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

In the Matter of:	)	
Upper Blackstone Water Pollution Abatement District	)	NPDES Appeal Nos. 10-09 through 10-12
NPDES Permit No. MA 0102369	)	

OPPOSITION OF REGION 1 TO PETITIONS FOR REVIEW

A portion of the final National Pollution Discharge Elimination System (NPDES) permit in this matter is again before the Board following the Board's order denying review in part and remanding in part. On remand, the Region determined to remove from the permit the sole remanded issue – regulation of satellite collection systems as "co-permittees" – so that the necessary nutrient limits in the permit could go into effect as soon as possible. Petitioners raise new arguments attacking provisions of the permit that are outside the limited scope of the Board's remand, and they fail to demonstrate error in the Region's determination. Review should be denied.

Procedural Background

The history of the first round of appeals on the permit is detailed in the Board's recent order. *In re: Upper Blackstone Water Pollution Abatement District*, 14 E.A.D. __ (EAB 2010). In brief, on August 22, 2008, the Region re-issued the NPDES permit to the Upper Blackstone Water Pollution Abatement District (the District). The District owns and operates a wastewater treatment plant located in Millbury, Massachusetts, which collects and treats sewage and wastewater from the surrounding areas, including from

collection systems owned by nearby municipal entities. Among the requirements, the permit includes effluent limitations for phosphorus and nitrogen to address severe, nutrient-driven impairments in the Blackstone River and upper Narragansett Bay. Eight parties filed petitions for review, including the District and several nearby municipalities who send their waste to the District's plant for treatment.

On May 28, 2010, the Board issued its ruling on the petitions. The Board upheld the challenged permit conditions in all respects except one: the Board remanded to the Region the Permit's provision adding certain satellite collection systems as "co-permittees." In its remand, the Board held that the Region may re-issue the Permit with or without the co-permittee provision. *See Upper Blackstone*, *supra*, *slip op.* at 19-20. The Board further held that, should the Region choose to maintain the co-permittee provision, the Region should provide a more comprehensive factual and legal rationale for its decision. *Id.* at 20.

On remand, the Region determined to "forego imposition of any co-permittee requirements in the Permit" in order to expeditiously implement the more stringent nutrient limits. *See* Det. on Remand at 2-3, Ex. 1 (AR 1).[1] The Region explained that it will respond to the Board's concerns in any future issuance or modification of the District's permit that includes a similar provision (or a permit issuance to another regional POTW should the issue be raised there first). *Id.* The Region concluded, however, that a number of factors counseled in favor of foregoing any co-permittee requirement in this permit issuance, including: 1) the extent of nutrient impairments to the receiving waters; 2) the fact that the District's discharges of nitrogen and phosphorus

[1] "Ex." refers to copies of documents submitted with this opposition for the Board's convenience. "AR" refers to the administrative record for the Region's Determination on Remand.

are a major contributor to these impairments; 3) the delay associated with evaluating and fully responding to the Board's concerns regarding the co-permittee provision; and 4) the fact that all other significant point sources contributing nutrients to Narragansett Bay already have final permits including stringent nitrogen limits. *Id.* at 2-3.

Appended to the Region's Determination on Remand is a "Notice of Conforming Changes," which reflects its decision to forego imposition of any co-permittee requirements. *See* Ex. B to Det. on Remand. More specifically, the Region removed all language from page 1 and Parts I.D and I.E of the Permit that provided that certain satellite collection systems must implement provisions contained in Part I.D (Unauthorized Overflows) and I.E (Operation and Maintenance). The Region did not remove the provisions from page 1 of the permit that specify which municipalities can send wastewater, septage or sludge to the District as these were outside the scope of the remand and, indeed, outside the scope of the original permit appeal proceedings; they were not challenged by any party and had already gone into effect. *See Notice of Uncontested and Severable Conditions* dated November 26, 2008 (appended as Ex. A to Det. on Remand) (AR 1). Nor did the Region remove provisions from Part I.E of the permit requiring that the District (as opposed to the co-permittees) develop and implement a plan to control inflow and infiltration; the Board specifically held that the District is obligated to prepare such a plan. *See Upper Blackstone, supra, slip. op.* at 101. However, as the requirements related to such a plan were initially crafted to apply to both the District (as owner of the treatment plant) and the co-permittees (as owners of the collection systems), the Region on remand clarified which aspects of the plan apply only

to the extent the District owns any portions of the separate sewer system. *See* Det. on Remand at 4.

