



COMMONWEALTH OF MASSACHUSETTS
 EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
 DEPARTMENT OF ENVIRONMENTAL PROTECTION
 ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

DEVAL L. PATRICK
 Governor

TIMOTHY P. MURRAY
 Lieutenant Governor

IAN A. BOWLES
 Secretary

LAURIE BURT
 Commissioner

September 17, 2008

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

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 CIVIL APPEALS BOARD

RE: Upper Blackstone Water Pollution Abatement District (UBWPAD)
 NPDES Permit No. MA0102369 – Millbury, Massachusetts

Dear Ms. Durr:

Enclosed for filing and docketing in your usual manner you will find the Massachusetts Department of Environmental Protection's (MADEP) Preliminary Petition for Permit Review of the above-captioned NPDES Permit issued to the Upper Blackstone Water Pollution Abatement District, Permit No. MA0102369 by the U.S. Environmental Protection Agency on August 22, 2008 and an Assented Scheduling Motion.

As set forth in the enclosed Preliminary Petition for Review, MADEP seeks a remand of the subject permit to EPA Region I for revision of the standard for discharges of nitrogen.

Please return an endorsed copy of the Initial Petition and Assented Scheduling Motion to me in the envelope provided.

Should you have any questions regarding MADEP's Petition for Review please direct them to legal counsel in MADEP's Office of General Counsel; One Winter Street; Boston, MA 02108 or by direct dial telephone as set forth below. Thank you for your kind attention to this matter. The fax number for the Office of General Counsel is (617) 338-5511.

Sincerely,

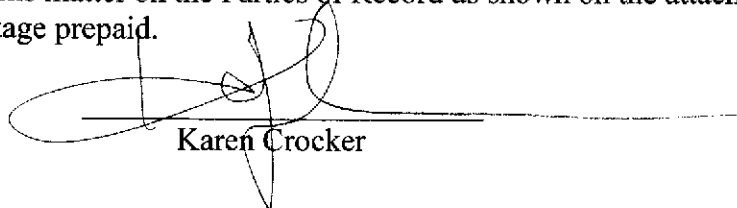
Karen Crocker, Sr. Counsel (617) 556-1195
 Rebecca Cutting, Sr. Counsel (617) 556-1002
 Deirdre Desmond, Sr. Counsel (617) 556-1028

Enclosures

CERTIFICATE OF SERVICE

I, Karen Crocker, do hereby certify that I did on this date serve a copy of the
aforementioned papers in this matter on the Parties of Record as shown on the attached Service
List by first class mail postage prepaid.

September 17, 2008



Karen Crocker

SERVICE LIST

Party

U.S.Environmental Protection Agency
Region I
Director, Office of Ecosystem Protection
One Congress Street
Boston, MA 02114

Upper Blackstone Water Pollution Abatement District
Fifty Route 20
Millbury, MA 01527

Representative

Karen A. McGuire, Esq.
U.S. Environmental Protection Agency,
Region I
One Congress Street, Suite 1100
Mail Code CDW
Boston, MA 02114-2023

Robert A. Cox, Jr., Esq.
Bowditch & Dewey, LLP
311 Main Street – Box 15156
Worcester, MA 01615

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

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ENV. APPEALS BOARD

In re:

**The Upper Blackstone Water Pollution
Abatement District (UBWPAD)**

NPDES PERMIT NO. MA0102369

NPDES Appeal No. 08-_____

PRELIMINARY PETITION FOR PERMIT REVIEW

I. Introduction

Pursuant to 40 C.F.R. 124.19(a), the Massachusetts Department of Environmental Protection (MassDEP) submits this preliminary petition ("Preliminary Petition") for review of certain of the conditions of the final National Pollution Discharge Elimination System (NPDES) Permit No. MA0102369 ("Permit"), issued to the Upper Blackstone Water Pollution Abatement District (UBWPAD) on August 22, 2008, by Region I of the United States Environmental Protection Agency ("Region I"). Filed simultaneously with the Preliminary Petition is an Assented-To Scheduling Motion that seeks a short extension of time within which MassDEP may provide a more detailed Petition and that will allow Region I commensurate time within which to prepare its response.¹

¹ In the event that the motion is denied or not decided before the expiration of the appeal period, MassDEP intends to supplement this Preliminary Petition by submittal of a more detailed Petition for Review inclusive of all arguments, attachments and exhibits within the existing thirty-day schedule which expires on September 24, 2008. Notwithstanding, MassDEP believes that this Preliminary Petition is sufficient to satisfy the requirements of 40 C.F.R. 124.19(a) for a petition for review of a final permit decision.

