IN RE UPPER BLACKSTONE WATER POLLUTION ABATEMENT DISTRICT

NPDES Appeal Nos. 10-09, 10-10, 10-11, and 10-12

ORDER DENYING REVIEW

Decided March 30, 2011

Syllabus

The Upper Blackstone Water Pollution Abatement District ("District") owns and operates a wastewater treatment plant located in Millbury, Massachusetts (the "Treatment Plant"), which collects and treats sewage and wastewater from the surrounding area including from collection systems owned by nearby municipalities and a sewer district. On August 22, 2008, U.S. Environmental Protection Agency Region 1 ("Region") issued to the District a National Pollution Discharge Elimination System ("NPDES") permit ("2008 permit decision"). On May 28, 2010, the Board issued its decision remanding the provisions of the 2008 permit decision that would have identified as co-permittees and imposed conditions on certain municipalities and the sewer district, which owned or operated sewage collection systems that discharge solely into the District's Treatment Plant. *See In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 585-91 (EAB 2010). On remand, the Region decided to "forego imposition of any co-permittee requirements" and issued its final permit decision ("Permit") on July 7, 2010, redacting all references in the Permit to co-permittees and making certain other conforming changes.

Before the Board at this time are petitions seeking review of the Permit. The petitions generally allege that the Region did not fully remove from the Permit the co-permittee requirements previously imposed on the municipalities and sewer district. The petitions were filed by: (1) the District; (2) the City of Worcester, Massachusetts ("Worcester"); (3) the Town of Millbury, Massachusetts ("Millbury"); and (4) the Town of West Boylston ("West Boylston").

Held:

1. Millbury and West Boylston do not have standing to file petitions arguing that the Region did not completely remove from the Permit the municipalities as co-permittees. Neither Millbury, nor West Boylston, demonstrate that they participated in the public comment period and they have failed to show that their petitions seek review of Permit terms that were changed between the draft and final Permit.

2. The Board concludes that the District and Worcester have failed to demonstrate that the Region's final permitting decision is based on a clear error of fact or law or that there is an important policy decision the Board should review. The Permit does not include the municipalities and sewer district as co-permittees subject to the Permit's requirements. The Permit now imposes requirements only on the District.

3. The Region followed the proper procedure when the Region decided to issue the July 7, 2010 final permit decision without opening public comment on the changes it made to the Permit on remand. The Region properly applied 40 C.F.R. § 124.14 in determining whether to reopen public comment. Further, the procedures for modifying an existing permit set forth at 40 C.F.R. § 122.62 are not applicable to the remand proceedings.

Before Environmental Appeals Judges Charles J. Sheehan, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

I. *INTRODUCTION*

The Upper Blackstone Water Pollution Abatement District ("District") owns and operates a wastewater treatment plant located in Millbury, Massachusetts ("Treatment Plant"), which collects and treats sewage and wastewater from the surrounding area including from collection systems owned by nearby municipalities and a sewer disrict. On August 22, 2008, U.S. Environmental Protection Agency Region 1 ("Region") issued to the District a National Pollution Discharge Elimination System ("NPDES") permit, number MA 0102369 ("2008 permitting decision").

Several parties filed petitions requesting that the Environmental Appeals Board ("Board") review the Region's 2008 permitting decision, and on May 28, 2010, the Board issued its decision denying review in all respects except one. Among other things, the Region's 2008 permitting decision would have identified as "co-permittees" and extended standard permit conditions governing operation, maintenance, and reporting to certain sewage collection systems separately owned and operated by some of the specific municipalities that discharge solely into the District's Treatment Plant. The Board remanded the provisions imposing permit conditions on the identified co-permittees. *See In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 585-91 (EAB 2010) [hereinafter "*Upper Blackstone I*"]. The Board stated that "[o]n remand, the Region may re-issue the Permit with, or without, the co-permittee provision as the Region determines is appropriate." *Id.* at 591. The Board also stated that if the Region decides to issue the permit with the co-permittee provision, the Region must correct its previous failure to "sufficiently articulate[] in the record of this proceeding a rule-of-decision, or interpretation, identifying the statutory and regulatory basis for expanding the scope of NPDES authority beyond the treatment plant owner and operator to separately owned and operated collection systems that discharge to the treatment plant." *Id.* at 589-90.

On remand, the Region decided to "forego imposition of any co-permittee requirements" and issued its final permit decision on July 7, 2010, redacting all references in the Permit to co-permittees and making certain other conforming

changes. Determination on Remand at 2-3 (July 7, 2010).[1] (The 2008 permitting decision, as changed by the Determination on Remand and by a modification[2] the Region issued prior to the Board's 2010 remand order, is referred to herein as the "Permit.")

Before the Board at this time are petitions seeking review of the Permit. The petitions for review generally allege that the Region did not fully remove from the Permit the co-permittee requirements previously imposed on the municipalities and sewer district. The petitions were filed by: (1) the District; (2) the City of Worcester, Massachusetts ("Worcester"); (3) the Town of Millbury, Massachusetts ("Millbury"); and (4) the Town of West Boylston ("West Boylston").

For the reasons discussed below, the Board denies review of the final Permit.

