2005), slip. op. at 11, n.17. As Judge Posner recently has noted, "[a] stream can be a tributary; why not a ditch? A ditch can carry as much water as a stream, or more; many streams are tiny. It wouldn't make much sense to interpret the [CWA] regulation as distinguishing between a stream and its manmade counterpart." Gerke Excavating, Inc., supra, slip op. at 3.

The Tidal Creek flows to the Herring River which flows to the North River which in turn flows to the Massachusetts Bay/Atlantic Ocean. See Fact Sheet (Attachment E to Response Memorandum) at 3. Thus the Tidal Creek falls within part (e) of the definition of "waters of the United States" in 40 C.F.R. § 122.2 (tributaries to waters used in interstate or foreign commerce and/or tributaries to territorial seas). See also Pepperell Associates v. EPA, 246 F.3d 15 (1st Cir. 2001) (tributary brook as well as adjoining river are "waters of the U.S.").

Thus review should be denied regarding this issue even if the Board finds that the Town did not waive its rights by failing to timely raise the issue.

II. CONCLUSION

For the reasons explained above and in the Region's Response Memorandum, the Petition for Review should be denied.

Respectfully submitted,

Jeffry Fowley
Senior Assistant Regional Counsel
U.S. EPA, Region I
One Congress St.
Boston, MA 02114
(617) 918-1094

Dated: 6-28-05

OF COUNSEL:
Lee Schroer/Mary Ellen Levine
Office of General Counsel
MC-2355(A)
1200 Penn. Ave., N.W.
Washington, D.C. 20460

ATTACHMENT AA

overflow pipe in the sand filter beds. The tidal ditch discharges to the Herring River which flows to the North River before discharging into Massachusetts Bay. The location of the Scituate WPCP, tidal ditch, the Herring River and Massachusetts Bay are shown in Figure I-7-1.

Discharge of the effluent from the Scituate WPCP to the tidal ditch is considered a discharge into Class SA waters because the ditch is subject to the rise and fall of the tide, and all such waters in Scituate are Class SA. Also, at low tide, the effluent would account for most of the flow in the tidal ditch. There would be little, if any, dilution of effluent entering the ditch. Therefore, the level of treatment must meet or exceed the water quality criteria for Class SA waters.

The Commonwealth of Massachusetts Water Quality Standards for SA waters are summarized in Table I-7-1, which also includes the comparable EPA water quality criteria. The Commonwealth Water Quality Standards include both quantitative and qualitative standards for parameters. Quantitative standards exist for dissolved oxygen, temperature, pH and fecal coliform. Additional narrative requirements are promulgated for the following parameters: aesthetics; solids; color and turbidity; oil and grease; nutrients; taste and odor; radioactive substances; and bottom pollutants. The Commonwealth Standards also include a narrative requirement for toxic pollutants. This narrative, however, references the EPA Water Quality Criteria which provide numerical criteria for priority pollutants.

The principal impacts of the estuarine disposal alternative would be concerns regarding dissolved oxygen, toxic chemicals, nutrients, and coliform levels. Dissolved oxygen depletion in the tidal ditch and estuary would be a function of the wastewater volume, strength (BOD_5 and suspended solids), temperature, dissolved oxygen content, and dilution with estuarine waters. In surveys conducted in June and August 1986, BOD_5 concentrations at the distal end (mouth) of the tidal ditch leading from the treatment plant to the Herring River were 2.2 mg/l and 5.0 mg/l, respectively. These concentrations were slightly higher than BOD levels at most other Herring River stations, and were comparable to levels found in Commonwealth water quality surveys in