As explained further below, the effluent limit for Total Nitrogen is based upon clearly erroneous conclusions of fact and law and upon exercise of Region I's discretion and important policy considerations that the Environmental Appeals Board should, in its discretion, review. See 40 C.F.R. 124.19(a). Although MassDEP identified these deficiencies in its public comments, Region I failed to adequately and rationally address them when it issued the Permit.

II. Background

The Permit authorizes UBWPAD to discharge treated wastewater to the Blackstone River from its wastewater facility in Millbury, Massachusetts ("the Facility"). UBWPAD is currently operating under a Permit issued on September 30, 1999, and modified on December 19, 2001, by a settlement agreement in the form of an administrative consent order ("Consent Order"). In accordance with the terms of the Consent Order, UBWPAD is in the final stages of completing a \$180 million dollar upgrade. It is anticipated that the start-up for the process train will be in the Spring of 2009.

UBWPAD submitted a permit renewal application to Region I on November 8, 2005, and Region I issued a draft permit on March 23, 2007. MassDEP and many others provided comments on the draft permit during the public comment period. (A copy of MassDEP's comments are attached hereto as Exhibit A.) On August 25, 2008, MassDEP received a copy of the final permit dated August 22, 2008, with Region I's Response to Comments attached.

III. Grounds for Appeal

MassDEP contends that the effluent limit for Total Nitrogen established in Part I.A.1. of the Permit is based upon errors of fact and law and upon abuses of Region I's discretion and important policy considerations that EAB should review. These include, *inter alia*, the following:

1. That Region I failed to follow its own regulations when it established the effluent limit as a concentration instead of in terms of mass because 40 CFR 122.45(f)(1) states that “[a]ll pollutants limited in permits *shall* have limitations, standards or prohibitions expressed in terms of mass” and none of the exceptions applies. (Emphasis added.)
2. In the alternative, if 40 CFR 122.45(f)(1)(ii) permits EPA to express the effluent limit as a concentration instead of in terms of mass, then Region I abused its discretion because the selection of a concentration limit instead of a mass limit discourages efficient treatment and water conservation and is inconsistent with its policy of addressing water quality impairments through mass limitations. *See* 33 U.S.C. § 1313; 40 C.F.R. 130.00; U.S. EPA NPDES Permit Writers’ Manual, December 1996, p. 67.
3. That Region I violated the Clean Water Act by basing the effluent limit on considerations of cost. *See U.S. Steel Corp. v. Train*, 556 F.2d 822, 838 (7 Cir. 1977); *In re City of Moscow*, 10 E.A.D. 135, 168 (2001).
4. That Region I erred in relying upon a severely flawed 2004 study by the Rhode Island Department of Environmental Management, entitled “Evaluation of Nitrogen Targets and WWTF Load Reductions for the Providence and Seekonk Rivers.”
5. That Region I erred in setting a total nitrogen limit that it has not demonstrated is necessary to achieve Rhode Island’s Water Quality Standards. *See* 40 C.F.R. 122.44(d)(1).

IV. Relief Sought

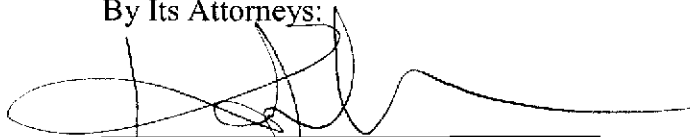
MassDEP respectfully requests full review by the EAB of the appealed condition of the Permit, based upon this Preliminary Petition and its supplemental Petition for review to be submitted in accordance with the Assented-To Scheduling Motion, if granted by the EAB or otherwise on or before the end of the thirty (30) day appeal period. As part of such review, MassDEP seeks the following relief:

1. That EAB grant MassDEP's Assented-To Scheduling Motion;
2. That EAB grant review of MassDEP's Preliminary and Supplemental Petitions;
3. That EAB remand to the Region for further permitting procedures, including but not limited to: (a) an order requiring it to strike the Permit condition imposing a Total Nitrogen limit of 5.0 mg/l and directing that a mass limitation be applied; (b) an order requiring Region I to remedy any clearly erroneous conclusions of law or fact or abuses of discretion; and (c) an order on any additional grounds raised in MADEP's forthcoming supplemental Petition for review.

