



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1
1 Congress Street, Suite 1100
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VIA ELECTRONIC FILING

October 19, 2010

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460-0001

Re: Upper Blackstone Water Pollution Abatement District
Region 1's Opposition to Motion for Leave to Reply
NPDES Appeal Nos. 10-09 through 10-12, NPDES Permit No. MA 0102369

Dear Ms. Durr:

In connection with the above-referenced permit appeals, I am filing electronically today the Region's Opposition to the Motion of the Upper Blackstone Water Pollution Abatement District for Leave to Reply, together with a certificate of service.

If you have any questions, please call me at 617-918-1711.

Sincerely,

Karen McGuire

Karen McGuire, Esq.
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Encls.

cc: Recipients on Enclosed Certificate of Service

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

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

**REGION 1'S OPPOSITION TO UPPER BLACKSTONE WATER POLLUTION
ABATEMENT DISTRICT'S MOTION FOR LEAVE TO FILE A REPLY**

Region 1 objects to the Motion of the Upper Blackstone Water Pollution Abatement District ("the District") for Leave to Reply. Through its motion and accompanying reply brief, the District seeks inappropriately to supplement the arguments in its petition. The motion should be denied.

The District principally seeks leave to amplify its arguments challenging requirements in Part I.E.3 of the permit that the District (as opposed to the municipal collection systems) implement an inflow-infiltration plan. This portion of the permit requires that the District's plan include, to the extent the District owns the sewer system, the following elements: an ongoing program to identify and remove sources of inflow/infiltration (I/I); an inflow identification and control program; identification and prioritization of areas that will provide increased aquifer recharge; and an educational public outreach program. See Permit at I.E.3. The permit also requires that the District's plan include demonstration that the District, through appropriate agreements, has required member communities to control discharges sufficiently to ensure high flows do not cause

or contribute to violations of effluent limitations or cause overflows from the portion of the system owned by the District. *See* Permit at I.E.3.

In response to the Region's point in opposition to the petitions for review that these provisions of the permit are outside the scope of the remand, the District argues that a reply is justified because this petition is "the first opportunity" the District had to raise its concerns. *See* District's Motion at 2; Reply at 6. According to the District, by removing the requirement that the co-permittees must comply with Part I.E. of the permit and by adding clarifying language that the District only need implement certain plan elements "to the extent the District owns the separate sewer," the Region has somehow altered how the permit operates, thereby entitling the District to amplify its arguments in reply. *See* District's Motion at 2; District's Reply at 5-6. This argument fails to confront that the permit has always required that the District itself implement an I/I plan; that the District failed to raise any concerns about these requirements in its initial appeal (other than to request additional time to submit its I/I plan), and that the Board has already stated that the District needs to implement requirements related to the I/I plan. *See* Region's Opposition at 10-11. Indeed, in its order, the Board ruled as follows:

The District also objects that [sic] the Permit condition requiring the District to complete an infiltration and inflow control plan within six months. Dist. Supp. Pet. at 57. The District, however, has failed to provide any evidence supporting its objection that six months is an inadequate time. Nevertheless, because this condition applies both to the District and to the co-permittees and because the Board is remanding the Permit's co-permittee condition, the Board remands this requirement for preparation of an inflow and infiltration plan as it relates to the co-permittees, and the Board denies review of this provision with respect to the District, which remains obligated to control inflow and infiltration.

See In re: Upper Blackstone Water Pollution Abatement District, 14 E.A.D. __ (EAB 2010), slip. op. at 101. The time to raise concerns about these requirements has long past.

The District similarly offers no justification for its new argument on reply that the language the Region included in the permit limiting the District's obligations to the extent the District owns the sewer system is not "clear and complete." *See* Motion at 2; Reply at 1-3. Nor does the District offer any rationale for its new claim that the municipal collection systems may be at risk for enforcement if there are effluent violations or unauthorized overflows at the District's facility resulting from the District's inability to control flows to its plant. *See* Reply at 4. These theories were all available to the District at the time of its initial filing. Indeed, the District had the affirmative obligation to present all available arguments with precision in its initial petition, *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 496, 520 (EAB 2002), and the District is not entitled to file a reply brief as of right. *See In re Town of Seabrook, N.H.*, 4 E.A.D. 806, 810 n.6 (EAB 1993). *See also EPA Environmental Appeals Board Practice Manual* at 48 (noting that after the permitting authority's response is filed, "the EAB normally does not require further briefing").

Moreover, the Region has repeatedly and clearly stated that it has no intent of asserting authority over the satellites in this permit issuance. *See, e.g.*, Det. on Remand at 2, 4, Ex. 1. What the permit *does* require is that the District take appropriate steps to control the flow to its plant to ensure that high flows do not cause or contribute to violations of effluent limitations or cause unauthorized bypasses at the treatment plant. *See* Permit at E.3; Response to Comments at 87. If such violations do occur, the District

(not the municipal collection systems) will be responsible. The District's attempt to offer new, alternative interpretations of the permit language should be rejected. *See, e.g., In re Austin Powder Co.*, RCRA Appeal No. 95-9, 6 E.A.D. 713, 717 (EAB 1997).

The underlying issue before the Board in this appeal is straightforward: did the Region in fact implement its intent of removing the contested co-permittee provisions from the permit? The Region believes it did so. If the Board nonetheless concludes the Region was insufficiently clear, the Board could easily direct the Region as to any additional specific changes that should be made to the permit to fulfill the Region's express intent of ensuring that the permit's requirements apply solely to the District without the need for additional briefing, public comment or further rounds of appeal to the Board. The Region decided to forego regulation of the municipal "co-permittees" for the very purpose of expeditiously implementing the necessary nutrient limitations in the permit. *See Det. on Remand at 3* ("It is untenable to forestall necessary reductions in the pollutants that are the primary cause of the water quality impairments while reconsideration of issues surrounding the regulation of satellite municipal collection systems undergoes potentially extended assessment by the Agency.").¹ The District has failed to demonstrate that further amplification of its arguments will in any way facilitate the Board's review or the orderly disposition of this matter. Accordingly, the Board should deny the District's motion for leave to reply.

¹ The District's criticism of separate efforts by EPA's Office of Water to examine issues related to regulation of satellite municipal collection systems is puzzling. *See District's Reply at 7-8*. Surely it is a positive development that the Agency is also evaluating these issues at national level. Further, the Region stated that it will fully respond to the Board's questions and concerns should the Region determine to regulate municipal collection systems in a future permitting proceeding. *See Det. on Remand at 2*.

Respectfully submitted by EPA-Region 1,

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Dated: October 19, 2010

CERTIFICATE OF SERVICE

I certify that copies of Region 1's Opposition to Upper Blackstone Water Pollution Abatement District's Motion for Leave to Reply in connection with NPDES Appeal Nos. 10-09 through 10-12 were sent to the following persons in the manner indicated:

By Electronic Submission (via CDX):

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