Having determined to remove the contested co-permittee provisions from the permit, the Region exercised its discretion under 40 C.F.R. § 124.14 not to reopen the record for additional public comment. *Id.* at n.4. In making this decision, the Region found that "the questions raised by the Region's analysis on remand are neither substantial nor new in the context of this permit proceeding." *Id.*

In its order, the Board provided that an appeal of the Region's determination on remand would be required to exhaust administrative remedies. *See Upper Blackstone, supra, slip op.* at 107. Four parties timely filed Petitions for Review, including the District and three satellite collection systems, the City of Worcester, the Town of Millbury, and the Town of West Boylston.

Petitioners raise both substantive and procedural challenges. With regard to substantive claims, they contest provisions in the permit they chose not to pursue in the initial round of appeals; this includes language in the Permit specifying from whom the District can accept wastewater and requirements imposed on the District to develop a plan to control inflow/infiltration. As to procedural issues, the District alone claims that the Region should have solicited public comment on its decision on remand.

Standard of Review

A party seeking review of a NPDES permit carries the burden of demonstrating 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 warranting review by the Board. *See* 40 C.F.R. § 124.19(a)(1)-(2); *In re Dominion Energy Brayton*

Point, L.L.C., 13 E.A.D. 407, 413 (EAB 2007). Review is based on the administrative record of the permit decision. *See Dominion Energy* at 413.

Argument

I. PETITIONERS IMPROPERLY CHALLENGE PERMIT TERMS OUTSIDE THE SCOPE OF THE REMAND.

A. THE PROVISION SPECIFYING FROM WHOM THE DISTRICT MAY ACCEPT WASTEWATER WAS NOT CHALLENGED BY ANY PARTY AND HAS ALEADY GONE INTO EFFECT.

Petitioners challenge language on page 1 of the final permit specifying that only certain municipalities are authorized to send their wastewater to the District's plant for treatment. According to Petitioners, the language cannot remain in the permit unless the Region offers the statutory and regulatory basis for exercising authority over these municipalities. *See* Dist. Pet. at 4-5.[2] This requirement, however, is a stand-alone provision that was not challenged by any party in the original permit proceeding and is outside the scope of the remand. Indeed, as the requirement was uncontested and severable, the Region put it into effect as contemplated by NPDES regulations. *See* 40 C.F.R. § 124.16(a)(2)(ii) ("The Region Administrator shall, as soon as possible after receiving notification from the EAB of the filing of a petition for review, notify the EAB, applicant, and all other interested parties of the uncontested (and severable) conditions of the permit…").

In its Initial Petition for Review, the District limited its challenge to those provisions making certain municipalities responsible for implementation of Parts I.D and I.E of the permit:

[2] As the petitions submitted by Millbury, West Boylston and Worcester essentially borrow verbatim from the District's petition, the Region has not included separate page citations for the arguments raised in the satellite systems' appeals.

- "Page 1 of 19" "Identification of Co-permittees for Part D and E;"
- "Part I.D. and E." "Permittee and co-permittee requirements;" and
- "Part I.E.3." "Infiltration and Inflow (I/I) Plan."

See Dist. Initial Pet., table at 3-4, Ex. 2. Parts I.D and I.E of the Permit, in turn, set forth requirements related to reporting of unauthorized discharges (Part I.D) and operation and maintenance (Part I.E). *See* Permit, Ex. 3 (AR 3). The District's Supplemental Petition for Review underscores that the District understood the "co-permittee" provisions as the requirement imposed on a subset of the satellite systems to comply with Parts I.D and I.E of the Permit. *See, e.g.*, Dist. Supp. Pet. at 61 (characterizing the "co-permittee" provision as "the actions or inactions of these municipalities under Part I.D. and E."), Ex. 5."[3]

The municipalities identified on page 1 of the permit as contributing wastewater to the District's facility are not identical to those listed as "co-permittees," further supporting that these two permit provisions are distinct. Sutton, Shrewsbury, Oxford and Paxton are on the list of those who send their waste to the District's plant, but were not named as "co-permittees" responsible for implementation of Parts I.D and I.E of the permit.

