

Capital Reporting Company  
Oral Argument - 10.29.09

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

----- :  
: ORIGINAL  
IN RE: :  
: UPPER BLACKSTONE WATER :  
POLLUTION ABATEMENT DISTRICT, :  
: : NPDES APPEAL NOS.  
NPDES PERMIT NO. MA0102369 :  
: 08-11 TO 08-18  
: &09-06  
: :  
----- :

Washington, D.C.

Thursday, October 29, 2009

The above-entitled matter came on for ORAL  
ARGUMENT, pursuant to notice, at 1201 Constitution  
Avenue, Northwest, Washington, D.C., before  
Constance H. Rhodes, of Capital Reporting Company,  
a Notary Public in and for the Commonwealth of  
Virginia, commencing at 10:00 a.m., before the  
HONORABLE JUDGES CHARLES SHEEHAN, ANNA A. WOLGAST,  
and KATHIE A. STEIN.

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1                   A P P E A R A N C E S

2       On behalf of CONSERVATION LAW FOUNDATION:

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4           Conservation Law Foundation

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9       On behalf of THE ENVIRONMENTAL PROTECTION AGENCY:

10          KAREN MCGUIRE, ESQUIRE

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17       On behalf of THE MUNICIPALITIES:

18          ROBERT D. COX, ESQUIRE

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1 On behalf of UPPER BLACKSTONE WATER POLLUTION

2 ABATEMENT DISTRICT:

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8 (312)357-1313

9 On behalf of the MASSACHUSETTS DEPARTMENT OF  
10 ENVIRONMENTAL PROTECTION (MassDEP):

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12 Office of Energy and Environmental Affairs

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14 Boston, Massachusetts 02108

15 (617) 292-5500

16 ALSO PRESENT:

17 Eurika Durr

18

19 \* \* \* \* \*

20

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22

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1 P R O C E E D I N G S

2 MS. DURR: The Enironmental Appeals  
3 Board of the United States Environmental  
4 Protection Agency is now in session for oral  
5 argument in re: The Upper Blackstone Water  
6 Pollution Abatement District, NPDES Permit Number  
7 MA0102369, NPDES Appeal Numbers 08-11 to 08-18 and  
8 09-06.

9 Please turn off all cell phones and  
10 recording devices.

11 Please be seated.

12 JUDGE WOLGAST: Good morning. We're  
13 here pursuant to the Board order of September 23,  
14 2009, from which we will follow the time frames  
15 for each of the litigants' arguments this morning,  
16 in which Conservation Law Foundation will proceed  
17 first and have 15 minutes for argument. Then the  
18 District will proceed with 30 minutes of argument.  
19 Massachusetts Department of Environment, then 5  
20 minutes, and 10 minutes total for the  
21 Municipalities, followed by 50 minutes for the  
22 Region. Also pursuant to the order, the District

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1 and Conservation Law Foundation may reserve up to  
2 5 minutes for rebuttal. And as you proceed and  
3 introduce yourself for the record, please let us  
4 know if you're reserving time and, if so, how  
5 much.

6 Shall we begin with the Conservation Law  
7 Foundation.

8 MR. KILIAN: Thank you. Good morning.  
9 I am Chris Kilian. I'm the senior law program  
10 attorney for Conservation Law Foundation, and I'm  
11 joined by my co-counsel David Mears from the  
12 Vermont Law School Environmental Law Clinic, and I  
13 would like to reserve five minutes for rebuttal.

14 The Board should grant CLF's petition  
15 for review in this matter because both the facts  
16 and the law require implementation of  
17 limit-of-technology controls on nitrogen along  
18 with additional appropriate offsets to account for  
19 a main nitrogen-loads facility.

20 The facts indicate that the Seekonk  
21 River, which is the ultimate receiving water for  
22 discharge from the District with regard to

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1     nitrogen, is the most severely impaired segment of  
2     Narragansett Bay, and that's been cited both in  
3     EPA's materials as well as ours as well as Rhode  
4     Island's amicus brief and underlying record.

5                 Eelgrass beds have disappeared  
6     completely from the Seekonk River and the upper  
7     two thirds of the Narragansett Bay as one  
8     indicator that water quality standards are not  
9     met. Needless to say, from our perspective, there  
10    is no remaining facility capacity for nitrogen in  
11    the Seekonk River or Narragansett Bay. The Upper  
12    Blackstone facility accounts for 60 percent of the  
13    nitrogen limit to upper Narragansett Bay. It is  
14    the dominant and primary source of nitrogen to  
15    upper Naragansett Bay. The record clearly  
16    indicates that dramatic reductions in excess of  
17    the limit of technology for treatment at  
18    wastewater treatment plants and this facility will  
19    be required to obtain water quality standards  
20    compliance.

21                While the Region, in our opinion,  
22    appropriately relied upon MERL tank experiments,

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1 the record is clear that there is no uncertainty  
2 with regard to the fact that the permit limits  
3 necessary to obtain water quality standards  
4 require implementation of the limit of technology,  
5 and Region I should not be allowed to inject a  
6 perception of uncertainty where there is a known  
7 outcome. Water quality standards will not be met  
8 with a limit of five on nitrogen. Into this  
9 record --

10 JUDGE WOLGAST: As I understood your  
11 brief, your position is that the water quality  
12 standards in Rhode Island also will not be met if  
13 RIDEM criteria were adopted; is that correct?

14 MR. KILIAN: Well, that's not our  
15 position, well -- it is our position, but it's  
16 what the record in this matter states.

17 JUDGE WOLGAST: And when you say that,  
18 are you relying on the Rhode Island study?

19 MR. KILIAN: What I relied on -- I guess  
20 the Rhode Island study, as I understand it, is the  
21 2004 evaluation of nitrogen targets. And yes, I  
22 am relying on that study. And there are several

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1 statements in that study which underscore our  
2 position.

3 JUDGE SHEEHAN: You refer to the code of  
4 uncertainty by the Region in attainment of the  
5 standard, can you point specifically to where you  
6 find those uncertain notes in the record?

7 MR. KILIAN: Yes. On the page 23 of the  
8 Rhode Island study, there is a statement -- this  
9 is a quote:

10 The present regulations coupled with the  
11 analysis presented above indicate that, among  
12 other reductions, wastewater treatment facility  
13 nitrogen contributions must be reduced to the  
14 limit of technology in the Providence and Seekonk  
15 Rivers.

16 The second statement on page 24 --

17 JUDGE SHEEHAN: Well, must be reduced  
18 isn't a number, it's just an aspiration, isn't it?

19 MR. KILIAN: The second statement I  
20 would refer you to on page 24 says:

21 With WWTFs in the watershed reducing  
22 their loads to a level consistent with the limit



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1 of technology, where effluent TN is 3 milligrams  
2 per liter, enrichment levels in the area would  
3 range from 1.1X to 4.7X. The scenario is arguably  
4 quite similar to the no-WWTF case. For the next  
5 higher (TN equals five) case, levels in the Upper  
6 Providence River and Seekonk Rivers increased  
7 significantly to 8.0X above Field Points and to  
8 9.3X in the Seekonk River. These levels would not  
9 be acceptable as water quality levels in the area  
10 based on behavior observed in the MERL experiment.

11 Lastly, at page 27, the Rhode Island  
12 study states:

13 Based upon MERL enrichment gradient  
14 experiment, minimum DO levels of approximately 3.0  
15 and 2.7 mg/l are anticipated from the no treatment  
16 plant and limit of technology cases respectively.  
17 Lower values are expected for the Providence  
18 River, since it is stratified, and the MERL  
19 experiment was conducted under unstratified  
20 conditions. This analysis indicates that the  
21 limits of technology is required but will not  
22 fully meet existing water quality standards,

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1 minimum of 5.0 mg/l except as naturally occurs,  
2 and may not meet EPA guidelines recently  
3 recommended for waters from Cape Cod to Cape  
4 Hatteras.

5 JUDGE STEIN: How do you explain -- as I  
6 understand it, the State of Rhode Island has  
7 indicated that the number that EPA has arrived at  
8 is sufficient to ensure Rhodes Island water  
9 quality standards. How are we to evaluate the  
10 position of the State of Rhode Island as the  
11 downstream state as saying the number that the  
12 Region has set is sufficient goes against the  
13 assertions of that Rhode Island study?

14 MR. KILIAN: Well, I guess I would state  
15 that Rhode Island DEM and the representatives of  
16 Rhode Island DEM have filed a brief on behalf of  
17 Rhode Island -- Rhode Island by the way as well in  
18 their own prior studies -- and their studies, the  
19 underlying record in this matter, reflected in  
20 both the evaluation study that I've been reading  
21 from as well as the materials in the record with  
22 regard to the basis for issuance of the Rhode

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1 Island permits that have been the subject of much  
2 briefing, that record, that factual record,  
3 clearly indicates that the limit of technology at  
4 wastewater treatment plants implemented  
5 immediately 3 mg/l, as determined to be the limit  
6 of technology by Rhode Island, will not result in  
7 attainment of that state's water quality  
8 standards. That is the record that is before you  
9 and the Region was faced with. The Region should  
10 not be allowed by this Board to insert an  
11 amendment by argument or alleged discretion in the  
12 face of some uncertainty, which I do not see in  
13 this record, in the place of these definitive  
14 statements. That is the record that is before  
15 you.

16 JUDGE SHEEHAN: Well, you place a lot of  
17 weight on the MERL study, but even the Region  
18 indicates, or at least this indicates, it's not a  
19 perfect representation of conditions in the river;  
20 is that right?

21 MR. KILIAN: Well, there are two issues  
22 that have been referenced. One is stratification

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1 and the other is flushing rate. And we would  
2 concede that no model is perfect. In fact, the  
3 MERL model is not perfect. But there are  
4 additional factors cited in the key underlying  
5 study, the evaluation study, as a basis for  
6 talking about why these definitive conclusions in  
7 the MERL tank experiments are further underscored  
8 as appropriate determinations. And that's on page  
9 25 of the evaluation.

10           There are three factors cited  
11 specifically as underscoring the  
12 limit-of-technology statements in the record. One  
13 is historical data regarding eelgrass beds and  
14 other ecosystem conditions. There's a bullet  
15 point on that. The second are recently -- as of  
16 the time of this record's closure -- issued  
17 Massachusetts guidelines for their estuaries  
18 program. And the last is a recently-developed  
19 land-use loading model developed by Massachusetts  
20 as well. There is a key statement, again, from  
21 the study which I want to read based on this  
22 corroborating information:

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1           The following points underscore this  
2    decision" -- and there's the list -- "In the  
3    context of the existing information on water  
4    quality conditions needed to support State water  
5    quality standards and the designated uses of the  
6    area, a loading scenario consistent with the 2X to  
7    4X condition represents the goal for the area.  
8    The WWTF scenario that produces loads consistent  
9    with this goal would require WWTFs in the  
10   watershed to implement reductions to the limit of  
11   technology. DEM's interpretation of this limit is  
12   the TN=3 scenario, with plant flows at 90 percent  
13   of design values." That's on page 27.

14           So the underlying -- the additional  
15   corroborating information in this record was not  
16   used by Rhode Island DEM or cited by Rhode Island  
17   DEM as the basis for saying the MERL tank  
18   experiments are not appropriate or correct. TN  
19   equals 3 --

20           JUDGE WOLGAST: I don't understand their  
21   argument being it's not appropriate. I understood  
22   it to be it was their best analog to a more

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1 comprehensive waste load analysis or TMDL data.  
2 And given that the limit is sort of the inherent  
3 limitations of that, are you saying that the  
4 Region had no discretion to interpret the data in  
5 this context and apply its own scientific  
6 expertise?

7 MR. KILIAN: I'm saying that the  
8 uncertainty question, as discussed in the  
9 recently-issued Attleboro decision, should go to  
10 the question of whether or not the MERL  
11 experiments can be relied upon. And that has been  
12 decided by this Board in Attleboro. The  
13 corroborating information as cited in the record  
14 supports the more restrictive limit.

15 JUDGE SHEEHAN: What about the other  
16 documents on which the Region relied in the 2000  
17 study and the Gold Book of '86? Actually, there  
18 were two 2000 studies: "Ecoregional Nutrient  
19 Criteria" and "Rivers and Streams Nutrient  
20 Guidance." What about them?

