

LEONARD KOPELMAN
DONALD G. PAIGE
ELIZABETH A. LANE
JOYCE FRANK
JOHN W. GIORGIO
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JOSEPH L. TEHAN, JR.
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DEBORAH A. ELIASON
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LAUREN F. GOLDBERG
MICHELE E. RANDAZZO
ILANA M. QUIRK

JANET HETHERWICK PUMPHREY
DIRECTOR WESTERN OFFICE

KOPELMAN AND PAIGE, P. C.

ATTORNEYS AT LAW

101 ARCH STREET
BOSTON, MA 02110-1109

(617) 556-0007
FAX (617) 654-1735

LENOX OFFICE
(413) 637-4300

NORTHAMPTON OFFICE
(413) 585-8632

WORCESTER OFFICE
(508) 752-0203

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February 7, 2007

BY FEDERAL EXPRESS

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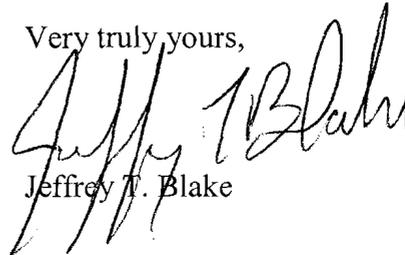
Re: North Attleboro (Massachusetts) Waterwater Treatment Facility
NPDES Permit No. MA0101036

Dear Sir/Madam:

Enclosed herewith, please find one (1) original and five (5) copies of the Town of North Attleboro's Petition for Review for filing and consideration.

Please contact me with any questions that you may have.

Very truly yours,



Jeffrey T. Blake

JTB/jmb

Enc.

cc: Town Administrator
DPW Director
Helen Gordon, Woodard and Curran
Ann Williams, Esq., U.S. Environmental Protection Agency
Rebecca Cutting, MA Department of Environmental Protection

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ENVIR. APPEALS BOARD
NPDES Appeal No. _____

In re:

NORTH ATTLEBORO WASTEWATER
TREATMENT FACILITY

NPDES Permit No. MA0101036

PETITION FOR REVIEW

I. INTRODUCTION

Now come the Town of North Attleboro Board of Public Works and the North Attleboro Wastewater Treatment Facility (“the Town” or “North Attleboro”) and, pursuant to 40 CFR 124.19(a) hereby petition for review of National Pollutant Discharge Elimination System (“NPDES”) Permit No. MA0101036 (the “New Permit”) dated January 4, 2007. (A copy of the Permit and the cover letter accompanying the same are attached hereto as Exhibit A). The Permit authorizes the Town to discharge to the Ten Mile River.

As discussed in greater detail below, the Town asserts that certain conditions of the New Permit are based upon clearly erroneous findings of fact and errors of law and that since the data relied upon by the EPA in determining certain nutrient limits is outdated, EPA’s reliance upon such data is arbitrary and capricious this Board should grant review. Further, review of this matter is particularly apt where, as here, the EPA has ignored site specific data that justifies keeping the permit levels for copper and aluminum at the 1999 permit levels.

Specifically, North Attleboro contends that the Board should grant review

because:

- 1) EPA has based certain conditions of the New Permit on non site specific data where more relevant site specific data is available;
- 2) EPA has incorrectly interpreted the Commonwealth's Water Quality Standards;
- 3) The copper and aluminum levels contained in the New Permit are arbitrary and capricious, and not based on reliable factual data; and
- 4) There is no record evidence to support more stringent copper, aluminum, phosphorus and nitrogen limits.

For further reasons therefor, the Petitioner relies upon the following.

