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1 and controlled by the discharger from a point
2 source to a navigable water.

3 JUDGE WOLGAST: But you say that the
4 Cities didn't apply -- and I think that's
5 undisputed -- but isn't it also clear that the
6 Cities have been on notice since the 2001 permit
7 that the Region felt that inflow and infiltration
8 issues were very significant and a very
9 significant issue to be addressed in terms of not
10 meeting water quality standards by the POTW
11 itself?

12 MR. COX: That's correct. And that's a
13 matter of record. I think the municipalities have
14 been very active in addressing that to the extent
15 that it can with the limited financial resources.
16 As I said earlier there have been grants and
17 monies to address I&I issues. Various studies
18 have been done. Worcester has 450 miles of sewer
19 which needs to be addressed and to be examined in
20 order to deal with the I&I issue.

21 JUDGE STEIN: But putting yourself in
22 the Region's shoes, they're issuing a permit to

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1 the District. We know that these towns contribute
2 discharge to the POTW. We know that there are
3 issues associated with this discharging. Your
4 position is there's no authority whatsoever on the
5 part of EPA to look to those tasks, and yet when
6 they look to the District; what's the District
7 going to say? I'm not responsible; that's the
8 towns' responsibility. How does that scheme make
9 sense?

10 MR. COX: Well, it makes sense because
11 it's what the law provides. In order to --

12 JUDGE STEIN: Does it make environmental
13 sense?

14 MR. COX: It makes environmental sense
15 in that we have all parties here looking at the
16 issue and trying to address the I&I. The
17 municipalities are certainly aware of it and are
18 trying to address it. DEP is working with the
19 municipalities to address it. EPA is encouraging
20 and helping the municipalities work with it as
21 well as the District. So in that sense it does
22 make sense to have all these parties looking at

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1 it.

2 But the issue here is the authority of
3 the Agency to bring these parties in as
4 co-permittees. There is none. And what the EPA
5 says is that the co-permittees need not apply,
6 that they need not consent, that EPA need not even
7 get the right entity that owns the properties.
8 That read, however, leaves out of the regulations
9 this whole section, subpart B, section 122.21,
10 which sets forth the permit application
11 requirements. And that just make no sense, and
12 it's consistent with the statute to require or
13 bring together the discharge of pollutants from a
14 point source to navigable waters to be the
15 triggering mechanism with respect to permitting.

16 For these reasons, we ask -- we ask that
17 this Board strike the co-permitting issue or
18 remand it back to the Region in order for it to do
19 the same.

20 JUDGE STEIN: Am I correct in
21 understanding that there are other permits in
22 Massachusetts that the Region has issued -- and

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1 perhaps I should address this to the Region --
2 that involved co-permittees on the permits?

3 MR. COX: Yes, there are. But that does
4 not make it consistent with the law or legal, that
5 other entities have decided to agree to a
6 co-permitting status. The towns they represent do
7 not agree. They do not consent. They do not
8 believe, as I've articulated here, that the law
9 allows the EPA to bring them in as co-permittees.

10 JUDGE SHEEHAN: So the practical effect
11 here with respect to the legal argument you make
12 is that if the towns are outside of the regulatory
13 authority of EPA, that it's just up to the towns'
14 compliance without any problem or waiting to see
15 if there is any enforcement issue, they just --
16 they become cat and mouse really. If there's a
17 mistake, maybe a regulator will come in and catch
18 it, but otherwise, the towns are on their own. Is
19 that what you're saying?

20 MR. COX: I'm saying that is one
21 mechanism available to the EPA. What I failed to
22 mention, and I mention now, is that there are

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1 regulations under the State, that 314 CMR -- 312
2 -- 314CMR12, which governs the municipalities with
3 respect to the operation of the sewer lines. So
4 we are regulated by the State but not through this
5 permitting scheme as co-permittees, as EPA sought
6 to impose as co-permittees.

7 Thank you very much.

8 MS. MCGUIRE: Good morning. Karen
9 McGuire for the Region. I'm joined by my
10 colleague, Amanda Helwig, as well as Peter Ford of
11 OGC. I am going to speak to nutrients and the
12 co-permittees, and Ms. Helwig will address the
13 aluminum modification. I'd like to reserve about
14 ten minutes for her, but we're flexible.

15 Let's start with nitrogen. The Region
16 used the same approach here as we did with the
17 permits to the watershed in Attleboro. We
18 obviously relied on standards for the Marlborough
19 model and other studies and the same factors
20 having set forth here on this record, including,
21 among other things, the severe environmental
22 impairments in the receiving waters. And here, as

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1 in Attleboro, we were up front that by using the
2 physical model, there were inherent and
3 unavoidable uncertainties in our approach. And,
4 again, with Attleboro, we acknowledged them,
5 identified them, and rationally accounted for
6 them.

7 I want to pause on the Region's
8 conclusion of our water quality experts related to
9 those uncertainties. There's been some retelling
10 of our view of MERL. It's suggested we didn't
11 think it was a good model. You will find that in
12 the record and also our conclusions related to the
13 uncertainty. The differences between the model
14 and the record, of course, is the touchtone
15 four-year review. What that makes clear as well,
16 the Region's experts concluded that MERL was an
17 analog, strong analog, of what was occurring. The
18 data and the data ending in 2004 is on the reports
19 edited by CLF, pages 11 and 12. There's data that
20 does show for a given comment -- given loading,
21 MERL does indeed over-predict the response in the
22 receiving water. And the record also shows that

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1 the Region identified differences between their
2 model and the natural setting such as flushing,
3 stratification, and over- and under-predicted.
4 And on the balance concluded that MERL did
5 over-predict. So we could not go where CLF is
6 urging you to direct us to go. We concluded we
7 could not just develop a limit based on 2X to 4X
8 output of MERL. And asking us to to do that is
9 asking us to ignore the uncertainties, ignore the
10 science, and not exercise our judgment and
11 expertise and to simply apply the model in
12 isolation.

