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

ORIGINAL

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IN RE: :

UPPER BLACKSTONE WATER :

POLLUTION ABATEMENT DISTRICT, :

NPDES PERMIT NO. MA0102369 :

NPDES APPEAL NOS. :

08-11 TO 08-18 :

&09-06 :

----- :

Washington, D.C.

Thursday, October 29, 2009

The above-entitled matter came on for ORAL ARGUMENT, pursuant to notice, at 1201 Constitution Avenue, Northwest, Washington, D.C., before Constance H. Rhodes, of Capital Reporting Company, a Notary Public in and for the Commonwealth of Virginia, commencing at 10:00 a.m., before the HONORABLE JUDGES CHARLES SHEEHAN, ANNA A. WOLGAST, and KATHIE A. STEIN.

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1 P R O C E E D I N G S

2 MS. DURR: The Environmental Appeals
3 Board of the United States Environmental
4 Protection Agency is now in session for oral
5 argument in re: The Upper Blackstone Water
6 Pollution Abatement District, NPDES Permit Number
7 MA0102369, NPDES Appeal Numbers 08-11 to 08-18 and
8 09-06.

9 Please turn off all cell phones and
10 recording devices.

11 Please be seated.

12 JUDGE WOLGAST: Good morning. We're
13 here pursuant to the Board order of September 23,
14 2009, from which we will follow the time frames
15 for each of the litigants' arguments this morning,
16 in which Conservation Law Foundation will proceed
17 first and have 15 minutes for argument. Then the
18 District will proceed with 30 minutes of argument.
19 Massachusetts Department of Environment, then 5
20 minutes, and 10 minutes total for the
21 Municipalities, followed by 50 minutes for the
22 Region. Also pursuant to the order, the District

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1 and Conservation Law Foundation may reserve up to
2 5 minutes for rebuttal. And as you proceed and
3 introduce yourself for the record, please let us
4 know if you're reserving time and, if so, how
5 much.

6 Shall we begin with the Conservation Law
7 Foundation.

8 MR. KILIAN: Thank you. Good morning.
9 I am Chris Kilian. I'm the senior law program
10 attorney for Conservation Law Foundation, and I'm
11 joined by my co-counsel David Mears from the
12 Vermont Law School Environmental Law Clinic, and I
13 would like to reserve five minutes for rebuttal.

14 The Board should grant CLF's petition
15 for review in this matter because both the facts
16 and the law require implementation of
17 limit-of-technology controls on nitrogen along
18 with additional appropriate offsets to account for
19 a main nitrogen-loads facility.

20 The facts indicate that the Seekonk
21 River, which is the ultimate receiving water for
22 discharge from the District with regard to

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1 nitrogen, is the most severely impaired segment of
2 Narragansett Bay, and that's been cited both in
3 EPA's materials as well as ours as well as Rhode
4 Island's amicus brief and underlying record.

5 Eelgrass beds have disappeared
6 completely from the Seekonk River and the upper
7 two thirds of the Narragansett Bay as one
8 indicator that water quality standards are not
9 met. Needless to say, from our perspective, there
10 is no remaining facility capacity for nitrogen in
11 the Seekonk River or Narragansett Bay. The Upper
12 Blackstone facility accounts for 60 percent of the
13 nitrogen limit to upper Narragansett Bay. It is
14 the dominant and primary source of nitrogen to
15 upper Naragansett Bay. The record clearly
16 indicates that dramatic reductions in excess of
17 the limit of technology for treatment at
18 wastewater treatment plants and this facility will
19 be required to obtain water quality standards
20 compliance.

21 While the Region, in our opinion,
22 appropriately relied upon MERL tank experiments,

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1 the record is clear that there is no uncertainty
2 with regard to the fact that the permit limits
3 necessary to obtain water quality standards
4 require implementation of the limit of technology,
5 and Region I should not be allowed to inject a
6 perception of uncertainty where there is a known
7 outcome. Water quality standards will not be met
8 with a limit of five on nitrogen. Into this
9 record --

10 JUDGE WOLGAST: As I understood your
11 brief, your position is that the water quality
12 standards in Rhode Island also will not be met if
13 RIDEM criteria were adopted; is that correct?

14 MR. KILIAN: Well, that's not our
15 position, well -- it is our position, but it's
16 what the record in this matter states.

17 JUDGE WOLGAST: And when you say that,
18 are you relying on the Rhode Island study?

19 MR. KILIAN: What I relied on -- I guess
20 the Rhode Island study, as I understand it, is the
21 2004 evaluation of nitrogen targets. And yes, I
22 am relying on that study. And there are several

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1 statements in that study which underscore our
2 position.

3 JUDGE SHEEHAN: You refer to the code of
4 uncertainty by the Region in attainment of the
5 standard, can you point specifically to where you
6 find those uncertain notes in the record?

7 MR. KILIAN: Yes. On the page 23 of the
8 Rhode Island study, there is a statement -- this
9 is a quote:

10 The present regulations coupled with the
11 analysis presented above indicate that, among
12 other reductions, wastewater treatment facility
13 nitrogen contributions must be reduced to the
14 limit of technology in the Providence and Seekonk
15 Rivers.

