

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

<hr/>)	
)	
UPPER BLACKSTONE WATER)	NPDES Appeal Nos. 09-06
POLLUTION ABATEMENT DISTRICT,)	
MILLBURY, MASSACHUSETTS)	
)	
NPDES Permit No. MA0102369)	
<hr/>)	

MOTION OF THE PERMITTEE TO CORRECT THE TRANSCRIPT

Upper Blackstone Water Pollution Abatement District (the “Permittee” or “District”), respectfully requests that the Environmental Appeals Board (the “Board”) accept certain corrections to the written transcript record of the oral arguments made by counsel for the District before the Board on October 29, 2009. A copy of the proposed corrections are attached to this Motion as Attachment 1. In support of its Motion, the District states as follows:

1. That the Board heard oral argument in the Matter of In Re: Upper Blackstone Water Pollution Abatement District, Milbury, Massachusetts, NPDES Permit No. MA0102369, NPDES Appeal No. 09-06 on October 29, 2009 (“Oral Argument”).
2. The transcript of the Oral Argument (“Transcript”) became available for review on or about November 17, 2009, and counsel for the Permittee immediately identified various discrepancies between the statements made before the Board and the statements reflected in the Transcript.

3. To confirm whether those or any other discrepancies existed, Permittee contacted the Clerk of the Board on November 30, 2009 and December 2, 2009 to determine if an audio recording of the Oral Argument was available for review.
4. At the Clerk of the Board's direction, Permittee filed a Freedom of Information Act ("FOIA") request on December 8, 2009 to obtain an audio and/or video recording of the Oral Argument.
5. The Board responded to Permittee's FOIA request on or about January 6, 2010 with a video copy of the Oral Argument.
6. Permittee has reviewed the video recording, compared it to the Transcript, and confirms that discrepancies do exist between the Transcript and the Oral Argument made by Permittee before the Board, as evidenced by Attachment 1.
7. If not corrected, many of the discrepancies could prejudice Permittee by either confusing issues presented by Permittee to the Board, or, in some instances, stating the exact opposite of what Permittee presented to the Board.

WHEREFORE, the Permittee respectfully requests that the Board accept the corrections to the Transcript attached hereto and enter them onto the docket for full consideration by the Board in this matter.

Respectfully submitted,
UPPER BLACKSTONE WATER
POLLUTION ABATEMENT DISTRICT
By its attorneys,



BOWDITCH & DEWEY, LLP
Robert D. Cox, Jr., Esquire
Norman E. Bartlett, II, Esquire
311 Main Street
P.O. Box 15156
Worcester, MA 01615-0156
(508) 926-3409
(508) 929-3012 Fax

BARNES & THORNBURG LLP
Fredric P. Andes, Esq.
Erika K. Powers, Esq.
Suite 4400
One N. Wacker Drive
Chicago, Illinois 60606-2809
(312) 214-8310
(312) 759-5646 Fax

BARNES & THORNBURG LLP
Nathan A. Stokes, Esq.
750 17th St. NW, Suite 900
Washington, DC 20006-4675
(202) 371-6376
(202) 289-1330 Fax

February 18, 2010

CERTIFICATE OF SERVICE

I, Nathan A. Stokes, hereby certify that I have served a copy of the foregoing on the following by mailing same, postage prepaid, this 18th day of February 2010, to:

Karen McGuire, Esq.
USEPA - Region 1
1 Congress Street, Suite 1100
Mail Code CDW
Boston, MA 02114-2023

John Davenport
Conservation Law Foundation
62 Summer Street
Boston, MA 02110-1016

J. Bradford Lange
Sewer Commission
Town of Millbury, Massachusetts
Municipal Office Building
127 Elm Street
Millbury, MA 01527

Karen L. Crocker
MA Dept. of Environmental Services
Office of General Counsel
One Winter Street
Boston, MA 02108

Christopher M. Kilian
Conservation Law Foundation
15 East State Street, Suite 4
Montpelier, VT 05602

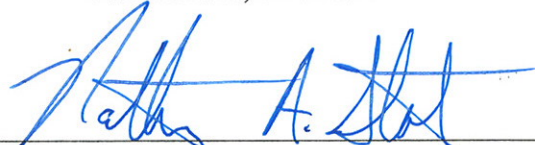
James Shuris
Director of Public Works
Town of Holden, Massachusetts
Holden, MA 01520

Donald G. Manseau
Cherry Valley Sewer District
P.O. Box 476
Leicester, MA 01524

Susan B. Forcier
Dept. of Environmental Management
Office of Legal Services
235 Promenade Street, 4th Floor
Providence, RI 02908-5767

David Mears
Environmental and Natural
Resources Law Clinic
Vermont Law School
P.O. Box 96, Chelsea Street
South Royalton, VT 05068

Northern RI Chapter 737 Trout
Unlimited
c/o Roland C. Gauvin
2208 Mendon Road
Cumberland, RI 02864


Nathan A. Stokes

Dated: , 2009

ATTACHMENT 1
EXCERPTED TRANSCRIPT WITH REQUESTED
CORRECTIONS

Capital Reporting Company

Oral Argument - 10.29.09

page 1

BEFORE THE ENVIRONMENTAL PROTECTION APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

IN RE:

UPPER BLACKSTONE WATER

POLLUTION ABATEMENT DISTRICT,

NPDES PERMIT NO. MA0102369

NPDES APPEAL NOS.

08-11 TO 08-18

&09-06

Washington, D.C.

Thursday, October 29, 2009

The above-entitled matter came on for ORAL

ARGUMENT, pursuant to notice, at 1201 Constitution

Avenue, Northwest, Washington, D.C., before

Constance H. Rhodes, of Capital Reporting Company,

a Notary Public in and for the Commonwealth of

Virginia, commencing at 10:00 a.m., before the

HONORABLE JUDGES CHARLES SHEEHAN, ANNA A. WOLGAST,

and KATHIE A. STEIN.