Petitioners cannot avail themselves of the argument that their current challenge to language specifying from whom the District could accept wastewater was not reasonably available to them in the first round of appeals. Indeed, in comments on the draft permit,

[3] In its Order granting the District to file supplemental briefing, the Board prohibited the District from challenging any terms or conditions other than those raised in its Initial Petition. *See Order Granting Extension of Time to Supplement Petitions and File Response* at 3 (September 23, 2008). The petitions filed by those satellite systems who participated in the initial round of appeals (Cherry Valley Sewer District, Holden, Millbury and Worcester) mirror the District's arguments and similarly do not appeal the language on page 1 of the permit specifying from whom the District may accept wastewater.

the District raised specific concerns about this very language (in addition to its comments about the imposition of Parts I.D and I.E on co-permittees), which the Region addressed by making some clarifications to the provision. The District found the Region's response acceptable; neither the District nor any other party challenged the language in the permit specifying from whom the District could accept wastewater in the first round of appeals. Rather, petitioners chose to appeal only those provisions making certain satellites responsible for implementation of Parts I.D and I.E.

More specifically, in its comments, the District raised the following concerns regarding the language detailing which municipalities could discharge to its treatment plant: that it conflicted with the District's authority under its enabling legislation to determine which communities could contribute flow to its plant; that the language did not name all communities from whom the District currently accepted wastewater; and that the provision potentially restricted from whom the District could accept septage and sludge. *See* District's Comments at #F28 and #F45, Ex. 4 (AR 6).[4] In response to the District's concerns, the Region made clear in the final permit that the provision addressed only wastewater flows and did not restrict from whom the District could accept septage or sludge. *See* Response at #F28 and #F45. Further, the Region added to the provision the names of the other municipalities the District identified in its comments as also contributing waste to its treatment facility. *Id.*

As no one challenged the provision specifying from whom the District could accept wastewater, the Region did not stay this requirement. The Region did stay the provision on page 1 that referred to a subset of the communities as co-permittees

[4] Ex. 4 is excerpts from the Region's Response to Comments which, in turn, includes the District's comments on the draft permit verbatim.

responsible for implementation of Parts I.D and I.E of the permit. *See* Notice of Uncontested and Severable Conditions dated November 26, 2008 at 1 (appended as Ex. A to the Det. on Remand), Ex. 1 (AR 1)(staying only "***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 page 1 and parts D and E***) (emphasis added)." The Region further placed all uncontested and severable conditions of the permit (including the provision specifying from whom the District may accept wastewater) into effect pursuant to 40 C.F.R. § 124.16(a)(2)(i). *Id.* at 2. In the year-and-a-half since the Region issued the Notice of Uncontested and Severable Conditions, petitioners never indicated that the Region erred in its determination.

Petitioners' opportunity to challenge this provision has long passed. The Board has repeatedly held that a petitioner may not raise for the first time in a second petition arguments that should have been raised in an original petition. *See Dominion Energy, supra*, 13 E.A.D. at 438 (citing cases). Allowing petitioners to raise new arguments two years after the filing of their first round of appeals would undermine the efficiency, predictability and finality of the permitting process.

On the merits, the language at issue does not impose any requirements on the satellite collection systems. This is entirely consistent with the Region's determination on remand, where the Region repeatedly and clearly stated that it had no intent of asserting authority over the satellites in this permit issuance. *See, e.g*, Det. on Remand at 2, 4, Ex. 1. The Notice of Conforming Changes accompanying the Determination identifies the District as the sole permittee and removes all requirements imposed on the co-permittees. The District's interpretation of the provision would stand the Region's

remand determination on its head. The better – in fact, only logical – reading in light of the remand determination is that the requirements in Parts I.D and I.E apply solely to the District. The newly challenged provision on page one simply identifies communities that send flow to the District for treatment, i.e., the District currently accepts wastewater from the City of Worcester, the Towns of Millbury, Auburn, Holden, West Boylston, Rutland, Sutton, Shrewsbury, Oxford and Paxton and the Cherry Valley Sewer District. The provision at issue is fully appropriate where, as here, the record reflects that the plant has not provided full treatment or met all effluent limitations (including water quality-based effluent limitations) during high flow events. *See, e.g.,* Discharge Monitoring Reports (AR 91).[5] The purpose behind this provision is thus 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.