II. *ISSUES ON APPEAL*

The petitions raise the following issues:

1. Do Millbury and West Boylston have standing to file petitions arguing that the Region did not completely remove from the Permit the municipalities as co-permittees?

2. Does the Permit, as changed by the Determination on Remand, improperly impose any requirements on the municipalities and sewer district previously identified as co-permittees?

3. Did the Region follow the proper procedure when the Region decided to issue the July 7, 2010 final permit decision without opening public comment on the changes it made to the Permit on remand?

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[1] As part of the Region's Determination on Remand the Region issued a Notice of Changes Conforming to the Board's Order on Remand, which identifies the specific words added to and deleted from the Permit.

[2] When initially issued in 2008, the Permit did not include a limit for total aluminum. On April 15, 2009, the Region issued a Permit modification setting the Permit's aluminum limit. On May 20, 2009, the District filed a petition seeking review of the aluminum limit. *See* Petition for Review of Revised Permit Conditions and Motion of the Permittee, Upper Blackstone Water Pollution Abatement District, to Consolidate this Petition with Others Related to this Permit, NPDES Appeal No. 08-11 (May 20, 2009) [hereinafter "Dist. Al Pet."]. By order dated August 6, 2009, the Board consolidated the District's petition for review of the Permit modification with the District's petition for review of other conditions of the 2008 permitting decision, and the Board's *Upper Blackstone I* decision denied review of the aluminum limit.

III. *SUMMARY OF DECISION*

As explained below, the Board concludes that Millbury and West Boylston do not have standing to file petitions for review of the Region's final permit decision. Neither Millbury nor West Boylston demonstrate that they participated in the public comment period, and they have failed to show that their petitions seek review of Permit terms that were changed between the draft and final Permit. However, even if they had satisfied the prerequisites for review, since their petitions are nearly identical to the petition filed by Worcester, the Board would deny review for the same reasons the Board denies review of Worcester's petition.

The Board concludes, for the reasons stated below, that the District and Worcester have failed to demonstrate that the Region's final permit decision is based on a clear error of fact or law or that there is an important policy decision the Board should review. The Permit no longer includes the municipalities and sewer district as co-permittees subject to the Permit's requirements. The Permit now imposes requirements only on the District.

The Region also followed the proper procedure on remand in deciding to issue the July 7, 2010 final permit decision without soliciting public comment on the changes it made to the Permit. The Region properly applied 40 C.F.R. § 124.14 in determining whether to reopen public comment. Further, the procedures for modifying an existing permit set forth at 40 C.F.R. § 122.62 are not applicable to the remand proceedings.

IV. *RELEVANT HISTORY*

The District was authorized to discharge pollutants to the Blackstone River pursuant to an NPDES permit the Region issued on September 30, 1999, and modified on December 19, 2001 ("2001 modified permit"). This case arises out of the District's application for an NPDES permit to authorize discharges upon the expiration of the 2001 modified permit.[3] The Board's decision in *Upper Blackstone I* describes the factual and procedural history leading to the Board's decision to deny review in part and remand the one issue regarding the co-permittee provisions.[4]*See* 14 E.A.D. at 580-83. The Board now considers and, as explained be-

[3] Although the term of the 2001 modified permit has expired, the District was initially authorized to continue discharging pursuant to that expired permit because the District timely filed an application for permit renewal. 40 C.F.R. § 122.6. As described below, after January 1, 2009, the District's discharges became subject to the undisputed and severable conditions of the Region's 2008 permitting decision as identified in the Region's November 2008 notice. *See* footnote 12 below.

[4] The following organizations filed petitions requesting Board review of the Region's 2008 permitting decision: (1) the District; (2) the Town of Holden, Massachusetts ("Holden"); (3) Millbury;
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low, denies the petitions for review of the Region's decision on remand, which petitions were filed by the District, Worcester, Millbury, and West Boylston.

V. *STANDARD OF REVIEW*

In proceedings such as this one under 40 C.F.R. § 124.19(a), only persons "who filed comments on th[e] draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision," except that "[a]ny person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision." 40 C.F.R. § 124.19(a).

The burden of persuading the Board that it should review a permit decision rests with the petitioner, who must demonstrate that a permit condition is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that the Board determines warrants review. *Id.*; *accord In re Hecla Mining Co.*, 13 E.A.D. 216, 223 (EAB 2006); *In re City of Marlborough*, 12 E.A.D. 235, 239-40 (EAB 2005), *appeal dismissed for lack of jurisdiction*, No. 05-2022 (1st Cir. 2005); *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 332-33 (EAB 2002); *In re City of Irving, Tex., Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 111, 122 (EAB 2001), *review denied sub nom. City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003). The Board is guided by the concept articulated in the preamble to the part 124 permitting regulations, which states that the Board's power of review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the [r]egional level." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 472 (EAB 2004).

