UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 11-1474

UPPER BLACKSTONE WATER POLLUTION ABATEMENT DISTRICT

Petitioner

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY

Respondent

No. 11-1610

CONSERVATION LAW FOUNDATION, INC.

Petitioner

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY

Respondent

ON APPEAL FROM A FINAL DECISION OF
THE ENVIRONMENTAL PROTECTION AGENCY

UPPER BLACKSTONE WATER POLLUTION ABATEMENT DISTRICT'S PETITION FOR REHEARING EN BANC AND PANEL REHEARING

This proceeding involves one or more questions of exceptional importance because it: (1) involves an issue on which the Panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue; and (2) involves significant issues that will affect industrial dischargers and municipal wastewater treatment plants and their rate-payers throughout the United States. For these reasons, the District requests that a Rehearing En Banc be granted pursuant to FED. R. APP. P. 35(b)(1)(B).

If a Rehearing En Banc is not granted, a Panel Rehearing should be allowed pursuant to FED. R. APP. P. 40(a)(2) because the Panel overlooked or misapprehended certain points of law and fact in its opinion. Specifically, the Panel's opinion: (1) made the erroneous legal conclusion that EPA *must* issue a new NPDES permit every five years and use the data in its possession at that time to set the permit limits, regardless of the quality of such data; and (2) misapprehended the facts concerning whether EPA used site-specific data to establish the *in-stream* phosphorus target as required by *American Paper Institute, Inc. v. United States EPA*, 996 F.2d 346 (D.C. Cir. 1993).

PETITION FOR REHEARING EN BANC

I. The Panel's Decision Regarding the In-Stream Phosphorus Target Conflicts With the Authoritative Decision in *American Paper* by the U.S. Court of Appeals for the District of Columbia Circuit.

A. The *American Paper* case held that EPA must perform a site-specific analysis when establishing in-stream targets and effluent limits.

The District seeks Rehearing En Banc because the Panel's decision in this case conflicts with the Court of Appeals for the District of Columbia Circuit's long-standing decision in *American Paper*. The Panel's opinion makes no mention of the *American Paper* case despite the District citing it in its briefs below (*see*, *e.g.*, Pet'r Reply Br. at 14) and the fact that it is an authoritative decision of another U.S. Court of Appeals that has addressed a key issue involved in this case.

Importantly, the Court of Appeals for the District of Columbia Circuit held in *American Paper* that EPA must "tailor the federal standard to any relevant *site-specific circumstances* in order to effectuate the intent of a particular state narrative criterion." *American Paper Inst., Inc. v. U.S. EPA*, 996 F.2d 346, 352 (D.C. Cir. 1993) (emphasis added). The applicable EPA regulation "*requires* a permit writer to tailor the federal standard to any relevant site-specific circumstances." *American Paper*, 996 F.2d at 352 (emphasis added).

B. The Panel's opinion conflicts with the holdings in *American Paper*.

In Massachusetts, water quality standards are expressed in narrative form and require that nutrients be controlled such that the waters of the Commonwealth are "free from nutrients in concentrations that would cause or contribute to

impairment of designated uses." 314 C.M.R. § 4.05(5)(c). These water quality standards are a predicate to the establishment of site-specific effluent limitations.

Accordingly, as it applies to this case, it is imperative to distinguish between the 0.1 mg/L *in-stream* phosphorus water quality target selected by EPA and the 0.1-1.0 mg/L seasonal phosphorus *effluent* limit imposed on the District in its 2008 permit. The in-stream target is intended to be a numeric representation of Massachusetts' narrative water quality standard, and should have been selected by EPA only after consideration of data and information specific to the Blackstone River as required by *American Paper*. By way of example, the *American Paper* court cited *Simpson Tacoma Kraft Co. v. Department of Ecology*, 119 Wash. 2d 640, 835 P.2d 1030 (Wash. 1992). In that case, the Washington State Department of Ecology set a uniform state-wide water quality standard for dioxin. The court invalidated the standard as being improperly applied without regard to which water body was at issue.