The Region's interpretation of the provision at issue here as imposing requirements only on the District is compelled by the administrative record of the remand determination and renders moot petitioners' claim to the contrary. *See, e.g., In re Austin Powder Co.*, RCRA Appeal No. 95-9, 6 E.A.D. 713, 717 (EAB 1997)(adoption of Region's interpretation of disputed provision of permit is authoritative reading of the permit that is binding on the agency). Review, accordingly, should be denied.[6]

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[5] The AR reference is to the administrative record for the final permit issued August 22, 2008.

[6] In addition to their argument that the provision imposes obligations on the satellite systems, petitioners forward other theories, all untimely, in support of their appeals. These include the claim that the language is imprecise because it does not specify that some communities send wastewater from only portions of their communities to the District's plant per separate agreements with the District. *Id.* at 7. Petitioners further contend that by failing to mention that the state Department of Recreation and Conservation (DCR) owns a portion of pipe in one of the communities, the language somehow prohibits municipalities upstream from sending their waste to the District's plant via DCR's pipe. *Id.* at n.4. These theories were all available to petitioners at the time they filed their initial appeals and cannot be raised now. *See Dominion Energy, supra,* 13 E.A.D. at 413. Indeed, these arguments would have been barred even in the first round of

B. PETITIONERS IMPROPERLY SEEK TO REOPEN THE ISSUE OF WHETHER THE DISTRICT MUST COMPLY WITH PROVISIONS TO CONTROL EXCESSIVE INFLOW\INFILTRATION.

Petitioners next object to requirements in Part I.E.3 of the Permit placed on the District to develop and implement a plan to control inflow and infiltration. As the District owns a limited amount of collection system piping, petitioners question the need for the requirements and assert that they are unnecessarily confusing. *See* Dist. Pet. at 11-12. Petitioners further challenge provisions requiring the District "to ensure that high flows do not cause I/I related effluent limit violations," *see* Dist. Pet. at 12, and that the District "shall require, through appropriate agreements, that all member communities control discharges to the permittee's POTW sufficiently to ensure that high flows do not cause or contribute to a violation of the permittee's effluent limitations or cause overflows from the permittee's collection system." Dist. Pet. at 8-9. According to petitioners, these provisions leave "intact the functionality of provisions aimed at co-permittees." *Id.* at 12. Petitioners also argue that the District cannot enter into such agreements with its members as the District's enabling legislation prohibits it from "operating or maintaining" the collection systems of its members. *Id.* at 8-9.

Petitioners ignore that the Board has already ruled that the District must develop and implement the inflow and infiltration plan required by Part I.E.3 of the Permit. *See*

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appeals as they were not preserved in comments on the draft permit. *See In re Christian County Generation, LLC,* 13 E.A.D. 449, 459-60 (EAB 2008). On the merits, and as noted above, it is not the Region's intent to pick and choose which municipalities may send their waste to the plant, but to ensure that the District does not add additional flows that jeopardize the ability to ensure water quality standards are met during high flow events. Furthermore, nothing in this provision or elsewhere in the permit prevents the District from entering into agreements with its members (or honoring existing agreements) regarding such issues as whether the District will receive all or only a portion of the wastewater from a community. And nothing in permit prohibits use of DCR's pipe as a conduit for wastewater from municipal collection systems; DCR simply maintains a portion of the collection system near a public drinking water supply and nothing in the record indicates that DCR contributes flow in addition to that generated by the municipalities.

Upper Blackstone, supra, slip op. at 101 (denying review of the requirement for preparation of an inflow and infiltration plan "with respect to the District, which remains obligated to control inflow and infiltration."). Further, in the first round of appeals, the only argument offered in support of the District's challenge to the imposition of the requirements of Part I.E.3 on it was that the Permit provided an insufficient amount of time for the District to prepare and submit its plan. *See* Dist. Supp. Pet. at 57, Ex. 5. If the provisions of Part I.E.3 of the Permit are indeed so inherently problematic for the District, it should have raised its concerns in comments on the draft permit and in its first appeal. Its current challenges to these requirements are waived.