Ordinarily, the scope of appeal is limited: the petitioner must demonstrate that any issues and arguments it raises on appeal were preserved for Board review by having been raised during the public comment period, unless the issues or ar-

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(4) Worcester; (5) the Northern RI Chapter 737 Trout Unlimited ("Trout Unlimited"); (6) the Conservation Law Foundation ("CLF"); (7) the Massachusetts Department of Environmental Protection ("MassDEP"); and (8) Cherry Valley Sewer District ("Cherry Valley"). The Rhode Island Department of Environmental Management ("RIDEM") also requested, and the Board granted, permission to participate in that proceeding as Amicus Curiae. In response to Trout Unlimited's petition, the Region issued on April 15, 2009, its revised decision establishing the Permit's conditions for total aluminum discharge and monitoring. The District filed a second petition requesting that the Board review the new total aluminum discharge and monitoring conditions. By Order dated August 7, 2009, the Board consolidated the original petitions and the District's second petition for administrative purposes, and decided all issues in *Upper Blackstone I.*

guments were not reasonably ascertainable before the close of public comment. 40 C.F.R. §§ 124.13, .19(a).[5] Where the decision at issue is a final decision issued after remand, as is the case here, the scope of the appeal is further limited to the remanded permit condition(s) and to any changes to the permit required by intervening changes in the law governing the permit. *See In re Dominion Energy Brayton Point, LLC,* 13 E.A.D. 407, 439 (EAB 2007), *appeal rendered moot by settlement*, No. 07-2059 (4th Cir. Dec. 17, 2007); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 7 (EAB 2000) ("All other issues pertaining to this PSD permit should have been raised at the time of the first appeal. Issues raised outside of the appeals period on the original permit are considered untimely."). This limitation is consistent with the Board's cases denying consideration of issues not raised in the initial petition for review, but instead raised in later briefs. *See In re Dominion Energy Brayton Point, LLC,* 12 E.A.D. 490, 595 (EAB 2006) (denying review of an issue first raised in response briefs); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 219 n.62 (EAB 2000) (same as to issue first raised in rebuttal brief); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999) ("New issues raised at the reply stage of the[] proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness."); *In re City of Ames*, 6 E.A.D. 374, 388 n.22 (EAB 1996) (denying petitioner's request to file a supplementary brief after the appeal period had expired because it raised a related but "distinct" new issue).

VI. *ANALYSIS*

A. *Millbury and West Boylston Do Not Have Standing to File Their Petitions Arguing that the Region Did Not Completely Remove from the Permit the Municipalities as Co-Permittees*

In the Board's remand decision, *Upper Blackstone I*, the Board held that Millbury did not have standing to file a petition for review because Millbury failed to demonstrate that it submitted comments on the draft permit or otherwise participated in the public comment process. 14 E.A.D. at 583-84. Millbury again in its present petition fails to demonstrate that it submitted comments on the draft permit or participated in the public comment process. West Boylston neither filed a petition in the prior appeal proceeding, nor demonstrates in its petition here that it submitted comments on the 2007 draft permit or participated in the public comment process in 2007. Accordingly, Millbury and West Boylston have standing to seek Board review "only to the extent of the changes from the draft to the final permit decision." 40 C.F.R. § 124.19(a).

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[5] In other words, the regulations require that persons who seek review of a permit decision, or another person submitting comments on the draft permit, "must raise *all reasonably ascertainable issues* and submit *all reasonably available arguments* supporting their position by the close of the public comment period." 40 C.F.R. § 124.13 (emphases added).

The "extent of the changes" in the present case is defined by the Region's decision to "forego imposition of any co-permittee requirements" and to issue the final permit on July 7, 2010, without the municipalities as co-permittees. Determination on Remand at 2-3 (July 7, 2010). Millbury and West Boylston do not object to the changes actually made by the Region, but instead they argue that the Region did not go far enough. Specifically, both Millbury and West Boylston state that they "support" the Region's decision to forego imposition of the co-permittee requirements, but they contend that "the Region's changes are insufficient to remove the effect of these provisions." West Boylston Pet. at 1; Millbury Pet. at 1. West Boylston and Millbury now challenge Permit language listing them as authorized to discharge to the District's Treatment Plant and Permit language prohibiting the District from accepting wastewater from entities not listed in the Permit. West Boylston Pet. at 1-2; Millbury Pet. at 1-2. West Boylston and Millbury also object to Permit language requiring the District to control inflow and infiltration in its collection system and requiring the District to enter into agreements providing for control of inflow and infiltration in collection systems that discharge to the District's Treatment Plant. West Boylston Pet. at 2-3; Millbury Pet. at 2-3. These provisions were not added to the Permit after public comment. In other words, both Millbury and West Boylston argue for additional changes going beyond the "extent of the changes" the Region has already made to the Permit on remand. However, Section 124.19(a) grants standing for persons who failed to submit comments and failed to participate in the public hearing to petition for review "*only to the extent* of the changes from the draft to the final permit decision;" it does not grant standing to request additional changes that go beyond the changes made. 40 C.F.R. § 124.19(a) (emphasis added). Accordingly, Millbury and West Boylston do not have standing to argue that the Region did not go far enough in making changes from the draft to the final permit.