II. RELEVANT FACTS

1. The Town of North Attleboro is a political subdivision of the Commonwealth of Massachusetts.
2. The Town of North Attleboro is the owner and operator of a certain wastewater disposal plant known as the North Attleboro Wastewater Treatment Facility ("NWTF"). The NWTF has an address of Cedar Road, North Attleboro, Massachusetts.
3. Pursuant to the Federal Clean Water Act, the Town is authorized to discharge from the NWTF to Ten Mile River pursuant to the terms of an NPDES permit issued on September 30, 1999 ("the 1999 Permit"). (A copy of the 1999 Permit is attached hereto as Exhibit B).
4. The 1999 Permit is still in effect since the Town has applied for its renewal and that process is still ongoing.
5. The Town submitted a permit renewal application to the Environmental Protection Agency ("EPA") for the reissuance of the 1999 Permit to discharge treated domestic sewerage effluent from NWTF the Ten Mile River.

6. In August-September, 2006, the EPA and the Massachusetts Department of Environmental Protection (“DEP”) solicited public comments on a draft NPDES permit developed pursuant to the permit renewal application from the Town. (A copy of the draft permit is attached hereto as Exhibit C).

7. The engineering firm of Woodard and Curran submitted comments on behalf of the Town. (The Comments and EPA’s response thereto are attached to the New Permit at Exhibit A).

8. On January 4, 2007 the EPA responded to Comments on the draft permit and issued NPDES Permit No. MA0101036, the New Permit, to the Town.

9. The Town received EPA’s response and the New Permit on January 9, 2007.

10. The New Permit did not address to the satisfaction of the Town, any of the comments submitted by the Town’s consultant. Indeed, based on review of the conditions contained in the New Permit and EPA’s responses to the Town’s Comments on said proposed conditions, the Town has determined that the factual and legal basis cited by the EPA for its issuance of certain conditions of the New Permit are clearly erroneous and in some cases based on significant misinterpretations of the Massachusetts Water Quality Standards.

11. The Town appeals the New Permit with respect to the following new conditions/changes contained in the New Permit;

- a. the more stringent limits on the discharge of copper, aluminum, phosphorus and nitrogen.

III. ARGUMENT

A. STANDARD OF REVIEW

In proceedings under 40 C.F.R. §124.19(a), the Environmental Appeals Board (“the Board” or “EAB”) should review EPA’s decision on an NPDES permit when the petition for review establishes that the permit condition in question is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that the Board determines warrants review. 40 C.F.R. §124.19(a); In re: Gov’t of D.C. Mun. Separate Storm Sewer Sys., 10 E.A.D. 323, 333 (EAB 2000).

In this matter, as outlined above and discussed in greater detail below, numerous conditions of the New Permit are based on clearly erroneous findings of fact and conclusions of law and implicate significant policy considerations; therefore, the Board should grant the Town’s request for review.

B. The Nitrogen limit in the New Permit is based on clearly erroneous findings of fact and is arbitrary and capricious

The EPA has significantly reduced the nitrogen limits contained in the New Permit without adequate evidence to support this reduction. The 1999 Permit allows average monthly nitrogen limits of 10 mg/l whereas the New Permit allows an average monthly limit of 8 mg/l. Compare Exhibits A and C. The nitrogen limits in the New Permit are based on clearly erroneous findings of fact and are therefore, arbitrary and capricious. Specifically, in Comment #7 to the draft permit, Exhibit C, the Town observed, in sum, that the proposed new nitrogen limits were arbitrary and capricious because said limits were not based on site specific data but rather assumptions and models. EPA responded that its determination and subsequent setting of permit levels for

nitrogen was based on stream data collected in 1995-1996 and estimated effluent data based on 2000-2002 reported effluent data. See Exhibit C at Response #7.

The EPA's methodology for establishing the nitrogen limits in the final permit is flawed. Part of EPA's methodology was based on the assumption that the current performance at the NWTf could not be maintained at the NWTf if it were operating at full design capacity. See Exhibit A at Response #7. The Project Engineering Report ("PER") prepared for the community has projected future flows for 2023 to be 2.69 MGD versus current domestic flows of 3.34 MGD which is still significantly less than the design capacity of 4.61 MGD of the NWTf.¹ A true and accurate copy of the PER is attached hereto as Exhibit D. This implies that the current performance can be maintained since the NWTf would be operating at less than full design capacity and close to current flow capacity. In other words, the assumption by EPA that current performance at the NWTf could not be maintained is incorrect. Therefore, any nitrogen limit set using this incorrect assumption is erroneous both factually and as a matter of law. Accordingly, the current 1999 permit levels for Nitrogen are sufficient to protect the environment and EPA's sudden and significant change to more stringent limits is arbitrary and capricious and based on a mistaken assumption.

