

No. 12-

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IN THE  
**Supreme Court of the United States**

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UPPER BLACKSTONE WATER POLLUTION  
ABATEMENT DISTRICT

*Petitioner,*

*v.*

U.S. ENVIRONMENTAL PROTECTION AGENCY

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

1. Whether this Court should grant a writ of certiorari to resolve a conflict between the Circuits on whether, in establishing NPDES permit limits to implement state narrative water quality criteria under the Clean Water Act, EPA should be allowed to simply select an in-stream nutrient target number from a range of numbers suggested by federally-published national guidance documents, or must the agency tailor the federal standard to relevant site-specific circumstances?

**LIST OF PARTIES**

The Conservation Law Foundation, an appellant below, is being served as a respondent herein.

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## **PETITION FOR A WRIT OF CERTIORARI**

The Upper Blackstone Water Pollution Abatement District respectfully petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the First Circuit in this case.

## **OPINIONS BELOW**

The order of the Environmental Appeals Board of the U.S. Environmental Protection Agency is set forth at Pet. App. 56a. The opinion of the United States Court of Appeals for the First Circuit in *Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA* is reported at 690 F.3d 9 (1st Cir. 2012), and is set forth at Pet. App. 1a. The First Circuit's order denying rehearing *en banc* is not reported but is set forth at Pet. App. 197a.

## **JURISDICTION**

The First Circuit Court of Appeals entered judgment on August 3, 2012. Pet. App. 1a. That court denied a timely petition for rehearing and rehearing *en banc* on September 25, 2012. Pet. App. 198a.

This Court has jurisdiction over this Petition pursuant to 28 U.S.C. § 1254(1).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

1. 33 U.S.C. § 1342 (The National Pollutant Discharge Elimination System ("NPDES"), setting forth a permitting program for discharges to navigable waters of the United States.)

2. 33 U.S.C. § 1311 (NPDES effluent limitations.)

3. 40 C.F.R. § 122.44 (Establishing limitations, standards, and other permit conditions under EPA administered NPDES programs).

## **STATEMENT OF THE CASE**

### **I. Introduction**

This case concerns the issuance of a National Pollution Discharge Elimination System (“NPDES”) permit under the Clean Water Act, 33 U.S.C. §§ 1251-1376 (“CWA”), to the Upper Blackstone Water Pollution Abatement District (the “District”) in 2008. In 2002, the United States Environmental Protection Agency (“EPA”) and the District entered into an Administrative Consent Order (“Consent Order”) with an eight-year schedule, requiring the District to upgrade its wastewater treatment plant at a cost of approximately \$180 million to meet, by 2009, a discharge limit of 0.75 mg/L for phosphorus during summer months. As construction of the facility upgrades was underway, EPA issued a new permit with a phosphorus limit of 0.1 mg/L for summer months. The District objected on the grounds, among others, that the new more stringent phosphorus limit was set before the effectiveness of the facility upgrades on water quality could be evaluated and without any site-specific water quality data. Ultimately, the issuance of the permit was upheld by EPA’s Environmental Appeals Board (“EAB”), and that decision was upheld by the Court of Appeals for the First Circuit.

The District now petitions this Court for a writ of *certiorari*, because the First Circuit Court of Appeals has rendered a decision in this case that conflicts with a decision by the Court of Appeals for the District of Columbia Circuit on the same important matter. At issue is the proper approach for EPA to take when it selects an “in-stream nutrient target number” for an NPDES permit under the CWA. The in-stream nutrient target number is important, because it ultimately dictates the effluent limit of that nutrient that will be allowed from a facility’s discharge under the permit. The key question in this case is whether, in establishing NPDES permit limits to implement state narrative water quality criteria under the CWA, EPA should be allowed to simply select an in-stream nutrient target number from a range of numbers suggested by federally-published national guidance documents, or must the agency tailor the federal standard to relevant site-specific circumstances?