On the merits, of course the permit makes the District responsible to ensure high flows do not cause effluent violations. As noted above, the record shows that the facility has had significant issues with wet weather flows, including discharges exceeding water quality-based effluent limitations during high flow events. *Supra* at 9. In addition, the discharge dominates the flow in the river under low flow conditions and during most storm events. *See, e.g.*, Response to Comments at 60, Ex. 4 (AR 6). Accordingly, to ensure that water quality-based effluent limitations will be met even during times of high flow, the Permit requires that the District take reasonable and appropriate steps, including entering into agreements with its members, to control the volume of flow to its plant. *See also* Response to Comments at 87 (explaining that the intent of the provision "is to ensure that high flows do not cause or contribute to violations of effluent limitations or cause unauthorized bypasses at the treatment plant."). [7]

[7] As the Region explained on remand, the specific language in the permit (including the requirement that the District enter into agreements with members to prevent effluent limitation violations associated with high flow) is derived from a state policy applicable to regional treatment facilities in Massachusetts. *See* Det. on Remand at 4 & n.5. The permit requirements track the state policy virtually verbatim. *Compare*

The District objects in particular to the provision requiring it to enter into agreements with its members, claiming that this requirement exceeds the District's authority. *See* Dist. Pet. at 9. The only provision of its enabling legislation the District offers in support of this claim, however, states that "nothing contained in this [enabling legislation] shall be construed to authorize the District to construct, operate or maintain the local sewerage system of each member." *Id.* Yet, the District nowhere explains how agreements to ensure that high flows do not cause effluent limit violations or overflows at its plant would by necessity result in the District itself constructing, operating or maintaining the communities' sewer systems. It is hard to fathom how the Region erred – much less *clearly* erred – where the federal permit condition at issue appears compatible on its face with the cited provision in the enabling legislation.[8]

Permit Part E.1.3 (Infiltration/Inflow Control Plan), Ex. 3 (AR 3), *with* Infiltration and Inflow Policy BRP01-1 at 2-3 (MassDEP, Sept. 6, 2001), Ex. 6 (AR 10). This specific language required by MassDEP's policy was not included in the District's 1999 expired permit because that permit was issued two years prior to MassDEP's policy.

[8] Even had the District demonstrated it lacked authority to control flows to its plant, the District's reliance on *American Iron and Steel Institute v. EPA*, 526 F.2d 1027 (3rd Cir. 1975) for the proposition that an NPDES permit may never contain provisions "out of the control of the permittee" is misplaced. *See* Dist. Pet. at 9. The decision stems from a challenge to EPA's national effluent limitation guidelines for the iron and steel industry, and the pertinent portion addresses the need for an individual plant to be able to obtain an adjustment from the otherwise applicable national effluent limitation if its inability to meet that limitation is attributable to significant levels of pollutants in surface waters used for its intake water. Under the intake credit regulations subsequently promulgated by EPA, credit is limited to adjustment of ***technology-based*** effluent limitations. *See* 40 C.F.R. § 122.45(g). The credit is only available provided several other conditions are met, including that the facility has already applied the level of treatment required by the guidelines, but the treatment is unsuccessful in reducing pollutants to levels specified for the industry. *See* 40 Fed. Reg. 29848 (preamble to July 16, 1975 regulations at 40 C.F.R. § 125.28)(noting that "a discharger will be responsible for removing only those pollutants he adds to the waters of the United States by receiving credit for the specific pollutants which are present in his intake water and are not removed through the application of the required level of technology"). The decision does not address any permit conditions based on or related to water quality standards, such as the provision in the District's permit requiring it to control flows to its facility. The purpose of this provision in the District's permit is, among other things, to ensure that excess flows do not result in violations of water quality-based effluent limitations. In addition, courts have clearly stated that technical infeasibility or impossibility are not relevant to the establishment of water-quality based effluent limitations (as opposed to the technology-based national effluent guidelines at issue in *American Iron*). *See U.S. Steel Corp. v. Train*, 556 F.2d 822, 838 (7th Cir. 1977).

Finally, with regard to petitioners' contention that certain of the inflow/infiltration requirements are unnecessary or confusing as they relate to the District, *see* Dist. Pet. at 10-11, the Board has already ruled that the District must submit the plan and the District concedes it owns at least some collection system piping. *See Upper Blackstone, supra,* slip op. at 101; Dist. Pet. at 3. Further, the Region clarified on remand that certain aspects of plan development apply only to the extent the District owns the separate sewer system. The Region explained:

> [A]s the requirements related to development and implementation of a plan to control inflow/infiltration (Part I.E.3) were initially crafted to apply to both the District (as owner of the treatment plant) and the co-permittees (as owners of the collection systems), the Region has on remand clarified which aspects of plan development, implementation and associated reporting requirements apply only to the extent the District owns any portions of the separate sewer system. These include requirements to identify and physically remove sources of inflow and infiltration to the separate sewer system.

