Bowditch
&Dewey
ATTORNEYS

Catherine Preston Connolly
Direct telephone: (508) 416-2475
Direct facsimile: (508) 929-3156
Email: cconnolly@bowditch.com

August 6, 2010

Via CDX

Eurika Durr, Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
Colorado Building
1341 G Street, NW, Suite 600
Washington, DC 20005

Re: In re: Upper Blackstone Water Pollution Abatement District
Millbury, Massachusetts
NPDES Permit No. MA0102369

Dear Ms. Durr:

Enclosed please find one (1) original of a Petition for Review from the Upper Blackstone Water Pollution Abatement District with respect to the above-referenced permit.

Very truly yours,

Catherine Preston Connolly

CPC/

Enclosures

{Client Files\ENV\210986\0124\DOC\F0627539.DOC;1}

CERTIFICATE OF SERVICE

I certify that copies of the District's Petition for Review and transmittal letter in connection with NPDES Appeal pursuant to Permit No. MA0102369 were sent to the following persons in the manner indicated:

By Electronic Submission (via CDX):

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

By First Class U.S. Mail:

Karen McGuire
U.S. EPA - Region 1
5 Post Office Square, Suite 100
Mail Code OEP 06-3
Boston, MA 02114-2023

Leon Gaumond, Jr., Town Administrator
Town of West Boylston
127 Hartwell Street, Suite 100
West Boylston, MA 01583

J. Bradford Lange, Vice Chairman
Sewer Commission
Town of Millbury
127 Elm Street
Millbury, MA 01527

Donald G. Manseau, Chairman
Cherry Valley Sewer District
P.O. Box 476
Leicester, MA 01524

Robert J. Moylan, Jr., Commissioner
Department of Public Works and Parks
City of Worcester
20 East Worcester Street
Worcester, MA 01604

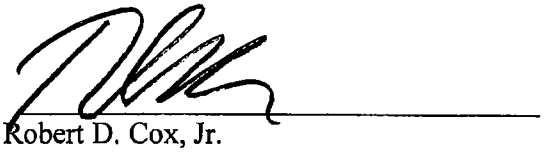
Board of Selectmen
Town of Auburn
104 Central Street
Auburn, MA 01501

Board of Selectmen
Town of Rutland
246 Main Street
Rutland, MA 01543

James Shuris, P.E., MBA
Director of Public Works
Town of Holden, Massachusetts
1196 Main Street
Holden, MA 01520

Glenn Haas
Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108

Bryant Firmin
Massachusetts Department of Environmental Protection
One Winter Street
Boston, MA 02108



Robert D. Cox, Jr.
Bowditch & Dewey LLP
311 Main Street
PO Box 15156
Worcester, MA 01615-0156
Tel: (508)926-3409
Fax: (508) 929-3012
rcox@bowditch.com

Dated: August 6, 2010

ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

In re:	)	
	)	
UPPER BLACKSTONE WATER POLLUTION ABATEMENT DISTRICT, MILLBURY, MASSACHUSETTS	)	NPDES Appeal No. 10-
	)	
NPDES Permit No. MA0102369	)	

PETITION FOR REVIEW OF REGION 1'S DETERMINATION ON REMAND AND PERMIT MODIFICATION ENTITLED "NOTICE OF CHANGES CONFORMING TO THE BOARD'S ORDER ON REMAND AND THE REGION'S DETERMINATION ON REMAND"

BOWDITCH & DEWEY, LLP
Robert D. Cox, Jr., Esq.
Norman E. Bartlett, II, Esq.
Catherine Preston Connolly, Esq.
311 Main Street
P.O. Box 15156
Worcester, MA 01615-0156
(508) 926-3409
(508) 929-3012 Fax

BARNES & THORNBURG LLP
Fredric P. Andes, Esq.
Erika K. Powers, Esq.
Suite 4400
One N. Wacker Drive
Chicago, Illinois 60606-2809
(312) 214-8310
(312) 759-5646 Fax

Counsel for Petitioner Upper Blackstone Water Pollution Abatement District

TABLE OF CONTENTS

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

In re:	)	
	)	
UPPER BLACKSTONE WATER POLLUTION ABATEMENT DISTRICT, MILLBURY, MASSACHUSETTS	)	NPDES Appeal No. 10-
	)	
NPDES Permit No. MA0102369	)	