16 The second statement on page 24 --

17 JUDGE SHEEHAN: Well, must be reduced
18 isn't a number, it's just an aspiration, isn't it?

19 MR. KILIAN: The second statement I
20 would refer you to on page 24 says:

21 With WWTFs in the watershed reducing
22 their loads to a level consistent with the limit

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1 of technology, where effluent TN is 3 milligrams
2 per liter, enrichment levels in the area would
3 range from 1.1X to 4.7X. The scenario is arguably
4 quite similar to the no-WWTF case. For the next
5 higher (TN equals five) case, levels in the Upper
6 Providence River and Seekonk Rivers increased
7 significantly to 8.0X above Field Points and to
8 9.3X in the Seekonk River. These levels would not
9 be acceptable as water quality levels in the area
10 based on behavior observed in the MERL experiment.

11 Lastly, at page 27, the Rhode Island
12 study states:

13 Based upon MERL enrichment gradient
14 experiment, minimum DO levels of approximately 3.0
15 and 2.7 mg/l are anticipated from the no treatment
16 plant and limit of technology cases respectively.
17 Lower values are expected for the Providence
18 River, since it is stratified, and the MERL
19 experiment was conducted under unstratified
20 conditions. This analysis indicates that the
21 limits of technology is required but will not
22 fully meet existing water quality standards,

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1 minimum of 5.0 mg/l except as naturally occurs,
2 and may not meet EPA guidelines recently
3 recommended for waters from Cape Cod to Cape
4 Hatteras.

5 JUDGE STEIN: How do you explain -- as I
6 understand it, the State of Rhode Island has
7 indicated that the number that EPA has arrived at
8 is sufficient to ensure Rhode Island water
9 quality standards. How are we to evaluate the
10 position of the State of Rhode Island as the
11 downstream state as saying the number that the
12 Region has set is sufficient goes against the
13 assertions of that Rhode Island study?

14 MR. KILIAN: Well, I guess I would state
15 that Rhode Island DEM and the representatives of
16 Rhode Island DEM have filed a brief on behalf of
17 Rhode Island -- Rhode Island by the way as well in
18 their own prior studies -- and their studies, the
19 underlying record in this matter, reflected in
20 both the evaluation study that I've been reading
21 from as well as the materials in the record with
22 regard to the basis for issuance of the Rhode

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1 Island permits that have been the subject of much
2 briefing, that record, that factual record,
3 clearly indicates that the limit of technology at
4 wastewater treatment plants implemented
5 immediately 3 mg/l, as determined to be the limit
6 of technology by Rhode Island, will not result in
7 attainment of that state's water quality
8 standards. That is the record that is before you
9 and the Region was faced with. The Region should
10 not be allowed by this Board to insert an
11 amendment by argument or alleged discretion in the
12 face of some uncertainty, which I do not see in
13 this record, in the place of these definitive
14 statements. That is the record that is before
15 you.

16 JUDGE SHEEHAN: Well, you place a lot of
17 weight on the MERL study, but even the Region
18 indicates, or at least this indicates, it's not a
19 perfect representation of conditions in the river;
20 is that right?

21 MR. KILIAN: Well, there are two issues
22 that have been referenced. One is stratification

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1 and the other is flushing rate. And we would
2 concede that no model is perfect. In fact, the
3 MERL model is not perfect. But there are
4 additional factors cited in the key underlying
5 study, the evaluation study, as a basis for
6 talking about why these definitive conclusions in
7 the MERL tank experiments are further underscored
8 as appropriate determinations. And that's on page
9 25 of the evaluation.

10 There are three factors cited
11 specifically as underscoring the
12 limit-of-technology statements in the record. One
13 is historical data regarding eelgrass beds and
14 other ecosystem conditions. There's a bullet
15 point on that. The second are recently -- as of
16 the time of this record's closure -- issued
17 Massachusetts guidelines for their estuaries
18 program. And the last is a recently-developed
19 land-use loading model developed by Massachusetts
20 as well. There is a key statement, again, from
21 the study which I want to read based on this
22 corroborating information:

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1 The following points underscore this
2 decision" -- and there's the list -- "In the
3 context of the existing information on water
4 quality conditions needed to support State water
5 quality standards and the designated uses of the
6 area, a loading scenario consistent with the 2X to
7 4X condition represents the goal for the area.
8 The WWTF scenario that produces loads consistent
9 with this goal would require WWTFs in the
10 watershed to implement reductions to the limit of
11 technology. DEM's interpretation of this limit is
12 the TN=3 scenario, with plant flows at 90 percent
13 of design values." That's on page 27.

14 So the underlying -- the additional
15 corroborating information in this record was not
16 used by Rhode Island DEM or cited by Rhode Island
17 DEM as the basis for saying the MERL tank
18 experiments are not appropriate or correct. TN
19 equals 3 --

20 JUDGE WOLGAST: I don't understand their
21 argument being it's not appropriate. I understood
22 it to be it was their best analog to a more

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1 comprehensive waste load analysis or TMDL data.
2 And given that the limit is sort of the inherent
3 limitations of that, are you saying that the
4 Region had no discretion to interpret the data in
5 this context and apply its own scientific
6 expertise?

7 MR. KILIAN: I'm saying that the
8 uncertainty question, as discussed in the
9 recently-issued Attleboro decision, should go to
10 the question of whether or not the MERL
11 experiments can be relied upon. And that has been
12 decided by this Board in Attleboro. The
13 corroborating information as cited in the record
14 supports the more restrictive limit.

15 JUDGE SHEEHAN: What about the other
16 documents on which the Region relied in the 2000
17 study and the Gold Book of '86? Actually, there
18 were two 2000 studies: "Ecoregional Nutrient
19 Criteria" and "Rivers and Streams Nutrient
20 Guidance." What about them?

