BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of: Town of Concord Department of Public Works NPDES Permit No. MA0100668	)	NPDES Appeal No. 13-08

RESPONDENT REGION 1'S RESPONSE
TO THE PETITION FOR REVIEW

Respectfully submitted,

Samir Bukhari
Assistant Regional Counsel
Michael Curley
Assistant Regional Counsel
US Environmental Protection Agency
Office of Regional Counsel, Region 1
5 Post Office Square
Boston, MA 02109
Tel: (617) 918-1095
Fax: (617) 918-0095
Email: bukhari.samir@epa.gov

Of Counsel:

Lee Schroer
Jim Curtin
Pooja Parikh
Water Law Office, Office of General Counsel

Dated: October 31, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

I. STATEMENT OF THE CASE 1

A. Statutory and Regulatory Background 2

1. The Clean Water Act 2

2. Applicable State Water Quality Standards 5

II. FACTUAL AND PROCEDURAL BACKGROUND 7

III. THRESHOLD PROCEDURAL REQUIREMENTS AND STANDARD OF REVIEW 11

IV. ARGUMENT 13

A. EFFLUENT LIMITATIONS 13

1. THE WASTEWATER EFFLUENT FLOW LIMIT 13

a) The Town Failed to Preserve Its Legal Arguments Regarding the Region's Authority to Impose Wastewater Effluent Flow Limits and Failed to Demonstrate Reviewable Error or Abuse of Discretion 13

b) Petitioner's Remaining Arguments Regarding the Flow Limit Were Not Preserved, Are Not Ripe, and Do Not Demonstrate Reviewable Error or Abuse of Discretion 17

2. THE PH LIMIT 20

a) Petitioner Fails to Demonstrate the Region Committed Clear Error or Abuse of Discretion in Revising the pH Limit to Ensure Compliance with Massachusetts Standards 20

3. THE ALUMINUM LIMIT 23

a) Petitioner Fails to Demonstrate That the Region Erred by Basing the Aluminum Limit on Existing Massachusetts Standards 24

b) Petitioner Failed to Preserve the Issue of Whether the Region Could Include Aluminum Limits Without an Aluminum TMDL 27

c) Petitioner Fails to Demonstrate that the Region Erred in Updating Its 7Q10 Calculations in the Final Permit 28

d) The Region's Method of Calculating the Aluminum Limit Does Not Constitute Reversible Error 30

e) Petitioner Fails to Demonstrate that the Region Erred by Using Effluent Data for the Period January 2009 to January 2011 in its Reasonable Potential Analysis for Aluminum 31

f) The Region Did Not Err by Not Including a Seasonally Varying Aluminum Limit 31

B. MONITORING AND REPORTING 32

1. The Monitoring and Reporting Requirements in the Permit Do Not Warrant Board Review 32

a) Petitioner's Contention that the Region Lacks Authority to Impose Conditions Regarding Collection System Mapping, Planning and Reporting Beyond Part Two Standard Conditions Was Not Preserved Below and Does Not Warrant Board Review 33

b) The Town's Arguments Regarding Monitoring Related to Nutrient Removal Processes Are Waived and Do Not Warrant Board Review 40

c) The Region's Decision to Impose DEHP Monitoring Was Rationally Based in the Record and Should be Upheld 40

V. CONCLUSION 44

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS 46

CERTIFICATE OF SERVICE 47

TABLE OF AUTHORITIES

Federal Cases

Am. Iron & Steel Inst. v. EPA, 115 F.3d 979 (D.C. Cir. 1997) 5
Arkansas v. Oklahoma, 503 U.S. 91 (1992) 4, 17
Natural Res. Def. Council, Inc. v. Costle, 568 F.2d 1369 (D.C. Cir. 1977) 17
United States v. Hartz Constr. Co., 2000 WL 1220919 (N.D. Ill. Aug. 17, 2000) 37
Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA, 690 F.3d 9 (1st Cir. 2012) 3

Environmental Appeals Board Cases

In re Alyeska Seafoods, Inc., NPDES Appeal No. 03-03 (EAB Apr. 4, 2004) 36
In re Beeland Group, LLC, UIC Appeal No. 08-02 (EAB Oct. 3, 2008) 12
In re City of Attleboro, NPDES Appeal No. 8-08 (EAB Sept. 15, 2009) 7, 13, 29, 45
In re City of Fayetteville, Ark., 2 E.A.D. 594 (CJO 1988) 3
In re City of Marlborough, 12 E.A.D. 235 (EAB 2005) 23
In re City of Moscow, 10 E.A.D. 135 (EAB 2001) 3, 36, 38, 41
In re City of Palmdale, PSD Appeal No. 11-07 (EAB Sept. 17, 2012) 20, 24
In re City of Port St. Joe, 7 E.A.D. 275 (EAB 1997) 29, 43
In re D.C. Water & Sewer Auth., 13 E.A.D. 714 (EAB 2008) 23
In re Dominion Energy Brayton Point, LLC, 12 E.A.D. 490 (EAB 2006) 12
In re Encogen Cogeneration Facility, 8 E.A.D. 244 (EAB 1999) 35, 39, 40
In re Gov't of D.C. Mun. Separate Storm Sewer Sys., 10 E.A.D. 323 (EAB 2002) .. 12, 23, 41
In re Hillman Power Co, 10 E.A.D. 673 (EAB 2002) 45
In re NE Hub Partners, LP, 7 E.A.D. 561 (EAB 1998) 45
In re New England Plating, 9 E.A.D. 726 (EAB 2001) 43
In re NPDES Permit for Wastewater Treatment Facility of Union Township, NPDES Appeal Nos. 00-26 & 00-28 (EAB, Jan. 23, 2001) (Order Denying Petitions for Review) 36, 37
In re Peabody W. Coal Co., 12 E.A.D. 22 (EAB 2005) 13
In re Rohm & Haas Co., 9 E.A.D. 499 (EAB 2000) 13, 40
In re Scituate Wastewater Treatment Plant, 12 E.A.D. 708 (EAB 2006) 35
In re Shell Offshore, Inc., 13 E.A.D. 357 (EAB 2007) 15
In re Three Mountain Power, LLC, 10 E.A.D. 39 (EAB 2001) 27, 30, 32
In re Town of Ashland Wastewater Treatment Facility, 9 E.A.D. 661 (EAB 2001) . 14, 23, 37, 38, 43
In re Upper Blackstone Water Pollution Abatement Dist., NPDES Appeal Nos. 08-11 to 08-18 & 09-06 (EAB May 28, 2010) 26, 28
In re Upper Blackstone Water Pollution Abatement Dist., NPDES Appeal Nos. 10-09 through 10-12 (EAB Mar. 31, 2011) 15
In re Washington Aqueduct Water Supply Syst., 11 E.A.D. 565 (EAB 2004) 5
In re Westborough, 10 E.A.D. 297 (EAB 2002) 13, 34, 39

