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October 13, 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
NPDES Appeal Nos. 10-09 through 10-12

Dear Ms. Durr:

Enclosed please find one (1) original of a Motion of the Permittee for Leave to Reply to Region 1's Opposition to Petitions for Review, along with a proposed brief reply, with respect to the above-referenced appeals.

Very truly yours,

Catherine Preston Connolly

CPC/

Enclosures

{Client Files\ENV\210986\0124\DOC\F0638281.DOC;1}

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

In re:	)	
	)	
UPPER BLACKSTONE WATER POLLUTION ABATEMENT DISTRICT, MILLBURY, MASSACHUSETTS	)	NPDES Appeal Nos. 10-09 through 10-12
	)	
	)	
NPDES Permit No. MA0102369	)	
	)	

MOTION OF THE PERMITTEE
FOR LEAVE TO REPLY TO
REGION 1'S OPPOSITION TO PETITIONS FOR REVIEW

Upper Blackstone Water Pollution Abatement District (the "Permittee" or "District") requests leave to submit to the Environmental Appeals Board (the "Board") a reply to Region 1's Opposition to Petitions for Review ("Opposition") of the Region'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." A proposed brief reply is provided with this motion. A brief reply will facilitate the Board's deliberation in the following respects:

1. Permittee should be allowed to respond to the procedural and substantive matters raised by the Region in its Opposition. Specifically, while the Region did insert in some places of the modified permit language limiting requirements "to the extent that the Permittee owns the separate sewer system," the Region did not put that language in the first paragraph of E. 3 which omission materially affects the requirements that follow. In addition, where the Region did include language limiting the obligations of the Permittee

it did not do so in a clear and complete manner, as the Region suggests. The Permittee should be given the opportunity to explain to the Board how the inclusion and exclusion of these words demonstrates the Region's failure to comply with the Board's remand order.

2. Permittee should also be allowed to respond to the Region's assertion that a permit requirement does not cause the Permittee to violate its enabling legislation. Specifically, the requirement that the Permittee must require its member communities to control discharges ignores its practical effect and the prospect that communities would refuse to do so, putting the District or the communities in violation of the permit. The Permittee should be given the opportunity to explain to the Board how this provision leads directly to the concerns about the Region's legal authority over satellite systems that led the Board to remand the co-permittee provisions.

3. The Region claims incorrectly that the Permittee did not properly preserve for review by the Board the "authorization to discharge" issue. The Permittee should be afforded the opportunity to respond and explain precisely the manner which this issue was raised and changed by the Board's remand and by the Region's permit modification.

4. Because the Region issued the Determination without any opportunity for the District (or others) to submit comments, the District's Petition was the first opportunity that the District had to raise any issue or concern regarding the modified permit. A brief reply will allow the District to correct misstatements of fact and law in the Region's Opposition. It will also allow the District to address mischaracterizations by the Region of the arguments presented in its Petition for Review.

This motion is timely, in that the Permittee first received the Region's Opposition on September 27, 2010. The Permittee's request for leave to reply is not merely an automatic response, but rather one reflecting the significance of the Region's errors, mischaracterizations, misstatements and new issues incorporated in the Region's Opposition.

The Permittee believes that a short reply would assist the Board as it will hone in on the key issues in contention in this appeal. The District's proposed reply is submitted with this motion. Should the Board issue an order allowing a reply, the District requests the Board consider the District's proposed reply in its review of this matter.

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

Robert D. Cox -cpc-

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October 13, 2010

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion of the Permittee for Leave to Reply to Region 1's Opposition to Petitions for Review, in connection with NPDES Appeal Nos. 10-9 through 10-12, were sent to the following persons in the manner indicated:

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Dated: _____

_____
Robert D. Cox, Jr., Esquire

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

In re:	)	
	)	
UPPER BLACKSTONE WATER POLLUTION ABATEMENT DISTRICT, MILLBURY, MASSACHUSETTS	)	NPDES Appeal Nos. 10-09 through 10-12
	)	
	)	
NPDES Permit No. MA0102369	)	
	)	

PERMITTEE'S REPLY TO
REGION 1'S OPPOSITION TO PETITION FOR REVIEW

Upper Blackstone Water Pollution Abatement District (the "Permittee" or "District"), hereby files this reply to the U.S. Environmental Protection Agency Region 1's ("Region 1" or the "Region") Opposition to Petition for Review ("Opposition"). In support of this reply and its Petition for Review, the District states as follows:

DISCUSSION

The Region has filed an opposition to the District's Petition for Review arguing that it should be denied for various reasons. The Region's Opposition, however, does not undermine the District's Petition, for three reasons. First, while the Region did insert in some places of the modified permit language limiting requirements "to the extent that the permittee owns the separate sewer system," the Region did not put that language in the first paragraph of E.3. Ex. B to Det. on Remand, page 2. That paragraph contains three requirements: (1) that the District develop and implement a plan to control infiltration and inflow (I/I) "to the separate sewer system," (2) that the plan describe the District's program "for preventing I/I related effluent limit violations, and all unauthorized discharges of wastewater," and (3) that the District is

"responsible to ensure that high flows do not cause I/I related effluent limit violations." *Id.* None of those obligations is limited to the 1,000 foot pipe owned by the District. Consequently, the Region has not complied with the Board's Order. The Region has "extend[ed] the Permit's requirements beyond what the District owns and operates" without providing the Board with legal authority to do so. Order, p. 19. Nor has the Region done what it said it would do to forgo imposition of co-permittee requirements in the Permit. It has not limited all obligations of the modified permit so that they apply only to the collection system owned by the District.