In the long-standing *American Paper* case, the Court of Appeals for the District of Columbia Circuit answered this question by holding 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.” *Am. Paper Inst., Inc. v. U.S. EPA*, 996 F.2d 346, 352 (D.C. Cir. 1993) (citing *Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 835 P.2d 1030 (Wash. 1992)) (emphasis added). In other words, EPA cannot simply pick a number out of a federal guidebook to use as an in-stream nutrient target, as this number may not be rationally connected to the achievement of the state’s narrative water quality standards for that specific water body.

In this case, however, when issuing the District's new NPDES permit, EPA did not tailor the in-stream phosphorus target to site-specific circumstances of the Blackstone River. Instead, EPA looked at a collection of various guidance documents, picked 0.1 mg/L from the federal "Gold Book," and asserted that this "national" number was the appropriate in-stream phosphorus target for the Blackstone River. EPA's approach, therefore, was contrary to that articulated by the D.C. Circuit in *American Paper*. The in-stream target EPA selected determined the effluent limit for phosphorus in the District's NPDES permit and, if allowed to stand, will require the District to spend \$180-200 million dollars to upgrade its publicly owned treatment works facility ("POTW"), despite having recently completed upgrades costing \$180 million in accordance with the Consent Order.

The District identified this problem to the First Circuit and discussed *American Paper* in its briefs below. Yet, the First Circuit upheld the phosphorus limit in the District's permit without even confronting the issues raised by *American Paper* or mentioning the case in any manner. By upholding the phosphorus limit in the District's permit without requiring the consideration of site-specific circumstances or addressing the reasoning in *American Paper*, the First Circuit created a conflict with the D.C. Circuit on an important matter under the CWA.

The decision on this matter will not just affect the local region but will resonate nationwide. Thousands of industrial dischargers and municipal wastewater treatment plants and their rate-payers are affected by state narrative water quality standards, the imposition of in-stream nutrient target numbers, and the resultant

effluent permit limits for nutrients through the NPDES permitting process. A conflict between the D.C. Circuit and the First Circuit as to whether a permit writer is required to tailor a federal guidebook standard to site-specific circumstances creates confusion and uncertainty about a recurring issue under the CWA. This Court should resolve this conflict in favor of the D.C. Circuit's interpretation of the applicable regulations in *American Paper*, which is consistent with the purpose, structure, and operation of the CWA.

## II. Statutory Background

The CWA authorizes EPA (or an authorized state) to issue NPDES permits allowing wastewater discharges subject to limited conditions. 33 U.S.C. § 1342. EPA administers the NPDES program in Massachusetts, because the state has not sought authorization to do so. Section 401(a)(2) of the CWA and 40 C.F.R. § 122.44(d)(4) require that NPDES permits be conditioned “in such a manner as may be necessary to insure compliance” with applicable water quality standards. Similarly, section 301(b)(1)(C) of the CWA specifies that permits must contain “any more stringent limitation, including those necessary to meet water quality standards . . . established pursuant to any State law or regulations or any other Federal law or regulation, or required to meet any applicable water quality standards established pursuant to this chapter.” 33 U.S.C. § 1311(b)(1)(C). NPDES permits must include conditions “necessary” to “[a]chieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.” 40 C.F.R. § 122.44(d)(1).

Water quality standards, adopted by states and approved by EPA, are designed to protect public health or welfare, enhance water quality, and advance the purposes of the CWA. 33 U.S.C. § 1313(c)(2)(A). In Massachusetts, water quality standards for nutrients 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 Mass. Code Regs. § 4.05(5)(c). With respect to the Blackstone River, the designated uses are for habitat for fish, other aquatic life and wildlife, and for primary (*e.g.*, swimming) and secondary (*e.g.*, fishing and boating) contact recreation. These narrative water quality standards are a predicate to the establishment of site-specific effluent limitations that are set forth in an NPDES permit.