Statutes

16 U.S.C. § 1274 8
33 U.S.C. § 1311 ..... 2, 3
33 U.S.C. § 1313 ..... 2, 3

33 U.S.C. § 1314 3
33 U.S.C. § 1318 36
33 U.S.C. § 1342 2
33 U.S.C. § 1362 2
Mass. Gen. Laws Ann. Ch. 21 § 43 11

Regulations

314 C.M.R. § 4.03 8
314 C.M.R. § 4.05 ..... 6, 7, 21, 27, 28
314 C.M.R. § 4.06 6
40 C.F.R. § 122.21 ..... 8, 16
40 C.F.R. § 122.4 ..... 4, 14, 17, 23, 37
40 C.F.R. § 122.41(d) 4, 34
40 C.F.R. § 122.41(e) 4, 34, 37, 38, 40
40 C.F.R. § 122.44(d) 4, 5, 9, 14, 25, 36, 37, 44
40 C.F.R. § 122.44(i) 35, 36, 37, 43
40 C.F.R. § 122.45 ..... 5, 16
40 C.F.R. § 122.6 8
40 C.F.R. § 122.62 10
40 C.F.R. § 124.13 ..... 12, 20
40 C.F.R. § 124.19 ..... 12, 13, 15, 20, 25, 26, 30, 31, 32, 33, 40
40 C.F.R. § 131.10 3
40 C.F.R. § 131.11 ..... 3, 7
40 C.F.R. § 131.2 3
40 C.F.R. § 131.21 7
40 C.F.R. § 131.3 3
40 C.F.R. § 131.6 3

EXHIBIT LIST

No.	AR No.	Name
1	I.8	EPA NPDES Permit Writers' Manual (2010)
2	I.5	National Recommended Water Quality Criteria (2002)
3	A.7	Fact Sheet (July 13, 2012)
4	B.1	NPDES Permit No. MA0100668 Response to Comments (August 2, 2013)
5	A.1	Final NPDES Permit No. MA0100668 (August 2, 2013)
6	A.6	Draft NPDES Permit No. MA0100668 (July 13, 2012)
7	A.11	Prior NPDES Permit No. MA0100668 (January 12, 2006)
8	F.1	Massachusetts 2010 Integrated List of Waters
9	A.10	Permit Renewal Application (September 2011)
10	D.1	MassDEP Clean Water Act Section 401 Certification (July 3, 2013)
11	I.11	EPA *Integrated Municipal Stormwater and Wastewater Planning Approach Framework* (June 5, 2012)
12	I.3	EPA's Technical Support Document for Water Quality-Based Toxics Control (1991)

I. STATEMENT OF THE CASE

This petition arises out of EPA Region 1's issuance of an NPDES permit ("Permit") to the Town of Concord ("Town" or "Petitioner") covering discharges to the Concord River from its wastewater treatment plant ("WWTP") in Concord, Massachusetts. The Town's WWTP discharges into a portion of the Concord River suffering from significant water quality impairments, including for nutrients.

The petition includes a lengthy recitation of the Town's environmentally innovative and progressive planning initiatives. EPA has never questioned these credentials. The relevant issues before the Board do not turn on the Town's environmental *bona fides*, but on specific statutory and regulatory provisions governing the imposition of NPDES permit requirements necessary to comply with applicable state water quality standards under the Clean Water Act ("CWA" or "Act").

The Town objects to effluent limitations and conditions imposed by the Region on wastewater effluent flow, aluminum and pH, as well as monitoring requirements for Di(2-ethylhexyl) phthalate ("DEHP") and reporting requirements pertaining to operation and maintenance of the Concord WWTP collection system. None of Concord's claims of error are sufficient to warrant review, as they in many cases fail to satisfy threshold procedural requirements, and in all cases fail to demonstrate that the Region committed reviewable error, or otherwise abused its discretion.

The Region in this case adequately responded to all comments. In the limited instances where the Petitioner substantively confronts the Region's actual explanations, it succeeds at most in presenting alternative opinions on technical matters, which under

longstanding Board precedent are insufficient to garner review. Significantly, in the case of flow, the Town premises its arguments on a simple mischaracterization of the permit proceedings, claiming that it formally submitted a direct request for a flow increase to the Region, and that the Region adjudicated the merits of that request and denied it. None of this has any basis in fact, and accordingly cannot serve as a basis for review.

Review of the permit should be denied.

A. Statutory and Regulatory Background

1. The Clean Water Act

Under CWA section 402, 33 U.S.C. § 1342, EPA may issue National Pollutant Discharge Elimination System ("NPDES") permits "for the discharge of any pollutant, or combination of pollutants" if the permit conditions assure that the discharge complies with certain requirements, including those of section 301 of the CWA, 33 U.S.C. § 1311.[1] The Act defines "pollutant" to mean, *inter alia*, "municipal . . . waste[]" and "sewage…discharged into water." CWA § 502(6); 33 U.S.C. § 1362(6).

CWA section 303 requires each State to adopt water quality standards ("WQS") for its waters. *See* 33 U.S.C. § 1313(a)-(c). Water quality standards consist of: (1) designated "uses" of the water, such as propagation of fish, aquatic life, and wildlife, recreation and aesthetics; (2) "criteria," expressed either in numeric or narrative form, which, *inter alia*, specify the amounts of various pollutants that may be present in those waters without impairing the designated uses; and (3) an antidegradation policy to

[1] The Commonwealth of Massachusetts has not obtained NPDES program authorization, and therefore EPA's Region 1 office issues NPDES permits to point source dischargers in Massachusetts.

maintain and protect existing uses and high quality waters. *See id.* § 1313(c)(2)(A); *see also* 40 C.F.R. §§ 131.2, 131.3, 131.6, 131.10, 131.11.

Section 301 of the CWA provides for two types of effluent limitations to be included in NPDES permits: "technology-based" limitations and "water quality-based" limitations. *See* 33 U.S.C. §§ 1311, 1313, 1314(b); 40 C.F.R. Parts 122, 125, 131 and 133. As a class, Publicly Owned Treatment Works ("POTWs") must meet technology-based requirements based on "secondary treatment." *See id.* § 1311(b)(1)(B). Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), of the Act requires that NPDES permits include effluent limits more stringent than technology-based limits whenever:

> necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations…or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to [the CWA].

NPDES permits must contain effluent limitations necessary to attain and maintain WQS, without consideration of the cost, availability or effectiveness of treatment technologies. *See Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA*, 690 F.3d 9, 33 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2282 (2013).

EPA has implemented Sections 301(b)(1)(C) and 402 of the Act through numerous regulations, which specify when the Region must include permit conditions, water quality-based effluent limitations or other requirements in NPDES permits. Most trenchantly, 40 C.F.R. § 122.4(d) *prohibits* issuance of an NPDES permit "[w]hen the imposition of conditions cannot *ensure* [emphasis added] compliance with the applicable water quality requirements of all affected States." Section 122.44(d)(1) is similarly broad in scope and obligates the Region to include in NPDES permits "any

requirements…necessary to: (1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality."

"Congress has vested in the Administrator [of EPA] broad discretion to establish conditions for NPDES permits" in order to achieve the statutory mandates of Section 301 and 402. *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992). Indeed, EPA has established by regulation various standard conditions that must be included in all NPDES permits, including "Proper Operation and Maintenance," which requires the proper operation and maintenance of all wastewater treatment systems and related facilities installed or used to achieve permit conditions, and the "Duty to Mitigate," requiring permittees to take all reasonable steps to minimize or prevent any discharge in violation of the permit which has the reasonable likelihood of adversely affecting human health or the environment. *See* 40 C.F.R. § 122.41(e), (d).

