
**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.
(For Continuation of Caption See Next Page)

ON APPEAL FROM A FINAL DECISION OF
THE ENVIRONMENTAL PROTECTION AGENCY

**REPLY BRIEF FOR PETITIONER UPPER BLACKSTONE WATER
POLLUTION ABATEMENT DISTRICT**

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Case No. 11-1610

CONSERVATION LAW FOUNDATION, INC.,
Petitioner,

v.

UPPER BLACKSTONE WATER
POLLUTION ABATEMENT DISTRICT,
Intervenor,

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

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INTRODUCTION

In its Brief in this matter, EPA responds to the District's claims by positing two basic choices: the specific numeric limits that EPA has imposed on the District, and the apocalypse. EPA then posits that this dichotomy of choices justifies the Agency's rush to judgment without waiting for enough information to make the correct legal and scientific conclusions. In fact, though, EPA ignores the real choice that is presented here, between EPA's mandated limits and the right set of limits—a set of limits that are both legally and scientifically justified. That set of appropriate limits is all that the District is asking for here, and under the Clean Water Act and Administrative Procedure Act, that is what this Court should require of EPA.

As to each of the limits being appealed by the District—for nitrogen, phosphorus and aluminum—EPA has made basic, fundamental errors in applying Clean Water Act requirements to the facts at hand. On nitrogen, for example, EPA has provided solid reasons to dismiss a study, based on major differences with real-world conditions, but then proceeds to rely completely on that study to justify the limit being imposed on the District. Also, EPA never makes an actual determination that that limit will result in attainment of water quality standards—other than by just saying that such is the case, without any scientific support. On phosphorus, EPA is required to show that its limit, based on a State narrative standard, is connected to site-specific conditions, but never even tries to establish

that connection. Instead, EPA just picks a number from a range set forth in various EPA documents, never showing why that number is correct and never even assessing whether another number outside of that range would adequately protect water quality in the Blackstone River. On aluminum, EPA bases the need for a limit on one data point that it should have excluded from its analysis entirely.

Now, information is available to EPA that can be used to remedy all of those flaws. There is a new water quality model, and there is a data set of effluent values collected since the District has completed a \$180 million upgrade to its facility, reflecting substantially lower discharge levels than were the case before the upgrade. In fact, the discharge levels being achieved are much better than the targets that the upgrade was designed to achieve. If this information is considered, limits can be developed for the District's facility that would be legally and scientifically appropriate. This Court should remand the Permit to EPA, so the Agency can commence that task.

ARGUMENT

I. The Nitrogen Limit is Arbitrary and Capricious.

A. EPA's improper use of the MERL Experiments.

It is expedient for EPA to blithely characterize the District's "overarching" position in this matter as a complaint that EPA should have "waited indefinitely" for more data or that EPA "was obliged to sit on its heels and wait [for new data] rather than using available information to address the severe impairment of

receiving waters.” Resp. at 49-50. Such dismissive characterizations are merely designed to sarcastically portray the District’s position as nothing more than sour grapes coupled with a desire to create delay and obfuscation. Yet, that has never been the District’s express or implied position.

Beginning in the comment period and continuing through its opening brief before this Court, the District’s chief complaint has remained consistent: EPA’s use of experimental results and other data that are not rationally related to the affected waters is insufficient and inadequate to justify the nitrogen and phosphorus limits proposed here. The nitrogen and phosphorus limitations contained in the 2008 Permit have no proven connection to the water quality impairment EPA cites in justifying those limitations. Nothing EPA has said in its lengthy Response Brief refutes the District’s position and, in fact, some of its statements confirm what the District has consistently argued.

Perhaps what is most telling is what EPA does not say in its Response Brief. Nowhere in its brief does EPA say that the 5.0 mg/l nitrogen limit will achieve water quality standards. EPA simply does not know one way or the other. It selected a number which it acknowledges is uncertain. Rather than spend the time and effort to acquire more certainty—something EPA has never done in this matter—it is bent on imposing this limitation irrespective of the enormous cost it will impose on the District and its rate-payers and the fact that the new obligations

will be imposed on top of a \$180 million upgrade, now in operation, that EPA required in the first place.

Instead, EPA attempts to justify its decision to select the 5.0 mg/l nitrogen limit under the amorphous “zone of reasonableness” and claims that the District is not “accounting for the full picture underlying the Region’s decision.” Resp. at 58-59, 70. EPA then proceeds to describe the supposedly painstaking process it followed to reach the nitrogen permit limit.