ATTACHMENT BB

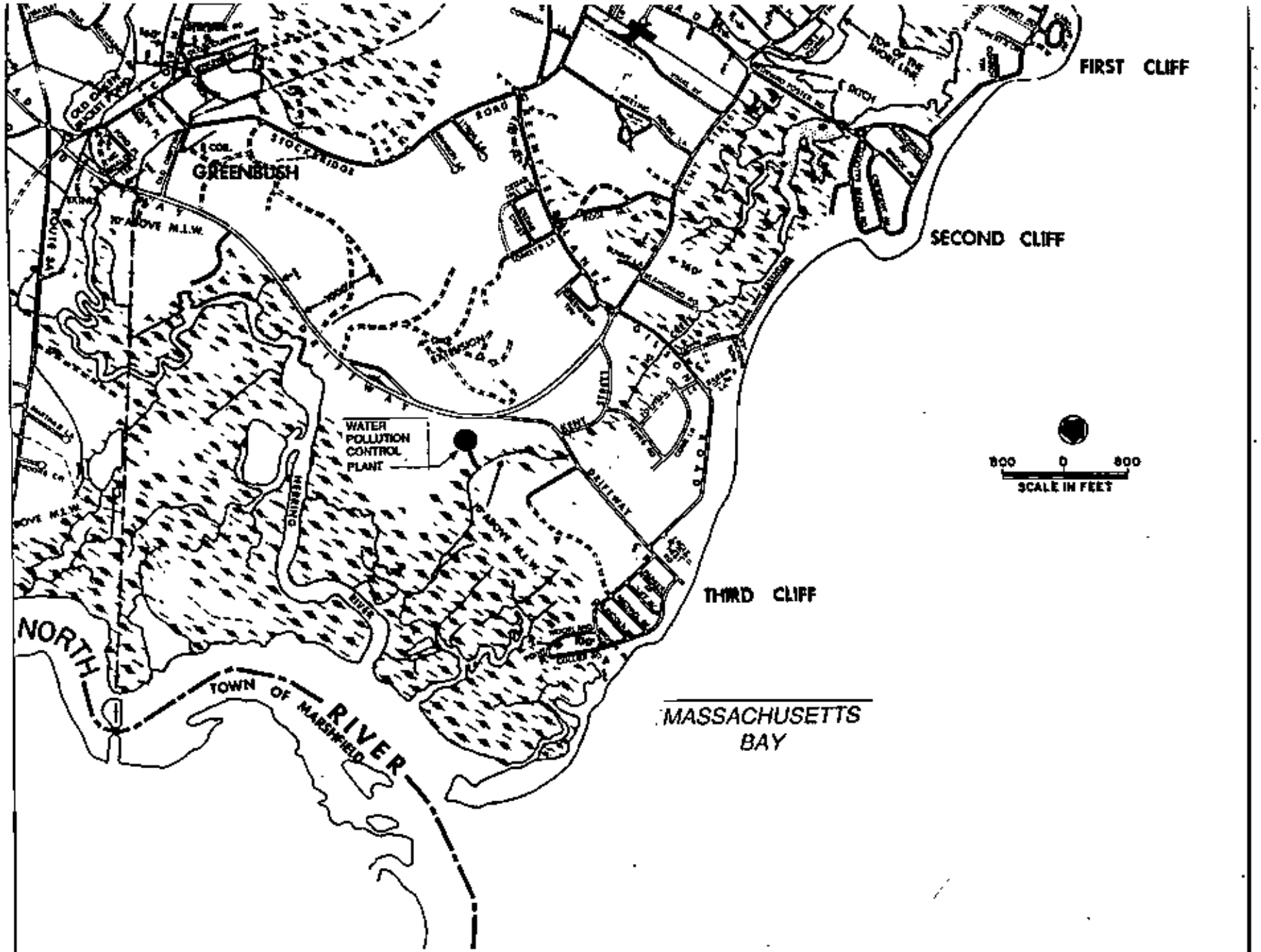

FIGURE II-7-1. NORTH RIVER AND MASSACHUSETTS BAY STUDY AREA

METCALF & EDDY

CERTIFICATE OF SERVICE

I, Jeffry Fowley, hereby certify that on the date below, I served a copy of the foregoing (i) Opposition to Motion for Leave to File a Reply Brief; Motion for Leave to File Sur-Reply Brief if Filing of Reply Brief is Allowed, and (ii) Respondent's Memorandum in Further Opposition to Petition for Review (Sur-Reply) , by first class mail, postage prepaid, to the following counsel of record for the Town of Scituate:

John W. Giorgio
Jason R. Talerman
Kopelman and Paige, P.C.
31 St. James Ave.
Boston, MA 92116

Dated: 6-28-05