In this case, EPA failed to tailor the in-stream phosphorus target to the relevant site-specific circumstances of the Blackstone River. To establish the in-stream limit, EPA looked at a collection of various guidance documents, picked 0.1 mg/L from the *Gold Book*, and claimed that this "national" number was the appropriate in-stream phosphorus target for the Blackstone River. EPA's Resp. Br. at 81. EPA does not actually know what value will achieve the water quality goals

for the Blackstone River and never even considered an in-stream target *above* 0.1 mg/L. EPA admits that the values in its range were not specifically developed by or for Massachusetts and EPA's own reference documents state that the guidance manuals might not apply to a particular situation or circumstance.[1] In fact, there is nothing in the entire record showing that EPA examined any site-specific information, as required by *American Paper*, to establish the 0.1 mg/L in-stream phosphorus water quality target.

The Panel did not hold EPA to the well-established precepts articulated by the District of Columbia Circuit in *American Paper*. The Panel only discusses site-specific information EPA considered in the course of establishing the *effluent* limit, not the in-stream target. "EPA did not blindly follow any of these recommended limits, but after examining additional site-specific data, including local water quality studies, selected a phosphorus limit designed to *ensure an in-stream concentration* of 0.1 mg/L." Op. at 52 (emphasis added). In other words, the Panel found that site specific data was used to evaluate the *effluent* limit of 0.1 mg/L that was selected to ostensibly achieve the already chosen *in-stream* target of 0.1 mg/L. However, the Panel did not hold EPA to the same site-specific data requirement with regard to the 0.1 mg/L *in-stream* target number which EPA had

[1] *See, e.g.*, EPA Office of Water, Nutrient Criteria Technical Guidance Manual: Rivers & Streams (2000) at Disclaimer, http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/rivers/index.cfm.

arbitrarily selected from its guidebooks. In fact, the Panel does not even discuss this issue in its opinion even though it is a key consideration in analyzing whether EPA satisfied its duty to "tailor the federal standard to any relevant site-specific circumstances" in implementing the narrative water quality goals for the Blackstone.

Accordingly, there is a conflict between the Panel's approach to this issue and the District of Columbia Circuit's long-standing holding in *American Paper* that site-specific data must be used in implementing narrative criteria. To address this conflict, the District respectfully seeks Rehearing En Banc.

II. This Matter Involves Significant Issues That Will Affect Industrial Dischargers and Municipal Wastewater Treatment Plants and Their Rate-Payers Throughout the United States

Under FED. R. APP. P. 35(b)(1)(B), a Rehearing En Banc may be appropriate when a proceeding involves one or more questions of exceptional importance. This is the first appellate case in the nation addressing the issue on how to apply narrative criteria to set NPDES permit limits. The results of this matter will not just affect the local region but will resonate nationwide.[2] Thousands of industrial dischargers and municipal wastewater treatment plants and their rate-payers are going to be affected by the imposition of in-stream target

[2] *See, e.g.*, Andrew Ragali, *Coalition to continue opposition to phosphorus limits* (Aug. 19, 2012), http://www.myrecordjournal.com/local/article_506345c2-ea7b-11e1-a629-001a4bcf887a.html.

numbers and effluent permit limits for nutrients through the NPDES permitting process.

EPA's method for devising the permit limits in this case is novel.[3] It is important that the full court carefully consider the issues raised in this matter rather than reflexively deem it a "deference" case. That approach discounts the nationwide implications of the first appellate opinion to be issued regarding use of narrative criteria to set permit limits for nutrients. Indeed, the Panel's opinion is already being cited by nongovernmental organizations during negotiations with regulatory agencies for the proposition that 0.1 mg/L should be used as a default phosphorus effluent limit.

This case is also significant with regard to the extreme degree of deference the Panel granted EPA which is based primarily on the court's novel reading of the statute to impose a firm deadline on issuance of new permits. This approach stands in contradiction to a number of recent decisions finding that EPA is not entitled to

[3] *See EPA Warns Stay of Suit Testing Numeric Permit Limit Would 'Subvert' CWA*, 2012 WLNR 13763386 (2012) (Westlaw); *Court Readies Novel Ruling On Using Narrative Criteria For NPDES Permits*, 2012 WLNR 14000447 (2012) (Westlaw)*; Failed Talks Raise Doubts On Novel EPA Permit For Narrative Water Criteria*, 2012 WLNR 12706017 (2012) (Westlaw)*; POTW Plans Rehearing Bid In Case Testing EPA Power To Set Nutrient Limits*, 2012 WLNR 18474700 (2012) (Westlaw).

such a high level of deference. During a recent two week period, the 5th, 6th and D.C. Circuits all refused to give deference to EPA in highly technical cases.[4]

Because of the exceptionally important questions in this matter regarding nationwide nutrient regulation, economic burdens on the regulated community, the appropriate level of deference to provide EPA, and EPA's duties when setting in-stream targets and effluent limits for nutrient discharges, the District respectfully requests a Rehearing En Banc.