In *Upper Blackstone I,* the Board accepted Millbury's brief as an *amicus curiae*. The Board explained that it would allow Millbury to participate as an amicus because a permittee has an interest in proceedings where the petitioning parties seek changes to the permittee's permit. *Upper Blackstone I*, 14 E.A.D. at 583-84. In the present proceeding, however, the Region removed the Permit conditions imposing co-permittee requirements on Millbury and West Boylston. Determination on Remand at 2-3. As explained below in Part VI.B, these changes were sufficient to remove Millbury and West Boylston as co-permittees under the Permit. Accordingly, Millbury and West Boylston no longer have the interest of a permittee, and the Board will not consider their petitions as amicus briefs in this appeal. Instead, Millbury and West Boylston's petitions are hereby dismissed for lack of standing. Further, since Millbury's and West Boylston's petitions are nearly identical to the petition filed by Worcester, even if Millbury and West Boylston would have had standing, the Board would deny review for the same reasons the Board denies review of Worcester's petition as discussed in the next part.

B. *The Changes the Region Made to the Permit Were Sufficient to Remove the Municipalities from the Permit as Co-Permittees Subject to the Permit's Requirements*

The District and Worcester originally objected to the Region's decision to impose co-permittee obligations on the municipalities and sewer district as part of the Region's 2008 permitting decision. The Region's 2008 permitting decision sought to extend standard permit conditions governing operation, maintenance, and reporting to sewage collection systems not owned or operated by the District, but instead owned and operated by the listed municipalities and Cherry Valley Sewer District. *Upper Blackstone I*, 14 E.A.D. at 585. The Region added the co-permittees to the Permit to control inflow and infiltration[6] in sewage collection systems transporting wastewater to the District's Treatment Plant. *Id.* at 585-86.

The Board remanded the co-permittee provisions to the Region after concluding that the Region had not adequately explained the legal basis for its decision. *Id.* at 585-91. On remand, the Region decided to "forego imposition of any co-permittee requirements" and issued its final permit decision on July 7, 2010, redacting all references in the Permit to co-permittees and making certain other conforming changes. Determination on Remand at 2-3. Now, although the District states that it supports the Region's decision to remove the co-permittee requirements from the Permit,[7] the District nevertheless requests that the Board review the Region's Determination on Remand because the District contends the Permit leaves "intact" the "effect" of the removed co-permittee conditions and the Permit "maintains the functional equivalent to the prior co-permittee requirements." Petition for Review of Region 1's Determination on Remand and Permit Modification Entitled "Notice of Changes Conforming to the Board's Order on Remand and the Region's Determination on Remand" at 4 [hereinafter "Dist. Pet."]. Worcester makes similar arguments. Worcester's Petition at 1-4 [hereinafter "Worcester Pet."].

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[6] "'Infiltration is groundwater that enters the collection system through physical defects such as cracked pipes, or deteriorated joints. Inflow is extraneous flow entering the collection system through point sources such as roof leaders, yard and area drains, sump pumps, manhole covers, tide gates, and cross connections from storm water systems.'" *Upper Blackstone I*, 14 E.A.D. at 586 n.10 (quoting Fact Sheet at 19). "'Significant I/I in a collection system uses conveyance and treatment capacity that will then not be available for sanitary flow, thereby reducing the capacity and the efficiency of the treatment works and increasing the possibility of sanitary sewer system overflows (SSO) from the collection system.'" *Id.*

[7] The Region explains that its reason to forego imposing co-permittee requirements on remand was principally based on the Region's assessment of the greater need to avoid delay in implementing the Permit's other conditions limiting nitrogen and phosphorous discharges due to the extent of nutrient impairment in the receiving waters and the significance of the District's discharge contribution to the problem. *See* Determination on Remand at 2-3.

At bottom, the District and Worcester contend the Region failed to fully comply with the Board's decision in *Upper Blackstone I* by allegedly failing to completely remove the co-permittee requirements or to explain the legal basis for the Permit imposing requirements on entities other than the District. The District and Worcester argue that Permit changes were incomplete in two areas. First, they argue that the revisions made to the Permit's first page are incomplete. Although the Region deleted language on the Permit's first page identifying certain municipalities and the sewer district as co-permittees, the District and Worcester argue that the Permit continues to assert jurisdiction over the municipalities and sewer district by language the Region did not change, which describes the listed municipalities and sewer district as "authorized to discharge wastewater" to the District's Treatment Plant. Dist. Pet. at 5-7 (quoting Permit at 1); *see also* Worcester Pet. at 1-2 (same). Second, the District and Worcester argue that Permit Part E either continues to impose requirements on the municipalities and sewer district or retains the effect of the former co-permittee requirements by requiring the District both to control inflow and infiltration in its collection system and to enter into agreements with other entities for control of inflow and infiltration in collection systems that discharge to the District's Treatment Plant. Dist. Pet. at 8-12; Worcester Pet. at 2-3.

The District's and Worcester's arguments must be rejected. By its July 7, 2010 decision, the Region removed from the Permit all language that previously identified the municipalities and the sewer district as "co-permittees" and all language that previously imposed requirements on those co-permittees. *See* Determination on Remand, Ex. B. Specifically, the Region removed the statement in the Permit's first paragraph identifying Worcester, Millbury, and West Boylston, among others, as "co-permittees for Part D and Part E [that] are responsible for implementation of the operation and maintenance and reporting requirements of Parts D and E related to their respective system." Determination on Remand, Ex. B at 5 (identifying deleted language). The Region also removed, from Parts D and E, references to "co-permittees," and in Part E, the Region added language stating that the specific requirements apply to the District, as the remaining permittee, "only to the extent the permittee owns the separate sewer system." *Id.,* Ex. B at 2-4, 6-8. No reference to "co-permittees" remains in the Permit after the Region made these changes. Thus, the Permit's current language only imposes requirements on the District as the sole remaining permittee; the Permit's plain meaning does not impose any requirements on the entities that discharge to the District's Treatment Plant.

