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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1
1 Congress Street, Suite 1100
BOSTON, MA 02114-2023

ENVIR. APPEALS BOARD

BY HAND AND ELECTRONIC SUBMISSION

March 9, 2009

Eurika Durr
Clerk of the Board
United States Environmental Appeals Board
Colorado Building
1341 G Street, NW
Suite 600
Washington, D.C. 20005

**Re: Upper Blackstone Water Pollution Abatement District
Region 1's Sur-Reply to Upper Blackstone Water Pollution Abatement District's and
Conservation Law Foundation's Reply Briefs
NPDES Appeal Nos. 08-11 and 08-13
NPDES Permit No. MA 0102369**

Dear Ms. Durr:

In connection with the above-referenced permit appeals, please find enclosed for docketing and review one original copy of Region 1's Sur-Reply to Upper Blackstone Water Pollution Abatement District's and Conservation Law Foundation's Reply Briefs, together with a certificate of service. Electronic copies of Region 1's submission will also be posted to the CDX filing system.

If you have any questions, please do not hesitate to contact me at 617-918-1711.

Sincerely,

A handwritten signature in cursive script that reads "Karen McGuire" followed by a stylized monogram "KMF".

Karen McGuire, Esq.
US EPA-Region 1

Enclosures

cc: Recipients Listed on Enclosed Certificate of Service

CERTIFICATE OF SERVICE

I certify that copies of the Sur-Reply to Upper Blackstone Water Pollution Abatement District's and Conservation Law Foundation's Reply Briefs, in connection with NPDES Appeal Nos. 08-11 and 08-13, were sent to the following persons in the manner indicated:

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

ENVIR. APPEALS BOARD

In the Matter of:)
)
Upper Blackstone Water)
Pollution Abatement District)
)
NPDES Permit No. MA 0102369)
)
_____)

NPDES Appeal Nos. 08-11 and
08-13

**REGION 1'S SURREPLY TO UPPER BLACKSTONE WATER
POLLUTION ABATEMENT DISTRICT'S AND CLF'S REPLY BRIEFS**

The Region submits this surreply to the reply briefs filed by the Upper Blackstone Water Pollution Abatement District ("the District") and the Conservation Law Foundation ("CLF"). The Region corrects errors and omissions in petitioners' re-telling of the record. The Region also points out new theories for relief that petitioners inappropriately offer for the first time in reply. As neither the District nor CLF has demonstrated any basis for review of the Region's decision-making, review of both petitions should be denied.

I. The Nitrogen Limit: the District and CLF Raise no Issues Warranting Review.

A. Region 1 Appropriately Exercised its Scientific and Technical Judgment To Account for Differences Between the Model and the Natural Setting.

While obviously seeking very different outcomes in this proceeding, both the District and CLF argue in reply that the Region erred in undertaking any effort to evaluate the differences between the MERL model and the natural setting of Narragansett Bay.

According to the District, a study cited by the Region supports its position that differences in flushing rates are so stark that the MERL model must be cast aside and no effort made to account for its uncertainties. *See District's Reply* at 6 (noting that differences in flushing rates make it "inappropriate to apply the MERL experiments to the Seekonk River"). Under CLF's view, the Region was compelled to apply the outputs of the MERL model wholesale, even in the face of differences indicating the model would over-predict the loading reductions needed to meet water quality standards. *See CLF's Reply* at 9 (claiming that "[w]hen there is any amount of uncertainty, EPA must err on the side of stricter limits."). Rather than call into question the approach undertaken by the Region, the result-oriented views offered by the petitioners in fact underscore the reasonableness of the Region's methodology: consistent with applicable regulations, the Region sought to rationally account for differences between the model and real world by taking into account all relevant information.