21 MR. KILIAN: On the phosphorus question?

22 JUDGE SHEEHAN: For nitrogen.

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1 MR. KILIAN: For nitrogen? Well, I
2 think from our perspective, we're in a non-TMDL
3 scenario. We have no TMDL. The water quality
4 based effluent limitation regulations in those
5 provisions of the Act apply, and this record is
6 robust with regard to what is required to
7 ultimately deal with wastewater treatment facility
8 loads, and that will be limit of technology --
9 from our perspective, consistent with the Board's
10 decision in the Marlborough-Easterly case -- plus
11 additional commitments to eliminate this
12 facility's contribution of nitrogen to the Seekonk
13 River. We don't have TMDL. We have robust
14 information for developing water quality based
15 upon the effluent limitation and statements in the
16 record that are not equivocal. They're not
17 uncertain. They say required, will be required.
18 So I guess I would say that I would turn to that
19 record and that factual information as a basis for
20 saying -- the other information is more of a
21 backdrop in this matter.

22 JUDGE SHEEHAN: What about the point

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1 that the Region makes about the safety net of
2 having a monitoring network to catch any
3 additional problems and correcting them later?

4 MR. KILIAN: Well, I don't believe that
5 the water quality based effluent limitation
6 regulations or the prior precedents of the Board
7 or the Act itself allows for an incremental
8 approach where you have a record that is clear.
9 And that is what -- and that is the case that's
10 before you with regard to this facility. The
11 statements I've read from the record and provided
12 the citations to are oft-repeated. The only
13 time -- I see I'm out of time. I apologize.

14 JUDGE WOLGAST: Go ahead and finish.

15 MR. KILIAN: Where we see equivocation
16 in the record with regard to what the appropriate
17 implementation approach is or plan is would be
18 indicated also in the evaluation study, where
19 there is discussion about cost efficiency. And
20 there is a specific discussion in the evaluation
21 study that talks about the fact that the five at
22 the bigger plants and eight at other plants would

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1 be the most cost-efficient approach or step to
2 take, you know, phased approach, at least as of
3 today. But that is not an available avenue given
4 the statement of facts here and the controlling
5 law.

6 JUDGE WOLGAST: Well, you are out of
7 time, but I wanted to quickly get your reaction to
8 the Region's argument about the phosphorus
9 standard and the use of the Gold Book analysis for
10 free-flowing streams. They alleged that that was
11 noticed and that you didn't comment on that
12 choice.

13 MR. KILIAN: Well, I would say at the
14 outset that we support the Region's conclusion of
15 implementing the phosphorus standard in this
16 matter. We raised in our petition that concern
17 because it jumped out at us in the Region's
18 response to our comments as a glaring concern.
19 And if additional phosphorus limits are required
20 here in order to conform with that guidance, then
21 we wanted to make sure to raise that for the
22 Board. Our primary effort here today is on the

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1 nitrogen standard. Thank you.

2 And by way of a question, if I went over
3 time, do I still have time for rebuttal?

4 JUDGE WOLGAST: Yes.

5 MR. KILIAN: Okay. Thank you.

6 JUDGE WOLGAST: Next we'll hear from the
7 District.

8 MR. ANDES: Good morning, Your Honor.
9 My name is Fred Andes. I'm counsel for the Upper
10 Blackstone Water Pollution Abatement District, and
11 I would like to reserve five minutes for rebuttal.

12 I was going to give you some background
13 in terms of the facility we're talking about,
14 including the fact that we've now completed the
15 upgrade, \$200 million upgrade, that was initially
16 planned in 2001. It is now operating. We think
17 that is going to yield significant reductions even
18 beyond the permit limits in the original permit
19 limit. But let me go right to the issue raised by
20 Conservation Law Foundation because it does touch
21 on the nitrogen issues we have as well.

22 The claim we've heard is that the

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1 District should be reducing to the limit of
2 technology. As you're aware, there's simply no
3 requirement for the limit of technology anywhere
4 within the Water Act. The requirement that does
5 apply, and we're asking for it to be implemented
6 here, is that the District received limits needed
7 to retain water quality standards, and our view of
8 the record indicates two things. One is that we
9 don't know at this point really what is needed.
10 We don't even know if the standards can be
11 attained. There really is no clear statement by
12 the EPA that reductions from the District along
13 with reductions from other sources will actually
14 get to attainment of the nitrogen standards here.

15 JUDGE STEIN: Well, if that's the case,
16 then how can they issue the permit?

17 MR. ANDES: We believe that instead of
18 issuing the permit, they should have gathered
19 additional information, including information from
20 the District's performance under the original
21 permit, to show -- because we believe that
22 reductions made from that upgrade were substantial

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1 and have not actively been taken into account yet.
2 We believe that there simply wasn't enough
3 information yet for the Agency to move ahead with
4 any reasonable certainty to determine the limit on
5 the --

6 JUDGE SHEEHAN: So in the face of severe
7 known impairment, et cetera, the Region should
8 just sit on its hands and not do anything?

9 MR. ANDES: No, not at all. We believe
10 there is scientific research going on right now,
11 that a model is being developed; and in fact, the
12 information will be available by the end of the
13 year -- phosphorus and nitrogen. We believe the
14 fact there is significant impairment -- there is
15 no question about that -- doesn't mean that the
16 Agency can move ahead in an arbitrary and
17 capricious manner. We believe they still need to
18 develop a sound technical basis for the permit
19 limits, and that, we believe, they have not done.