PETITION FOR REVIEW OF REGION 1'S DETERMINATION ON REMAND AND PERMIT MODIFICATION ENTITLED "NOTICE OF CHANGES CONFORMING TO THE BOARD'S ORDER ON REMAND AND THE REGION'S DETERMINATION ON REMAND"

I. Introduction

Pursuant to 40 CFR § 124.19(a), the Upper Blackstone Water Pollution Abatement District (the "District" or the "Permittee") hereby submits this Petition for Review of the Region's Determination on Remand modifying National Pollutant Discharge Elimination System Permit No. MA0102369, signed by Stephen S. Perkins (the "Determination"), and of the unsigned Exhibit B of the Determination, the "Notice of Changes Conforming to the Board's Order on Remand and the Region's Determination on Remand" (the "Notice"), both issued on July 7, 2010 by the United States Environmental Protection Agency Region 1 ("Region 1" or the "Region") to the District for its publicly-owned treatment works ("POTW") and attached as Exhibit A. The District supports the Region's decision to "forego imposition of the co-permittee requirements," as the Notice was described in the Determination. Despite stating this as the intent of the changes in the Notice, the Region has failed to remove completely the co-permittee requirements in accordance with the Order Denying Review in Part and Remanding in Part,

issued by the Environmental Appeals Board (the "Board") on May 28, 2010 (the "Order"). While the word "co-permittee" has been removed, the Region's changes are insufficient to remove the effect of the original co-permittee provisions.

II. Procedural Background

The District filed an application for renewal of its NPDES permit on November 11, 2005. Region 1 issued a draft permit in response to that application on March 23, 2007. On May 24, 2007, the District timely filed comments with Region 1 concerning conditions in the draft permit, including the Region's inclusion as "co-permittees" certain listed municipalities and a sewer district who own and operate separate collection systems (the "Comments"). On August 22, 2008, Region 1 issued the final permit (the "Final Permit" or the "Permit"). On September 15, 2008, the District filed a Petition for Review, appealing, among other provisions, the "co-permittee" requirements of the Final Permit. On December 18, 2008, Region 1 filed an opposition to the petitions for review filed by the District and other parties.[1] Oral argument on the petitions for review was held on October 29, 2009. The Board issued its Order on May 28, 2010.

Following consideration of the Order, Region 1 concluded that the most appropriate action at this time would be to drop the provisions that were remanded - the co-permittee requirements. Region 1's Determination and Notice were issued concurrently on July 7, 2010. Now comes the District, in support of Region 1's stated goal of removing the offending co-

[1] While the District's Petition for Review was pending, Region I issued a draft permit modification in accordance with 40 CFR 124.5 to impose a limit on aluminum and allowing the opportunity for public comments in accordance with 40 CFR 124.10. The District timely filed comments on the draft permit modification and the modification became final on April 17, 2009. The District petitioned for review of the modification on May 19, 2009, and the Board consolidated the appeals.

permittee verbiage, but also petitioning for review, as the changes made by the Region fail to satisfy the requirements in the Board's Order remanding this issue.

III. Factual Background

The District is a political subdivision of the Commonwealth of Massachusetts. The District owns and operates a POTW, including collection piping of approximately 1,000 linear feet and discharge piping, that treats wastewater from Worcester and surrounding communities ("the Facility"). The Facility has an address of 50 Route 20, Millbury, Massachusetts. Pursuant to the federal Clean Water Act ("CWA"), the District is authorized to discharge from the Facility to the Blackstone River pursuant to the terms of an NPDES permit issued on September 30, 1999, as modified by a settlement agreement dated December 19, 2001 (the "2001 Permit"). In accordance with the settlement agreement, an administrative consent order (the "Consent Order") issued in 2002 with an 8-year compliance schedule[2]. In accordance with the Consent Order, treatment plant upgrades were completed in August, 2009.