However, none of this can withstand scrutiny. It is, in fact, “the full picture” which demonstrates that EPA’s process has resulted in a numeric limit which is not supported by sound and reliable science and remains a loose game of “connect the dots.” In response to the District’s argument that the MERL experiments do not qualify as reliable scientific data because the actual conditions in the local water bodies are materially different from the conditions under which the experiments were conducted, EPA concedes that the experiments “do not yield a precise level of nitrogen control required to restore uses in the system.” Resp. at 60; Appx. 1254. EPA’s use of the qualifier “precise” in this statement is merely intended to blunt the reality that the MERL experiments do not establish any level of nitrogen control that will attain water quality standards in the Providence and Seekonk Rivers.

Indeed, EPA repeatedly admits that the flushing rate “used in MERL tank experiments was significantly slower than flushing rates in the natural ecosystem.”

Resp. at 32; *see also* Resp. at 63, 73. In fact, flushing times in the Seekonk River are on the order of 3.5 days—a far cry from the 27 days used in the MERL experiments. Appx. 59-61, 147-153, 196. RIDEM observed that “significantly lower mean DIN concentrations were observed in the Providence and Seekonk Rivers as compared to the MERL experiments for an equivalent loading rate, which may be the result of large differences between the field and experimental flushing times, uptake by macroalgae and denitrification in the bottom waters.” Appx. 5306. As a result of these flushing rate disparities, EPA says that the MERL data should not be taken at face value because it could lead EPA to “overestimate the effects of a given nutrient load.” Resp. at 32. In light of these admissions, there is simply no way to know the correct nitrogen limit and, other than merely citing to its “technical expertise and scientific judgment” (Resp. at 32), EPA does not explain how it can use data derived from disparate flushing rates to conclude that a limit of no more than 5.0 mg/l will achieve water quality standards. This type of reasoning would allow EPA to settle for uncertain or inapplicable data that it must significantly transform and reinterpret in order to connect the data to “real-world” circumstances. This is especially problematic if “the selection of representative data” will receive little to no scrutiny by the EAB. Add. 52. Instead, EPA’s admission, in and of itself should be fatal to the use of MERL experiments to develop the nitrogen limit for these water bodies.

But this would require EPA to do more work—perhaps even develop a model that actually was applicable to the real-world conditions in the Providence and Seekonk Rivers. Instead of doing that, EPA attempts to justify its continued use of the MERL experiments and the RIDEM Report that analyzed them. To do this, EPA makes much of its ability to rely on a model that provides “useful information” even if it is inconsistent with natural conditions. Resp. at 60. However, the only “useful information” EPA claims to have actually derived from the MERL experiments are basic scientific principles concerning the interaction between nitrogen and oxygen. According to EPA, the MERL experiments taught the agency that there is a “basic relationship between nitrogen loadings and cultural eutrophication that reflects the actual conditions in the Providence and Seekonk Rivers.” Resp. at 62, 66. Was this really an unsettled scientific question? Of course not. EPA did not need the MERL experiments to teach it the well-established scientific principle that high nitrogen levels can cause cultural eutrophication.¹

This is all a shell game. The reality is, notwithstanding EPA’s continued admissions that the MERL experiments engender “scientific uncertainty as to how various levels of nitrogen control at the [District’s] Plant would affect

¹ Low DO in the Providence and Seekonk Rivers is not just the result of cultural eutrophication. It may result from local discharge of cBOD and ammonia from other large plants, as well as Combined Sewer Overflows and sediment oxygen demand built up over considerable period. The District provided comments on this point. Appx. 150.

eutrophication in its receiving waters” (Resp. at 63; *see also* Appx. 1254: “the physical model does not generate a definitive level of nitrogen control that can be applied to a real world discharge”), that is the exact purpose for which EPA used the MERL data—to establish the definitive level of control that must be applied to the District’s real-world discharge. *See* Appx. 1254. (“EPA was required to exercise its technical expertise and scientific judgment based on the available evidence when translating these laboratory results in establishing the permit limit.”) (emphasis added). In one breath, EPA identifies the substantial limitations of the MERL experiments for establishing nitrogen permit limits and, in another breath, EPA conveniently claims “though the MERL study did not exactly simulate conditions in the Upper Narragansett Bay, it did capture the relationship between nitrogen loadings and eutrophication well enough that Region 1 judged it to be worthy of consideration in setting a nitrogen limit for the [District’s] Plant.” Resp. at 66. This inconsistency cannot be reconciled.

