IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 11-1474

UPPER BLACKSTONE WATER
POLLUTION ABATEMENT DISTRICT,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Case No. 11-1610

CONSERVATION LAW FOUNDATION, INC.,
Petitioner,

v.

UPPER BLACKSTONE WATER
POLLUTION ABATEMENT DISTRICT,
Intervenor,

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON APPEAL FROM AN ORDER ENTERED FROM THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF PETITIONER UPPER BLACKSTONE WATER POLLUTION ABATEMENT DISTRICT FOR REVERSAL OF THE ORDER

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Dated: November 15, 2011

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae*-Movant the National Association of Clean Water Agencies states that it is not a publicly held corporation, does not have any parent corporations, and that no publicly held corporation owns ten percent or more of its stock.

Dated: November 15, 2011

Respectfully submitted,

/s/ Karma B. Brown

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Interest of *Amicus Curiae*

Amicus curiae the National Association of Clean Water Agencies ("NACWA") is a national trade organization representing the interests of the nation's publicly owned wastewater and stormwater utilities with nearly 300 public utility members nationwide, including thirteen public utility members in U.S. Environmental Protection Agency ("EPA" or the "Agency") Region 1.[1] NACWA is the leading advocate for responsible national policies that advance clean water and create a healthy balance between investment and environmental benefit.

NACWA and its members are keenly focused on federal and state approaches to curbing nutrient pollution, which EPA has identified as potentially "one of the costliest and the most challenging environmental problems we face" in the water environment.[2] Our nation's nutrient problems are both diffuse and

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[1] NACWA states that this brief has been authored in whole by its counsel, and no party, counsel for any party, or other person has contributed any money towards preparation or submission of this brief. Upper Blackstone Water Pollution Abatement District ("District") is one of NACWA's members, but the District has not committed funds towards preparation of this brief. Counsel for NACWA contacted the parties to this appeal to ascertain their position in regard to the motion. FED. R. APP. P. 29(a). Petitioners District and Conservation Law Foundation have no objection. Respondent EPA reserves its position on this motion.

[2] Memorandum from Nancy K. Stoner, Acting Assistant Adm'r, Office of Water, EPA, to Reg'l Adm'rs, Regions 1-10, "Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through Use of a Framework for State Nutrient Reductions," at 1 (Mar. 16, 2011), *available at*

diverse, originating with urban runoff, air deposition, agricultural livestock activities, row crop runoff, and regulated industrial and municipal wastewater dischargers, among other sources.[3]

NACWA's public clean water agency members recognize that they are an important part of nutrient reduction efforts and stand ready to do their share. Indeed, many of the gains in nutrient control made to date are because of the investments and efforts of NACWA's members. However, a lasting solution to nutrient pollution must be equitable, with all sources bearing responsibility according to their level of contribution and no disproportionate or irrational burden being placed on any one source. The solution also must be adaptive, since new data developed in the process of pursuing our shared water quality goals will help to reduce uncertainty and validate or adjust implementation efforts.

NACWA's public clean water agency members operate pursuant to National Pollutant Discharge Elimination System ("NPDES") permits, which regulate and control the amount of nutrients and other pollutants that may be lawfully discharged. Through the NPDES permit process, EPA and delegated state permitting authorities have both the opportunity and the obligation to assess the

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http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/upload/memo_nitrogen_framework.pdf.

[3] *Id.*

quality of a discharge against the quality of the receiving waterbody, and then assign limits or conditions tailored to meet the technology- and water quality-based objectives of the Clean Water Act ("CWA"), 33 U.S.C. § 1342. These limits and conditions can be costly to achieve and may take years to implement. Moreover, their impact on water quality is relative to the performance of other sources and contributors, many of which are completely unregulated. Such relativity reinforces the need for an adaptive approach to permitting, where the results of past actions and progress continually feed into the decision-making process.

Because of their dual mandate to protect the environment and provide cost-effective service to their ratepayers, NACWA members must make smart investments to provide clean water at the best value. Simply put, money matters.

This case presents issues that cut to the core of NACWA's mission. First, it is imperative that all NPDES permit decisions are grounded in relevant facts. Here, at the time of the contested permitting action, the District was substantially invested in, and progressing toward the completion of, a significant capital upgrade project to reduce nutrients according to the terms and schedule of a prior permitting action and related consent order. J.A. at 1423-60, 1501-20, 1521-34. In spite of this major undertaking, EPA changed the District's nutrient limits, in effect compelling a second and even larger capital upgrade. Addendum to Pet'rs Br. ("Add.") at ADD110-29 (Sept. 9, 2011) (ECF No. 00116257776). EPA did so

without any regard for, or evaluation of, the performance or water quality benefits of the District's upgrade-in-progress. If the hallmark of lawful agency action is *informed* decision-making, then this marks a new and dangerous low.

