

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

ENVIR. APPEALS BOARD

2008 DEC 18 AM 11:51

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In re:)
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)

UPPER BLACKSTONE WATER)
POLLUTION ABATEMENT DISTRICT,)
MILLBURY, MASSACHUSETTS)

NPDES Permit No. MA0102369)
_____)

NPDES Appeal Nos. 08-11, 08-12,
08-13, 08-14, 08-15, 08-16, 08-17,
08-18

**RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT'S
MOTION FOR LEAVE TO SUBMIT A BRIEF AS AMICUS CURIAE**

Now comes the Rhode Island Department of Environmental Management ("RIDEM"), and hereby requests leave to submit a brief as amicus curiae in this matter. As grounds therefore, RIDEM asserts the following:

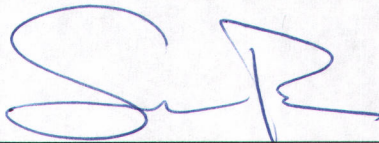
1. (1) RIDEM has standing to file a Petition for Review of the National Pollution Discharge Elimination System ("NPDES") Permit number MA0102369 ("the Permit"), issued on August 22, 2008 by the United States Environmental Protection Agency, Region 1 ("the Region") by virtue of its having submitted comments during the public comment period. *See* Written Correspondence of RIDEM Containing Comments on Draft Permit MA0102369, dated May 18, 2007 ("RIDEM Comments"), attached to RIDEM's brief as Exhibit A.
2. Rhode Island is a downstream affected state whose waters are affected by the discharges made by the Upper Blackstone Water Pollution Abatement District, and

whose water quality standards the Region must guarantee compliance with when issuing the Permit.

3. RIDEM has elected not to file a Petition for Review of this Permit, and instead wishes supply the Environmental Appeals Board ("the Board") with a concise brief as *amicus curiae* in order to further inform the Board regarding certain issues that relate to the State of Rhode Island and the Permit's insurance of compliance with Rhode Island water quality standards.

RIDEM's proposed brief as *amicus curiae* is attached hereto for submission to the Board.

Respectfully submitted,
RI Department of Environmental Management,
By its attorney,



Date: _____

12/17/08

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the above pleading was hand delivered on December 18, 2008 to the U.S. Environmental Protection Agency, Clerk of the Board, Environmental Appeals Board, 1341 G Street, N.W., Suite 600, Washington, D.C. 20005, and was submitted electronically through the CDX system and sent by first class mail, postage pre-paid, on December 17, 2008 to the following individuals:

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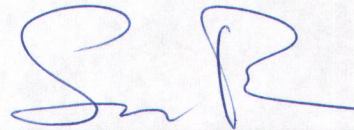
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BRIEF OF AMICUS CURIAE
RHODE ISLAND DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

INTRODUCTION AND BACKGROUND

The Upper Blackstone Water Pollution Abatement District ("UBWPAD") was issued NPDES Permit MA0102369 (the "Permit") by the United States Environmental Protection Agency, Region 1 ("Region 1" or "Region") on August 22, 2008. The Permit allowed UBWPAD to discharge from its facility located in Millbury, Massachusetts to the receiving waters of the Blackstone River. The UBWPAD facility in Millbury is a wastewater treatment facility with a design capacity of fifty-six million gallons per day, engaged in the collection and treatment of domestic, commercial, and industrial wastewater from the city of Worcester, and portions of the cities of Auburn, West Boylston, Holden, Rutland, Oxford and Millbury, Massachusetts. *See* Fact Sheet at 1. The discharge point is near the headwaters of the Blackstone River and during low flow conditions, the discharge from the UBWPAD facility dominates the river flow. *Id.* at 2.

The Blackstone River originates in Worcester, Massachusetts and flows south to the Rhode Island border, where it joins the Seekonk River and eventually the Providence River, which flows into Narragansett Bay. The Blackstone River in Massachusetts is classified as a Class B warm water fishery, designated as a habitat for fish, other aquatic life, and wildlife, and for primary and secondary contact recreation. *Id.* at 6. The Blackstone River in Rhode Island is designated as a Class B1 waterway to the confluence with the Seekonk River, designated for fish and wildlife habitat, and for primary and secondary contact recreational use, except that primary contact uses may be limited due to pathogens from approved wastewater discharges. *Id.* The Seekonk River and the northern section of the Providence River are designated as Class SB1 {a} marine waters. Class SB1 waters are designated for the same uses as B1 waters, and the {a} designation indicates that the waters are likely to be impacted by combined sewer overflows (CSO) in accordance with an approved CSO facilities plan. *Id.* The southern section of the Providence River is designated as Class SB {a} marine water. *Id.* Class SB waters are designated for the same uses, in addition to shellfish harvesting for controlled relay.