Second, even where the Region did add language limiting obligations of the District, it did not do so in a clear and complete manner. After the first paragraph of E.3., where the modified permit states what elements the I/I plan must include, the Region added, after "[t]he plan shall include," this language: "but only to the extent the Permittee owns the separate sewer system." Ex. B to Det. on Remand, page 2. There is no way to tell how that language applies to the required plan elements that follow. For example, the first element is "[a]n ongoing program to identify and remove sources of I/I." Does that mean only I/I sources that are responsible for direct contributions into the District's pipe, or does that also mean I/I sources into one of the municipalities' pipes, that then flow into the District's pipe? If the latter, then the Region has not made the change that it promised, and it has not complied with the Board's Order.[1] The same concern applies to the other listed elements of the I/I plan, including the inflow identification and control program and identification of areas that will provide increased aquifer recharge. Do those requirements apply only as to direct contributions to the District's pipe, or to any

[1] These co-permittee provisions were remanded because "[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.

contributions into any of the municipal collection systems as well? There is no way to tell, based on the permit language.[2]

Also, it is important to note that the listed elements at paragraph E.3 are all items that the plan "shall include." There is no indication there that these are the ***only*** things that must be in a plan; the plan still must meet the general requirements in the first paragraph of E.3. *Id.* So even if the Board were to find that the Region has appropriately limited the District's obligations as to the listed items through its "only to the extent" language, there is no question that the Region has not limited the overall, general obligations in the first paragraph.

Third, the last required element in the I/I plan - the requirement that the District must require the communities to control discharges to the POTW sufficiently to address high flows - has two problems. First, like the first paragraph, it does not contain any limitation that would apply it only to the District's own pipe. This provision was part of the District's original challenge on the co-permittee issue, mentioned by the Board on page 13 of its Order, so it is logical to surmise that if the Region was going to limit other requirements in Part E, it would have limited this provision too. It did not do that. Second, the Region's argument as to this provision - that it does not cause the District to violate its enabling legislation - ignores its practical effect. While the Region says in its Opposition that this provision merely requires the District to enter into agreements, Opposition, p. 12, it does much more than that. It requires the District "to require, through appropriate agreements, that all member communities control discharges to the permittee's POTW sufficiently...." Ex. B to Det. on Remand. The agreements

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[2] In its Opposition, the Region says that it "fully appreciates that the District's plan will not address all elements," suggesting that the Region's interpretation of its own modified permit is that it applies only to direct contributions to the District's pipe. The Region then goes on to state: "if the District is correct that certain sources of inflow/infiltration do not exist . . . , the identification and removal requirements of the plan should be easy to satisfy. Review should be denied." Opposition, p. 13. The Region's flippant response does nothing to clarify the scope of the modified permit and whether it applies to municipalities with collection systems who are "authorized to discharge" who were formerly identified as "co-permittees." As noted below, the issuance of a draft permit, subject to public comment, could have avoided unnecessary confusion and this appeal.

are just the mechanism specified. The real problem is the substantive mandate; that the District must require its members to take certain control actions. That is what the District cannot do. The communities may refuse to enter into any such agreements. They have no obligation to do so.[3] Would the District then have to attempt to take over operation and maintenance of its member community system? That would directly violate the enabling legislation, which says that the District cannot operate or maintain its members' systems. Moreover, this scenario also raises liability concerns for the communities. They are still listed in the permit as entities "authorized to discharge" to the District's system. If a community refuses to enter into an agreement with the District, is the community then liable under the permit for causing the District to violate its permit obligations? That would result in the exact legal authority concerns that led the Board to remand the co-permittee provisions to the Region in the first place. See Order, pp. 14-20.

The District, in its Petition for Review, raises several reasons why the permit provisions that include the satellite systems as entities with "authorization to discharge" are legally invalid. In response, the Region contends that the District is precluded from raising these claims because it did not contest the "authorization to discharge" provision in its original appeal. That argument ignores key aspects of the District's claims here, and also fails to recognize that by its action in issuing the Determination, the Region changed how the permit operates, and therefore changed the claims that the District needs to raise.