When considering the issues in this case, it is imperative to distinguish between the in-stream water quality target for a nutrient and the effluent limit set forth in an NPDES permit. The in-stream target number is intended to be a numeric representation of a state’s narrative water quality standard – that is, the allowable level of a nutrient in the water body that will achieve the designated uses articulated by the state’s narrative water quality standards (*e.g.*, swimming and fishing). The effluent limit, in turn, is the permissible level of discharge from a facility into that water body that will attain the in-stream target number for that nutrient. In short, the in-stream target number is supposed to achieve the narrative water quality standard, and the effluent limit is supposed to achieve the in-stream target number. Accordingly, the permissible effluent limit for a nutrient is determined by the in-stream target number for that nutrient.

### **III. Factual Background**

The District owns and operates a POTW in Millbury, Massachusetts that treats wastewater from Worcester and several surrounding communities. The District is authorized to discharge treated wastewater from its POTW to the Blackstone River under the terms of an NPDES permit issued on September 30, 1999, as modified by a settlement agreement with Region 1 of EPA dated August 8, 2001 (the “2001 Permit”). The Blackstone River flows from its origin in Massachusetts south to Rhode Island and into the Seekonk River and then into the Providence River, both of which are tidal extensions of Narragansett Bay.

As provided under the 2001 Permit, the District and EPA entered into the Consent Order establishing an eight-year compliance schedule for a series of upgrades designed to bring the District’s facility into compliance with certain discharge limits in the 2001 Permit, including, among other things, a discharge limit of 0.75 mg/L for phosphorus during the summer months. The Consent Order required the District to complete the upgrades necessary to meet the phosphorus limit by August 2009.

In accordance with the Consent Order, the District moved forward with the POTW upgrades, at a cost of approximately \$180 million. The upgrades were designed to meet not only a total phosphorus discharge limit of 0.75 mg/L, but also to reduce total nitrogen discharges to 8-10 mg/L, even though the 2001 Permit set no limit on total nitrogen.



As construction of the upgrades was underway, the District timely submitted an application for renewal of its 2001 Permit to EPA on November 8, 2005, as required by 40 C.F.R. § 122.21(d). On March 23, 2007, in response to the application for renewal, EPA issued a draft NPDES permit to the District. Despite the existing, enforceable compliance schedule established under the Consent Order and the 2001 Permit, EPA proposed new, more stringent limits on phosphorus in the new draft permit. EPA established an in-stream phosphorus water quality target of 0.1 mg/L, and proposed an effluent limit of 0.1 mg/L during summer months to achieve the 0.1 mg/L in-stream target. A new discharge limit for total nitrogen was also established. The District and others submitted comments objecting to these new limits during the public comment period, which concluded on May 25, 2007.

Over a year later, EPA issued a final NPDES permit to the District on August 2008 (“2008 Permit”). Despite the objections of the District and other commenters, the 2008 Permit contained the same new limits for total phosphorus and total nitrogen that EPA had proposed in the draft permit, even though the \$180 million worth of POTW upgrades agreed upon in the Consent Order were nearing completion, but had not yet come on-line. In other words, EPA had not waited to see the results of the upgrades agreed-upon in the Consent Order before issuing the 2008 Permit with the more stringent limits.

The District appealed to the EAB, which upheld the 2008 Permit. Pet. App. 58a. The District subsequently requested, and the First Circuit granted on April 29, 2011, a stay of the contested 2008 Permit conditions. The District presented evidence that the 2008 Permit, which but for the stay would have been effective on May 1, 2011,

would require the District to immediately commence upgrading its wastewater treatment facility, at a cost of approximately \$180-\$200 million (over and above the \$180 million in upgrades the District had just completed), and would increase significantly the District's annual operating costs and cause various energy and environmental side effects. These costs would be passed on to the District's rate-payers. The First Circuit eventually upheld the 2008 Permit and on September 25, 2012, denied the District's Petition for Rehearing and Rehearing En Banc. Pet. App. 198a.