C. EPA incorrectly interpreted the Commonwealth's Water Quality Standards when it set the New Permit Phosphorus limit

In setting the new phosphorus limits, the EPA has incorrectly interpreted the Commonwealth's Water Quality Standards, therefore, any reliance on the misinterpreted

¹ The Town has and is currently undertaking an extensive I/I removal program which will significantly reduce I/I. The above quoted projected future flows for 2023 of 2.69 MGD assumes a 50% reduction in the I/I, which is reasonable to assume can be accomplished over a 20 year planning period. Also, this assumes NO major expansion to the sewer system occurs during the planning period and that flow increase is proportional to the projected population growth of 0.06% per year that was estimated by the Southeastern Regional Planning and Economic Development District.

Water Quality Standards are erroneous as a matter of law. Specifically, in Comment #4 the Town contested that the proposed change in the total phosphorus limit from average monthly/average weekly/maximum daily of 1mg/1.5mg/l to 2mg/l to 0.2mg/l. See Exhibit A. The Town's basis for contesting the increased limit was and still is that there is no regulatory basis for imposing a more stringent phosphorus discharge standard on the Town. In its response, EPA states that the criteria for nutrients are found at 314 CMR §4.04(5), as part of the state's anti-degradation provisions. This section requires that "any existing point source discharge containing nutrients in concentrations which encourage eutrophication or growth of weeds or algae shall be provided with the highest and best practicable treatment to remove such nutrients." See Exhibit A at Response #4. Mistakenly believing that 314 CMR §4.04(5) required the highest and best practical treatment to remove phosphorus from the Town's discharge, EPA, proposed new more stringent phosphorus limits.

EPA has misinterpreted the Massachusetts Water Quality Standards. In its response to the Town's Comments, EPA asserts, citing the above quoted sentence in 314 CMR § 4.04(5) as set forth below, that the Commonwealth's Water Quality Standards require the imposition of Highest and Best Practical Treatment for phosphorus for any discharge, not just discharges to lakes and ponds as justification for the increase. See Exhibit C at Fact Sheet p. 7.

The relevant language of the current water quality standards is as follows:

(5) Control of Eutrophication. From and after the date 314 CMR 4.00 become effective there shall be no new or increased point source discharge of nutrients, primarily phosphorus and nitrogen, directly to lakes and ponds. There shall be no new or increased point source discharge to tributaries of lakes or ponds that would encourage cultural eutrophication or the growth of weeds or algae in these lakes or ponds. *Any existing point source discharge containing nutrients in*

concentrations which encourage eutrophication or growth of weeds or algae shall be provided with the highest and best practical treatment to remove such nutrients. Activities which result in the nonpoint source discharge of nutrients to lakes and ponds shall be provided with all reasonable best management practices for nonpoint source control. 314 CMR 4.04(5) (emphasis supplied).

The entire above quoted paragraph discusses the control of eutrophication in lakes and ponds and tributaries thereof. The Town, however, does not discharge to a lake, pond or tributary thereof. Rather the Town's discharge flows into the Ten Mile River which in turn flows into the Narragansett Bay. Because the discharge from the NWTF is not to a lake, pond or tributary thereof, 314 CMR § 4.04(5) is inapplicable and certainly does not provide an adequate legal basis for increasing the phosphorus limits in the New Permit.

Although EPA does not claim that the Town's discharge is to a lake or pond, notwithstanding the plain language of the above quoted regulation, EPA, in Response #4, incorrectly asserts the italicized sentence applies to all discharges, not just those to lakes and ponds and tributaries thereof. This strained interpretation of 314 CMR § 4.04(5) is a clearly erroneous conclusion of law.

