11. Infiltration/Inflow Control Plan

Region 1 has failed to adequately address the comments made by the District with regard to the length of time needed to complete an Infiltration/Inflow Control Plan. Expecting that it can be completed in six months is unreasonable. The Region's failure to acknowledge the local conditions and instead imposing this stringent deadline constitutes an abuse of discretion. Member communities must include money for such studies in their annual budget requests, as contingent funds are scarce in these austere times. Budget approval must occur at annual town meetings typically held in the spring, in many cases, more than six months from the original effective date of the Permit. Once such projects are budgeted and funded, state purchasing requirements are such that getting a consultant on board to help develop the plan would take the better part of six months. The more parties involved, the more complex it becomes. The District appreciates that the Region believes that an adequate plan can be developed within this timeframe; the District, however, remains unconvinced and believes substantially more time should be given for the completion of the plan, or at a minimum, the timeframe should be tied to a different benchmark date, such as the signing of the contract to develop this plan. To not give the District adequate time to complete this task is an abuse of the Region's discretion.

I. <u>The Board Should Grant Review Because This Matter Involves Important Policy Considerations.</u>

For the following reasons, the Board should grant review because this matter involves important policy considerations. 40 C.F.R. § 124.19(a).

First, the facts outlined in this Petition and in Region 1's Response to Comments establish that Region 1 that insisted upon the issuance of the contested permit provisions instead

of working first to develop more appropriate limits. MassDEP has chosen not to join in this Permit. Instead, Region 1 exercised its own discretion, and ultimately ignored significant public policy considerations that should have been addressed in the issuance of the final permit and require further consideration.

Second, Region 1's decision was not required by any known EPA policy or regulation. Instead, EPA's policies outlined in this Petition plainly call upon the agency to work with permittees to develop site-specific and watershed-based approaches. Issuing permits with overly stringent, unnecessary limits and then utilizing administrative orders or other similar mechanisms to investigate more appropriate limits after issuing the final permit is an unfair and inappropriate administrative practice that this Board should not allow. Modifying permits to increase limits, without adequate technical basis, is inconsistent with the CWA and its implementing regulations. Moreover, it is also poor public policy, creating an overburdensome and unfair administrative process.

For the reasons outlined in the Petition, issuing a permit with unnecessary and/or unattainable limitations is nonsensical public policy because it imposes overly stringent permit limitations notwithstanding Massachusetts regulatory options, EPA's policies, and the ongoing efforts by the UBWPAD, the Commonwealth and Region 1 to develop more appropriate limitations. Imposing such permit limitations is arbitrary and capricious. *See Puerto Rico Sun Oil Company v. Environmental Protection Agency*, No. 92-2359 (1st Cir., October 21, 1993), slip opinion at p. 20 (reversing Board and EPA Region II for issuing permit without mixing zone where EPA policy and Puerto Rico supported mixing zones). The Board should review the

contested Permit conditions as well as Region 1's decision to issue the final permit as a matter of discretion and policy.

1. Improvements Implemented Under The Existing Permit And Scheduled To Be Implemented Under The Existing Permit Were Not Adequately Considered By Region 1 In Issuing The Final Permit.

Region 1, in issuing the final permit, failed to adequately consider the improvements implemented and scheduled to be implemented under the current existing permit and subsequent Consent Order. The current existing permit and Consent Order provide the District with eight years to implement the infrastructure and treatment improvements agreed upon by Region 1 and the District. The District is in compliance with its permit, the Consent Order and implementing schedule regarding these infrastructure and treatment improvements. Nonetheless, Region 1 proceeded to issue a new final permit with lower limits for the pollutants which these improvements are to address, thereby ignoring/inadequately considering the beneficial impacts of the improvements completed and wholly dismissing the beneficial impacts of the work in progress. Region 1 in its Response to Comments states that it is required to issue a permit every five years, but fails to acknowledge that it is not required to change the limits or conditions unless revisions are justified, which is not the case concerning the District's permit. Further, Region 1 frequently notes in its Response to Comments that modifications can be made to the Permit as necessary.