13 JUDGE STEIN: How do you square the
14 Region's conclusion with the Board's statements in
15 DCMS4 and in the Marlboro case? The Region has
16 used language that is consistent with water
17 quality standards; whereas, my recollection of the
18 regulatory language as well as what the Board said
19 in those other two cases is that the Region needed
20 to be able to ensure compliance. So I wondered if
21 you could explain to me how and why we should
22 construe "consistent with" to be the functional

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1 equivalent of the regulatory language.

2 MS. MCGUIRE: I think, Your Honor,
3 although there are much more affirmative
4 statements in the records, that may be an inartful
5 choice of words. Again, the Region was very up
6 front in terms of the uncertainties that I just
7 described that we're facing.

8 Let's speak to Marlborough, the answer
9 is very different. In Marlborough, the record
10 there suggested that in addition to a numeric
11 limit, we thought that other conditions might be
12 necessary to meet standards, in particular
13 addressing the phosphorus that had accumulated in
14 sediments. You remanded as there were no --
15 there's no monitoring, no reopening -- nothing in
16 the permit addressing sediments. While there are
17 uncertainties in applying the physical model to
18 the natural setting, as we're facing here in this
19 permit, no one has identified another condition.
20 We haven't. No one else has. Or a prerequisite.
21 We haven't addressed that's necessary to meet
22 standards here.

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1 In terms of more affirmative language, I
2 direct you to responses by F6, 18A in the record,
3 walk through the applicable statutory regulatory
4 standards, make clear that the Region understands
5 what its obligation is here, have more affirmative
6 language regarding what we're expecting --
7 anticipating to see in terms of significant
8 reductions here, your Honor.

9 THE COURT: I guess to follow up on
10 that, you have a problem or at least an issue.
11 You've got the data which seems to say three won't
12 do it. Now, I know you're trying to account for
13 that, but you have that at one extreme. At the
14 other extreme you have the Marlborough "will
15 ensure compliance" standard. And then, like Judge
16 Stein said, you have been consistent with language
17 which seems fairly diffident. You have -- in the
18 fact statement you say five is necessary in order
19 to achieve, which maybe is a little bit better,
20 but it is a little bit nominalist even after
21 Marlborough in Region I, the words "will ensure
22 compliance" did not come out of the Region's mouth

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1 in this situation. So it does raise a flag.

2 MS. MCGUIRE: I gave to you -- in terms
3 of other references I gave you, I also believe in
4 our responses to F51, I think you will find more
5 of the affirmative language you're looking for.

6 JUDGE SHEEHAN: Do you use that
7 language? I don't have it in front of me.

8 MS. MCGUIRE: Just the citation in my
9 response to comments in terms of the Region
10 indicating we're imposing a limit of five here
11 that we believe will ensure standards. That type
12 of language.

13 To address one point you raised, we do
14 not believe that the December 2004 report -- the
15 record shows the Region's -- the statements, for
16 instance, cited on page 27 of the report by
17 counsel for CLF, they're consistent with what we
18 are saying and are showing that going to 2X to 4X
19 is MERL in isolation, going to that three limit,
20 wrote it right into this report. It continues to
21 say there are uncertainties and differences in the
22 model. Rhode Island in their amicus brief is

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1 endorsing the approach we've taken here. So our
2 water quality experts are not coming to that
3 conclusion reading this report, Your Honor.

4 JUDGE SHEEHAN: But even as late as your
5 brief in opposition, on page 62, I think, you talk
6 about the fact that their standard is rational or
7 it rationally accounts for what the studies show,
8 and that your conclusions are saying again, well,
9 in condition of reasonableness. Reasonable,
10 again, doesn't sound like ensure.

11 MS. MCGUIRE: We do not have a
12 calibrated mathematical model here, so our
13 analysis does not lend itself to generating a
14 precise number that we can drop into a permit. We
15 are being candid about the uncertainties we face,
16 but we are using our best technical judgment to
17 identify, account for the different ways the
18 uncertainty cuts in applying the outputs of MERL
19 to define the loading that we think is going to
20 support standards being met in the upper Seekonk,
21 and that's the limit we've calculated here, Your
22 Honor.

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1 JUDGE SHEEHAN: So apart from some of
2 the records received and some of the linguistic
3 characterizations of how you include it here, can
4 you point to us in the record itself, the
5 technical record, where the facts are to support
6 the limit of five even apart from how you
7 characterize it, the brass tacks, bottom-line
8 facts in that record?

9 MS. MCGUIRE: The citations I gave you
10 are the most detailed in terms of the development
11 of the nitrogen, Your Honor, in addition to the
12 fact sheet.

13 JUDGE WOLGAST: You're saying that's
14 Exhibit 15a and --

15 MS. MCGUIRE: They're not exhibits, Your
16 Honor. I believe they are in -- if you're looking
17 for our explanation rather than reports, I would
18 direct you on nitrogen F6, F18A and also F51.

19 JUDGE STEIN: Let me ask one more
20 question about this because I think this issue is
21 of great importance, and it's of great importance
22 to this Board because this will be the third

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1 occasion in the past several years in which an
2 issue -- it may be more -- but I sat on the DCMS4
3 panel and I sat on the Marlborough panel, so the
4 concern I have is not that there's uncertainty,
5 because I think as we made clear in Attleboro and
6 other cases, there is an issue of uncertainty in
7 all of these permit-type cases, but I want to be
8 sure that what we're dealing with here is perhaps
9 an inartful use of wording and not a watering down
10 of what the regulations really call for. And
11 frankly, where I land on that issue in this case
12 will really determine down the road what's in the
13 record, what's not in the record. Going back to
14 DCMS4 there was -- there was no analysis at all,
15 so it's a very different case than we have here.
16 But I'm trying -- if I understand you correctly,
17 what you're saying is it's not lack of analysis
18 here, it's perhaps an inartful choice of words, or
19 are you saying something different?