Contrary to EPA's position, it is well-settled that "the plain meaning of statutory language, as derived from the whole of the statute, including its overall policy and purpose, controls." Rolland v. Romney, 318 F.3d 42, 48 (1st Cir. 2003)(emphasis supplied). Thus, "[r]ather than culling selected words [or sentences] from a statute's text and inserting them in an antiseptic laboratory setting, [an agency] engaged in the task of statutory interpretation must examine the statute as a whole, giving due weight to design, structure and purpose, as well as to aggregate language." Cable Vision of Boston, Inc. v. Public Improvement Commission of Boston, 184 F.3d 88, 101 (1st Cir. 1999)(quoting O'Connell v. Shalala, 79 F.3d 170, 178 (1st Cir. 1996).

In this matter, the EPA cherry picked a single sentence and applied it out of context so as to achieve the result it desired. When read as a whole, it is clear that 314 CMR 4.04(5) was intended to control eutrophication in lakes, ponds and tributaries thereof, and there is no language in said section to suggest that it is intended to apply to rivers and streams (other than tributaries to lakes and ponds).

Indeed, the DEP has acknowledged that the existing language only applies to lakes, ponds and tributaries thereof. The Department has promulgated new, proposed water quality standards which are not yet adopted and approved by EPA. In describing these new standards, the Department clearly states as follows:

Nutrients/Control of Eutrophication 314 CMR 4.05(5)(c): Cultural eutrophication now is addressed in the narrative nutrient criteria. *The resulting provision is expanded to ensure that all surface waters, not just lakes and ponds, are protected from excessive nutrients.* (See Massachusetts Department of Environmental Protection, Proposed Water Quality Standards Improvements, attached hereto as Exhibit E)(emphasis supplied).

Obviously, an agency's interpretation of regulations it is authorized to promulgate is given great deference. South Shore Hosp., Inc. v. Thompson, 308 F.3d 91, 97 (1st Cir.2002) ("Courts withhold such deference only when the agency's interpretation of its regulation is plainly erroneous or inconsistent with its language"); see also Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)("[w]here Congress has entrusted rulemaking and administrative authority to an agency, courts normally accord the agency particular deference in respect to the interpretation of regulations promulgated under that authority). Here, DEP has acknowledged that the existing regulations apply only to lakes, ponds, and tributaries thereof not to discharges to streams. Accordingly, EPA's position that 314 CMR 4.04(5) applies to all sources is based on a clearly erroneous conclusion of law.

Furthermore, in its Response #4 to the Town's comment, the EPA also justifies the new limit by stating "that evaluations of the receiving water indicate that it is not attaining water quality standards due to phosphorus. The impacts associated with the excessive loading of phosphorus are documented in the Ten Mile River Basin 1997 Water Quality Assessment Report published by the MassDEP in March 2000." See Exhibit A at Response #4.

EPA's methodology for establishing the phosphorous levels lower than current levels in the final permit is flawed because it did not take into account the cumulative effect of the reduced phosphorus limits in the 1999 permit. Specifically, while the receiving water in 2002 was still eutrophic; however, the NWTf was NOT consistently meeting the 1999 permit limits of 1.0 mg/l until May 2001. Further reduction in the effluent phosphorus concentration from the NWTf has occurred since then. Particularly, between May 2003 and April 2004 the NWTf was averaging between 0.6 and 1.1 mg/l for its phosphorus discharge, which is after the 2002 study. EPA has not allowed sufficient time to pass to determine if, once met, the 1999 permit limit is effective. It takes time for the impacts of reduced phosphorus discharge to be realized. The time period between May 2001 and the 2002 study is too short. In light of the fact that the EPA has a "No Backsliding" policy it is in the best interest of the public to conduct another permit period to assess the long term reduction impacts to the water body based on the reduction in phosphorous loadings.