20 JUDGE SHEEHAN: And why do you think the
21 Region didn't develop a sound technical basis?

22 MR. ANDES: Well, on nitrogen, we think

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1 the primary problem, not the only one, is that
2 they relied on the MERL study at the same time
3 that they, in essence, dismissed its conclusions.
4 They want to put it up there as support for their
5 findings and yet they say they're -- it's clearly
6 in the record that both EPA and DEP Rhode Island
7 in the study indicate that we know this study --
8 for example, they say that these differences from
9 a natural setting may overestimate the impact of
10 given loads. They say that problems when
11 encountering modeling interactions in the water
12 body -- we are unable to simulate the chemical and
13 biological behavior of the system. They say that
14 the physical model does not generate a definitive
15 level of nitrogen control that can be applied to a
16 real world discharge.

17 JUDGE SHEEHAN: But is the definitive
18 level standard the standard? Doesn't the Region
19 have the discretion to do as well as it can to
20 come up with a good standard?

21 MR. ANDES: Well, we think there is a
22 dividing line. We can't simply say in every case,

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1 well, they've done as well as they can; and
2 therefore, it has to work. There has to be a
3 point where you say, you know what, you have
4 information, and it's not enough, particularly
5 when the Agency itself, in responding to CLF's
6 argument says, well, we don't really have that
7 much confidence in the study and the model. Okay.
8 If you don't have that much confidence, you
9 shouldn't have used it, you should have gone out
10 and collected additional information so you really
11 have a reasonable level of confidence in your
12 conclusions. We don't think they really have
13 that.

14 JUDGE WOLGAST: Mr. Andes, how is this
15 different from our recent decision in Attleboro?
16 I mean there, also, we were dealing with compared
17 water bodies where there hadn't been a
18 comprehensive wastewater allocation done. There
19 hadn't been a DMPL performed, and yet we found
20 that the Region could fill the gap even given
21 these uncertainties.

22 MR. ANDES: Right. In terms of

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1 Attleboro, we should first sort of put aside
2 phosphorus and aluminum issues because, while
3 there were some phosphorus and aluminum issues in
4 that case, they were very different than the
5 issues raised here. As for nitrogen, we've
6 reviewed this issue carefully, you can imagine.
7 And we believe there is one argument that is
8 really on all points with one of our arguments,
9 which is the flushing-rate issue, which we still
10 believe is a valid issue. But the flushing issue
11 problem in the Seekonk River, we believed was
12 raised in Attleboro and was disposed of. So we
13 are not pursuing that further. But the main
14 argument in Attleboro in terms of the model is
15 different in significant ways than the argument we
16 raised. Our reading of the Attleboro argument
17 made by the City was you should not have relied on
18 the physical model, you should have relied on the
19 Kester model instead. We specifically said in our
20 briefs we don't know enough about the Kester Model
21 to say whether in fact it's a good model to use
22 here. Our argument instead was -- and raised in

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1 our comments -- that here where EPA has said in
2 the record, A, this information is not sufficient
3 to do a TMDL for the Bay -- I just read you
4 statements about the behavior --

5 JUDGE SHEEHAN: Are you saying it's not
6 sufficient or it's not perfect?

7 MR. ANDES: We're saying --

8 JUDGE SHEEHAN: Nothing is perfect.

9 MR. ANDES: Understood. Nothing is
10 perfect. We're saying that by the Agency's own
11 admission and the statements from the study, it's
12 not the issue in Attleboro -- which is, well, you
13 should used this one instead of this one. We're
14 saying that the MERL study, based on these
15 statements, including the statements made in
16 response to CLF where the EPA has said, well, we
17 don't really believe in the study all that much,
18 we think that altogether says -- and particularly
19 when you say, well, we can't do a TMDL, but we can
20 do a permit limit. There's nothing in the Water
21 Act that says, well, all right, so the level of
22 scientific technology you need for those two is

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1 different. You need less of a substantial basis
2 to do a permit limit than a TMDL. We said -- so
3 when you look at all that, our argument is we
4 don't think that the MERL model, based on these
5 statements in this record, that EPA has really a
6 substantial basis for regulation by its own
7 statements.

8 JUDGE SHEEHAN: Do you have a different
9 opinion technically about the decision reached by
10 EPA about what the limit should be? Reasonable
11 minds may differ? Is that your argument?

12 MR. ANDES: No. Because, in fact, we
13 have not said that we think, well, it should be X
14 instead of Y, because we don't think that the
15 information is in the record to document, first,
16 how they can attain standards in this watershed,
17 and what is the necessary limit for Upper
18 Blackstone to be able to get us there. We don't
19 think that information is there in the record yet.
20 We think that needs to be developed. There are
21 models being developed. There is information out
22 there that we think if the Agency, as we've been

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1 saying all along -- would engage in a dialog on
2 that, that we would come to a set of limits --
3 and I'm not saying it has to be but it clearly
4 has to be a sufficient analysis to support the set
5 limit. And we think that can be done.

6 JUDGE WOLGAST: Okay. I want to be
7 clear about your argument. Are you saying,
8 notwithstanding our opinion in Attleboro, that the
9 application of the MERL model in this case is a
10 basis for error?

11 MR. ANDES: Yes. We also believe, in
12 terms of other issues, there are other parts of
13 their nitrogen analysis here that are problematic.
14 One in particular was with respect to delivery
15 rates, which is not an issue. This was definitely
16 a factor in Attleboro, where there were several
17 studies. The initial study said that the delivery
18 rate should be 87 percent. We commented and said,
19 well, that doesn't consider other sources. EPA
20 responded, well, there's another report that does
21 consider other sources and that says 73 percent.
22 But we're going to make it 87 percent anyway. And

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1 that makes an enormous difference. That makes the
2 difference between a 5 milliliter limit and a 7
3 milliliter limit, which we think we could probably
4 meet right now. So we think that issue also,
5 which was not touched by Attleboro, is sufficient
6 to overturn the limits and remand down for
7 re-examination.