In essence, EPA attempts to have it both ways with the MERL data by proffering a flawed syllogism: (i) EPA first discounts the MERL data’s usefulness for setting nitrogen limits in the Providence and Seekonk Rivers because of the clear disconnect between the model and real-world conditions; (ii) then, EPA asserts that the MERL data is nevertheless useful to confirm generic and well-known “cause and effect” principles of cultural eutrophication; and (iii) finally, EPA concludes that because the experiments confirmed generic and well-known

principles of cultural eutrophication, the agency could in fact use the MERL data to help set permit limits for the District even if the model does not accurately represent the specific conditions in the Providence and Seekonk Rivers. It has been difficult for the District to comprehend, much less defend against, such flawed reasoning. Put simply, premise (ii) does not negate premise (i), nor support conclusion (iii).

B. The 5.0 mg/l permit limit is not adequately supported.

The final frame in EPA's "full picture" to justify using the MERL experiments despite their acknowledged applicability problems is for EPA to explain that it selected "a nitrogen limit based on a less stringent loading scenario than that recommended by the RIDEM report based on the MERL experiment alone." Resp. at 63. That is, because EPA could not trust the MERL data as being applicable to the Providence and Seekonk Rivers, instead of applying the 3.0 mg/l level referenced in the RIDEM Report, EPA decided that "a seasonal reduction of nitrogen to no more than 5.0 mg/l is required at the [District's Treatment Plan] in order to achieve water quality standards." Appx. 1341. (emphasis added). However, there is no scientific analysis to support 5.0 mg/l as the limit that is necessary to attain water quality standards. EPA simply adopted an arbitrary "ceiling" as a permit limit because it did not know what the actual "necessary" numeric limit should be.

The only additional argument EPA makes to justify the 5.0 mg/l limit demonstrates additional problems with EPA's methodology:

In arriving at its determination of the necessary nitrogen limits for the Treatment Plant, the Region expressly accounted for the limits RIDEM recommended, in light of the MERL results, for Massachusetts facilities, as well as the limits RIDEM imposed on Rhode Island facilities contributing to nitrogen impairments in Narragansett Bay. RIDEM has issued NPDES permits to Rhode Island wastewater treatment facilities with nitrogen limits in the range of 5-8 mg/l.

Resp. at 64 (emphasis added). This is quite odd. Here, EPA is explaining the supplemental information it used to mitigate the uncertainty of the MERL data and to reach the 5.0 mg/l limit; however, EPA is referencing limits RIDEM imposed on other dischargers based on the MERL data. Moreover, there is no scientific analysis as to whether 5.0 mg/l is the specific limit that is "necessary" for the District to meet water quality standards as required under 33 U.S.C. § 1311(b)(1)(C). EPA merely says that 5.0 mg/l limits have been imposed by RIDEM on dischargers that have "similar capacity" to that the District. This vague explanation is not based on any scientific analysis specific to the District's discharge and, in any event, is again based on the MERL data. Considering EPA's admission that other local dischargers are receiving permit limits as high as 8 mg/l from RIDEM, EPA has failed to adequately explain why the District's limit should be 5.0 mg/l.

C. EPA's actions are not justified by its desire to act with speed.

Although EPA devotes numerous pages in its Response Brief to explain why it feels compelled to act quickly, even with incomplete or imperfect scientific information, the fact is that there is no statutory or regulatory mandate, under the Clean Water Act or EPA's implementing regulations, that requires that the District's renewed permit must be issued by a certain date. There is nothing that compels EPA to issue a new permit using admittedly flawed data and analysis, simply because that is what was available. The Administrative Procedure Act does not allow a Federal agency to impose arbitrary and capricious requirements on a regulated party, and then justify that action by simply stating that the agency decided to proceed before collecting sufficient scientific data. This is nothing more than an excuse for EPA's failure to dedicate the time and resources necessary to develop reliable scientific support for its decisions.