Det. on Remand at 4, Ex. 1. Accordingly, the Region fully appreciates that the District's plan will not address all elements. Furthermore, if the District is correct that certain sources of inflow/infiltration do not exist, *see* Dist. Pet. at 12, the identification and removal requirements of the plan should be easy to satisfy. Review should be denied.

II. THE REGION APPROPRIATELY EXERCISED ITS DISCRETION NOT TO SEEK PUBLIC COMMENT ON ITS DETERMINATION ON REMAND.

The District is alone among the petitioners in its argument that the Region erred in not re-opening the record for public comment. While the District supports the Region's decision to forego imposition of the co-permittee provision, it argues that the Region was compelled to solicit public comment as the remand was governed by procedures related to permit modifications set forth at 40 C.F.R. § 124.5. *See* Dist. Pet. at 15-16. Alternatively, the District argues that the Region should have accepted public comment

since it considered the views of the Rhode Island Department of Environmental Management. *Id.* at 17.

As a preliminary matter, the District inaccurately conflates the rationales offered by the Region for two separate determinations – the decision to issue the permit without the contested co-permittee provisions and the decision not to seek public comment. *See, e.g.*, Dist. Pet. at 15. The District is correct that the Region, in an exercise of policy discretion, determined to forego imposition of the co-permittee provisions in order to put the nutrient limits into effect as soon as possible. *See* Det. on Remand at 2, 3. Having decided to delete from the permit the precise provisions petitioners had challenged, the Region determined this was not the type of decision requiring reopening of public comment under applicable NPDES procedural regulations. *Id.* at n.4 (noting that "[t]he questions raised by the Region's analysis on remand are neither substantial nor new in the context of this permit proceeding.").

The District is also incorrect that the Region acted on remand "to correct … mistaken interpretations of law" pursuant to the permit modification requirements at 40 C.F.R. § 122.62(15). *See* Dist. Pet. at 15. First, the District's claim mischaracterizes the Board's holding. In its Order, the Board explicitly reserved judgment on legal issues surrounding the extent to which the NPDES requirements apply to municipal collection systems. S*ee Upper Blackstone*, *supra,* slip op. at 19 (noting that "the Region's conclusion that it has legal authority to extend the Permit's requirements beyond what the District owns and operates must be considered, as an integrated whole, together with the Region's full legal analysis, which it has not yet provided…."). Moreover, NPDES procedural regulations do not expressly or impliedly require default to 40 C.F.R. § 122.62

in order for the Region to decide issues on remand. Both the Board's prior decisions and the Region's consistent practice (where, like here, the Board's order does not contain explicit instructions regarding whether the Region should re-open the record for public comment), instead apply the regulations at 40 C.F.R. § 124.14 by analogy in making such a determination.

Under 40 C.F.R. § 124.14(b), a public comment period may be reopened "[i]f any data[,] information [,] or arguments submitted during the public comment period . . . appear to raise substantial new questions concerning the permit." Although the regulations refer to new information raised during a public comment period, the Board has employed them in the context of a remand proceeding. *See, e.g, In re NE Hub Partners, L.P.,* 7 E.A.D. 561, 584-86 (EAB 1998)(applying 40 C.F.R. § 124.14(b) and determining that the Region was not required to reopen the public comment period on remand), *aff'd, Penn Rule Gas, Inc. v. EPA*, 185 F.3d (3rd Cir. 1999); *Dominion Energy, supra,* 13 E.A.D. at 416(finding no error in the Region's decision not to reopen the record for public comment under § 124.14(b)); *In the Matter of Velsicol Chemical Corp.*, 1 E.A.D. 882 (EPA September 14, 1984), 1984 EPA App. LEXIS 12 at *10(remanding RCRA permit to Region "so that the comment period can be reopened under § 124.14").

