



**RHODE ISLAND**  
**DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

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ENVIR. APPEALS BOARD

September 22, 2008

**VIA Overnight Federal Express**

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

RE: In the Matter of: City of Attleboro, MA Department of Wastewater,  
NPDES Appeal Nos. 08-08 and 08-09  
NPDES Permit No. MA 0100595

Dear Sir/Madam,

Enclosed for filing in the above referenced matter, please find the original and five copies of Petitioner RIDEM's Reply Brief. Please do not hesitate to contact me at the number above should you have any questions or concerns about this filing. Thank you very much for your prompt attention to the enclosed.

Very truly yours,

A handwritten signature in black ink, appearing to read "S B Forcier".

Susan B. Forcier, Esq.

Enclosures

Cc: Samir Bukhari, Esq.  
Douglas H. Wilkins, Esq.

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

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ENVIR. APPEALS BOARD

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In the Matter of: )  
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City of Attleboro, Massachusetts )  
Department of Wastewater )  
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NPDES Appeal Nos. 08-08 and 08-09  
NPDES Permit No. MA 0100595

**REPLY BRIEF OF THE  
RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT**

Petitioner Rhode Island Department of Environmental Management (“RIDEM” or “Petitioner”) has reviewed the lengthy Briefs submitted by both the Permittee and by the Region, and now submits this short reply brief in order to address the limited points set out in its Motion for Leave to File a Reply Brief.

1. **Both The City’s response and the Region’s Memorandum claim that RIDEM failed to raise the issues below that it seeks to present on appeal.**
  - a. **RIDEM’s comments below requested that the Region comply with its duty to ensure compliance with all applicable downstream water quality standards, including through the use of appropriate hardness values.**

The City indicates that RIDEM’s comments merely “raised only a general issue, asking EPA to provide information to ‘support’ the 100 hardness value” and stated that hardness “values typically observed in RI waters” are less than 100. Response of the Permittee at p. 3. The comments submitted by RIDEM during the comment period, which were attached to RIDEM’s Petition as Exhibit C, demonstrate that the use of a hardness value of 100, which is significantly

higher than observed values, will lead to higher water quality criteria, and consequently, to violations of Rhode Island Water Quality Standards. RIDEM's comments further included evaluation pages which demonstrated relevant calculations for various pollutants using the criteria established, assuming an in-stream hardness value of 100, as was assigned by the Region in this permit. Those calculations further demonstrated the gross violations of RI Water Quality Standards that would result from the application of these criteria. RIDEM's comments demonstrated that the Region was not meeting its obligation under 40 C.F.R § 122.44 to ensure compliance with all applicable water quality standards. In response to those comments, the Region was required to either demonstrate how the use of the 100 hardness value would ensure such compliance, or to lower the values used so that compliance with downstream water quality standards could be ensured.

The City's Response also misstates RIDEM's burden of establishing that its Petition warrants review by the Board. The Burden is on the Petitioner to demonstrate that an issue was raised below and that the Region did not adequately address that issue in its response to comments. In order to avoid the filing of a petition in the first place, the Region must provide an adequate response to any comments that are received. In the case of the comments regarding hardness values, the Region's responses failed to provide any justification or evidence that the use of hardness values of 100 would ensure that RI Water Quality Standards would be met at the Rhode Island border and in Rhode Island receiving waters generally, and specifically did not address the evaluations performed by RIDEM demonstrating non-compliance related to the use of 100 as a hardness value. Instead, the Region simply stated that the hardness values used were derived from data samples taken above the North Attleborough discharge and that the low-range data point from that data was applied in setting the permit limits. Those samples and data do not

adequately reflect conditions at the point of the Attleboro discharge or the downstream receiving waters where the Region is required to ensure compliance with water quality standards.

**b. Availability of data to the Region in advance of issuance of the permit.**

The Region's response states that RIDEM failed to provide sampling data to the Region prior to issuance of permit. This sampling program (SAMPLING PLAN SURFACE WATER MONITORING IN THE TEN MILE RIVER WATERSHED, YEAR 2007) was conducted by RIDEM in cooperation with MADEP and the Region. MADEP was a joint permit issuer for this permit, working in conjunction with the Region in issuing this permit, just as it worked in conjunction with RIDEM on this sampling program. Moreover, the Region approved the complete plan for the sampling program, performed the metals and hardness laboratory analysis for all the samples collected, and was therefore fully aware of the study and the pending nature of the data even prior to the data having been made available. While the data was not yet available at the time of the initial comment period in the fall of 2006, the Permit was not issued until June 9, 2008, after the data became available to the permit issuers. The Administrative record for a NPDES Permit remains open until the date of issuance of the final permit. This data is part of the record, and the failure to take this data into account was clear error on the part of the Region.

**2. Both the City's Response and the Region's Memorandum include misstatements of law and fact, including the scope of the burden borne by RIDEM as Petitioner, and whether RIDEM's Petition carried that burden, and the timeliness and relevance of the data referenced in RIDEM's Petition.**

**a. RIDEM's burden to show that Region's analysis below was arbitrary and capricious.**

- i. The City's statement that RIDEM presented incomplete/insufficient data.