8 I'm not aware of how much time I have
9 left.

10 JUDGE WOLGAST: You have about fourteen
11 minutes. Well, you're reserving your time, so
12 about ten minutes.

13 MR. ANDES: Thank you. In terms of
14 phosphorus, our argument on that has been
15 basically that the Agency's selection of the .1
16 number was again without any basis here. What EPA
17 actually said of phosphorus, well, there are a lot
18 of numbers out there nationally, and we'll pick
19 one; and Upper Blackstone, you should be okay
20 because it's not the most restrictive one.
21 There's no examination at all there of what's --
22 not even to the level of nitrogen -- there's no

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1 examination of what's the right number of this
2 segment, what's the right number for the Bay,
3 what's the right number for this watershed. It is
4 simply taking a bunch of numbers that are out
5 there around the country and picking one, and
6 saying, well, we think that makes sense. We think
7 that is particularly problematic given that there
8 is additional information being developed on
9 phosphorus. It will be available by the end of
10 the year. We think, again, if the EPA waited and
11 used that information, it could have developed
12 numbers. We're saying in all of these issues, not
13 that there shouldn't be limits -- we understand
14 that this plant would get nitrogen and phosphorus
15 limits -- what we are questioning is the specific
16 limits that the Agency developed.

17 JUDGE SHEEHAN: Why didn't the Region
18 directly apply the Gold Book effect standard in
19 setting the phosphorus limit?

20 MR. ANDES: We think that by simply
21 citing to -- oh, well -- if you're referring to
22 the argument by CLF in terms of whether they

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1 applied a .5 or 1.0, our issue really is not that.
2 Our issue was that we think that rather than
3 relying on .1, we thought what they should have
4 done is actually looked at this situation, looked
5 at phosphorus and determined what levels of
6 phosphorus really needed to be in this watershed.

7 JUDGE SHEEHAN: What about looking in
8 the Gold Book to make that call and some of the
9 other criteria the EPA's entitled look at?

10 MR. ANDES: Well, we think they're
11 entitled to look at them, but we don't think that
12 it's simply look at information on the national
13 level, including the Gold Book, and just impose a
14 number without any examination of what's going on
15 with this watershed. On nitrogen they clearly did
16 that. We quarrel with how they did it, but there
17 is no question they actually looked at information
18 in that water body. With phosphorus, they really
19 didn't do that, they just picked a number.

20 JUDGE SHEEHAN: Isn't the District the
21 dominant phosphorus discharger here into the
22 Blackstone at that point?

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1 MR. ANDES: Yes. But we think that the
2 issue at hand is what's the right water quality
3 target. And there's no question that we're saying
4 the District would need to make significant
5 reductions. In fact, we think that the reductions
6 that have been made already through the upgraded
7 facility that is now online are in fact
8 significantly more than was required in that
9 permit, and. We think that that's part of what
10 needs to be addressed are the reductions -- what
11 role do the reductions we've already made play in
12 this process. And it's really not there.

13 JUDGE STEIN: Didn't you have an
14 opportunity to put all that information into the
15 record, however? I mean we're dealing with a
16 permit that was issued many years ago, and -- I
17 mean I've been through your briefs, and what I
18 hear is, well, let's wait. And it strikes me that
19 the original permit has been around for quite a
20 while, and I'm having difficulty seeing the
21 justification for waiting when you had the
22 opportunity to put into this record all of your

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1 claims about where you are in terms of progress,
2 in terms of your efforts. What's missing?

3 MR. ANDES: Your Honor, what was missing
4 was the fact that the upgrade that we were given
5 eight years to complete was completed on time in
6 August of this year. Until we completed the
7 upgrade, EPA data -- and EPA provided data
8 saying, well, your phosphorus numbers for 2003
9 weren't so good. Well, we were in the midst of
10 doing the upgrade. The upgrade now is complete.
11 The facilities have been turned on. Now is the
12 time when actually we are starting to get data
13 showing the real improvements, including getting
14 down, in fact, significantly below those original
15 limits. So until we had the upgrade complete, we
16 really couldn't provide additional information in
17 terms of how we were going to perform.

18 JUDGE WOLGAST: Mr. Andes, as to time, I
19 misspoke earlier. You have 11 minutes remaining,
20 and you should find it in the right-hand corner of
21 your monitor right there.

22 MR. ANDES: Thank you.

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1 In terms of aluminum, our other issue,
2 there are really two points that we've been making
3 here. One of them is that, in essence, the Agency
4 has been -- careful evaluation of the aluminum
5 data shows that this facility should not receive a
6 permit limit for aluminum. The Agency has gone
7 back and forth in terms of which data it's
8 evaluated. It's admitted errors in evaluating the
9 data. First, it said it evaluated the data a
10 certain way -- it didn't exclude certain data, and
11 it turned out it did. There is one major data
12 point, an outlier of 344 micrograms per liter, and
13 we feel they should exclude it. It makes all the
14 difference when you exclude that data point. We
15 do not have reasonable potential, and we think,
16 therefore, if the Agency looked at the data
17 carefully and evaluated it in the way that their
18 guidances talk about doing, including excluded
19 outliers, they should have concluded there was no
20 limit required.