PETITION FOR PANEL REHEARING

III. The Panel Erroneously Concluded That EPA *Must* Issue a New NPDES Permit Every Five Years.

A. The Panel misapprehended the law regarding NPDES permit renewals.

In its August 3, 2012 decision, the three-judge Panel of this Court (the "Panel") started its analysis of the District's challenges to its 2008 NPDES permit limitations by adopting a faulty premise concerning the NPDES permit program. The Panel erroneously concluded that EPA *must* issue a new NPDES permit every five years under 33 U.S.C. § 1342(a)(3), (b)(1)(B) (Op. at 28) regardless of the quality of data EPA has available to set the limits in the new permit. In fact, the Panel's opinion states that Congress "set a firm deadline for issuing new permits."

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[4] *See Texas v. U.S. EPA*, No. 10-60614, 2012 WL 3264558 (5th Cir. Aug. 13, 2012); *Summit Petroleum Corp. v. U.S. EPA*, Nos. 09-4348, et al., 2012 WL 3181429 (6th Cir. Aug. 7, 2012); *EME Homer City Generation, L.P. v. U.S. EPA*, Nos. 11-1302, et al., 2012 WL 3570721 (D.C. Cir. Aug. 21, 2012).

Op. at 33. The Panel concludes, as a result, that "under the CWA the EPA is required to exercise its judgment even in the face of some scientific uncertainty."

However, this misapprehends an important point of law concerning the operation of the NPDES permit program. Congress has *not* "set a firm deadline for issuing new permits" and EPA is not invariably required to issue a new NPDES permit every five years. EPA has much more flexibility and discretion than the Panel contends.

The five-year time frame in 33 U.S.C. § 1342(a)(3), (b)(1)(B) applies only to the time period before which permits expire, not when they must be re-issued. 33 U.S.C. § 1342(b)(1)(B) (specifying that permits "are for fixed terms not exceeding five years."). EPA has a tremendous backlog of unprocessed renewal applications.[5] Absent some mechanism for continuance of expired permits, each of these permit holders would be operating without a permit and in violation of the CWA. As noted by the Panel's opinion, however, 40 C.F.R. § 122.6 provides for continuance of an expiring permit where the permittee has submitted a timely application and the agency does not issue a permit with an effective date on or before the expiration date of the previous permit. In that case, the continued permit remains "fully effective and enforceable." 40 C.F.R. § 122.6(b).

[5] *See* EPA's NPDES web page noting the size of the backlog as of 2009 http://cfpub.epa.gov/npdes/permitissuance/backlog.cfm.

Therefore, the CWA provides EPA with flexibility in the timing of permitting decisions. *See, e.g., Costle v. Pacific Legal Found.*, 445 U.S. 198 (1980) (allowing multiple extensions of the expiration of a City of Los Angeles waste water treatment plant NPDES permit to allow completion of an Environmental Impact Statement); *Puerto Rico Sun Oil Co. v. U.S. EPA*, 8 F.3d 73 (1st Cir. 1993) (noting EPA had discretion to defer issuance of a final permit until the Puerto Rico Water Quality Board acted on Puerto Rico Sun Oil Co.'s Reconsideration Request and request to incorporate the new information into a new permit). It is clear that EPA need not reflexively issue a new, more stringent NPDES permit upon expiration of the five-year term of the existing permit. In fact, not only is EPA under no compulsion to act immediately upon the expiration of an NPDES permit, but EPA regularly uses the administrative continuance period to allow for the collection of additional data and studies to ensure that the discharge limits in the new permit are legally and scientifically justified.[6]

[6] For example, in *In re: Guam Waterworks Authority*, Nos. 09-15, et al., 2011 WL 5885263 (EAB Nov. 16, 2011), EPA granted municipal waste water treatment plants ("WWTPs") modified permits in 1986. The permits expired in 1991 and the WWTPs filed timely requests to renew. EPA spent the next six years requesting additional information from the WWTPs to supplement the renewal applications. Finally, in 1997, EPA explained that it would be necessary to deny the applications because the available data showed that the WWTPs had failed to carry out sufficient monitoring and failed to demonstrate that the proposed discharges would not adversely impact public health or coral reef communities. During that six year period, while EPA requested additional scientific data, the terms of the 1986 permits were administratively continued.

