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**BY HAND AND ELECTRONIC SUBMISSION**

February 17, 2009

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

Re: Upper Blackstone Water Pollution Abatement District, Permittee's Reply to Region 1's Memorandum in Opposition to the Petitions for Review, the Amicus Curiae brief and Other Petitions for Review  
NPDES Appeal Nos. 08-11, 08-12, 08-13, 08-14, 08-15, 08-16, 08-17, and 08-18  
NPDES Permit No. MA 0102369

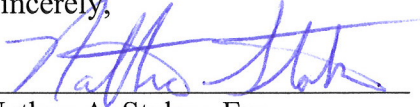
Dear Ms. Durr:

In connection with the above-referenced permit appeals, please find enclosed for docketing and review one original copy of Permittee's Reply to Region 1's Memorandum in Opposition to the Petitions for Review, the Amicus Curiae brief and Other Petitions for Review. Electronic copy of the Permittee's submission will also be posted via the CDX filing system.

The deadline for this Reply, originally set in the Order from the Board as February 16, 2008, is governed by 40 C.F.R. § 124.20, which states that "If the final day of any time period falls on a weekend or legal holiday, the time period shall be extended to the next working day." You confirmed<sup>1</sup> that this means that the Reply is due today, February 17, 2009.

Thank you very much for your assistance in this matter.

Sincerely,

  
Nathan A. Stokes, Esq.

Enclosures

Cc: Recipients listed on enclosed certificate of service

<sup>1</sup> Phone conversation between Mr. Nathan Stokes, of Barnes and Thornbury, LLP, and Ms. Eurika Durr, Clerk of the Environmental Appeals Board, January 27, 2009.



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

In re:	)	
	)	
UPPER BLACKSTONE WATER	)	NPDES Appeal Nos. 08-11, 08-12, 08-13,
POLLUTION ABATEMENT DISTRICT,	)	08-14, 08-15, 08-16, 08-17 and 08-18
MILLBURY, MASSACHUSETTS	)	
	)	
NPDES Permit No. MA0102369	)	
	)	

**REPLY OF THE PERMITTEE, UPPER BLACKSTONE  
WATER POLLUTION ABATEMENT DISTRICT,  
TO REGION 1'S MEMORANDUM IN OPPOSITION TO PETITIONS FOR REVIEW,  
THE AMICUS CURIAE BRIEF OF RHODE ISLAND DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT AND OTHER PETITIONS FOR REVIEW**

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**REPLY OF THE PERMITTEE, UPPER BLACKSTONE  
WATER POLLUTION ABATEMENT DISTRICT,  
TO REGION 1'S MEMORANDUM IN OPPOSITION TO PETITIONS FOR REVIEW,  
THE AMICUS CURIAE BRIEF OF RHODE ISLAND DEPARTMENT OF  
ENVIRONMENTAL MANAGEMENT AND OTHER PETITIONS FOR REVIEW**

Upper Blackstone Water Pollution Abatement District (the "District") submits this reply ("Reply") in response to Region 1's Memorandum in Opposition to Petitions for Review ("Region's Memo"), as well as to the amicus curiae brief submitted by the Rhode Island Department of Environmental Management ("RIDEM") and to those other petitions for review (collectively, the "Filings") of NPDES Permit No. MA0102369 issued to the District on August 25, 2008 (the "Permit").

Since it received its last NPDES Permit, in 2001, the District has been working to plan, construct and operate the extensive and expensive control systems needed not only to meet but also exceed the strict conditions in that permit. Now, without carefully examining whether those control systems will achieve the needed water quality goals, the Region has issued a new permit, which contains new requirements that go well beyond the provisions of the prior permit. Those new conditions have no legal or technical basis. The District's initial Brief explained the

problems with the Permit – not only with regard to the nitrogen and phosphorus limits, but also as to the Region’s decision on compliance schedules, its decision on co-permittees, and on several other significant issues. In this Reply, the District focuses on specific aspects of the nitrogen/phosphorus, compliance schedule and co-permittee issue, to respond to misstatements in the Region’s Memo, as well as to the RIDEM amicus curiae brief, and to emphasize facts and legal provisions that the Region has tried to avoid. Ultimately, we believe that the Environmental Appeals Board (the “Board”) should remand the Permit to the Region, with specific direction to fix the identified legal and technical problems and issue a revised permit that is legally and technically sound.