The City's Response states that "RIDEM's evidence is insufficient on its face." Response of the Permittee at p. 4. This discussion goes on to state that RIDEM failed to conduct the necessary analysis to relate the data presented to the Attleboro discharge "weeks earlier and miles away in another state . . ." *Id.* Permittee appears to have overlooked the fact that the discharge at issue here is just 200 yards upstream from the Rhode Island border, and that the EPA's duty under 40 C.F.R. § 122.44 is to ensure compliance with all applicable water quality standards, a duty which includes ensuring compliance with Rhode Island Water Quality Standards at the point where the Ten Mile River crosses the Rhode Island border and throughout Rhode Island receiving waters downstream of the discharge. The data which was utilized by the Region in determining which hardness value to apply in setting permit limits, however is derived from samples obtained upstream of the North Attleborough Wastewater Treatment Facility, a discharge which is, in fact, miles upstream from the MA/RI border and of the discharge at issue here. The data that RIDEM has recommended the use of includes samples taken much closer to the actual discharge at issue and within the receiving waters, and therefore provides a much more accurate picture of actual conditions and hardness levels in the receiving waters. The Region's duty is to ensure compliance with water quality standards in downstream receiving waters. The data RIDEM advocates for the use of is relevant to and representative of those receiving waters. Only certain data points were referenced in RIDEM's Petition so as not to inundate the Board with data. The complete data are readily available to the permit issuers for consideration. The points presented in RIDEM's Petition were those which were representative of 7Q10 critical conditions and therefore of the hardness values that RIDEM feels are more appropriate for use in this permit.

- ii. The City's statement that RIDEM's data is new and the City should be able to rebut it by arguing for a different dilution factor.

In presenting its argument that RIDEM's data is not supported due to flow time and dilution factors, the City is again attempting to cloud the issues relevant to RIDEM's Petition. All of the detail provided in this section of the City's Response is irrelevant to the issue of whether RIDEM carried its burden in its petition. RIDEM's burden is to demonstrate its participation in the permit process leading up to the permit decision, and to demonstrate that the issue(s) raised in the petition are "reviewable" issues, i.e. that the issues were initially raised during the comment period, and finally, to raise such issues with specificity, beyond restating the objections raised in the comment period, and to demonstrate why the Region's response to those objections is clearly erroneous or otherwise warrants review. RIDEM has met all of these standards. RIDEM submitted comments during the comment period on a number of issues, including the hardness value applied by the Region. RIDEM's Petition went beyond simply restating the objections raised by RIDEM and others during the comment period and clearly demonstrated the ways in which the Region's responses were deficient.

The City's arguments regarding dilution factor and residence time are both inaccurate and misplaced. RIDEM's concern is that RI Water Quality Standards are met at the MA/RI border and throughout Rhode Island receiving waters, as it is the Region's duty to ensure. That border is only 200 yards downstream from the discharge at issue here, and not the miles upstream that are cited by the City in their Response. It is not the duty of RIDEM to provide the Region with the appropriate available information or to inform the Region what permitting decisions are appropriate based on available information. Those duties belong to the Region as a part of its

larger duty to responsibly issue permits that are in compliance with relevant regulations and statutes.

- b. **RIDEM recommended selection of the lowest observed values from the most recent and relevant data, while the Region relied on the lowest observed values from the data set that it selected.**

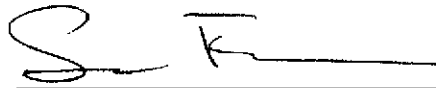
The Region asserted in its Memorandum in Opposition that its response to comments, explaining where its data came from and that the lowest value observed in that data was applied in determining the permit limits, was adequate and reasonable. RIDEM agrees, and agreed in its petition, that the method of selecting of the lowest observed hardness values in determining the appropriate permit limits was proper. However, when the data applied is from samples taken many miles upstream of the discharge and receiving waters, even the use of a proper method is inadequate. The Region is not required by law to ensure compliance with water quality standards only in upstream waters, but also in all affected downstream states. This discharge is 200 yards upstream of the Rhode Island border, so the Region should be concerned with whether the discharge will meet RI Water Quality Standards and about the actual conditions observed in the Rhode Island receiving waters, yet the Region seems convinced that consideration of hardness values upstream of both this discharge and the North Attleborough WWTF discharge is adequately representative of the conditions in the receiving waters downstream of the Attleboro WPCF discharge and adequately protective to ensure compliance with Rhode Island Water Quality Standards. It is not.

RIDEM recommended the selection of the lowest values observed from the more recent and relevant data, while the Region elected to select the lowest values observed from the data obtained upstream of the North Attleborough WWTF. The Region acknowledged in the response to comments and again in the Memorandum in Opposition that the Region “opted to

use the lower value” in order to approximate hardness level during critical conditions. All that RIDEM has requested is that the Region expand the protectiveness of that standard to employ the most recent and relevant data that is available to the Region, and which is representative of the downstream receiving waters. The data used by the Region in setting the permit limits, while spanning a greater time frame, was from a different portion of the river and failed to take into account the flow input from either the North Attleborough WWTF or the Attleboro WPCF.

Respectfully submitted,

RHODE ISLAND DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT,  
By its Attorney,



Dated: September 22, 2008

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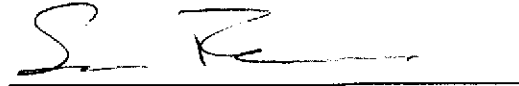


**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Motion to Submit Reply Brief were sent to the following individuals by first class mail, postage pre-paid on this 22<sup>nd</sup> day of September, 2008:

Douglas H. Wilkins, Esq.  
Anderson & Kreiger, LLP  
One Canal Park, Suite 200  
Cambridge, MA 02141

Samir Bukhari, Esq.  
Office of Regional Counsel  
U.S. EPA, Region 1  
1 Congress Street 1100 (RAA)  
Boston, MA 02114-2023

A handwritten signature in black ink, appearing to read "S. Bukhari", is written above a solid horizontal line.