20 MS. MCGUIRE: The specific quote I made
21 might have been from a fact sheet that was given
22 to me. In isolation, well, perhaps that is

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1 inartful. Again, our water quality experts
2 looking at this are straightforward people. They
3 are acknowledging that this is -- there are
4 unavoidable uncertainties here -- doing their best
5 on their judgment to give the right limit here.
6 We could have crafted that differently. We could
7 have taken out any and all language talking about
8 uncertainties to alleviate this concern, but we
9 chose not to. What we're trying to do is just be
10 straightforward identifying when we're dealing
11 with them, but we're recognizing we don't have a
12 calibrated mathematical model here.

13 JUDGE STEIN: But in the Region's
14 judgment, the Region's technical judgment, the
15 number that you have come up with for this limit
16 you believe will show compliance with standards?

17 MS. MCGUIRE: This is our best technical
18 judgment of the limit that is necessary to result
19 in the response variables in the Bay that will be
20 adequate to support standards, Your Honor.

21 JUDGE WOLGAST: That's a yes?

22 MS. MCGUIRE: That's a yes. Very

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1 briefly, on the differences related to
2 attenuation, the details are outlined in our
3 brief. At the very best there is a difference of
4 opinion on some technical judgment, and this is
5 setting aside your recent decision in Attleboro
6 regarding the use of attenuation in the deveopment
7 of effluent limitation itself. Our brief and
8 response to comment outline various studies. We
9 looked at three of them, and why we selected the
10 value we did, taking into account a number of
11 scientific technical factors.

12 I want to turn briefly just to the issue
13 of the exception of concentration mass, the
14 expression of limits in the regulations in
15 122.45(f)(1) as not being accepted. We do believe
16 that the exception of laws here, which, again,
17 indicates that where the underlying standards or
18 limitations are expressed in the unit of the
19 measurement under mass, that the effluent
20 limitation also may be. And what was missing from
21 the MassDEP's presentation earlier is that the
22 clinical standards of Rhode Island's narrative

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1 speaks to the control of concentrations of
2 nutrients and that's the narrative 83-D10 that
3 we're interpreting here. And Massachusetts has
4 very similar narrative language and has not
5 objected to our crafting of phosphorus limits in
6 this permit or in Attleboro in terms of
7 concentration. Rhode Island has interpreted its
8 own narrative and is moving forward with nine
9 other permits to other facilities that discharge
10 to the Bay expressly in terms of concentration.
11 In the various national guidance documents --
12 there's also a Commonwealth study that's in the
13 record recommending some protective nitrogen
14 limits -- protective nitrogen thresholds. I think
15 it's Exhibit 20. MassDEP expresses those
16 recommended thresholds in terms of concentration.

17 If there are no other questions on
18 nitrogen, I'll turn to phosphorus.

19 JUDGE WOLGAST: Would you explain why
20 the Region used the .1 instead of the .5 standard
21 that would apply to impairment of water quality?

22 MS. MCGUIRE: As we did indicate in --

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1 just preliminarily, the argument comes very late
2 and we don't believe preserves -- our focus was on
3 the region downstream where we had documentation
4 of the significant impairments. No one in the
5 entire record -- and there were also 30 comments
6 where the Commonwealth brought this issue to our
7 attention during the permitting, Your Honor. We
8 also, as Your Honor alluded to, did explain why we
9 selected a fact-based approach in lieu of
10 referenced-based approaches. We did evaluate
11 site-specific studies here documenting the
12 impairments as well as calculated what the
13 in-stream concentration would be of a discharge
14 allowed under the expired permit limit of 750
15 micrograms per liter, and that was 682 micrograms
16 per liter, so well in excess of the protected
17 target that we had identified.

18 With regard to the District's
19 suggestions that there is some model of some
20 output around the corner that is not in the
21 record, to the extent counsel is referring to the
22 model that the District has undertaken, those all

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1 actually were -- nothing on that topic or issue
2 was provided during commentary on the record. The
3 District simply appended some models and
4 simulations to a petition as an exhibit, so they
5 were procedurally late.

6 Additionally, as we pointed out, there's
7 no evidence that runs have been calibrated. So by
8 acknowledging the efforts the District is
9 undertaking to do some modeling investigation in
10 the Blackstone, certainly not regulatorily
11 required, there is nothing being offered here to
12 us as available for our use in this determination
13 or anything around the corner.

14 On co-permittees, oh, excuse me, I have
15 to backtrack. The limit for phosphorus we had
16 entered in the brief -- we missed CLF's challenge
17 to this. In addition to the summer limits of .1,
18 there is a limit of one. And CLF very briefly in
19 its petition on page 21, does also challenge the
20 winter limits. We respond that the winter limits
21 are preserved and comment that CLF just very
22 broadly said that the Region should consider full

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1 year-round limits. We responded on page eight of
2 the response to comment that indeed, we did, for
3 phosphorus, have the limit of one. We also went
4 further and explained that the reason it was one
5 was based on an evaluation of phosphorus in the
6 effluent of four POTWs that discharged to the
7 Assebet River in Massachusetts, showing that the
8 vast majority of phosphorus would be dissolve
9 ortho phosphate monitoring requirement in the
10 permit. CLF has not confronted the Region
11 technical responses on this.