### **ARGUMENT**

#### I. THE REGION IS REQUIRED TO PROVIDE A SOUND SCIENTIFIC BASIS FOR THE EFFLUENT LIMITS IMPOSED IN A NPDES PERMIT.

In an effort to clarify the record, and counter to the many assertions by the Region, the District is not contesting the Region’s authority to establish limits necessary to protect water quality, inclusive of water quality in Rhode Island. Nor is the District contesting the fact that nutrients can cause impairments in water bodies. Nor is the District claiming that completing a TMDL is the only allowable method for the Region to issue lower permit limits to the District.

Instead, what the District claims is that the Clean Water Act (“CWA”) mandates that the Region have a sound scientific basis for the proposed limits, especially in the absence of a TMDL, and maintains that the Region has not met this obligation. This is not merely an academic difference of opinion. In establishing numeric limits to satisfy narrative standards, the Region’s failure to demonstrate that these limits will attain and maintain the water quality standard constitutes a clear error of law. While expedient, the Region cannot simply assert that,

since impairment exists, it must act by lowering the discharge limits in the Permit. Such action by the Region requires that it demonstrate a connection between District's discharge and the impairment as well as a showing that the limits are appropriate and necessary to address the impairment and will result in water quality attainment.

Moreover, the Region has also made clear errors by using experiments inapplicable to the receiving waters and downstream environment and data which do not reflect recent upgrades to the facility as the basis for establishing the effluent limits in the Permit. Simply stated, the scientific basis for the proposed limits is insufficient and inadequate. The Region did not meet its burden to provide a sound, scientific basis for these limits simply by asserting that it has considered inapplicable experiments and data that predate major improvements designed to reduce the very pollutants in question.

A. The Region fails to make the requisite demonstration in establishing numeric criterion for narrative Massachusetts and Rhode Island standards

Despite twice citing the requirements of 40 C.F.R. § 122.44(d)(1)(vi) for establishment of permit limits when a state has not established a numeric water quality criterion for the pollutant, the Region as the permitting authority, has not made the requisite demonstration pursuant to said regulation that the numeric limit will attain and maintain the narrative criterion. *Region's Memo*, pp. 4 and 30. The Region asserts that it sought to develop the limits using effects-based relationships between causal and response variables. *Region's Memo*, p. 17. In fact, the Region used no such relationship to derive the limits, nor did it link the relationship to any impairment of designated uses in the receiving water or downstream. Despite its claims to the contrary, the Region makes no attempt to determine how various nutrient loadings from various sources would affect the causal factors, and how the response of these causal factors impairs designated



uses. Instead the Region established the numeric limits in the Permit based entirely on estimations of the concentration of the nutrients in the receiving water (which the Region attributes to the District), without regard to the nature of the response of this ecosystem to these loadings. As a result, the essence of the Region's justification for its numeric limits to address the narrative criterion is that such limits are likely to be protective of designated uses. Likely to be protective of designated uses falls well short of the demonstration required by 40 C.F.R. § 122.44(d)(1)(vi) that the limit will attain and maintain the narrative criterion. Since the Region has not met its requirement as the permit authority under the CWA regulations, the District respectfully requests that the Board remand the Permit to the Region with instructions to complete the requisite demonstration before imposing numeric limits for said narrative criterion.

B. Region relies on old data to establish new permit limits which ignores the beneficial impacts of the District's recent capital improvements

The Region mischaracterizes the District's effluent and the overall health of the river ecosystem through its use of outdated data. The Region presents an analysis of environmental data from the summer of 2003 to justify its conclusions that the permit limits it imposed just two years earlier in 2001 are not protective of the receiving water. *Region's Memo*, p. 86. The use of data from 2003 to justify permit limits ignores the significant progress the District has made in reducing its discharge levels in recent years. *See Fact Sheet*, pp. 8, 9. In compliance with the modified 2001 permit, the District has undertaken substantial plant improvements, many of which have come online since 2003. By the time these upgrades are complete in late 2009, the Region's contention that non-point source pollution is dwarfed by the District's will no longer be true; yet the Region ignores not only the effect of substantial improvements that have already been made since 2003 and those to come later this year, but also the agreement between the

Region and the District as to a schedule of implementation for these improvements. *See Region's Memo*, p. 93.