21 JUDGE WOLGAST: Would you address the
22 point that the Region made in its surreply that

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1 said that you failed to preserve the issue of
2 challenging the 344 mg/l data point?

3 MR. ANDES: Sure. Our initial -- the
4 issues in terms of the looking at the 344 never
5 came out until the responsive comments from the
6 Agency. In our initial review and in our comment,
7 what we said was, look, if you look at the data
8 carefully -- and we showed them exactly how we
9 proposed looking at the data -- it was clear that
10 a limit was not needed. They had considered some
11 data and not considered other data. We questioned
12 whether they were considering the right data and
13 what their basis was for excluding certain data.
14 We had concern that they were including data which
15 should not have been included and vice versa. So
16 the Agency, in response to comment says, well, we
17 went back and we reevaluated the data and we
18 considered some new information and did another
19 analysis, and now we come out showing you have
20 more potential. Well, we looked at that new
21 argument, that new analysis they did, and said,
22 well, wait a minute, we always conceded that that

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1 344 was out there. We never thought that you were
2 going to include it in terms of doing that
3 analysis. Now, when we look at your new analysis
4 in the response to comments and we start picking
5 it apart, we see a number of problems, including
6 the use of the 344.

7 JUDGE WOLGAST: Was it correct, as the
8 Region alleged in their surreply, that you had
9 asked -- the District had asked that data between
10 2004 to 2008 be included in the analysis, and
11 would then this data point fall in that range?

12 MR. ANDES: Oh, absolutely. July 9th,
13 2007. But when we said initially in our comments,
14 well, if you look at the whole database -- when
15 our engineers took a look at the whole database,
16 that doesn't mean that they take every data point,
17 and they don't do any fundamental screening like
18 looking at outliers and excluding them. Our
19 initial argument was premised on if you look at
20 this data, it is clear that we were below the
21 levels in the Upper Blackstone. And in fact, it's
22 the levels we believe are naturally occurring. So

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1 our levels vary with the ambient levels. That was
2 our initial argument. When they came back and
3 said, well, we looked at the data in a different
4 way. They still didn't evaluate all the data.
5 And they still excluded some things, and they
6 included the 344. We said, well, oh, okay, well,
7 you're redoing that reasonable potential analysis,
8 and you're excluding some data, which we
9 contested, and you're including the 344. Now we
10 have a problem. So in our initial suggestion that
11 they had sort of picked and chose from the
12 database and they shouldn't do that, we didn't
13 say, oh, and by the way, make sure to include all
14 your outliers. We felt the Agency should pursue
15 their own values in response to them by not
16 including certain data points as you go through.
17 It just didn't come off until we saw that they
18 were including that data point and said, well,
19 wait a minute. Now, if you're going to do an
20 evaluation, you're including data we think you
21 shouldn't.

22 JUDGE SHEEHAN: What about the argument

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1 that Massachusetts is silent as to what the
2 limited standard might be, site-specific or
3 otherwise? Rhode Island has set the standard at
4 87, and the standard set by the Region here is 87.

5 MR. ANDES: Well --

6 JUDGE SHEEHAN: It would seem like
7 it's -- certainly it's not unreasonable for this
8 Region to adapt it as it did here in setting the
9 87 limit.

10 MR. ANDES: Our point beyond the
11 reasonable potential issue, in terms of the 87,
12 was that we thought it's pretty clear from the
13 charts we provided that the levels were naturally
14 occurring. In the response, the EPA said, well,
15 it's not a direct correlation, which I think is
16 not an answer at all. The charts show that
17 basically our levels and the naturally occurring
18 ambient levels rose and fell pretty much in sync.
19 So we think they simply did not engage on that
20 issue, which was, if they were naturally
21 occurring, then the level should be set at that
22 level. The Agency didn't contest that. It simply

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1 contested what we said actually I think in a way
2 that didn't deal with our data at all.

3 JUDGE SHEEHAN: Doesn't Massachusetts
4 law say that if the State is silent on the issue,
5 then you go to the 2002 National Water Criteria,
6 which the Region arguably did here, plus the fact
7 that you have your break downstream Rhode Island
8 with an 87 standard. That certainly makes the
9 Region look reasonable here. How do you answer
10 that?

11 MR. ANDES: Well, what the Massachusetts
12 regulation talked about is that in meeting the
13 87 -- unless the DEP determines that it's
14 naturally occurring. We submitted in our comments
15 the information we felt showed it wasn't naturally
16 occurring.

17 JUDGE WOLGAST: From what source?

18 MR. ANDES: The data?

19 JUDGE WOLGAST: No, no. I'm sorry.
20 What did you allege was the source of the
21 naturally occurring presence of aluminum?

22 MR. ANDES: Our feeling was that we

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1 cited to documents, I believe, from CLF. We felt
2 that there is evidence of significant amounts of
3 aluminum leaching out of the soils in this area,
4 and that while we couldn't speculate in terms of
5 example how this all occurs, it is clear that
6 putting aside other sources, that the ambient
7 levels of aluminum were pretty high.

8 I'd like to reserve the balance of my
9 time unless there are further questions.

10 JUDGE WOLGAST: You will have five
11 minutes for rebuttal. You're saying that you want
12 to the reserve the four minutes?