12 JUDGE WOLGAST: As to the co-permittee
13 issue, why isn't the Cities' argument compelling?

14 MS. MCGUIRE: Preliminarily, it's not
15 preserved. In the petition the District -- the
16 community and the District argued that we should
17 have issued several permits. Now, the theory has
18 evolved that we are not authorized to issue
19 permits. What we're trying to do here, Your
20 Honor, is regulate the whole -- the treatment
21 works here -- the whole POTW, not a portion of
22 it -- the District operating the treatment

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1 facilities -- owning and operating those -- and a
2 number of municipalities owning and operating the
3 collection systems. The definition of POTW under
4 the Clean Water Act, EPA's regulations, covers
5 both. It covers the treatment facilities. It
6 covers all the pipes, the electrical equipment,
7 the conveyance to the pumping stations, to get all
8 that waste to the treatment facility and --

9 JUDGE SHEEHAN: How far upstream does
10 your reasoning on that point go? Does it go
11 beyond the cities to individual homes that had
12 pipes going to the --

13 MS. MCGUIRE: No, Your Honor. If you
14 look at -- if this were one single entity, only
15 the POTW, we would regulate it in the same way,
16 and it's not a big, significant portion of the
17 POTW here. In one of the annual I&I reports, we
18 did receive from the District that's in the
19 record, it's document 88 in the record, the
20 District had a presentation indicating -- we're
21 talking about 600 miles of sewers, eight pumping
22 stations, 23,000 manholes, and if we did not have

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1 this political legal separation of entities, we'd
2 be regulating the whole. We'd have standard O&M
3 conditions that we include in every permit, that's
4 at 122.41(a), that required proper operation and
5 maintenance of the whole thing. So that's all
6 we're trying to do. We're trying to respect and
7 honor what's being represented to us, told to us,
8 that these are separate distinct entities.

9 JUDGE SHEEHAN: I understand what you're
10 trying to do, but if the District itself is the
11 axle and the seven or eight, whatever number,
12 cities we have here that you included as
13 co-permittees are the spokes leading into that
14 axle, my question is more a matter of just pure
15 law, how many other mini-spokes out beyond these
16 eight or so cities can you reach legally, putting
17 aside whether you should or what you're trying to
18 do. I'm looking at the question as a matter of
19 law not practicality.

20 MS. MCGUIRE: Thank you, Your Honor. We
21 can regulate that which is legally part of the
22 POTW that falls within the definition of POTW.

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1 And no one is contesting that it makes sense to do
2 this work in light of O&M. The need for O&M is to
3 reduce the occurrence of the tank or sewer
4 overflows, access I&I. No one is challenging that
5 this makes sense.

6 JUDGE WOLGAST: So if a hospital
7 connects with a District's piping, would they be
8 susceptible to being a co-permittee?

9 MS. MCGUIRE: Not a private entity, Your
10 Honor, no. I mean not a user of the POTW.

11 JUDGE SHEEHAN: But why not? If the
12 hospital has, from 2128 of the Act, if the
13 hospital has a sewage collection system and is
14 sending it out, or whether from 4433 re, that if
15 hospital has conveyances to send the sewage out,
16 why aren't they as much a part of the regulatory
17 system, ideally anyhow, as the cities?

18 MS. MCGUIRE: Because we are defining a
19 publicly operated treatment works, so it is not
20 the lateral from my house to a municipality main.

21 JUDGE SHEEHAN: So it's the public.

22 MS. MCGUIRE: Correct.

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1 JUDGE STEIN: How do you respond to the
2 arguments that were made that these entities are
3 not discharging pollutant; and therefore, with
4 respect to before they even come within the scope
5 of a treatment works, they're not discharging
6 pollutant and therefore you have no legal
7 authority to regulate them?

8 MS. MCGUIRE: The discharger in that
9 case is the one that we have always permitted at
10 the out fall at end of the District's plant. We
11 considered these entities part of the whole POTW.
12 So it's part of the whole treatment works. It is
13 not --

14 THE COURT: So is it relevant whether
15 they discharge effluent and they're part of the
16 treatment works?

17 MS. MCGUIRE: The discharger is the one
18 at the end point, Your Honor.

19 JUDGE STEIN: So are you saying if
20 they're discharging they contributed to it, or are
21 you saying that's not a discharge?

22 MS. MCGUIRE: We're saying the only

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1 discharge -- the discharge that is permitted is
2 the District's discharge at the outfall by -- just
3 by virtue of, again, political boundaries. These
4 municipalities are separated. Those collection
5 systems are separated, so we're just covering the
6 entire POTW.

7 JUDGE WOLGAST: And what requirements
8 could you impose on the Cities by calling them
9 co-permittees that you can't by issuing a permit
10 to Upper Blackstone District?

11 MS. MCGUIRE: We are not anticipating
12 requiring anything other than what types of
13 requirements here, that the co-permittees are
14 required to properly operate and maintain their
15 respective portions of the collection system to
16 develop plans to control I&I. So the requirements
17 that we've come up with relate directly to what
18 they own and operate as part of the POTW, Your
19 Honor.

20 JUDGE WOLGAST: But I mean isn't it the
21 distinction that you could enforce, again,
22 directly against the City because they are the

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1 co-permittee?

2 MS. MCGUIRE: If they fail to develop a
3 plan or submit it and it was required by the
4 permit, that would be --

5 JUDGE WOLGAST: Which you couldn't
6 otherwise do.

7 MS. MCGUIRE: Right now there is no
8 requirement that the co-permittees do this and
9 require permits. What we have required is that
10 the Districts are in the capacity of a facilitator
11 and just try to obtain voluntary cooperation on
12 these issues.