The Blackstone River is listed on both the *Massachusetts Year 2004 Integrated List of Waters* and Rhode Island's *2004 CWA § 303(d) List of Impaired Waters* ("303(d) lists") as impaired for various metals, pathogens, biodiversity impacts, nutrients and low dissolved oxygen, among other reasons. Both the Seekonk River and the Providence River are on Rhode Island's 303(d) list as impaired for at least nutrients, low dissolved oxygen and excess algal growth. *Id.*

Rhode Island is a downstream affected state under the Clean Water Act, and therefore the Region, in crafting and issuing the Permit, was required to condition the permit to ensure compliance with Rhode Island water quality standards, in addition to Massachusetts water

quality standards, and was required to condition the permit to ensure that the discharge will not cause, have reasonable potential to cause, or contribute to violations of either state's water quality standards. *See* 40 CFR §§ 122.4(d), 122.44(d).

The Rhode Island Department of Environmental Management ("RIDEM") submitted comments on the draft permit for the UBWPAD facility by letter dated May 18, 2007, and therefore had standing to file a Petition for Review to the Environmental Appeals Board ("Board") in this matter during the appeal period. *See* Letter of RIDEM, dated May 18, 2007, attached at Exhibit A. Rather than submit a Petition for Review appealing the issuance of the Permit, RIDEM wishes to submit this brief as *amicus curiae* in order to draw the Board's attention to certain issues in this matter which involve the State of Rhode Island, and to provide the State of Rhode Island's position on those issues.

NITROGEN

The total nitrogen limit in the Permit is set in order to meet Rhode Island water quality standards only, because excess nitrogen is the limiting nutrient in marine waters, in this case, Rhode Island's Seekonk River, Providence River and Upper Narragansett Bay. All of the discharge waters are included on Rhode Island's 303(d) list of impaired waters, in part due to excessive nitrogen concentrations. Stricter limitations on total nitrogen are therefore necessary to achieve water quality standards in both the Blackstone River and in the discharge waters further downstream into Narragansett Bay.

In requiring the UBWPAD to comply with the nitrogen limits set out in the Permit, no disproportionate burden is being shifted onto Massachusetts facilities, as suggested by UBWPAD, and RIDEM is not seeking to impose any such burden. RIDEM has been holding in-

state facilities to equivalent standards as it is seeking to have the Region hold the UBWPAD to with regard to total nitrogen. In December 2004, Rhode Island published the report entitled "Evaluation of Nitrogen Targets and WWTF Load Reductions for the Providence and Seekonk Rivers." As noted in this report, the allowable WWTF total nitrogen concentrations vary based on consideration of the environmental impact of each WWTF. In particular, the WWTF load reduction includes consideration of uptake of nitrogen for discharges located on tributary rivers (e.g. UBWPAD which discharges to the Blackstone, a tributary of the Seekonk River) and the proximity to the more severely degraded portions of the receiving waters. RIDEM analyzed this issue further in its response to comments from UBWPAD and MADEP when it issued certain Rhode Island permits, finding that greater reductions of nitrogen effluent were appropriate for facilities located closer to the portion of the receiving waters where the greatest impacts have been observed.

To date, RIDEM has issued RIPDES permits with equivalent nitrogen limits to nine facilities (Narragansett Bay Commission Fields Point, Narragansett Bay Commission Bucklin Point, East Providence, Cranston, West Warwick, Warwick, East Greenwich, Smithfield, Burrillville). Rhode Island facilities that are currently being held to the same Total Nitrogen concentration limits as UBWPAD (5 mg/l) include: Narragansett Bay Commission Fields Point, Narragansett Bay Commission Bucklin Point, East Greenwich and Woonsocket. These facilities discharge relatively greater amounts of nitrogen, and do so in the upstream portions of the system, and have larger design capacities overall. The Woonsocket facility, as discussed below, has recently been issued a new permit which includes a nitrogen limit of 3 mg/l. Those Rhode Island facilities which have a nitrogen limit of 8 mg/l are facilities that discharge into the Providence River or directly into Narragansett Bay, where the flushing rate is higher. Those

facilities also tend to have relatively smaller capacities and discharge lower amounts of nitrogen overall. While some of these limits are set to be achieved through the application of compliance schedules agreed to in Consent Orders, Rhode Island licensed facilities are committing to design for lower and lower standards.