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

Page 2

Capital Reporting Company

Oral Argument - 10.29.09

1 A P P E A R A N C E S

2 On behalf of CONSERVATION LAW FOUNDATION:

3 CHRISTOPHER KILIAN, ESQUIRE

4 Conservation Law Foundation

5 15 East State Street

6 Suite 4

7 Montpelier, Vermont 05602

8 (802) 223-5992

9 On behalf of THE ENVIRONMENTAL PROTECTION AGENCY:

10 KAREN MCGUIRE, ESQUIRE

11 AMANDA J. HELWIG, ESQUIRE

12 EPA - New England, Region 1

13 One Congress Street

14 Suite 1100 (RAA)

15 Boston, Massachusetts 02114

16 (617) 918-1180

17 On behalf of THE MUNICIPALITIES:

18 ROBERT D. COX, ESQUIRE

19 Bowditch & Dewey, LLP

20 311 Main Street

21 Worcester, Massachusetts 01615

22 (508) 926-3409

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

Capital Reporting Company

Oral Argument - 10.29.09

Page 3

1 On behalf of UPPER BLACKSTONE WATER POLLUTION

2 ABATEMENT DISTRICT:

3 FREDERIC P. ANDES, ESQUIRE

4 Barnes & Thornburg LLP

5 One North Wacker Drive

6 Suite 4400

7 Chicago, Illinois 60606

8 (312)357-1313

9 On behalf of the MASSACHUSETTS DEPARTMENT OF

10 ENVIRONMENTAL PROTECTION (MassDEP):

11 MACDARA FALLON, ESQUIRE

12 Office of Energy and Environmental Affairs

13 One Winter Street

14 Boston, Massachusetts 02108

15 (617) 292-5500

16 ALSO PRESENT:

17 Eurika Durr

18

19 * * * * *

20

21

22

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

Capital Reporting Company

Oral Argument - 10.29.09

Page 4

1 P R O C E E D I N G S

2 MS. DURR: The Environmental Appeals

3 Board of the United States Environmental

4 Protection Agency is now in session for oral

5 argument in re: The Upper Blackstone Water

6 Pollution Abatement District, NPDES Permit Number

7 MA0102369, NPDES Appeal Numbers 08-11 to 08-18 and

8 09-06.

9 Please turn off all cell phones and

10 recording devices.

11 Please be seated.

12 JUDGE WOLGAST: Good morning. We're

13 here pursuant to the Board order of September 23,

14 2009, from which we will follow the time frames

15 for each of the litigants' arguments this morning,

16 in which Conservation Law Foundation will proceed

17 first and have 15 minutes for argument. Then the

18 District will proceed with 30 minutes of argument.

19 Massachusetts Department of Environment, then 5

20 minutes, and 10 minutes total for the

21 Municipalities, followed by 50 minutes for the

22 Region. Also pursuant to the order, the District

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

1 and Conservation Law Foundation may reserve up to
2 5 minutes for rebuttal. And as you proceed and
3 introduce yourself for the record, please let us
4 know if you're reserving time and, if so, how
5 much.

6 Shall we begin with the Conservation Law
7 Foundation.

8 MR. KILIAN: Thank you. Good morning.

9 I am Chris Kilian. I'm the senior law program
10 attorney for Conservation Law Foundation, and I'm
11 joined by my co-counsel David Mears from the
12 Vermont Law School Environmental Law Clinic, and I
13 would like to reserve five minutes for rebuttal.
14 The Board should grant eLF's petition
15 for review in this matter because both the facts
16 and the law require implementation of
17 limit-of-technology controls on nitrogen along
18 with additional appropriate offsets to account for
19 a main nitrogen-loads facility.
20 The facts indicate that the Seekonk
21 River, which is the ultimate receiving water for
22 discharge from the District with regard to
(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

1 nitrogen, is the most severely impaired segment of
2 Narragansett Bay, and that's been cited both in
3 EPA's materials as well as ours as well as Rhode
4 Island's amicus brief and underlying record.
5 Eelgrass beds have disappeared
6 completely from the Seekonk River and the upper
7 two thirds of the Narragansett Bay as one
8 indicator that water quality standards are not
9 met. Needless to say, from our perspective, there
10 is no remaining facility capacity for nitrogen in
11 the Seekonk River or Narragansett Bay. The Upper
12 Blackstone facility accounts for 60 percent of the
13 nitrogen limit to upper Narragansett Bay. It is
14 the dominant and primary source of nitrogen to
15 upper Narragansett Bay. The record clearly
16 indicates that dramatic reductions in excess of
17 the limit of technology for treatment at
18 wastewater treatment plants and this facility will
19 be required to obtain water quality standards
20 compliance.

21 While the Region, in our opinion,
22 appropriately relied upon MERL tank experiments,
(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

1 nitrogen standard. Thank you.

2 And by way of a question, if I went over

3 time, do I still have time for rebuttal?

4 JUDGE WOLGAST: Yes.

5 MR. KILIAN: Okay. Thank you.

6 JUDGE WOLGAST: Next we'll hear from the

7 District.

8 MR. ANDES: Good morning, Your Honor.

9 My name is Fred Andes. I'm counsel for the Upper

10 Blackstone Water Pollution Abatement District, and

11 I would like to reserve five minutes for rebuttal.

12 I was going to give you some background

13 in terms of the facility we're talking about,

14 including the fact that we've now completed the

15 upgrade, \$200 million upgrade, that was initially

16 planned in 2001. It is now operating. We think

17 that is going to yield significant reductions even

18 beyond our permit limits in the original permit

19 limit. But let me go right to the issue raised by

20 Conservation Law Foundation because it does touch

21 on the nitrogen issues we have as well.

22 The claim we've heard is that the

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

1 District should be reducing to the limit of

2 technology. As you're aware, there's simply no

3 requirement for the limit of technology anywhere

4 in the Clean Water Act. The requirement that does

5 apply, and we're asking for it to be implemented

6 here, is that the District receive limits needed

7 to attain water quality standards, and our view of

8 the record indicates two things. One is that we

9 don't know at this point really what is needed.

10 We don't even know if the standards can be

11 attained. There really is no clear statement by

12 the EPA that reductions from the District along

13 with reductions from other sources will actually

14 get us to attainment of the nitrogen standards here.

15 JUDGE STEIN: Well, if that's the case,

16 then how can they issue the permit?

17 MR. ANDES: We believe that instead of

18 issuing the permit, they should have gathered

19 additional information, including information from

20 the District's performance under the original

21 permit, to show -- because we believe that

22 reductions made from that upgrade were substantial

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

Deleted: the

Deleted: within the

Deleted: d

Deleted: retain

1 and have not adequately been taken into account yet.
2 We believe that there simply wasn't enough
3 information yet for the Agency to move ahead with
4 any reasonable certainty to determine the limits that were needed.
5
6 JUDGE SHEEHAN: So in the face of severe
7 known impairment, eutrophication, et cetera, the Region should
8 just sit on its hands and not do anything?
9 MR. ANDES: No, not at all. We believe
10 there is scientific research going on right now,
11 there are models being developed; and in fact, the
12 information will be available by the end of the
13 year -- phosphorus and nitrogen. We believe the
14 fact there is significant impairment -- there is
15 no question about that -- doesn't mean that the
16 Agency can move ahead in an arbitrary and
17 capricious manner. We believe they still need to
18 develop a sound technical basis for the permit
19 limits, and that, we believe, they have not done.
20 JUDGE SHEEHAN: And why do you think the
21 Region didn't develop a sound technical basis?
22 MR. ANDES: Well, on nitrogen, we think
(866) 448-DEPO
www.CapitalReportingCompany.com ©2009