This flexibility in the time-frame for gathering and evaluating scientific data in the permitting process was recently discussed in *National Mining Ass'n v. U.S. EPA*, No. 10-1220, 2012 WL 3090245 (D. D.C. July 31, 2012). That case involved a Final Guidance Memorandum issued by EPA that concerned a number of water quality issues including the timing of when a determination needs to be made regarding the need for effluent limits. *Id.* at *9, 15. Plaintiff challenged the Final Guidance claiming that it removed the states' discretion to conduct post-permit analysis, through collection of site-specific data, to determine whether a discharge actually will cause or has the potential to cause a violation of state standards and therefore whether effluent limits were needed. *Id.* at *14.

The court rejected EPA's position and found that the CWA regulations do not mandate *when* the state permitting authority must conduct its analysis of the discharge's impact on the water quality standard. *Id.* at *16. It held that EPA's position that permitting authorities should not defer effluent limit decisions until after permit issuance has no support in the CWA or the regulations. *Id.* at *17. This case provides further support that the Panel erred in finding that that EPA had no choice but to act and use the data in its possession at the time to set the District's permit limits.

B. The faulty premise that EPA was compelled to issue the 2008 permit contributed to an erroneous result.

As the Panel noted, on November 8, 2005, the District timely applied for a renewal of its 2001 NPDES permit. Op. at 19. Therefore, there can be no dispute that the District's 2001 permit could be—and was—administratively continued pursuant to 40 C.F.R. § 122.6. There was no mandate that EPA issue the District a new permit by a certain date and certainly no "firm deadline" set by Congress. Op. at 33. Accordingly, there was no reason that EPA could not have spent time and effort to develop new data that would be rationally related to the affected waters in this matter rather than using data that EPA admits is flawed. Instead, EPA was content to play a game of "connect the dots" with a potpourri of faulty, inapplicable, and generic data while never spending the time and effort to acquire the certainty needed to make a decision supported by sound science. The Panel appears to accept this result because it believes EPA was *required* to act on the permit renewal using whatever data it currently had, regardless of its reliability.

The District has never argued that EPA should have waited indefinitely to issue a new permit or that EPA cannot act in the face of some scientific uncertainty. Instead, the District finds fault in EPA's complete refusal to obtain recent, reliable data that clearly connected the discharge limits it was setting to the real world conditions. That refusal is particularly egregious in this case, where EPA was well aware that the District was developing a model that would provide

better science on these critical issues. *See* EPA's Resp. Br. at 53 ("[T]he District asserted throughout the permitting process that it was working on a new model relating to phosphorus (including a simulation of nitrogen dynamics) in the Blackstone River, *see* JA 1376-77…."). Instead of waiting for that information, EPA essentially chose numbers that "sound good" on the surface but lack an evidentiary basis when scrutinized. For example, EPA has *no* site-specific evidence whatsoever that 0.1 mg/L is the correct in-stream phosphorus limit for the Blackstone River. Instead of using the administrative continuance period to obtain reliable data, as EPA has done in other matters—or to work with the District to hasten the development of its model—EPA justifies its lack of effort by its desire to act with speed. The Panel's opinion countenances this approach under the premise that there was a "firm deadline" for EPA to act. That is not correct as a matter of law and, given the degree of uncertainty in the science and data as explained in detail in the District's briefs below, the resulting permit limits are arbitrary and capricious.

IV. The Panel Misapprehended the Facts Concerning Whether EPA Used Site-Specific Data to Establish the *In-Stream* Phosphorus Target.

A. The Panel's analysis of EPA's application of site-specific data conflates the selection of an in-stream water quality target with the establishment of effluent limits.