As noted above, the Final Permit was issued on August 22, 2008, along with Region 1's Response to Comments ("RTC"). Permit's conditions were stayed as the District and others filed petitions for review with this Board. The Order denied petitioners review of the contested limits, and remanded the questions raised regarding the inclusion of the District's members as co-permittees. "Accordingly, the Permit's co-permittee provision [was] remanded for the Region to reconsider the extent to which the NPDES requirements apply to collection systems

[2] The 2001 Permit and Consent Order called for a discharge limit for phosphorus of 0.75 mg/L in summer, with no limit on total nitrogen. Based upon these limits, the District committed to upgrade its facility at a significant cost of approximately $180 million. The upgrades were designed to consistently meet effluent levels of 0.75 mg/L for phosphorous and 8 - 10 mg/L for nitrogen and were completed in August 2009.

that discharge to the treatment plant and are owned by entities other than the District, and to fully articulate its decision in the administrative record." Order, p. 19.

Instead of explaining the Region's earlier conclusion that the Region has legal authority to extend the Permit's requirements beyond what the District owns and operates, the Region opted to drop the co-permittee provisions. The Region says the basis for doing so is the urgency to address "the nutrient-related impairments in the receiving waters" and "the District's ongoing contribution to those impairments." Determination, p. 2. The Region, however, draws this conclusion without regard for the plant upgrades made to the POTW, completed in August, 2009, designed to not only meet but exceed the limits set by the 2001 Permit. The Region's decision to drop the co-permittee issue was developed in consultation with the Rhode Island Department of Environmental Management ("RIDEM"), yet the District was afforded no opportunity to offer comment prior to the Notice issuance. More importantly, the changes proposed fall well short of the changes ordered by this Board, compelling the District to bring this appeal. For these reasons, the District asks that the Board again remand the question to Region 1 with more specific instructions to remove, not just the word "co-permittee" as it has done, but all functional equivalents to the co-permittee requirements in the Permit.

IV. Argument

The District supports the decision to remove the co-permittee provisions and recognizes that the Board explicitly gave Region 1 the option to do just that. See Order, p. 19-20. However, the changes to the Permit announced in the Notice remove the term "co-permittee" but leave intact its effect through a number of provisions. As such, the Region maintains the functional equivalent to the prior co-permittee requirements in the Permit through various provisions in the

Notice without the rationale called for by the Board in its Order. The District has made the Region aware of the limits on the District's authority with respect to its members as far back as the 1999 permit renewal process, and reminded Region 1 of these limits in comments on the Draft Permit in May, 2007. These concerns were reiterated in each of the relevant filings with the Board on the appeal of the Permit, including the District's Initial Petition for Review, Supplemental Petition for Review, and Reply Brief, and during oral argument, yet the Region continues to impose requirements that the District has no legal ability to meet and which are beyond the Region's authority to require. Moreover, the rationale stated by the Region for modifying the Permit in this manner is flawed, based on outdated information and information not in the record. To the extent the Region deems it appropriate to modify the District's Permit rather than provide the rationale required by the Board, such a modification is governed by 40 CFR § 122.62(15) and requires public notice and comment.

A. Region 1 erroneously presumes jurisdiction over certain collection systems by listing specific municipalities which are permitted to send wastewater to the District.

The Board clearly articulated in its Order that to the extent Region 1 expects to exercise jurisdiction over "collection systems that discharge to the treatment plant [that] are owned by entities other than the District," further explanation was required so that the Board could determine whether or not such an exercise of jurisdiction was consistent with the regulatory scheme under which NPDES permits are issued. Order, p. 19. In the Notice, the City of Worcester, the Towns of Millbury, Auburn, Holden, West Boylston, Rutland, Sutton, Shrewsbury, Oxford and Paxton, and the Cherry Valley Sewer District all remain listed as entities "authorized to discharge wastewater to the UBWPAD facility." Notice, p. 1. No

explanation is given for the Region's jurisdiction over those entities in either the Determination or the Notice. Instead, Region 1 explains only that it has decided to remove the co-permittee provisions, rather than provide such an explanation at this time. Determination, p. 2. It has not, however, removed all of these provisions. By stating that these specific municipalities and sewer district have exclusive permission from Region 1 to discharge wastewater to the District, the Region asserts jurisdiction over them and continues to impose what are, for all practical purposes, co-permittee requirements in the Notice.