Deleted: actively

Deleted: on

Deleted: the

Deleted: that a

Deleted: is

1 the primary problem, not the only one, is that
2 they relied on the MERL study at the same time
3 that they, in essence, dismissed its conclusions.
4 They want to put it up there as support for their
5 findings and yet they say they're -- it's clear,
6 in the record that both EPA and Rhode Island
7 in the study indicate that we know this study --
8 for example, they say that these differences from
9 a natural setting may overestimate the impact of
10 given loads. They say that problems were,
11 encountered when modeling interactions in the water
12 body -- we are unable to simulate the chemical and
13 biological behavior of the system. They say that
14 the physical model does not generate a definitive
15 level of nitrogen control that can be applied to a
16 real world discharge.
17 JUDGE SHEEHAN: But is the definitive
18 level standard the standard? Doesn't the Region
19 have the discretion to do as well as it can to
20 come up with a good standard?
21 MR. ANDES: Well, we think there is a
22 dividing line. We can't simply say in every case,
(866) 448-DEPO
www.CapitalReportingCompany.com ©2009

Deleted: ly

Deleted: DEP

Deleted: when

Deleted: ing

1 well, they've done as well as they can; and
2 therefore, that's supportable. There has to be a
3 point where you say, you know what, you have
4 information, and it is not enough, particularly
5 when the Agency itself, in responding to CLF's
6 argument says, well, we don't really have that
7 much confidence in the study and the model. Okay.
8 If you don't have that much confidence, you
9 shouldn't have used it, you should have gone out
10 and collected additional information so you really
11 have a reasonable level of confidence in your
12 conclusions. We don't think they really have
13 that.

14 JUDGE WOLGAST: Mr. Andes, how is this
15 different from our recent decision in Attleboro?
16 I mean there, also, we were dealing with compared
17 water bodies where there hadn't been a
18 comprehensive wasteload allocation done. There
19 hadn't been a TMDL performed, and yet we found
20 that the Region could fill the gap even given
21 these uncertainties.

22 MR. ANDES: Right. In terms of

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

.

.

1 Attleboro, we should first sort of put aside
2 phosphorus and aluminum issues because, while
3 there were some phosphorus and aluminum issues in
4 that case, they were very different and the
5 issues raised here were different. As for nitrogen, we've
6 reviewed this issue carefully, as you can imagine.
7 And we believe there is one argument that is
8 really on all points with one of our arguments,
9 which is the flushing-rate issue, which we still
10 believe is a valid issue. But the flushing issue
11 in the Providence and Seekonk Rivers, we believed was
12 raised in Attleboro and was disposed of. So we
13 are not pursuing that further. But the main
14 argument in Attleboro in terms of the model is
15 different in significant ways than the argument we
16 raised. Our reading of the Attleboro argument
17 made by the City was you should not have relied on
18 the physical model, you should have relied on the
19 Kester model instead. We specifically said in our
20 briefs we don't know enough about the Kester Model
21 to say whether in fact it's a good model to use
22 here. Our argument instead was and raised in
(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

.

.

Deleted: it has to work

Deleted: it's

Deleted: wastewater

Deleted: DMPL

Deleted: than the

Deleted: problem

1 our comments -- that here where EPA has said in
2 the record, A, this information is not sufficient
3 to do a TMDL for the Bay -- I just read you
4 statements about the behavior
5 JUDGE SHEEHAN: Are you saying it's not
6 sufficient or it's not perfect?
7 MR. ANDES: We're saying
8 JUDGE SHEEHAN: Nothing is perfect.
9 MR. ANDES: Understood. Nothing is
10 perfect. We're saying that by the Agency's own
11 admission and the statements from the study, it's
12 not the issue in Attleboro -- which is, well, you
13 should used this one instead of this one. We're
14 saying that the MERL study, based on these
15 statements, including the statements made in
16 response to CLF where the EPA has said, well, we
17 don't really believe in the study all that much,
18 we think that altogether says -- and particularly
19 when you say, well, we can't do a TMDL, but we can
20 do a permit limit. There's nothing in the Water
21 Act that says, well, all right, so the level of
22 scientific technology you need for those two is
(866) 448-DEPO

•

1 different. You need less of a substantial basis
2 to do a permit limit than a TMDL. We said -- so
3 when you look at all that, our argument is we
4 don't think that the MERL model, based on these
5 statements in this record, that EPA has really a
6 substantial basis for regulation by their own
7 statements.

Deleted: its

8 JUDGE SHEEHAN: Do you have a different
9 opinion technically about the decision reached by
10 EPA about what the limit should be? Reasonable
11 minds may differ? Is that your argument?
12 MR. ANDES: No. Because, in fact, we
13 have not said that we think, well, it should be X
14 instead of Y, because we don't think that the
15 information is in the record to document, first,
16 how they can attain standards in this watershed,
17 and what is the necessary limit for Upper
18 Blackstone to be able to get us there. We don't
19 think that information is there in the record yet.
20 We think that needs to be developed. There are
21 models being developed. There is information out
22 there that we think if the Agency, as we've been
(866) 448-DEPO

•

•

1 saying all along -- engaged in a dialog on
2 that, that we would come to a set of limits --
3 and I'm not saying it has to be in a TMDL but there clearly
4 has to be a sufficient analysis to support a set of
5 limits. And we think that can be done.

Deleted: would

Deleted: it

Deleted: the

6 JUDGE WOLGAST: Okay. I want to be
7 clear about your argument. Are you saying,
8 notwithstanding our opinion in Attleboro, that the
9 application of the MERL model in this case is a
10 basis for error?

11 MR. ANDES: Yes. We also believe, in
12 terms of other issues, there are other parts of
13 their nitrogen analysis here that are problematic.
14 One in particular was with respect to delivery
15 rates, which is not an issue. This was definitely
16 different factually in Attleboro, where there were several

Deleted: a factor

17 studies. The initial study said that the delivery
18 rate should be 87 percent. We commented and said,
19 well, that doesn't consider other sources. EPA
20 responded, well, there's another report that does
21 consider other sources and that says 73 percent.
22 But we're going to pick 87 percent anyway. And

Deleted: make it

(866) 448-DEPO
www.CapitalReportingCompany.com ©2009

.

.

1 that makes an enormous difference. That makes the
2 difference between a 5 milligram per liter limit and a 7
3 milligram per liter limit, which we think we could probably
4 meet right now. So we think that issue also,
5 which is not touched by Attleboro, is sufficient
6 to overturn the limits and remand down for
7 re-examination.

Deleted: milliliter

Deleted: milliliter

Deleted: was

8 I'm not aware of how much time I have
9 left.

10 JUDGE WOLGAST: About fifteen minutes. You have about fourteen
11 minutes. Well, you're reserving five, so
12 about ten minutes.

Deleted: your time

13 MR. ANDES: Thank you. In terms of
14 phosphorus, our argument on that has been
15 basically that the Agency's selection of the .1
16 number was again without any basis. Here, what EPA
17 said in essence as to phosphorus was, well, there are a lot
18 of numbers out there nationally, and we'll pick
19 one; and Upper Blackstone, you should be okay
20 because it's not the most restrictive one.

