

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

In re:)	
)	
Upper Blackstone Water Pollution)	
Abatement District Millbury, Massachusetts)	NPDES Appeal Nos. 08-11,
)	08-12, 08-13, 08-14, 08-15,
)	08-16, 08-17 and 08-18
NPDES Permit No. MA0102369)	
)	

**REPLY OF THE PETITIONER, CONSERVATION LAW FOUNDATION,
TO REGION I'S MEMORANDUM IN OPPOSITION TO PETITIONS
FOR REVIEW AND THE UPPER BLACKSTONE WATER POLLUTION
ABATEMENT DISTRICT'S PETITION FOR REVIEW**

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INTRODUCTION

Petitioner Conservation Law Foundation ("CLF") has analyzed the petition for review of the captioned NPDES permit submitted by Permittee Upper Blackstone Water Pollution Abatement District (the "District") and EPA Region I's Memorandum in Opposition (the "Region I Memorandum"), and now respectfully submits this reply consistent with the Environmental Appeals Board's Order dated February 11, 2009.

Conservation Law Foundation submits this brief because more stringent limits are necessary than those currently included in the Final Permit. The Clean Water Act is unambiguous in stating that by July 1, 1977, a date long since passed, discharges subject to the NPDES permitting program shall have achieved whatever limitations are necessary to meet water quality standards. 33 U.S.C. § 1311(b)(1)(C). Federal regulations require that NPDES permits ensure compliance with state water quality standards. *See* 40 C.F.R. § 122.4(d). The Final Permit's nutrient effluent limits do not ensure compliance with

state water quality standards. In fact, even if the discharge requires implementation of controls at the limit of technology, water quality standards will not be met in receiving waters: As a result, to the extent that such technology will not ensure water quality standards, the Region must impose additional offsets to ensure compliance with the statutory mandate. *See City of Marlborough, Massachusetts, Easterly, Wastewater Treatment Facility*, 12 E.A.D. 235 (EAB 2005).

In addition, Region I adopted insufficient nutrient limits based upon its misinterpretation of federal regulations and relevant guidebooks. To comply with federal regulations, Region I must determine the appropriate nutrient effluent limitations based on a water treatment facility's design flow, *see* 40 C.F.R. § 122.45(b)(1), but did not do so. Additionally, the Region failed to apply the correct nutrient effluent limits, which are provided in the Gold Book, and supported by the Ecoregion XIV guidebook. Finally, CLF preserved for review the issue of whether the Region determined proper phosphorus limits, and consideration of the Gold Book and Ecoregion XIV guidebooks in deciding this issue is well within the scope of the EAB's authority. *See* 40 C.F.R. § 124.13.

The Board should find in favor of CLF and remand the Permit to Region I with instructions to include more stringent nutrient limits to ensure compliance with state water quality standards.

ARGUMENT

- I. REGION I CANNOT ENSURE ATTAINMENT OF WATER QUALITY STANDARDS AT THE LESS STRINGENT NUTRIENT LIMIT BECAUSE THE RECORD DOES NOT SUPPORT SUCH A CLAIM.

The record clearly indicates that water quality standards will not be met at a total nitrogen limit of 5 milligrams per liter ("mg/l") or even at a limit of 3 mg/l. The one

definitive statement in the record relevant to setting a total nitrogen limit that will meet water quality standards is made by the Rhode Island Department of Environmental Management (“RIDEM”) in a 2004 study:

DEM has evaluated impacts and set nitrogen load reduction targets using studies conducted at the University of Rhode Island’s Marine Ecosystems Research Laboratory (MERL). This analysis indicated that even if the WWTF discharges are reduced to the limit of technology (total nitrogen of 3 mg/l), the Seekonk River and portions of the Providence River would not fully comply with existing water quality standards (minimum of 5.0 mg/l .except as naturally occurs.) and may not meet the latest Environmental Protection Agency (EPA) guidelines that DEM has proposed to adopt.

Evaluation of Nitrogen Targets and WWTF Load Reduction for the Providence and Seekonk Rivers (the “RIDEM Study”), at 3 (see Appendix A) (emphasis added). In its reply, Region I never provides any definitive record evidence sufficient to overcome this statement in the RIDEM study.