In this case, EPA was clearly intent on issuing a discharge permit prior to obtaining the latest and best data reflecting the upgrades the District made to its facility as a result of the settlement agreement with EPA. Further, rather than waiting for new scientific models of the Blackstone River watershed that were in development (and are now complete),² EPA hurried to rely on data from tank

² As to this model, EPA points out that it is not part of the record, but then goes on to set forth a series of criticisms of the District's modeling effort, listing specific scientific issues as to which the District has supposedly not provided EPA with adequate information. In fact, during the years that the modeling work was being

experiments which the agency readily admits are rife with uncertainty and lack applicability in many respects to the rivers at issue. The irrational result is a set of permit limitations which are not connected to the District's discharges and are unproven to attain the applicable water quality standards. EPA's rush to issue the permit, rather than wait for the latest data and scientific models, makes no sense and appears to be "a mechanical desire to reach a rapid conclusion without regard to whether the result is sound." *Puerto Rico Sun Oil Co. v. U.S. EPA*, 8 F.3d 73, 79 (1st Cir. 1993).³

performed, the District provided EPA with periodic reports on the work being done, and gave EPA numerous opportunities to provide input—which the Agency chose not to do. The relevant documents, including presentations made at meetings that Agency staff attended, are not part of the record. The District can produce them for the Court's information if so requested.

³ In its Supplemental Brief in response to the *Amicus Curiae* Brief of the National Association of Clean Water Agencies, EPA seeks to excuse this rush to judgment by stating that any concerns about the technical or financial feasibility of the new limits "will be" accommodated. Supplemental Brief at 5. It appears that the basis for this claim is that at one point, EPA proposed that the District be provided with a compliance schedule in an administrative order. *Id.* at 6. The notion that that proposal by the Agency would "accommodate" the District's concerns is completely without foundation. First, the schedule would have still required that the District meet the limits that are being appealed here as without legal or scientific basis. Second, the schedule would have provided only until 2016 for the District to take all of the steps needed to meet those limits—an incredibly short timeframe to design, construct and install the enormously costly control technologies that would be needed. Third, even if the District received and complied with such an administrative order, it would still have found itself in a position of continual noncompliance with its permit between the issuance of the order and the final 2016 deadline for installation of controls—the order would simply be an enforcement tool, which would not necessarily protect the District from suit by other parties during that time period. For all of those reasons, the suggested "accommodation" would have been of little use to the District. The

II. The Phosphorus Limit is Arbitrary and Capricious.

A. There is no basis for the 0.1 mg/l permit limit.

In its opening brief, the threshold question the District raised with regard to the phosphorus limit was: what specific evidence is there that 0.1 mg/l is the correct limit for the Blackstone River? The answer to this question as reflected in EPA's Response Brief is: "none." EPA's arguments on this issue are simply a collection of conclusory statements masked as reasoned analysis and judgment.

EPA admits that it lacks a model or measurements linking various phosphorus discharge concentrations to particular levels of cultural eutrophication. Resp. at 80. That is not important, EPA says, and it should not be forced to "ignore data" that supports its position that more stringent phosphorus limitations are necessary to ensure compliance with Massachusetts water quality standards. *Id.* The District disagrees. It is important that EPA does not know what levels of phosphorus actually contribute to cultural eutrophication or what numeric level will serve to reduce eutrophication in the Blackstone River without being unduly conservative. Further, the District has not argued that EPA should ignore purported evidence of cultural eutrophication or the need for more stringent

District did suggest other options that would have addressed its concerns. In particular, the District informed EPA that it "is open to discussion of an interim set of standards that are more stringent than the 2001 Permit based on levels that we are currently able to achieve as the result of the facility upgrade and similar to those included in your draft schedule." Exhibit C to Petitioner's Emergency Motion for Stay, 4/29/11, *Upper Blackstone*, No. 11-1474. EPA was not willing to discuss that idea.

phosphorus limits; however, the District does assert that EPA needs to connect the specific phosphorus limit it chooses with the protection of the Blackstone River's designated uses. *See* 40 C.F.R. § 122.44(d)(1)(vi)(A).

EPA has made no demonstration that the reduction of phosphorus to meet the 0.1 mg/l summertime limit would have a substantial impact on the cultural eutrophication of the Blackstone River or on any designated uses. The Massachusetts water quality standards do not authorize the wholesale application of limits to protect against cultural eutrophication. Rather, the standards 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). Even where cultural eutrophication is invoked as a rationale for nutrient control, it is to “ensure protection of existing and designated uses.” 314 C.M.R. § 4.05(5)(c).