The Board rejects the District's and Worcester's contention that Permit language on the first page identifying specific municipalities as "authorized"[8] to discharge to the District's facility constitutes an attempt by the Region to exert jurisdiction over the listed entities by granting discharge authority to them. Dist. Pet. at 6 ("By stating that these specific municipalities and sewer district have exclusive authority from Region 1 to discharge to the District, the Region asserts jurisdiction over them * * * ."); Worcester's Pet. at 1-2. Contrary to the District's and Worcester's argument, the Permit does not purport to grant discharge authority to the listed entities (or to enlarge those entities' discharge authority), but instead the Permit merely lists the entities from whom the District currently accepts wastewater flow for treatment. Not only is this the most natural meaning of the Permit's words, but it also is the Region's interpretation, *see* Region's Opposition at 9, and, therefore, this meaning is binding on the Region. *In re Austin Power Co.,* 6 E.A.D. 713, 717 (EAB 1997) (permit issuer's interpretation of disputed permit terms is authoritative and binding on the agency). This meaning is also apparent from the provision's history as it was developed through the permitting process. The Region initially compiled the list based on the entities the District identified in its application as discharging to the District's Treatment Plant. *Upper Blackstone I*, 14 E.A.D. at 589. Then, later, the Region expanded the list when the District provided comments during the public comment process identifying additional entities that discharge to the District's Treatment Plant. *Id.* There is no indication in the permitting history and the Region's explanation for its actions that suggests the Region sought to do more than identify the entities contributing wastewater flow to the District's Treatment Plant.

The Board also rejects the District's and Worcester's additional contention that the Region exceeded its authority by retaining language on the Permit's first page stating that "[o]nly municipalities specifically listed above are authorized to discharge wastewater into the [District's] facility." *See* Dist. Pet. at 6. The Region explains that "[t]he purpose behind this provision is * * * to compel the *District* (and not any of the satellites) to seek a permit modification should it decide to tie-in another municipality during the life of the permit." Region's Resp. at 9. This reading of the Permit language is also binding on the Region, *Austin Power,* 6 E.A.D. at 717, and precludes the Region from later seeking to impose liability on the listed municipalities or sewer district for any alleged violation of this Permit language. Thus, this Permit language imposes no requirements on Worcester or any other municipality. Moreover, the District has not alleged that the Region

[8] The Permit states as follows: "The City of Worcester, the Towns of Millbury, Auburn, Holden, West Boylston, Rutland, Sutton, Shrewsbury, Oxford and Paxton, and the Cherry Valley Sewer District are authorized to discharge wastewater to the UBWPAD facility." Permit at 1.

lacks federal authority to impose this condition on the District;[9] nor has the District alleged that this condition exceeds the Region's authority under 40 C.F.R. § 122.43(a) to establish conditions to provide for and assure compliance with the CWA and regulations,[10] including regulations requiring proper operation and maintenance of the Treatment Plant and related appurtenances, e.g., *id.* § 122.41(e).[11]

More importantly, because nobody – not the District, not Worcester, nor any other party – requested review of this condition imposed by the Region's 2008 permitting decision, this condition became fully effective and enforceable on January 1, 2009, pursuant to 40 C.F.R. § 124.16(a) and the Region's November 26, 2008 notice. *See* Letter from Robert W. Varney, Regional Administrator, U.S. EPA Region 1, to Thomas K. Walsh, Director, Upper Blackstone Water Pollution Abatement District (Nov. 26, 2008) ("November 2008 Notice"). In particular, the regulations state that, if a petition for review is filed, only the contested permit conditions are stayed pending final agency action and the uncontested conditions become effective after the permit issuer provides notice identifying the uncontested severable permit conditions. 40 C.F.R. § 124.16(a)(1), (2). Specifically, "[t]he Regional Administrator shall, as soon as possible after receiving notification from the EAB of the filing of a petition for review, notify the EAB, the applicant, and all other interested parties of the uncontested (and severable) conditions of the final permit that will become fully effective enforceable obligations of

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[9] The District argues that this Permit language "conflicts" with the District's authority under its enabling legislation. Dist. Pet. at 7. The District's argument, however, fails to demonstrate any conflict, but instead the District confirms that it has authority "to determine which entities may become members of the District and/or send wastewater to the District's facility." *Id.* The Permit requires the District to use this authority to restrict the District's receipt of new wastewater flows, unless the District applies for a Permit modification allowing it to accept additional flows. The Permit requires the District to use its authority to restrict new flows as a condition of the Permit's grant to the District of permission to discharge treated wastewater into waters of the United States. For the same reason, the Board also rejects the District's contention that the Region exceeded its authority by imposing a Permit condition requiring the District to enter into agreements with the owners of sewage collection systems to reduce inflow and infiltration from those collection systems. *Id.* at 8-10; *see also* Worcester Pet. at 2-3. As noted, the District's argument demonstrates that the District has authority "to determine which entities may become members of the District and/or send wastewater to the District's facility." Dist. Pet. at 7. The Permit merely requires the District to use this authority to address the problem of inflow and infiltration in the flows the District accepts for treatment prior to discharge by the District into waters of the United States.