There is no similar provision extending standard permit conditions to collection systems not owned or operated by the District in the prior 2001 Permit, under which the District is currently authorized to discharge treated wastewater into the Blackstone River. Order, p. 12. The Board noted that the Region had "without apparent explanation, abandoned its historic practice, of limiting the permit to 'only the legal entity owning and operating the wastewater treatment plant.'" Order, p. 15. The Region still refuses to follow its historic practice, and, contrary to the Order, has failed to provide any statutory or regulatory basis for including the owners and operators of upstream collection systems in the Notice.[3] The District, therefore, must again ask the Board to instruct the Region to articulate what authority it has under the NPDES permit program to regulate upstream users of the Facility.

Despite the Order, the Region also continues to ignore the statutory relationship between the District and its members. By limiting authorized dischargers to "[o]nly municipalities specifically listed," the Region has imposed a requirement which conflicts with Chapter 752 of

[3] The Board noted in the Order that "[t]he Region has not sufficiently articulated in the record of this proceeding a rule-of-decision, or interpretation, identifying the statutory and regulatory basis for expanding the scope of NPDES authority beyond the treatment plant owner and operator to separately owned and operated collection systems that discharge to the treatment plant." Order, p. 18.

the Acts of 1968, as amended (the "Enabling Legislation"), which authorizes the District to determine which entities may become members of the District and/or send wastewater to the District's Facility. In further error, by listing non-District members – Sutton, Shrewsbury, Oxford and Paxton – as municipalities with authority to collect and transport their wastewater to the Facility, the Region has improperly permitted those municipalities to send wastewater from their collection systems to the Facility where, pursuant to specific agreements between the District and those municipalities, only certain collection systems located physically within those municipal areas may send wastewater, not an entire municipal collection system.[4] For these reasons, the Region erred in including the separate collection systems in the Notice, and in providing that only those municipalities may "discharge wastewater" to the Facility. Notice, p. 1. The District respectfully requests that the Board remand the Determination and Notice to the Region with specific instructions to either strike the listed collection system owners and operators and the statement that only these municipalities may discharge to the District at Page 1 of the Notice or to provide the basis required in the Order.

B. The Region has not articulated the rationale by which it may expand its permitting authority beyond the District.

As noted in the District's previous filings on this matter, the communities served by the District do not discharge directly to the waters of the United States; therefore, they are exempt from NPDES permitting under 40 CFR § 122.3 and may not be regulated under the District's

[4] As further error, the Region fails to list the Massachusetts Department of Conservation and Recreation ("DCR") which owns and operates a system that transports wastewater to the District's facility. Because the Notice states "[o]nly [the] municipalities specifically listed above are authorized to discharge wastewater to the UBWPAD facility," the Notice prohibits any use of the DCR's collection system which means for upstream collection systems, some of whom are "specifically listed," use of the DCR system to transport their wastewater to the District's facility for treatment is not allowed. This illogical result could not be what the Region intended and reflects the Region's error by listing and seeking to regulate through the Notice the specific collection systems not owned or operated by the District.

NPDES permit. See Reply of the Permittee, p. 9-10, 16. Region 1, in its filings, has previously stated that because the definition of a POTW includes "sewers, pipes and other conveyances," it has the authority to regulate the POTW and all collection systems which feed into it. RTC, p. 86. The Board found this logic questionable, noting that under the Region's theory, "any collection system that ultimately discharges to the Treatment Plant is subject to NPDES permitting." Order, p. 14. The Region's attempts at oral argument to explain the limitations of the Region's regulatory authority were found lacking. "Indeed, what the Region left unanswered at oral argument is precisely the question that the Board asked, namely under the Region's reasoning, how far up collection systems does the regulatory jurisdiction to impose NPDES requirements on co-permittee reach." Order, p. 16. Region 1, in its Determination and Notice, has decided to list the collection systems its seeks to authorize to discharge to the Facility and to, in effect, maintain co-permittee requirements on them as members of the District. As a result, explanation of the Region's reasoning is still needed in order for the Board to determine whether or not it is a permissible exercise of the Region's regulatory authority.

C. Region 1 may not require[5] that the District enter into agreements with its members requiring them to control discharges to prevent high flows.

The Notice mandates that the District require agreements of its members to control Inflow/Infiltration ("I/I") discharges to the POTW. Notice, p. 3. While the District works closely with its members on a number of initiatives, including those necessary to identify and eliminate sources of I/I, it is not within the District's power to force the membership into such agreements. Nor is it within the Region's power to force the District to attempt to do so. The

[5] "The permittee shall require, through appropriate agreements, that all member communities control discharges to the permittee's POTW sufficiently to ensure that high flows do not cause or contribute to a violation of the permittee's effluent limitation or cause overflows from the permittee's collection system." Notice, p. 3.