By failing to account for the benefits of the completed work and failing to allow the District to complete the scheduled work in accordance with the terms of Consent Order, EPA Region 1 has made a major policy error that warrants review by the EAB. This major policy

consideration for the EAB to review is multifaceted. First, as indicated in the preceeding discussion of challenges to specific limits, not considering the benefits of the District's infrastructure and treatment improvements is further evidence of Region 1's selective consideration of the available data. Second, failing to allow the District to compete the work as set forth in the Consent Order schedule before lowering the permit limits leaves little incentive for the District, or any other permittees, to engage in such negotiations with Region 1 or to make the necessary appropriations based on these discussions if the District or other permittees will not get the benefit of seeing the scheduled and consented work through to fruition with the benefits analyzed and accounted for by Region 1 before the permit limits are changed. Third, the repetitive statement by Region 1 in its Response to Comments that modifications can be made to the Permit as necessary is also undercut by Region's actions: changing the permit limits without full consideration of District's improvement and scheduled improvements leaves little to no credibility to this statement that Region 1 is willing to account for other future beneficial data or circumstances subsequent to issuance of the final permit when Region 1 will not even consider existing benefits and scheduled benefits and improvements. Fourth, a more appropriate method for issuing permits is for Region 1 to properly evaluate all available data including benefits resulting from infrastructure and treatment improvements; allow completion of work scheduled in the Consent Order prior to lowering limits; set necessary and appropriate limits on the basis of available data rather than establish arbitrary and over burdensome limits with an offer to adjust them subsequently as necessary. In sum, Region 1's failure to consider the work completed and scheduled under the Consent Order is a major policy making error that undercuts the credibility

of the permitting process with all of EPA and warrants review by the Board and whatever redress it deems appropriate.

2. Co-Permittees

Region 1 has improperly expanded the scope of the Permit to include as "Co-permittees" municipalities that own and operate wastewater collection systems which convey wastewater to the District's system and plant for treatment. Furthermore, Region 1 has sought to create a class of "co-permittees" upon which obligations are imposed without those co-permittees ever making application for or signing the Permit. While Region 1 did revise the co-permittee provision of the final permit in an apparent effort to respond to the District's comments and concerns that Region 1 was impermissibly making the District responsible for operation and maintenance of these local collection systems, the revised provision remains unclear and inappropriate. For example, Region 1's effort to shift to co-permittees certain operation and maintenance obligations is incomplete because it obligates the District to undertake reporting activities associated with wastewater collection systems over which the District has no control. This provision of the final permit still imposes an improper burden on the District and risk of EPA enforcement against the District for the actions or inactions of these municipalities under Part I. D. and E. which the District is prohibited from managing and are more appropriately addressed in separate permits with each municipality.

Region 1 looks to the District's enabling legislation, Chapter 752 of the Acts of 1968. (Appended as <u>Exhibit J</u>.), for authority to impose this obligation, and specifically I/I control. *See* RTC, R#F45, p. 87. Region 1 improperly relies upon Section 7, which addresses industrial

discharges only, and ignores Section 16 which specifically limits the District's authority over its member communities' satellite systems. Section 16 provides:

> nothing [in the District's enabling authority] shall be interpreted to authorize the board to construct, *operate or maintain the local sewage system* of each member, city, town or sewage district." (Emphasis added).

Further, according to Region 1,

> that [District] and its member communities have decided to maintain separate ownership of the treatment plant and collection system does not require the EPA to solicit separate signatures from each of the satellite systems. Nor does it require the EPA to issue separate permits to [the District] the satellite systems.

RTC, R#F45, p. 86.

It is precisely for this reason – separate ownership and control of the collection system and the treatment of collected waste – that the EPA must issue separate permits to the District and the "co-permittees." Issuing a single permit puts the District in conflict with its enabling statute issued by the Great and General Court of the Commonwealth of Massachusetts and at risk of being the target of enforcement by Region 1 for matters it is legally prohibited from controlling by state law. The enforcement mechanisms of this provision remain unclear in the final permit, and as a result the District is unfairly and inappropriately at risk of developing a negative enforcement and compliance history with the EPA for potential actions between EPA and the municipal co-permittees which would be lodged on the record of the District's NPDES permit.