Nonetheless, in its analysis, the Region emphasized that concentrations of phosphorus in the effluent approached the 0.75 mg/l limit of the 2001 permit in August of 2003, and that even at those levels, the river suffered from an overabundance of macrophytes which grew over the course of the summer. But macrophytes generally derive their nutrients from sediments, which would reflect the accumulated history of nutrient discharges, and not just the August conditions cited by the Region. Moreover, the Region does not acknowledge or present the fact that the 2003 data it utilized predates the District's improvements to the facility. Equally misleading, is the fact that the 2003 growing season data shows that the District's phosphorous load was approximately 65% greater than would be expected under the 2001 permit limits. The Region can not reasonably rely on the 2003 data as a justification for ratcheting effluent limits below those required by the 2001 permit. Consequently, the District respectfully requests that the Board remand the Permit to the Region with instructions to complete the requisite demonstration before imposing numeric limits for said narrative criterion.

C. The Region simply adopts the RIDEM recommendation on total nitrogen improperly relying on elements of the MERL experiments without adequate scientific basis.

The Region dismisses the District's comments on its development of the 5 mg/l limit for total Nitrogen in favor of adopting the RIDEM proposed limit without adequate scientific basis or demonstration. In response to the District's observations, the Region either provides overly broad generalizations that offer no specific answer to the District's concerns, or it provides information that is inaccurate or misapplied. The Region has based the District's nitrogen limit

on the purported impacts of its discharge on the Seekonk River section of Narragansett Bay. *Fact Sheet*, p. 14. In selecting this portion of the Bay, the Region follows the lead of the RIDEM in developing limits for the District's facility. *Fact Sheet*, p. 14; *Evaluation Of Nitrogen Targets And WWTF Load Reductions For The Providence And Seekonk Rivers*, p. 27. The significant difference in flushing times between the MERL experiments and reported values for the Seekonk River makes the MERL loading rate response curves inapplicable to the Seekonk River. The Region has explicitly acknowledged the uncertainty associated with the application of these studies to the Seekonk River. *Region's Memo*, p. 23. The Region, nonetheless, attempts to support its position by suggesting that the flushing times would in fact be longer at 7Q10 low flows, citing specific studies of the Providence and Seekonk River systems, thereby minimizing the differences. *Region's Memo*, p 35. However, the Region is referencing the flushing rate of the Providence River or the combined Providence and Seekonk River system, not the Seekonk River alone. Using the reference cited in *Region's Memo* at page 35, the flushing rate in the Seekonk River under average conditions is only 1 day, and under conditions of no flow from any tributary, which certainly constitutes critical low flow, is slightly less than 3 days. See Asselin and Spaulding, *Flushing times for the Providence River Based on Tracer Experiments*, Figure 7 AR 154. This further confirms that it is inappropriate to apply the MERL experiments to the Seekonk River.

The Region compounds its errors by asserting that the loading necessary to achieve water quality standards in the Seekonk River portion is 4.4 mg/l. This is a new position, not previously presented by the Region until submittal of its Memo to the Board. We find no place in the record where this is supported and therefore respectfully request that the Board disregard it. However,

even this late assertion fails to adequately support the Region's conclusion. All of the calculations of loadings on the Seekonk River assume a 5 mg/l discharge to that river for the three major dischargers (The District, Woonsocket and Bucklin Point). The Region provides no discussion as to how attenuation would modify these loading rates, although it surely would. The Region casts each of these decisions as a "conservative assumption" but when piled one on top of another, the resulting contorted analysis lacks credibility and can not constitute a demonstration that the limits in the District's permit will "attain and maintain applicable narrative water quality criteria and will fully protect the designated use." 40 C.F.R. § 122.44(d)(vi). In light of the uncertainty associated with the Region's analysis, the District respectfully requests that the Board remand the Permit to the Region with instructions to complete the requisite demonstration before imposing numeric limits for said narrative criterion.