21 MR. KILIAN: On the phosphorus question?

22 JUDGE SHEEHAN: For nitrogen.

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1                   MR. KILIAN: For nitrogen? Well, I  
2 think from our perspective, we're in a non-TMDL  
3 scenario. We have no TMDL. The water quality  
4 based effluent limitation regulations in those  
5 provisions of the Act apply, and this record is  
6 robust with regard to what is required to  
7 ultimately deal with wastewater treatment facility  
8 loads, and that will be limit of technology --  
9 from our perspective, consistent with the Board's  
10 decision in the Marlborough-Easterly case -- plus  
11 additional commitments to eliminate this  
12 facility's contribution of nitrogen to the Seekonk  
13 River. We don't have TMDL. We have robust  
14 information for developing water quality based  
15 upon the effluent limitation and statements in the  
16 record that are not equivocal. They're not  
17 uncertain. They say required, will be required.  
18 So I guess I would say that I would turn to that  
19 record and that factual information as a basis for  
20 saying -- the other information is more of a  
21 backdrop in this matter.

22                   JUDGE SHEEHAN: What about the point

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1     that the Region makes about the safety net of  
2     having a monitoring network to catch any  
3     additional problems and correcting them later?

4             MR. KILIAN: Well, I don't believe that  
5     the water quality based effluent limitation  
6     regulations or the prior precedents of the Board  
7     or the Act itself allows for an incremental  
8     approach where you have a record that is clear.  
9     And that is what -- and that is the case that's  
10    before you with regard to this facility. The  
11    statements I've read from the record and provided  
12    the citations to are oft-repeated. The only  
13    time -- I see I'm out of time. I apologize.

14            JUDGE WOLGAST: Go ahead and finish.

15            MR. KILIAN: Where we see equivocation  
16    in the record with regard to what the appropriate  
17    implementation approach is or plan is would be  
18    indicated also in the evaluation study, where  
19    there is discussion about cost efficiency. And  
20    there is a specific discussion in the evaluation  
21    study that talks about the fact that the five at  
22    the bigger plants and eight at other plants would



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1 be the most cost-efficient approach or step to  
2 take, you know, phased approach, at least as of  
3 today. But that is not an available avenue given  
4 the statement of facts here and the controlling  
5 law.

6 JUDGE WOLGAST: Well, you are out of  
7 time, but I wanted to quickly get your reaction to  
8 the Region's argument about the phosphorus  
9 standard and the use of the Gold Book analysis for  
10 free-flowing streams. They alleged that that was  
11 noticed and that you didn't comment on that  
12 choice.

13 MR. KILIAN: Well, I would say at the  
14 outset that we support the Region's conclusion of  
15 implementing the phosphorus standard in this  
16 matter. We raised in our petition that concern  
17 because it jumped out at us in the Region's  
18 response to our comments as a glaring concern.  
19 And if additional phosphorus limits are required  
20 here in order to conform with that guidance, then  
21 we wanted to make sure to raise that for the  
22 Board. Our primary effort here today is on the

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1     nitrogen standard. Thank you.

2                   And by way of a question, if I went over  
3     time, do I still have time for rebuttal?

4                   JUDGE WOLGAST: Yes.

5                   MR. KILIAN: Okay. Thank you.

6                   JUDGE WOLGAST: Next we'll hear from the  
7     District.

8                   MR. ANDES: Good morning, Your Honor.

9     My name is Fred Andes. I'm counsel for the Upper  
10    Blackstone Water Pollution Abatement District, and  
11    I would like to reserve five minutes for rebuttal.

12                  I was going to give you some background  
13    in terms of the facility we're talking about,  
14    including the fact that we've now completed the  
15    upgrade, \$200 million upgrade, that was initially  
16    planned in 2001. It is now operating. We think  
17    that is going to yield significant reductions even  
18    beyond the permit limits in the original permit  
19    limit. But let me go right to the issue raised by  
20    Conservation Law Foundation because it does touch  
21    on the nitrogen issues we have as well.

22                  The claim we've heard is that the

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1 District should be reducing to the limit of  
2 technology. As you're aware, there's simply no  
3 requirement for the limit of technology anywhere  
4 within the Water Act. The requirement that does  
5 apply, and we're asking for it to be implemented  
6 here, is that the District received limits needed  
7 to retain water quality standards, and our view of  
8 the record indicates two things. One is that we  
9 don't know at this point really what is needed.  
10 We don't even know if the standards can be  
11 attained. There really is no clear statement by  
12 the EPA that reductions from the District along  
13 with reductions from other sources will actually  
14 get to attainment of the nitrogen standards here.

15 JUDGE STEIN: Well, if that's the case,  
16 then how can they issue the permit?

17 MR. ANDES: We believe that instead of  
18 issuing the permit, they should have gathered  
19 additional information, including information from  
20 the District's performance under the original  
21 permit, to show -- because we believe that  
22 reductions made from that upgrade were substantial

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1 and have not actively been taken into account yet.  
2 We believe that there simply wasn't enough  
3 information yet for the Agency to move ahead with  
4 any reasonable certainty to determine the limit on  
5 the --

6 JUDGE SHEEHAN: So in the face of severe  
7 known impairment, et cetera, the Region should  
8 just sit on its hands and not do anything?

9 MR. ANDES: No, not at all. We believe  
10 there is scientific research going on right now,  
11 that a model is being developed; and in fact, the  
12 information will be available by the end of the  
13 year -- phosphorus and nitrogen. We believe the  
14 fact there is significant impairment -- there is  
15 no question about that -- doesn't mean that the  
16 Agency can move ahead in an arbitrary and  
17 capricious manner. We believe they still need to  
18 develop a sound technical basis for the permit  
19 limits, and that, we believe, they have not done.

20 JUDGE SHEEHAN: And why do you think the  
21 Region didn't develop a sound technical basis?

22 MR. ANDES: Well, on nitrogen, we think

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1 the primary problem, not the only one, is that  
2 they relied on the MERL study at the same time  
3 that they, in essence, dismissed its conclusions.  
4 They want to put it up there as support for their  
5 findings and yet they say they're -- it's clearly  
6 in the record that both EPA and DEP Rhode Island  
7 in the study indicate that we know this study --  
8 for example, they say that these differences from  
9 a natural setting may overestimate the impact of  
10 given loads. They say that problems when  
11 encountering modeling interactions in the water  
12 body -- we are unable to simulate the chemical and  
13 biological behavior of the system. They say that  
14 the physical model does not generate a definitive  
15 level of nitrogen control that can be applied to a  
16 real world discharge.

17 JUDGE SHEEHAN: But is the definitive  
18 level standard the standard? Doesn't the Region  
19 have the discretion to do as well as it can to  
20 come up with a good standard?

21 MR. ANDES: Well, we think there is a  
22 dividing line. We can't simply say in every case,

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1 well, they've done as well as they can; and  
2 therefore, it has to work. There has to be a  
3 point where you say, you know what, you have  
4 information, and it's not enough, particularly  
5 when the Agency itself, in responding to CLF's  
6 argument says, well, we don't really have that  
7 much confidence in the study and the model. Okay.  
8 If you don't have that much confidence, you  
9 shouldn't have used it, you should have gone out  
10 and collected additional information so you really  
11 have a reasonable level of confidence in your  
12 conclusions. We don't think they really have  
13 that.

14 JUDGE WOLGAST: Mr. Andes, how is this  
15 different from our recent decision in Attleboro?  
16 I mean there, also, we were dealing with compared  
17 water bodies where there hadn't been a  
18 comprehensive wastewater allocation done. There  
19 hadn't been a DMPL performed, and yet we found  
20 that the Region could fill the gap even given  
21 these uncertainties.

22 MR. ANDES: Right. In terms of

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1 Attleboro, we should first sort of put aside  
2 phosphorus and aluminum issues because, while  
3 there were some phosphorus and aluminum issues in  
4 that case, they were very different than the  
5 issues raised here. As for nitrogen, we've  
6 reviewed this issue carefully, you can imagine.  
7 And we believe there is one argument that is  
8 really on all points with one of our arguments,  
9 which is the flushing-rate issue, which we still  
10 believe is a valid issue. But the flushing issue  
11 problem in the Seekonk River, we believed was  
12 raised in Attleboro and was disposed of. So we  
13 are not pursuing that further. But the main  
14 argument in Attleboro in terms of the model is  
15 different in significant ways than the argument we  
16 raised. Our reading of the Attleboro argument  
17 made by the City was you should not have relied on  
18 the physical model, you should have relied on the  
19 Kester model instead. We specifically said in our  
20 briefs we don't know enough about the Kester Model  
21 to say whether in fact it's a good model to use  
22 here. Our argument instead was -- and raised in

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1 our comments -- that here where EPA has said in  
2 the record, A, this information is not sufficient  
3 to do a TMDL for the Bay -- I just read you  
4 statements about the behavior --

5 JUDGE SHEEHAN: Are you saying it's not  
6 sufficient or it's not perfect?

7 MR. ANDES: We're saying --

8 JUDGE SHEEHAN: Nothing is perfect.

9 MR. ANDES: Understood. Nothing is  
10 perfect. We're saying that by the Agency's own  
11 admission and the statements from the study, it's  
12 not the issue in Attleboro -- which is, well, you  
13 should used this one instead of this one. We're  
14 saying that the MERL study, based on these  
15 statements, including the statements made in  
16 response to CLF where the EPA has said, well, we  
17 don't really believe in the study all that much,  
18 we think that altogether says -- and particularly  
19 when you say, well, we can't do a TMDL, but we can  
20 do a permit limit. There's nothing in the Water  
21 Act that says, well, all right, so the level of  
22 scientific technology you need for those two is



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1 different. You need less of a substantial basis  
2 to do a permit limit than a TMDL. We said -- so  
3 when you look at all that, our argument is we  
4 don't think that the MERL model, based on these  
5 statements in this record, that EPA has really a  
6 substantial basis for regulation by its own  
7 statements.

8 JUDGE SHEEHAN: Do you have a different  
9 opinion technically about the decision reached by  
10 EPA about what the limit should be? Reasonable  
11 minds may differ? Is that your argument?

12 MR. ANDES: No. Because, in fact, we  
13 have not said that we think, well, it should be X  
14 instead of Y, because we don't think that the  
15 information is in the record to document, first,  
16 how they can attain standards in this watershed,  
17 and what is the necessary limit for Upper  
18 Blackstone to be able to get us there. We don't  
19 think that information is there in the record yet.  
20 We think that needs to be developed. There are  
21 models being developed. There is information out  
22 there that we think if the Agency, as we've been

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1 saying all along -- would engage in a dialog on  
2 that, that we would come to a set of limits --  
3 and I'm not saying it has to be but it clearly  
4 has to be a sufficient analysis to support the set  
5 limit. And we think that can be done.

6 JUDGE WOLGAST: Okay. I want to be  
7 clear about your argument. Are you saying,  
8 notwithstanding our opinion in Attleboro, that the  
9 application of the MERL model in this case is a  
10 basis for error?

11 MR. ANDES: Yes. We also believe, in  
12 terms of other issues, there are other parts of  
13 their nitrogen analysis here that are problematic.  
14 One in particular was with respect to delivery  
15 rates, which is not an issue. This was definitely  
16 a factor in Attleboro, where there were several  
17 studies. The initial study said that the delivery  
18 rate should be 87 percent. We commented and said,  
19 well, that doesn't consider other sources. EPA  
20 responded, well, there's another report that does  
21 consider other sources and that says 73 percent.  
22 But we're going to make it 87 percent anyway. And

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1     that makes an enormous difference. That makes the  
2     difference between a 5 milliliter limit and a 7  
3     milliliter limit, which we think we could probably  
4     meet right now. So we think that issue also,  
5     which was not touched by Attleboro, is sufficient  
6     to overturn the limits and remand down for  
7     re-examination.

8                     I'm not aware of how much time I have  
9     left.

10                    JUDGE WOLGAST: You have about fourteen  
11     minutes. Well, you're reserving your time, so  
12     about ten minutes.