In fact, Region I cannot point to any materials in the record to show that water quality standards will be attained at a 5 mg/l or even a 3 mg/l limit. Instead, the Region identifies a series of oblique statements relating to nitrogen limits and water quality standards, none of which are definitive. *See Region I Memorandum*, at 64-65. These statements by EPA do not offer any affirmative statements supporting a finding that a 5 mg/l total nitrogen limit is sufficient.

Perhaps because of the lack of any definitive statements in the record to counter the RIDEM study, the Region endeavors to find uncertainty in the RIDEM study where it does not exist. Region I suggests that RIDEM is not certain whether more stringent standards are necessary. *See Region I Memorandum*, at 26 (“RIDEM has indicated that more stringent limits may be necessary to achieve water quality standards[.]”) (noting the Region cited the *2004 RIDEM Load Reduction Evaluation*, at 27 (Ex. 13)) (emphasis

added). This is a mischaracterization of the record. The RIDEM study unequivocally states that even a limit of 3 mg/l would not result in attainment of water quality standards. It should be clear, for this reason and as CLF has consistently stated, that a total nitrogen limit of 5 mg/l could never result in attainment with water quality standards or elimination of the facility's contribution to water quality violations.

II. THE EXISTENCE OF SCIENTIFIC UNCERTAINTY REQUIRES EPA TO ERR ON THE SIDE OF TIGHTER LIMITATIONS TO ENSURE ATTAINMENT OF WATER QUALITY STANDARDS.

Section 301(b)(1)(C) of the Clean Water Act requires that, to be lawful, discharges must be subject to a CWA permit that includes "any more stringent limitations, including those necessary to meet water quality standards . . . or required to implement any applicable water quality standard established pursuant to this chapter." 33 U.S.C. § 1311(b)(1)(C). In keeping with this statutory mandate, federal regulations require that NPDES permits ensure attainment of water quality standards. 40 CFR 122.4(d). When confronted with scientific uncertainty concerning the likelihood that the effluent limitations in a discharge permit will result in attainment of water quality standards, EPA must err on the side of stronger limits. *See Marlborough*, 12 E.A.D. 235 (EAB 2005).

The issue in *Marlborough* was whether or not the permit's nutrient effluent limits were stringent enough to meet water quality standards. The Environmental Appeals Board was unable to find that the permit would result in attainment of water quality standards. For that reason, the Board remanded the permit to the Region with instructions to either demonstrate that its existing effluent limitations were sufficiently stringent to ensure compliance with water quality standards, as required by 40 C.F.R.

122.4(d), or to tighten the restrictions appropriately so that they would ensure compliance. *Marlborough*, 12 E.A.D. at 251-3. As in the current case, the discharge at issue in *Marlborough* dominated the natural flow of the river and constituted the majority of nutrient input into the river system. *Marlborough*, 12 E.A.D. at 237 (noting that the wastewater treatment facility's effluent comprised "between 50% and 99% of the flow in Hop Brook"); *id.* at 239 (noting that "the vast majority of phosphorus entering Hop Brook is from the [wastewater treatment] facility") (citation omitted). Also as in the case currently before the Board, in *Marlborough* there was scientific uncertainty as to the relative contributions of nutrient pollutants from other sources such as storm water runoff and recirculation from the sediment. *Id.* at 239. Based on the record in *Marlborough*, the Board found there was scientific uncertainty as to whether the permit, as written, would ensure water quality standard compliance. *Id.* at 250. The Board in *Marlborough* clearly stated that "[a] mere possibility of compliance . . . does not 'ensure' compliance." *Id.* at 236. It held, in light of uncertainty regarding whether the effluent limits would ensure that water quality standards were achieved, that the permit's nutrient effluent limitations were insufficiently stringent to ensure compliance. Based upon this conclusion, the Board determined that the permit should be revised to include additional control measures. *Id.* at 252-3.