EPA's regulations set out the process for the Region to determine whether permit limits are "necessary" to achieve WQS and for the formulation of these requirements. *See id.* § 122.44(d). Permit writers are first required to determine whether pollutants "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion" of the narrative or numeric criteria set forth in the WQS. *Id.* § 122.44(d)(1)(i). EPA guidance directs that this "reasonable potential" analysis be based on "worst-case" conditions. *In re Washington Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 584 (EAB 2004). If a discharge is found to cause, have the reasonable potential to cause, or contribute to an excursion of a state water quality criterion, then a permit *must* contain effluent limits as stringent as necessary to achieve the WQS. 40 C.F.R. § 122.44(d)(1), (5).

Establishing water quality-based effluent limitations that are sufficiently protective to meet in-stream water quality criteria likewise requires the Region to account for both effluent wastewater and receiving water flows. Ex.1 at 6-16 to 6-20 (NPDES Permit Writers Manual) (AR I.8). When deriving permit effluent limits, EPA accounts for effluent wastewater flow under POTW design flow conditions (40 C.F.R. § 122.45(b)(1)); the concentration of a given pollutant in the effluent (discharge concentration); the percentage of effluent in the receiving water immediately downstream of the discharge under the critical low flow conditions identified in the WQS (available dilution); and the concentration of pollutants upstream of the discharge (background) to determine how much the discharge can contribute such that the resulting mix downstream does not exceed the criterion. *Id.* at 6-22 to 6-30. Where the discharge concentration exceeds the criterion, and there is no available dilution or remaining assimilative capacity in the receiving water for the pollutant, then the permit writer may establish the permit limit at the criterion level, to ensure the resulting discharge will not cause or contribute to an exceedance of the numeric criterion in-stream. *See, e.g., id.* at 6-19.

2. Applicable State Water Quality Standards

The Concord WWTP discharges into a reach of the Concord River that has been classified by the Commonwealth in its Surface Water Quality Standards, 314 Mass. Code Regs. 4.00 *et seq.* ("Massachusetts Standards") as a Class B Warm Water Fishery and as a Treated Water Supply. This segment extends from the confluence of the Sudbury and Assabet Rivers to the Town of Billerica's water supply intake. As a Class B Warm Water Fishery, it is designated as a habitat for fish, other aquatic life and wildlife and for primary (*e.g.*, swimming) and secondary (*e.g.*, fishing and boating) contact recreation.

314 C.M.R. §§ 4.05(3)(b), 4.06 (Table 18). For Class B waters, pH must be in the range of 6.5 through 8.3 standard units and not more than 0.5 units outside of the natural background range, and there shall be no change from natural background conditions that would impair any designated use. *Id*. § 4.05(3)(b)(3).

In addition to criteria specific to Class B waters, Massachusetts imposes minimum narrative criteria applicable to all surface waters, including nutrients, *id.* § 4.05(5)(c) ("Unless naturally occurring, all surface waters shall be free from nutrients in concentrations that would cause or contribute to impairment of existing or designated uses…"), and toxics, *id.* § 4.05(5)(e) ("All surface waters shall be free from pollutants in concentrations . . . that are toxic to humans, aquatic life or wildlife").

Massachusetts implements its narrative toxics standard at 314 C.M.R. § 4.05(e) by specifying that, "[f]or pollutants not otherwise listed in 314 CMR § 4.00, the *National Recommended Water Quality Criteria: 2002, EPA 822R-02-047, November 2002* ["Recommended Criteria"] published by EPA pursuant to Section 304(a) of the [CWA], are the allowable receiving water concentrations for the affected waters, unless the Department …establishes a site specific criterion[.]" In those cases where the Commonwealth does develop site-specific criteria, Massachusetts must document it and subject it to full inter-governmental coordination and public participation. *See id.* § 4.05(5)(e)(4). In addition, federal law requires EPA's review and approval of site-specific criteria before they are effective for CWA purposes. *See* 40 C.F.R. §§ 131.11(b)(1)(ii) (providing that states may establish criteria based on Section 304(a) criteria modified to reflect site-specific conditions), 131.21 (providing for EPA review and approval of state water quality standards). Aluminum and Di(2-ethylhexyl) phthalate

("DEHP") have not been "otherwise listed" in 314 CMR 4.00 and no site-specific limits for the Concord River have been developed for these pollutants. Accordingly, EPA's Recommended Criteria apply for these pollutants, including a freshwater chronic criterion for aluminum of 87 ug/L and human health criteria for DEHP of 1.2 µg/L for consumption of water and organisms, and 2.2 µg/L for consumption of organisms only. Ex. 2 (Recommended Criteria) at 23 and 16, respectively (AR I.5).[2]

Massachusetts requires WQS to be met even during severe hydrological conditions, *i.e.*, periods of critical low flow when the volume of the receiving water is able to provide relatively little dilution. *In re City of Attleboro*, NPDES Appeal No. 8-08, slip op. at 58 (EAB Sept. 15, 2009) (citing 314 C.M.R. § 4.03(3)). NPDES permit limits for discharges to rivers and streams must be calculated to meet standards at the "7Q10," *id.*, or "the lowest mean flow for seven consecutive days to be expected once in ten years." 314 C.M.R. § 4.03(3).

II. FACTUAL AND PROCEDURAL BACKGROUND

The Concord WWTP is a 1.2 million gallon per day (MGD) secondary wastewater treatment facility located in Concord, Massachusetts, serving a population of about 6,500. Ex. 3 (Fact Sheet or "FS") at 5 (AR A.7). The facility discharges treated wastewater effluent into the Concord River several miles upstream of the Town of Billerica, Massachusetts, which uses the Concord River as its drinking water supply. *Id.* at 8; Ex. 4 (Response to Comments or "RTC") (AR B.1) at Figure 1. The Concord WWTP discharges into a segment of the river that in 1999 was designated by the federal

[2] This compound is referred to in the Recommended Criteria by its synonym, bis(2-ethylhexyl) phthalate.

government as a part of the National Wild and Scenic Rivers System, recognizing the recreational, ecologic, scenic, and historic/cultural resources of the river.[3]

The Concord WWTP discharges into a reach of the Concord River that is listed on the *Massachusetts 2010 Integrated List of Waters* as impaired and requiring TMDLs for mercury, fecal coliform, and total phosphorus. 33 U.S.C. § 1313(d); Ex. 8 (Integrated List) at 162 (AR F.1).

The Town's previous permit became effective March 13, 2006 and expired on February 28, 2011. Ex. 7 (Prior Permit) (AR A.11). The permit was administratively extended pursuant to 40 C.F.R. § 122.6(a)(1) because the Town timely filed a complete application for permit reissuance under 40 C.F.R. § 122.21. Ex. 3 (FS) at 4. The Town's permit application indicated that the design flow of the Concord WWTP was 1.2 MGD. Ex. 9 (Permit Application) at 3.