As to the listed "co-permittees," Region 1 does not adequately consider or respond to the District's comments regarding the affected municipalities' participation in the Permit process. The Region contends that co-permittees need not apply for or sign any permit application or,

apparently, take any affirmative step in order for Permit conditions to be binding upon those communities. However, the regulations implementing the NPDES permit application process belie this interpretation. In describing who must sign applications for a permit, 40 C.F.R. § 122.22 (a)(3) notes that all permit applications must be signed, "*For a municipality, State, Federal, or other public agency.* By either a principal executive officer or ranking elected official." The application for this permit was not signed by either a principal executive officer nor a ranking elected official for any of the seven other public entities which the Region seeks to bind by this final permit. Moreover, the director of the District cannot be said to be an authorized representative of these public entities, even if the regulations were to allow permit applications to be signed by authorized representatives. "Authorized representative" is defined in the subsequent section of the regulations, which requires that reports or other information submitted to EPA in connection with a permit be signed by one of the parties described in (a) or an authorized representative:

> A person is a duly authorized representative only if: (1) The authorization is made in writing by a person described in paragraph (a) of this section; (2) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity such as the position of plant manager, operator of a well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company, (A duly authorized representative may thus be either a named individual or any individual occupying a named position.) and, (3) The written authorization is submitted to the Director.

40 C.F.R. § 122.22(b)

The Director of UBWPAD in this case received no authorization in writing to represent any of the "co-permittees," nor was such written authorization submitted with the application.

The application was submitted solely on behalf of the District, was only signed by the District and cannot now be imposed upon entities which were not party to the application.

The Region apparently relied upon information in the District's application identifying "municipalities served," but chose to ignore the separate municipal and state entities which have legal control over the collection systems in those municipalities and the various contractual relationships between them. Instead of seeking to identify and then permit each owner of the satellite systems, Region 1 contends that it has legal authority to bind each system under the Permit because it purportedly gave notice of these new obligations by providing each municipal "co-permittee" with a copy of the Fact Sheet and draft permit in advance of the final permit. RTC, R#F45, p. 87. Certainly, having not signed a permit application, the named "co-permittees" were not on notice of or informed of Region 1's plan to impose new obligations on them under this Permit. The District notes that the owners of some wastewater collection systems were ignored (e.g., Massachusetts Department of Conservation and Recreation), and others, while recognized, were inexplicably deemed too small to be included as co-permittees (e.g., Sutton, Shrewsbury, Oxford and Paxton). Such arbitrary permitting action is not fully addressed by the Region's Response to Comments. Consequently, the District requests that the Board order Region 1 to remove the co-permittee provisions of the final permit.

3. The Final Permit Raises Significant Interstate/Trans-Boundary Considerations

The Board should review the Permit issued by the Region because the contested provisions of the Permit involve important, precedent-setting policy considerations with regard to interstate water quality management. The Region has erroneously interpreted the CWA to

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require that all downstream standards must be applied to upstream sources. The Region has discounted or refused to consider the impacts of attenuation, flow, dilution, etc. in calculating the effluent limits, despite the fact that the Rhode Island border is 28 miles from the source. Finally, the Region has 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.

In order to subject a point source to permit requirements based on another state's water quality standards, EPA must demonstrate that the point source's discharge is causing or contributing to a violation of those out-of-state standards.[14] As discussed elsewhere in these comments, EPA has not made any showing that the proposed limits in the Permit are needed to prevent violations of Rhode Island water quality standards. The burden is on EPA to show how the proposed limits will lead to attainment of the Rhode Island standards, and EPA has not done this. Therefore, there is no legal basis for those limits.