In support of its claim that the peer-reviewed MERL model should be rejected outright, the District's reply focuses on a study by Asselin and Spaulding. In its Opposition, the Region referenced the study for the proposition that these differences, although significant, were not as severe as painted by the District. In reply, the District argues the Asselin study is irrelevant since it evaluated flushing rates in the Providence and Seekonk River system, not solely the Seekonk River where the District's discharge first reaches the upper Bay. *See District's Reply* at 6. However, the Region's consideration of the study stands to reason: the Seekonk River joins and widens into the

Providence River, which flows directly into Narragansett Bay; all of these waters are impaired as a result of excessive nitrogen loading. It is also consistent with the approach taken by the Rhode Island Department of Environmental Management (RIDEM) in its 2004 Evaluation. *See Evaluation of Nitrogen Targets and WWTF Load Reductions for the Providence and Seekonk Rivers* (RIDEM, December 2004) (“2004 RIDEM Load Reduction Evaluation”) at 9 (“How Does the Providence and Seekonk River System Compare with the MERL Experiment”) (Ex. 13).¹ More importantly, by focusing on the question of whether residence times in the Seekonk River, the Providence River, or the two Rivers together, were somewhat faster or slower, the District obscures the larger point: the Region fully recognized and took into account that flushing rates in the natural ecosystem were significantly faster than the flushing period utilized by the MERL model. When establishing the nitrogen limit, the Region determined that it would be appropriate to account for differences in flushing rates between the model and the real world, and for this reason decided not to impose a more stringent limit (*i.e.*, one based on a loading scenario that corresponds to a limit of 3.0 mg/l) at this time.

Just as it would be unreasonable to completely reject the MERL model, CLF’s position that the Region should simply resolve all uncertainties by imposing the most stringent limit possible is not scientifically supportable. Although it concedes the model cannot “precisely mimic the natural system [] and therefore did not generate definitive results,” (*CLF’s Reply* at 6), CLF contends the Region need not have bothered with any

¹ Exhibit numbers refer to the exhibits to the Region’s Opposition.

evaluation of these differences. Rather, in CLF's view, the Region should have simply applied the results of the MERL studies wholesale.

Offering an isolated quote from a 2005 RIDEM report which refers to the results of the MERL analysis, CLF contends that RIDEM has unequivocally concluded that a limit of 3.0 mg/l or lower is necessary to meet standards. *CLF's Reply* at 3.² CLF nowhere confronts, however, the fact that RIDEM, given the entire record, has expressly concurred with imposition of a nitrogen limit of 5.0 mg/l in the District's permit and has acknowledged this limit is comparable to those that RIDEM has already imposed on facilities within its jurisdiction. Further, the Region has frankly and repeatedly acknowledged that the MERL model, *viewed in isolation*, yields the conclusion that the District's limit should be set at a level corresponding to the 2-4X loading scenario. Yet, as all parties agree (including CLF), the model's outputs cannot yield definitive permit limits in light of differences between the model and the natural ecosystem. RIDEM has also acknowledged these uncertainties. *See, e.g., 2004 RIDEM Load Reduction Evaluation* at 24 (Ex. 13). Rather than reflexively assume that all uncertainties support the model's outputs (as CLF urges), the Region undertook to evaluate and rationally account for the differences between the model and real world based on evaluation of site-specific data and other studies. CLF has provided no compelling reason to cast the Region's technical judgment into question. *See In re Envotech, L.P.*, 6 E.A.D. 260, 284 (EAB 1996) ("absent compelling circumstances, the Board will defer to a Region's

² CLF indicates the quote is from the *2004 RIDEM Load Reduction Evaluation*. *CLF's Reply* at 3. The citation is actually from a 2005 report to the Rhode Island governor and legislature entitled *Plan for Managing Nutrient Loadings to Rhode Island Waters* (RIDEM 2005).

determination of issues that depend heavily upon the Region's technical expertise and experience.")

CLF enjoys no support for its position in the Board's decision in *City of Marlborough, Massachusetts, Easterly, Wastewater Treatment Facility*, 12 E.A.D. 235 (EAB 2005). In *Marlborough*, the Region concluded that the nutrient limitation at issue offered only the "possibility" of meeting standards in light of a site-specific study evaluating in-stream nutrient loadings from the sediments. Based on the Region's conclusion drawn from the sediment study, coupled with the lack of any indication that sediment loadings would be further evaluated or reduced over the term of the permit, the Board remanded. CLF's effort to equate the Region's findings related to the sediment study in *Marlborough* with the Region's conclusions about the MERL model is misplaced. That the Region, after thorough evaluation of site-specific data and other materials, ultimately concluded the MERL model outputs over-predicted the loading reductions required of the District in this permit reissuance does not lead to the conclusion that a limit of 5.0 mg/l offers only a "possibility" that standards will be met. Rather, in applying the laboratory results to a real world setting, the Region used its technical judgment and expertise to derive a permit limit needed to meet standards. And, as noted above, the Region has further grounded its conclusion in the fact that RIDEM has issued comparable limits to facilities in Rhode Island and has expressly concurred with the 5.0 mg/l limit at issue here. As yet a further backstop to its decision-making, the Region has ensured that a continuous monitoring program is in place to ensure the