Region again ignores the statutory relationship between the District and its members. As noted above, and explained in comments on the draft permit in 2007 and in filings with this Board, the District and its members are entirely separate legal entities. The District's Enabling Legislation, at Section 16, provides that "nothing contained in this Act shall be interpreted to authorize the [District] to construct, operate or maintain the local sewage system of each member, city, town or sewage district." (Emphasis supplied). The Region, in attempting to require agreements to address I/I, which necessarily entails the operation or maintenance of a member's sewer systems, ignores the Enabling Legislation.

The Region may not, as a condition of the permit, require measures which are beyond the control of a permittee, putting compliance with the permit out of the control of the permittee. Am. Iron & Steel Inst. v. EPA, 526 F.2d 1027, 1056 (3d Cir. 1975).[6] In American Iron & Steel Institute, the petitioners claimed that effluent limitations should have been established "on a net rather than gross basis" because otherwise, the petitioners would be required to address contamination in intake water that already had been impacted by other companies. The Third Circuit agreed, stating that "any individual point source should be entitled to an adjustment in the effluent limitation applicable to it if it can show that its inability to meet the limitation is attributable to significant amounts of pollutants in the intake water. Such an adjustment would seem required by due process, since without it a plant could be subjected to heavy penalties because of circumstances beyond its control." *Id.* at 1056. (Emphasis added.) Similarly here, by demanding I/I agreements between the District and its members, the Region has imposed permit measures, the compliance with which is beyond the District's control. As a result, the

[6] Amended on other grounds by Am. Iron & Steel Inst. v. EPA, 560 F.2d 589 (3d Cir. 1977), app. on other grounds after remand, Am. Iron & Steel Inst. v. EPA, 568 F.2d 284 (3d Cir. 1977), cert. denied, Am. Iron & Steel Inst. v. EPA, 435 U.S. 914 (1978)

Region improperly seeks to compel action the permittee is legally restrained from performing and regulate all member communities, without providing the required rationale to support what essentially functions as a co-permittee provision without using that term. The District respectfully requests that the Board remand the Determination and Notice to the Region with specific instructions to either strike these provisions or to provide the basis required in the Order.[7]

D. The Region leaves intact certain I/I requirements which are without any support in the administrative record as necessary or appropriate to regulate the Facility, and which are directly contrary to the Board's instructions.[8]

The Notice includes specific I/I planning requirements. Notice, pp 2-4. While most of the I/I provisions revised by the Notice contain language indicating that their applicability is "only to the extent that [District] owns the separate sewer system," the continued inclusion of these provisions is inappropriate,[9] contrary to the Order and unnecessarily confusing. The Region is well aware that the separate sewer systems are not owned by the District, but rather by the members the Region previously tried to include in the Permit as co-permittees. Nonetheless, the Notice requires the District to "develop and implement a plan to control [I/I] to the separate sewer system." Notice, p. 2. (Emphasis supplied). Where the Region has decided to remove the members as co-permittees in response to the Order, there can be no "separate sewer system"

---

[7] The District is committed to working with the separate collection systems to reduce I/I and has seen much progress by the separate collection systems in addressing I/I in their own systems. The fact that flow volumes at the District have been level over the past 15 years despite significant population growth in the communities served suggest that the separate collection systems have been effective at eliminating extra flow into the system, which reduction has been offset by new, legal sources. Nonetheless, as the District has consistently informed the Region, the District has no authority to compel its members to implement I/I programs and the elimination of extra flow into the system associated with I/I by member communities has been entirely through voluntary cooperative measures.

[8] See pages 3 and 4 of the Notice, where plan and reporting requirements are imposed "only to the extent the permittee owns the separate sewer system."

[9] As the District noted in its comments on the draft permit (RTC #45) and during oral argument, there is no legal or factual need for the Region to attempt to control municipal I/I in the District's Permit, as municipal I/I is otherwise adequately regulated by the Massachusetts Department of Environmental Protection pursuant to 314 CMR 12.00. Consequently, the Region's effort to regulate I/I through the Notice is unnecessary and inappropriate.

subject to the Permit. Thus, the Region's reference to "the separate sewer system" is inappropriate and confusing.