Dischargers in Rhode Island, which are much closer to the Bay than is the District's facility, have received total nitrogen limits as high as 8 or 10 mg/L and, in some cases, no limit at all. If attenuation is considered (as it must be), an equivalent limit for the District, based on alleged impacts to the Bay, would be much higher that those limits. Yet, without justification, EPA has applied a limit of 5 mg/L to the District. In light of RIDEM's actions concerning its

[14] Related legal concerns of the District include whether the imposition of Rhode Island requirements on Massachusetts point source discharges, without the CWA-required demonstration that the point source's discharge is causing or contributing to a violation of those out-of-state standards/requirements: (1) violates Section 510 of the CWA, 33 U.S.C. § 1370, which prohibits construing any provision of the statute as impairing "any right or jurisdiction of the States with respect to waters (including boundary waters) of such states"; and/or (2) violates the Tenth Amendment of the United States Constitution or invades Massachusetts' sovereignty and, thus, is unconstitutional.

own dischargers, EPA's interpretation of Rhode Island narrative water quality standards is erroneous.

Requiring that Massachusetts plants meet more stringent limits than Rhode Island plants, without a technical justification based on protection of water quality, violates the Commerce Clause of the Constitution. The actions the Region has taken in setting these limits have the effect of securing an unfair economic advantage or benefits for Rhode Island through use of the CWA, e.g., by unfairly shifting a disproportionate share of the responsibility and expense of reducing/treating the total nitrogen load that may not be necessary or economically feasible.

4. Environmental justice policy considerations

Region 1 did not adequately consider or respond to the District's comments regarding the need for meaningful involvement by the Environmental Justice ("EJ") community impacted by the Permit. A significant EJ Population, as identified by the Massachusetts Executive Office of Energy and Environmental Affairs ("EOEEA") based upon income, minority status, and English language proficiency, will bear the burden of increased rates that will be necessary to fund the facility upgrades required by the Permit. RTC, C#F51, p. 112-113. In its Comments, the District informed Region 1 of this EJ Population, which EOEEA determined to be most at risk of being unaware of, or unable to participate in, environmental decision-making. The District also informed Region 1 of the requirements of EPA's own EJ Action Plan, which calls for assuring that community input from potential EJ areas of concern is sought before the issuance of environmentally significant permits, such as this one. The Region, however, ignored the District's comments.

Region 1 made no effort to involve any EJ Population, as required by Executive Order 12898 and the Region's Action Plan.[15] Instead, and as the Region states in the Response to Comments, it addressed EJ's concerns by holding "a public hearing at a community college in Worcester and extended public comment period." RTC, R#F51, p. 114. This cannot constitute compliance with Region 1's EJ policy, which says that regulatory staff will "incorporate EJ into all aspects of their work with local, state, and federal agencies, will encourage interagency cooperation with respect to EJ issues, and will provide opportunities for meaningful participation in our environmental decision-making and program implementation to all external stakeholders down to the local government and neighborhood levels." *EPA New England Regional Policy on Environmental Justice*, adopted October 1, 2001.[16] Despite knowledge of significant EJ Population impacted by the Permit, Region 1 did nothing to specifically engage the disadvantaged population, in violation of Region 1's own policies and a federal Executive Order. It failed to seek out community input from those most at risk of being unaware of, or unable to participate, in permit decision-making. While the Region extended the public comment period for 5 business days, the Region did not do so to assure that it had sought community input from potential EJ areas of concern as mandated by the Region's EJ Action Plan, but rather at the request of the Blackstone River Heritage Commission. Hearing Transcript pp. 150-151.[17]

[15] The District believes both the Executive Order and Action Plan will be included in the Administrative Record to be provided by Region 1, but reserves the right to supplement the record if necessary.

[16] The District believes Region 1's Environmental Justice policy will be included in the Administrative Record to be provided by Region 1, but reserves the right to supplement the record if necessary.

[17] The District believes the hearing transcript will be included in the Administrative Record to be provided by Region 1, but reserves the right to supplement the record if necessary.