Here, EPA looked at a collection of various guidance documents, picked 0.1 mg/l from the *Gold Book*, and claimed that this national number is applicable to the Blackstone River because 0.1 mg/l falls within “a range” of ambient phosphorus concentrations that are sufficiently low to prevent cultural eutrophication. Resp. at 81. Put another way, EPA believes that the correct phosphorus limit lies somewhere between 0.024 mg/l set forth in the *Ecological Nutrient Criteria* and 0.1 mg/l set forth in the *Gold Book* (Appx. 1314), but the agency does not know the correct number. Nor does the Agency know what value will achieve the water

quality goals for the Blackstone River. EPA admits that the values in its range were not specifically developed by or for Massachusetts. *Id.* Nevertheless, EPA picked a number in this range and imposed it on the District without any specific evidence that this was the correct number to meet the designated uses for the Blackstone River.⁴

Remarkably, EPA claims that by this process it “has answered the District’s call for a demonstration of the relationship between the value applied by the Region from EPA’s national guidance and the protection of the designated uses of the Blackstone River.” Resp. at 82. The conclusory statement is not supported by the record or by EPA’s self-described process for selecting the 0.1 mg/l limit. Pursuant to 40 C.F.R. § 122.44(d)(1)(vi), the selected limit must be one that will attain and maintain the narrative criteria. While EPA may be authorized to establish effluent limits on a case-by-case basis using EPA’s water quality criteria (40 C.F.R. § 122.44(d)(1)(vi)(B)), 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 Institute, Inc. v. U.S. EPA*, 996 F.2d

⁴ EPA claims that it also considered and rejected a 0.2 mg/l phosphorus limit because it purportedly was insufficient to control cultural eutrophication. Resp. at 81 n.19. EPA did nothing of the sort. In the analysis referenced, EPA assessed whether a discharge limit of 0.2 mg/l for the District’s facility would be sufficient to reduce phosphorus levels in the river to EPA’s selected target of 0.1 mg/l. Unsurprisingly, EPA concluded that the 0.2 mg/l limit would not be adequate for that purpose. Appx. 1337. At no time did the Agency assess whether a higher water quality target in the river than its choice of 0.1 mg/l would be sufficient to address the site-specific cultural eutrophication issues in the Blackstone River.

346, 352 (D.C. Cir. 1993) (internal citations omitted). EPA has made no attempt to consider site-specific circumstances here or conducted any independent analysis. Instead, EPA did the least amount of work possible and simply adopted its own federal value. Such a process circumvents the essential requirement that the limit be set to protect uses and invites arbitrary application of guidelines that are not relevant to the District's setting. That is exactly what has occurred in this case. Again, as with nitrogen, EPA's actions on phosphorus show "a mechanical desire to reach a rapid conclusion without regard to whether the result is sound." *Puerto Rico Sun Oil Co. v. U.S. EPA*, 8 F.3d 73, 79 (1st Cir. 1993).

III. The Aluminum Permit Limit is Arbitrary and Capricious.

A. The District did not have an opportunity to comment on EPA's analysis and therefore could not have waived its arguments on the aluminum limit.

EPA's analysis concerning the need to establish an aluminum limit shifted a number of times. By the time EPA finally reached a landing on the analysis it would apply and disclosed it to the District, the record had closed and comments were no longer being accepted. In fact, it was not until EPA filed its opening brief before the EAB that it revealed its final, revised methodology for determining that an aluminum limit was necessary. Therefore, it is improper for EPA to assert that the District waived any challenge to EPA's process in establishing the aluminum limit.

The chronology of events supports the District's position:

Date	Event	Citation
8/22/08	EPA issues final Permit for the District, with no effluent limit for aluminum. In response to comments by Trout Unlimited that the Permit should address concerns with aluminum, EPA said aluminum was a “potential concern” and that the Permit requires monitoring “in order to obtain more information relative to the potential to violate receiving water criteria.” EPA said that “if the data indicate that there is a reasonable potential to violate receiving waters criteria, further permit actions will include an aluminum limit.”	Add. 110-129, 159
9/22/08	Trout Unlimited submits petition to EAB, requesting that EPA modify the Permit to include an effluent limit for aluminum.	Appx. 863-881
1/30/09	EPA issues Notice of Draft Modification to Permit to add a numeric effluent limit and associated monitoring for aluminum, with a statement of basis for the modification.	Appx. 5741-5759
2/27/09	District submits comments to EPA on Draft Permit Modification. The comments state that EPA selectively chose to use only portions of the aluminum database and incorrectly recorded values for results that were below the detection limit. The comments showed that when all of the data were included (other than values below the detection limit), “the District’s effluent is consistently below ambient levels in the Blackstone River.”	Appx. 842-844
4/20/09	EPA issues Permit Modification and Response to Comments stating: “In the statement of basis accompanying the draft permit modification, the Region <u>fully described its rationale for including or excluding data.</u> ” (emphasis added) EPA stated that it only used data collected during low-flow conditions, and that any errors made were harmless.	Add. 278-279, 291-296