This Petition concerns the process by which EPA selected the in-stream phosphorus target of 0.1 mg/L for the 2008 Permit which, in turn, determined the phosphorus effluent limit from the District's POTW of 0.1 mg/L during summer months.

## **REASONS FOR GRANTING THE PETITION**

### **I. THERE IS A CONFLICT BETWEEN THE FIRST CIRCUIT AND D.C. CIRCUIT REGARDING AN IMPORTANT ISSUE UNDER THE CLEAN WATER ACT**

#### **A. Resolving a Circuit Conflict Regarding the Proper Method to Establish NPDES Permit Limits Under the Clean Water Act is of Special Importance and Will Address a Recurring Issue**

This case presents a serious and important question concerning the interpretation and application of provisions of the CWA and its associated regulations that should be settled by this Court. The objective of the CWA is "to

restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The nationwide system of regulation under the CWA reflects an important and substantial federal interest. *See, e.g., City of Milwaukee v. Illinois & Michigan*, 451 U.S. 304, 318 (1981) (noting Congress' intent in enacting the CWA was "to establish an all-encompassing program of water pollution regulation"). NPDES permits are issued throughout the country on a regular basis, and the provisions in question at 40 C.F.R. § 122.44(d) play a major role in the decision-making process regarding in-stream water quality targets and the effluent limits that will be incorporated into each permit.

Most states still rely on narrative (as opposed to numeric) nutrient criteria to describe their water quality standards, and nutrient pollution is one of the most prevalent and challenging issues in the ongoing effort to improve and maintain the quality of the nation's waters. EPA is urging states to translate narrative nutrient criteria into numeric limits, and the agency's approach in Region 1 will influence how in-stream nutrient targets and effluent limits are established for NPDES permit-holders throughout the nation.<sup>1</sup> A conflict between the Circuits on an issue that will affect thousands of industrial dischargers and municipal wastewater treatment plants

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1. *See* Delta Farmers Advocating Resource Management, *EPA Launches Novel Effort to Impose Strict Numeric Nutrient Limits in States*, Feb. 25, 2011, [http://deltafarm.org/news/epa\\_nutrient\\_limits](http://deltafarm.org/news/epa_nutrient_limits); Letter from Tinka G. Hyde, Director, EPA Water Division, to Marcia Willhite, Chief, Illinois EPA Bureau of Water (Jan. 21, 2011), *available at* [http://www.nutrients.utah.gov/documents/EPA\\_letter\\_to\\_Illinois\\_Expectation\\_to\\_Include\\_Nutrient\\_Limits\\_in\\_NPDES\\_permits.pdf](http://www.nutrients.utah.gov/documents/EPA_letter_to_Illinois_Expectation_to_Include_Nutrient_Limits_in_NPDES_permits.pdf).

and their rate-payers disrupts this system, and the Court should resolve the conflict in order to provide clarity and consistency in the nationwide implementation of the CWA.

**B. There is a Conflict Between the D.C. Circuit and the First Circuit on the Need to Consider Site-Specific Information When Translating State Narrative Water Quality Criteria Into In-Stream Water Quality Targets and Effluent Limitations**

There is a defined process by which EPA is to convert state narrative water quality standards into an in-stream target and then, ultimately, into specific effluent limitations for an NPDES permit. 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., Inc. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993). For the 2008 Permit, EPA chose option (B) under this regulation, which requires the agency 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.*, at Pet. App. 103a. In *American Paper*, the D.C. Circuit held squarely: “[T]his alternative [*i.e.*, 40 C.F.R. § 122.44(d)(1)(vi)(B)] requires a permit writer to tailor the federal standard to any relevant site-specific circumstances in order to effectuate the intent of a particular state narrative criterion.” *Am. Paper Inst., Inc.*, 996 F.2d at 352 (citing *Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 835 P.2d 1030 (Wash. 1992)) (emphasis added). This holding dictates that for both the in-stream target number and effluent

limit, site-specific data must be analyzed to ensure there is a connection between the numbers selected and the designated uses for the specific water body at issue.

