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 A FINAL DECISION OF THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER UPPER BLACKSTONE WATER POLLUTION ABATEMENT DISTRICT'S PETITION FOR REHEARING EN BANC AND PANEL REHEARING BY THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES AND SUPPORTING MEMORANDUM OF LAW

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Dated: September 21, 2012

Pursuant to Federal Rule of Appellate Procedure 29(a), the National Association of Clean Water Agencies ("NACWA") files this Motion for Leave to File an *Amicus Curiae* Brief in Support of Petitioner Upper Blackstone Water Pollution Abatement District's (the "District") Petition for Rehearing En Banc and Panel Rehearing and states:

1. 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. NACWA and its members are keenly interested in federal and state approaches to curbing nutrient pollution.

2. 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. The limits imposed in these permits by the U.S. Environmental Protection Agency ("EPA") and delegated state permitting authorities can be costly to achieve and take years to implement. It is critical to NACWA's members that all NPDES permit decisions be grounded in relevant facts, supported by the record, and *necessary* to meet applicable water quality standards.

3. NACWA's members have spent, or committed to spend, billions of dollars in infrastructure improvements and other measures to reduce nutrients.

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

4. Granting leave to participate as *amicus curiae* is within the sound discretion of the Court. *See, e.g., Alliance of Auto. Mfrs. v. Gwadowsky,* 297 F. Supp. 2d 305, 307 (D. Me. 2003); *Liberty Res., Inc. v. Philadelphia Hous. Auth.*, 395 F. Supp. 2d 206, 209 (E.D. Pa. 2005); *DeJulio v. Georgia*, 127 F. Supp. 2d 1274, 1284 (N.D. Ga. 2001).

5. NACWA's motion for leave to file an amicus brief in support of the District's Petition for Review of EPA's final permit decision was granted by this Court on December 7, 2011.

6. The Court favorably acknowledged the assistance provided by amici curiae in this case, including NACWA. *Upper Blackstone Water Pollution Abatement Dist. v. U.S. Envtl. Prot. Agency*, Nos. 11-1474, 11-1610, 2012 U.S. App. LEXIS 16145, at *29 n.17 (1st Cir. Aug. 3, 2012).

7. Counsel for NACWA contacted the parties to this appeal to ascertain their position in regard to this Motion. FED. R. APP. P. 29(a). Petitioner Upper Blackstone Water Pollution Abatement District has no objection. Petitioner Conservation Law Foundation reserves its position on this Motion. Respondent EPA had not provided its position at the time this Motion was filed.

MEMORANDUM OF LAW IN SUPPORT OF MOTION

"'An amicus brief should normally be allowed . . . when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.'" *Citizens Against Casino Gambling in Erie Cnty. v. Kempthorne*, 471 F. Supp. 2d 295, 311 (W.D.N.Y. 2007) (emphasis omitted) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997)). Participation of an *amicus* is viewed favorably where the *amicus* "will ensure complete and plenary presentation of difficult issues so that the court may reach a proper decision" or where a case involves an "issue of general public interest." *Liberty Res.*, 395 F. Supp. 2d at 209 (internal citations omitted).

NACWA brings a unique national perspective to this case, representing the interests of nearly 300 public utility members nationwide, including Petitioner and thirteen other public utility members in EPA Region 1. NACWA believes that two particular issues raised in the District's Petition for Rehearing En Banc and Panel Rehearing -- (a) whether EPA *must* issue a new NPDES permit every five years and (b) how EPA derives numeric permit limits from narrative water quality standards -- have profound implications not just for the District but also for publicly owned wastewater and stormwater utilities all across the country. NACWA also believes that its members' experience with these issues constitutes

"unique information [and] perspective" not represented by the current parties that will assist the Court's review and decision making. *Citizens Against Casino Gambling in Erie Cnty.,* 471 F. Supp. 2d at 311.

CONCLUSION

For all of the foregoing reasons, NACWA respectfully asks the Court to grant its Motion for Leave to File an *Amicus Curiae* Brief.

Dated: September 21, 2012

Respectfully submitted,

/s/ Karma B. Brown

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of September, 2012, I electronically filed the foregoing Motion for Leave to File an *Amicus Curiae* Brief in Support of Petitioner Upper Blackstone Water Pollution Abatement District's Petition for Rehearing En Banc and Panel Rehearing by the National Association of Clean Water Agencies and Supporting Memorandum of Law, and Brief of *Amicus Curiae* the National Association of Clean Water Agencies in Support of Petitioner Upper Blackstone Water Pollution Abatement District's Petition for Rehearing En Banc and Panel Rehearing with the Clerk of the Court for the United States Court of Appeals for the First Circuit by using the appellate CM/ECF system.