From July 13 through August 11, 2012, the Region solicited public comments on the Draft Permit, which included water quality-based effluent limitations for total phosphorus, total recoverable aluminum, and pH based on the Massachusetts Standards. *See* Ex. 6 (Draft Permit) (AR A.6); *see also supra* Section I.A.2 (describing requirements).

The Draft Permit also included a wastewater effluent flow limitation of 1.2 MGD, which was consistent with the design flow set forth in the permit application and also identical to the previous permit. Ex. 6 (Draft Permit) at 2; Ex. 9 (Permit Application) at 3; Ex. 7 (Prior Permit) at 2 (AR A.11). The Region utilized the 1.2 MGD flow value as a

[3] Sudbury, Assabet, and Concord Wild and Scenic River Act, Pub. L. 106-20, 113 Stat. 30 (1999), 16 U.S.C. § 1274(a)(160).

constant in various permit calculations, including, among other things, its determination of available dilution under critical low flow conditions (*i.e.*, 7Q10) under which Massachusetts Standards must be met; and to determine the existence of pollutants in the discharge at a level that have a reasonable potential to cause or contribute to an excursion of water quality standards, necessitating a water quality-based effluent limitation under 40 C.F.R. § 122.44(d)(1). Ex. 6 (Draft Permit) at 2; Ex. 3 (Fact Sheet) at 8, 10, 12, 13, 15, 16, 17, 18, Appendices B-F (AR A.7).

Additionally, the Draft Permit included monitoring and reporting requirements relating to collection systems operation and maintenance, which were included to prevent or minimize water quality standards violations from Sanitary Sewer Overflows ("SSOs"), and to limit the amount of non-wastewater flow to the collection system due to excessive inflow and infiltration. Ex. 3 (FS) at 19-20. Finally, the Draft Permit included sampling for DEHP, which was detected in priority pollutant scans performed in connection with the Town's permit reapplication. *Id.* at 17-19.

The Region received comments from the Town, the Concord Business Partnership, OARS, Inc. ("OARS"), the River Stewardship Council and the National Park Service. Ex. 4 (RTC).[4] Supporting and adverse comments were made with respect to each of the five limits and conditions in this appeal. *Id.*

In its comments, the Town did not request that the Region increase the WWTP's flow by any specified amount or delete the flow limit.[5] Ex. 4 (RTC) at 2-21. Rather, the

---

[4] The Region reproduced verbatim comments received on the Draft Permit in the Response to Comments documents. All citations to comments in the Response to Petition are to the RTC.

[5] In discussions before the Draft Permit was issued, the Town requested that EPA delay the public notice of the Draft Permit to allow the Town time to complete planning it

Town stated that "it has become increasingly evident that additional capacity at the Concord municipal WWTF is needed" and, to that end, the Town had been actively engaged in "comprehensive planning activities that have focused on the identification of alternatives for creating additional wastewater capacity," including "possible groundwater discharge to supplement the WWTF surface water discharge." *Id.* at 4. The Town suggested that these planning processes would likely culminate in a formal request for a flow increase through a permit modification upon completion of state planning processes and approvals. *Id.* The Concord Business Partnership requested that EPA carefully consider the anticipated flow increase request in light of relevant factors, including economic growth. *Id*. at 21-22. Others, including the National Park Service, commenting pursuant to its obligations under Section 7 of the Wild and Scenic Rivers Act, stated that consideration of a flow increase would be premature given that planning processes were ongoing.[6] *Id.* at 25-26, 37.

In the Final Permit, the Region included the flow limit of 1.2 MGD that had been in the Prior Permit and the Draft Permit. The Region also retained without change monitoring and reporting requirements related to the collection system and DEHP upon considering and responding to comments for and against these requirements. Ex. 4 (RTC) at 13-14, 27 (collection system) and 16-17, 26, 37 and Appendix A. Finally, in

---

believed would support an increase to the authorized discharge flow. Ex. 3 (FS) at 4. The Region decided not to hold the draft permit process in abeyance pending completion of the Town's planning activities, noting among other things significant uncertainty around the completion date, but also indicated that a completed plan and any required state approvals would be considered "new information" for purposes of a permit modification request under 40 C.F.R. § 122.62(a)(2). *Id.*

[6] The National Park Service is responsible for administering the Wild and Scenic River System, including *inter alia*, providing for the conservation of fish, wildlife, and plants, and their habitats within the System.

response to comments, the Region made the aluminum and pH limits more stringent. *Id.* at 6-13, 18-21, 34-36, 40 and 43-44 (aluminum) and at 17, 31-33, 42 and 44 (pH). In the case of aluminum, the Region recalculated the limit after updating the 7Q10 flow used in its Draft Permit calculations to reflect more recent data. *Id.* at 7, 33-35, Appendix A. The Region also revised the permit's pH limit after considering additional sampling data and deciding that the limit must be more stringent in order to conform to applicable WQS. *Id.* at 31-33.

Massachusetts certified the permit on July 3, 2013. Ex. 10 (Certification) (AR D.1). EPA issued the permit on August 2, 2013.[7] The Town timely appealed.

III. THRESHOLD PROCEDURAL REQUIREMENTS AND STANDARD OF REVIEW

A petition for review that fails to meet threshold procedural requirements, including with respect to issue preservation and specificity, must be denied. *In re Beeland Grp., LLC*, UIC Appeal No. 08-02, slip op. at 8-9 (EAB Oct. 3, 2008). Here, the Town's failure to meet these requirements warrants denial of review outright on many issues, most notably flow.

In order for an issue to be preserved for review, it must be raised with a reasonable degree of specificity and clarity during the comment period. *In re Maui Elec.*

[7] Although the Region administers the NPDES program in Massachusetts, the Commonwealth maintains separate, independent permitting authority over surface water discharges pursuant to the Massachusetts Clean Waters Act. *See* Mass. Gen. Laws Ann. Ch. 21 § 43. While the federal and state permits have separate legal foundations, the Region and the Massachusetts Department of Environmental Protection ("MassDEP") typically coordinate their respective permitting efforts and simultaneously issue the two permits using a single document. *See generally In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 497 n.5 (EAB 2006). MassDEP issued a state permit with identical limitations, including with respect to flow. Ex. 5 (Final Permit) at 13-14.

Co., 8 E.A.D. 1, 9 (EAB 1998). Moreover, a party "must have raised during the public comment period the specific argument that the petitioner seeks to raise on appeal; it is not sufficient for the petitioner to have raised a more general or related argument during the public comment period." *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 339 (EAB 2002) ("DCMS4").

Although the Town had the obligation to demonstrate that any "reasonably ascertainable" issues raised in the petition were previously raised during the public comment period by providing specific citation to the administrative record, 40 C.F.R. §§ 124.13, 124.19(a)(4)(ii), it failed to satisfy this requirement in whole or in part with respect to issues raised in Sections A.1-3, 5 (Flow), B.1, 2, 4-6 (Aluminum), D (DEHP) and E (Collection System) of its Petition. Moreover, "[f]or each issue raised that was not raised previously, the petition must explain why such issues were not required to be raised during the public comment period as provided in § 124.13[,]" *id.* § 124.19(a)(4)(ii). In all but one of the instances above, the Town neglected to do so.