The Board should review the Permit in light of the Region's clear error in not adhering to Executive Order 12898 and the local implementing policy and action plan. Contrary to these important public policy instruments, nothing was done to ensure the involvement of disadvantaged populations in the permitting process, either in Massachusetts or Rhode Island. Without that input, the Region had no information to properly consider the potential adverse impacts on those populations. The process the Region used does not honor EPA's commitment to Environmental Justice and as such, should not be considered valid. The Board should act to ensure that Environmental Justice concerns are appropriately considered and remand to the Region to allow it to comply with Executive Order 12898 and its EJ Action Plan by seeking EJ community input and to assure that it assesses the social and economic effects on minority and low income populations resulting from the requirements of the Permit.

5. Sustainability policy considerations

Region 1 failed to consider or adequately address the District's comments regarding the need for the Region to consider sustainability issues consistent with the EPA's own sustainability policies and efforts. In its comments, the District noted that compliance with the new total phosphorus and total nitrogen limits set by the Permit will result in significant additional chemical use, energy consumption and sludge production, with resulting increases in greenhouse gas emissions, and that from a sustainability perspective, Permit limits are not justified. The Region's Response to Comments show that it chose to ignore or simply not apply EPA's sustainability policies in setting the limits. RTC, R#F52, p. 116-117.

The detrimental environmental impacts resulting from additional energy usage, chemicals, and sludge processing and disposal toward achieving the Permit limits are significant. In order to achieve a total phosphorus limit of 0.1 mg/L and a total nitrogen limit of 5 mg/L for the entire flow reaching the treatment facility, additional aeration tankage would be required, and the tankage currently under construction would have to be modified to implement the modified Bardenpho process. Storage and feed facilities to accommodate the addition of 800 gallons per day of methanol or a similar energy source, would be required for nitrogen removal. Because methanol is an explosive substance, significant care must be taken in the design and operation of this chemical storage facility. Use of such energy sources will produce additional carbon dioxide a greenhouse gas and will reduce the amount of the alternative energy available for other purposes.

Subsequent to final clarification, the entire flow would have to be pumped to an add-on filtration or high rate settling process to achieve the phosphorus limits. Multipoint chemical addition (likely ferric chloride) would be required at a rate of 8,500 gallons per day. The chemical addition will increase sludge production at the facility by an estimated 35%. The sludge generated by the District is currently thickened, dewatered and incinerated on-site in multiple hearth furnaces. The chemical sludge produced in order to achieve the proposed phosphorus limit will be more difficult to dewater and incinerate. The dewatered sludge will likely have a lower percent solids and be more inert due to the high fraction of chemicals in the sludge. Additional energy required to dewater and incinerate the sludge is expected to be significant. Lastly, additional ash will be produced, again due to the inert chemical addition,

which will more readily consume the finite ash landfill capacity on the District's property. The combined electrical energy required to achieve these nutrient limits is expected to be on the order of 3,000,000 kW-hr/yr, nearly 20% above current usage, resulting in a commensurate increase in greenhouse gas emissions.

The EPA's sustainability policies[18] require a holistic approach; the EPA is to review these impacts in conjunction with setting limits. The Region, however, says that such considerations "are not part of the statutory or regulatory requirement for **setting** water quality-based effluent limitations" and mistakenly castes sustainability policy considerations into the category of cost and technical considerations.

> Cost and technical considerations are not considered at this point in the process of establishing water quality-based effluent limits. Once these limits are established and set forth in the final permit, however, the regulations include a mechanism to allow relief from meeting the limits where they are demonstrated to be unaffordable.

RTC, R#F52, p. 116.

Before requiring any facility to expend this much energy, consume significant amounts of chemicals and generate more sludge to be processed and disposed of, EPA should determine that there are substantial water quality benefits that will result from achieving the proposed limits. In this situation, the opposite is the case: viewed as a whole, achieving these limits would have more detrimental environmental impact than any proven benefits that might be realized in the receiving waters. Accordingly, the Board should remand the new nutrient requirements for reconsideration by Region 1 consistent with EPA's sustainability policies.