Deleted: h

Deleted: .

Deleted: W

Deleted: actually said of

21 There's no examination at all there of what's
22 not even to the level of nitrogen -- there's no
(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

.

.

1 examination of what's the right number of this
2 segment, what's the right number for the Bay,
3 what's the right number for this watershed. It is
4 simply taking a bunch of numbers that are out
5 there around the country and picking one, and
6 saying, well, we think that makes sense. We think
7 that is particularly problematic given that there
8 is additional information being developed on
9 phosphorus that will be available by the end of
10 the year. We think, again, if the EPA waited and
11 used that information, it could have developed
12 numbers. We're saying in all of these issues, not
13 that there shouldn't be limits -- we understand
14 that this plant would get nitrogen and phosphorus
15 limits what we are questioning is the specific
16 limits that the Agency developed.

Deleted: . It

17 JUDGE SHEEHAN: Why didn't the Region
18 correctly apply the Gold Book effect standard in
19 setting the phosphorus limit?

Deleted: directly

20 MR. ANDES: We think that by simply
21 citing to -- oh, well -- if you're referring to
22 the argument by CLF in terms of whether they

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

.

.

1 applied a .5 or 1.0, our issue really was not that.
2 Our issue was that we think that rather than
3 relying on .1, we thought what they should have
4 done is actually looked at this situation, looked
5 at phosphorus and determined what levels of
6 phosphorus really needed to be in this watershed.
7 JUDGE SHEEHAN: What about looking in
8 the Gold Book to make that call and some of the
9 other criteria the EPA's entitled look at?
10 MR. ANDES: Well, we think they're
11 entitled to look at them, but we don't think that
12 it's simply look at information on the national
13 level, including the Gold Book, and just impose a
14 number without any examination of what's going on
15 with this watershed. On nitrogen they clearly did
16 that. We quarrel with how they did it, but there
17 is no question they actually looked at information
18 in that water body. With phosphorus, they really
19 didn't do that, they just picked a number.

Deleted: is

20 JUDGE SHEEHAN: Isn't the District the
21 dominant phosphorus discharger here into the
22 Blackstone at that point?

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

.

.

1 MR. ANDES: Yes. But we think that the
2 issue at hand is what's the right water quality
3 target. And there's no question that we're saying
4 the District would need to make significant
5 reductions. In fact, we think that the reductions
6 that have been made already through the upgraded
7 facility that is now online are in fact
8 significantly more than was required in that
9 permit, and. We think that that's part of what
10 needs to be addressed are the reductions -- what
11 role do the reductions we've already made play in
12 this process. And it's really not there.

13 JUDGE STEIN: Didn't you have an
14 opportunity to put all that information into the
15 record, however? I mean we're dealing with a
16 permit that was issued many years ago, and -- I
17 mean I've been through your briefs, and what I
18 hear is, well, let's wait. And it strikes me that
19 the original permit has been around for quite a
20 while, and I'm having difficulty seeing the
21 justification for waiting when you had the
22 opportunity to put into this record all of your

(866) 448-DEPO
www.CapitalReportingCompany.com ©2009

•
•

1 claims about where you are in terms of progress,
2 in terms of your efforts. What's missing?

3 MR. ANDES: Your Honor, what was missing
4 was the fact that the upgrade that we were given
5 eight years to complete was completed on time in
6 August of this year. Until we completed the

7 upgrade, any data -- and EPA provided data
8 saying, well, your phosphorus numbers for 2003
9 weren't so good. Well, we were in the midst of
10 doing the upgrade. The upgrade now is complete.
11 The facilities have been turned on. Now is the
12 time when actually we are starting to get data
13 showing the real improvements, including getting
14 down, in fact, significantly below those original
15 limits. So until we had the upgrade complete, we
16 really couldn't provide additional information in
17 terms of how we were going to perform.

18 JUDGE WOLGAST: Mr. Andes, as to time, I
19 misspoke earlier. You have 11 minutes remaining,
20 and you should find it in the right-hand corner of
21 your monitor right there.

22 MR. ANDES: Thank you.

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•
•

Deleted: EPA

1 In terms of aluminum, our other issue,
2 there are really two points that we've been making
3 here. One of them is that, in essence, the Agency
4 has been -- careful evaluation of the aluminum
5 data shows that this facility should not receive a
6 permit limit for aluminum. The Agency has gone
7 back and forth in terms of which data it's

8 evaluating. It's admitted errors in evaluating the
9 data. First, it said it evaluated the data a

Deleted: evaluated

10 certain way -- it didn't exclude certain data, and
11 it turned out it did. There is one major data
12 point, an outlier of 344 micrograms per liter, and
13 we feel they should exclude it. It makes all the
14 difference when you exclude that data point. We
15 do not have reasonable potential, and we think,
16 therefore, if the Agency looked at the data
17 carefully and evaluated it in the way that their
18 guidances talk about doing, including excluded
19 outliers, they should have concluded there was no
20 limit required.

21 JUDGE WOLGAST: Could you address the
22 point that the Region made in its surreply that
(866) 448-DEPO

Deleted: Would

www.CapitalReportingCompany.com ©2009

•
•

1 said that you failed to preserve the issue of
2 challenging the 344 ug/l data point?

Deleted: m

3 MR. ANDES: Sure. Our initial -- the

4 issues in terms of the looking at the 344 never
5 came out until the responsive comments from the
6 Agency. In our initial review and in our comment,
7 what we said was, look, if you look at the data
8 carefully -- and we showed them exactly how we
9 proposed looking at the data -- it was clear that
10 a limit was not needed. They had considered some
11 data and not considered other data. We questioned
12 whether they were considering the right data and
13 what their basis was for excluding certain data.

14 We had a concern that they were including data they

Deleted: which

15 should not have been including and vice versa. So

Deleted: included

16 the Agency, in response to comment says, well, we
17 went back and we reevaluated the data and we
18 considered some new information and did another
19 analysis, and now we come out showing you have
20 reasonable potential. Well, we looked at that new
21 argument, that new analysis they did, and said,
22 well, wait a minute, we always conceded that that
(866) 448-DEPO

Deleted: more

www.CapitalReportingCompany.com ©2009

•
•

1 344 was out there. We never thought that you were
2 going to include it in terms of doing that
3 analysis. Now, when we look at your new analysis
4 in the response to comments and we start picking
5 it apart, we see a number of problems, including
6 the use of the 344.

7 JUDGE WOLGAST: Was it correct, as the
8 Region alleged in their surreply, that you had
9 asked -- the District had asked that data between
10 2004 to 2008 be included in the analysis, and
11 would then this data point fall in that range?