In this case, EPA took a different approach for the District's 2008 Permit; it did not use, consider, or even seek out "other relevant information." 40 C.F.R. § 122.44(d)(1)(vi)(B). Instead, it picked an in-stream nutrient target number out of a federal guidebook and arbitrarily claimed that it was appropriate to meet state narrative water quality criteria for the Blackstone River. More specifically, EPA selected a target number from a 1986 guidance document: EPA Office of Water, *Quality Criteria for Water* (May 1, 1986) (the "*Gold Book*"). The values in this guidebook were not specifically developed for the Blackstone River or even for Massachusetts. Nevertheless, EPA selected the *Gold Book* criterion of 0.1 mg/L as the in-stream phosphorus water quality target, without considering any site-specific information related to the Blackstone River. 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. The in-stream target of 0.1 mg/L resulted in the 2008 Permit's effluent limits of 0.1 mg/L during summer months.<sup>2</sup>

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2. After identifying the national guidance documents EPA reviewed to select the in-stream target, the First Circuit stated 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." Pet. App. 49a. (emphasis added). A careful review of this statement reveals that the First Circuit was explaining that EPA examined site-specific data to establish the phosphorus effluent limit of 0.1 mg/L, not the

This entire approach is in contravention to *American Paper* and circumvents the essential requirement that in-stream targets and effluent limits be set to protect the Blackstone River's designated uses. The District identified this problem to the First Circuit and discussed *American Paper* in its briefs. However, the First Circuit upheld the phosphorus limit in the District's permit without even confronting the issues raised by *American Paper* or mentioning the case in any manner. By upholding the phosphorus limit in the District's 2008 Permit without requiring the consideration of site-specific circumstances for the in-stream phosphorus target or addressing the reasoning in *American Paper*, the First Circuit created a

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in-stream phosphorus target of 0.1 mg/L. *Id.* at 49a-50a (reviewing site-specific data EPA reviewed to establish the effluent limit). The First Circuit's analysis confuses the site-specific data review EPA performed in establishing the effluent limit with EPA's selection from the *Gold Book* of the in-stream phosphorus 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.

Importantly, once EPA arbitrarily fixed the in-stream phosphorus target at 0.1 mg/L, any site-specific analysis it performed to consider effluent limits above this number was illusory. Given the process that EPA used to determine the limits, it would be virtually impossible for the District's phosphorus effluent limit to be anything higher than the in-stream target. Put another way, once the in-stream target was arbitrarily selected from the *Gold Book*, the effluent limit was predetermined. Therefore, any argument by EPA that it considered the feasibility of higher effluent limits misses the point. It needed to consider site-specific data for the in-stream phosphorus target first.

conflict with the D.C. Circuit on the correct interpretation of 40 C.F.R. § 122.44(d)(1)(vi)(B), which is an important issue under the CWA.

**C. The D.C. Circuit’s Interpretation of the Regulations Should Be Followed to Resolve the Conflict**

The D.C. Circuit’s interpretation of the CWA and its associated regulations in *American Paper* was correct. When EPA selects an in-stream nutrient target number and an effluent limit for an NPDES permit, the agency must adhere to the intent and structure of the CWA and its implementing regulations by tailoring the numbers to relevant site-specific circumstances. Specifically, as explained in *American Paper*, 33 U.S.C. § 1311 requires that “every permit contain (1) effluent limitations . . . and (2) any more stringent pollutant release limitations necessary for the waterway . . . to meet ‘water quality standards.’” *Am. Paper Inst., Inc.*, 996 F.2d at 349 (quoting 33 U.S.C. § 1311) (internal citations omitted) (emphasis added). The clear language of 33 U.S.C. § 1311 thus requires a case-by-case analysis of site-specific circumstances for “the waterway” at issue. This makes sense, of course, as the goal of translating state narrative water quality standards is to select numerical values for the in-stream water quality targets and effluent limits that will achieve the designated uses of that water body.