Respectfully Submitted,

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION

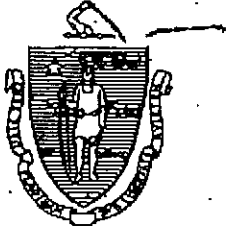
By Its Attorneys:

A handwritten signature in black ink, appearing to be 'Karen L. Crocker', written over a horizontal line.

Karen L. Crocker, Counsel
H. Rebecca Cutting, Counsel
Massachusetts Department of
Environmental Protection
Office of General Counsel
One Winter Street
Boston, MA 02108
(617) 556-1195 (Mon-Weds; Ms. Crocker)
(617) 556-1002 (Ms. Cutting)
Fax # (617) 338-5511

September 17, 2008

EXHIBIT A



COMMONWEALTH OF MASSACHUSETTS
 EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS
 DEPARTMENT OF ENVIRONMENTAL PROTECTION
 ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

DEVAL L. PATRICK
 Governor

TIMOTHY P. MURRAY
 Lieutenant Governor

IAN A. BOWLES
 Secretary

ARLEEN O'DONNELL
 Commissioner

May 9, 2007

Roger Janson, Chief
 Municipal NPDES Permits Branch
 U.A. EPA
 1 Congress Street
 Boston, MA 02114-2023

Dear Mr. Janson:

The draft NPDES permit for the Upper Blackstone Water Pollution Abatement District (UBWPAD), which is the subject of today's hearing, is being jointly issued by the Department and the Environmental Protection Agency (EPA). However, a key provision of the draft permit, the effluent limit for nitrogen, is a federal, only requirement and therefore it is appropriate to provide our comments on the nutrient effluent limits.

The effluent limit for nitrogen in the draft permit is expressed as milligrams per liter. However, EPA permitting requirements at 40 CFR 122.45(f)(1) state that "All pollutants limited in permits shall have limitations, standards or prohibitions expressed in terms of mass."¹ The expressed results needed to reduce impairments to Narragansett Bay are a reduction in mass loading. While no Total Maximum Daily Load (TMDL) has been calculated to ascertain how to allocate load reductions, it is important to note that in the case of Long Island Sound, a TMDL has been completed for nitrogen that calls for a reduction in mass loading of nitrogen. In this case the discharge permits issued by Connecticut correctly contain only mass limits. Finally, mass limits for nitrogen in the UBWPAD discharge permit would give the facility the needed flexibility to manage the treatment plant while attaining strict effluent requirements and would encourage the facility to reduce its discharge volume, a notable goal unto itself. Consequently we believe that EPA should express any nitrogen limit in terms of a mass only limit.

The Draft permit contains limits for nitrogen and phosphorus that the UBWPAD facility cannot currently attain and therefore a schedule for the facility to come into compliance with those limits is necessary. The nitrogen effluent limit is meant to address impairments for Rhode Island waters and we understand that the Rhode Island Water Quality Standards for surface waters do not allow for compliance schedules to be included in a discharge permit. However, the

¹ There are exceptions but they not apply in this instance.

phosphorus effluent limit addresses impairments to waters within Massachusetts and the Massachusetts Water Quality Standards for surface waters do allow for compliance schedules to be included in discharge permits. Therefore we suggest that a schedule for compliance with the phosphorus limit be incorporated into the final permit. From an engineering and economic standpoint it only makes sense that when a compliance schedule for the nitrogen limit is established, the schedule should be consistent with the schedule outlined below that we are proposing for compliance with the phosphorus limit and we encourage EPA to follow this approach.


Below is MassDEP's suggested schedule for UBWPAD to attain the phosphorus effluent limits:

1. August 2009- Complete construction of ongoing upgrade
2. January 2011- initiate engineering evaluation of necessary upgrades to meet phosphorus effluent limit.
3. January 2012- complete engineering evaluation of necessary upgrades to meet phosphorus effluent limit.
4. January 2013- complete design of necessary upgrades to meet phosphorus effluent limit.
5. July 2013- initiate construction of necessary upgrades to meet phosphorus effluent limit.
6. December 2014- complete construction necessary upgrades to meet phosphorus effluent limit.
7. May 2015- obtain operational level meet phosphorus effluent limit.

Finally, MassDEP is concerned that the effluent limits for phosphorus and nitrogen were established without the benefit of scientific guidance provided by Total Maximum Daily Loads (TMDL) and the water quality goals they establish. So as to avoid a large capital expenditure without the benefit of a TMDL, MassDEP is committed to completing a TMDL for phosphorus for the Blackstone River prior to the start of construction in the above schedule. We expect that EPA will require Rhode Island to similarly complete a nitrogen TMDL for Narragansett Bay.