12 MR. ANDES: Oh, absolutely. July 9th,
13 2007. But when we said initially in our comments,
14 well, if you look at the whole database -- when
15 our engineers tend to look at the whole database,
16 that doesn't mean that they take every data point,
17 and they don't do any fundamental screening like
18 looking at outliers and excluding them. Our
19 initial argument was premised on if you look at

Deleted: took a

20 this data, it is clear that we were below the
21 levels in the Upper Blackstone. And in fact, it's
22 the levels we believe are naturally occurring. Because

Deleted: So

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•
•

1 our levels vary with the ambient levels. That was
2 our initial argument. When they came back and
3 said, well, we looked at the data in a different
4 way. They still didn't evaluate all the data.
5 And they still excluded some things, and they
6 included the 344. We said, well, oh, okay, well,
7 you're redoing that reasonable potential analysis,
8 and you're excluding some data, which we
9 contested, and you're including the 344. Now we
10 have a problem. So in our initial suggestion that
11 they had sort of picked and chose from the
12 database and they shouldn't do that, we didn't
13 say, oh, and by the way, make sure to include all
14 your outliers. We felt the Agency would pursue
15 their own guidance which talks about not
16 including certain data points as you go through.
17 It just didn't come up until we saw that they
18 were including that data point and said, well,
19 wait a minute. Now, you've done an
20 evaluation, you're including that, we think you
21 shouldn't.

22 JUDGE SHEEHAN: What about the argument
(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•
•

1 that Massachusetts is silent as to what the
2 limited standard might be, site-specific or
3 otherwise? Rhode Island has set the standard at
4 87, and the standard set by the Region here is 87.
5 MR. ANDES: Well--
6 JUDGE SHEEHAN: It would seem like
7 it's -- certainly it's in the zone of reasonableness for the
8 Region to have acted as it did here in setting the
9 87 limit.

10 MR. ANDES: Our point beyond the
11 reasonable potential issue, in terms of the 87,
12 was that we thought it's pretty clear from the
13 charts we provided that the levels were naturally
14 occurring. In the response, the EPA said, well,
15 it's not a direct correlation, which I think is
16 not an answer at all. The charts show that
17 basically our levels and the naturally occurring
18 ambient levels rose and fell pretty much in sync.
19 So we think they simply did not engage on that
20 issue, which was, if they were naturally
21 occurring, then the level should be set at that
22 level. The Agency didn't contest that. It simply
(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•
•

Deleted: should

Deleted: values in response to them by

Deleted: off

Deleted: if you're going to do

Deleted: data

Deleted: not unreasonable

Deleted: this

Deleted: adapt it

1 contested what we said factually I think in a way
2 that didn't deal with our data at all.
3 JUDGE SHEEHAN: Doesn't Massachusetts
4 law say that if the State is silent on the issue,
5 then you go to the 2002 National Water Quality Criteria,
6 which the Region arguably did here, plus the fact
7 that you have right downstream Rhode Island
8 with an 87 standard. That certainly makes the
9 Region look reasonable here. How do you answer
10 that?

Deleted: actually

11 MR. ANDES: Well, what the Massachusetts
12 regulations talk about is that it would be
13 87 -- unless the DEP determines that it's
14 naturally occurring. We submitted in our comments
15 the information we felt showed it was naturally
16 occurring.

Deleted: your break

Deleted: ed

Deleted: in meeting the

Deleted: n't

17 JUDGE WOLGAST: From what source?
18 MR. ANDES: The data?
19 JUDGE WOLGAST: No, no. I'm sorry.
20 What did you allege was the source of the
21 naturally occurring presence of aluminum?
22 MR. ANDES: Our feeling was that we
(866) 448-DEPO
www.CapitalReportingCompany.com ©2009

1 cited to documents, I believe, from CLF itself
2 that there is evidence of significant amounts of
3 aluminum leaching out of the soils in this area,
4 and that while we couldn't speculate in terms of
5 exactly how this all occurs, it seemed pretty clear that
6 putting aside other sources, that the ambient
7 levels of aluminum were pretty high.
8 I'd like to reserve the balance of my
9 time unless there are further questions.

Deleted: . We felt

Deleted: example

Deleted: is

10 JUDGE WOLGAST: You will have five
11 minutes for rebuttal. You're saying that you want
12 to the reserve the four minutes?
13 MR. ANDES: So I have four minutes plus
14 the five minutes; is that what you're saying?
15 JUDGE WOLGAST: Yes. That's fine.
16 MR. ANDES: Thank you.
17 MR. FALLON: Good morning. My name is
18 MacDara Fallon, and I'm here with our co-counsel
19 Karen Crocker. I represent the Massachusetts
20 Department of Environmental Protection. Thank you
21 for giving us the opportunity to present to you
22 our argument on why we feel the Board should
(866) 448-DEPO
www.CapitalReportingCompany.com ©2009

1 or did you not?

2 MR. FALLON: I believe we did. Your

3 Honor, I'm drawing a blank on the actual reason

4 that we did. I believe the District did. I'm

5 drawing a blank on the actual comments that were

6 made regarding the study.

7 JUDGE WOLGAST: Thank you. Now we'll

8 hear from the Cities.

9 MR. COX: Good morning. My name is

10 Robert Cox, and I'm counsel for the District, but

11 I'm presenting to you this morning and speaking to

12 you on behalf of the four petitioning District

13 members, City of Worcester, the towns of Holden,

14 and Millbury, and Cherry Valley Sewer District

15 with respect to the co-permittee issue.

16 The four petitioning District members

17 are owners and operators of sewer lines which

18 deliver wastewater to the District's facility for

19 treatment and then discharge to the Upper

20 Blackstone River. The four petitioning District

21 members as well as the District seek to have this

22 Board strike the co-permittee issue from the

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

1 permit. They seek -- or we seek to have it

2 stricken for the simple reason that the Region,

3 the Agency, has no authority to make them

4 co-permittees.

5 The EPA claims that the Clean Water Act

6 in the definition of treatment works which

7 broadly includes the words sewer; it also includes

8 the words sewage collections systems -- gives it

9 the power to make the owner and operator of

10 sewers subject to its permitting authority. While

11 certainly the definition to which the EPA and the

12 Region cite to does include a reference to sewers

13 within treatment works, that does not make an

14 owner and operator of a sewer a permittee. What

15 is missing from the EPA's analysis are the

16 operative terms, the terms which trigger

17 permitting, and these are the discharge of a

18 pollutant. That term is defined to mean, quote,

19 "any addition of any pollutant to navigable waters

20 from any point source."