Substantively, a petition must show that the permit condition in question is based on a "finding of fact or conclusion of law that is clearly erroneous," or an "exercise of discretion or an important policy consideration that the [EAB] should, in its discretion, review." *Id.* § 124.19(a)(4)(i). The burden of demonstrating that review is warranted rests squarely with Petitioner. *Id.* § 124.19(a); *In re Rohm & Haas Co.*, 9 E.A.D. 499, 504 (EAB 2000). Further, "a petitioner must demonstrate with specificity in the petition why the Region's prior response to those objections is clearly erroneous or otherwise merits review." *In re Westborough*, 10 E.A.D. 297, 305 (EAB 2002). To meet this requirement, petitioners must provide specific citation to the relevant comment and

response in the Response to Comments document and explain *why* the response to the comment was clearly erroneous or otherwise warrants review. 40 C.F.R. § 124.19(a)(4). Accordingly, "mere allegations of error" or "vague or unsubstantiated claims" are not enough to warrant review. *In re City of Attleboro,* NPDES Appeal No. 08-08, slip op. at 32, 45, 61, 74 (EAB Sept. 15, 2009). Although it is clear that to obtain review a petitioner must "explain why, in light of the permit issuer's rationale, the permit is clearly erroneous or otherwise deserving of review," the Town in many cases failed to "substantively confront," material aspects of the Region's actual basis of decision. *In re Peabody W. Coal Co*., 12 E.A.D. 22, 33 (EAB 2005); *see Pet.* at Section A.1-3, C, D, E.

A petitioner seeking review of issues that are technical in nature, as here, bears a heavy burden because the Board generally gives substantial deference to the permit issuer on questions of technical judgment. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001). "[C]lear error or a reviewable exercise of discretion is not established simply because [a] petitioner presents a difference of opinion or alternative theory regarding a technical matter," as it has in Sections A-D. *Id.*

IV. ARGUMENT

A. EFFLUENT LIMITATIONS

1. THE WASTEWATER EFFLUENT FLOW LIMIT

a) The Town Failed to Preserve Its Legal Arguments Regarding the Region's Authority to Impose Wastewater Effluent Flow Limits and Failed to Demonstrate Reviewable Error or Abuse of Discretion

The Town mistakenly contends that the Region sought to limit flow from the Concord WWTP on the basis that flow, or the "quantity of water, in and of itself," *Pet.* at

11, was a "pollutant" whose discharge could be regulated under the Act. *Id.* at 10-11. Petitioner is incorrect, and attributes legal positions to the Region that it never professed. Had the Town timely presented its legal argument during the public comment period, the Region would have dispelled Petitioner's incorrect view of the basis for the permit limit; contrary to the Town's rendition, conditions imposed by the Region to limit wastewater effluent flows from the Concord WWTP for the permit term are designed to assure that the facility's *pollutant discharges* do not result in excursions above in-stream water quality criteria, in accordance with section 301(b)(1)(C) of the Act and implementing regulations. *See* Section I.A.1, *supra*; 40 C.F.R. §§ 122.4(d), 122.44(d)(1), 122.44(d)(1)(vii)(A), 122.44(d)(5). The Town's challenge thus fails on substantive as well as procedural grounds.

Foremost, the argument was not presented anywhere below, and is accordingly waived. *In re Upper Blackstone Water Pollution Abatement Dist*., NPDES Appeal Nos. 10-09 through 10-12, slip op. at 7 (EAB Mar. 31, 2011), *aff'd*, 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2382 (May 13, 2013). It is unsurprising, therefore, that the Town fails to even attempt compliance with 40 C.F.R. § 124.19(a)(4)(ii). Nowhere in its comments on the Draft Permit did the Town request a change in or deletion of the flow limit, which has been in the Town's permit for multiple permit cycles. *See, e.g.*, Ex. 7 (Prior Permit). Neither did the Town question the Region's legal authority to impose flow limits, much less the *specific legal theory* for flow limits (*i.e.*, the purported regulation of water as a pollutant) that it now seeks to ascribe, without any foundation, to the Region. Indeed, far from questioning the Region's ability to include a flow limit in the permit, the Town in its comments on the Draft Permit acceded to the flow limit for

the time being, and indicated that it was likely to request a higher one only after taking other intervening steps. *See* Ex. 4 at 4 (RTC). Board review is hardly justified under these circumstances. *In re Shell Offshore, Inc.*, 13 E.A.D. 357, 394-95 (EAB 2007) (rejecting as unpreserved legal arguments regarding the applicability of certain regulations when not specifically raised during the comment period). For these reasons alone, review should be denied.

Contrary to the Town's unsubstantiated allegation, unaccompanied by any reference to the Fact Sheet or RTC (or indeed any other record citation), the Region nowhere suggested that it was attempting to regulate the flow of water *per se*. Rather, the flow limit was related to ensuring that WQS would be met. More specifically, EPA based both its reasonable potential calculations and its permit effluent limitations for individual pollutants on a presumed maximum effluent discharge of 1.2 MGD, or the design flow of the Concord facility, and critical receiving water flow, or 7Q10.[8] *See* Ex. 3 (FS) at 8, 10, 12, 13, 15-18, Appendices B, D-E; Ex. 4 (RTC) at 10, 30, 34, Appendices A-F. From the standpoint of EPA's section 301(b)(1)(C) analyses, the use of design flow

[8] EPA may use design flow to both determine the necessity for effluent limitations in the permit that comply with the Act, and to calculate the limits themselves. Using a facility's design flow in the derivation of pollutant effluent limitations, including conditions to limit wastewater effluent flow, is fully consistent with, and indeed clearly anticipated by, NPDES permit regulations. Regarding the calculation of effluent limitations for POTWs, 40 C.F.R. § 122.45(b)(1) provides, "permit effluent limitations…shall be calculated based on design flow." POTW permit applications are required to include the design flow of the treatment facility. *Id.* § 122.21(j)(1)(vi).

Similarly, EPA's reasonable potential regulations require EPA to consider "where appropriate, the dilution of the effluent in the receiving water," 40 C.F.R. § 122.44(d)(1)(ii), which is a function of *both* the wastewater effluent flow and receiving water flow. As discussed in Section I.A.1, *supra*, EPA guidance directs that this "reasonable potential" analysis be based on "worst-case" conditions. EPA accordingly is authorized to carry out its reasonable potential calculations by presuming that a plant is operating at its design flow when assessing reasonable potential.

as a worst-case condition was an integral "constant." Should the discharge flow exceed the flow assumed in these calculations, the instream dilution would decrease and the calculated effluent limits would not be protective of WQS. Further, pollutants that did not have the reasonable potential to exceed WQS at the lower discharge flow may have reasonable potential at a higher flow due to the decreased dilution. In order to ensure that the assumptions underlying the Region's reasonable potential analyses and derivation of permit effluent limitations remain sound for the duration of the permit, the Region back-stopped its "worst-case" effluent wastewater flow assumption through imposition of a permit condition. The flow limit is thus a component of the water quality quality-based effluent limitations ("WQBELs"), because the WQBELs are premised on a maximum level of flow.