13 MR. ANDES: So I have four minutes plus
14 the five minutes; is that what you're saying?

15 JUDGE WOLGAST: Yes. That's fine.

16 MR. ANDES: Thank you.

17 MR. FALLON: Good morning. My name is
18 MacDara Fallon, and I'm here with our co-counsel
19 Karen Crocker. I represent the Massachusetts
20 Department of Environmental Protection. Thank you
21 for giving us the opportunity to present to you
22 our argument on why we feel the Board should

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1 exercise its discretion and grant review of its
2 draft permit from Region I.

3 I'd like to point out that this is the
4 first time the MassDEP has appealed to Region 1
5 NPDES permit where we dispute the manner in which
6 the Region has proposed to amend an effluent
7 limit. The permit in this matter, as drafted,
8 proposes a nitrogen limit in a manner that is
9 clear error of law and contrary to the claimed
10 nitrogen regulations. In addition, in the
11 imposition of a nitrogen limit as drafted would
12 violate long-standing EPA policies as expressed in
13 both EPA guidance and in the order of compliance
14 and settlement agreement which was previously
15 entered into for this facility.

16 Massachusetts is non-delegated state for
17 NPDES permitting purposes. We recognize we are
18 not the permitting agency, the Region is.
19 However, we issue of our own independent permits
20 that must comply at least with the minimum
21 standards set forth in the Region I permit. We
22 believe the approach taken by Region I in not

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1 applying the mandatory regulatory requirements, of
2 Section 122.45(f)(1), is wrong as a matter of law,
3 and the result of the imposition of improper
4 federal standard on the Massachusetts permit.

5 Contrary to what is implied in the
6 Region's brief, Massachusetts is committed to
7 having a permit that will meet Rhode Island water
8 quality standards. However, we're committed to
9 having that standard met considering both federal
10 regulations and federal policy.

11 We assert that the Region's clear error
12 of law, as set forth in our brief, is that section
13 122.45(f)(1) is a mandatory requirement; that is,
14 that all pollutants shall have limitations,
15 standards, or prohibitions expressed in terms of
16 mass. There are three exceptions to those named.
17 The Region relies upon the permit's segment
18 section. However, the Region fails to articulate
19 how the applicable Rhode Island narrative
20 standards and limitations are expressed in any
21 other unit of measurement other than mass. I
22 believe it is undisputed that Rhode Island's

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1 narrative criteria does not have an express
2 standard and limitation in other units of measure.
3 Region I committed a clear error of law when it
4 improperly extrapolated a different unit of
5 measurement for nitrogen other than the
6 measurement of mass.

7 JUDGE SHEEHAN: Do you concede that the
8 Region has discretion to apply the limit in terms
9 of concentration in its discretion?

10 MR. FALLON: Yes. But that, I don't
11 believe, is what happened here.

12 JUDGE SHEEHAN: And why was it an abuse
13 of discretion for the Region to conceivably use
14 concentration instead of mass?

15 MR. FALLON: It didn't apply the
16 proper -- well, at this point on the regulatory
17 requirement, it did not apply the proper
18 regulatory standard. We believe it's abuse of
19 discretion that the Region applied a concentration
20 unit of measure as opposed to EPA policy, in terms
21 of encouraging water conservation, and also we
22 believe it goes against the expression of policy

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1 in the settlement agreement and the order for
2 compliance that was issued for this facility.

3 JUDGE SHEEHAN: But if the Permit
4 Writers Manual allows the Region to use
5 concentration that it might attain greater
6 treatment efficiencies, why is that wrong here?

7 MR. FALLON: Because we don't believe
8 they actually followed the regulatory process they
9 should have followed under section 122.4 -- I'm
10 sorry 122.44(d)(1).

11 JUDGE SHEEHAN: Can you be specific
12 about that -- that will help -- your rationale for
13 that?

14 MR. FALLON: Well, I believe it is quite
15 simple. We think that the regulation requires
16 that mass be used unless there is some other unit
17 of measure in other water quality standards. Here
18 the Rhode Island narrative criteria does not have
19 any unit of measure; therefore, we use mass.

20 THE COURT: So the Region's hands are
21 tied? They cannot use concentration?

22 MR. FALLON: We believe they could use

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1 concentration in mass under the regulations. And
2 that is allowed, but we don't believe that was the
3 method that they followed here in reaching their
4 conclusion.

5 JUDGE WOLGAST: Well, what would be the
6 practical effect here in using mass versus
7 concentration?

8 MR. FALLON: Well, mass allows more
9 flexibility for the facility to operate where they
10 are actually discharging. It doesn't penalize the
11 facility for discharging underneath its allocated
12 effluent discharge, and we believe it's strictly
13 required by the regulations and that it wasn't
14 actually followed, and it should have been
15 followed when it went through this permitting
16 process. We believe EPA had a tough decision in
17 coming to this conclusion, but they skipped the
18 mandatory regulatory requirement to consider mass
19 over concentration and just jumped over that and
20 said we are going to impose a concentration unit
21 because we believe that's the best thing to do.
22 Does that answer your question?

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1 The other things you want to refer to --
2 and we actually refer to it in our brief -- are
3 Permit Writers' Manual, also, the policy
4 consideration that was set forth by the settlement
5 agreement and the compliance order. There is no
6 limitation of on nitrogen put in place at that
7 point. Both the MERL study and Rhode Island
8 Department of Environmental Management report were
9 in effect at the time those documents were issued.
10 Those documents were issued in the public
11 interest, and had have no limitations on nitrogen
12 at that time.

13 I see I am out of time. Just in
14 conclusion, we suggest there is a clear error of
15 law based on the wrong standard of concentration
16 over mass. We believe there is a violation of EPA
17 policy. We ask that you exercise your discretion
18 and grant review of this permit and remand it to
19 the Region for modification.