necessary reductions are being achieved. See Ex. 22 (description of Narragansett Bay fix-site monitoring network).

Nor can CLF avail itself of the fact that the facility located in Woonsocket, Rhode Island has *voluntarily* agreed to meet a limit of 3.0 mg/l. *CLF's Reply* at 9. Based on its analysis of the MERL model and other site-specific data, RIDEM assigned Woonsocket an effluent limitation of 5.0 mg/l. In settlement of Woonsocket's appeal of the 5.0 mg/l limit, the facility voluntarily agreed to meet 3.0 mg/l upon certain conditions, including an agreed-upon compliance schedule. That Woonsocket voluntarily agreed to go above and beyond the limit RIDEM identified as necessary to meet standards does not support that a more stringent limit is needed in this proceeding.

Neither the District nor CLF have raised issues regarding the Region's approach warranting review. To the contrary, the Region's approach was reasonable, technically-sound and consistent with applicable regulations. Review of both petitions should be denied.

B. The Region's Decision to Establish the District's Effluent Limitation at the Point of Discharge is Not New and is Necessary to Ensure Rhode Island's Water Quality Standards are Met Downstream.

In its Reply, the District feigns surprise that Region determined to assign the 5.0 mg/l limit at the point of discharge rather than 28 miles downstream at the point where the District's loading reaches the upper Bay. *District's Reply* at 6-7. According to the District, the Region never explained that this approach (which would result in a concentration of less than 5.0 mg/l actually reaching the Bay) was necessary in order to

meet Rhode Island's water quality standards. *Id.* at 6. As is amply detailed in the record, the Region determined that 13% of the District's nitrogen load would be attenuated (via uptake of nitrogen by aquatic plants) as it travelled down the Blackstone River, resulting in 87% of the load ultimately being delivered to the Bay. *See Fact Sheet* at 13-14 (Ex. 1); *Response to Comments (RTC)* at 45-46 (Ex. 2). The record also makes clear that the 5.0 mg/l is applied at the point of discharge, *see e.g., Permit* at I.A.1, and that after adjustment for attenuation, 87% of the District's load would reach the Seekonk. *See, e.g., Seekonk Reach Loads* (Ex. 27); *2004 RIDEM Load Reduction Evaluation* at 18 (Ex. 13).

That the District fully appreciated the Region's approach is manifest in its consultant's comment on the draft permit that the Region should have assigned the 5.0 mg/l limit at the point where the District's load reached the Bay (i.e., the mouth of the Seekonk) rather than at the point of discharge from the District's facility to the Blackstone River. *See RTC* at 53-54, Comment #F18E (Ex. 2). By assigning the 5.0 mg/l limit at the mouth of the Seekonk, the District argued it should be allowed to meet a limit as high as 5.74 mg/l at its discharge to the Blackstone (again, because the process of attenuation would reduce the loading as it traveled down the Blackstone River to the Bay). *Id.* The Region rejected this approach, responding that, in light of the significant size of the District's nitrogen loading and the location of the discharge in the most severely impacted portion of the upper Bay, a limit of 5.0 mg/l at the point of discharge was necessary to meet Rhode Island's standards. *See RTC* at 54, Response #F18E.

The record is clear that the Region applied the 5.0 mg/l limit at the point of discharge and explained its approach was necessary to meet Rhode Island's standards. Review should be denied.

C. CLF's Argument that the Region Failed to Appropriately Account for Design Flow in Development of the Nitrogen Limit is Raised for the First Time on Reply.