13                    MR. ANDES: Thank you. In terms of  
14     phosphorus, our argument on that has been  
15     basically that the Agency's selection of the .1  
16     number was again without any basis here. What EPA  
17     actually said of phosphorus, well, there are a lot  
18     of numbers out there nationally, and we'll pick  
19     one; and Upper Blackstone, you should be okay  
20     because it's not the most restrictive one.  
21     There's no examination at all there of what's --  
22     not even to the level of nitrogen -- there's no

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1 examination of what's the right number of this  
2 segment, what's the right number for the Bay,  
3 what's the right number for this watershed. It is  
4 simply taking a bunch of numbers that are out  
5 there around the country and picking one, and  
6 saying, well, we think that makes sense. We think  
7 that is particularly problematic given that there  
8 is additional information being developed on  
9 phosphorus. It will be available by the end of  
10 the year. We think, again, if the EPA waited and  
11 used that information, it could have developed  
12 numbers. We're saying in all of these issues, not  
13 that there shouldn't be limits -- we understand  
14 that this plant would get nitrogen and phosphorus  
15 limits -- what we are questioning is the specific  
16 limits that the Agency developed.

17 JUDGE SHEEHAN: Why didn't the Region  
18 directly apply the Gold Book effect standard in  
19 setting the phosphorus limit?

20 MR. ANDES: We think that by simply  
21 citing to -- oh, well -- if you're referring to  
22 the argument by CLF in terms of whether they

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1 applied a .5 or 1.0, our issue really is not that.  
2 Our issue was that we think that rather than  
3 relying on .1, we thought what they should have  
4 done is actually looked at this situation, looked  
5 at phosphorus and determined what levels of  
6 phosphorus really needed to be in this watershed.

7 JUDGE SHEEHAN: What about looking in  
8 the Gold Book to make that call and some of the  
9 other criteria the EPA's entitled look at?

10 MR. ANDES: Well, we think they're  
11 entitled to look at them, but we don't think that  
12 it's simply look at information on the national  
13 level, including the Gold Book, and just impose a  
14 number without any examination of what's going on  
15 with this watershed. On nitrogen they clearly did  
16 that. We quarrel with how they did it, but there  
17 is no question they actually looked at information  
18 in that water body. With phosphorus, they really  
19 didn't do that, they just picked a number.

20 JUDGE SHEEHAN: Isn't the District the  
21 dominant phosphorus discharger here into the  
22 Blackstone at that point?

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1                   MR. ANDES: Yes. But we think that the  
2     issue at hand is what's the right water quality  
3     target. And there's no question that we're saying  
4     the District would need to make significant  
5     reductions. In fact, we think that the reductions  
6     that have been made already through the upgraded  
7     facility that is now online are in fact  
8     significantly more than was required in that  
9     permit, and. We think that that's part of what  
10    needs to be addressed are the reductions -- what  
11    role do the reductions we've already made play in  
12    this process. And it's really not there.

13                  JUDGE STEIN: Didn't you have an  
14    opportunity to put all that information into the  
15    record, however? I mean we're dealing with a  
16    permit that was issued many years ago, and -- I  
17    mean I've been through your briefs, and what I  
18    hear is, well, let's wait. And it strikes me that  
19    the original permit has been around for quite a  
20    while, and I'm having difficulty seeing the  
21    justification for waiting when you had the  
22    opportunity to put into this record all of your

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1 claims about where you are in terms of progress,  
2 in terms of your efforts. What's missing?

3 MR. ANDES: Your Honor, what was missing  
4 was the fact that the upgrade that we were given  
5 eight years to complete was completed on time in  
6 August of this year. Until we completed the  
7 upgrade, EPA data -- and EPA provided data  
8 saying, well, your phosphorus numbers for 2003  
9 weren't so good. Well, we were in the midst of  
10 doing the upgrade. The upgrade now is complete.  
11 The facilities have been turned on. Now is the  
12 time when actually we are starting to get data  
13 showing the real improvements, including getting  
14 down, in fact, significantly below those original  
15 limits. So until we had the upgrade complete, we  
16 really couldn't provide additional information in  
17 terms of how we were going to perform.

18 JUDGE WOLGAST: Mr. Andes, as to time, I  
19 misspoke earlier. You have 11 minutes remaining,  
20 and you should find it in the right-hand corner of  
21 your monitor right there.

22 MR. ANDES: Thank you.

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1           In terms of aluminum, our other issue,  
2   there are really two points that we've been making  
3   here. One of them is that, in essence, the Agency  
4   has been -- careful evaluation of the aluminum  
5   data shows that this facility should not receive a  
6   permit limit for aluminum. The Agency has gone  
7   back and forth in terms of which data it's  
8   evaluated. It's admitted errors in evaluating the  
9   data. First, it said it evaluated the data a  
10   certain way -- it didn't exclude certain data, and  
11   it turned out it did. There is one major data  
12   point, an outlier of 344 micrograms per liter, and  
13   we feel they should exclude it. It makes all the  
14   difference when you exclude that data point. We  
15   do not have reasonable potential, and we think,  
16   therefore, if the Agency looked at the data  
17   carefully and evaluated it in the way that their  
18   guidances talk about doing, including excluded  
19   outliers, they should have concluded there was no  
20   limit required.

21           JUDGE WOLGAST: Would you address the  
22   point that the Region made in its surreply that



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1 said that you failed to preserve the issue of  
2 challenging the 344 mg/l data point?

3 MR. ANDES: Sure. Our initial -- the  
4 issues in terms of the looking at the 344 never  
5 came out until the responsive comments from the  
6 Agency. In our initial review and in our comment,  
7 what we said was, look, if you look at the data  
8 carefully -- and we showed them exactly how we  
9 proposed looking at the data -- it was clear that  
10 a limit was not needed. They had considered some  
11 data and not considered other data. We questioned  
12 whether they were considering the right data and  
13 what their basis was for excluding certain data.  
14 We had concern that they were including data which  
15 should not have been included and vice versa. So  
16 the Agency, in response to comment says, well, we  
17 went back and we reevaluated the data and we  
18 considered some new information and did another  
19 analysis, and now we come out showing you have  
20 more potential. Well, we looked at that new  
21 argument, that new analysis they did, and said,  
22 well, wait a minute, we always conceded that that

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1 344 was out there. We never thought that you were  
2 going to include it in terms of doing that  
3 analysis. Now, when we look at your new analysis  
4 in the response to comments and we start picking  
5 it apart, we see a number of problems, including  
6 the use of the 344.

7 JUDGE WOLGAST: Was it correct, as the  
8 Region alleged in their surreply, that you had  
9 asked -- the District had asked that data between  
10 2004 to 2008 be included in the analysis, and  
11 would then this data point fall in that range?

12 MR. ANDES: Oh, absolutely. July 9th,  
13 2007. But when we said initially in our comments,  
14 well, if you look at the whole database -- when  
15 our engineers took a look at the whole database,  
16 that doesn't mean that they take every data point,  
17 and they don't do any fundamental screening like  
18 looking at outliers and excluding them. Our  
19 initial argument was premised on if you look at  
20 this data, it is clear that we were below the  
21 levels in the Upper Blackstone. And in fact, it's  
22 the levels we believe are naturally occurring. So

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1 our levels vary with the ambient levels. That was  
2 our initial argument. When they came back and  
3 said, well, we looked at the data in a different  
4 way. They still didn't evaluate all the data.  
5 And they still excluded some things, and they  
6 included the 344. We said, well, oh, okay, well,  
7 you're redoing that reasonable potential analysis,  
8 and you're excluding some data, which we  
9 contested, and you're including the 344. Now we  
10 have a problem. So in our initial suggestion that  
11 they had sort of picked and chose from the  
12 database and they shouldn't do that, we didn't  
13 say, oh, and by the way, make sure to include all  
14 your outliers. We felt the Agency should pursue  
15 their own values in response to them by not  
16 including certain data points as you go through.  
17 It just didn't come off until we saw that they  
18 were including that data point and said, well,  
19 wait a minute. Now, if you're going to do an  
20 evaluation, you're including data we think you  
21 shouldn't.

22 JUDGE SHEEHAN: What about the argument

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1     that Massachusetts is silent as to what the  
2     limited standard might be, site-specific or  
3     otherwise? Rhode Island has set the standard at  
4     87, and the standard set by the Region here is 87.

5             MR. ANDES: Well --

6             JUDGE SHEEHAN: It would seem like  
7     it's -- certainly it's not unreasonable for this  
8     Region to adapt it as it did here in setting the  
9     87 limit.

10            MR. ANDES: Our point beyond the  
11     reasonable potential issue, in terms of the 87,  
12     was that we thought it's pretty clear from the  
13     charts we provided that the levels were naturally  
14     occurring. In the response, the EPA said, well,  
15     it's not a direct correlation, which I think is  
16     not an answer at all. The charts show that  
17     basically our levels and the naturally occurring  
18     ambient levels rose and fell pretty much in sync.  
19     So we think they simply did not engage on that  
20     issue, which was, if they were naturally  
21     occurring, then the level should be set at that  
22     level. The Agency didn't contest that. It simply

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1 contested what we said actually I think in a way  
2 that didn't deal with our data at all.

3 JUDGE SHEEHAN: Doesn't Massachusetts  
4 law say that if the State is silent on the issue,  
5 then you go to the 2002 National Water Criteria,  
6 which the Region arguably did here, plus the fact  
7 that you have your break downstream Rhode Island  
8 with an 87 standard. That certainly makes the  
9 Region look reasonable here. How do you answer  
10 that?

11 MR. ANDES: Well, what the Massachusetts  
12 regulation talked about is that in meeting the  
13 87 -- unless the DEP determines that it's  
14 naturally occurring. We submitted in our comments  
15 the information we felt showed it wasn't naturally  
16 occurring.

17 JUDGE WOLGAST: From what source?

18 MR. ANDES: The data?

19 JUDGE WOLGAST: No, no. I'm sorry.  
20 What did you allege was the source of the  
21 naturally occurring presence of aluminum?

22 MR. ANDES: Our feeling was that we

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1     cited to documents, I believe, from CLF. We felt  
2     that there is evidence of significant amounts of  
3     aluminum leaching out of the soils in this area,  
4     and that while we couldn't speculate in terms of  
5     example how this all occurs, it is clear that  
6     putting aside other sources, that the ambient  
7     levels of aluminum were pretty high.

8             I'd like to reserve the balance of my  
9     time unless there are further questions.

10            JUDGE WOLGAST: You will have five  
11     minutes for rebuttal. You're saying that you want  
12     to the reserve the four minutes?

13            MR. ANDES: So I have four minutes plus  
14     the five minutes; is that what you're saying?

15            JUDGE WOLGAST: Yes. That's fine.

16            MR. ANDES: Thank you.

17            MR. FALLON: Good morning. My name is  
18     MacDara Fallon, and I'm here with our co-counsel  
19     Karen Crocker. I represent the Massachusetts  
20     Department of Environmental Protection. Thank you  
21     for giving us the opportunity to present to you  
22     our argument on why we feel the Board should

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1 exercise its discretion and grant review of its  
2 draft permit from Region I.

3 I'd like to point out that this is the  
4 first time the MassDEP has appealed to Region 1  
5 NPDES permit where we dispute the manner in which  
6 the Region has proposed to amend an effluent  
7 limit. The permit in this matter, as drafted,  
8 proposes a nitrogen limit in a manner that is  
9 clear error of law and contrary to the claimed  
10 nitrogen regulations. In addition, in the  
11 imposition of a nitrogen limit as drafted would  
12 violate long-standing EPA policies as expressed in  
13 both EPA guidance and in the order of compliance  
14 and settlement agreement which was previously  
15 entered into for this facility.

16 Massachusetts is non-delegated state for  
17 NPDES permitting purposes. We recognize we are  
18 not the permitting agency, the Region is.  
19 However, we issue of our own independent permits  
20 that must comply at least with the minimum  
21 standards set forth in the Region I permit. We  
22 believe the approach taken by Region I in not

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1 applying the mandatory regulatory requirements, of  
2 Section 122.45(f)(1), is wrong as a matter of law,  
3 and the result of the imposition of improper  
4 federal standard on the Massachusetts permit.

5 Contrary to what is implied in the  
6 Region's brief, Massachusetts is committed to  
7 having a permit that will meet Rhode Island water  
8 quality standards. However, we're committed to  
9 having that standard met considering both federal  
10 regulations and federal policy.

11 We assert that the Region's clear error  
12 of law, as set forth in our brief, is that section  
13 122.45(f)(1) is a mandatory requirement; that is,  
14 that all pollutants shall have limitations,  
15 standards, or prohibitions expressed in terms of  
16 mass. There are three exceptions to those named.  
17 The Region relies upon the permit's segment  
18 section. However, the Region fails to articulate  
19 how the applicable Rhode Island narrative  
20 standards and limitations are expressed in any  
21 other unit of measurement other than mass. I  
22 believe it is undisputed that Rhode Island's



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1 narrative criteria does not have an express  
2 standard and limitation in other units of measure.  
3 Region I committed a clear error of law when it  
4 improperly extrapolated a different unit of  
5 measurement for nitrogen other than the  
6 measurement of mass.