21 The four petitioning District members do

22 not discharge from a point source. They send

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

Deleted: permitting

Deleted: permits at

Deleted: s

Deleted: s

Deleted: a

1 wastewater through sewer lines to the District for
2 treatment. The town where I live, the town of
3 Rutland, has its own sewer lines, which are
4 connected to a sewer line owned and operated by
5 the Massachusetts Department of Conservation and
6 Recreation, DCR. The DCR line goes through the
7 Town of Holden. That line connects to a line in
8 Worcester, and the Worcester line then connects to
9 the District. The District then discharges the
10 wastewater at a point source. It is this action,
11 the action of discharging at a point source, at
12 the Upper Blackstone River, that triggers the
13 permitting and not, as the EPA would have it, the
14 mere ownership of the sewer line -- ownership or
15 operation of the sewer line that provides the
16 conveyance for the treatment and discharge. This
17 is--

Deleted: of

18 JUDGE WOLGAST: May I ask you, what
19 otherwise requires -- say, hypothetically, you're
20 not a co-permittee, what otherwise requires the
21 cities to address inflow and infiltration into the
22 POTW?

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

.

.

1 MR. COX: The relationship with the
2 District, with the District, as the members. It
3 is urging them, as well as the municipalities, to
4 address I&I. The municipalities have been
5 addressing I&I through various funding mechanisms,
6 to study and investigate it and to prevent
7 additional I&I from occurring.
8 JUDGE SHEEHAN: That doesn't sound like
9 any kind of a regulatory call.
10 MR. COX: No. It is not. There is not
11 a regulatory call -- regulatory provision to do
12 it. The mechanism -- I would not want this to be
13 brought upon my towns -- but the mechanism may be
14 enforcement. If there is a discharge from a line
15 that enters or gets into navigable waters.
16 The point that I'm making here with
17 respect to the permittee must be the entity that's
18 discharging from a point source is borne out by
19 the regulations themselves. In subpart B,
20 entitled permit application requirements -- it's
21 section 122.21 -- it provides, quote, "Any person
22 who discharges must submit an application, must
(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

.

.

1 submit a complete application according to the
2 section." It's what the District did, but not
3 what the four petitioning District members did.
4 They never applied. They never signed on the
5 application form. They never authorized the
6 District when it submitted its application to be a
7 participant or co-permittee. The Region, the EPA,
8 claims, well, that doesn't matter. It can permit
9 regardless.

10 JUDGE SHEEHAN: Is it your argument that
11 a discharger has to apply in order to be
12 regulated?

13 MR. COX: That's the way the regulations
14 read.

15 JUDGE SHEEHAN: So if the discharger
16 doesn't apply, the discharger cannot be touched by
17 the regulatory body?

18 MR. COX: Discharger from a point

19 source. There needs to be that operative term tied onto the discharger that it is a discharge from a point source.

20 JUDGE SHEEHAN: So it's up to the
21 discharger to basically trigger the regulatory
22 regime. If the discharger doesn't step up and
(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•
•

1 sign an application, send it in, the regulating
2 authority cannot touch a discharger into a
3 water --

4 MR. COX: They cannot touch an entity
5 that provides the conveyance system.

6 THE COURT: That's a different question.

7 MR. COX: No. I'm stating it

8 differently, because discharge, the way it's
9 defined in the regulations, is discharge of a
10 pollutant to a navigable water. So the only
11 entity that is doing that here is the District
12 that is discharging from their pipe that goes into
13 the--

14 JUDGE STEIN: But don't they discharge
15 to the POTW, which in turn discharges, so that
16 what flows into the District's POTW has a source
17 in the these towns -- has an original source in
18 these towns?

19 MR. COX: They discharge in the sense
20 that wastewater most certainly is sent down the
21 pipes, but in connection with the definitions
22 under the Act and in the regulations, that is modified

Deleted: conveyed

1 and controlled by the discharger from a point
2 source to a navigable water.

3 JUDGE WOLGAST: But you say that the

4 Cities didn't apply -- and I think that's

5 undisputed -- but isn't it also clear that the

6 Cities have been on notice since the 2001 permit

7 that the Region felt that inflow and infiltration

8 issues were very significant and a very

9 significant issue to be addressed in terms of not

10 meeting water quality standards by the POTW

11 itself?

12 MR. COX: That's correct. And that's a

13 matter of the record. I think the municipalities have

14 been very active in addressing that to the extent

15 that it can with the limited financial resources.

16 As I said earlier there have been grants and

17 monies to address I&I issues. Various studies

18 have been done. Worcester has 450 miles of sewer

19 which needs to be addressed and to be examined in

20 order to deal with the I&I issue.

21 JUDGE STEIN: But putting yourself in

22 the Region's shoes, they're issuing a permit to

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

.

1 the District. We know that these towns contribute

2 discharge to the POTW. We know that there are

3 issues associated with this discharge. Your

4 position is there's no authority whatsoever on the

5 part of EPA to look to those tasks, and yet when

6 they look to the District; what's the District

7 going to say? I'm not responsible; that's the

8 towns' responsibility. How does that scheme make

9 sense?

10 MR. COX: Well, it makes sense because

11 it's what the law provides. In order to

12 JUDGE STEIN: Does it make environmental

13 sense?

14 MR. COX: It makes environmental sense

15 in that we have all parties here looking at an

16 issue and trying to address I&I. The

17 municipalities are certainly aware of it and are

18 trying to address it. DEP is working with the

19 municipalities to address it. EPA is encouraging

20 and helping the municipalities work with it as

21 well as the District. So in that sense it does

22 make sense to have all these parties looking at

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

.

.

Deleted: ing

Deleted: the

Deleted: the

1 it.

2 But the issue here is the authority of

3 the Agency to bring these parties in as

4 co-permittees. There is none. And what the EPA

5 says is that the co-permittees need not apply,

6 that they need not consent, that EPA need not even

7 get the right entity that owns or operates a line.

8 That reading, however, leaves out of the regulations

9 this whole section, subpart B, section 122.21,

10 which sets forth the permit application

11 requirements. And that just make no sense, and

12 it's consistent with the statute to require or

13 bring together the discharge of pollutants from a

14 point source to navigable waters to be the

15 triggering mechanism with respect to permitting.

16 For these reasons, we ask -- we ask that

17 this Board strike the co-permitting issue or

18 remand it back to the Region in order for it to do

19 the same.

20 JUDGE STEIN: Am I correct in

21 understanding that there are other permits in

22 Massachusetts that the Region has issued -- and

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

1 perhaps I should address this to the Region

2 that involved co-permittees on the permits?

3 MR. COX: Yes, there are. But that does

4 not make it consistent with the law or legal, that

5 other entities have decided to agree to a

6 co-permitting status. The towns represent do

7 not agree. They do not consent. They do not

8 believe, as I've articulated here, that the law

9 allows the EPA to bring them in as co-permittees.

10 JUDGE SHEEHAN: So the practical effect

11 here with respect to the legal argument you make

12 is that if the towns are outside of the regulatory

13 authority of EPA, that it's just up to the towns'

14 compliance without any problem or waiting to see

15 if there is any enforcement issue, they just --

16 they become cat and mouse really. If there's a

17 mistake, maybe a regulator will come in and catch

18 it, but otherwise, the towns are on their own. Is

19 that what you're saying?