The D.C. Circuit’s analysis is also consistent with the various requirements of 40 C.F.R. § 122.44(d), which expressly states that NPDES permits “shall include conditions . . . [to] achieve water quality standards . . . including state narrative criteria for water quality.”

40 C.F.R. § 122.44(d)(1). The regulations also specifically contemplate the collection of site-specific data to determine whether a discharge actually will cause or has the potential to cause a violation of the CWA:

When determining whether a discharge... [may] cause... an in-stream excursion...the permitting authority shall use procedures which account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing...and where appropriate, the dilution of the effluent in the receiving water.

40 C.F.R. § 122.44(d)(1)(ii) (emphasis added). 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)), the D.C. Circuit's conclusion 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" is consistent with the language and intent of the regulations that the characteristics of each water body should be considered individually during this process. *Am. Paper Inst., Inc.*, 996 F.2d at 349 (internal citations omitted).

The use of national guidance documents alone cannot properly account for the site-specific conditions present in the Blackstone River or other water bodies. To be meaningful, and to protect the designated uses assigned to a particular water body, the criteria and limits need to account for disparate site- and condition-specific factors that directly influence how nutrients are assimilated



into the water.<sup>3</sup> Nutrient fate and transport is directly influenced by physical, chemical, and biological conditions as they exist in a particular water body. In the case of the Blackstone River, for example, there are numerous dams on the river, which create stagnant water and drastically affect the ability of the river to achieve water quality standards.<sup>4</sup> EPA cannot close its eyes to these issues, especially given the regulatory mandate to consider them under 40 C.F.R. § 122.44(d) and the D.C. Circuit’s sound interpretation of what these regulations mean.

In sum, the D.C. Circuit’s approach discussed in *American Paper*, derived from a reasoned interpretation of the plain language of 40 C.F.R. § 122.44(d), is that an NPDES permit writer, when implementing state narrative criteria, must “tailor the federal standard to any relevant site-specific circumstances in order to effectuate the intent of a particular state narrative criterion.” *Am. Paper Inst., Inc.*, 996 F.2d at 352 (citing *Simpson Tacoma Kraft Co. v. Dep’t of Ecology*, 835 P.2d 1030 (Wash. 1992)) (emphasis added). Given the interplay between the in-stream water quality target and the effluent limit, this necessarily means that site-specific information must be considered for both components, so that the selected target and limits are designed to achieve the designated uses for that water body. Until now, this approach has not been contradicted by any Court of Appeals.

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3. See EPA et al., *Clean Water Action Plan: Restoring and Protecting America’s Waters* (Feb. 1998), available at <http://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=20004J7S.txt>.

4. See Upper Blackstone Water Pollution Abatement District et al., *Blackstone River Water Quality Study: Project Summary* 1-3, 13-14 (Nov. 2011), available at [http://www.ubwpad.org/BR%20Files/UBWPAD\\_ProjectSummary\\_2011Nov.pdf](http://www.ubwpad.org/BR%20Files/UBWPAD_ProjectSummary_2011Nov.pdf).

In this case, however, the First Circuit allowed EPA to simply “take a number out of a guidebook” when selecting the in-stream phosphorus target for the 2008 Permit. There is nothing in the record indicating that EPA ever considered site-specific information when it selected the in-stream phosphorus target of 0.1 mg/L. This arbitrary number directly resulted in arbitrary effluent limitations in the 2008 Permit, which will cost the District and its rate-payers \$180-200 million without any evidence that these limitations will achieve the designated uses of the Blackstone River. In ignoring the District’s citations to *American Paper*, the First Circuit created a conflict between it and the D.C. Circuit that this Court should resolve. Alternatively, this Court should vacate the First Circuit’s decision and remand with instructions to address *American Paper* with regard to the facts in this matter.

### CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

Respectfully submitted,

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