Second, EPA imposed significantly more stringent nutrient limits through the challenged action without an adequate record to support them. For NPDES permit limits to be defensible, EPA must be able to show that they are *necessary* to meet applicable water quality standards. 40 C.F.R. § 122.44(d)(1). Rather than consider the specific quality of the discharge (after the upgrade-in-progress) or the specific quality of the receiving water in the context of other relevant and site-specific biological, chemical, and physical properties, EPA relied on laboratory experiments and literature values wholly disconnected from the discharge or waterbody at issue and wholly inadequate to demonstrate that the contested nutrient limits were, in fact, necessary. *See, e.g.*, J.A. at 1339-41, 5306.

Recognizing that a court typically will defer to an agency's decision on technical matters within its expertise, the agency's decision must nonetheless be rational. *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Here the Court's review of EPA's actions, and the rationality of those actions, will have a profound and direct impact on NACWA and its members as they spend, or commit to spend, billions of dollars in infrastructure improvements and other measures to reduce nutrients. NACWA's

members have a fundamental and abiding interest in ensuring that the nutrient limits assigned in NPDES permits, like those at issue here, are rational and supported by sound science.

Summary of the Argument

The subject of this appeal is an NPDES permit issued to the District in 2008 by EPA Region 1 pursuant to CWA section 402, 33 U.S.C. § 1342. Add. at ADD110-29. The District is currently operating under an NPDES permit issued on September 30, 1999, as modified on August 8, 2001, by a settlement agreement. J.A. at 1501-34. As provided under the settlement agreement, EPA issued an Administrative Order in 2002 establishing an eight year schedule for facility upgrades with specific milestones designed to bring the facility into compliance with certain discharge limits. J.A. at 1501-34. Pursuant to the Order, the District committed to implement -- and, in fact, was in the process of implementing -- a $180 million facility upgrade over the eight year compliance schedule. J.A. at 1521-34, 1377.

However, before the first project was even complete, or its beneficial impacts on water quality could be determined, EPA forged ahead and issued a new NPDES permit to the District in 2008. Add. at ADD110-29. The 2008 permit imposed significantly more stringent nutrient limits that, if upheld, will cost the

District an additional $200 million in facility upgrades to achieve.[4] *Id.*; *see also* Affidavit of Thomas K. Walsh, P.E., ¶¶ 14-15, *Upper Blackstone*, No. 11-1474 (1st Cir. Apr. 29, 2011) (ECF No. 00116202807).

EPA's decision to impose new requirements even before realizing the results of the old ones is *per se* irrational, especially when the new requirements are not predicated on the actual quality of the discharge or receiving waterbody but rather laboratory experiments and literature values. Accordingly, NACWA respectfully urges this Court to remand the permit to EPA.

Argument

I. EPA acted irrationally in setting permit limits without regard to pending upgrades to the District's treatment plant and without consideration of the performance or environmental benefits of those upgrades.

The record here does not, and cannot, lawfully support EPA's action. The issuance of an NPDES permit is governed by the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). The Court must set aside the permit if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* In order to be upheld, EPA must provide a "'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n*, 463

[4] Implementation of these facility upgrades has been stayed pending resolution of this appeal. Corrected Order, *Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA* ("*Upper Blackstone*"), No. 11-1474 (1st Cir. Apr. 29, 2011) (ECF No. 00116202819).

U.S. at 43, *quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

NPDES permits must meet the technology- and water quality-based objectives of the CWA. For permits to achieve these objectives, they must be developed based on the facts of each particular discharge (*i.e.*, the quality and characteristics of the discharge evaluated against the quality, characteristics, and regulatory performance standards of the receiving waterbody). 40 C.F.R. § 122.44(d).

In this case, at the time of the contested permitting decision in 2008, the District was actively involved in a significant $180 million capital upgrade project targeted to reduce nutrients in its discharge. Instead of pausing to consider the impact of this project-in-progress on the quality of the District's discharge, or its impact on the receiving waterbody, EPA plowed forward with new, and significantly more stringent, limits that would have the effect of requiring a second, and even more substantial, $200 million capital upgrade project. Without minimizing the profound and adverse cost of this decision, EPA's action was tantamount to forcing the construction of a new four-lane superhighway, and then doubling the number of lanes while bulldozers were still clearing the land and before the highway department even had a chance to evaluate the use, demand, and capacity of the initial project.