This case also concerns scientific uncertainty. In the present case, the uncertainty relates to the question of whether a nitrogen limit of 5 mg/l will ensure that the District's discharge will meet water quality standards in the Upper Blackstone River and downstream receiving waters, including Narragansett Bay and the Seekonk River. In fact, the uncertainty is such that EPA does not know whether an even lower standard at

the limits of technology, a limit of 3 mg/l, will be sufficiently protective. *See Fact Sheet*, at 12 (adopting the RIDEM study as a key report); *see e.g., RIDEM Study*, at 3 (Appendix A) (indicating that water quality standards might not even be satisfied at 3mg/l).

In light of this scientific uncertainty, Region I has relied broadly on a number of scientific state and federal guidebooks and studies to determine the effluent limitations necessary to ensure compliance with water quality standards. These scientific studies are valid but are not fully conclusive, as is often the case where scientists' understanding of complex systems is evolving. For example, the studies conducted at the University of Rhode Island's Marine Ecosystems Research Laboratory ("MERL"),¹ relied on by the Region and RIDEM, could not precisely mimic the natural system, and therefore did not generate definitive results.

While EPA recognizes these studies as the best available information, both EPA and the District agree that the results are not conclusive. *See Region I Memorandum*, at 60-63 (noting the scientific studies relied upon show that increased nutrient levels contribute directly to eutrophication, but are not conclusive, and result in uncertainty over appropriate effluent limitations); *see District Supplemental Petition for Review*, at 24 (noting "flaws and uncertainty associated with the [MERL] experiments"). This uncertainty is not, as the District suggests, a reason for delay or a basis for less stringent standards. On the contrary, given the scientific uncertainty in this case, the Clean Water Act and its implementing regulations mandate the imposition of more stringent limits. Further, since a nitrogen limit of 3 mg/l may not ensure attainment of water quality

¹ The MERL studies were conducted by the Rhode Island Department of Environmental Management between 1995-1996 including "analysis of data produced by a physical model of the Providence/Seekonk River system". *See Fact Sheet*, at 12-13. The study was part of an overall effort "to evaluate the impact of various levels of nutrient loading on the rivers and Narragansett Bay." *Id.*

standards, additional offsets are required to meet this statutory mandate. *See Marlborough*, 12 E.A.D. at 252-3. That was exactly what the EAB held in *Marlborough* and is also the proper result in this case.

It is important to note that the Region itself argues, in response to the District's arguments, that uncertainty is not a valid basis for refraining from imposing more stringent limits. In making this argument, the Region is responding the District's argument that, in light of the "uncertainty associated with the [MERL] experiments," it is improper for the Region "to impose binding, enforceable permit limits on the District . . . without sufficient technical basis to determine whether such a limit is appropriate and necessary to address impairments." *See District Petition*, at 24. Despite the fact that the District's discharge constitutes the majority of nutrient input into the system, the District suggests that the lack of regulation of "loads from local contributing non-point sources" is a justification for less stringent limits in the permit. *Id.* The District further argues that scientific uncertainty "underscore[s] the need for a TMDL to determine the relative relationship and relative importance of nutrient loading." *Id.* at 25.

In response to this argument by the District EPA appropriately noted that the agency is not required to await additional studies or the completion of a TMDL before setting limits in the permit.

EPA is clearly authorized, even in technically and scientifically complex cases, to base its permitting decision on a wide range of relevant material, including EPA technical guidance, state laws and policies applicable to the narrative water quality criterion, and site-specific studies. Nothing in the foregoing regulation, or its preamble, suggests that EPA is required to await the completion of approved TMDLs or dynamic water quality models as predicates to imposing a water quality-based effluent limit.

— See *Region I Response to Comments*, at 28 (“*RTC*”). Consistent with this argument, Region I also correctly asserts that a “protective approach is appropriate because, once begun, the cycle of eutrophication can be difficult to reverse given the tendency of nutrients to recycle through the ecosystem.” *RTC*, at n.12.

Region I attempts to distinguish *Marlborough*, arguing that there is a greater degree of scientific uncertainty in the instant case. The Region points principally to the fact that the scientific experiments relied upon in that case were conducted in the natural setting, whereas the MERL experiments relied upon in this case represented laboratory research. The fact that the MERL studies were conducted in the lab setting does not, however, distinguish *Marlborough* from the instant case. *Marlborough* demonstrates how a permit should be judged when there is scientific uncertainty concerning whether the permit will meet water quality standards. In the face of scientific uncertainty, the Board in *Marlborough* held that stricter limits were necessary to ensure compliance. See *Marlborough*, 12 E.A.D. 235 (EAB 2005). The nature or degree of uncertainty is an important consideration, but the holding of *Marlborough* is that uncertainty is not a basis for imposing less stringent effluent limitations.