To the extent the Region seeks to regulate I/I issues that may be occurring in the District's system, the provisions left in place make no sense. The Facility has approximately 1,000 feet of collection pipe to gather wastewaters entering the treatment facility (the "Pipe"). The Pipe is on and surrounded by land owned by the District. Given the physical construction and location of the Facility, a program to identify illegal connections to the Pipe is not appropriate. There are no sump pumps or roof downspouts that connect to the Pipe. There can be no benefit from a public educational outreach program for I/I issues associated with the Pipe where there are no such issues associated with the Pipe.

To the extent the Region seeks to regulate I/I issues associated with the separate collection systems, the Region exceeds the scope of its authority. Despite clear instructions from the Board in its Order, the Region has not provided the rationale required by the Board to allow the District, the separate collection systems or the Board to evaluate whether the Region's attempt to regulate these users of the Facility is valid. Because only the separate collection systems have been working on I/I issues within their collection systems, and because the Notice specifies planning requirements that could only be associated with the separate collection systems, the regulation of such collection systems appears to be the Region's intent, despite the stated limitation in the Notice that I/I provisions apply "only to the extent that the [District] owns the separate sewer system." Notice, p. 2.

There is nothing in the administrative record showing that there is I/I occurring within the District-owned system.[10] As noted above, there are no sump pumps or downspouts connecting to the District's 1,000 feet of collection pipe. There is nothing in the administrative record to suggest that there is any need for identification and prioritization of areas that will provide increased capacity for recharge as the result of reduction or elimination of I/I. Both are cited as goals of the required I/I plan on Page 3 of the Notice. There is nothing in the administrative record suggesting a need for, or any benefit from, educational public outreach on I/I control for the Pipe. An outreach requirement is especially well-suited to collection systems which serve individual households and businesses and not to the District, whose primary clientele is municipalities and sewer districts. As such, even if the Region intended for these provisions to apply only to the Pipe, the requirements are not supported by the administrative record as required by 40 CFR § 124.18.

The Region has left intact the functionality of provisions aimed at co-permittees. The ambiguity inherent in such language leaves open the possibility the District would be held accountable for the acts of the separate collection systems. The language used by the Region, along with the statement that the "permittee is responsible to insure that high flows do not cause I/I related effluent limit violations," shows the Region's expectation that the District will be held accountable for I/I issues, be it illegal sump pumps or some other source of I/I, occurring in "separate" upstream collection systems whose wastewater legally reaches the Pipe. As such, these provisions are inconsistent with the Board's Order. The District respectfully requests that the Board remand the Determination and Notice to the Region with specific instructions to strike

[10] The District accepts that it is appropriate for it to maintain the Pipe in good working order and to take steps to prevent and correct any I/I occurring in the Pipe.

"the separate sewer system" reference and the I/I plan provisions or to provide the basis required in the Order.

E. The modification to the permit in response to the Board's decision was conducted without any input solicited from the regulated party.

Region 1 did not solicit input from the District in preparing the Notice or Determination. This appeal likely could have been avoided had the District been afforded the opportunity to discuss the changes with Region 1 prior to their issuance, as the District could have pointed out where, despite their stated intentions to the contrary, the Region had left in place the effect of the co-permittee provisions.

Instead, Region 1 chose to move forward with the Notice and the removal of the word "co-permittee" in the belief that "it will take a significant amount of time to develop a comprehensive response to the factual and legal questions posed by the Board," and to address "the nutrient-related impairments in the receiving waters" and "the District's ongoing contribution to those impairments." Determination, p. 2. The Region's urgency to finalize the permit, however, is simply not borne out by Region 1's actions to date or current information.