[10] Notably, the regulations specifically require all permittees to provide notice to the permit issuer regarding new introduction of pollutants into a publicly owned treatment works ("POTW") by an indirect discharger and regarding substantial change in the volume or character of pollutants being introduced into a POTW. 40 C.F.R. § 122.42(b)(1), (2).

[11] The District also has failed to explain how this condition restricting the District's authority to accept new waste flows is not an appropriate exercise of the Region's authority under 40 C.F.R. § 122.44(k)(2) and (4) respecting use of best management practices to control stormwater discharges, or to achieve effluent limitations and standards, or to carry out the purposes and intent of the CWA.

the permit as of [30 days after the date of the notification]." *Id.* § 124.16(a)(2)(ii). The Region's November 2008 Notice identified the contested conditions that were stayed as a result of the petitions for review and it stated that "[a]ll other conditions of the Permit are uncontested and severable from the Contested Conditions" and thus "all of the other conditions will become fully effective enforceable obligations of the Permit on January 1, 2009." November 2008 Notice at 2. The District and Worcester did not immediately or at any time after the November 2008 Notice object that the Region's Notice was in error.

Accordingly, the Permit's conditions that were not identified as contested in the November 2008 Notice became final on January 1, 2009, and may not be challenged by the District or Worcester in the present proceeding. The conditions that became final in January 2009 included the Permit language at issue here prohibiting the District from accepting discharge from entities not listed in the Permit's first paragraph. *See id.* at 1.[12]

The Board also rejects the District's and Worcester's additional contention that the Permit's requirements in Part E regarding inflow and infiltration, which the Permit expressly limits "only to the extent that [the District] owns the separate sewer system," are nevertheless "inappropriate, contrary to the [Remand] Order and unnecessarily confusing." Dist. Pet. at 10; *see also* Worcester Pet. at 2-3. At bottom, the District and Worcester argue that, because the sewage collection system the District owns is allegedly approximately 1,000 feet in length,[13] there is no practical reason for the Region to impose these standard permit conditions on the District. Dist. Pet. at 10-11; Worcester Pet. at 2-3. However, the District's admission that it owns a sewage collection system is sufficient grounds for the Region to include standard permit terms governing the operation and maintenance of that collection system, no matter what its length. Accordingly, review of these Permit conditions in Permit Parts D and E are denied.

Finally, the Board rejects the District's request for review of the Permit condition, also in Part E, that states the "'permittee is responsible to insure that high flows do not cause I/I related effluent limit violations.'" Dist. Pet. at 12 (quoting Permit Pt. E). The provision now challenged by the District merely restates in a specific context the standard language, which the regulations require to be in-

[12] The November 2008 Notice identified the contested co-permittee conditions as the "imposition of requirements of Parts D and E on the District and other co-permittees, including the timing for submittal of the Inflow/Infiltration Plan (*see* Permit at 1 and Parts D and E)." November 2008 Notice at 1. The Notice did not identify as contested the Permit's language stating that only the listed entities are authorized to discharge to the District's Treatment Plant.

[13] The District has not identified where this alleged fact is established in the administrative record. Nevertheless, even assuming, arguendo, that it is in fact true, the allegedly short length of the District's collection system is not grounds for removal of these Permit conditions for the reason stated in the text.

cluded in all permits, that the permittee comply with all conditions of the permit including effluent limits. 40 C.F.R. § 122.41(a). Stated simply, the District is responsible for the effluent it discharges to the Blackstone River and the District is prohibited from discharging effluent that violates the Permit's effluent limits. This prohibition applies under all circumstances, including under high flow conditions whether or not caused by inflow and infiltration in the District's collection system or in collection systems owned by other entities that discharge to the District's Treatment Plant. The regulations also bar the District from arguing in an enforcement action that the District would have needed to halt or reduce the permitted activity in order to maintain compliance with the conditions of the Permit. *Id.* § 122.41(c). In other words, the District is required to reduce the wastewater it accepts for treatment if that is what it must do in order to comply with its NPDES Permit.[14] The Permit's conditions, including the Permit's effluent limits, were imposed to ensure that the District's discharges comply with the water quality standards of all affected states.[15] *Id.* § 122.4(d).

C. *The Region Followed the Proper Procedure on Remand When the Region Decided to Issue the Permit Without Opening Public Comment on the Changes It Made to the Permit*

After the Board remanded the co-permittee conditions to the Region on May 28, 2010, the Region decided to "forego imposition of any co-permittee requirements" and issued its Determination on Remand, making final changes to the Permit on July 7, 2010. Determination on Remand at 2-3. The Region took this action directly without issuing a new draft permit and without opening a new public comment period on the change. The Region explained that "questions raised by the Region's analysis on remand are neither substantial nor new in the context of this permit proceeding" and that, therefore, it was exercising its discretion under 40 C.F.R. § 124.14 to not open the record for additional public comment. Determination on Remand at 3-4 n.4.