As discussed in detail in Section I(B) above, there is a defined process by which EPA is to translate a narrative water quality standard into an in-stream target

and then, ultimately, specific effluent limitations for an NPDES permit. *American Paper* dictates that for *both* the in-stream target and effluent limit, site-specific data must be analyzed to ensure there is a connection between the limits being imposed and the specific water body at issue. In this case, EPA looked at a collection of various guidance documents, picked 0.1 mg/L from the *Gold Book*, and claimed that this "national" number was the appropriate in-stream phosphorus target for the Blackstone River. But, there is *nothing* in the entire record showing that EPA examined any site-specific information, as required by *American Paper*, to establish the 0.1 mg/L in-stream phosphorus water quality target. EPA even refused to examine the effect of the District's improved effluent data from its $180 million upgrade on phosphorus levels in the Blackstone.

Even if the Panel was aware of and attempting to apply *American Paper* in its opinion, the Panel appears to have misapprehended the facts relevant to this issue. After identifying the national guidance documents EPA reviewed to select the *in-stream* target (Op. at 51) the Panel then states that "EPA did not blindly follow any of these recommended limits, but after examining additional site-specific data, including local water quality studies, selected a phosphorus limit designed to *ensure an in-stream concentration* of 0.1 mg/L." Op. at 52 (emphasis added). A close review of this statement reveals that the Panel was actually explaining that EPA examined site-specific data to establish the phosphorus

effluent limit of 0.1-1.0 mg/L, not the *in-stream* phosphorus target of 0.1 mg/L. *Id.* at 52-53 (reviewing site-specific data EPA reviewed to establish the discharge limit). The Panel's analysis confuses the site-specific data review EPA performed in establishing the effluent limit with EPA's selection from its guidebooks of the *in-stream* water quality target, which did *not* include any site-specific analysis as it should have pursuant to *American Paper*. Because no site-specific analysis has been conducted regarding the in-stream target, no connection has been established between the state's narrative criteria and the effluent limit selected that supports EPA's decision-making on this issue.

B. The arbitrary in-stream target predetermines the discharge limit.

The Panel overlooks a second fundamental problem which naturally arises from EPA's conduct. Once EPA arbitrarily fixed the in-stream phosphorus target at 0.1 mg/L, the phosphorus *discharge* limit was predetermined, regardless of any site-specific evaluation performed. Given the process that EPA used to determine limits, it would be virtually impossible for the District's phosphorus discharge limit to be anything higher than the in-stream target. *See* Op. at 52 n.27 ("In this instance, the EPA determined that a monthly average total phosphorus limit of 0.1 mg/L was necessary from April 1 through October 31 in order to ensure an *in-stream concentration* of not more than 0.1 mg/L ….") (emphasis added). By abdicating its duty to conduct a site-specific analysis for the in-stream target and

instead selecting a "national" number, EPA ultimately "locked-in" the 0.1 mg/L *effluent* limit it desired even if it was arbitrary and unduly stringent.

EPA's assertion that it did in fact evaluate a higher effluent limit for the District when it considered 0.2 mg/L is a red herring. *See* Pet'r Reply Br. at 14 n.4 (noting EPA unsurprisingly determined that an effluent limit of 0.2 mg/L for the District would be inadequate to reduce phosphorus levels in the Blackstone River to EPA's selected in-stream target of 0.1 mg/L). Once EPA chose 0.1 mg/L as the in-stream water quality target, any analysis it performed of discharge limits above this number was illusory. EPA's arbitrary in-stream target of 0.1 mg/L invariably begets EPA's desired discharge limit of 0.1 mg/L. So, not only did EPA's failure to evaluate site-specific data for the in-stream target contradict *American Paper* as a matter of law, it resulted in arbitrary and capricious values for both the in-stream target and the effluent discharge limits contained in the permit.

The Panel overlooked this important issue in its opinion and misapprehended the facts concerning whether EPA used site-specific data to establish the in-stream phosphorus target. Accordingly, the Panel should grant a rehearing to consider these and the other issues discussed herein.

Respectfully submitted,

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Dated: September 14, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September, 2012, I filed the foregoing Petition for Rehearing En Banc and Panel Rehearing with the Court using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/ Robert D. Cox, Jr.
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