## II. THE REGION AND RIDEM HAVE MISINTERPRETED FEDERAL LAW REGARDING AVAILABILITY OF WATER QUALITY-BASED COMPLIANCE SCHEDULES IN PERMITS

The Region and RIDEM have misapplied federal regulation and case law addressing the ability to allow compliance schedules in permits for limits based upon water quality standards. The agencies argue that permits cannot contain compliance schedules for limits based upon water quality standards, because the CWA deadline for compliance with water quality standards has passed. This position is inconsistent with the applicable law and longstanding practice of EPA and the states concerning compliance schedules. The Region and RIDEM acknowledge the proper authority for compliance schedules, but misapply that authority. 40 C.F.R. § 122.47(a) authorizes compliance schedules in permits, and states that such schedules "shall require compliance as soon as possible, but not later than the applicable statutory deadline under the

CWA.” The agencies also both cite the Rhode Island regulations, which allow permits to contain compliance schedules. 12 190 3 R.I. Code R. 20.01 and 20.02. However, the Region then makes a problematic leap of logic in stating that as the regulation concerns water quality standards, the “applicable statutory deadline” is July 1, 1977, regardless of when the standard was adopted. While CWA Section 301(b)(1)(C) does indeed provide a deadline of July 1, 1977, that provision has been interpreted in *In the Matter of Star-Kist Caribe, Inc.*, 3 E.A.D. 172 (Adm’r 1990) to allow for compliance schedules when the state authorizes them for water quality standards adopted after July 1, 1977 as quoted below.

EPA does not have the authority to establish schedules of compliance in NPDES permits that will postpone compliance with state water quality standards beyond the July 1, 1977 statutory deadline, **unless the schedule is added pursuant to authorization contained in the state water quality standards or the State's regulations implementing the standards.** [Emphasis added.]

As the District properly noted in its Petition, the limits for nitrogen and phosphorus are based upon interpretations of narrative standards that were adopted by the Region specifically as it relates to the Permit it issued to the District on August 25, 2008, an action that occurred after July 1, 1977. And as the District, RIDEM and the Region all agree, the Rhode Island regulations authorize compliance schedules in permits. The Rhode Island regulations make no limitation concerning compliance schedules for water quality-based permit limits. Thus, RIDEM’s interpretation of these regulations is clearly inconsistent with the plain language of the regulations, and should be afforded no discretion or consideration by the Board.<sup>1</sup> Consequently,

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<sup>1</sup> A court’s deference to an agency’s interpretation of a regulation, “is warranted only when the language of the regulation is ambiguous.” *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). The Christensen Court explained the rationale behind this rule:

To defer to the agency’s position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation. Because the

the Region should have included a compliance schedule in the District's permit. The District respectfully requests that the Board remand the Permit to the Region with instructions to include a rational schedule of compliance for nitrogen and phosphorus in the Permit.

III. THE CONTINUED INCLUSION OF CO-PERMITTEES IS NOT AUTHORIZED BY THE CLEAN WATER ACT, IS UNNECESSARY, DIRECTLY HARMS THE DISTRICT AND CONFLICTS WITH MASSACHUSETTS LAW.

Despite the Region's insistence to the contrary, its decision to include the member communities as co-permittees is not consistent with the CWA and implementing regulations. For the first time, the Region through its most recent round of permit renewals for Massachusetts POTWs, seeks to establish as routine the inclusion of independent, legally separate entities, which are neither owners nor operators of a POTW facility, as co-permittees. In fact, the Region does not have the authority to make the member communities co-permittees of the District. The Region posits that Section 402(a)(1) of the CWA – which allows EPA to issue permits for the discharge of any pollutant – and provisions addressing the definition and requirements for POTWs somehow combine to authorize the Region to require permit coverage for entities with sewers that connect to the District's sewer system above the District's treatment plant. However, such an interpretation impermissibly reads out of the CWA the fundamental requirement of a “discharge of pollutants.” Section 402(a)(1) speaks of the need for a “permit for the discharge of any pollutant, or combination of pollutants, notwithstanding Section 301(a).” Section 301(a) addresses the “discharge of any pollutant” which is in turn defined in Section 502(12) as follows:

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regulation is not ambiguous on the issue of compelled compensatory time, ...  
deference is unwarranted.

*Id.* In other words, where the language selected by the drafters is clear and unequivocal, courts are bound to give effect to the plain meaning of the chosen words and no duty of interpretation arises. *Id.*; see also, *T. V. A. v. Hill*, 437 U.S. 153, 184, n. 29 (1978); *Caminetti v. United States*, 242 U.S. 470, 485 (1917); C. Sands, *Sutherland Statutory Construction* § 46.01 (4<sup>th</sup> ed. 1972)).

