TOWN OF MILLBURY
MASSACHUSETTS

Department of Public Works

August 5, 2010

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board (MC 1103B)
Colorado Building
1341 G Street, NW
Suite 600
Washington, D.C. 20005

Dear Madam Clerk:

Pursuant to 40 CFR § 124.19(a), the Town of Millbury, Massachusetts ("Town") hereby submits this Petition for Review of the Notice of Changes Conforming to the Board's Order on Remand and the Region's Determination on Remand modifying National Pollutant Discharge Elimination System Permit No. MA0102369 issued on July 7, 2010 (the "Notice") by the United States Environmental Protection Agency Region 1 (the "Region") to the Upper Blackstone Water Pollution Abatement District (the "District") for its publicly-owned treatment works ("POTW"). The Town supports the Region's decision to "forego imposition of the co-permittee requirements," as the Notice is described in the Region's Determination on Remand, issued concurrently with the Notice. Unfortunately, we were disappointed to note that, despite stating this as the intent of the changes proposed in the Notice, the Region has failed to completely remove 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 these provisions.

For example, the Town remains listed in the permit (Notice, p. 1). By listing the Town and other District members in the permit and stating that the Town and other District members are "authorized to discharge wastewater to the UBWPAD facility," the Region ignores the Order's direction to the Region to explain "the statutory and regulatory basis for expanding the scope of the 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). Indeed, the Region still leaves unanswered 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).

Town of Millbury 127 Elm St. Millbury, MA 01527 **Phone** (508) 865-4710 **Fax** (508) 865-0843
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Moreover, the Town does not discharge directly to the waters of the United States. As the Town and the District have raised previously with the Board, the owners or operators of collection systems that discharge to the treatment plant are owned by entities other than the District. They do not "discharge [ ] a pollutant" within the meaning of the statute and regulations, and the collection systems that connect to the District's system "are exempt indirect discharges" under 40 C.F.R. §122.3. The Region has no power to say who can discharge to the facility where these entities are not "point sources," and the Region has provided no information to allow the Town or the Board to evaluate whether the Region's rationale for including the Town is consistent with the statute and the regulatory scheme.

Furthermore, by limiting authorized dischargers to "[o]nly municipalities specifically listed," the Region has imposed a requirement which conflicts with the District's enabling statute, Chapter 725 of the Acts of 1968, as amended, which authorizes the District to determine which entities may become members of the District and/or send wastewater to the District's treatment facilities. In further error, by listing non-District members as municipalities with authority to discharge to the UBWPAD facility – Sutton, Shrewsbury, Oxford and Paxton – the Region has improperly permitted those municipalities to discharge from their collection systems 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. Similarly, by not naming the collection system owned by the Commonwealth of Massachusetts, Department of Conservation and Recreation ("DCR"), the Notice by its terms precludes the DCR collection system from discharging wastewater to the UBWPAD facility. For these reasons, the Town contends the Region erred in continuing to name the Town and other municipalities in the Notice, and in providing that only those municipalities may discharge wastewater to the UBWPAD facility. (Notice, p. 1.) As noted by the Board in its Order, "[t]here is no similar provision in the prior 2001 permit under which the District is currently authorized to discharge treated wastewater into the Blackstone River." Despite the Region's change from its historic practice, the Region has failed to provide any statutory or regulatory basis for including the Town in the Notice.

The Notice also includes specific inflow/infiltration (I/I) planning requirements which, as the Town understands the Notice, can only be carried out through the Region asserting its authority upon the Town via the Notice. (Notice, pp. 2-4, Section E. Operation and Maintenance of the Sewer System). While most of the I/I provisions revised by the Notice contain language indicating their applicability is "only to the extent that the [District] owns the separate sewer system," the continued inclusion of these provisions is inappropriate, 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. As the Region has decided to remove the members as co-permittees in response to the Order, there are no "separate sewer systems" subject to the permit, let alone ones owned or operated by the District. By removing the term "co-permittee" but otherwise leaving the I/I provisions unaltered, the Region has made nothing more than a cosmetic change to the permit.

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 District's facility has approximately 1,000 feet of collection pipe. This pipe collects wastewaters entering the treatment facility. As a member of the District, the Town is aware of no I/I issues with the District's pipe. Given the physical construction of the District's facility, a program to identify illegal connections is not appropriate, particularly where the pipe and surrounding area is all on District-owned land. There are, to the Town's knowledge, no sump pumps or roof downspouts that connect to the District's pipe. Similarly, the Town cannot fathom any benefit that might be derived from an educational outreach program for I/I issues associated with the District's 1,000 feet of pipe where, to the Town's knowledge, there are no such issues associated with the District's pipe.

To the extent the Region seeks to regulate I/I issues associated with the Town, 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 Town, the District, its members or the Board evaluate whether the Region's attempt to regulate these users of the District's facility is valid. Because only the municipalities have been working on I/I issues within their collection systems, and because the Notice is specific as to planning requirements that could only be associated with the separate collection systems, the regulation of the Town collection system appears to be the Region's intent, despite the Region 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.)

Finally, the Notice mandates that the District require agreements with the Town and the District's members to control I/I discharges to the POTW. (Notice, p. 3). While the Town works with the District in 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 Town into any such agreement. Nor is it within the Region's power to force the District to attempt to do so. The Region ignores the statutory relationship between the District and its members. As was explained in comments on the draft permit in 2007 and in filings and appeals to this Board submitted in the fall of 2008, the District and its members are entirely separate legal entities. No one member may dictate the actions of the District or other members. Conversely, Section 16 of Chapter 725 of the Acts of 1968 clearly states that "nothing contained in this Act [the District's enabling authority] shall be interpreted to authorize the [District] to construct, operate or maintain the local sewage system of each member, city, town or sewage district." Despite the Order, the Region fails to respect this limitation on the District's authority. The Region oversteps its bounds in attempting to require such agreements, reaching to regulate members without providing the required rationale to support what essentially functions as a co-permittee provision without using that term.

By not following the direction of the Order and including "co-permittee"–like requirements upon the Town in the Notice, the Region has committed clearly erroneous errors of fact or law and, in so doing, raised an important policy of considerations which the Board, in its discretion, should review. For these reasons, the Town requests the Board remand the Notice to

the Region with instructions to remove all language which could be construed as applying to the separate system of the Town rather than District's facility.

Respectfully submitted,
Town of Millbury,

By: J. Bradford "Brad" Lange, Sewer
Superintendent, Department of Public Works,
Town of Millbury