13 JUDGE WOLGAST: What authority other
14 than the definition of POTW are you pointing to?
15 And specifically, I am interested in guidance,
16 past possible relevant preamble language, the
17 Permit Issuers' Manual. I have to say I've read a
18 lot of these things and I haven't read anything
19 that speaks to this scenario. I mean you have
20 some very clear statements in the Permit Writers'
21 Manual that say you don't have to have a permit if
22 you, yourself, are not discharging into the water

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1 of the United States, but in all of the guidances
2 I see nothing that interprets the definition of
3 POTW in this manner, and if you could point me to
4 it.

5 MS. MCGUIRE: I do not have a citation
6 for Your Honor, other than what I've relayed to
7 you.

8 JUDGE SHEEHAN: I like to go back to
9 Judge Stein's prior inquiry. I'm not sure I
10 picked up everything, but is your point that
11 discharge from one of these municipalities, as the
12 co-permittee here, is a discharge because their
13 sewage is sent downstream as opposed to discharge
14 in the normal sense, which is into a water of the
15 U.S. In fact, if Millbury's discharge never
16 leaves the pipe, continues down through the Upper
17 Blackstone District Treatment Plant, comes out of
18 Upper Blackstone's outfall, is that a discharge by
19 Millbury or a discharge by Upper Blackstone?

20 MS. MCGUIRE: Again, our approach
21 here -- we think of this as one big POTW and
22 there's one discharge here.

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1 JUDGE WOLGAST: How does that -- explain
2 how that fits with the fact that these are
3 separately owned and operated entities, albeit
4 entities that then contribute discharge to the
5 main, the Upper Blackstone POTW.

6 MS. MCGUIRE: So meaning -- I'm sorry,
7 Your Honor.

8 JUDGE WOLGAST: Well, by Massachusetts
9 law, it's not such an amoeba. I mean isn't that
10 right? I mean --

11 MS. MCGUIRE: No.

12 JUDGE WOLGAST: -- that's what we see in
13 the briefs, that under Massachusetts law these are
14 very separate entities.

15 MS. MCGUIRE: Correct. But it's
16 unattenable to us, because of the political and
17 legal separation, to not be able to regulate a
18 large part of the POTW. And there's no dispute
19 that what we're trying to do here -- no one is
20 disputing that it makes sense in terms of
21 controlling the high levels of I&I that are coming
22 through the facility are reducing FSOs.

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1 JUDGE WOLGAST: And does the District
2 have any ability to require that the Cities
3 address I&I or address it in a certain manner?

4 MS. MCGUIRE: The District has told us
5 no. We don't feel like there are a lot of great
6 alternatives here. We could, for instance, ask
7 the District to go back to the Massachusetts
8 legislature and get authority to be able to take
9 care of these issues or regulate it, but what is
10 being relayed to us is that we are separate, we
11 cannot control operation and maintenance, so we
12 are trying to honor that which is effectively
13 regulation of the whole.

14 JUDGE SHEEHAN: You're using words like
15 effective, unattenable, and sense, all of which
16 are fine words, but they are more policy-ridden
17 legal words, and we're struggling to get the legal
18 authority you have as the District guardian to
19 address -- and discharge is your word -- as
20 regulated discharges. It's difficult to see that.
21 And on the point just a moment ago about whether
22 or not the District has the authority to regulate

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1 I&I by the municipalities that feed into it, the
2 permit itself says that each is individually
3 responsible, right? So whether the authority
4 exists, you are saying each town needs to take
5 care of its own I&I affairs, right?

6 MS. MCGUIRE: Correct. And to
7 summarize, we believe the authority to do this
8 comes from the statutory and regulatory
9 definitions of POTW, similar requirements that we
10 impose with the collection systems, the general
11 O&M requirements in our regulation that we apply
12 to the whole POTW.

13 JUDGE SHEEHAN: And the hospital, the
14 hypothetical raised by Judge Wolgast, if that
15 hospital were public, could you include it in this
16 permit legally -- not that you should or would --
17 but could you --

18 MS. MCGUIRE: I'm having trouble
19 following --

20 JUDGE SHEEHAN: Well, you said --

21 MS. MCGUIRE: -- your question because I
22 mean I can't imagine if there were ever a hospital

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1 that a POTW would --

2 JUDGE SHEEHAN: Well, you said --

3 JUDGE WOLGAST: Well, as Judge Sheehan
4 is saying, I mean you told us that there may be
5 other industrial users, but they're private.
6 There may be a hospital, there may be a paper
7 mill, there may be something else. But this is
8 why you can reach these cities is because they're
9 public. And Judge Sheehan's question is if there
10 is another public entity other than a city, can
11 you reach out and make them a co-permittee?

12 MS. MCGUIRE: No. If it's part of --
13 we're regulating here the same way we would if
14 this were just the City of Worcester and it owned
15 the treatment works. So we're taking the
16 authority just as far as we would in that case --
17 what fits within the publicly-owned treatment
18 works in that case. So we're not trying to go to
19 users whether they be publicly owned. So my
20 apologies if I confused you there. We're handling
21 this the same way we do for the many permits we
22 have where one municipality owns the whole thing.

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1 JUDGE WOLGAST: Okay. So I don't -- I
2 didn't understand your point earlier. And if
3 there is an industrial facility that feeds into
4 the Upper Blackstone plant, then under that logic
5 they could be co-permittees as well?

6 MS. MCGUIRE: No. Your Honor, they
7 would be handled per our pretreatment
8 requirements. An industrial user that is --

9 JUDGE WOLGAST: But the point is the
10 Agency has issued federal regulations, right, that
11 preempts pretreatment of industrial users. That
12 doesn't make it theoretically different for this
13 purpose, for the purpose of an analysis of whether
14 they could or couldn't be a co-permittee. You're
15 just saying they got taken care of by another
16 federal mechanism that this Agency didn't choose
17 to apply to municipalities.

18 JUDGE SHEEHAN: And doesn't Clean Water
19 Act section 212.2(a) define treatment works as
20 including industrial wastes -- municipal sewage or
21 industrial wastes?