7 JUDGE SHEEHAN: Do you concede that the  
8 Region has discretion to apply the limit in terms  
9 of concentration in its discretion?

10 MR. FALLON: Yes. But that, I don't  
11 believe, is what happened here.

12 JUDGE SHEEHAN: And why was it an abuse  
13 of discretion for the Region to conceivably use  
14 concentration instead of mass?

15 MR. FALLON: It didn't apply the  
16 proper -- well, at this point on the regulatory  
17 requirement, it did not apply the proper  
18 regulatory standard. We believe it's abuse of  
19 discretion that the Region applied a concentration  
20 unit of measure as opposed to EPA policy, in terms  
21 of encouraging water conservation, and also we  
22 believe it goes against the expression of policy

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1 in the settlement agreement and the order for  
2 compliance that was issued for this facility.

3 JUDGE SHEEHAN: But if the Permit  
4 Writers Manual allows the Region to use  
5 concentration that it might attain greater  
6 treatment efficiencies, why is that wrong here?

7 MR. FALLON: Because we don't believe  
8 they actually followed the regulatory process they  
9 should have followed under section 122.4 -- I'm  
10 sorry 122.44(d)(1).

11 JUDGE SHEEHAN: Can you be specific  
12 about that -- that will help -- your rationale for  
13 that?

14 MR. FALLON: Well, I believe it is quite  
15 simple. We think that the regulation requires  
16 that mass be used unless there is some other unit  
17 of measure in other water quality standards. Here  
18 the Rhode Island narrative criteria does not have  
19 any unit of measure; therefore, we use mass.

20 THE COURT: So the Region's hands are  
21 tied? They cannot use concentration?

22 MR. FALLON: We believe they could use

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1 concentration in mass under the regulations. And  
2 that is allowed, but we don't believe that was the  
3 method that they followed here in reaching their  
4 conclusion.

5 JUDGE WOLGAST: Well, what would be the  
6 practical effect here in using mass versus  
7 concentration?

8 MR. FALLON: Well, mass allows more  
9 flexibility for the facility to operate where they  
10 are actually discharging. It doesn't penalize the  
11 facility for discharging underneath its allocated  
12 effluent discharge, and we believe it's strictly  
13 required by the regulations and that it wasn't  
14 actually followed, and it should have been  
15 followed when it went through this permitting  
16 process. We believe EPA had a tough decision in  
17 coming to this conclusion, but they skipped the  
18 mandatory regulatory requirement to consider mass  
19 over concentration and just jumped over that and  
20 said we are going to impose a concentration unit  
21 because we believe that's the best thing to do.  
22 Does that answer your question?

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1           The other things you want to refer to --  
2   and we actually refer to it in our brief -- are  
3   Permit Writers' Manual, also, the policy  
4   consideration that was set forth by the settlement  
5   agreement and the compliance order. There is no  
6   limitation of on nitrogen put in place at that  
7   point. Both the MERL study and Rhode Island  
8   Department of Environmental Management report were  
9   in effect at the time those documents were issued.  
10   Those documents were issued in the public  
11   interest, and had have no limitations on nitrogen  
12   at that time.

13           I see I am out of time. Just in  
14   conclusion, we suggest there is a clear error of  
15   law based on the wrong standard of concentration  
16   over mass. We believe there is a violation of EPA  
17   policy. We ask that you exercise your discretion  
18   and grant review of this permit and remand it to  
19   the Region for modification.

20           JUDGE SHEEHAN: One further question.  
21   Did you timely challenge the use of the MERL study  
22   in your comments? Did you raise that point then

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1 or did you not?

2 MR. FALLON: I believe we did. Your  
3 Honor, I'm drawing a blank on the actual reason  
4 that we did. I believe the District did. I'm  
5 drawing a blank on the actual comments that were  
6 made regarding the study.

7 JUDGE WOLGAST: Thank you. Now we'll  
8 hear from the Cities.

9 MR. COX: Good morning. My name is  
10 Robert Cox, and I'm counsel for the District, but  
11 I'm presenting to you this morning and speaking to  
12 you on behalf of the four petitioning District  
13 members, City of Worcester, the towns of Holden,  
14 and Millbury, and Cherry Valley Sewer District  
15 with respect to the co-permitting issue.

16 The four petitioning District members  
17 are owners and operators of sewer lines which  
18 deliver wastewater to the District facility for  
19 treatment and then discharge to the Upper  
20 Blackstone River. The four petitioning District  
21 members as well as the District seek to have this  
22 Board strike the co-permits at issue from the

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1 permit. They seek -- or we seek to have it  
2 stricken for the simple reason that the Region,  
3 the Agency, has no authority to make them  
4 co-permittees.

5           The EPA claims that the Clean Water Act  
6 in the definition of treatment works -- which  
7 broadly includes the words sewer; it also includes  
8 the words sewage collections systems -- gives it  
9 the power to make the owners and operators of  
10 sewers subject to a permitting authority. While  
11 certainly the definition which the EPA and the  
12 Region cite to does include a reference to sewers  
13 within treatment works, that does not make an  
14 owner and operator of a sewer a permittee. What  
15 is missing from the EPA's analysis are the  
16 operative terms, the terms which trigger  
17 permitting, and these are the discharge of a  
18 pollutant. That term is defined to mean, quote,  
19 "any addition of any pollutant to navigable waters  
20 from any point source."

21           The four petitioning District members do  
22 not discharge from a point source. They send

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1 wastewater through sewer lines to the District for  
2 treatment. The town where I live, the town of  
3 Rutland, has its own sewer lines, which are  
4 connected to a sewer line owned and operated by  
5 the Massachusetts Department of Conservation and  
6 Recreation, DCR. The DCR line goes through the  
7 Town of Holden. That line connects to a line in  
8 Worcester, and the Worcester line then connects to  
9 the District. The District then discharges the  
10 wastewater at a point source. It is this action,  
11 the action of discharging at a point source, at  
12 the Upper Blackstone River, that triggers the  
13 permitting and not, as the EPA would have it, the  
14 mere ownership of the sewer line -- ownership or  
15 operation of the sewer line that provides the  
16 conveyance for the treatment of discharge. This  
17 is --

18 JUDGE WOLGAST: May I ask you, what  
19 otherwise requires -- say, hypothetically, you're  
20 not a co-permittee, what otherwise requires the  
21 cities to address inflow and infiltration into the  
22 POTW?

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1 MR. COX: The relationship with the  
2 District, with the District, as the members. It  
3 is urging them, as well as the municipalities, to  
4 address I&I. The municipalities have been  
5 addressing I&I through various funding mechanisms,  
6 to study and investigate it and to prevent  
7 additional I&I from occurring.

8 JUDGE SHEEHAN: That doesn't sound like  
9 any kind of a regulatory call.

10 MR. COX: No. It is not. There is not  
11 a regulatory call -- regulatory provision to do  
12 it. The mechanism -- I would not want this to be  
13 brought upon my towns -- but the mechanism may be  
14 enforcement. If there is a discharge from a line  
15 that enters or gets into navigable waters.

16 The point that I'm making here with  
17 respect to the permittee must be the entity that's  
18 discharging from a point source is borne out by  
19 the regulations themselves. In subpart B,  
20 entitled permit application requirements -- it's  
21 section 122.21 -- it provides, quote, "Any person  
22 who discharges must submit an application, must



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1 submit a complete application according to the  
2 section." It's what the District did, but not  
3 what the four petitioning District members did.  
4 They never applied. They never signed on the  
5 application form. They never authorized the  
6 District when it submitted its application to be a  
7 participant or co-permittee. The Region, the EPA,  
8 claims, well, that doesn't matter. It can permit  
9 regardless.

10 JUDGE SHEEHAN: Is it your argument that  
11 a discharger has to apply in order to be  
12 regulated?

13 MR. COX: That's the way the regulations  
14 read.

15 JUDGE SHEEHAN: So if the discharger  
16 doesn't apply, the discharger cannot be touched by  
17 the regulatory body?

18 MR. COX: Discharger from a point  
19 source.

20 JUDGE SHEEHAN: So it's up to the  
21 discharger to basically trigger the regulatory  
22 regime. If the discharger doesn't step up and

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1 sign an application, send it in, the regulating  
2 authority cannot touch a discharger into a  
3 water --

4 MR. COX: They cannot touch an entity  
5 that provides the conveyed system.

6 THE COURT: That's a different question.

7 MR. COX: No. I'm stating it  
8 differently, because discharge, the way it's  
9 defined in the regulations, is discharge of a  
10 pollutant to a navigable water. So the only  
11 entity that is doing that here is the District  
12 that is discharging from their pipe that goes into  
13 the --

14 JUDGE STEIN: But don't they discharge  
15 to the POTW, which in turn discharges, so that  
16 what flows into the District's POTW has a source  
17 in the these towns -- has an original source in  
18 these towns?

19 MR. COX: They discharge in the sense  
20 that wastewater most certainly is sent down the  
21 pipes, but in connection with the definitions  
22 under the Act in the regulations, that is modified

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1 and controlled by the discharger from a point  
2 source to a navigable water.

3 JUDGE WOLGAST: But you say that the  
4 Cities didn't apply -- and I think that's  
5 undisputed -- but isn't it also clear that the  
6 Cities have been on notice since the 2001 permit  
7 that the Region felt that inflow and infiltration  
8 issues were very significant and a very  
9 significant issue to be addressed in terms of not  
10 meeting water quality standards by the POTW  
11 itself?

12 MR. COX: That's correct. And that's a  
13 matter of record. I think the municipalities have  
14 been very active in addressing that to the extent  
15 that it can with the limited financial resources.  
16 As I said earlier there have been grants and  
17 monies to address I&I issues. Various studies  
18 have been done. Worcester has 450 miles of sewer  
19 which needs to be addressed and to be examined in  
20 order to deal with the I&I issue.

21 JUDGE STEIN: But putting yourself in  
22 the Region's shoes, they're issuing a permit to

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1 the District. We know that these towns contribute  
2 discharge to the POTW. We know that there are  
3 issues associated with this discharging. Your  
4 position is there's no authority whatsoever on the  
5 part of EPA to look to those tasks, and yet when  
6 they look to the District; what's the District  
7 going to say? I'm not responsible; that's the  
8 towns' responsibility. How does that scheme make  
9 sense?

10 MR. COX: Well, it makes sense because  
11 it's what the law provides. In order to --

12 JUDGE STEIN: Does it make environmental  
13 sense?

14 MR. COX: It makes environmental sense  
15 in that we have all parties here looking at the  
16 issue and trying to address the I&I. The  
17 municipalities are certainly aware of it and are  
18 trying to address it. DEP is working with the  
19 municipalities to address it. EPA is encouraging  
20 and helping the municipalities work with it as  
21 well as the District. So in that sense it does  
22 make sense to have all these parties looking at

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1 it.

2 But the issue here is the authority of  
3 the Agency to bring these parties in as  
4 co-permittees. There is none. And what the EPA  
5 says is that the co-permittees need not apply,  
6 that they need not consent, that EPA need not even  
7 get the right entity that owns the properties.  
8 That read, however, leaves out of the regulations  
9 this whole section, subpart B, section 122.21,  
10 which sets forth the permit application  
11 requirements. And that just make no sense, and  
12 it's consistent with the statute to require or  
13 bring together the discharge of pollutants from a  
14 point source to navigable waters to be the  
15 triggering mechanism with respect to permitting.

16 For these reasons, we ask -- we ask that  
17 this Board strike the co-permitting issue or  
18 remand it back to the Region in order for it to do  
19 the same.

20 JUDGE STEIN: Am I correct in  
21 understanding that there are other permits in  
22 Massachusetts that the Region has issued -- and

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1 perhaps I should address this to the Region --  
2 that involved co-permittees on the permits?

3 MR. COX: Yes, there are. But that does  
4 not make it consistent with the law or legal, that  
5 other entities have decided to agree to a  
6 co-permitting status. The towns they represent do  
7 not agree. They do not consent. They do not  
8 believe, as I've articulated here, that the law  
9 allows the EPA to bring them in as co-permittees.