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ON APPEAL FROM A FINAL DECISION OF THE
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BRIEF OF *AMICUS CURIAE* THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF PETITIONER UPPER BLACKSTONE WATER POLLUTION ABATEMENT DISTRICT'S PETITION FOR REHEARING *EN BANC* AND PANEL REHEARING

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I. Statement of *Amicus*'s Interest and Reasons the Petition Should Be Granted

This case warrants rehearing because the panel wrongly decided questions of exceptional national importance to publicly owned municipal wastewater utilities and their rate-payers throughout the United States. Fed R. App. P. 35(b)(1)(B). *Amicus curiae* the National Association of Clean Water Agencies ("NACWA") urges the Court to grant the District's petition for the following reasons.[1]

First, despite the panel's conclusion, EPA is **not** under an obligation to issue a new National Pollutant Discharge Elimination System ("NPDES") permit every five years. To the contrary, EPA and delegated state permitting authorities routinely extend the permitting cycle pursuant to 40 C.F.R. §122.6, which provides for the continuance of an expiring permit. The need for such extensions is varied and complex, involving matters of fundamental public policy (e.g., when, where, and how the permitting authority applies its limited administrative resources, and what technical issues must be overcome before the permitting authority has a solid and defensible record for its permitting decision). It is imperative that EPA and

[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. NACWA's interest in this case is described in the accompanying motion. Upper Blackstone Water Pollution Abatement District ("District") is one of NACWA's members, but has not committed funds toward preparation of this brief.

delegated state permitting authorities have flexibility and discretion to extend the permitting cycle as they deem necessary, consistent with 40 C.F.R. § 122.6. The panel's decision in *Upper Blackstone Water Pollution Abatement Dist. v. Envtl. Prot. Agency*, Nos. 11-1474, 11-1610, 2012 U.S. App. LEXIS 16145 (1st Cir. Aug. 3, 2012) ("Op."), erroneously removes this flexibility and discretion.

Second, in a decision of first impression before the federal appellate courts, the panel misinterpreted EPA's regulations on how permitting authorities derive numeric permit limits based on narrative water quality standards. Those regulations underscore the necessity of considering relevant local information, such as water quality conditions and designated use(s) in the receiving waterbody. Such information is especially important in the context of nutrient criteria, since nutrients are necessary for life and are not inherently "bad" (i.e., the question is not how to eliminate them, but rather how to establish a healthy balance). Both because this is a decision of first impression and because it involves a permitting question that has broad national significance, it is imperative that the issue is resolved in a manner that reinforces the necessity of considering relevant local information, consistent with EPA's own regulations.

II. The Panel's Fundamental Errors of Law Require Correction Through Rehearing.

Rehearing is warranted to correct at least two errors: (1) the panel misapplied the CWA and held that EPA **must** issue a new NPDES permit every

five years; and (2) the panel misinterpreted EPA's regulations on how permitting authorities are supposed to derive numeric permit limits based on narrative water quality standards.

A. EPA's Regulations Provide Flexibility and Discretion to Extend the Five-Year Permitting Cycle by Continuing Expiring Permits.

The panel erroneously interpreted the CWA and regulations and held that EPA had no authority to extend the five-year permitting cycle and instead **must** issue a new NPDES permit. 33 U.S.C. § 1342(a)(3), (b)(1)(B); Op. at *34. But this conclusion is wrong. EPA's regulations at 40 C.F.R. § 122.6 provide a lawful and commonly used mechanism for permitting authorities to extend the five-year cycle by continuing an expiring permit. In fact, thousands of expiring NPDES permits across the country have been deemed to be administratively continued, thereby giving permitting authorities additional time to develop sound and defensible records on which to base their eventual permitting decisions.

A permitting authority's flexibility and discretion are more than a mere administrative convenience. They are essential to the proper operation of government, serve vital environmental policy goals, and help to ensure sound permitting decisions. Agency resources are limited. Requiring reflexive and unwavering permitting actions every five years unfairly constrains a permitting authority's discretion in deciding when and how to deploy its resources. For example, many EPA regions and states have focused their efforts on a watershed

approach to water quality protection, which may involve sequencing all permits in a watershed to be issued at the same time (so that cumulative effects can be better understood and managed).[2] In order to do this, regions and states take previously staggered permit terms and coordinate them. Without an option to extend certain expiring permits, this type of watershed approach simply cannot be accomplished.

Likewise, many permitting decisions hinge on understanding and resolving complex technical issues. Oftentimes, these issues cannot be resolved on a fixed schedule, or, perhaps more importantly, may be better and more meaningfully resolved on an extended schedule. In this, both permitting authorities and municipal clean water permittees share a common goal -- sound permitting decisions based on a solid and defensible record.

EPA's extensive backlog of unprocessed renewal applications reinforces the point that EPA does not reissue a permit every five years. *See* http://cfpub.epa.gov/npdes/permitissuance/backlog.cfm. Indeed, EPA and delegated state permitting authorities regularly rely on the administrative continuance option to efficiently process NPDES permits and manage their backlog. A majority of NACWA's members surveyed on this issue report having at least one permit that has been administratively continued.