The term “discharge of a pollutant” and the term “discharge of pollutants” each means (A) any addition of any pollutant **to navigable waters from any point source**, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft. [Emphasis added.]

The operable part of the definition provides that to be regulated by a permit, there must be a point source discharge to waters from a point source. In the case of the member communities, there is no point source discharge from their sewer systems to waters. Rather, as clearly specified in the District’s permit application, the member communities’ sewer systems connect to the District’s sewer system above the District’s treatment plant, and their wastewater is treated by the District’s plant prior to the occurrence of a point source discharge from the District’s treatment plant to waters, namely, the Blackstone River. Thus, the Region has no authority to include the member communities as co-permittees to the Permit because they do not “discharge [of] pollutants,” as the same is defined in the CWA.

The Region’s only stated reason for including the member communities as co-permittees in the Permit is to address I/I in the member communities’ sewer systems. However, it is not necessary for the Region to use the District’s permit to address the alleged I/I problems. As the Region is well aware, there are a variety of other, more appropriate tools, both in the permitting and enforcement arenas, at its disposal to address I/I at the municipal level. The District’s individual NPDES permit is an inappropriate vehicle for dealing with inputs to the system where the discharger does not control the inputs. Although the District would likely benefit from reduced I/I, the obligation to make those reductions belongs to the entities which own the pipes. The District cannot accept a permit which includes responsibilities for issues which it may not legally control.

Furthermore, if the District members are considered “dischargers of pollutants,” the attempt to bind the member communities through the actions of the District is contrary to 40 C.F.R. § 122.21. That regulation states that “Any person who discharges or proposes to discharge pollutants... must submit a complete application to the Director in accordance with this section and part 124 of this chapter.” 40 C.F.R. § 122.21(a)(1). The only “person” who submitted an application for a permit was the District. It is unclear in the Permit and the Region’s stated position that it can bind the named co-permittees who the Region considers to be the person or persons submitting an application on behalf of the named co-permittees. The regulations go on to note that “[w]hen a facility or activity is owned by one person but is operated by another person, it is the operator's duty to obtain a permit.” 40 C.F.R. § 122.21(b). In the District’s case, it owns and operates its own facility. It does not own or operate those municipal systems which connect to the District’s facility. Therefore, when the District submitted its application, it did so only on behalf of the system which is owns and/or operates.

While the CWA regulations contemplate the possibility of more than one application form being required for a facility<sup>2</sup>, they do not contemplate more than one facility being permitted with one application. In listing the basic application information required of all POTWs, the regulations state that an applicant must provide: “(i) Facility information. Name, mailing address, and location of the facility for which the application is submitted; (ii) Applicant information. Name, mailing address, and telephone number of the applicant, and indication as to whether the applicant is the facility's owner, operator, or both.” 40 C.F.R. § 122.21(j)(1). The applicant is not the owner or operator of any of the facilities owned and operated by the co-

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<sup>2</sup> “More than one application form may be required from a facility depending on the number and types of discharges or outfalls found there.” 40 C.F.R. § 122.21(a)(2)(i)



permittees. The co-permittees were not listed as applicants. They are not the owner or operator of the applicant facility.

The Region states that it derived its list of co-permittees from the District's answer to Question A4 on its application. Question A4, however, requests information on the areas served by the facility; information on the facility itself is in Question A1 and information on the applicant is in Question A2. After Questions A1 and A2, the form goes on to ask whether the applicant is the owner or operator or both and whether correspondence regarding the permit should be directed to the facility or the applicant. What is apparent from the structure of this form and the District's response is the member communities were properly listed on the application as areas served by the facility; at no time were they listed or otherwise considered part of the facility, nor as an applicant for the District's permit. Where the municipalities are not a part of the facility applying nor are they one of the applicants, it is inappropriate for the Region to include them as co-permittees on the District's permit.