10 JUDGE SHEEHAN: So the practical effect  
11 here with respect to the legal argument you make  
12 is that if the towns are outside of the regulatory  
13 authority of EPA, that it's just up to the towns'  
14 compliance without any problem or waiting to see  
15 if there is any enforcement issue, they just --  
16 they become cat and mouse really. If there's a  
17 mistake, maybe a regulator will come in and catch  
18 it, but otherwise, the towns are on their own. Is  
19 that what you're saying?

20 MR. COX: I'm saying that is one  
21 mechanism available to the EPA. What I failed to  
22 mention, and I mention now, is that there are

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1 regulations under the State, that 314 CMR -- 312  
2 -- 314CMR12, which governs the municipalities with  
3 respect to the operation of the sewer lines. So  
4 we are regulated by the State but not through this  
5 permitting scheme as co-permittees, as EPA sought  
6 to impose as co-permittees.

7 Thank you very much.

8 MS. MCGUIRE: Good morning. Karen  
9 McGuire for the Region. I'm joined by my  
10 colleague, Amanda Helwig, as well as Peter Ford of  
11 OGC. I am going to speak to nutrients and the  
12 co-permittees, and Ms. Helwig will address the  
13 aluminum modification. I'd like to reserve about  
14 ten minutes for her, but we're flexible.

15 Let's start with nitrogen. The Region  
16 used the same approach here as we did with the  
17 permits to the watershed in Attleboro. We  
18 obviously relied on standards for the Marlborough  
19 model and other studies and the same factors  
20 having set forth here on this record, including,  
21 among other things, the severe environmental  
22 impairments in the receiving waters. And here, as

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1 in Attleboro, we were up front that by using the  
2 physical model, there were inherent and  
3 unavoidable uncertainties in our approach. And,  
4 again, with Attleboro, we acknowledged them,  
5 identified them, and rationally accounted for  
6 them.

7 I want to pause on the Region's  
8 conclusion of our water quality experts related to  
9 those uncertainties. There's been some retelling  
10 of our view of MERL. It's suggested we didn't  
11 think it was a good model. You will find that in  
12 the record and also our conclusions related to the  
13 uncertainty. The differences between the model  
14 and the record, of course, is the touchtone  
15 four-year review. What that makes clear as well,  
16 the Region's experts concluded that MERL was an  
17 analog, strong analog, of what was occurring. The  
18 data and the data ending in 2004 is on the reports  
19 edited by CLF, pages 11 and 12. There's data that  
20 does show for a given comment -- given loading,  
21 MERL does indeed over-predict the response in the  
22 receiving water. And the record also shows that



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1 the Region identified differences between their  
2 model and the natural setting such as flushing,  
3 stratification, and over- and under-predicted.  
4 And on the balance concluded that MERL did  
5 over-predict. So we could not go where CLF is  
6 urging you to direct us to go. We concluded we  
7 could not just develop a limit based on 2X to 4X  
8 output of MERL. And asking us to to do that is  
9 asking us to ignore the uncertainties, ignore the  
10 science, and not exercise our judgment and  
11 expertise and to simply apply the model in  
12 isolation.

13 JUDGE STEIN: How do you square the  
14 Region's conclusion with the Board's statements in  
15 DCMS4 and in the Marlboro case? The Region has  
16 used language that is consistent with water  
17 quality standards; whereas, my recollection of the  
18 regulatory language as well as what the Board said  
19 in those other two cases is that the Region needed  
20 to be able to ensure compliance. So I wondered if  
21 you could explain to me how and why we should  
22 construe "consistent with" to be the functional

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1 equivalent of the regulatory language.

2 MS. MCGUIRE: I think, Your Honor,  
3 although there are much more affirmative  
4 statements in the records, that may be an inartful  
5 choice of words. Again, the Region was very up  
6 front in terms of the uncertainties that I just  
7 described that we're facing.

8 Let's speak to Marlborough, the answer  
9 is very different. In Marlborough, the record  
10 there suggested that in addition to a numeric  
11 limit, we thought that other conditions might be  
12 necessary to meet standards, in particular  
13 addressing the phosphorus that had accumulated in  
14 sediments. You remanded as there were no --  
15 there's no monitoring, no reopening -- nothing in  
16 the permit addressing sediments. While there are  
17 uncertainties in applying the physical model to  
18 the natural setting, as we're facing here in this  
19 permit, no one has identified another condition.  
20 We haven't. No one else has. Or a prerequisite.  
21 We haven't addressed that's necessary to meet  
22 standards here.

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1           In terms of more affirmative language, I  
2   direct you to responses by F6, 18A in the record,  
3   walk through the applicable statutory regulatory  
4   standards, make clear that the Region understands  
5   what its obligation is here, have more affirmative  
6   language regarding what we're expecting --  
7   anticipating to see in terms of significant  
8   reductions here, your Honor.

9           THE COURT: I guess to follow up on  
10   that, you have a problem or at least an issue.  
11   You've got the data which seems to say three won't  
12   do it. Now, I know you're trying to account for  
13   that, but you have that at one extreme. At the  
14   other extreme you have the Marlborough "will  
15   ensure compliance" standard. And then, like Judge  
16   Stein said, you have been consistent with language  
17   which seems fairly diffident. You have -- in the  
18   fact statement you say five is necessary in order  
19   to achieve, which maybe is a little bit better,  
20   but it is a little bit nominalist even after  
21   Marlborough in Region I, the words "will ensure  
22   compliance" did not come out of the Region's mouth

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1 in this situation. So it does raise a flag.

2 MS. MCGUIRE: I gave to you -- in terms  
3 of other references I gave you, I also believe in  
4 our responses to F51, I think you will find more  
5 of the affirmative language you're looking for.

6 JUDGE SHEEHAN: Do you use that  
7 language? I don't have it in front of me.

8 MS. MCGUIRE: Just the citation in my  
9 response to comments in terms of the Region  
10 indicating we're imposing a limit of five here  
11 that we believe will ensure standards. That type  
12 of language.

13 To address one point you raised, we do  
14 not believe that the December 2004 report -- the  
15 record shows the Region's -- the statements, for  
16 instance, cited on page 27 of the report by  
17 counsel for CLF, they're consistent with what we  
18 are saying and are showing that going to 2X to 4X  
19 is MERL in isolation, going to that three limit,  
20 wrote it right into this report. It continues to  
21 say there are uncertainties and differences in the  
22 model. Rhode Island in their amicus brief is

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1 endorsing the approach we've taken here. So our  
2 water quality experts are not coming to that  
3 conclusion reading this report, Your Honor.

4 JUDGE SHEEHAN: But even as late as your  
5 brief in opposition, on page 62, I think, you talk  
6 about the fact that their standard is rational or  
7 it rationally accounts for what the studies show,  
8 and that your conclusions are saying again, well,  
9 in condition of reasonableness. Reasonable,  
10 again, doesn't sound like ensure.

11 MS. MCGUIRE: We do not have a  
12 calibrated mathematical model here, so our  
13 analysis does not lend itself to generating a  
14 precise number that we can drop into a permit. We  
15 are being candid about the uncertainties we face,  
16 but we are using our best technical judgment to  
17 identify, account for the different ways the  
18 uncertainty cuts in applying the outputs of MERL  
19 to define the loading that we think is going to  
20 support standards being met in the upper Seekonk,  
21 and that's the limit we've calculated here, Your  
22 Honor.

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1 JUDGE SHEEHAN: So apart from some of  
2 the records received and some of the linguistic  
3 characterizations of how you include it here, can  
4 you point to us in the record itself, the  
5 technical record, where the facts are to support  
6 the limit of five even apart from how you  
7 characterize it, the brass tacks, bottom-line  
8 facts in that record?

9 MS. MCGUIRE: The citations I gave you  
10 are the most detailed in terms of the development  
11 of the nitrogen, Your Honor, in addition to the  
12 fact sheet.

13 JUDGE WOLGAST: You're saying that's  
14 Exhibit 15a and --

15 MS. MCGUIRE: They're not exhibits, Your  
16 Honor. I believe they are in -- if you're looking  
17 for our explanation rather than reports, I would  
18 direct you on nitrogen F6, F18A and also F51.

19 JUDGE STEIN: Let me ask one more  
20 question about this because I think this issue is  
21 of great importance, and it's of great importance  
22 to this Board because this will be the third

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1 occasion in the past several years in which an  
2 issue -- it may be more -- but I sat on the DCMS4  
3 panel and I sat on the Marlborough panel, so the  
4 concern I have is not that there's uncertainty,  
5 because I think as we made clear in Attleboro and  
6 other cases, there is an issue of uncertainty in  
7 all of these permit-type cases, but I want to be  
8 sure that what we're dealing with here is perhaps  
9 an inartful use of wording and not a watering down  
10 of what the regulations really call for. And  
11 frankly, where I land on that issue in this case  
12 will really determine down the road what's in the  
13 record, what's not in the record. Going back to  
14 DCMS4 there was -- there was no analysis at all,  
15 so it's a very different case than we have here.  
16 But I'm trying -- if I understand you correctly,  
17 what you're saying is it's not lack of analysis  
18 here, it's perhaps an inartful choice of words, or  
19 are you saying something different?

20 MS. MCGUIRE: The specific quote I made  
21 might have been from a fact sheet that was given  
22 to me. In isolation, well, perhaps that is

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1 inartful. Again, our water quality experts  
2 looking at this are straightforward people. They  
3 are acknowledging that this is -- there are  
4 unavoidable uncertainties here -- doing their best  
5 on their judgment to give the right limit here.  
6 We could have crafted that differently. We could  
7 have taken out any and all language talking about  
8 uncertainties to alleviate this concern, but we  
9 chose not to. What we're trying to do is just be  
10 straightforward identifying when we're dealing  
11 with them, but we're recognizing we don't have a  
12 callibrated mathematical model here.

13 JUDGE STEIN: But in the Region's  
14 judgment, the Region's technical judgment, the  
15 number that you have come up with for this limit  
16 you believe will show compliance with standards?

17 MS. MCGUIRE: This is our best technical  
18 judgment of the limit that is necessary to result  
19 in the response variables in the Bay that will be  
20 adequate to support standards, Your Honor.

21 JUDGE WOLGAST: That's a yes?

22 MS. MCGUIRE: That's a yes. Very



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1 briefly, on the differences related to  
2 attenuation, the details are outlined in our  
3 brief. At the very best there is a difference of  
4 opinion on some technical judgment, and this is  
5 setting aside your recent decision in Attleboro  
6 regarding the use of attenuation in the deveopment  
7 of effluent limitation itself. Our brief and  
8 response to comment outline various studies. We  
9 looked at three of them, and why we selected the  
10 value we did, taking into account a number of  
11 scientific technical factors.

12 I want to turn briefly just to the issue  
13 of the exception of concentration mass, the  
14 expression of limits in the regulations in  
15 122.45(f)(1) as not being accepted. We do believe  
16 that the exception of laws here, which, again,  
17 indicates that where the underlying standards or  
18 limitations are expressed in the unit of the  
19 measurement under mass, that the effluent  
20 limitation also may be. And what was missing from  
21 the MassDEP's presentation earlier is that the  
22 clinical standards of Rhode Island's narrative

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1 speaks to the control of concentrations of  
2 nutrients and that's the narrative 83-D10 that  
3 we're interpreting here. And Massachusetts has  
4 very similar narrative language and has not  
5 objected to our crafting of phosphorus limits in  
6 this permit or in Attleboro in terms of  
7 concentration. Rhode Island has interpreted its  
8 own narrative and is moving forward with nine  
9 other permits to other facilities that discharge  
10 to the Bay expressly in terms of concentration.  
11 In the various national guidance documents --  
12 there's also a Commonwealth study that's in the  
13 record recommending some protective nitrogen  
14 limits -- protective nitrogen thresholds. I think  
15 it's Exhibit 20. MassDEP expresses those  
16 recommended thresholds in terms of concentration.

17 If there are no other questions on  
18 nitrogen, I'll turn to phosphorus.

19 JUDGE WOLGAST: Would you explain why  
20 the Region used the .1 instead of the .5 standard  
21 that would apply to impairment of water quality?