In contravention of the Board's February 11, 2009 order, CLF raises a brand new argument in its reply brief: that the Region has failed to make a demonstration that the facility can meet state standards at design flow. *See CLF's Reply* at 10-11. CLF never raised this issue in its comments. Nor was this argument raised by any other commenter; as such, CLF could not have even asserted its new theory for the first time in its petition. *See Gov't of D.C. Mun. Separate Storm Sewer Sys., 10 E.A.D. 323, 339 (EAB 2002)* (holding that a petitioner must have raised during the public comment period the specific argument it seeks to raise on appeal). CLF is clearly proscribed from raising new arguments in reply. *See Order Granting CLF's Motion for Leave to File Reply* at 2 ("The Board will not entertain any new arguments for review."). *See also In re Keene Wastewater Treatment Plant*, NPDES Appeal No. 07-18 at 20 (Order, March 19, 2008) ("to the extent that ... arguments [in a reply brief] raise substantive nuances that are not set forth in the petition ... they constitute, in essence, 'late-filed appeals' because they could have been raised in the petition but were not so raised.") In this matter, the Region evaluated comments from over 30 parties and has responded to eight petitions for review.

In the thousands of pages of record materials, no one to date has raised a concern about this issue. CLF's new argument, raised for the first time in reply, should be rejected.

D. The Region Appropriately Did Not Include a Compliance Schedule in The Permit to Meet the Nitrogen Limit.

Rhode Island has not authorized compliance schedules in permits to meet water quality standards. Absent the requisite enabling language, the Region is bound to respect the State's preference in this matter. *See In the Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172 (Adm'r 1990).

Citing language in the State's baseline permitting regulations at Rule 20.01 of the *Rhode Island RIPDES Regulations*, (Ex. 37), the District concludes that Rhode Island does allow compliance schedules for water quality-based limits in its permits. *See District's Reply* at 8. This is an erroneous interpretation of *Star-Kist* and Rhode Island's regulations.

Star-Kist requires a reasonably clear and unambiguous expression of state intent to allow schedules of compliance to meet water quality-based effluent limitations in a permit. The District points to language in Rule 20.01 of the *RIPDES Regulations* in support of its claim that compliance schedule enabling language related to water quality-based effluent limitations exists in Rhode Island's regulations. However, the mere existence of Rule 20.01 in Rhode Island's permitting regulations – without more – does not provide sufficiently clear evidence of Rhode Island's intent to authorize compliance schedules for water quality-based effluent limitations. Rule 20.10 merely tracks EPA's general compliance schedule regulations at 40 C.F.R. § 122.47, consistent with 40 C.F.R.

§123.25(18). Rule 20.01 of the *RIPDES Regulations* does not expressly or clearly articulate Rhode Island's intent to allow compliance schedules for water quality-based effluent limitations. Indeed, the Rule makes no reference at all to compliance schedules to meet water quality-based effluent limitations. Moreover there is no language allowing compliance schedules for water quality-based effluent limitations in the State's separate *Water Quality Regulations*. See *Rhode Island Water Quality Regulations, Rule 8, (Ex. 5)*. By itself, Rule 20.10 does not lay the "necessary groundwork" for EPA to conclude that Rhode Island has authorized inclusion of compliance schedules for water quality-based effluent limitations in NPDES permits. See *Star-Kist, supra*, 3 E.A.D. at 177. By contrast, Massachusetts has chosen to allow compliance schedules to meet water quality-based effluent limitations within permits. To make its preference clear, Massachusetts included this authorization directly in its water quality standards regulations. See *Massachusetts Surface Water Quality Standards*, 314 C.M.R. § 4.03(1)(b), (Ex. 4).

To the extent there is any ambiguity regarding this issue in Rhode Island's regulatory framework, RIDEM has stated, as *amicus curiae*, that it does not interpret its regulations to allow compliance schedules in permits to meet water quality-based effluent limitations. Furthermore, the state's longstanding practice has been to include schedules for compliance with water quality-based effluent limitations in separate administrative orders.

The Region has appropriately interpreted federal law and Rhode Island's regulations. As is detailed in the record, the Region continues to be willing to include an

appropriate schedule in an administrative order as we have done for many permittees faced with new, more stringent effluent limitations.