In the initial permit, several satellite communities were included in the "authorization to discharge," but that was the only provision that mentioned them. Other communities were included in that authorization, but the permit also provided that those communities were required

[3] The Towns of Millbury and West Boylston, and the City of Worcester, note in their petitions for review that it is not within the District's power to force their municipalities into any such agreement.

to comply with Parts D and E of the permit. In its comments and briefs, the District contested EPA's general authority to include satellite systems in the permit, and also specifically challenged the application of the Part D and E requirements to satellite systems. Since the only substantive requirements applied to the communities that were subjected to Parts D and E, the District's list of appealed provisions specified "Identification of Co-permittees for Part D and E." But that certainly did not mean that the District did not intend to raise its general concerns about EPA's legal authority to include the co-permittees in the permit. And clearly, the Board did not divine any such intent on the part of the District to limit its claims. The Board spent considerable effort reviewing the legal issues concerning EPA's authority, and eventually remanded the permit to the Region to provide an explanation of this broad issue: "[t]he Permit's co-permittee provision is remanded for the Region to reconsider the extent to which the NPDES requirements apply to collection systems 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. From that ruling, it is clear that the issue of which entities can be included in a permit's authorization to discharge is very much a part of this case. As explained in its Petition, the District believes that on this issue (and others), the Region's Determination failed to comply with the Board's Order.

The Region, in arguing for preclusion of the District's "authorization to discharge" claims, also ignores the ways in which its Determination changed the permit's structure and, therefore, the arguments that the District needs to, and is authorized to, raise before the Board in its Petition. In the initial permit, it was clear that the general authorization provision was functionally distinct from the additional provision that subjected the satellite systems to Parts D and E. See Ex. B to Det. on Remand, page 1. However, that distinction has been erased in the

modified permit. The Region took out the statement that certain communities are subject to Parts D and E. However, as explained in the Petition and elsewhere in this Reply, the Region's changes in other provisions of the permit appear to continue EPA's jurisdiction over and the liability for satellite systems that the Region claims it took out. And those provisions are not limited to only certain communities; the permit as written applies to those obligations to all communities that are covered by the general authorization to discharge. Therefore, that authorization to discharge now operates differently than it did in the initial appeal, due directly to the Region's action, in the Determination, to modify the permit. Since the Region issued the Determination without any opportunity for the District (or others) to submit comments, this Petition is the first opportunity that the District has had to raise these concerns. The District has not waived these arguments and should not be precluded from raising them before the Board.

Finally, as to the Region's argument that it did not need to seek public comment on its Determination on remand, the issues raised above make it obvious that public comment should have been requested. The Region claims that the Determination "simply removed the provisions that were on the table during the original public comment period and contested in the original appeals," and that the Region's action "flowed directly from the Board's order." Opposition, p. 16. However, as shown above, the change that the Region sought to make to the permit was not a simple removal of the appealed provisions, and it did not flow directly from the Board's order.

In complying with the Board's order, the Region had several options. The change that the Region made (which the District believes does not even comply with the Board's order) was not the only option that it could have chosen. Nevertheless, the Region claims that the District "never explains the purpose of additional public comment in this case." Opposition, p. 15. In

fact, it did[4] and the purpose of additional public comment here is obvious. The concerns raised in the District's appeal show exactly why comment should have been requested. Before dropping the co-permittee provisions, the Region should have taken comment on how to do it, and then considered the concerns and suggestions that would have been raised by the District, the member communities, and other stakeholders during the public comment period. Had the Region done so, these issues could have been resolved without the necessity of going back to the Board. Because the Region did not do that, the District must now ask the Board to enforce its original order, and send the permit modification back to the Region for reconsideration and with the specific direction remove all language which could be construed as applying to the separate collection systems not owned by the District and to conduct a public comment period before such modification is finalized.

There is one final factor that we believe the Board should consider in deciding whether to accept the District's Petition for Review. In its Order in this matter, the Board ruled that the Region had not yet set forth a clear legal basis for its attempt to include satellite collection systems in the NPDES permit for a publicly owned treatment works (POTW). Order, pp. 18-20. Rather than set forth an explanation of its legal authority in this area (which the District does not believe exists), the Region has chosen to change the permit in a manner that, according to the Region, removes the legal issue from the Board's consideration. It is worth noting that on June 1, 2010 (several days after the Board issued its ruling), EPA issued a Federal Register notice seeking stakeholder input on possible changes to the NPDES regulations concerning satellite collection systems and related issues. 75 *Fed. Reg.* 30395. In that notice, EPA asks the question: "Should EPA propose to require permit coverage for municipal satellite collection

[4] See District's Petition for Review, p. 13 ". . . had the District been afforded the opportunity to discuss the changes with Region 1 prior to their issuance . . . 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."

systems?" *Id.* at 303400. EPA states that it "is considering clarification of the framework for regulating municipal satellite collection systems under the NPDES permit program," and asks for comment on several questions, including "whether (and which) satellite collection systems should be required to obtain an NPDES permit." *Id.* It appears that rather than provide a legal explanation in this proceeding for the permit conditions that it sought to impose on the District and its satellite communities, EPA is seeking to shift the discussion of its legal authority to a rulemaking venue, where its decision will not be subject to review by the Board. The District believes that the issues remaining in this proceeding present important policy considerations that deserve continued Board review.

CONCLUSION

For all of the above reasons, and those set forth in the District's Petition, the Board should grant the District's Petition.

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

Robert D. Cox - CPC -

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Dated: October 13, 2010

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Permittee's Reply to Region 1's Opposition to Petition for Review, in connection with NPDES Appeal Nos. 10-9 through 10-12, were sent to the following persons in the manner indicated:

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