22 MS. MCGUIRE: As we did indicate in --

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1 just preliminarily, the argument comes very late  
2 and we don't believe preserves -- our focus was on  
3 the region downstream where we had documentation  
4 of the significant impairments. No one in the  
5 entire record -- and there were also 30 comments  
6 where the Commonwealth brought this issue to our  
7 attention during the permitting, Your Honor. We  
8 also, as Your Honor alluded to, did explain why we  
9 selected a fact-based approach in lieu of  
10 referenced-based approaches. We did evaluate  
11 site-specific studies here documenting the  
12 impairments as well as calculated what the  
13 in-stream concentration would be of a discharge  
14 allowed under the expired permit limit of 750  
15 micrograms per liter, and that was 682 micrograms  
16 per liter, so well in excess of the protected  
17 target that we had identified.

18           With regard to the District's  
19 suggestions that there is some model of some  
20 output around the corner that is not in the  
21 record, to the extent counsel is referring to the  
22 model that the District has undertaken, those all

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1 actually were -- nothing on that topic or issue  
2 was provided during commentary on the record. The  
3 District simply appended some models and  
4 simulations to a petition as an exhibit, so they  
5 were procedurally late.

6           Additionally, as we pointed out, there's  
7 no evidence that runs have been calibrated. So by  
8 acknowledging the efforts the District is  
9 undertaking to do some modeling investigation in  
10 the Blackstone, certainly not regulatorily  
11 required, there is nothing being offered here to  
12 us as available for our use in this determination  
13 or anything around the corner.

14           On co-permittees, oh, excuse me, I have  
15 to backtrack. The limit for phosphorus we had  
16 entered in the brief -- we missed CLF's challenge  
17 to this. In addition to the summer limits of .1,  
18 there is a limit of one. And CLF very briefly in  
19 its petition on page 21, does also challenge the  
20 winter limits. We respond that the winter limits  
21 are preserved and comment that CLF just very  
22 broadly said that the Region should consider full

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1 year-round limits. We responded on page eight of  
2 the response to comment that indeed, we did, for  
3 phosphorus, have the limit of one. We also went  
4 further and explained that the reason it was one  
5 was based on an evaluation of phosphorus in the  
6 effluent of four POTWs that discharged to the  
7 Assebet River in Massachusetts, showing that the  
8 vast majority of phosphorus would be dissolve  
9 ortho phosphate monitoring requirement in the  
10 permit. CLF has not confronted the Region  
11 technical responses on this.

12 JUDGE WOLGAST: As to the co-permittee  
13 issue, why isn't the Cities' argument compelling?

14 MS. MCGUIRE: Preliminarily, it's not  
15 preserved. In the petition the District -- the  
16 community and the District argued that we should  
17 have issued several permits. Now, the theory has  
18 evolved that we are not authorized to issue  
19 permits. What we're trying to do here, Your  
20 Honor, is regulate the whole -- the treatment  
21 works here -- the whole POTW, not a portion of  
22 it -- the District operating the treatment

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1 facilities -- owning and operating those -- and a  
2 number of municipalities owning and operating the  
3 collection systems. The definition of POTW under  
4 the Clean Water Act, EPA's regulations, covers  
5 both. It covers the treatment facilities. It  
6 covers all the pipes, the electrical equipment,  
7 the conveyance to the pumping stations, to get all  
8 that waste to the treatment facility and --

9 JUDGE SHEEHAN: How far upstream does  
10 your reasoning on that point go? Does it go  
11 beyond the cities to individual homes that had  
12 pipes going to the --

13 MS. MCGUIRE: No, Your Honor. If you  
14 look at -- if this were one single entity, only  
15 the POTW, we would regulate it in the same way,  
16 and it's not a big, significant portion of the  
17 POTW here. In one of the annual I&I reports, we  
18 did receive from the District that's in the  
19 record, it's document 88 in the record, the  
20 District had a presentation indicating -- we're  
21 talking about 600 miles of sewers, eight pumping  
22 stations, 23,000 manholes, and if we did not have

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1    this political legal separation of entities, we'd  
2    be regulating the whole. We'd have standard O&M  
3    conditions that we include in every permit, that's  
4    at 122.41(a), that required proper operation and  
5    maintenance of the whole thing. So that's all  
6    we're trying to do. We're trying to respect and  
7    honor what's being represented to us, told to us,  
8    that these are separate distinct entities.

9               JUDGE SHEEHAN: I understand what you're  
10   trying to do, but if the District itself is the  
11   axle and the seven or eight, whatever number,  
12   cities we have here that you included as  
13   co-permittees are the spokes leading into that  
14   axle, my question is more a matter of just pure  
15   law, how many other mini-spokes out beyond these  
16   eight or so cities can you reach legally, putting  
17   aside whether you should or what you're trying to  
18   do. I'm looking at the question as a matter of  
19   law not practicality.

20              MS. MCGUIRE: Thank you, Your Honor. We  
21   can regulate that which is legally part of the  
22   POTW that falls within the definition of POTW.

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1 And no one is contesting that it makes sense to do  
2 this work in light of O&M. The need for O&M is to  
3 reduce the occurrence of the tank or sewer  
4 overflows, access I&I. No one is challenging that  
5 this makes sense.

6 JUDGE WOLGAST: So if a hospital  
7 connects with a District's piping, would they be  
8 susceptible to being a co-permittee?

9 MS. MCGUIRE: Not a private entity, Your  
10 Honor, no. I mean not a user of the POTW.

11 JUDGE SHEEHAN: But why not? If the  
12 hospital has, from 2128 of the Act, if the  
13 hospital has a sewage collection system and is  
14 sending it out, or whether from 4433 re, that if  
15 hospital has conveyances to send the sewage out,  
16 why aren't they as much a part of the regulatory  
17 system, ideally anyhow, as the cities?

18 MS. MCGUIRE: Because we are defining a  
19 publicly operated treatment works, so it is not  
20 the lateral from my house to a municipality main.

21 JUDGE SHEEHAN: So it's the public.

22 MS. MCGUIRE: Correct.



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1 JUDGE STEIN: How do you respond to the  
2 arguments that were made that these entities are  
3 not discharging pollutant; and therefore, with  
4 respect to before they even come within the scope  
5 of a treatment works, they're not discharging  
6 pollutant and therefore you have no legal  
7 authority to regulate them?

8 MS. MCGUIRE: The discharger in that  
9 case is the one that we have always permitted at  
10 the out fall at end of the District's plant. We  
11 considered these entities part of the whole POTW.  
12 So it's part of the whole treatment works. It is  
13 not --

14 THE COURT: So is it relevant whether  
15 they discharge effluent and they're part of the  
16 treatment works?

17 MS. MCGUIRE: The discharger is the one  
18 at the end point, Your Honor.

19 JUDGE STEIN: So are you saying if  
20 they're discharging they contributed to it, or are  
21 you saying that's not a discharge?

22 MS. MCGUIRE: We're saying the only

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1 discharge -- the discharge that is permitted is  
2 the District's discharge at the outfall by -- just  
3 by virtue of, again, political boundaries. These  
4 municipalities are separated. Those collection  
5 systems are separated, so we're just covering the  
6 entire POTW.

7 JUDGE WOLGAST: And what requirements  
8 could you impose on the Cities by calling them  
9 co-permittees that you can't by issuing a permit  
10 to Upper Blackstone District?

11 MS. MCGUIRE: We are not anticipating  
12 requiring anything other than what types of  
13 requirements here, that the co-permittees are  
14 required to properly operate and maintain their  
15 respective portions of the collection system to  
16 develop plans to control I&I. So the requirements  
17 that we've come up with relate directly to what  
18 they own and operate as part of the POTW, Your  
19 Honor.

20 JUDGE WOLGAST: But I mean isn't it the  
21 distinction that you could enforce, again,  
22 directly against the City because they are the

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1 co-permittee?

2 MS. MCGUIRE: If they fail to develop a  
3 plan or submit it and it was required by the  
4 permit, that would be --

5 JUDGE WOLGAST: Which you couldn't  
6 otherwise do.

7 MS. MCGUIRE: Right now there is no  
8 requirement that the co-permittees do this and  
9 require permits. What we have required is that  
10 the Districts are in the capacity of a facilitator  
11 and just try to obtain voluntary cooperation on  
12 these issues.

13 JUDGE WOLGAST: What authority other  
14 than the definition of POTW are you pointing to?  
15 And specifically, I am interested in guidance,  
16 past possible relevant preamble language, the  
17 Permit Issuers' Manual. I have to say I've read a  
18 lot of these things and I haven't read anything  
19 that speaks to this scenario. I mean you have  
20 some very clear statements in the Permit Writers'  
21 Manual that say you don't have to have a permit if  
22 you, yourself, are not discharging into the water

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1 of the United States, but in all of the guidances  
2 I see nothing that interprets the definition of  
3 POTW in this manner, and if you could point me to  
4 it.

5 MS. MCGUIRE: I do not have a citation  
6 for Your Honor, other than what I've relayed to  
7 you.

8 JUDGE SHEEHAN: I like to go back to  
9 Judge Stein's prior inquiry. I'm not sure I  
10 picked up everything, but is your point that  
11 discharge from one of these municipalities, as the  
12 co-permittee here, is a discharge because their  
13 sewage is sent downstream as opposed to discharge  
14 in the normal sense, which is into a water of the  
15 U.S. In fact, if Millbury's discharge never  
16 leaves the pipe, continues down through the Upper  
17 Blackstone District Treatment Plant, comes out of  
18 Upper Blackstone's outfall, is that a discharge by  
19 Millbury or a discharge by Upper Blackstone?

20 MS. MCGUIRE: Again, our approach  
21 here -- we think of this as one big POTW and  
22 there's one discharge here.

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1 JUDGE WOLGAST: How does that -- explain  
2 how that fits with the fact that these are  
3 separately owned and operated entities, albeit  
4 entities that then contribute discharge to the  
5 main, the Upper Blackstone POTW.

6 MS. MCGUIRE: So meaning -- I'm sorry,  
7 Your Honor.

8 JUDGE WOLGAST: Well, by Massachusetts  
9 law, it's not such an amoeba. I mean isn't that  
10 right? I mean --

11 MS. MCGUIRE: No.

12 JUDGE WOLGAST: -- that's what we see in  
13 the briefs, that under Massachusetts law these are  
14 very separate entities.

15 MS. MCGUIRE: Correct. But it's  
16 unattenable to us, because of the political and  
17 legal separation, to not be able to regulate a  
18 large part of the POTW. And there's no dispute  
19 that what we're trying to do here -- no one is  
20 disputing that it makes sense in terms of  
21 controlling the high levels of I&I that are coming  
22 through the facility are reducing FSOs.

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1 JUDGE WOLGAST: And does the District  
2 have any ability to require that the Cities  
3 address I&I or address it in a certain manner?

4 MS. MCGUIRE: The District has told us  
5 no. We don't feel like there are a lot of great  
6 alternatives here. We could, for instance, ask  
7 the District to go back to the Massachusetts  
8 legislature and get authority to be able to take  
9 care of these issues or regulate it, but what is  
10 being relayed to us is that we are separate, we  
11 cannot control operation and maintenance, so we  
12 are trying to honor that which is effectively  
13 regulation of the whole.

14 JUDGE SHEEHAN: You're using words like  
15 effective, unattenable, and sense, all of which  
16 are fine words, but they are more policy-ridden  
17 legal words, and we're struggling to get the legal  
18 authority you have as the District guardian to  
19 address -- and discharge is your word -- as  
20 regulated discharges. It's difficult to see that.  
21 And on the point just a moment ago about whether  
22 or not the District has the authority to regulate

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1 I&I by the municipalities that feed into it, the  
2 permit itself says that each is individually  
3 responsible, right? So whether the authority  
4 exists, you are saying each town needs to take  
5 care of its own I&I affairs, right?

6 MS. MCGUIRE: Correct. And to  
7 summarize, we believe the authority to do this  
8 comes from the statutory and regulatory  
9 definitions of POTW, similar requirements that we  
10 impose with the collection systems, the general  
11 O&M requirements in our regulation that we apply  
12 to the whole POTW.