II. The Phosphorus Limit: Petitioners Raise No Issues Warranting Review.

A. CLF Failed to Preserve Arguments that the Phosphorus Limit is Inadequate.

CLF failed to preserve the argument that the phosphorus limit should be based on the *Gold Book* recommended value of 0.05 mg/l (applicable to streams discharging to a lake or reservoir) rather than the recommended value of 0.1 mg/l (applicable to streams not discharging directly to lakes or impoundments). As the Region pointed out in its opposition, CLF nowhere raised this argument in its comments on the draft permit. *Region's Opposition* at 104. In reply, CLF contends the Region should have intuited its concern based on the following statement in CLF's comments on the draft permit: "[O]ur principle concern is with the draft Permit's limit on total nitrogen and on total phosphorus." *CLF's Reply* at 11. Yet, CLF's comments **nowhere mention the *Gold Book***, let alone suggest that the Region should have selected one recommended *Gold Book* value over another. *See CLF's Comments*.³ To the contrary, CLF's comments suggested CLF in fact supported the phosphorus limit: "[T]he total phosphorus limit should be no higher than 0.1 mg/l." *Id.* at 2. CLF's new argument was clearly available during the public comment period on the draft permit: the Region fully explained its approach to establishment of the phosphorus limit in the Fact Sheet, including its consideration of the *Gold Book* recommended value of 0.1 mg/l, together with peer-

³ CLF filed a copy of its comments with the Board on September 30, 2008. *See* Docket at Filing #11.

reviewed literature and national guidance materials. CLF failed to preserve this issue by not raising it in comments on the draft permit. Review should be denied.

B. The Phosphorus Limit in the Expired Permit (0.75 mg/l) Will Not Meet State Water Quality Standards.

The District re-asserts its claim that the limit of 0.75 mg/l in the expired permit may, in fact, be enough to meet water quality standards. In the District's view, the Region must first await completion of current upgrades to meet the limit in the expired permit and then evaluate the response of the River to these upgrades before imposing a more stringent limit. To support this theory, the District argues that site-specific data collected before completion of current upgrades (such as the 2003 study by the U.S. Army Corps) should be tossed aside. *See District's Reply* at 4. The District's "wait and see" approach is not appropriate where, as here, it is clear that the old limit is inadequate to meet standards.

In development of the phosphorus limit, the Region appropriately considered available site-specific data, including the 2003 studies that the District seeks to discard. The Region does not dispute that the District has not consistently met the 0.75 mg/l in its expired permit. Yet, even during periods where the District has managed to reduce its loadings as it makes treatment upgrades, the River demonstrates severe and substantial impairment, including almost 100% cover of the river bottom with macrophytic growth immediately downstream from the District's discharge, substantial filamentous algae farther downstream, low DO, unpleasant odors and an unhealthy benthic community. *See Region's Opposition* at 8-9, 86-87. The Region concluded that reductions of loadings to

0.1 mg/l were necessary to address these impairments and to restore the aquatic community and recreational uses of the River. *See Fact Sheet* at 10. *See also RTC* at 113-14 (describing the benefits anticipated from the phosphorus reduction to 0.1 mg/l).

The District's argument also completely ignores that the loadings allowed under its expired permit result in an in-stream concentration that is well in excess of the recommended range of in-stream values in EPA guidance and peer-reviewed literature published since the issuance of the old permit. The District does not dispute that the total phosphorus limit of 0.75 mg/l (750 ug/l) in the expired permit would result an in-stream concentration of 0.682 mg/l (682 ug/l) at critical low flow conditions. *See Fact Sheet* at 9-10 (Ex. 1). This amount far exceeds the in-stream phosphorus values ranging from 0.01 mg/l (10 ug/l) to 0.1 mg/l (100 ug/l) that are recommended in EPA guidance documents and peer-reviewed literature as sufficiently stringent to control cultural eutrophication and adverse nutrient-related impacts. *Id.*