In this case, the question of whether – or not – municipal satellite collection systems should be regulated under the permit as co-permittees was on the table during the original public comment period and contested in the original appeals. Although it seeks public comment, the District never explains the purpose of additional public comment in this case, where the Region has removed the very provision from the permit that petitioners objected to in their original appeals. The District has failed to demonstrate the

Region's analysis on remand raised any substantial or new questions and, therefore, warranted public comment.

The District attempts to distinguish *Hub Partners* by arguing that the permit writer in that case made no changes to the permit on remand. That a change to the permit was necessary to remove the co-permittee provision from the District's permit does not in and of itself mandate a public comment process. Rather, relevant considerations include whether the change raises any new or significant issues and is a logical outgrowth of the permitting process. *Hub* at 584-588; *Dominion Energy* at 416 & n.10. *See also In re City of Newburyport Wastewater Treatment Facility*, NPDES Appeal No. 04-06, Order Denying Review in Part and Remanding in Part at 14 (EAB December 8, 2005)(where Region failed to adequately explain removal of effluent limitation between draft and final permit, re-opening record for public comment not necessary should Region determine on remand to alter the final permit by restoring the requirement).[9] Here, the change simply removed the provisions that were on the table during the original public comment period and contested in the original appeals. Further, the Region's action flowed directly from the Board's order, in which the Board instructed the Region to either drop the challenged provisions or to provide a more robust factual and legal rationale for maintaining them. Finally, in its Determination on Remand, the Region adequately explained its rationale

[9] In the context of changes made between draft and final permits, the Board has repeatedly held that the regulations at 40 CFR Part 124 do not call for a new comment period every time the permit changes between draft and final versions. *See, e.g., In re District of Columbia Water and Sewer Authority (WASA), 13 E.A.D. 714, 758-59 (EAB 2008). See also NRDC v. US EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988)(holding agency must have authority to promulgate final rule that differs in some particulars from proposed rule because "otherwise the process might never end."). Where a change is a logical outgrowth of the permitting process, reopening comment is not necessary. *WASA, supra,* 13 E.A.D. at 759; *In re Old Dominion Elec. Co.*, 3 E.A.D. 779, 797 (Adm'r 1992)(reopening comment period not necessary under 124.14(b) because, among other reasons, "[t]he revised permit by all accounts is a logical outgrowth of the notice and comment process ....").

for dropping the co-permittee provision and for not seeking public comment so that a dissatisfied party could develop a permit appeal.

Nor can the District avail itself of the argument that the Region was compelled to accept public comment since it considered the views of Rhode Island, the downstream state affected by the District's discharges of nutrients. *See* Dist. Pet. at 17. According to the District, reliance on Rhode Island's views was an inappropriate supplementation of the administrative record and an abuse of discretion. *Id.* at 17-18. The communication at issue is an email from the director of the Rhode Island Department of Environmental Management's (RIDEM's) surface water permit program to the manager of the NPDES program at the Region. *See* Email dated June 15, 2010 from Angelo Liberti to Damien Houlihan, Ex. 7 (AR 10). RIDEM does not offer an opinion as to what the Region should do in response to the Board's remand, but simply urges the Region to proceed with alacrity in the face of the substantial nutrient-driven water quality impairments to surface waters in that state, the relative size of the District's contribution to those impairments, and the fact that Rhode Island facilities have already proceeded with construction of new facilities to meet comparable limits. *Id.* Indeed, RIDEM could not have commented on the Region's decision to drop the co-permittee requirement since, at the time of RIDEM's email (i.e., June 15, 2010), the Region had not yet developed its response to the Board's order. When the Region ultimately decided to forego the co-permittee provision, the Region did not seek comment from RIDEM or anyone else on its approach. The Region nonetheless included the email in the administrative record for this proceeding as the Region considered RIDEM's views as it began its internal deliberations. *See Dominion Energy*, *supra*, 13 E.A.D. at 417 (noting that general principles of administrative law

dictate that the official administrative record include all documents, materials and information that an agency relied on directly or indirectly in making its decision).

Although it seeks public comment, the District never explains the benefits of such a process in this case, where the Region has removed the very provision from the permit that petitioners objected to in their original appeals. The District has failed to demonstrate the Region's analysis on remand raised any substantial or new questions and, therefore, warranted public comment.

Conclusion

For the foregoing reasons, review should be denied.

Respectfully submitted by EPA-Region 1,

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