22 MS. MCGUIRE: What the treatment works

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1 is handling, yes, Your Honor, what the flow that
2 is being handled by the POTW.

3 JUDGE SHEEHAN: The definition includes
4 industrial wastes as well as municipal wastes,
5 right?

6 MS. MCGUIRE: Yes, Your Honor.

7 JUDGE STEIN: I don't know whether there
8 is anything in this record that shows whether any
9 other permits that EPA has issued include
10 co-permittees in Region I or otherwise.

11 MS. MCGUIRE: I believe we have, Your
12 Honor, taken this approach with the Greater
13 Worcester District in Massachusetts. I do not
14 know if any other permits have issued in draft,
15 but I could correct the record if that's of
16 interest to the Board.

17 JUDGE WOLGAST: And those are not
18 challenged?

19 MS. MCGUIRE: I do not believe so, Your
20 Honor. Also, I believe I've located -- no, excuse
21 me. I am happy to provide a list if that's of
22 interest to the Board. Thank you.

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1 MS. HELWEG: Good morning, Your Honors.

2 I'm Amanda Helwig for the Region. I'll be
3 discussing aluminum.

4 As a foundation, aluminum is toxic to
5 wildlife. The aluminum concentrations in the
6 Blackstone River at the point of the District's
7 discharge are already above the chronic criterion.
8 Additionally, the aluminum concentrations in the
9 District discharge exceed the criterion on
10 individual dates as well as on average. Based on
11 the District's reasonable potential to cause or
12 contribute to a violation of water quality
13 standards, the aluminum limit of 87 is warranted
14 in this case. I'm going to address three specific
15 issues on the aluminum limit: The appropriateness
16 of the Region's approach in setting the limit, the
17 inclusion of the 344 value, and the naturally
18 occurring argument.

19 As to the appropriateness of the
20 Region's approach, the District has not sustained
21 its heavy burden of showing that the region erred
22 in setting the aluminum limit. The District

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1 effluent data evaluated under multiple different
2 scenarios clearly demonstrate a reasonable
3 potential to cause or contribute to violations of
4 water quality standards. As shown in response to
5 comments, even using all of the data as the
6 District requested demonstrates reasonable
7 potential. Any suggestion by the District that we
8 were selective in the use of the data must fail.
9 We followed a methodology clearly and accurately
10 articulated in the statement of basis. We
11 determined reasonable potential based on the
12 District's average aluminum effluent
13 concentrations during typical low flow months.
14 But the fundamental point here is that this
15 dataset evaluated in many different ways
16 consistently supports a limit of 87 on the
17 District's discharge to ensure compliance with
18 water quality standards. The only way to reach
19 the District's desired outcome is to average in
20 the aluminum effluent data and exclude the 344
21 volume.

22 So turning to the 344 data point, the

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1 Board did not need to reach this issue on
2 procedural grounds alone. The District did not
3 request that the Region exclude this data point in
4 its comments. Rather, as the Board noted before,
5 the District asked the Region to use all of the
6 data collected between 2004 and 2008 and
7 specifically referenced the 344 data point in its
8 comments.

9 JUDGE SHEEHAN: What about the
10 District's argument that you inordinantly relied
11 on a high-flow data?

12 MS. HELWEG: We did not, Your Honor. As
13 accurately set forth in the statement basis, we
14 looked at the District's aluminum data collected
15 during typical low-flow months. That is the
16 standard Region's practice. And the District's
17 assertion, as well, that our use of the 344 data
18 point came up for the first time in responses to
19 comment is clearly inaccurate. On seven and page
20 ten of the statement of basis we describe our use
21 of the 344 value along with the other points
22 applied to typical low flow areas.

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1 JUDGE SHEEHAN: Does that statement of
2 basis explanation differ somewhat from the
3 response to comments explanation?

4 MS. HELWEG: It does, Your Honor. Based
5 on a miscommunication among the permittee, the
6 response to comments did mischaracterize our
7 process by stating that we had cross-checked the
8 actual flows of the data points collected during
9 typical low-flow months. That did not occur.
10 However, had we done that, that would also support
11 the limit of 87 in this case. And in our response
12 to comments, we fully responded to the District's
13 comments and evaluated the data fully as the
14 District had requested.

15 Turning back to the 344 data point on
16 the merits, the District did not create its burden
17 of showing why this data point is aberrational
18 such that it is not representative of the
19 District's discharge. The District has not
20 offered any explanation beyond a vague reference
21 to changing weather conditions for what caused
22 this aluminum concentration or why this

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1 concentration could not occur again. The Region
2 must account for situations that could occur again
3 in the future. Our regulations specifically
4 instruct us to consider effluent variability in
5 our reasonable potential analysis. Therefore, we
6 cannot just exclude data without reason. So
7 unless the 344 data point resulted from
8 circumstances unlikely to reoccur, the Region must
9 consider this data point in its reasonable
10 potential analysis.

11 So lastly, turning to the naturally
12 occurring argument, first and foremost as the
13 Board alluded to earlier, MassDEP has not made a
14 determination that naturally occurring background
15 concentrations of aluminum exceed the national
16 recommended criteria in the Blackstone River.
17 Similar to the Board's finding in Attleboro with
18 respect to the development of site-specific
19 aluminum criteria, the Massachusetts water quality
20 standards reserve naturally occurring
21 determinations to the State. In the absence of
22 such determination, we must apply the national

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1 recommended criteria to ensure compliance with
2 water quality standards.

3 Furthermore, the District's argument
4 rests on the theory that acid rain caused aluminum
5 to leach from soil and rocks into the Blackstone
6 River. However, the District has yet to explain
7 how acid rain is naturally occurring.