The Region's continued insistence on including the individual member communities of the District as co-permittees to the Permit carries substantial enforcement and compliance consequences, and thereby causes significant harm to the District. *Region's Memo*, p. 145. The District acknowledges the Region's responses to several of its concerns with regard to inclusion of the co-permittees which it expressed during both the comment period and in its petition for review. *See RTC*, p. 87. Even if the Region were to issue a revised permit that memorializes the further assurances on this topic made in the *Region's Memo*, it would nonetheless fail to address the District's legal constraints. For example, such revised permit including co-permittees would still need to ensure that the named respondent in any enforcement proceeding would be the entity

that failed to meet its obligation under the Permit; and that the District has no reporting, operational or maintenance obligations with respect to the sewer systems under the jurisdiction of another co-permittee. *Region's Memo*, p. 149, 150. Even were the Region to suitably incorporate its offered protections in a revised permit, the Region is without the authority to make the member communities co-permittees, as there is no point source discharge from their sewer systems to waters, as their wastewater is treated by the District's plant prior to discharge to the Blackstone River.

Even were the Region to suitably incorporate its offered protections in a revised permit, with all of the member municipal systems regulated under one permit, the risk that violations of one co-permittee will be imputed to all remains. EPA's Enforcement and Compliance History Online ("ECHO") database is ill-suited to distinguishing between violations of permittees where both share a permit.<sup>3</sup> For example, the ECHO report for the Greater Lawrence Sewer District, whose new permit includes its served communities/members as co-permittees, makes no mention of co-permittees, nor makes any indication that any entity other than the sewer district has responsibility for compliance.<sup>4</sup> In the case of the District, any failure of any municipality to address I/I issues as required by the Permit will be entered in ECHO under the permit number assigned to the District. The ECHO database will then reflect that the District was non-compliant in the quarter that an alleged significant violation and/or a formal or informal enforcement action occurs. *See Exhibit 1 (Screenshots of ECHO.)* The risk of improper enforcement against the District for potential violations by the District's member communities

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<sup>3</sup> Reassurances from the Region that the database can be adjusted to reflect this new practice rings hollow in light of the continued failure of the database to accurately report the daily monitoring reports submitted by permittees.

<sup>4</sup> The member communities of the Greater Lawrence Sewer District are the City of Lawrence, Town of Andover, Town of North Andover, Town of Methuen and Town of Salem, NH.

are too great and an unnecessary burden on the District since the Region has other, more appropriate means of addressing its concerns with member community I/I management.

The Region's inclusion of the member communities as co-permittees is a clear error of law. It is not authorized by the Clean Water Act or its implementing regulations. The District is prohibited by its enabling legislation from binding the member communities, which the Permit, as issued, does.<sup>5</sup> Given the conflict with federal and state law and the potential implications for the District's enforcement and compliance history the Region should avail itself of other mechanisms to address I/I at the municipal level. The Region decided to lump all of the communities and the District together under one permit, not because it is legally required, makes sense, or will better protect the environment, but because it is expedient for the Region to do so. Expediency of addressing municipal I/I is insufficient justification for the heavy burden it imposes upon the District and is in violation of the Clean Water Act and its implementing regulations. The District respectfully requests that the Board strike the co-permittee provisions of the Permit or remand the Permit to the Region with instructions to strike the co-permittee provisions.

#### IV. REGION'S AD HOC DECISION MAKING RENDERS FUTILE THE DISTRICT'S ATTEMPTS AT SOUND CAPITAL PLANNING.

The Region has repeatedly engaged in ad hoc, reactionary decision making with limited scientific support. The Region's view that "the central dispute" in this appeal pertains to the numeric effluent limitations for phosphorus and nitrogen marginalizes the 15 other provisions of the Permit for which the District seeks relief, and illustrates how this permitting process was, from the outset, driven by the Region's reaction to concerns raised by RIDEM. *See District's*

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<sup>5</sup> See Chapter 752 of the Acts of 1968, Section 16 (Appended as Exhibit J to the District's Petition).

*Initial Petition for Review*, pp. 3-4; *Region's Memo*, p. 1. The slipshod nature of the process is demonstrated by footnote 1 of the *Region's Memo*, in which it notes that the appeal by Trout Unlimited has been rendered moot because, upon reflection, the Region supports that organization's position regarding aluminum limitations and has proposed a permit modification to reflect this. *Region's Memo*, p. 2. This response to the Trout Unlimited appeal belies the Region's espoused view that the central issues of the appeals are the numeric limits of nitrogen and phosphorus. More importantly, had the Region undertaken a thorough, pro-active review of all the relevant data and criteria pertaining to the Permit and come up with a unified response, further modifications would not be proposed a mere four months after issuance of the Permit.