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[18] *See* http://www.epa.gov/sustainability/basicinfo.htm#what.

V. CONCLUSION

For the foregoing reasons, the District requests that this Board grant this Petition for Review and establish a briefing schedule for this Appeal.

After such review, the UBWPAD seeks the following relief:

(1) To the extent stayed by operation 40 C.F.R § 124.16(a) or § 124.60(b) the contested permit conditions and limitations be stayed pending the outcome of this administrative proceeding;

(2) Stay of appropriate terms and conditions until expiration of the current consent order, inclusive of any extensions granted;

(3) Any such interim relief as may be appropriate under the circumstances, including orders requiring further development of the administrative record by the Region, and further correction of the technical flaws in the water quality model used to develop the permit limits by the Region; and

(4) Remand to the Region for further permitting procedures, including, but not limited to:

1) an order to issue an amended Permit that restores the phosphorus limits to the 2001 Permit levels;

2) an order requiring it to strike the Permit condition imposing a winter level of 1.0 mg/L Total Phosphorus;

3) an order requiring it to strike the Permit condition imposing a Total Nitrogen limit of 5 mg/L;

4) an order requiring it to strike the Permit condition imposing a year round disinfection requirement; and

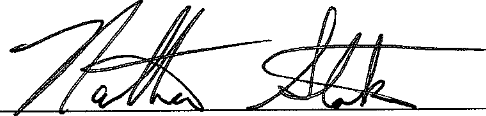
5) an order requiring the Region to remedy any clearly erroneous and/or irrational conclusions of law or fact, and requiring it to consider any

data, analyses, and other arguments that the Board determines Region 1 failed to duly consider.

In addition, the UBWPAD requests the opportunity to present an oral argument in this proceeding to assist the Board in resolving the matters in dispute.

Thank you for your consideration.

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



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Dated: October 8, 2008

ATTACHMENT 1
TERMS OR PROVISIONS FROM NPDES
PERMIT NO. MA0102369 SUBJECT TO THE DISTRICT'S APPEAL

	Part	**Term or Provision Appealed**	**Subject Matter**
1.	Page 1 of 19	Identification of Co-permittees for Part D and E	Co-permittees
2.	Part I. A.1	Fecal coliform limit (November 1 – March 31)	Effluent limits
3.	Part I. A. 1.	Ammonium Nitrogen (year round)	Effluent limits
4.	Part I. A.1	Total nitrogen	Effluent limits
5.	Part I. A.1	Total phosphorus	Effluent limits
6.	Part I. A.1	Total aluminum, lead and nickel limits	Effluent limits
7.	Part I. A. 1	Total copper limits	Effluent limits
8.	Part I. A.1	Whole effluent toxicity	Effluent limits, Monitoring and Sampling
9.	Part I. A.1	Effluent limits and monitoring requirements applicable to outfall 001 and 001A (wet weather discharge)	Effluent limits, Monitoring and Sampling
10.	Part I. A.1, Footnote 5	Sampling protocol	Monitoring and Sampling
11.	Part I. A.1, Footnote 6	Fecal coliform sampling parameters	Monitoring and Sampling
12.	Part I. A.1, Footnote 8	Sampling protocol	Monitoring and Sampling
13.	Part I. A. 1, Footnote 9	Cold weather denitrification	Operations, Monitoring and Sampling
14.	Part I. A.1,	Sampling schedule and protocol	Monitoring and

	Footnote 13		Sampling
15.	Part I. A.1, Subsection e.	Dry weather description	Effluent limits
16.	Part I. D. and E.	Permittee and co-permittee requirements	Co-permittees
17.	Part I. E. 3.	Infiltration and Inflow (I/I) Plan	I/I Plan

CERTIFICATE OF SERVICE

I, Nathan A. Stokes hereby certify that I have served a copy of the foregoing Supplemental Petition for Review on the following by mailing same, postage prepaid, this 8th day of October 2008, to:

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Nathan A. Stokes

Dated: October 8, 2008

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