

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIRECTOR'S DECISION

IN RE: NEWBAY CORPORATION  
RIPDES APPLICATION  
NO. RI 0021750

DECISION

This matter comes before the Director pursuant to requests of potentially interested persons under Rule 49 of "Regulations for the Rhode Island Pollutant Discharge Elimination System" of the Department of Environmental Management.

On or about August 14, 1990 the Division of Water Resources issued the Rhode Island Pollution Discharge Elimination Systems (RIPDES) Permit for the applicant's proposed Cogeneration Facility located at Dexter Road in East Providence, Rhode Island.

Thereafter, the Director received hearing requests from Governor Edward D. DiPrete, the City of East Providence, C Care of Rhode Island, Inc. and the Blackstone Park Improvement and East Providence Coalition.

As Director I have reviewed the following materials for purposes of this record.

9-13-90 Hearing request from Governor  
Edward D. DiPrete

9-13-90 Technical and Regulatory  
Evaluation by Ferrari Engineering

- 9-13-90 Hearing request from City of East Providence
- 09-20-90 Hearing request from C Care
- 10-02-90 Objections from Newbay to requests for Hearings from:  
(a) Governor DiPrete  
(b) Blackstone & East Providence Coalition  
(c) City of East Providence  
(d) C Care
- 10-12-90 Rebuttal of Governor DiPrete to Objection.
- 10-09-90 Objection from C Care to Motion to Dismiss
- 10-23-90 Objection of Blackstone and East Providence Coalition on Motion to Dismiss, response to objection of Newbay to request for hearing.
- 10-23-90 Affidavit of Mark McSally, attorney for Blackstone and East Providence Coalition
- 10-24-90 Copy of Governor DiPrete's rebuttal to Newbays' objection to request for hearing

In addition to the above documents, I have reviewed the August, 1990 Permit as well as materials presented in the Division's second hearing (Divison's record).

#### FINDINGS OF FACT

1. The permit's procedure and travel are proper in form and comply with the appropriate RIPDES Rules and Regulations.

2. The Rule 49 Petitions for an administrative hearing are timely filed and comport with the substantive requirements of Rule 49.

3. Permit Condition I.A. 6.(d)-(i) referencing baseline studies is the only permit condition which is being ruled upon in this decision.

4. The Petitioner's, The City of East Providence and Governor DiPrete, cite valid issues as to the use of baseline studies as they relate to dilution and instream concentrations of pollutants.

5. The assumptions of this permit, although permissible by the regulations, lead to effluent limitations which will govern control techniques to be reevaluated subsequent to baseline study development.

6. While it is appropriate to set effluent limitations that will govern control techniques and control of the pollutants in the waste stream, the question to be addressed, would be, are these baseline values so predominate in scope as to virtually negate permit development prior to baseline study and subsequent evaluation.

7. In essence, the baseline here is so critical in this water quality situation that entire permit limitations, redevelopment and subsequent control techniques will have to be re-established, subject to yet to be undertaken baseline report and study.

8. There exists a substantial factual issue as to what, if any, alternatives would be available under the re-opener provision of this permit condition.

9. This issue goes beyond the scope of said contested permit condition per se and to the substance of whether the permit itself can be issued at all.

10. The C Care request while referencing a number of associated areas did not define this issue.

11. All other points raised by the hearing requests were addressed to the satisfaction of the Director by the permit process.

#### CONCLUSIONS OF LAW

1. The permit's procedure and travel are proper in form and comply with the appropriate RIPDES Rules and Regulations.

2. The Rule 49 Petitions for an administrative hearing are timely filed and comport with the substantive requirements of Rule 49.

3. Permit Condition I.A. 6.(d)-(i) referencing baseline studies is the only permit condition which is being ruled upon in this decision.

4. The Director has clear discretionary authority to grant a hearing in whole or in part under Rule 49 of the above-referenced regulation.

5. That the regulations and this decision are authorized by and comply with the appropriate portions of Chapters 46-12, 42-17.1 and 42-35 of the Rhode Island General Laws.

## DISCUSSION

The issue of whether the actual baseline studies should be completed prior to the issuance of this permit raises both policy and fundamental fairness questions.

The record appears to present this director with a proverbial Hobson's choice on this issue. Reduced to its basic elements it seems that both the Applicant and the Division of Water Resources used an assumed baseline for purposes of drafting both the permit and permit conditions.

The permit itself [Section I.A.6.] requires that appropriate baseline studies be performed and based on those conclusions the permit possibly be re-opened.

I share the concern raised by some of the petitioners in that in a "worst case" scenario, the baseline study would yield a conclusion whereby the discharge should not be permitted and the facility at that point in time already has been constructed.

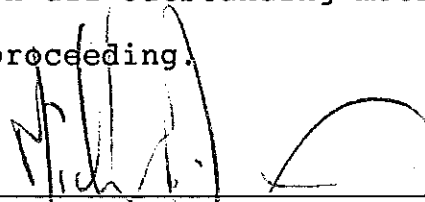
If a discharge continues under those circumstances then the Water Quality will suffer adversely and potentially permanently. If the applicant is forced to close the facility there is an obvious severe economic harm to its interest. In my review of the record, I could find no substantial evidence that reasonable engineering alternatives had been identified to a continued RIPDES discharge if one were found not to be permissible after completion of the baseline studies.

Therefore, I hereby Order:

1. That the request for an adjudicatory hearing is hereby granted on the issue of whether baseline studies should be completed prior to the issuance of the permit or whether there exists an alternative to the RIPDES discharge which could be retro-fitted were the discharge found to be ultimately unacceptable.

2. The Administrative Adjudication Division is hereby ordered to conduct a hearing on this matter.

3. I remand to the sound discretion of the Administrative Adjudication Division all outstanding motions and other pending matters in this proceeding.

  
MICHAEL ANNARUMMO, DIRECTOR  
State of Rhode Island  
Department of Environmental  
Mangement

3 Dec 90

Date

CERTIFICATION

I hereby certify that I caused a true copy of the within Director's Decision to be forwarded to Attorney James Truslow, Partridge, Snow & Hahn, One Old Stone Square, Providence, Rhode Island 02903, C-Care, Ms. Gloria Garvin, 324 North Broadway, Rumford, Rhode Island 02915, Blackstone Improvement Association c/o Attorney Mark McSally, Taft & McSally, 21 Garden City Drive, Cranston, Rhode Island by hand-delivering a copy of the same this 3rd day of December, 1990.

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