13 JUDGE SHEEHAN: And the hospital, the  
14 hypothetical raised by Judge Wolgast, if that  
15 hospital were public, could you include it in this  
16 permit legally -- not that you should or would --  
17 but could you --

18 MS. MCGUIRE: I'm having trouble  
19 following --

20 JUDGE SHEEHAN: Well, you said --

21 MS. MCGUIRE: -- your question because I  
22 mean I can't imagine if there were ever a hospital

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1     that a POTW would --

2                 JUDGE SHEEHAN: Well, you said --

3                 JUDGE WOLGAST: Well, as Judge Sheehan  
4     is saying, I mean you told us that there may be  
5     other industrial users, but they're private.  
6     There may be a hospital, there may be a paper  
7     mill, there may be something else. But this is  
8     why you can reach these cities is because they're  
9     public. And Judge Sheehan's question is if there  
10    is another public entity other than a city, can  
11    you reach out and make them a co-permittee?

12                MS. MCGUIRE: No. If it's part of --  
13    we're regulating here the same way we would if  
14    this were just the City of Worcester and it owned  
15    the treatment works. So we're taking the  
16    authority just as far as we would in that case --  
17    what fits within the publicly-owned treatment  
18    works in that case. So we're not trying to go to  
19    users whether they be publicly owned. So my  
20    apologies if I confused you there. We're handling  
21    this the same way we do for the many permits we  
22    have where one municipality owns the whole thing.



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1 JUDGE WOLGAST: Okay. So I don't -- I  
2 didn't understand your point earlier. And if  
3 there is an industrial facility that feeds into  
4 the Upper Blackstone plant, then under that logic  
5 they could be co-permittees as well?

6 MS. MCGUIRE: No. Your Honor, they  
7 would be handled per our pretreatment  
8 requirements. An industrial user that is --

9 JUDGE WOLGAST: But the point is the  
10 Agency has issued federal regulations, right, that  
11 preempts pretreatment of industrial users. That  
12 doesn't make it theoretically different for this  
13 purpose, for the purpose of an analysis of whether  
14 they could or couldn't be a co-permittee. You're  
15 just saying they got taken care of by another  
16 federal mechanism that this Agency didn't choose  
17 to apply to municipalities.

18 JUDGE SHEEHAN: And doesn't Clean Water  
19 Act section 212.2(a) define treatment works as  
20 including industrial wastes -- municipal sewage or  
21 industrial wastes?

22 MS. MCGUIRE: What the treatment works

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1 is handling, yes, Your Honor, what the flow that  
2 is being handled by the POTW.

3 JUDGE SHEEHAN: The definition includes  
4 industrial wastes as well as municipal wastes,  
5 right?

6 MS. MCGUIRE: Yes, Your Honor.

7 JUDGE STEIN: I don't know whether there  
8 is anything in this record that shows whether any  
9 other permits that EPA has issued include  
10 co-permittees in Region I or otherwise.

11 MS. MCGUIRE: I believe we have, Your  
12 Honor, taken this approach with the Greater  
13 Worcester District in Massachusetts. I do not  
14 know if any other permits have issued in draft,  
15 but I could correct the record if that's of  
16 interest to the Board.

17 JUDGE WOLGAST: And those are not  
18 challenged?

19 MS. MCGUIRE: I do not believe so, Your  
20 Honor. Also, I believe I've located -- no, excuse  
21 me. I am happy to provide a list if that's of  
22 interest to the Board. Thank you.

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1 MS. HELWEG: Good morning, Your Honors.

2 I'm Amanda Helwig for the Region. I'll be  
3 discussing aluminum.

4 As a foundation, aluminum is toxic to  
5 wildlife. The aluminum concentrations in the  
6 Blackstone River at the point of the District's  
7 discharge are already above the chronic criterion.  
8 Additionally, the aluminum concentrations in the  
9 District discharge exceed the criterion on  
10 individual dates as well as on average. Based on  
11 the District's reasonable potential to cause or  
12 contribute to a violation of water quality  
13 standards, the aluminum limit of 87 is warranted  
14 in this case. I'm going to address three specific  
15 issues on the aluminum limit: The appropriateness  
16 of the Region's approach in setting the limit, the  
17 inclusion of the 344 value, and the naturally  
18 occurring argument.

19 As to the appropriateness of the  
20 Region's approach, the District has not sustained  
21 its heavy burden of showing that the region erred  
22 in setting the aluminum limit. The District

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1 effluent data evaluated under multiple different  
2 scenarios clearly demonstrate a reasonable  
3 potential to cause or contribute to violations of  
4 water quality standards. As shown in response to  
5 comments, even using all of the data as the  
6 District requested demonstrates reasonable  
7 potential. Any suggestion by the District that we  
8 were selective in the use of the data must fail.  
9 We followed a methodology clearly and accurately  
10 articulated in the statement of basis. We  
11 determined reasonable potential based on the  
12 District's average aluminum effluent  
13 concentrations during typical low flow months.  
14 But the fundamental point here is that this  
15 dataset evaluated in many different ways  
16 consistently supports a limit of 87 on the  
17 District's discharge to ensure compliance with  
18 water quality standards. The only way to reach  
19 the District's desired outcome is to average in  
20 the aluminum effluent data and exclude the 344  
21 volume.

22 So turning to the 344 data point, the

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1 Board did not need to reach this issue on  
2 procedural grounds alone. The District did not  
3 request that the Region exclude this data point in  
4 its comments. Rather, as the Board noted before,  
5 the District asked the Region to use all of the  
6 data collected between 2004 and 2008 and  
7 specifically referenced the 344 data point in its  
8 comments.

9 JUDGE SHEEHAN: What about the  
10 District's argument that you inordinantly relied  
11 on a high-flow data?

12 MS. HELWEG: We did not, Your Honor. As  
13 accurately set forth in the statement basis, we  
14 looked at the District's aluminum data collected  
15 during typical low-flow months. That is the  
16 standard Region's practice. And the District's  
17 assertion, as well, that our use of the 344 data  
18 point came up for the first time in responses to  
19 comment is clearly inaccurate. On seven and page  
20 ten of the statement of basis we describe our use  
21 of the 344 value along with the other points  
22 applied to typical low flow areas.

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1 JUDGE SHEEHAN: Does that statement of  
2 basis explanation differ somewhat from the  
3 response to comments explanation?

4 MS. HELWEG: It does, Your Honor. Based  
5 on a miscommunication among the permittee, the  
6 response to comments did mischaracterize our  
7 process by stating that we had cross-checked the  
8 actual flows of the data points collected during  
9 typical low-flow months. That did not occur.  
10 However, had we done that, that would also support  
11 the limit of 87 in this case. And in our response  
12 to comments, we fully responded to the District's  
13 comments and evaluated the data fully as the  
14 District had requested.

15 Turning back to the 344 data point on  
16 the merits, the District did not create its burden  
17 of showing why this data point is aberrational  
18 such that it is not representative of the  
19 District's discharge. The District has not  
20 offered any explanation beyond a vague reference  
21 to changing weather conditions for what caused  
22 this aluminum concentration or why this

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1 concentration could not occur again. The Region  
2 must account for situations that could occur again  
3 in the future. Our regulations specifically  
4 instruct us to consider effluent variability in  
5 our reasonable potential analysis. Therefore, we  
6 cannot just exclude data without reason. So  
7 unless the 344 data point resulted from  
8 circumstances unlikely to reoccur, the Region must  
9 consider this data point in its reasonable  
10 potential analysis.

11 So lastly, turning to the naturally  
12 occurring argument, first and foremost as the  
13 Board alluded to earlier, MassDEP has not made a  
14 determination that naturally occurring background  
15 concentrations of aluminum exceed the national  
16 recommended criteria in the Blackstone River.  
17 Similar to the Board's finding in Attleboro with  
18 respect to the development of site-specific  
19 aluminum criteria, the Massachusetts water quality  
20 standards reserve naturally occurring  
21 determinations to the State. In the absence of  
22 such determination, we must apply the national

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1 recommended criteria to ensure compliance with  
2 water quality standards.

3 Furthermore, the District's argument  
4 rests on the theory that acid rain caused aluminum  
5 to leach from soil and rocks into the Blackstone  
6 River. However, the District has yet to explain  
7 how acid rain is naturally occurring.  
8 Additionally, even if acid rain was naturally  
9 occurring, the District has not demonstrated that  
10 natural background concentrations of aluminum  
11 exceed the criterion. The District heavily relies  
12 on the late submitted Kendall and tributary  
13 sampling data collected seven miles upstream from  
14 the District which is not even before the Board.  
15 Nevertheless, even these data do not support the  
16 District's argument. The average aluminum  
17 concentration at the Kendall transfer station is  
18 substantially lower than the criterion. And in  
19 relation to the background concentration at the  
20 point of the District's discharge, the District  
21 has completely dismissed the fact that numerous  
22 potential ambient anthropogenic sources of



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1 aluminum exists upstream from the District,  
2 including the City of Worcester, the second  
3 largest city in Massachusetts, with runoff from  
4 city streets. And the drinking water treatment  
5 facility produces aluminum and in its process  
6 discharges backwash water from this process into  
7 the Blackstone River.

8           So for these reasons the District has  
9 not demonstrated that the background  
10 concentrations of aluminum in the Blackstone River  
11 are naturally occurring.

12           If there are no other questions by the  
13 Board, I would assert that the Region did not show  
14 clear error, and the Board should not deny the  
15 review this issue. Thank you very much.

16           MR. KILIAN: Thank you. Again, Chris  
17 Kilian for Conservation Law Foundation.  
18 Narragansett Bay does not have time. We have a  
19 severely impaired waterway that has no similar  
20 capacity for discharges of nitrogen remaining. We  
21 don't have to time to wait. We have fishkills,  
22 eelgrass bed disappearance. It's time to take

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1 action, and it's time to take the right action.  
2 Based on this record, there are clear statements  
3 in the key study relied on by EPA, prepared by  
4 Rhode Island DEP, that the limit of technology is  
5 required. Those are not my words. Those words  
6 are written on the page with the citations I  
7 provided to the Board. Again, page 23, throughout  
8 that document and down to the end.

9 JUDGE WOLGAST: Would you address the  
10 Region's argument that they had the discretion to  
11 take the 2004 study as well as other data and to  
12 apply their own scientific expertise and also with  
13 consultation provided to come up with the five  
14 limit?

15 MR. KILIAN: We do not agree with that  
16 argument. We do not agree with that point of  
17 view, and we believe that the record of underlying  
18 scientific data and information here speaks for  
19 itself. Where uncertainty is discussed in the key  
20 study -- again, this is the evaluation study that  
21 I referred to before -- it is addressed through  
22 corroborating evidence that is used to support the

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1 conclusions of the MERL tank studies.

2 Specifically, again, pages 26 and 27, there is an  
3 analysis that goes through corroborating evidence  
4 in the face of uncertainty. Again, uncertainty  
5 alleged or argued by the Region and referenced in  
6 this Board's decision in Attleboro goes both ways.

7           If you look at stratification, there are  
8 statements that say the MERL model  
9 under-predicts -- under-predicts that more  
10 stringent controls would be required. If you look  
11 at flushing rates, it's possible -- and there was  
12 no statement by counsel -- there is no notation in  
13 the record that in fact there is an  
14 over-prediction as a result of flushing. There is  
15 simply an indication that it could over-predict as  
16 a result of flushing, but there's uncertainty to  
17 the extent there is uncertainty mitigating both  
18 ways. Ultimately, the corroborating evidence  
19 that's referenced in this key study is  
20 corroborating evidence for the notion, again, on  
21 pages -- on page 27 that limit of technology and  
22 limits reaching the 2X to 4X scenario are required

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1 to implement water quality standards. Those are  
2 the kinds of statements that I think are required  
3 by this Board's prior precedent and by the  
4 regulations.

5           On page 30 of the study, Rhode Island  
6 DEM talks about adopting a phased implementation  
7 for upward of 2 through .5 at some of the larger  
8 facilities and 8 at some of the smaller facilities  
9 such as Attleboro. And the statement made on page  
10 30 is that that would enhance the near-term  
11 environmental improvement while plants are below  
12 their design flows. That falls well short of the  
13 requisite language.

14           EPA counsel today did not answer the  
15 question yes. There was no yes, this will be. It  
16 was more semantics. That's our concern here. The  
17 record is clear. I would also note that in the  
18 Attleboro decision, the discussion of certainty,  
19 and the Board -- this Board's recognition that  
20 there might be uncertainty in that data could be  
21 addressed by the Region through exercise of its  
22 discretion, goes to the question of whether or not

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1 the MERL tank experiments can be relied upon at  
2 all, not what is indicated as what is necessary in  
3 order to attain water quality standards once that  
4 study is relied upon. And I believe that's  
5 supported by my reading of it -- by the language  
6 of the Board's decision in Attleboro. And I can  
7 provide the citations; I did not bring it up here  
8 with me. I'm sorry. Again, EPA has not made that  
9 requisite clear statement today, and I would  
10 caution that we have a study in the record here.  
11 I would also refer the Board to document 192 which  
12 is Rhode Island's response to comments on the  
13 amount of Rhode Island permits that were upgraded  
14 at pages five and six. Similar statements. I see  
15 I'm out of time. I have one last claim to make.