Therefore, because the existing water quality standards cited by the EPA do not apply to the North Attleboro discharge, EPA's reliance on 314 CMR § 4.04(5) as a basis for establishing a more stringent phosphorus limit is erroneous as a matter of law,

therefore, the phosphorus limit of the New Permit should be stricken, and the limit set forth in the 1999 Permit should remain in effect. Additionally, since the New Permit levels are based on studies conducted prior to the more stringent 1999 permit levels without any studies to determine what affect the 1999 permit levels have had on the water quality the New Permit levels are not based on any site specific data and therefore, are arbitrary and capricious.

D. EPA's Methodology for establishing the Copper and Aluminum levels in the New Permit is arbitrary and capricious

The methodology used by the EPA in setting the copper and aluminum levels in the New Permit is arbitrary and capricious. Particularly, the 1999 Permit contained copper and aluminum average monthly limits of 20 ug/l and 140 ug/l respectively; whereas, in the New Permit the EPA has significantly reduced the average monthly limits of copper and aluminum to 9.9 ug/l and 92 ug/l respectively. In Comment #6, the Town objected to the significantly more stringent copper and aluminum levels contained in the New Permit since the prior limits were based on in-situ testing conducted by the DEP and no further studies had been conducted that support the more stringent permit levels. Notwithstanding these drastically more stringent copper and aluminum levels in the New Permit, there is no evidence of a pattern of increasing presence of these metals. Therefore, absent a new site specific study indicating that the copper and aluminum levels contained in the 1999 permit are causing environmental damage, there is no basis for the significantly more stringent levels contained in the New Permit.

Specifically, the EPA in their response to the Town's comments on the draft permit limits calculated metal limits based on recommended water quality criteria found in the National Recommended Water Quality Criteria 2002. See Exhibit A Response #6.

This criterion is outdated since more recent studies have been conducted by the EPA and independent researchers on revised ambient water quality criteria for copper using the biotic ligand model (“BLM”). In 2003, EPA published the 2003 Draft Update of Ambient Water Quality of Criteria for Copper. A true and accurate copy of the 2003 Update is attached hereto as Exhibit F. This draft document updated freshwater and saltwater aquatic life criteria for copper. In addition to incorporating newly available data, the freshwater criteria also included research into a model to predict copper toxicity and allowed for its use in calculation of site-specific water quality criteria for copper using the BLM. The BLM takes into account the fact that most natural water bodies have characteristics that reduce copper’s toxicity such as hardness, dissolved organic carbon, pH and alkalinity. To date the BLM results have shown that the risk associated with ambient copper is much less than had previously been thought based on results obtained elsewhere. Use of this model is expected to show higher copper discharge limits than those currently shown in the Town’s permit may be permitted without causing environmental harm. Accordingly, at this time there is no evidence that the significantly more stringent copper and aluminum levels in the New Permit will have any beneficial impact on the water quality of the Ten Mile River. Nor is there any evidence that suggests that the levels contained in the 1999 permit are inadequate.

In addition, EPA acknowledged that the DEP has in the past conducted site specific studies for metals, which are described in more detail below, but also acknowledged that EPA did not consider these studies since DEP did not revise its water quality standard to reflect the site specific criteria. Instead EPA used the National Recommended Water Quality Criteria 2002, which are not site specific. The Town has

no influence on the DEP establishment of revised water quality standards and should not be penalized for DEP's failure to revise its water quality standards within the time frame required for the Town's NPDES permit renewal. Accordingly, EPA should have used the site specific information available to it in setting permit limits but instead choose to ignore the site specific data and used a more general National Water Quality Criteria 2002.