For facilities like Concord WWTP, which has been operating near its design flow for several years[9], and anticipates the need to exceed its current design flow in the near future, the flow limitation provides important assurance that assumptions underlying the permit remain secure for the near term. As discussed in Section I.A.1, *supra*, the Region is prohibited from issuing a permit "[w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements." 40 C.F.R. § 122.4(d). Establishing a flow limit in the permit provides certainty that the assumptions underlying permit determinations remain accurate and protective, which in turn, effectuates the Region's obligations under NPDES regulations to 'assure' compliance with WQS under Section 301(b)(1)(C) of the Act. The Region's approach is consistent with Congress's grant to EPA of "broad discretion to establish conditions for NPDES permits" in order to

[9] Ex. 3 (FS) at 8 ("Review of facility flow between January 2009 and December 2010 shows that the average flow was 1.1 MGD.").

achieve the statutory mandate of establishing effluent limitations to attain and maintain WQS. *Arkansas v. Oklahoma*, 503 U.S. 91, 105-06 (1992); *see also Natural Res. Def. Council, Inc. v. Costle*, 568 F.2d 1369, 1380 (D.C. Cir. 1977) (recognizing the "considerable flexibility" afforded EPA under section 402 of the Act "in framing the permit to achieve a desired reduction in pollutant discharges").

For all these reasons, the Board should deny review of this issue.

b) Petitioner's Remaining Arguments Regarding the Flow Limit Were Not Preserved, Are Not Ripe, and Do Not Demonstrate Reviewable Error or Abuse of Discretion

The Board should decline to review Petitioner's remaining claims on the flow issue, as they all ultimately rest on a factual misstatement by Petitioner: that the Town 'directly requested' a flow increase and that the increase was rejected. *Pet.* at 13. As the Town is fully aware, the Region took no action on the merits of any flow increase request, because no such request was ever made by the Town. In its comments on the Draft Permit, the Town clearly stated: "The Town understands that a formal request for a flow increase will require a future modification to the permit and will be initiated via a notice of project change to be via the Massachusetts EOEEA-MEPA office." Ex. 4 (RTC) at 4. Thus, the Town itself acknowledged that a request had not been made and that it would undertake additional actions under applicable state planning processes prior to upgrading plant capacity to accommodate increased flow. *See id.*[10] It was not even clear from the comments that a flow increase request would be forthcoming:

> As we *continue to explore* opportunities associated with each wastewater capacity alternative evaluated, it is clear that an increase in the effluent discharge capacity

[10] Again, the Town cannot satisfy, and therefore ignores, the procedural requirements of 40 C.F.R 124.19(a)(4)(ii).

> under the WWTF surface water discharge permit *may be* the most viable alternative available.

Id. (emphases added). It was only through the Petition that the Region learned that the Town intends to seek a *37%* increase in its permitted flow. *See Pet.* at 11 (seeking increase in permitted flow to 1.65 MGD).

When viewed in this light, the Town's various arguments pertaining to the Region's technical recommendations and other statements on a potential future flow increase request by Concord WWTP are not ripe for review, and they clearly do not constitute reviewable error or abuse of discretion. *See Pet.* at 11-18. For example, the Town objects to the Region's discussion of potential alternatives in the Response to Comments. *See Pet.* at 13-18 (Section A.4). While the Region did provide some technical recommendations in the RTC for the Town to consider as it evaluated *whether* to seek a flow increase request in a future permit proceeding, the mere fact that the Town disagrees with the Region's opinions and technical advice on these matters is inconsequential to this appeal. The Region did not take any action based on these considerations, because no flow increase request had been made.

Similarly, the Town's contention that the Region treated the Commonwealth's comprehensive wastewater management planning ("CWMP") process[11] as a legal "prerequisite" to granting a flow increase in order "to avoid addressing the facility flow/capacity issues raised by Concord or as a basis to impose a limit on facility flow/capacity in the Permit[,]" is unconvincing. *Pet.* at 11-12 (Section A.2). The Town

[11] The CWMP is the state process whereby current and future wastewater needs are evaluated, wastewater management alternatives are developed which will meet these needs, and a final plan is chosen through careful comparison and evaluation of the alternatives. http://www.mass.gov/dep/water/laws/wwtrfpg.pdf (last visited Oct. 31, 2013).

cannot escape the fact that the "facility flow/capacity issues raised by Concord" did not include a request to amend the permit's existing flow limit. Additionally, nowhere did the Region state that the CWMP was or could be used as "authority to regulate flow" or "as a basis to impose a limit" on flow. *See* Section IV.A.1.a, *supra* (describing the function of flow in the permit). The Region identified the CWMP process as relevant to the timing of any future flow increase request, based on the view that state planning processes should be allowed to run their ordinary course. *See* Ex. 4 (RTC) at 5, 11, 27, 38; Ex. 3 (Fact Sheet) at 4. The Region cannot be faulted for this view, especially where the Town also referenced, in its comments on the Draft Permit, the need for additional actions under state planning processes prior to requesting a flow increase. *See* Ex. 4 (RTC) at 2-4. Review of this issue should be denied.

Finally, the Town contends that the Region erred by failing to include a "stepped effluent flow limit," which in the Town's opinion would have addressed its concerns consistent with EPA's *Integrated Municipal Stormwater and Wastewater Planning Approach Framework*. *Pet.* at 18. Concord, however, waived this issue when it failed to comment on this issue during the public comment period. 40 C.F.R. § 124.19(a)(4); *see id.* § 124.13. Moreover, merely identifying what the Region "could have done" is sheer speculation, and not a basis for Board review under this Board's precedent. *In re City of Palmdale*, PSD Appeal No. 11-07, slip op. at 52 n.37 (EAB Sept. 17, 2012) ("Speculative suggestions fall short of establishing clear error or abuse of discretion on appeal."). There are, of course, differing variations of permitting schemes that would be consistent with the Integrated Planning Memo. Indeed, the Town concedes that the Region's

approach here was consistent with the express terms of that document. *Pet.* at 18 citing Ex. 3 (FS) at 4. Review of this issue should be denied.

2. THE PH LIMIT

a) Petitioner Fails to Demonstrate the Region Committed Clear Error or Abuse of Discretion in Revising the pH Limit to Ensure Compliance with Massachusetts Standards

Petitioner asserts that it was clearly erroneous and an abuse of discretion for the Region to set the minimum limit for pH at 6.5 SU in the Final Permit, where it had been set at 6.0 SU in the Draft Permit, as well as in previous permits for this facility. *Pet.* at 25-30. Petitioner complains that the Region's explanation for the change was inadequate and unsupported by evidence because the data cited by the Region reveal only one measurement below 6.5. Additionally, Petitioner contends that the change from 6.0 to 6.5 was not a "logical outgrowth" of the Draft Permit, *Pet.* at 27, and that, consequently, it was denied the opportunity to comment on the issue. *Pet.* at 27-28. For all these reasons, argues Petitioner, the permit must be remanded and revised to reflect the limit contained in the Draft Permit. *Pet.* at 29. Review on these issues should be denied.