8 Additionally, even if acid rain was naturally
9 occurring, the District has not demonstrated that
10 natural background concentrations of aluminum
11 exceed the criterion. The District heavily relies
12 on the late submitted Kendall and tributary
13 sampling data collected seven miles upstream from
14 the District which is not even before the Board.
15 Nevertheless, even these data do not support the
16 District's argument. The average aluminum
17 concentration at the Kendall transfer station is
18 substantially lower than the criterion. And in
19 relation to the background concentration at the
20 point of the District's discharge, the District
21 has completely dismissed the fact that numerous
22 potential ambient anthropogenic sources of

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1 aluminum exists upstream from the District,
2 including the City of Worcester, the second
3 largest city in Massachusetts, with runoff from
4 city streets. And the drinking water treatment
5 facility produces aluminum and in its process
6 discharges backwash water from this process into
7 the Blackstone River.

8 So for these reasons the District has
9 not demonstrated that the background
10 concentrations of aluminum in the Blackstone River
11 are naturally occurring.

12 If there are no other questions by the
13 Board, I would assert that the Region did not show
14 clear error, and the Board should not deny the
15 review this issue. Thank you very much.

16 MR. KILIAN: Thank you. Again, Chris
17 Kilian for Conservation Law Foundation.
18 Narragansett Bay does not have time. We have a
19 severely impaired waterway that has no similar
20 capacity for discharges of nitrogen remaining. We
21 don't have to time to wait. We have fishkills,
22 eelgrass bed disappearance. It's time to take

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1 action, and it's time to take the right action.
2 Based on this record, there are clear statements
3 in the key study relied on by EPA, prepared by
4 Rhode Island DEP, that the limit of technology is
5 required. Those are not my words. Those words
6 are written on the page with the citations I
7 provided to the Board. Again, page 23, throughout
8 that document and down to the end.

9 JUDGE WOLGAST: Would you address the
10 Region's argument that they had the discretion to
11 take the 2004 study as well as other data and to
12 apply their own scientific expertise and also with
13 consultatation provided to come up with the five
14 limit?

15 MR. KILIAN: We do not agree with that
16 argument. We do not agree with that point of
17 view, and we believe that the record of underlying
18 scientific data and information here speaks for
19 itself. Where uncertainty is discussed in the key
20 study -- again, this is the evaluation study that
21 I referred to before -- it is addressed through
22 corroborating evidence that is used to support the

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1 conclusions of the MERL tank studies.

2 Specifically, again, pages 26 and 27, there is an
3 analysis that goes through corroborating evidence
4 in the face of uncertainty. Again, uncertainty
5 alleged or argued by the Region and referenced in
6 this Board's decision in Attleboro goes both ways.

7 If you look at stratification, there are
8 statements that say the MERL model
9 under-predicts -- under-predicts that more
10 stringent controls would be required. If you look
11 at flushing rates, it's possible -- and there was
12 no statement by counsel -- there is no notation in
13 the record that in fact there is an
14 over-prediction as a result of flushing. There is
15 simply an indication that it could over-predict as
16 a result of flushing, but there's uncertainty to
17 the extent there is uncertainty mitigating both
18 ways. Ultimately, the corroborating evidence
19 that's referenced in this key study is
20 corroborating evidence for the notion, again, on
21 pages -- on page 27 that limit of technology and
22 limits reaching the 2X to 4X scenario are required

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1 to implement water quality standards. Those are
2 the kinds of statements that I think are required
3 by this Board's prior precedent and by the
4 regulations.

5 On page 30 of the study, Rhode Island
6 DEM talks about adopting a phased implementation
7 for upward of 2 through .5 at some of the larger
8 facilities and 8 at some of the smaller facilities
9 such as Attleboro. And the statement made on page
10 30 is that that would enhance the near-term
11 environmental improvement while plants are below
12 their design flows. That falls well short of the
13 requisite language.

14 EPA counsel today did not answer the
15 question yes. There was no yes, this will be. It
16 was more semantics. That's our concern here. The
17 record is clear. I would also note that in the
18 Attleboro decision, the discussion of certainty,
19 and the Board -- this Board's recognition that
20 there might be uncertainty in that data could be
21 addressed by the Region through exercise of its
22 discretion, goes to the question of whether or not

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1 the MERL tank experiments can be relied upon at
2 all, not what is indicated as what is necessary in
3 order to attain water quality standards once that
4 study is relied upon. And I believe that's
5 supported by my reading of it -- by the language
6 of the Board's decision in Attleboro. And I can
7 provide the citations; I did not bring it up here
8 with me. I'm sorry. Again, EPA has not made that
9 requisite clear statement today, and I would
10 caution that we have a study in the record here.

11 I would also refer the Board to document 192 which
12 is Rhode Island's response to comments on the
13 amount of Rhode Island permits that were upgraded
14 at pages five and six. Similar statements. I see
15 I'm out of time. I have one last claim to make.

16 JUDGE WOLGAST: Briefly.

17 MR. KILIAN: Thank you. And that is
18 simply that remedial purposes of the Clean Water
19 Act would mitigate in favor -- in the face of any
20 uncertainty, mitigating both ways in favor of
21 adopting the clear language in the record in
22 requiring more stringent --

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1 JUDGE STEIN: I have one question. Is
2 it the concern -- and perhaps the District can
3 answer this -- on the part of the District that
4 it's not capable of achieving the limit of three
5 or it just costs too much?

6 MR. KILIAN: I would argue that that
7 is -- the cost concern is the concern. And one
8 other note --

9 THE COURT: It's not a technological --
10 there's not any technological issue in terms of
11 this facility meeting this limit?