16 JUDGE WOLGAST: Briefly.

17 MR. KILIAN: Thank you. And that is  
18 simply that remedial purposes of the Clean Water  
19 Act would mitigate in favor -- in the face of any  
20 uncertainty, mitigating both ways in favor of  
21 adopting the clear language in the record in  
22 requiring more stringent --

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1 JUDGE STEIN: I have one question. Is  
2 it the concern -- and perhaps the District can  
3 answer this -- on the part of the District that  
4 it's not capable of achieving the limit of three  
5 or it just costs too much?

6 MR. KILIAN: I would argue that that  
7 is -- the cost concern is the concern. And one  
8 other note --

9 THE COURT: It's not a technological --  
10 there's not any technological issue in terms of  
11 this facility meeting this limit?

12 MR. KILIAN: Well, I would refer to a  
13 very important point in the record that's before  
14 you. And that is that EPA, in its response to  
15 comments, Region I, has recognized that -- and I  
16 want to find this, I have a citation here for  
17 you -- but in the response to comments that the  
18 Woonsocket facility is now at a limit of three.  
19 The other major facility discharging into the  
20 Seekonk River is not at five. And this is  
21 important because in the Attleboro decision, in  
22 footnote 56, this Board notes that at the time of

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1 the closure of that record, Woonsocket was at  
2 five. And the Board -- the text associated with  
3 footnote 56 is that we have a larger facility than  
4 the Attleboro facility discharging into the  
5 most-impaired segment of this waterway. It's  
6 appropriate to have a lower limit. I would note  
7 that since the time that that record closed, this  
8 record, in its specific response to comments, EPA  
9 recognizes that Woonsocket is now at three, at the  
10 limit of technology. And we should say -- we  
11 would say that that same rationale that Rhode  
12 Island used to go to three at Woonsocket should be  
13 used here as well. I'm sorry for not having the  
14 cite with me.

15 JUDGE WOLGAST: That's all right. Thank  
16 you.

17 MR. KILIAN: Thank you.

18 JUDGE WOLGAST: Mr. Andes. You have  
19 nine minutes.

20 MR. ANDES: Thank you. If I could  
21 address that question first, Your Honor, on behalf  
22 of the District. The District feels that under

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1 the statute, the requirements that should be  
2 imposed are those that are needed to attain water  
3 quality standards. There has been absolutely no  
4 showing that a limit of three is needed or that  
5 even these water quality standards could be  
6 attained. We think that the statements made here  
7 by EPA further support our contention that the  
8 MERL study is a very weak read, and we should face  
9 permit limits.

10 JUDGE STEIN: But if we were to  
11 conclude, contrary to your arguments, that in fact  
12 what was needed to achieve water quality standards  
13 was a limit of three, is there evidence in this  
14 record that the District cannot achieve a limit of  
15 three? I'm not asking you to agree with me that  
16 that's what the water quality standards require,  
17 but if we were to conclude that's correct --

18 MR. ANDES: Are you asking me if it's  
19 physically possible to achieve with --

20 JUDGE STEIN: I'm asking if the record  
21 shows whether there are any feasibility or other  
22 issues associated with that.



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1                   MR. ANDES: Since a limit of three was  
2 never proposed, the District has not produced any  
3 information about whether it can or can't meet  
4 that. If that were proposed, we -- I can  
5 guarantee you -- would provide a lot of  
6 information about whether that's the appropriate  
7 number, including whether that's technically  
8 feasible to meet. I can guarantee you that it  
9 cannot be met with the current \$200 million  
10 upgrade. Whether it can -- whether that is  
11 physically possible to be met by the District, I  
12 don't know. We've never been confronted with that  
13 issue.

14                   In terms of the statements here, we've  
15 heard that MERL is a strong analog for what's  
16 really occurring, but we've also heard that that  
17 analysis over-predicts and that the analysis does  
18 not go to a precise number that can be dropped  
19 into a permit. Well, in a permit we get a precise  
20 number and the District's officials are civilly  
21 and criminally liable for meeting that number.  
22 Under the statute it's not enough to say there's a

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1 problem. It's not enough to say that that issue  
2 needs to be addressed. Under this statute, the  
3 way it's constructed, the District is entitled to  
4 a sound basis for a limit that is needed to attain  
5 water quality standards, not to get below or not  
6 to impose the limit of technology standard. Tell  
7 the District, EPA needs to support, this is what's  
8 needed to attain water quality standards for this  
9 system as a whole. That's simply not here. When  
10 you look at the response to comments, at the  
11 places where EPA is cited, in fact, the statements  
12 there in F6, 18A, 51 are really just conclusory;  
13 and in fact, the statements that I cited earlier  
14 in terms of the fact that the -- when I cited the  
15 statements about the physical model was not  
16 generated precisely a definitive nitrogen control  
17 that could be applied to a real world discharge,  
18 that's straight from that 18A MEP response.

19 The Agency simply does not know whether  
20 these standards can be met and whether these  
21 limits are the limits that are needed to attain  
22 water quality standards. Without that, they don't

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1 have a basis for a limit yet. Should there be  
2 limits on nitrogen and phosphorus? Yes. And  
3 we're not saying that the limits of the old  
4 permit, the 2001 permit, that we have now  
5 installed the equipment for are adequate. We  
6 certainly would not say there was a phosphorus  
7 limit and no nitrogen limit. We designed the  
8 system to meet very low numbers on phosphorus and  
9 nitrogen. In fact, we think we'll do much better  
10 than the phosphorus limit that's in that permit.  
11 So we recognize that the next permit needs to have  
12 lower numbers. The question is what are those  
13 numbers and how are they needed to attain water  
14 quality standards. We don't think the Agency has  
15 provided that information, and we simply don't  
16 have the information to make that conclusion.  
17 They also have not responded to the point I  
18 mentioned earlier that the delivery rate, which is  
19 one critical issue here where they had one  
20 number -- we raised an issue instead the 73 is  
21 wrong -- the 87 is wrong, 73 is better. They  
22 recognized that the 73 does incorporate other

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1 sources and yet took the 87 instead as an example  
2 of the way in which these limits have been  
3 developed. They simply don't have a reasonable  
4 basis.

5 JUDGE SHEEHAN: Well, you say they don't  
6 have a reasonable basis, but they have an earlier  
7 permit and studies that went on there. They've  
8 had 15 years of water quality data. They have at  
9 least four criteria documents -- guidance  
10 documents, and the regulation allows them to  
11 consider guidance. That seems as if the Region  
12 does have a sufficient bank of materials on which  
13 to make its judgment. To insist on more or longer  
14 in face of the severe impairment would seem  
15 environmentally dangerous and seem not justified  
16 in light of the fact that EPA seems to have a  
17 pretty solid corpus of information and guidance  
18 from it.

19 MR. ANDES: The data they have, Your  
20 Honor, doesn't go to the question. One would  
21 think that at this point, if they had enough data,  
22 they would have been able to say somewhere in this

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1 record that here are the limits. These limits,  
2 along with other limits, will get us to water  
3 quality standards on this water body. They don't  
4 say that. And I think part of it is is because  
5 they don't know if they can really get there. And  
6 under this statute, clearly, because the standard  
7 needs to be attainable, that's the conclusion the  
8 Agency needs to make. If they can't conclude that  
9 those standards are attainable under this statute,  
10 they're supposed to revisit and revise those  
11 standards.

12 JUDGE SHEEHAN: But don't they say in  
13 the fact sheet that the limit of five for nitrogen  
14 will therefore achieve the water quality  
15 standards? They say it.

16 MR. ANDES: And when that issue was  
17 questioned in the response to the comments, the  
18 standards are not nearly as unequivocal. The  
19 standards in response to comments don't even say  
20 in any word we really know that we're going to  
21 attain the standard. If they don't know that,  
22 they can't just impose requirements on discharge

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1 and say, well, it will get us there. That could  
2 be under another statute, but under this statute,  
3 that's not way it works.

4 JUDGE SHEEHAN: You seem to be saying  
5 that unless there's some absolute bullet-proof  
6 guarantee, which is probably impossible in any  
7 scenario, the Region has to tie its hands and sit.

8 MR. ANDES: Well, we would say not that  
9 there has to be a bullet-proof guarantee, we would  
10 say nowhere in this record -- nowhere in this  
11 record does the Agency say we're going to get the  
12 water quality standards in this watershed and  
13 here's how. Instead they say -- they say a lot of  
14 times, well, it's a really big problem and Upper  
15 Blackstone is a significant contributor. Granted,  
16 something needs to be done. The issue we have  
17 here is, is what they did -- something that has  
18 rational support that it will result in a  
19 attaining water quality standards. I simply don't  
20 see where they concluded that, even with all this  
21 information.

22 I would also point out as to aluminum,

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1    because to me the key issue there, as I think  
2    we've seen this morning, is the Agency recognized  
3    that they have the data. When they take out the  
4    344, there's no limit. The rest of the data are  
5    much, much lower than 344. I think we just need  
6    to go back to the comments because it's clear that  
7    what we did in comments was we said, first, that  
8    the Agency has selectively used the District's  
9    data, leaving out data from 2004, a portion of  
10   2005, most of 2006, half of 2007, and most of  
11   2008. That selective use of the data allowed them  
12   to form an erroneous conclusion. So that  
13   paragraph, we basically say go back, review your  
14   dataset properly, and do a new analysis. Our  
15   second paragraph then went on to say, by the way,  
16   if you look at all the data, even with the 344, we  
17   are always under -- consistently below the ambient  
18   levels in the Blackstone River. And there's no  
19   varying ambient conditions. A separate point  
20   where we said, well, look at all the dataset,  
21   we're under ambient levels, how could se be  
22   causing to contributing to a violation?

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1           The first point we raised in the  
2    comments was you selectively used data. Stop  
3    that. So in their response to comments, they  
4    said, fine, we're going to consider more data.  
5    Here's a new analysis we've run, and we didn't mix  
6    in the 344. And our response was, well, okay,  
7    that's a new analysis. We didn't think to say, by  
8    the way, when you do the new analysis, follow all  
9    your own guidance. Don't include outliers. Do  
10   the various other data manipulation techniques  
11   which you ordinarily do. I guess if we had to put  
12   that in context of the time, we would insert some  
13   boilerplates saying follow their own guidance. We  
14   didn't think we needed to do that. So we think we  
15   did reserve the issue. They submitted a new  
16   analysis. We reviewed it. It's clear that it  
17   rests on one data point and that data point should  
18   be excluded, and then there would be no limit.  
19   Thank you.

20           JUDGE WOLGAST: Thank you very much for  
21   your arguments. They were very helpful. The case  
22   is now submitted.



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1                   (Whereupon, at 11:55 a.m. the  
2                   proceedings were concluded.)

3

4                                   \* \* \* \* \*

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1 CERTIFICATE OF NOTARY PUBLIC

2  
3 I, CONSTANCE HUNT RHODES, the officer  
4 before whom the foregoing oral argument was taken,  
5 do hereby certify that the proceedings were taken  
6 by me in stenotypy and thereafter reduced to  
7 typewriting by me; that said transcription is a  
8 true record of the proceedings; that I am neither  
9 counsel for, related to, nor employed by any of  
10 the parties to the action in which this deposition  
11 was taken; and further, that I am not a relative  
12 or employee of any attorney or counsel employed by  
13 the parties thereto, nor financially or otherwise  
14 interested in the outcome of the action.

15

16

17

Constance H. Rhodes

18

CONSTANCE HUNT RHODES

19

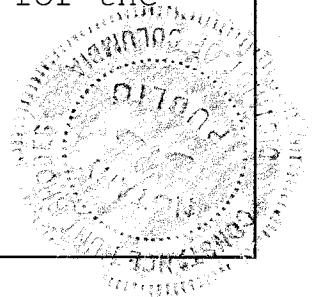
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20

District of Columbia

21 My commission expires:

22 January 1, 2013



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