Massachusetts Standards require that in Class B waters pH "[s]hall be in the range of 6.5 through 8.3 standard units and not more than 0.5 units outside of the natural background range." 314 C.M.R. § 4.05(3)(b)(3). In the Fact Sheet, the Region recognized that a lower limit for pH of 6.0 was "less stringent than the customary limit of 6.5 for facilities discharging to Class B waters," but further noted that imposing a less stringent limit was based, in part, on the availability of sufficient dilution in the receiving water. Ex. 3 (FS) at 9. During the comment period, however, several commenters questioned the appropriateness of setting a minimum pH limit lower than the 6.5

specified in the WQS. Ex. 4 (RTC) at 31-32, 42, 44. As a result, the Region re-examined the assumption that there was sufficient dilution to justify a decision to deviate from EPA's normal practice of setting pH limits equal to state pH criteria. *Id.* at 17, 32. In addition to 2009-2010 data discussed in the Fact Sheet showing two exceedances of the maximum limit of 8.3, the Region in its RTC observed that more recent data revealed an excursion below the minimum pH criterion and, thus, that dilution should not be used to establish the minimum pH limit. *Id.* Moreover, three additional data points, which Petitioner neglects to note, reported pH values at, or just above, 6.5. *Id.* at 32. The Region further observed that additional data show that "the river often has low alkalinity, or acid buffering capacity, in the winter months, meaning that the river has little ability [to] maintain a neutral pH in response to an acidic discharge." *Id.* at 17; *see also id.* at 32. In other words, the data indicated that, with conditions in the river at or below the state minimum criterion, the river may have a limited capacity to absorb low-pH discharges[12] without further violations of this criterion – an explanation that Petitioner never squarely addresses. Moreover, the minimum pH criterion is an instantaneous, not to be exceeded, ambient criterion value. Ex. 5 (Final Permit) at 5. Based on all of this information, the Region concluded that a limit of 6.0 may not adequately ensure attainment of the water quality criterion for minimum pH and, consequently, could result in a violation of Massachusetts Standards. Ex. 4 (RTC) at 32.[13]

---

[12] The DMR Summary in the Fact Sheet reveals that minimum pH for the facility's discharge is routinely below 6.5. *See* Ex. 3 (FS) Appendix A at 1. For instance, the average monthly minimum measured by Petitioner for the period January 2009 to December 2010 was 6.22. *Id.*

[13] Petitioner cites *In re Amoco Oil Co.*, 4 E.A.D. 954, 980 (EAB 1993), for the proposition that the permit must be remanded, *Pet.* at 26, but that case is distinguishable; the Region provided no explanation for why it had changed a permit limit and merely

Once that issue became evident, the Region was required to revise the pH limit to one that would ensure compliance with WQS, *In re D.C. Water & Sewer Auth.*, 13 E.A.D. 714, 765 (EAB 2008); 40 CFR §§ 122.4(d), 122.44(d), not to one that was merely "reasonably capable" of achieving compliance, *DCM S4*, 10 E.A.D. 323, 342 (EAB 2002) . With that backdrop, although based on what the Region recognized as an inherently limited dataset,[14] it was not reversible error for the Region to have concluded that an effluent limit below 6.5 may not ensure compliance with state water quality standards, but that setting it at 6.5 would ensure compliance. At best, Petitioner's objection amounts to a difference of opinion on a technical issue, not a demonstration of clear error, and, thus, review on this issue should be denied. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001).

Petitioner's two other issues related to the lower pH limit are unpersuasive. First, Petitioner complains that it did not have an opportunity to comment on the revised permit limit until now and refers to the revised pH limit as an "about-face," arguing that the Region issued a final permit that "differs so greatly from the draft version" that it was not a "logical outgrowth" of the draft permit. *Pet.* at 26-28. But the fact that comments were received noting that the pH limits in the Draft Permit differed not only from those in permits for other WWTPs in the same watershed, but also from Massachusetts Standards, Ex. 4 (RTC) at 31-32, 42, 44, "is foreseeable and a logical outgrowth of the public

---

concurred with another commenter. *See e.g.*, *Amoco*, 4 E.A.D. at 980. Here, in contrast, the Region adequately explained the reasons for the revision.

[14] As noted by Petitioner, *Pet.* at 28, the Final Permit includes a special condition providing a mechanism by which the minimum pH limit could be lowered if the permittee can demonstrate that a lower limit has no reasonable potential to cause or contribute to a violation of WQS. Ex. 5 (Final Permit) at 13; Ex. 4 (RTC) at 17, 32. The Region was not required to include this provision, but did so at its discretion.

comment period." *City of Palmdale*, slip op. at 26. Furthermore, the Region adequately explained the additional analysis performed as a result of these comments.

Finally, Petitioner included with its Petition various sampling results that it claims demonstrate that the Region's decision to raise the permit limit to 6.5 was clear error. *Pet.* at 29-30; Ex. J; Ex. K. First, the 23-year old data presented in Petitioner's Exhibit J consist of measurements recorded on just two dates – July 11, 1990 and August 22, 1990 – and, thus, their representativeness of current conditions in the river is, at best, questionable. *Pet.* at 29; Exhibit J. The data presented in Petitioner's Exhibit K, though more numerous, represent measurements taken almost ten miles downstream from the permitted facility and, thus, may not be representative of conditions in the receiving water near the permitted facility. Nonetheless, the data in Petitioner's Exhibit K appear to corroborate the Region's observation that, in recent years, the river's buffering capacity is low at certain times, particularly in winter months. Ex. 4 (RTC) at 17, 32. Even if the data do not include pH measurements in violation of Massachusetts Standards, they do not override the fact that the data cited by the Region in support of the revised limit indicate that a limit of 6.0 may not adequately ensure attainment of the water quality criterion for minimum pH and, consequently, could result in a violation of standards. Ex. 4 (RTC) at 32. Petitioner has failed to show that the Region's analysis based on all of the available information is clearly erroneous. Review on this issue should be denied.

3. THE ALUMINUM LIMIT

The decision to include a WQBEL in a permit for a particular pollutant is made via a "reasonable potential" analysis, s*ee* 40 C.F.R. § 122.44(d)(1), which is based, in

part, on the 7Q10 for the receiving water at the permitted facility. The Draft Permit included an aluminum effluent limit of 306 μg/L based on the chronic aluminum criterion of 87 ug/l and a calculated 7Q10 for the Concord River of 34 cubic feet per second ("cfs"). Ex. 3 (FS) at 12-13, Appendix B.

After receiving multiple public comments requesting greater clarity in the 7Q10 calculations in the Fact Sheet, *see* Ex. 4 (RTC) at 33, 42, 44, the Region revisited those calculations and determined that low flow conditions had decreased over time. *Id.* at 33. In order to reflect current conditions in the watershed, the Region recalculated the 7Q10 to be 26.1 cfs in the Final Permit, resulting in a correspondingly lower aluminum limit in the Final Permit of 255 μg/L. *Compare* Ex. 3 (FS) at 11-14 *with* Ex. 4 (RTC) at Appendix A at 4-7.

a) Petitioner Fails to Demonstrate That the Region Erred by Basing the Aluminum Limit on Existing Massachusetts Standards

Petitioner asserts that the Region should not have based the aluminum limit on EPA's recommended criterion of 87 μg/L, which is incorporated into Massachusetts Standards, arguing that the elevated levels of aluminum in the River "may be" naturally occurring, *Pet.* at 19, and that various studies show that EPA's recommended criteria "may be" significantly overprotective, *Pet.* at 20-22.