The UBWPAD Petition suggests that while Rhode Island facilities' limits may be comparable to those set in this Permit, the Rhode Island facilities are being allotted substantial time for compliance that UBWPAD argues that it is not being provided here. Rhode Island has negotiated compliance schedules through consent orders with a number of facilities, and RIDEM has no objection to the same taking place here. RIDEM is not attempting to impose any stricter limits on UBWPAD than it has imposed on Rhode Island facilities.

The two main point sources of nitrogen to the Blackstone River are the UBWPAD facility at issue in this appeal, and the Woonsocket, RI Water Pollution Control Facility. *See* Response to Comments, Response F17, p. 45. The Woonsocket facility, as referenced in both the Region's Response to Comments and the Petition filed by Conservation Law Foundation, was issued a total nitrogen effluent limit of 5 mg/L (identical to UBWPAD) but recently committed, through a consent agreement, to design its new facility to achieve a total nitrogen effluent of 3 mg/L. In response to that consent agreement, RIDEM re-issued the permit for the Woonsocket facility in September 2008, with a nitrogen limit of 3 mg/L. Based on the reasoning and justification provided by the Region, RIDEM supports the 5mg/L limit set by the Region for total nitrogen in this Permit, and does not object to that limit being achieved as set out in a reasonable compliance schedule to be negotiated and outlined in a consent order. RIDEM does object to such a compliance schedule being included in the permit itself, and agrees with and

supports the Region's decision not to include a compliance schedule in this permit, as discussed in further detail below.

SCHEDULE OF COMPLIANCE

In its Petition for Review, the UBWPAD states that the Region's refusal to incorporate compliance schedules into the final permit was arbitrary and capricious, and an abuse of discretion and not supported by law. UBWPAD suggests that the Region did not have to follow Rhode Island permitting regulations in issuing this Permit, but such a suggestion is contrary to the requirement of 40 CFR §122.4, CWA Section 401 that the Region impose permit conditions that will ensure that applicable water quality requirements of all affected states will be met.

The Clean Water Act provides that compliance schedules may only be included in permits when state water quality standards clearly authorize such schedules and where such schedules will ensure that state water quality standards will be achieved by July 1, 1977. *See In the Matter of Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5 (April 16, 1990). That case further held that it is for the states to determine whether compliance schedules may be incorporated into NPDES permits, and the Region owes deference to states' determinations and interpretations on that point. RIDEM has determined that schedules of compliance may not be included in permits if the compliance required by the schedule would be achieved only after the July 1, 1977 deadline. Therefore, compliance schedules are not permissible in permits currently being issued.

The RIDEM Water Quality Regulations do not include any provisions relating to compliance schedules, and further, are meant to be read in conjunction with the Rhode Island Pollution Discharge Elimination System Permitting Regulations ("RIPDES Regulations"), which

do not allow schedules of compliance to be included in permits. The simple fact that the Water Quality Regulations themselves do not provide authorization for compliance schedules is enough to make it clear that Rhode Island has not clearly authorized them, but in reading the Water Quality Regulations together with the RIPDES Regulations, as RIDEM does, it becomes more clear that compliance schedules for water quality based effluent limits are not to be included in permits. RIDEM's practice has always been to negotiate and establish compliance schedules, when necessary, through consent agreements.

The RIPDES Regulations, with regard to schedules of compliance, state in relevant part as follows:

The permit may, when appropriate, specify a schedule of compliance leading to compliance with the State and Federal Acts and all other applicable authority for these regulations.

Any schedules of compliance under this section shall require compliance as soon as possible.

[S]chedules of compliance shall require compliance not later than the applicable statutory deadline under State and Federal law, and shall be subject to State and Federal regulations.

RIPDES Regulations, §20.01 and 20.02. The interpretation of Rhode Island's position on compliance schedules provided by the Region in the Response to Comments is accurate. The "applicable statutory deadline" referred to above is the deadline provided in the Clean Water Act and Section 301(b)(1)(c), July 1, 1977. Because that date has long since past, permits being issued now cannot include compliance schedules because they will not ensure compliance with all state water quality standards by that statutory deadline.

The Region's statements in the Response to Comments relating to Rhode Island's requirement that schedules of compliance are not allowed to be included in permits is correct.

Because the limits in this Permit are required to ensure compliance with the water quality standards of all downstream affected states and all applicable statutes and regulations, it would have been improper for the Region to have included compliance schedules in this Permit, especially in light of the fact that the Nitrogen limits in this Permit have been included in order to ensure compliance with Rhode Island's water quality standards only, and not Massachusetts' standards.