5/20/09	District files Petition for Review of 2009 Modification and shows that EPA had not, as claimed, used only data from low-flow conditions. Also, the District points out that EPA had improperly considered the 344 ug/l result that occurred during a plant upset, and that EPA had dealt improperly with other results that were below the detection limit. The District states that if the errors were corrected, the data would show that the District's effluent will not cause or contribute to a violation of water quality standards. Therefore, EPA's errors were not harmless.	Appx. 825-830
7/13/09	EPA files Opposition to the District's Petition for Review and for the <u>first time</u> acknowledges that it did not cross-check data with actual flows for the dates on which testing occurred. EPA again claims that any errors were harmless. In support of that claim, EPA provides a new <u>analysis</u> , with 5 different data value scenarios, in which it incorporates the outlier data point of 344 ug/l into all 5 scenarios. This leads to an average effluent value above 87 ug/l for each scenario, thus requiring an aluminum permit limit. EPA had never revealed this analysis until this brief was filed.	Add. 303, 309
7/27/09	The District submits its Reply to the Region's Memorandum in Opposition to Petition for Review including a table showing EPA's five scenarios—each with the 344 ug/l outlier data point removed. None of the scenarios exceed the 87 ug/l threshold with the outlier removed.	Add. 310-316

The above matrix demonstrates that it was the District that was facing a “moving target,” not EPA as it complains of in its Response Brief. Resp. at 84. At each stage, the District notes EPA's selective use of data to arrive at a particular

permitting outcome, and EPA responds with a different analysis and justification of that same outcome. Further, EPA's contention that it was "forced to offer the full substantive explanation of its decision in setting a total aluminum limit of 87 ug/l for the first time in a brief to the EAB" is simply false. As the matrix makes clear, this was the third substantive explanation EPA proffered for its shifting analysis. (The first occurred when the draft permit modification was issued; the second came when the final permit modification was issued, and the third appeared in EPA's brief to the EAB.) EPA argues that simply because the 344 ug/l was present in EPA's initial database supporting the new limit, the District should have presciently realized how EPA would ultimately use that outlier data point in the manner that it finally disclosed on July 13, 2009. This is "gotcha" gamesmanship rather than a true waiver argument. It is disingenuous for EPA to have "hidden the ball" on its methodology and then argue that the District waived its ability to challenge the agency's approach.⁵

⁵ If the Court agrees that the District has not waived its right to appeal the inclusion of the outlier data point in the aluminum decision, then the proper course of action would be to remand the aluminum limit to EPA, for the full consideration of the District's "outlier" argument that has never occurred. In its Brief here, EPA faults the District for not challenging the "Region's determination that there were other discharges above 87 ug/L which, on their own, justify the Region's determination that the District's discharge had a reasonable potential to cause or contribute to an exceedence of the aluminum criterion." Resp. at 87. The Region, however, set permit limits based upon an average concentration level. (Add. 285-86). Only in its submittals to the EAB and this Court has EPA suggested that the maximum concentration of a pollutant in the discharge effluent might be used by a permit writer to justify a limit. This, however, is not what EPA did when issuing the 2009

CONCLUSION

In issuing the District's Permit, EPA has imposed effluent limits for nitrogen, phosphorus and aluminum that do not pass legal or scientific muster. Information is available that can be used to remedy those flaws, so a Permit can be developed that protects water quality through proper application of the requirements of the Clean Water Act. This Court should reverse the decision of the Environmental Appeals Board and remand the Permit to EPA, so that all of the available information can be considered, and the proper limits can be developed and then implemented.

Aluminum Modification. Consistent with common Region 1 practice, it used average concentrations, which without the 344 ug/l outlier data point do not exceed the 87 ug/l standard. (See Table 1, Add. 316).

Respectfully submitted,
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CERTIFICATE PURSUANT TO FED. R. APP. P. 32 (a)(7)

I, hereby certify that I have complied with the type volume limitations imposed by Fed. R. App. P. 32(a)(7). I hereby certify that I have confirmed through a word count of a word processing system that the total number of words in this brief (excluding the Table of Contents and Table of Authorities) is 4,263.

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CERTIFICATE OF FILING AND SERVICE

I, Robert D. Cox, Jr., hereby certify pursuant to Fed. R. App. P. 25(d) that, on December 12, 2011, the foregoing document was filed with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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