12 MR. KILIAN: Well, I would refer to a
13 very important point in the record that's before
14 you. And that is that EPA, in its response to
15 comments, Region I, has recognized that -- and I
16 want to find this, I have a citation here for
17 you -- but in the response to comments that the
18 Woonsocket facility is now at a limit of three.
19 The other major facility discharging into the
20 Seekonk River is not at five. And this is
21 important because in the Attleboro decision, in
22 footnote 56, this Board notes that at the time of

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1 the closure of that record, Woonsocket was at
2 five. And the Board -- the text associated with
3 footnote 56 is that we have a larger facility than
4 the Attleboro facility discharging into the
5 most-impaired segment of this waterway. It's
6 appropriate to have a lower limit. I would note
7 that since the time that that record closed, this
8 record, in its specific response to comments, EPA
9 recognizes that Woonsocket is now at three, at the
10 limit of technology. And we should say -- we
11 would say that that same rationale that Rhode
12 Island used to go to three at Woonsocket should be
13 used here as well. I'm sorry for not having the
14 cite with me.

15 JUDGE WOLGAST: That's all right. Thank
16 you.

17 MR. KILIAN: Thank you.

18 JUDGE WOLGAST: Mr. Andes. You have
19 nine minutes.

20 MR. ANDES: Thank you. If I could
21 address that question first, Your Honor, on behalf
22 of the District. The District feels that under

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1 the statute, the requirements that should be
2 imposed are those that are needed to attain water
3 quality standards. There has been absolutely no
4 showing that a limit of three is needed or that
5 even these water quality standards could be
6 attained. We think that the statements made here
7 by EPA further support our contention that the
8 MERL study is a very weak read, and we should face
9 permit limits.

10 JUDGE STEIN: But if we were to
11 conclude, contrary to your arguments, that in fact
12 what was needed to achieve water quality standards
13 was a limit of three, is there evidence in this
14 record that the District cannot achieve a limit of
15 three? I'm not asking you to agree with me that
16 that's what the water quality standards require,
17 but if we were to conclude that's correct --

18 MR. ANDES: Are you asking me if it's
19 physically possible to achieve with --

20 JUDGE STEIN: I'm asking if the record
21 shows whether there are any feasibility or other
22 issues associated with that.

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1 MR. ANDES: Since a limit of three was
2 never proposed, the District has not produced any
3 information about whether it can or can't meet
4 that. If that were proposed, we -- I can
5 guarantee you -- would provide a lot of
6 information about whether that's the appropriate
7 number, including whether that's technically
8 feasible to meet. I can guarantee you that it
9 cannot be met with the current \$200 million
10 upgrade. Whether it can -- whether that is
11 physically possible to be met by the District, I
12 don't know. We've never been confronted with that
13 issue.

14 In terms of the statements here, we've
15 heard that MERL is a strong analog for what's
16 really occurring, but we've also heard that that
17 analysis over-predicts and that the analysis does
18 not go to a precise number that can be dropped
19 into a permit. Well, in a permit we get a precise
20 number and the District's officials are civilly
21 and criminally liable for meeting that number.
22 Under the statute it's not enough to say there's a

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1 problem. It's not enough to say that that issue
2 needs to be addressed. Under this statute, the
3 way it's constructed, the District is entitled to
4 a sound basis for a limit that is needed to attain
5 water quality standards, not to get below or not
6 to impose the limit of technology standard. Tell
7 the District, EPA needs to support, this is what's
8 needed to attain water quality standards for this
9 system as a whole. That's simply not here. When
10 you look at the response to comments, at the
11 places where EPA is cited, in fact, the statements
12 there in F6, 18A, 51 are really just conclusory;
13 and in fact, the statements that I cited earlier
14 in terms of the fact that the -- when I cited the
15 statements about the physical model was not
16 generated precisely a definitive nitrogen control
17 that could be applied to a real world discharge,
18 that's straight from that 18A MEP response.

19 The Agency simply does not know whether
20 these standards can be met and whether these
21 limits are the limits that are needed to attain
22 water quality standards. Without that, they don't

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1 have a basis for a limit yet. Should there be
2 limits on nitrogen and phosphorus? Yes. And
3 we're not saying that the limits of the old
4 permit, the 2001 permit, that we have now
5 installed the equipment for are adequate. We
6 certainly would not say there was a phosphorus
7 limit and no nitrogen limit. We designed the
8 system to meet very low numbers on phosphorus and
9 nitrogen. In fact, we think we'll do much better
10 than the phosphorus limit that's in that permit.
11 So we recognize that the next permit needs to have
12 lower numbers. The question is what are those
13 numbers and how are they needed to attain water
14 quality standards. We don't think the Agency has
15 provided that information, and we simply don't
16 have the information to make that conclusion.
17 They also have not responded to the point I
18 mentioned earlier that the delivery rate, which is
19 one critical issue here where they had one
20 number -- we raised an issue instead the 73 is
21 wrong -- the 87 is wrong, 73 is better. They
22 recognized that the 73 does incorporate other

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1 sources and yet took the 87 instead as an example
2 of the way in which these limits have been
3 developed. They simply don't have a reasonable
4 basis.

5 JUDGE SHEEHAN: Well, you say they don't
6 have a reasonable basis, but they have an earlier
7 permit and studies that went on there. They've
8 had 15 years of water quality data. They have at
9 least four criteria documents -- guidance
10 documents, and the regulation allows them to
11 consider guidance. That seems as if the Region
12 does have a sufficient bank of materials on which
13 to make its judgment. To insist on more or longer
14 in face of the severe impairment would seem
15 environmentally dangerous and seem not justified
16 in light of the fact that EPA seems to have a
17 pretty solid corpus of information and guidance
18 from it.

19 MR. ANDES: The data they have, Your
20 Honor, doesn't go to the question. One would
21 think that at this point, if they had enough data,
22 they would have been able to say somewhere in this