UBWPAD urged the Region to include a compliance schedule for Phosphorous, because it is subject to Massachusetts Regulations as well as Rhode Island's, arguing that Massachusetts regulations allow for the inclusion of compliance schedules in permits. However, the Region wisely declined to include a compliance schedule in the permit for one limit and not for others for which compliance schedules might be necessary down the road. The Phosphorous limits in the Permit are designed to ensure compliance with both the Massachusetts and Rhode Island water quality standards, and because Rhode Island's water quality standards will not allow for the inclusion of a compliance schedule in the permit, the Region elected to wait until more information is known about "such issues as modes of compliance and cost" before a compliance schedule can be formulated to comprehensively handle all compliance issues. *See* RtC, Response E.2, p. 19; RtC, Response F21, p. 58; RtC, Response F46, p. 90.

INTERSTATE/TRANSBOUNDARY ISSUES

In its Petition, the UBWPAD raises certain "interstate/trans-boundary considerations" relating to "policy considerations with regard to interstate water quality management."

UBWPAD Petition at 64. First, UBWPAD asserts that the Region has erroneously interpreted its regulations to mean that it must apply "all aspects of a state's permitting and procedural rules,

rather than merely its water quality standards, and has used this as the basis for refusing to include a compliance schedule in the District's permit." UBWPAD Petition at 65. Essentially, UBWPAD argued in its Petition that because RIDEM's regulations relating to compliance schedules appear in its RIPDES Regulations rather than the Water Quality Regulations, no deference to RIDEM's interpretation of those regulations as not allowing compliance schedules to be included in permits was necessary. The requirements of 40 CFR §§ 122.4 and 122.44 are clear; the Region must "ensure compliance with the applicable water quality requirements of all affected states" and set permit limits to "control all pollutants ... which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard ..."

As discussed above, the Rhode Island Water Quality Regulations and the RIPDES Regulations are designed to be read together. The fact that the Water Quality Regulations are silent with regard to the issue of compliance schedules while the RIPDES Regulations set out requirements for compliance schedules is indicative of this fact. RIDEM reads these two sets of regulations in conjunction with one another in issuing permits, and the Region is required by the Clean Water Act to give some deference to states' interpretations of their own regulations. As stated above, under *Star-Kist*, compliance schedules may only be included in permits when they are authorized by state water quality standards, meaning that the Regions, in issuing permits, must look to states' interpretations of their own water quality standards to determine whether compliance schedules are permitted or not. Therefore, Region 1 was required to defer to Rhode Island's and Massachusetts' interpretations of their own Regulations in issuing this Permit, and it is clear that the Region's decision to consider both sets of Rhode Island regulations in issuing

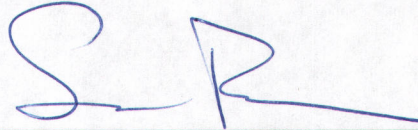
this Permit was appropriate and in accordance with RIDEM's own interpretation of its regulations.

Additionally, UBWPAD asserts that RIDEM has imposed less stringent limitations on dischargers in Rhode Island, placing Massachusetts dischargers at an economic disadvantage, and that the Region is essentially singling out Massachusetts dischargers for more restrictive treatment, despite Rhode Island dischargers being located further downstream and therefore closer to the receiving waters at issue. These statements are inaccurate. Rhode Island has placed nitrogen limits on dischargers that are equivalent and, in some cases (e.g., Woonsocket), even more stringent than the limit proposed in this Permit. While some Rhode Island dischargers have negotiated compliance schedules through consent agreements after the permits were issued, and therefore have additional time to comply with the limits set out in the permits, the ultimate limits are in almost every case equivalent to or more stringent than those proposed in this Permit. RIDEM does not object to the use of compliance schedules in this instance to help the UBWPAD reach the limits set out in the Permit, and RIDEM stands ready to assist or otherwise participate in the development of said compliance schedules. Rhode Island is not seeking to have the Region impose any stricter standards on this or any other Massachusetts facilities than those imposed on equivalent Rhode Island dischargers, but only to have the same standards imposed in order to ensure the protection of the already-impaired Rhode Island receiving waters.

CONCLUSION

For the reasons stated herein, RIDEM believes that the Board should uphold the Permit as issued.

Respectfully submitted,
RI Department of Environmental Management,
By its attorney,

A handwritten signature in blue ink, appearing to be 'S B Forcier', written over a horizontal line.

Date: _____

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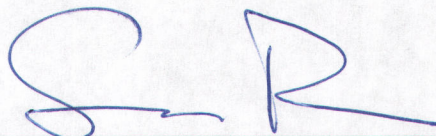
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