Misunderstanding this core holding of *Marlborough*, and based on its assertion that there is a greater degree of uncertainty in this case, Region I did not opt for the approach providing the greatest level of control needed to attain water quality standards, or eliminate the District’s contribution to violations. Instead, the Region settled on a less stringent limit in an effort to “account for differences and similarities between that laboratory and the real world.” See *Region I Memorandum*, at 62 (citing *RTC*, at 47-48

(Ex. 2)). In doing so, the Region misconstrues the holding of *Marlborough* which, properly applied, would have led the Region to adopt more, not less, stringent standards.

It is important to note that CLF does not, as Region I suggests, simply submit a different interpretation of the studies. Instead, CLF asserts that the Region must choose the most protective limits achievable in light of the scientific uncertainty the studies create. It matters not that CLF and the Region hold “different opinion[s] as to the relative weight of the uncertainties in the MERL studies.” See *Region I Memorandum*, at 62.

When there is any amount of uncertainty, EPA must err on the side of stricter limits.

While the scientific complexities and differences between the watersheds prevent a direct apples-to-apples comparison, the situation in *Marlborough* is too similar to the instant case to ignore the precedent it sets. In this case, the EAB should follow its own precedent and err on the side of stricter limitations.

Here, resolving uncertainty as to whether water quality standards will be complied with requires imposing the restrictions to the limit of technology. As noted by Amicus Curiae Rhode Island Department of Environmental Management, the Woonsocket Water Pollution Control Facility operates under a permit that requires a nitrogen effluent limitation of 3mg/l. See *Brief of Amicus Curiae R.I. Dep't. of Env't. Mgmt.*, at 5.

Therefore, the District should also be required to meet this limit. Also, to the extent that imposing stricter limits will not ensure compliance, the permit must include additional offsets. Uncertainty does not provide a basis for either less stringent limits as EPA argues, or delay and further study as the District argues. Rather, scientific uncertainty requires EPA to implement stricter limits to ensure attainment of water quality standards.

III. REGION I MUST ESTABLISH THE TOTAL NITROGEN EFFLUENT LIMITATION BASED ON THE FACILITY'S MAXIMUM DESIGN FLOW.

Region I must determine the total nitrogen effluent limitation for the District's NPDES permit based on the facility's maximum design flow, in order to achieve and maintain state water quality standards. *See* 40 C.F.R. § 122.45(b)(1) (requiring that "[POTW] effluent limitations . . . shall be calculated based on design flow") (emphasis added). On its face, the NPDES permit at issue in this case, as is true of any discharge permit, authorizes the District to discharge nitrogen at the maximum design flow for the life of the permit.² With this in mind, and to achieve the purpose of the Clean Water Act to restore and maintain water quality, the Region must ensure that the District can meet state water quality standards for total nitrogen at the established maximum design flow.

The Region attempts to justify the less stringent 5 mg/l nitrogen effluent limitation by reasoning that the facility generally operates below the maximum design flow. *See Region I Memorandum*, at 24. Region I concludes that the 5 mg/l limit will result in lower mass loadings "for the foreseeable future, as treatment plant flows remain well below the facility's design flow of 56 mgd (i.e., 34 – 43 mgd) and have been steady in recent years." *Id.* Such a justification flies directly in the face of 40 C.F.R. § 122.45(b)(1). Region I itself recognized this fact, when it flatly and properly rejected the District's assertion that limits must be based on "historical discharge flow volumes and not permitted design flows as required by permitting regulations." *See Region I Memorandum*, at 97 n.22. The Region's erroneous use of historical flows rather than

² In addition the ability to discharge at the maximum design flow for the life of the permit, the District is not limited in their discharges through a Total Maximum Daily Load ("TMDL") restriction. This restriction would put a ceiling on the total amount of nutrient effluent they could discharge per day.

design flows casts further doubt regarding whether the permit's nitrogen limit will ensure compliance with water quality standards.