The District argues that the Region erred by applying 40 C.F.R. § 124.14 to determine whether to reopen the public comment period. Dist. Pet. at 15-18. The District contends that the changes the Region made to the Permit constitute a permit modification under 40 C.F.R. § 122.62(a)(15), for which a new draft permit is

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[14] The Board rejects the District's suggestion that it cannot be held responsible for problems in the waste flow the District receives from its members. Dist. Pet. at 9. The District's sole activity is treating wastewater the District receives from its members and other municipalities in the area. The District cannot shirk its duty to treat that waste flow and comply with the Permit's conditions, including effluent limits, merely by claiming that it has received the compliance problem in the waste flows it accepts for treatment.

[15] In addition, the regulations recognize the need to control inflow and infiltration. *See* 40 C.F.R. § 122.21(j)(2)(i).

required under 40 C.F.R. §§ 124.5(c) and .6 and a new public comment period is required under § 124.10. *See* Dist. Pet. at 15-16. The District is mistaken and its argument must be rejected because, as explained below, it was appropriate for the Region to use 40 C.F.R. § 124.14 to determine whether to open public comment on remand, and the District has not demonstrated that the Region misapplied section 124.14.

1. *On Remand, Section 124.14 (Not Section 122.62(a)(15)) Governs the Region's Decision Whether to Open Public Comment*

When the Board issued its remand decision, the Board held invalid the Region's initial 2008 permitting decision to the extent it established the co-permittee conditions.[16] Thus, at that time, after the Board issued its decision, there was no valid final permit decision establishing co-permittee conditions for the Region to modify through the permit modification process of 40 C.F.R. § 122.62(a)(15).[17] Instead, the Board's decision vacated the Region's initial decision on the co-permittee conditions and the Region was then required to complete its decisionmaking process regarding those conditions and to issue a valid final permitting decision pursuant to 40 C.F.R. § 124.15(a).

The Board has consistently described the procedural posture of remanded permit conditions as returned to pre-final decision status. Thus, for example, the Board has frequently explained that, on remand, the permit issuer should "supplement the record" with new information and the Board has explained that the permit issuer may reopen public comment under § 124.14 as provided in that section. *See, e.g., In re Chukchansi Gold Resort & Casino Waste Water Treatment Plant*, 14 E.A.D. 260, 281 (EAB 2009) ("The Region should supplement the record as necessary during the remand process. Additionally, the Region may reopen the record for additional public comment as necessary, in accordance with 40 C.F.R. § 124.14."); *In re Conocophillips Co.*, 13 E.A.D. 768, 769 (EAB 2008) (same); *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 391 (EAB 2007); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 707 (EAB 2006). Supplementing the record

[16] Because the regulations provide that the uncontested and severable Permit conditions were not stayed and became final on January 1, 2009, the Board's *Upper Blackstone I* decision did not remand the entire 2008 permitting decision to the Region, but instead remanded only the stayed provisions. *See* note 12 and accompanying test above.

[17] Specifically, the Board held that the Region failed to "sufficiently articulate[] in the record of this proceeding a rule-of-decision, or interpretation, identifying the statutory and regulatory basis for expanding the scope of NPDES authority beyond the treatment plant owner and operator to separately owned and operated collection systems that discharge to the treatment plant." *Upper Blackstone I*, 14 E.A.D. at 589-90. Notably, the Board rejected the Region's decision because the decision was not adequately explained in the record; the Board did not hold that the Region applied a mistaken interpretation of law. Thus, section 122.62(a)(15), which the District cites and which authorizes permit modification to correct a mistaken interpretation of law, would not apply in any event.

with new information is authorized prior to the permitting office issuing the final permit decision under 40 C.F.R. § 124.15(a). *See* 40 C.F.R. §§ 124.17(b), .18(b)(4), (6). Additionally, reopening public comment under section 124.14 is also an authority applicable to the process prior to a final permit decision under section 124.15(a). The Board's precedents, thus, indicate that remand proceedings are governed by 40 C.F.R. part 124 as a continuation of the exiting permit application proceeding, not as a new proceeding to modify an existing permit. The Board has never required a permitting authority to use the permit modification provisions when making changes to a permit's terms on remand.[18]

Moreover, here, where the Region's decision to issue the Permit without the co-permittee condition is precisely what the District requested in its public comments, there is no reason for the Region to be required to follow different or more extensive procedural steps in making its decision on remand after appeal than had the Region made the same decision in the first instance after its initial review of the public comments. Accordingly, the Region committed no error in deciding to apply 40 C.F.R. § 124.14 to determine whether to reopen public comment on remand in this case.