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[2] EPA, "Watershed-Based NPDES Permitting Implementation Guidance," at 1-4 to 1-6 (Dec. 17, 2003).

Rehearing is appropriate to correct the panel's erroneous conclusion that EPA **must** issue a new permit every five years.

B. Deriving Numeric Permit Limits From Narrative Water Quality Standards Necessarily Requires Consideration of Relevant Local Information.

The panel misinterpreted EPA's regulations on how permitting authorities are supposed to derive numeric permit limits based on narrative water quality standards. 40 C.F.R. § 122.44(d)(1)(vi) "requires NPDES permit writers to use one of three mechanisms to translate relevant narrative criteria into *chemical-specific* effluent limitations." *Am. Paper Inst. v. Envtl. Prot. Agency*, 996 F.2d 346, 350 (D.C. Cir. 1993). EPA chose option (B) in this proceeding, which requires it to "[e]stablish effluent limits on a case-by-case basis, using EPA's water quality criteria … supplemented where necessary by other relevant information." 40 C.F.R. § 122.44(d)(1)(vi)(B); *In re Upper Blackstone Water Pollution Abatement Dist.*, Nos. 08-11 to -18, 09-06, 2010 WL 2363514 (EAB May 28, 2010). Having chosen that option, EPA may not simply use its off-the-shelf national recommendations,[3] but rather must supplement them with "other relevant information." 40 C.F.R. § 122.44(d)(1)(vi)(B).

[3] Many states, including Massachusetts, rely on general narrative statements in their water quality standards to determine and regulate unacceptable nutrient impacts. In 1998, the White House Clean Water Action Plan called on EPA to intercede, setting a goal that each state would incorporate numeric criteria for

Here, EPA simply relied on the *Gold Book*'s "national" number as well as some of its existing national guidance documents, and claimed the resulting number was appropriate for the Blackstone River. EPA did not consider data and information specific to the Blackstone River. And the panel erred by allowing EPA's approach to stand.[4] NACWA submits that the panel's failure to require EPA to follow its regulations and supplement with site- and condition-specific criteria supports granting the District's petition for rehearing.

Supplementation "by other relevant information" is especially critical in the nutrient context because nutrient criteria and limits are not one-size-fit-all. Rather, to be meaningful, and to protect the specific uses assigned to a particular waterbody, those criteria and limits need to account for site- and condition-specific factors that directly influence how nutrients are assimilated into the water

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nutrients into their water quality standards. EPA *et al., Clean Water Action Plan: Restoring and Protecting America's Waters* (Feb. 1998). Since that time, EPA has filled the shelf with technical guidance and recommendations for nutrients on a national, rather than site-specific, basis. *See, e.g.,* EPA, EPA 822-R-98-002, "National Strategy for the Development of Regional Nutrient Criteria" (June 1998), *available at* http://water.epa.gov/scitech/swguidance/standards/criteria/nutrients/strategy/#strategy.

[4] NACWA and others have long expressed concerns with the additional national guidance documents used by EPA to set the District's permit limits, particularly the flawed Ecoregional criteria. None of these documents properly account for the site-specific conditions present in the Blackstone River that EPA should have considered.

environment. For example, nutrient fate and transport are directly influenced by physical, chemical, and biological conditions as they exist in a particular waterbody. It would be impossible to meaningfully control the adverse impacts of nutrient **over-** or **under**-enrichment in such a waterbody without accounting for such conditions **within** the waterbody.

There are no short cuts. The panel should have required EPA to follow its regulations. The necessity of considering relevant local information is a key issue, not just in this case, but nationwide. Most states still rely on narrative (as opposed to numeric) nutrient criteria, and nutrient pollution is one of the costliest and the most challenging environmental problems the nation faces in the water environment. EPA is already pushing states to translate narrative nutrient criteria into numeric limits, and what the Agency does in Region 1 will set the stage for the rest of the nation. Thus proper resolution of this issue is critical as courts and stakeholders, including NACWA members, across the country look to this decision for instruction, if not binding authority.[5]

[5] 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, **regardless of relevant local conditions**. Specifically, in an August, 2012 letter to Illinois EPA, a nongovernmental agency states "[i]f a TMDL cannot be developed, a default effluent limit that is supported by the science and case law is 0.1 mg/L. See Upper Blackstone Water Pollution Abatement District v. USEPA (1st Cir. 2012) (upholds 0.1 mg/L effluent limit set by USEPA to restore a P-impacted water body)." Letter

III. Conclusion

NACWA urges the Court to grant the District's petition for rehearing. The petition presents issues of national importance, and respectfully NACWA believes the Court's decision is flawed on two fundamental permitting issues. Therefore, we urge this Court to review the panel's decision and remand the contested limits to EPA for further action.

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from Albert Ettinger & Cindy Skrukrud to Bob Mosher, Illinois EPA, at 5 (Aug. 15, 2012) (available upon request).

Dated: September 21, 2012

Respectfully submitted,

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