Moreover, the Region should not "find it puzzling" that the District objects to both pound loading and concentration limits for ammonia. *Region's Memo*, p. 143. The Region rejects the District's objection to the ammonia limits on the basis that (1) they are part of the settlement of the 2001 permit; and (2) they cannot be changed citing anti backsliding provisions. The Region should understand that coupling the ammonia limit now with a total nitrogen limit is significantly different from the accepted limits in the 2001 modified permit. Further, anti backsliding should not apply here as the District has not yet completed construction of the facilities that will allow it to consistently meet the 2001 permit limits.<sup>6</sup>

The problems resulting from such ad hoc permitting are only compounded by the use of data from 2003 to justify Permit limits which ignores the significant progress the District has made in reducing its discharge levels in recent years as detailed in Section I.B of this Reply. The

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<sup>6</sup> The District regards as ironic the Region's comment on the District's stance on ammonia. In light of the Region's abandonment of limits in the 2001 consent agreement, which the District had at least 8 years to achieve, referring to the District's acceptance of the limits in that agreement is disingenuous at best.

Region piles one conservative assumption on top of another, resulting in a contorted analysis which lacks credibility. Moreover, the Region has exceeded its legal authority by including the member communities as co-permittees on the District's permit. These communities are not dischargers under the Clean Water Act, and are exempt indirect dischargers under 40 C.F.R. § 122.3. The Region is simply over-reaching and tries to justify its actions by asserting that the last permit and fact sheet contained a forewarning of this possibility.

Since 2001, the District has been proceeding with planning and constructing the ambitious and costly program of improvements that will meet or exceed the permit levels established in the last permit and associated schedule issued in the Order of Compliance. The Region, in contrast, has decided that the schedule embodied in the Order of Compliance arising out of the parties settlement agreement is binding only upon the District, leaving the Region free to impose new limits, procedures and criteria even before the required measures are due. The Region has chosen to do so despite its agreement with the District to include stakeholders in the permitting process. *2001 NPDES Appeal 00-11 Settlement Agreement*, p. 3, item 9. The District questions how it can be expected to effectively plan for capital investments, when the Region changes its goals, before the improvements are scheduled to be completed, let alone given the chance to make an impact on the water's quality. The Region's decision that the improvements already underway are not sufficient is not driven by data from the facility, but rather by policy discussions with Rhode Island. The Region's performance standards for the plant are an unpredictable moving target such that District upgrades could be deemed obsolete or insufficient by the time they are finished, requiring millions more in retrofits. The Region has attempted to color this reactionary permitting process with a patina of thoughtful science, covering up the

reality that the effluent limits imposed are based on an amalgam of facts and studies unrelated either to each other or to this watershed. The Region calls this “exercising professional judgment.” We call it guessing. While the Region may be entitled to deference, the District is entitled to a thoughtful, rational process which demonstrates that the limits set by the Region will achieve the goals of the narrative criteria established by Rhode Island and all the other limits imposed in the Permit.

Over the past 15 years, the District alone has spent approximately \$180 million in capital funds to build facilities to improve water quality discharges for its service population of less than 250,000. By funding the development of a water quality model of the Blackstone River, the District has considerably accelerated the ability of all parties to develop new, scientifically defensible limits. Thus, contrary to the picture of the District painted by the Region as a profligate polluter simply interested in delay, the District has been proactively moving forward with substantial environmental improvements, and has continuously offered to do so in the future.

### **CONCLUSION**

For these reasons, and in light of the fact that this ad hoc process has led the Region to begin amending the permit less than four months after it was issued, the District respectfully requests that the Board remand the Permit to the Region with instructions to 1) engage meaningfully with the District and other stakeholders in developing the rigorous science needed to demonstrate the need for and effectiveness of effluent limits in the watershed; 2) include in the Permit or any resulting permit a schedule for compliance for any resulting effluent limits; and 3) remove all co-permittee provisions from the permit.

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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply, in connection with NPDES Appeal Nos. 08-11, 08-12, 08-13, 08-14, 08-15, 08-16, 08-17 and 08-18, were sent to the following persons in the manner indicated:

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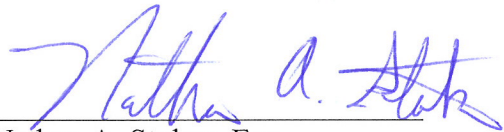
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