As the permit is now written, the District can discharge at the maximum design flow, exacerbating the impairment of state water quality standards, and still meet its permit limits. This is flatly inconsistent with the Clean Water Act and EPA's own regulations.

IV. CLF PROPERLY PRESERVED FOR REVIEW ARGUMENTS REGARDING THE PROPER PHOSPHORUS LIMITS BASED UPON THE GOLD BOOK AND ECOREGION XIV GUIDEBOOKS FOR NUTRIENT CRITERIA RECOMMENDATIONS.

CLF preserved for review the issue of Total Phosphorus limits by directly addressing that issue in the Comments on the Draft NPDES Permit. *See CLF Comments on Draft NPDES Permit No. MA0102369 (May 23, 2007)*, at 1-2. CLF's comments make clear that "our principle concern is with the Draft Permit's limits on total nitrogen and on total phosphorus." *Id.* CLF did not need to do more in order to be allowed to cite to the Gold Book and Ecoregion XIV guidebooks as well as to any "other generally available reference materials" which do not have to be referenced during comment. *See* 40 C.F.R. § 124.13. Based upon EPA's regulations, the Board has clear authority to rely on these guidebooks.

EPA developed the Gold Book and Ecoregion XIV guidebooks to provide specific nutrient criteria as part of an effort to reduce problems associated with excess nutrients in water bodies. The Gold Book sets forth recommendations for concentrations of in-stream phosphorus depending on the type of water body. *See Region I Memorandum*, at 18; *see also Gold Book: Quality Criteria for Water*, at 235-239 (May 1, 1986). The Ecoregion XIV guidebook includes specific nutrient criteria for the region in

which the Upper Blackstone River and the greater watershed are situated. *See Ambient Water Quality Criteria Recommendations: Information Supporting the Development of State and Tribal Nutrient Criteria, Rivers and Streams in Nutrient Ecoregion XIV, (Dec. 2000) (EPA-822-B-00-022).*

EPA contends that CLF failed to preserve the Gold Book recommended value of 0.05 mg/l because no one specifically referenced that guide during the comment period. Similarly, EPA contends that CLF's concern regarding the Region's decision to ignore Ecoregion XIV guidebook was not preserved for review because no one offered comments on the draft permit indicating the Region should have imposed a phosphorous limit based on the Ecoregion XIV values. Thus, EPA argues that CLF is now precluded from addressing the appropriateness of reliance on the Gold Book and Ecoregion XIV guidebook materials.

EPA's argument fails because CLF's recommendation that EPA refer to the guidebooks is fully consistent with and merely supportive of its position that the phosphorus limits are insufficient to meet water quality standards. *See 40 C.F.R. § 124.13; see CLF Comments on Draft NPDES Permit No. MA0102369 (May 23, 2007), at 1-2.* Even more importantly, EPA confuses the need to preserve issues during the comment period with the importance of introducing information *in support of* an issue that has already been preserved and addressed. CLF does not attempt to raise a new issue by referencing these documents. CLF simply intends to correct Region I's misinterpretation of the Gold Book criteria and further support its position on the issue of total phosphorous limits with the valuable, site-specific information found in the Ecoregion XIV guidebook.

V. REGION I CHOSE THE WRONG STANDARD FOR LIMITING PHOSPHORUS BASED ON THE GOLD BOOK AND ECOREGION XIV NUTRIENT CRITERIA RECOMMENDATIONS.

In setting the phosphorus limit at 0.1 mg/l, Region I misapplied the Gold Book standards and failed to adequately consider the Ecoregion XIV guide.

a. Region I chose the wrong standard for limiting Phosphorus based on the Gold Book nutrient criteria recommendations.

The Gold Book “recommends in-stream phosphorus concentrations of no greater than 50 ug/l [0.05mg/l] in any stream entering a lake or reservoir, 100 ug/l [0.1 mg/l] for any stream not discharging directly to lakes or impoundments.” *Fact Sheet* at 9. The Region I Memorandum fails to squarely address the reasoning behind the decision to select the 0.1 mg/l standard instead of the applicable 0.05 mg/l standard for discharges into streams that flow into reservoirs or impoundments. By the Gold Book’s plain language, the 0.1 mg/l standard applies only to “streams” – not POTW discharges – that do not discharge directly to a lake or impoundment. The Blackstone does discharge directly to a lake or impoundment, and therefore the 0.05 mg/l Gold Book standard applies.