Even assuming that EPA had a technical basis for the new limits (which NACWA disputes, as discussed below), it was irrational to impose those new limits without regard to the project-in-progress. It was also fundamentally bad policy. The wise use of limited municipal dollars to achieve environmental improvements is essential, as is the prioritization and balancing of clean water investments to ensure those limited dollars are spent on projects that maximize water quality benefits. Demanding a second investment before achieving and assessing the results of the first is both uninformed and irrational. It could very well lead to wasteful spending. And it undermines the adaptive approach that the National Research Council, EPA, and the broader scientific and regulatory community have embraced as vital to making meaningful progress toward our water quality goals.[5]

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[5] *See, e.g.*, Memorandum from Benita Best-Wong, Dir., Assessment & Watershed Prot. Div., EPA, to Water Div. Dirs., Region I-X, "Clarification Regarding 'Phased' Total Maximum Daily Loads," at 4 (Aug. 2, 2006) ("Adaptive implementation is an iterative implementation process that makes progress toward achieving water quality goals while using any new data and information to reduce uncertainty and adjust implementation activities…. ***By using the adaptive implementation approach, one can utilize the new information available from monitoring following initial … implementation efforts to appropriately target the next suite of implementation activities***.") (emphasis added), *available at* http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/upload/2006_08_08_tmdl_tmdl_clarification_letter.pdf; National Research Council, *Assessing the TMDL Approach to Water Quality Management* (2001), *available at* http://www.nap.edu/openbook.php?isbn=0309075793.

A permit is akin to a contract between the permittee and the regulator. Thus, fundamentally, a permit should accord certainty to all parties. And regulatory agencies must live up to their end of that contract. Indeed, for that very reason, EPA guidance recognizes that modifications generally should not occur during the term of a permit so as to provide some measure of certainty to the permit holder. 49 Fed. Reg. 37,998, 38,045 (Sept. 26, 1984) ("In general, permits are not modified to incorporate changes made in regulations during the term of the permit. This is to provide some measure of certainty to both the permittees and the Agency during the term of the permits."). Moreover, in response to public comments made when EPA originally promulgated its modification regulations, EPA cautioned that "any attempt to apply limitations or standards which were not in effect at the time of permit issuance constitutes unauthorized overreaching by the permit issuing authority." 44 Fed. Reg. 32,854, 32,869 (June 7, 1979).

Congress, too, recognized the importance of certainty (for both the permit holder and the regulator) when drafting the CWA. The statutory language of the CWA includes a "permit shield" provision providing that, once a permit is issued, compliance with the permit means that the permittee is in full compliance with the CWA.[6] 33 U.S.C. § 1342(k). *See also Piney Run Pres. Ass'n v. Cnty. Comm'rs of*

[6] EPA interprets this so-called permit "shield" to extend to the discharges of pollutants (whether or not expressly authorized) that are specifically identified as

Carroll Cnty., Md., 268 F.3d 255 (4th Cir. 2001); *Atl. States Legal Found., Inc. v. Eastman Kodak Co.*, 12 F.3d 353, 357 (2d Cir. 1993) ("Section 402(k) contains the so-called 'shield provision,' 33 U.S.C. § 1342(k), which defines compliance with a NPDES or SPDES permit as compliance with Section 301 for the purposes of the CWA's enforcement provisions."); *Ohio Valley Envtl. Coal., Inc. v. Apogee Coal Co., LLC*, 531 F. Supp. 2d 747, 756-57 (S.D. W.Va. 2008). "The purpose of § 402(k) seems to be to insulate permit holders from changes in various regulations during the period of a permit and relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict. In short, § 402(k) serves the purpose of giving permits finality."[7] *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 138 n.28 (1977). The fundamental

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present in facility discharges or that are constituents of waste streams, operations, or processes identified in writing during the permit application process and contained in the administrative record for the permit proceeding. Memorandum from Robert Perciasepe, Assistant Adm'r for Water, EPA, *et al*., to Reg'l Adm'rs & Reg'l Counsels, "Revised Policy Statement on Scope of Discharge Authorization and Shield Associated with NPDES Permits," at 2-3 (Apr. 11, 1995), *available at* http://cfpub.epa.gov/npdes/docs.cfm?document_type_id=1&view=Policy%20and%20Guidance%20Documents&program_id=1&sort=name.

[7] *See also* 45 Fed. Reg. 33,290, 33,311 (May 19, 1980) (noting that "[t]his 'shield' provision is one of the central features of EPA's attempt to provide permittees with maximum certainty during the fixed terms of their permits . . . This new provision gives a permittee the security of knowing that, if it complies with its permit, it will not be enforced against for violating some requirement of the appropriate Act which was not a requirement of the permit.").

principle is clear -- permits are designed to provide certainty to the permit holder and regulator alike.