With regard to the District's new theory that the blanket of macrophytic growth downstream of its discharge observed in 2003 is attributable solely to historical discharges from its facility that have accumulated in sediments, *see District's Reply* at 5, such a fact, if true, would not counsel in favor of a less stringent limit. *See Marlborough, supra, 12 E.A.D.* at 251 (where the permit writer concludes that loadings from sediments may prevent attainment of standards, either the POTW limit needs to be more stringent or the sediment source must be addressed to ensure standards are met.) Having had the

opportunity to file an initial petition, a supplemental petition and now a reply, the District is well past the point of offering new theories for the Board's review. *See Keene, supra.*

C. The 2001 Order of Compliance and Settlement Agreement Resolving The District's Appeal of the 1999 Permit Nowhere Restrict the Region From Imposing New Permit Limits at this Time.

The District suggests that the compliance schedule negotiated as part of the settlement of the District's appeal of the expired permit prohibits the Region from issuance of more stringent nutrient limits at this time. *See District's Reply* at 16. The District backstops this claim by arguing that the timing of the new permit will frustrate effective planning for capital investments and further treatment upgrades. *Id.*

Nothing in the Settlement Agreement or Compliance Order prohibits this permit issuance. Indeed, this would be contrary to the requirement in the CWA that permits are subject to regular, periodic review every five years. The best the District can muster in support of its theory is its claim that the Region failed to sufficiently involve stakeholders in development of the new permit as was contemplated in the Settlement Agreement. *See District's Reply* at 16. Not only is this claim utterly unsupported by the record, this new argument should be rejected outright as an improper supplementation of the District's petition. *See Keene, supra.*

The Region recognizes the financial and technical challenges that can arise when permit limits are tightened as a result of a permit modification or reissuance. For this reason, the Region tries to facilitate cost-effective planning by cautioning permittees when it believes limits may become more stringent in the future. During the proceedings

surrounding issuance of the expired permit, for instance, the Region urged the District to evaluate the potential for more stringent nutrient limits as part of the design for treatment upgrades. *See Fact Sheet for the 1998 Draft Permit* at 6 (AR 76); *See 1999 Response to Comments* at 4-5 (Ex. 23; AR 74). As soon as the Region knew the specific nutrient limits it believed necessary to meet water quality standards, it issued a draft permit including a nitrogen limit of 5.0 mg/l and a phosphorus limit of 0.1 mg/l. *See Draft Permit* dated March 23, 2007. While the ongoing upgrades to the District's biological treatment system may achieve even better performance than that required by the expired permit, there is no dispute that biological treatment alone cannot meet the new limits.

That the District will need to make further adjustments to treatment is not relevant to whether the limits themselves have been appropriately set. As is detailed in the Region's Opposition, costs and other technical considerations play no role in the *establishment* of water quality-based effluent limitations. Therefore, they cannot be a basis to delay setting the limits. But, as the Region has acknowledged, concerns related to cost can be taken into account in the establishment of a compliance schedule (in this case, in an administrative order). For instance, the Region has noted that it may be appropriate to allow some period of time to operate following the current upgrades before making a final decision on all aspects of additional treatment facilities to enable the District and its consultants to determine the most cost-effective technologies for achieving the new limits. *See Region's Opposition* at 118.

The settlement and compliance order related to the expired permit do not preclude issuance of more stringent nutrient limits here. Review should be denied.

III. The Region Appropriately Included the Satellite Collection Systems as Co-Permittees.

In its challenge to the “co-permittee” provisions of the permit, the District inappropriately supplements its appeal with two new arguments. First, after arguing in its petition that the Region should have issued separate NPDES permits to the District and the sewage collection systems that send their waste to the District (“the satellite systems”), the District now claims in its reply that the Region does not have authority to regulate the satellite systems through a permit at all. Second, the District inappropriately adds additional documents to the record – compliance reports from EPA’s ECHO database for another POTW, the Greater Lawrence Sanitary Sewer District.

In its petition for review, the District asserted three arguments in support of its claim that the satellite systems should not be included as “co-permittees” in this permit: 1) that the co-permittee provisions of the permit made the District somehow responsible for operation and maintenance activities in the satellite systems; 2) that the Region should have required the co-permittees to submit a permit application before including them in the permit; and 3) that the District might be unfairly held accountable for violations attributable solely to the co-permittees.