The requirement that the more stringent limits for streams discharging into lakes or impoundments be applied is particularly important in the instant case due to the fact that the District’s discharge so dramatically dwarfs the natural flow of the stream. With an authorized discharge that is thirteen times the 7Q10 flow of the River there is simply no possibility of significant attenuation in the River between the District’s facility and the first downstream impoundment. *See Region I Memorandum*, at 5; *see Fact Sheet*, at 2. In fact, the attenuation rate along the entire length of the River is estimated at only thirteen percent. *See Fact Sheet*, at 13. It is essential that streams delivering nutrients

into impoundments are protected with more stringent limits. As noted in the Gold Book, “[t]he majority of the Nation's eutrophication problems are associated with lakes or reservoirs and currently there are more data to support the establishment of a limiting phosphorus level in those waters than in streams or rivers that do not directly impact such water.” *See* Gold Book, at 240-41. In setting a less stringent phosphorous limit, Region I ignored this important principle and misinterpreted the plain language of the Gold Book recommendations.

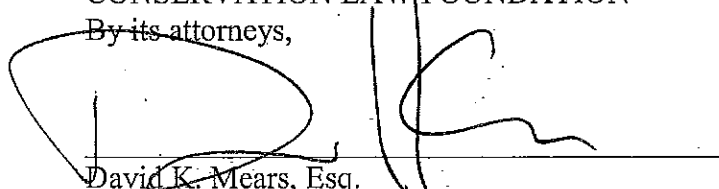
- b. The Ecoregion XIV guidebook provides strong support for imposing a stricter limit on total phosphorous.

The Ecoregion XIV materials add technical support for imposing a stricter limit on total phosphorous to ensure compliance with state water quality standards. When establishing water-quality based effluent limitations, EPA must consider a “wide range of materials, including nationally recommended criteria, supplemented by other relevant materials, such as EPA technical guidance and information[.]” *See Region I Memorandum*, at 16; *see* 40 C.F.R. §§ 122.44(d)(1)(vi)(A), (B). Ecoregion XIV provides information on nutrient levels that is both specific to the Blackstone River area, and relevant to determining the most appropriate nutrient limits for ensuring attainment of state water quality standards in this watershed. The Ecoregion XIV guidebook suggests that the limitation for Total phosphorous in the Blackstone River watershed should be no higher than 0.024 mg/l. *Fact Sheet*, at 9. While CLF does not propose that EPA set the limit at this level, the fact that the Ecoregion XIV guidebook suggests such a stringent limit provides strong support for adopting the 0.05 mg/l limit recommended by the Gold Book.

CONCLUSION

The District's permit fails to impose nutrient effluent limits that will ensure attainment of state water quality standards. We respectfully ask this Board to remand the permit to Region 1 with instructions to include more stringent nutrient effluent limits that will ensure state water quality standards. Region 1 must regulate the District's discharges to 0.05 mg/l for total phosphorous and to the limit of technology for total nitrogen, which is 3 mg/l. Further, to the extent that such technology will not ensure water quality standards, the Region must impose additional offsets to ensure compliance with the statutory mandate.

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I, David K. Mears, hereby certify that copies of the foregoing Reply, in connection with the 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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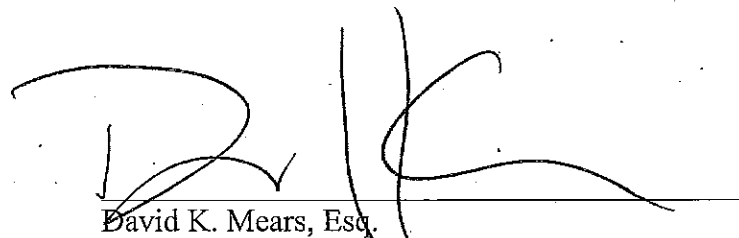
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