Here, although the contested limits arose during a permit reissuance proceeding, they were derived and imposed in the midst of an eight year compliance schedule that was part of a previous consent order negotiated between the parties and entered into at the same time as the District's 2001 NPDES permit. Taken together, the consent order and the 2001 permit were designed to provide the District with certainty about its compliance obligations and reflected the reasoned judgment of EPA at that time.[8]

The principle of certainty and the protection of a shield are as relevant to a compliance schedule as to a permit term, particularly here, where the schedule in the order and the related permit were designed to be complementary documents. Since EPA itself determined that eight years was the appropriate and reasonable time frame to achieve the compliance target, it is *per se* unreasonable for EPA to make the target even more stringent before the eight year schedule was over.

In consideration of the District's project-in-progress under the pre-existing eight year compliance schedule, EPA should have deferred additional changes. At

[8] The consent order provides as follows: "Pursuant to Section 309(a)(5)(A) of the [Clean Water] Act, 33 U.S.C. Sec. 1319(a)(5)(A), the Order provides a schedule for compliance that the Director of the Office of Environmental Stewardship ***has determined to be reasonable***." J.A. at 1523 (emphasis added).

a minimum, EPA should have considered the results of the project-in-progress in deriving any such additional changes. EPA did neither.

The consequences of this kind of uninformed and precipitous decision-making could be disastrous to thoughtful capital planning or reasoned permitting decisions. If a permit writer is not bound to consider the results of prior permitting decisions or pending actions that have a direct and material bearing on water quality, then the concept of rationality goes out the door. The permit writer can simply impose -- unilaterally -- whatever new limits it wants whenever it wants without record or rationale.

Although Congress committed to a national goal of fishable and swimmable waters when it adopted the CWA in 1972, 33 U.S.C. § 1251(a), given the numerous demands of achieving that goal and the limited resources available, Congress surely intended for our various clean water priorities to be balanced. And, in fact, EPA has recently confirmed that such flexibility is available using its existing CWA authorities, as demonstrated by its recent announcement to pursue integrated planning efforts for cost-effective solutions to water quality improvement that "will help municipalities responsibly meet their CWA obligations by maximizing their infrastructure improvement dollars though the

appropriate sequencing of work."[9] The actions taken by EPA in this case clearly do not reflect the focus on coordination and prioritization of clean water investments that the Agency now acknowledges is critically important.[10]

The reality is that America's public clean water agencies have done the lion's share of the work over the last forty years to remove the vast majority of conventional pollutants from the nation's waters, and studies show that, in most cases, the only way to significantly reduce the remaining amount of pollutants is to reduce discharges from non-point sources.[11] Indeed, the greatest influx of pollutants to many waters is from agricultural runoff and other unregulated sources. *Id.*

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[9] Memorandum from Nancy Stoner, Acting Assistant Adm'r, Office of Water ("OW"), EPA, & Cynthia Giles, Assistant Adm'r, Office of Enforcement & Compliance Assurance ("OECA"), EPA, to EPA Reg'l Adm'rs & OW & OECA Office & Div. Dirs., "Achieving Water Quality Through Integrated Municipal Stormwater and Wastewater Plans," at 2 (Oct. 27, 2011), *available at* http://cfpub.epa.gov/npdes/integratedplans.cfm.

[10] *See*, *e.g.*, Letter from Nancy Stoner, Acting Assistant Adm'r, OW, EPA, to Herschel Vinyard, Sec'y, Fla. Dep't of Envtl. Prot. (Nov. 2, 2011), *available at* http://www.epa.gov/region4/water/wqs/documents/nancy-stoner-letter-to-fdep-nnc-rule.pdf (demonstrating the need for flexibility in how nutrients are handled).

[11] *See*, NACWA, *NACWA Money Matters™, Smarter Investment to Advance Clean Water, Two Sides of the Same Coin: Increased Investment & Regulatory Prioritization*, at 4 (2011), *available at* http://www.nacwa.org/index.php?option=com_content&view=article&id=938&Itemid=3.

Rather than requiring municipal utilities to spend hundreds of millions of dollars for unproven reductions in nutrient levels, the government should focus on maximizing water quality returns for each dollar invested. Public clean water agencies simply do not have the luxury, or the resources, to give every government directive the same priority, especially not without a rational balancing of cost and benefit. Rather, their priorities must be informed by both fact and consequence.