If quick implementation was imperative, it is hard to understand why it took the Region 16 months from the submittal of the application for a renewal permit to issue a draft, or 15 months from the end of the comment period to the issuance of a final permit. Quick implementation was not urgent when Region 1 was considering the application or the comments. Now, however, the Region cannot take the time to evaluate whether or not there is a legal basis for provisions in its own permit, or consider data that reflects the current operations of the POTW. Approaching five years since the District first applied (more than half of which was time waiting for the draft and final permits), the facts about the POTW's current capabilities and

performance have changed dramatically. At significant cost, and in accordance with the 2001 Permit and Consent Order, the District upgraded its facility. The upgrades were designed to consistently meet effluent levels of 0.75mg/ for phosphorous and 8-10 mg/L for nitrogen and were completed in 2009. Yet, in claiming that the nutrient situation is so urgent that the Region must act quickly to issue the Notice without allowing for any public comment, the Region completely ignores any improvements to the nutrient situation that may be brought about by this recent upgrade in effluent treatment by the District.

Another reason cited by the Region for moving forward with the Notice is the "tendency of nutrients to recycle once released into the system, and contribute to future impairment, [such that] delay in addressing point source nutrient contributors will only compound the challenges in restoring the receiving waters." Determination, p. 3. Nutrient recycling in a natural system has no relationship to current point source contributions. Moreover, the Region's reasoning points out that the nutrients present in the Blackstone River at this time, and therefore the degraded nature of the river, are not due to the District's current effluent, as implied, but to the build up and recycling of nutrients from a vast array of point and non-point sources. The Region cannot demonstrate that the Blackstone River would no longer be nutrient impaired, even if all current sources of nutrients were cut off, as nutrient recycling plays such a strong role in the continued impaired status of the water body. It is therefore inappropriate to cite this cycle, which is beyond the District's control and bears no relationship to the District's current discharge or the impairment of the river, as a factor in the Region's decision to proceed with implementation of the Permit.

Similarly, nutrient loads from other point sources are unreasonably cited as a factor in justifying the need to implement this Permit without taking the time to develop an appropriate legal basis for the permit elements Region 1 wishes to impose. The District is neither responsible for, nor is its compliance affected by, the effluent limits at other facilities on the same river. Point sources at other locations in the watershed, serving different populations, with different funding sources and different mixes and concentrations of pollutants, have no bearing on what the appropriate effluent limits are for the District.

Consequently, the reasons upon which the Region relies for moving forward with the Notice without fully addressing the co-permittee issue are not well founded and do not excuse or provide reason to dispense with a public comment process to which the District and the communities are entitled. As a matter of public policy, the District requests that, upon remanding the Determination and Notice to Region 1 to carry out the instructions in the Order, the Board specifically instruct Region 1 to consult with the parties to the appeal prior to issuance of a new Determination on Remand.

F. Modification of a permit, even in response to a remand from EAB, requires public comment.

There is no basis in the statute or regulation for the Region's permit modification without additional public comment. A NPDES permit may be modified only for specifically delineated reasons, and as applicable here "to correct ...mistaken interpretations of law made in determining permit conditions." 40 CFR § 122.62(15). Consequently, where the Region takes action in response to a finding from the EAB that certain permit conditions were the result of mistaken interpretations of law, a permit modification is necessary. According to 40 CFR

§ 124.5(c), if the Director[11] decides to issue a permit modification, he shall prepare a draft permit under 40 CFR § 124.6. In the District's case, the Director has decided to modify the permit to remove mistaken interpretations of law. Consequently, permit modification should be prepared under the regulations established for draft permits at 40 CFR § 124.6. Draft permits prepared under 40 CFR § 124.6 are subject to public notice and comment, according to 40 CFR § 124.10. Thus, contrary to the Region's contention that the Notice should be governed by the Director's discretion to re-open a comment period as described in 40 CFR § 124.14, the Region's proposed modification to the District's permit, addressing the flaws in legal interpretation identified by the Board, should be publicly noticed and subject to an open comment period under 40 CFR §124.10.

The Region cites In re: NE Hub, 7 E.A.D. 561, 584-85 (EAB 1998), for the proposition that the Region has unfettered discretion in deciding when to reopen a comment period. Reliance on In re: NE Hub is misplaced, since that case deals with an entirely different situation than is presented here. In In re: NE Hub, commenters to a permit action sought to reopen the comment period due to changes in the permitted activity and due to new information received during remand. The Board denied that request under 40 CFR § 124.14. In contrast, the District is not arguing that a new comment period is needed due to activity changes or new information; it is asking for a new public comment period because of action by the Region, which is seeking to modify the permit. That permit modification is, as noted above, governed by 40 CFR § 124.10. Public comment periods for permit modifications under 40 CFR § 124.10 are not

[11] "*Director* means the Regional Administrator, the State director or the Tribal director as the context requires, or an authorized representative." 40 CFR § 124.2.

discretionary. Since the Determination and Notice in response to the Board's remand order constitutes a permit modification, a new comment period is required.