If you have any questions regarding these comments please contact me at (617) 292-5748.

Sincerely,



Glenn Haas, Acting Assistant Commissioner
Bureau of Resource Protection

Cc: R. Varney, EPA
T. Walsh, UBWPAD
A. O'Donnell
E. Kunce

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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In re:

**The Upper Blackstone Water Pollution
Abatement District (UBWPAD)**

NPDES PERMIT NO. MA0102369

NPDES Appeal No. 08-_____

ASSENTED-TO SCHEDULING MOTION

The Massachusetts Department of Environmental Protection (MassDEP) with the assent of the United States Environmental Protection Agency, Region I ("Region I") respectfully requests a modification of the schedule to allow an additional fourteen (14) days for MassDEP to complete the filing of its Petition for Review of the final NPDES Permit No. MA0102369 ("Permit") issued to the Upper Blackstone Water Pollution Abatement District (UBWPAD) as well as for Region I's response thereto. This modest extension of time is necessary and appropriate due to the timing of issuance of the Permit and will enable an orderly disposition of the matter. As further grounds for this assented-to motion, MassDEP states:

1. MassDEP submitted comments to Region I on the draft permit on May 9, 2008, before the public comment period concluded.
2. The Permit was issued in late August at a time when many key personnel were unavailable to review and respond;
3. Region I issued the final Permit with a 122 page, single-spaced, Response to Comments;

4. On information and belief, a similar motion has been filed by UBWPAD with the assent of Region I;
5. Since it is anticipated that some of the arguments of UBWPAD and MassDEP will overlap, granting both motions would aid in the orderly disposition of this matter;
6. Region I, through counsel, has advised MassDEP that it does not object to this motion solely on the grounds that, in the event the Environmental Appeals Board (EAB) grants a similar motion filed by UBWPAD, the Region anticipates it would move to consolidate any petitions filed and request the EAB establish a single date for the Region to respond to all petitions (i.e., December 5, 2008). The Region, accordingly, does not object to MassDEP's motion, provided that: (a) EAB allows a briefing schedule that provides Region I with a similar two-week extension for the filing of its response to the Petition and (b) MassDEP's Preliminary Petition accompanying this motion provide a concise itemization of the conditions for which MassDEP seeks review;
7. MassDEP is simultaneously filing with this motion its Preliminary Petition for Permit Review ("Preliminary Petition"). While this Preliminary Petition does not fully present MassDEP's grounds for objection to the Permit, it does provide EAB, Region I and all other parties with a summary of the conditions and grounds upon which MassDEP seeks review;
8. A grant of additional time will benefit EAB because it will enable MassDEP to thoroughly review Region I's Responses to Comments and then present its arguments as clearly and concisely as possible; and

9. Allowing the requested schedule modification will not prejudice any other party because the schedule provides for a commensurate modification for Region I and similar modifications may be made for any other petitions as appropriate.

In light of the foregoing, MassDEP submits that the grounds for extension, good cause and no prejudice to opposing parties, are present here and thus warrant a grant of this motion.

See In re B & B Wrecking and Excavation, Inc., 4 EAD 16 (1992).

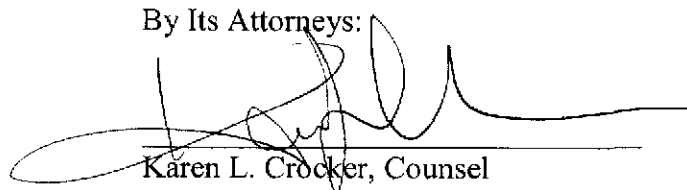
MassDEP thus respectfully requests that EAB modify the schedule for the petition process as follows: (a) MassDEP will submit a supplement to its Preliminary Petition no later than October 8, 2008; and (b) Region I will submit its Response no later than December 5, 2008.

In the event that EAB denies this Motion or fails to decide it before the expiration of the appeal period, MassDEP reserves the right to supplement its Preliminary Petition by submittal of a more detailed Petition for Review inclusive of all arguments, attachments and exhibits within the existing thirty-day schedule which expires on September 24, 2008.

Respectfully Submitted,

MASSACHUSETTS DEPARTMENT OF
ENVIRONMENTAL PROTECTION

By Its Attorneys:



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H. Rebecca Cutting, Counsel
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