20 MR. COX: I'm saying that is one

21 mechanism available to the EPA. What I failed to

22 mention, and I will mention now, is that there are

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

Deleted: the properties

Deleted: they

1 regulations under the State, that 314 CMR -- 312
2 -- 314CMR12, which governs the municipalities with
3 respect to the operation of the sewer lines. So
4 we are regulated by the State but not through this
5 permitting scheme as co-permittees, as EPA sought
6 to impose on the co-permittees.

7 Thank you very much.

8 MS. MCGUIRE: Good morning. Karen

9 McGuire for the Region. I'm joined by my

10 colleague, Amanda Helwig, as well as Peter Ford of

11 OGC. I am going to speak to nutrients and the

12 co-permittees, and Ms. Helwig will address the

13 aluminum modification. I'd like to reserve about

14 ten minutes for her, but we're flexible.

15 Let's start with nitrogen. The Region

16 used the same approach here as we did with the

17 permits to the watershed in Attleboro. We

18 obviously relied on standards for the Marlborough

19 model and other studies and the same factors

20 having set forth here on this record, including,

21 among other things, the severe environmental

22 impairments in the receiving waters. And here, as

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

Capital Reporting Company

Oral Argument - 10.29.09

Page 56

1 in Attleboro, we were up front that by using the

2 physical model, there were inherent and

3 unavoidable uncertainties in our approach. And,

4 again, with Attleboro, we acknowledged them,

5 identified them, and rationally accounted for

6 them.

7 I want to pause on the Region's

8 conclusion of our water quality experts related to

9 those uncertainties. There's been some retelling

10 of our view of MERL. It's suggested we didn't

11 think it was a good model. You will find that in

12 the record and also our conclusions related to the

13 uncertainty. The differences between the model

14 and the record, of course, is the touchtone

15 four-year review. What that makes clear as well,

16 the Region's experts concluded that MERL was an

17 analog, strong analog, of what was occurring. The

18 data and the data ending in 2004 is on the reports

19 edited by CLF, pages 11 and 12. There's data that

20 does show for a given comment -- given loading,

21 MERL does indeed over-predict the response in the

22 receiving water. And the record also shows that

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

Deleted: as

1 the closure of that record, Woonsocket was at
2 five. And the Board -- the text associated with
3 footnote 56 is that we have a larger facility than
4 the Attleboro facility discharging into the
5 most-impaired segment of this waterway. It's
6 appropriate to have a lower limit. I would note
7 that since the time that that record closed, this
8 record, in its specific response to comments, EPA
9 recognizes that Woonsocket is now at three, at the
10 limit of technology. And we should say -- we
11 would say that that same rationale that Rhode
12 Island used to go to three at Woonsocket should be
13 used here as well. I'm sorry for not having the
14 cite with me.

15 JUDGE WOLGAST: That's all right. Thank
16 you.

17 MR. KILIAN: Thank you.

18 JUDGE WOLGAST: Mr. Andes. You ll have
19 nine minutes.

20 MR. ANDES: Thank you. If I could
21 address that question first, Your Honor, on behalf
22 of the District. The District feels that under
(866) 448-DEPO
www.CapitalReportingCompany.com ©2009

1 the statute, the requirements that should be
2 imposed are those that are needed to attain water
3 quality standards. There has been absolutely no
4 showing that a limit of three is needed or that
5 even these water quality standards could be
6 attained. We think that the statements made here
7 by EPA further support our contention that the
8 MERL study is a very weak reed on which to base
9 permit limits.

10 JUDGE STEIN: But if we were to
11 conclude, contrary to your arguments, that in fact
12 what was needed to achieve water quality standards
13 was a limit of three, is there evidence in this
14 record that the District cannot achieve a limit of
15 three? I'm not asking you to agree with me that
16 that's what the water quality standards require,
17 but if we were to conclude that's correct --
18 MR. ANDES: Are you asking me if it's
19 physically possible to achieve with --
20 JUDGE STEIN: I'm asking if the record
21 shows whether there are any feasibility or other
22 issues associated with that.

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

Deleted: read

Deleted: , and we should face

1 MR. ANDES: Since a limit of three was
2 never proposed, the District has not produced any
3 information about whether it can or can't meet
4 that. If that were proposed, we -- I can
5 guarantee you -- would provide a lot of
6 information about whether that's the appropriate
7 number, including whether that's technically
8 feasible to meet. I can guarantee you that it
9 cannot be met with the current \$200 million
10 upgrade. Whether it can -- whether that is
11 physically possible to be met by the District, I
12 don't know. We've never been confronted with that
13 issue.

14 In terms of the statements here, we've
15 heard that MERL is a strong analog for what's
16 really occurring, but we've also heard that on balance
17 it over-predicts and that the analysis does
18 not yield a precise number that can be dropped
19 into a permit. Well, in a permit we get a precise
20 number and the District's officials are civilly
21 and criminally liable for meeting that number.
22 Under the statute it's not enough to say there's a

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

.

.

1 problem. It's not enough to say that that issue
2 needs to be addressed. Under this statute, the
3 way it's constructed, the District is entitled to
4 a sound basis for a limit that is needed to attain
5 water quality standards, not to get lower, not
6 to impose the limit of technology standard. Tell
7 the District, EPA needs to support, this is what's
8 needed to attain water quality standards for this
9 system as a whole. That's simply not here. When
10 you look at the response to comments, at the
11 places where EPA has cited, in fact, the statements
12 there in F6, 18A, 51 are really just conclusory
13 and in fact, the statements that I cited earlier
14 in terms of the fact that the when I cited the
15 statements about the physical model does not
16 generate a precise, a definitive level of nitrogen control
17 that could be applied to a real world discharge,
18 that's straight from F 18A, from that response.

19 The Agency simply does not know whether
20 these standards can be met and whether these
21 limits are the limits that are needed to attain
22 water quality standards. Without that, they don't

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

.

.