In its reply, the District now asserts a new theory: that the Region cannot regulate the satellites through this NPDES permit as the wastewater from these collection systems passes through the District’s treatment plant before reaching the Blackstone River. *See*

District's Reply at 9-10. The District hinges its theory on the definition of "discharge of pollutants" in Section 502(12) of the CWA, which defines the term as the "addition of any pollutant to navigable waters from any point source...." Not only did the District fail to raise this argument in its petition, it conceded that the CWA does in fact authorize the Region to regulate the satellite collection systems. In its petition, the District argued that the Region should issue **separate** permits to the District and the satellites. *See District's Petition* at 62 (arguing that, because of the separate legal ownership of the collection and treatment systems in this matter, "EPA must issue separate permits to the District and the 'co-permittees.'"). The District nowhere reconciles its conflicting interpretations of the CWA.

Making matters worse, there is no question the District's new argument was available to it prior to filing its petition. In fact, the District's attorneys submitted comments on the draft permit questioning the Region's authority under the CWA to regulate the satellite systems. *RTC* at 83 (Comment #F45). In its response, the Region walked through the applicable statutory and regulatory provisions that authorize the Region to regulate the entirety of a publicly-owned treatment works, which in this instance includes the treatment plant (owned and operated by the District) and the collection systems (owned and operated by the satellites). *RTC* at 84-86 (Response #F45). The District's argument is both in error and too late.

The District's assertion that the co-permittees must submit separate permit applications is not relevant to the context here: the Region is exercising its authority to

ensure proper operation and maintenance through an NPDES permit of the *entire* POTW, not only a portion of it. The Region explained that this comprehensive approach is necessitated by the need to address excessive inflow and infiltration. *RTC* at 87. About 15 million gallons per day (out of a daily average of 37 million gallons per day) of flow that reaches the District's plant is inflow and infiltration, the vast majority of which is from the separate sewer areas of the satellite systems. *Id.* at 34. Treating and handling all this excess flow unnecessarily consumes a substantial amount of chemicals and energy, and excess flow can cause overflows in separate sewer systems. *See Region's Opposition* at 145. Furthermore, the District has repeatedly asserted that its enabling legislation does not authorize it to require its members to undertake appropriate operation and maintenance or to otherwise reduce inflow/infiltration in their collection systems. Accordingly, rather than require the District to undertake these activities (or to seek to amend its enabling legislation to obtain the requisite authority to do so), the Region determined to make the collection systems directly responsible for these activities in the permit.

To the extent the District contends the Region's approach of including both the treatment facility and collection systems in a single permit will render the District responsible for the permit obligations of its member communities, *see District's Reply* at 10 & 14, it is concerned about a liability that does not exist. The permit nowhere makes the District responsible for the co-permittees' collection systems. *See Region's Opposition* at 147-48. Rather, the permit specifically identifies the respective

responsibilities of the District (as the owner and operator of the treatment facility) and the satellite systems (as the owners and operators of the sewage collection systems). The Region's approach honors, rather than undermines, the District's assertions regarding the limited legal authority it has over its members.

The District also inappropriately seeks to supplement the record and its petition by submitting selected pages from EPA's ECHO system for the Greater Lawrence Sewer District. The District contends that these materials support its concerns that the violations of co-permittees will be imputed to the District. *See District's Reply* at 13. The District adds that the "[r]eassurances from the Region that the database can be adjusted ... rings hollow in light of the continued failure of the database to accurately report the daily monitoring reports submitted by permittees." *Id.* at n.3. Considering no party has ever mentioned the ECHO system until now, the District's reference to "reassurances" from the Region on this subject is far from clear. In addition, the District's arguments regarding the database were available at the time it filed its petition and, therefore, are untimely and should be rejected by the Board. *See Keene, supra*. Furthermore, the merits or flaws of a compliance database are irrelevant to whether it is legally permissible to include the satellite collection systems as co-permittees. In light of the District's argument, however, the Region will review whether any changes need to be made to data entry to the ECHO system.

Conclusion.

The District and CLF have raised no issues in reply warranting review. The Board should deny both petitions.

Respectfully submitted by EPA-Region 1,



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