Here, neither the fact of the District's project-in-progress nor the consequence of that project mattered to EPA. But they do to the District and the hundreds of other public clean water agencies around the country trying to do their part to address nutrient pollution in a thoughtful, responsible, and proportionate manner. The irrational and uninformed action taken by EPA in this case threatens to establish an incredibly dangerous precedent that could have negative effects not only on the District, but also on other public clean water utilities in EPA Region 1 and around the nation.

In order to achieve the objectives of the CWA, permit writers need to be flexible and informed. If EPA had been more flexible and allowed the District to complete its required improvements under the 2001 permit and consent order before forging ahead with a second round of infrastructure requirements, it would have been informed as to whether an additional $200 million upgrade was in fact warranted. We respectfully submit that it was not.

II. EPA erred in assigning the contested nutrient limits because it lacked a sound scientific basis and failed to demonstrate that the limits were necessary to achieve water quality standards.

Even assuming that EPA had acted rationally to impose new limits in the 2008 permit, EPA could not lawfully do so without proper record support. Here, EPA derived the new limits using laboratory experiments and literature values wholly disconnected from the discharge or waterbody at issue and wholly inadequate to demonstrate that the limits were, in fact, necessary. *See, e.g.,* Pet'rs Br. 10-11 (Sept. 9, 2011) (ECF No. 00116257775) (discussing EPA's reliance on 2004 report issued by the Rhode Island Department of Environmental Management, which focused on results of a physical model experiment conducted in the early 1980s by the Marine Ecosystems Research Laboratory). The EPA Environmental Appeals Board deferred to the Agency, concluding that "[t]he selection of representative data for the analysis is a technical judgment that falls within the permit issuer's discretion and technical expertise." Add. at ADD52 (citations omitted). But that decision was wrong.

While an agency is entitled to "substantial deference," its decision must be rational "even in technical areas of regulation." *Puerto Rico Sun Oil Co. v. U.S. Envtl. Prot. Agency*, 8 F.3d 73, 77 (1st Cir. 1993) (internal citations omitted). Here, it was not.

First, EPA failed to consider *relevant* data regarding the discharge and its impact on receiving water quality. 40 C.F.R. § 122.44(d)(1)(ii). Instead of using data representative of the District's substantial capital upgrade project, EPA relied on data that preceded the project.

Second, in deriving the contested limits, EPA relied on laboratory experiments and literature values that were not demonstrated to be directly relevant to, or appropriate for, the particular discharge or waterbody at issue in this proceeding. *See* Pet'rs Br. at 10-12. Such experiments and values may be appropriate starting points for deriving limits, but alone are inadequate because they fail to show actual cause and effect.[12] Moreover, they fail to show that the limits derived by EPA are actually necessary to meet applicable water quality standards in this particular waterbody (*i.e.*, neither more nor less than necessary). 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1).

For the benefit of the District and public clean water agencies across the country, EPA must be held to a standard of rationality, even in technical areas.

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[12] *See*, *e.g.*, Letter from Dr. Deborah L. Swackhamer, Chair, EPA Science Advisory Bd. ("SAB") & Dr. Judith L. Meyer, Chair, Ecological Processes & Effects Comm., SAB, to Lisa P. Jackson, Adm'r, EPA, "SAB Review of Empirical Approaches for Nutrient Criteria Derivation," at 21-22 (Apr. 27, 2010), *available at* http://yosemite.epa.gov/sab/sabproduct.nsf/0/E09317EC14CB3F2B85257713004BED5F/$File/EPA-SAB-10-006-unsigned.pdf (underscoring the need for a direct and demonstrated causative relationship between stressor and response, and cautioning against the experimental validation of such a relationship).

Here, such rationality compels, at a minimum, the consideration of *relevant* data and the development of a record that *actually justifies* the limits assigned. EPA failed to do either. For that reason, the contested limits in the permit should be remanded to EPA.

Conclusion

In this proceeding, EPA imposed limits without regard to relevant and material facts, without consideration of a substantial project-in-progress, and without a record to support them. If upheld, the consequence to the District would be a massive second capital investment that may well prove to be unnecessary and ill-spent.

This case presents issues that cut to the core of NACWA's mission and to the billions of dollars NACWA's members have spent or committed to spend to reduce nutrients in a thoughtful, responsible and proportionate manner. We urge this Court to hold EPA to a standard of rationality and remand the contested limits for further action.

Dated: November 15, 2011

Respectfully submitted,

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(s) /s/ Karma B. Brown

Attorney for National Association of Clean Water Agencies

Dated: November 15, 2011