2. *The District Has Not Demonstrated Clear Error in the Region's Application of Section 124.14 in Deciding Not to Reopen Public Comment*

Although the District has not alleged that any of the conditions identified in 40 C.F.R. § 124.14 for reopening public comment exist in the present case, nevertheless the District has, in one respect, alleged that the Region abused its discretion in determining not to reopen public comment under section 124.14. The District notes that the Region made reference in its Determination on Remand to a communication the Region received from the Rhode Island Department of Environmental Management ("RIDEM") requesting the Region move forward expeditiously to place into effect the Permit conditions appealed but not remanded by the Board. Dist. Pet. at 17-18. The District alleges that it was an abuse of discretion for the Region to receive this information from RIDEM and to not solicit comment from the District and other interested persons. *Id.* at 18.

The District's contention must fail. The Region was authorized to add RIDEM's communication to the administrative record. As already noted, when a

[18] Occasionally, permit issuers have made changes to a permit condition while a petition for review was pending before the Board and, under those circumstances where the Board has not held the permitting decision invalid, permit issuers have used the modification procedures to effect the change. The Region followed this procedure in the present case when adding an aluminum limit to the Permit. *See* note 2 above. Such use of the modification provisions to make changes to a permit condition that the Board has not invalidated, and that the permit issuer has not withdrawn, is consistent with the Board's decision here.

permit is in the procedural posture after the close of public comment and awaiting the Region's final permit decision under 40 C.F.R. § 124.15(a), the Region has the authority to add new information to the administrative record. The information the Region may add to the administrative record is not limited only to information received during public comment. To the contrary, under 40 C.F.R. §§ 124.17(b) and .18(b)(4), the permit issuer may add information to the record in response to the public comments. In addition, under § 124.18(b)(6), "[t]he administrative record for any final permit shall consist of * * * (6) [o]ther documents contained in the supporting file for the permit * * * ." 40 C.F.R. § 124.18(b)(6). These provisions are not designed to place limits on the relevant information the Region may consider when making its final permit decision, but instead are designed to ensure that all information the Region actually relies upon is, in fact, included as part of the record of the Region's decision. In addition, as explained in *Upper Blackstone I*, there is no ex parte rule prohibiting the Region from communicating with RIDEM. 14 E.A.D. at 593 n.21;[19] *see also Sierra Club v. Costle*, 657 F.2d 298, 386-400 (D.C. Cir. 1981) (declining in informal rulemaking to find error based on EPA's addition to the docket of ex parte communication received after the close of public comment where the procedural rules authorized addition of material to the docket after close of public comment). The Region has the discretionary authority to consider and rely upon information, including comments, received after the close of public comment and is not required to reopen the public comment period except where the Region determines in its discretion that the new information it relies upon raises substantial new questions. *In re Prairie State Generating Co.,* 13 E.A.D. 1, 48-49, 68-69 & n.72 (EAB 2006), *aff'd sub. nom Sierra Club v. U.S. EPA,* 499 F.3d 653 (7th Cir. 2007); *see also In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 194 & n.32 (EAB 2000) (permit issuer considered and responded to late-filed comment).

Moreover, RIDEM's communication only urged the Region to proceed with haste based on circumstances already well documented and discussed in the record. The e-mail from RIDEM Chief of Surface Water Protection states that Rhode Island waters continue to suffer significant impairment due to excessive nitrogen and phosphorus inputs, that Rhode Island facilities are subject to permit limits reducing nitrogen and phosphorus discharges, and that the District is a significant contributor to the impairment of Rhode Island waters. E-mail from Angelo S. Liberti, PE, Chief Surface Water Protection, RIDEM, to Damien Houlihan, U.S. EPA Region 1 (June 15, 2010). In its remand decision, the Board discussed similar information already in the administrative record. *See Upper*

[19] As explained in *Upper Blackstone I*, "NPDES permitting proceedings are not required to be conducted in accordance with APA section 556." 14 E.A.D. at 593 n.21 (citing *In re USGEN New England, Inc., Brayton Point Station*, 11 E.A.D. 525, 529-30 (EAB 2004) (denying motion for formal evidentiary hearing under APA section 556), *aff'd sub nom Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12 (1st Cir. 2006); Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two, 65 Fed. Reg. 30,886 (May 15, 2000)).

Blackstone I, 14 E.A.D. at 594-623. In this respect, RIDEM's post-remand communication added no new information that was not already part of the record of this proceeding. The e-mail from RIDEM did not advocate any particular means by which the Region could bring speedy conclusion to the permitting proceeding. Thus, RIDEM's communication did not constitute "substantial new questions" that would warrant reopening the public comment period under 40 C.F.R. § 124.14(b), and the Board further concludes that RIDEM's communication, which was duplicative of information already in the record, was not material to the Region's procedural decision. Further, as explained above in Part VI.B, the Board also finds no clear error in the substance of the Region's decision.

Accordingly, for the reasons discussed above, the Board rejects the District's contention that the Region committed clear error when it issued its final permit decision on the co-permittee issue without reopening public comment on the changes the Region made to the draft permit's co-permittee conditions.

VII. *CONCLUSION*

For the foregoing reasons, the Board denies, in all respects, the petitions for review filed by Upper Blackstone Water Pollution Abatement District and the City of Worcester, Massachusetts. Also for the reasons stated above, the Board denies the petitions for review filed by the Town of Millbury, Massachusetts and the Town of West Boylston because these municipalities do not have standing to petition for review of the Permit as changed by the Region's Determination on Remand.

So ordered.