20 JUDGE SHEEHAN: One further question.
21 Did you timely challenge the use of the MERL study
22 in your comments? Did you raise that point then

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1 or did you not?

2 MR. FALLON: I believe we did. Your
3 Honor, I'm drawing a blank on the actual reason
4 that we did. I believe the District did. I'm
5 drawing a blank on the actual comments that were
6 made regarding the study.

7 JUDGE WOLGAST: Thank you. Now we'll
8 hear from the Cities.

9 MR. COX: Good morning. My name is
10 Robert Cox, and I'm counsel for the District, but
11 I'm presenting to you this morning and speaking to
12 you on behalf of the four petitioning District
13 members, City of Worcester, the towns of Holden,
14 and Millbury, and Cherry Valley Sewer District
15 with respect to the co-permitting issue.

16 The four petitioning District members
17 are owners and operators of sewer lines which
18 deliver wastewater to the District facility for
19 treatment and then discharge to the Upper
20 Blackstone River. The four petitioning District
21 members as well as the District seek to have this
22 Board strike the co-permits at issue from the

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1 permit. They seek -- or we seek to have it
2 stricken for the simple reason that the Region,
3 the Agency, has no authority to make them
4 co-permittees.

5 The EPA claims that the Clean Water Act
6 in the definition of treatment works -- which
7 broadly includes the words sewer; it also includes
8 the words sewage collections systems -- gives it
9 the power to make the owners and operators of
10 sewers subject to a permitting authority. While
11 certainly the definition which the EPA and the
12 Region cite to does include a reference to sewers
13 within treatment works, that does not make an
14 owner and operator of a sewer a permittee. What
15 is missing from the EPA's analysis are the
16 operative terms, the terms which trigger
17 permitting, and these are the discharge of a
18 pollutant. That term is defined to mean, quote,
19 "any addition of any pollutant to navigable waters
20 from any point source."

21 The four petitioning District members do
22 not discharge from a point source. They send

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1 wastewater through sewer lines to the District for
2 treatment. The town where I live, the town of
3 Rutland, has its own sewer lines, which are
4 connected to a sewer line owned and operated by
5 the Massachusetts Department of Conservation and
6 Recreation, DCR. The DCR line goes through the
7 Town of Holden. That line connects to a line in
8 Worcester, and the Worcester line then connects to
9 the District. The District then discharges the
10 wastewater at a point source. It is this action,
11 the action of discharging at a point source, at
12 the Upper Blackstone River, that triggers the
13 permitting and not, as the EPA would have it, the
14 mere ownership of the sewer line -- ownership or
15 operation of the sewer line that provides the
16 conveyance for the treatment of discharge. This
17 is --

18 JUDGE WOLGAST: May I ask you, what
19 otherwise requires -- say, hypothetically, you're
20 not a co-permittee, what otherwise requires the
21 cities to address inflow and infiltration into the
22 POTW?

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1 MR. COX: The relationship with the
2 District, with the District, as the members. It
3 is urging them, as well as the municipalities, to
4 address I&I. The municipalities have been
5 addressing I&I through various funding mechanisms,
6 to study and investigate it and to prevent
7 additional I&I from occurring.

8 JUDGE SHEEHAN: That doesn't sound like
9 any kind of a regulatory call.

10 MR. COX: No. It is not. There is not
11 a regulatory call -- regulatory provision to do
12 it. The mechanism -- I would not want this to be
13 brought upon my towns -- but the mechanism may be
14 enforcement. If there is a discharge from a line
15 that enters or gets into navigable waters.

16 The point that I'm making here with
17 respect to the permittee must be the entity that's
18 discharging from a point source is borne out by
19 the regulations themselves. In subpart B,
20 entitled permit application requirements -- it's
21 section 122.21 -- it provides, quote, "Any person
22 who discharges must submit an application, must

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1 submit a complete application according to the
2 section." It's what the District did, but not
3 what the four petitioning District members did.
4 They never applied. They never signed on the
5 application form. They never authorized the
6 District when it submitted its application to be a
7 participant or co-permittee. The Region, the EPA,
8 claims, well, that doesn't matter. It can permit
9 regardless.

10 JUDGE SHEEHAN: Is it your argument that
11 a discharger has to apply in order to be
12 regulated?

13 MR. COX: That's the way the regulations
14 read.

15 JUDGE SHEEHAN: So if the discharger
16 doesn't apply, the discharger cannot be touched by
17 the regulatory body?

18 MR. COX: Discharger from a point
19 source.

20 JUDGE SHEEHAN: So it's up to the
21 discharger to basically trigger the regulatory
22 regime. If the discharger doesn't step up and

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1 sign an application, send it in, the regulating
2 authority cannot touch a discharger into a
3 water --

4 MR. COX: They cannot touch an entity
5 that provides the conveyed system.

6 THE COURT: That's a different question.

7 MR. COX: No. I'm stating it
8 differently, because discharge, the way it's
9 defined in the regulations, is discharge of a
10 pollutant to a navigable water. So the only
11 entity that is doing that here is the District
12 that is discharging from their pipe that goes into
13 the --

14 JUDGE STEIN: But don't they discharge
15 to the POTW, which in turn discharges, so that
16 what flows into the District's POTW has a source
17 in the these towns -- has an original source in
18 these towns?

19 MR. COX: They discharge in the sense
20 that wastewater most certainly is sent down the
21 pipes, but in connection with the definitions
22 under the Act in the regulations, that is modified