To the extent that the Board's decisions have set precedent for the issuance of a "Determination on Remand" permit modification without public comment, the Region may not avail itself of the option to use this practice when it consulted with RIDEM after the issuance of the Board's decision and cited that consultation as among the bases for the changes made. Region 1, on Page 3 of the Determination, states that among the factors supporting removal of the co-permittee provisions of the Permit at this time is that the "Rhode Island Department of Environmental Management, upon review of the Board's Order, has requested that the Region move forward as expeditiously as possible to place the nutrient limits into effect to address the significant water quality impairments to waters in that state." Thus, Region 1 accepted public comment from an amicus to the case, without offering the opportunity to comment to parties, including the District. Moreover, that amicus point of view is cited as one of the deciding factors in determining in which direction the Region would steer the Permit at this time, illustrating precisely how important and persuasive comments to the Region can be. Failure to provide the District the opportunity to comment on a draft permit modification of its own permit and participate in the discussion regarding the appropriate final form for the permit is an abuse of the Region's discretion. As such, it requires that this Board exercise its discretion to remand the permit to the Region for proceedings, including a draft permit and public comment period, modifying the permit to be consistent with the Board's Order.

Moreover, in citing the request from RIDEM, which by the Region's own description occurred after the Board had issued the Order, Region 1 has based its decision to modify the

permit on information outside of the record. Under 40 CFR § 124.9(a), provisions of a draft permit (including a draft permit modification) must be based on the administrative record. As such, the Region's reliance on communications with RIDEM after closing the record is impermissible under the NPDES regulations.

Similarly, the administrative record for a final permit shall consist of that for the draft permit, as well as any comments received during the open comment period, a tape or transcript of any hearings held, written materials submitted at hearings, the response to comments, other documents used in support, and the final permit. 40 CFR § 124.18(b). "The record shall be complete on the date the final permit is issued," according to 40 CFR § 124.18(c). It is the District's position that the modification constitutes a new draft permit that should be subject to a new open comment period under 40 CFR § 124.10. But even if the Notice is not a modification to the permit, and that therefore, any decision to re-open the existing comment period is at the discretion of the Director under 40 CFR § 124.14, relying on comments received from only one party as the basis of the decision is an abuse of discretion. The District respectfully asks the Board to address this abuse of discretion by ordering the opening of a new comment period for the Region to receive and consider additional information from all other interested parties.

V. Conclusion

For the foregoing reasons, the District requests that this Board grant this Petition for Review. After such review, the District seeks the following relief:

1. The Board remand the Determination and Notice to the Region with instructions to remove all language which could be construed as applying to the separate collection systems not owned by the District;

2. The Board order Region 1 to issue the permit modification following remand as a draft permit and conduct a public comment period before such modification is finalized; and

3. Any such other relief as may be appropriate under the circumstances.

In addition, the District requests the opportunity to present an oral argument in this proceeding and establish a briefing schedule for this Appeal to assist the Board in resolving the matters in dispute.

Respectfully submitted,
UPPER BLACKSTONE WATER
POLLUTION ABATEMENT DISTRICT
By its attorneys,

BOWDITCH & DEWEY, LLP
Robert D. Cox, Jr., Esq.
Norman E. Bartlett, II, Esq.
Catherine Preston Connolly, Esq.
311 Main Street
P.O. Box 15156
Worcester, MA 01615-0156
(508) 926-3409
(508) 929-3012 Fax

BARNES & THORNBURG LLP
Fredric P. Andes, Esq.
Erika K. Powers, Esq.
Suite 4400
One N. Wacker Drive
Chicago, Illinois 60606-2809
(312) 214-8310
(312) 759-5646 Fax

BARNES & THORNBURG LLP
Nathan A. Stokes, Esq.
750 17th St. NW, Suite 900
Washington, DC 20006-4675
(202) 371-6376
(202) 289-1330 Fax

Dated: August 6, 2010