An abstract from a joint EPA and DEP study completed in 1984 states "The United States Environmental Protection Agency Region I and the Massachusetts Division of Water Pollution Control" undertook an intensive monitoring program of the waters of the Ten Mile River Basin in 1984. A true and accurate copy of the 1984 study is attached hereto as Exhibit G. The purpose of the program was to evaluate all environmental components of the basin related to water quality and biological integrity. Those results were used to determine effluent limitations for all significant dischargers to the Basin. The findings of the program indicated that the Ten Mile River was biologically stressed and was toxic, to varying degrees, to aquatic organisms. Many wastewater discharges were extremely toxic and significantly impacted the receiving stream and its biota. Heavy metals were prevalent throughout the system, particularly in the numerous impoundments on the Ten Mile River. The limitations for discharge to the river are very restrictive for heavy metals in order to eliminate toxicity and prevent further accumulation of metals in the sediment of the river.

To address the issues of the heavy metals noted above the study recommended the following heavy metal limits for the Town:

Metal	Maximum Daily, $\mu\text{g/l}$	Average Monthly, $\mu\text{g/l}$
Aluminum	140	140
Copper	20	20

These site specific heavy metal limits are significantly less stringent than the heavy metal limits in the New Permit, yet, the EPA has cited no data to justify the more stringent limits. Accordingly, until additional studies are completed the New Permit's copper and aluminum limits should reflect the site specific recommendations from this 1984 report or at the very least remain as they were in the previous permit. Otherwise, the EPA is simply arbitrarily ascribing a copper and aluminum limit with no empirical foundation.

Moreover, EPA's treatment of other similarly situated treatment facilities underscores the arbitrary nature of the New Permit's copper and aluminum levels. For instance, the 2006 Draft NPDES Permit No. MA0100595 for the City of Attleboro Water Pollution Control Facility, also a discharge to the Ten Mile River, includes an average monthly copper discharge limitation of 13.0 $\mu\text{g/l}$ and a maximum daily copper limitation of 19.6 $\mu\text{g/l}$. A true and accurate copy of 2006 Draft Attleboro NPDES Permit is attached hereto as Exhibit H. Whereas the North Attleboro permit limits for copper include a much more stringent 9.9 $\mu\text{g/l}$ average monthly discharge and a maximum daily discharge of 14.8. See Exhibit A. For some unknown reason, EPA saw fit to allow significantly higher limits in the Attleboro permit even though the permitted monthly average flow discharge limitation from the Attleboro Water Pollution Control Facility is

8.6 MGD almost twice the 4.61 MGD of the NWTF which of course means that the Attleboro discharge has a greater impact on the conditions of the receiving water.

Similarly the Attleboro permit includes an average monthly aluminum discharge limitation of 122 $\mu\text{g/l}$ and a maximum daily aluminum discharge limitation of 950 $\mu\text{g/l}$. See Exhibit H. Whereas the North Attleboro permit requires a much more stringent average monthly aluminum discharge of 92 ug/l and a maximum daily limitation of 140 ug/l . See Exhibit A. These represent mass loadings approximately 2-1/2 times greater than what is being permitted from the NWTF.

EPA has presented no data to justify treating North Attleboro differently than Attleboro. Rather it is clear that North Attleboro is being penalized with significantly more stringent permit levels to compensate for Attleboro's higher levels of discharge. This approach is wholly arbitrary and capricious and as such the metals limits of the 1999 Permit should remain in effect.

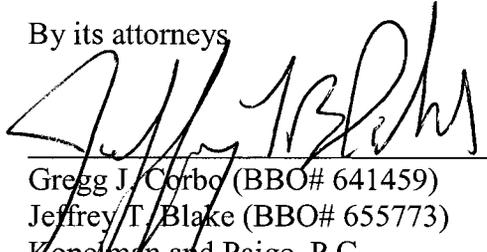
IV. CONCLUSION

For the foregoing reasons, the Board should grant review and order the EPA to amend the New Permit as follows:

1. Restore the copper, aluminum, phosphorus, and nitrogen limits to the 1999 Permit levels.

Town of North Attleboro

By its attorneys



Gregg J. Corbo (BBO# 641459)
Jeffrey T. Blake (BBO# 655773)
Kopelman and Paige, P.C.

Town Counsel
101 Arch Street
12th Floor
Boston, MA 02110-1109
(617) 556-0007