Deleted: that

Deleted: analysis

Deleted: go to

Deleted: below

Deleted: or

Deleted: is

Deleted: was

Deleted: d

Deleted: ly

Deleted: that

Deleted: MEP

1 have a basis for a limit yet. Should there be
2 limits on nitrogen and phosphorus? Yes. And
3 we're not saying that the limits in the old
4 permit, in the 2001 permit, that we have now
5 installed the equipment for are adequate. We
6 certainly would not say there was a phosphorus
7 limit and no nitrogen limit. We've designed a
8 system to meet very low numbers on phosphorus and
9 nitrogen. And in fact, we think we'll do much better
10 than the phosphorus number that is in that permit.
11 So we recognize that the next permit needs to have
12 lower numbers. The question is what are those
13 numbers and how are they needed to attain water
14 quality standards. We don't think the Agency has
15 provided that information yet. They simply don't
16 have the information to make that conclusion.
17 They also have not responded to the point I
18 mentioned earlier that the delivery rate, which is
19 one critical issue here where they had one
20 number -- we raised an issue instead the 73 is
21 wrong -- the 87 is wrong, 73 is better. They
22 recognized that the 73 does incorporate other

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

1 sources and yet took the 87 instead as an example
2 of the way in which these limits have been
3 developed. They simply don't have a reasonable
4 basis.
5 JUDGE SHEEHAN: Well, you say they don't
6 have a reasonable basis, but they have an earlier
7 permit and studies that went on there. They've
8 had 15 years of water quality data. They have at
9 least four criteria documents -- guidance
10 documents, and the regulation allows them to
11 consider guidance. That seems as if the Region
12 does have a sufficient bank of materials on which
13 to make this judgment. To insist on more or longer
14 in face of the severe impairment would seem
15 environmentally dangerous and seem not justified
16 in light of the fact that EPA seems to have a
17 pretty solid corpus of information and guidance
18 in front of it.

19 MR. ANDES: The data they have, Your
20 Honor, doesn't go to the question. One would
21 think that at this point, if they had enough data,
22 they would have been able to say somewhere in this

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

Deleted: of

Deleted: the

Deleted: I

Deleted: limit

Deleted: 's

Deleted: , and we

Deleted: its

Deleted: from

1 record that here are the limits. These limits,
2 along with other limits, will get us to water
3 quality standards on this water body. They don't
4 say that. And I think part of it is because
5 they don't know if they can really get there. And
6 under this statute, clearly, because the standards
7 need to be attainable, that's the conclusion the
8 Agency needs to make. If they can't conclude that
9 those standards are attainable under this statute,
10 they're supposed to revisit and revise those
11 standards.

12 JUDGE SHEEHAN: But don't they say in
13 the fact sheet that the limit of five for nitrogen
14 will therefore achieve the water quality
15 standards? They say it.

16 MR. ANDES: And when that issue was
17 questioned in the response to the comments, the
18 standards are not nearly as unequivocal. The
19 standards in response to comments don't even say
20 any where we really know that we're going to
21 attain this standard. If they don't know that,
22 they can't just impose requirements on discharger
(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

1 and say, well, it will get us there. That could
2 be under another statute, but under this statute,
3 that's not way it works.

4 JUDGE SHEEHAN: You seem to be saying
5 that unless there's some absolute bullet-proof
6 guarantee, which is probably impossible in any
7 scenario, the Region has to tie its hands and sit.

8 MR. ANDES: Well, we would say not that
9 there has to be a bullet-proof guarantee, we would
10 say nowhere in this record -- nowhere in this
11 record does the Agency say we're going to get to

12 water quality standards in this watershed and
13 here's how. Instead they say -- they say a lot of
14 times, well, it's a really big problem and Upper
15 Blackstone is a significant contributor. Granted,

16 something needs to be done. The issue at hand
17 here is, is what they did -- something that has

18 rationale to support that it will result in a
19 attaining water quality standards. We simply don't
20 see where they concluded that, even with all this
21 information.

22 I would also point out as to aluminum,

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

•

Deleted: s

Deleted: in

Deleted: word

Deleted: e

Deleted: the

Deleted: we have

Deleted: I

1 because to me the key issue there, as I think

2 we've seen this morning, is the Agency recognized

3 if they average the data and they take out the

4 344, there's no limit. The rest of the data are

5 much, much lower than 344. And in terms of whether this issues was adequately preserved by Upper Blackstone. I

think we just need

6 to go back to the comments because it's clear that

7 what we did in comments was we said, first, that

8 the Agency had selectively used the District's

9 data, leaving out data from 2004, a portion of

10 2005, most of 2006, half of 2007, and most of

11 2008. That selective use of the data allowed them

12 to form an erroneous conclusion. So that

13 paragraph, we basically say go back, review your

14 dataset properly, and do a new analysis. Our

15 second paragraph then went on to say, by the way,

16 if you look at all the data, even with the 344, we

17 are always under -- consistently below ambient

18 levels in the Blackstone River. And they tend to

19 vary with ambient conditions. A separate point

20 where we said, look, look at all the dataset,

21 we're under ambient levels, how are we

22 causing or contributing to a violation?

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

•

Capital Reporting Company

Oral Argument - 10.29.09

Page 104

1 The first point we raised in the

2 comments was you selectively used data. Stop

3 that. So in their response to comments, they

4 said, fine, we're going to consider more data.

5 Here's a new analysis we've run, we didn't exclude

6 the 344. And our response was, well, okay,

7 that's a new analysis. We didn't think to say, by

8 the way, when you do the new analysis, follow all

9 your own guidance. Don't include outliers. Do

10 the various other data manipulation techniques

11 you ordinarily do. I guess if we had to put

12 that in comments every time, we would insert some

13 boilerplates saying follow your own guidance. We

14 didn't think we needed to do that. So we think we

15 did Preserve the issue. Because the Agency did a new

16 analysis. We reviewed it. It's clear that it

17 rests on one data point and that data point should

18 be excluded, and then there would be no limit.

19 Thank you.

20 JUDGE WOLGAST: Thank you very much for

21 your arguments. They were very helpful. The case

22 is now submitted.

(866) 448-DEPO

www.CapitalReportingCompany.com ©2009

Capital Reporting Company

Oral Argument - 10.29.09 • Page 105

Deleted: that they have the data

Deleted: . When

Deleted: has

Deleted: the

Deleted: there's no

Deleted: varying

Deleted: well

Deleted: could we be

Deleted: to

Deleted: and

Deleted: mix

Deleted: in

Deleted: which

Deleted: context of

Deleted: the

Deleted: their

Deleted: They submitted a new

1 (Whereupon, at 11:55 a.m. the
2 proceedings were concluded.)

3
4 * * * * *

5
6
7
8
9
10 • 11

12
13
14
15
16
17
18
19
20
21 • 22

(866) 448-DEPO
www.CapitalReportingCompany.com ©2009

•
•
•
Capital Reporting Company
Oral Argument - 10.29.09
Page 106

1 CERTIFICATE OF NOTARY PUBLIC

2
3 I, CONSTANCE HUNT RHODES, the officer
4 before whom the foregoing oral argument was taken,
5 do hereby certify that the proceedings were taken
6 by me in stenotypy and thereafter reduced to
7 typewriting by me; that said transcription is a
8 true record of the proceedings; that I am neither
9 counsel for, related to, nor employed by any of
10 the parties to the action in which this deposition
11 was taken; and further, that I am not a relative
12 or employee of any attorney or counsel employed by
13 the parties thereto, nor financially or otherwise
14 interested in the outcome of the action.

15
16
17
18
19
20
21
22
CONSTANCE HUNT RHODES
Notary Public in and
District of Columbia
My commission expires:
January 1, 2013