Review on these issues must be denied. Foremost, Petitioner has failed to demonstrate that these issues were raised during the public comment period, and thus, that they have been preserved. 40 C.F.R. § 124.19(a)(4)(ii). While Petitioner commented that "MassDEP and others are currently evaluating aluminum criteria for Massachusetts' waters" and expressed the hope that such evaluation would lead to less

restrictive criteria, Ex. 4 (RTC) at 11, the specific assertions that EPA has elsewhere recognized that site-specific criteria for aluminum may be warranted or that "elevated aluminum in the River may be naturally occurring," and, therefore, that EPA's recommended criterion is inapplicable under Massachusetts Standards, were never presented during the public comment period.[15] Petitioner's impermissible attempts to offer extra-record materials for the first time on appeal purporting to show that other EPA Regions have approved state revisions to aluminum criteria, *see, e.g.*, Ex. F, Ex. G,[16] or that 87 μg/L is unnecessarily low, *see, e.g.*, Ex. H, Ex. I, and to present arguments based on them must be rejected, *In re Upper Blackstone Water Pollution Abatement Dist.*, NPDES Appeal Nos. 08-11 to 08-18 & 09-06, slip op. at 94-95 (EAB May 28, 2010).

Even if Petitioner's comments could be read to encompass the assertions it now makes – that a higher criterion should apply because elevated aluminum levels in the river may be naturally occurring or because 87 μg/L is overly-protective – review must nonetheless be denied because Petitioner has failed to explain how the Region's decision to base the permit's aluminum limit on the current Massachusetts chronic criterion for aluminum was based on a "finding of fact or conclusion of law that is clearly erroneous" or is otherwise deserving of review. 40 C.F.R. § 124.19(a)(4)(i).

---

[15] Instead, Petitioner asserted that it was "premature and unreasonable" to establish an effluent limit based on an existing criterion, that *may* eventually be changed. Ex. 4 (RTC) at 11. A petitioner "must have raised during the public comment period the specific argument that the petitioner seeks to raise on appeal; it is not sufficient for the petitioner to have raised a more general or related argument during the public comment period." *DCMS4*, 10 E.A.D. 323, 339 (EAB 2002).

[16] Furthermore, Exhibit F and Exhibit G prove nothing more than that other EPA Regions have approved state revisions to Water Quality Standards with respect to aluminum. Massachusetts has **not** proposed any revision to its existing Water Quality Standard for aluminum.

As described in Section I.A.2, *supra*, Massachusetts Standards require use of EPA's 2002 National Recommended Criteria for a variety of pollutants, including aluminum, "unless [MassDEP] either establishes a site specific criterion or determines that naturally occurring background concentrations are higher." 314 C.M.R. § 4.05(5)(e).[17] It is undisputed that MassDEP has not established site specific criteria for aluminum. Ex. 4 (RTC) at 11. Nor is there anything in the record to indicate whether or when MassDEP will in fact develop site specific criteria. Petitioner makes various assertions purporting to demonstrate that studies and other information support less stringent criteria, *Pet.* at 20-22, but even if Petitioner were correct, unless and until MassDEP actually establishes site specific criteria and EPA approves such a revision of Massachusetts Standards, the Region is obligated to base the aluminum effluent limit on EPA's recommended criterion. *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 76-82 (EAB Sept. 15, 2009).

Petitioner's argument that the background concentration of aluminum should become the relevant criterion, *Pet.* at 19-20, is equally unavailing. Petitioner has merely speculated, with no record support, that ambient aluminum concentrations in the river "may be" naturally occurring. *Pet.* at 19. "The Board will not overturn a permit provision based on speculative arguments." *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 58 (EAB 2001). Moreover, this assertion ignores Petitioner's own contention that "there are at least eight wastewater treatment plant discharges upstream" of its facility that

[17] *See also* 314 C.M.R. § 4.05(5)(e)(1) ("[W]here [MassDEP] determines that [EPA recommended criteria for a specific pollutant] are invalid due to site specific physical, chemical or biological considerations, [MassDEP] shall use a site specific criterion as the allowable receiving water concentration for the affected waters . . . . [***MassDEP***] ***will adopt any such site specific criteria as revisions to 314 CMR 4.00*** in accordance with M.G.L. c. 30A.") (emphasis added).

contribute aluminum to the Concord River. *Pet.* at 23. In addition, Petitioner failed to demonstrate, as required by 314 C.M.R. § 4.05(5)(e), that MassDEP determined that natural background levels of aluminum are higher than EPA's recommended criteria.

Petitioner has failed to carry its burden to demonstrate that the Region's reliance on the currently applicable aluminum criterion was clearly erroneous or otherwise deserving of review and, therefore, review on this issue should be denied.[18]

b) Petitioner Failed to Preserve the Issue of Whether the Region Could Include Aluminum Limits Without an Aluminum TMDL

Next, Petitioner asserts that, due to its location downstream of several other facilities that discharge aluminum, it is unfair to require it to meet restrictive limits without a TMDL. *Pet.* at 23 ("The appropriate mechanism would be the development of a TMDL for aluminum . . ."). Not only did the Town fail to preserve this argument by raising it during the public comment period, but, with respect to the need for a TMDL, it actually submitted comments to the contrary. Ex. 4 (RTC) at 18. ("The Town notes in the discussion of TMDLs that there is no . . . need for a TMDL for aluminum.").

Even if Petitioner had preserved this argument, the Region is not required to wait for the development of a TMDL or watershed analysis for the Concord River before regulating aluminum in the permit. *Cf. Upper Blackstone*, slip op. at 38-40. Moreover, Petitioner's unsubstantiated allegation that there are differences between the Region's

[18] Petitioner suggests that the addition of an aluminum limit for the first time to its 2013 permit is somehow suspect because EPA's recommended criteria for aluminum have existed since 1989. *Pet.* at 20. The Region notes that the addition of stringent phosphorous limits in recent years to permits for POTWs has led many POTWs to use alum in their treatment processes to control phosphorous, resulting in elevated levels of aluminum in their discharges. Concord, similar to other POTWs, has only in recent years had to achieve compliance with a stringent phosphorus effluent limit of 0.2 mg/l.

approach to Concord and the upstream POTWs that discharge aluminum is insufficient to warrant review, but in any case "a disparity in requirements imposed on POTWs is not by itself a matter warranting review." *In re City of Port St. Joe*, 7 E.A.D. 275, 305 n.44 (EAB 1997); *accord City of Attleboro*, slip op. at 36, 41 . For these reasons, review of this issue should be denied.

c) Petitioner Fails to Demonstrate that the Region Erred in Updating Its 7Q10 Calculations in the Final Permit

Petitioner next contends that the Region "used a faulty method to determine the 7Q10 flow," which resulted in a more stringent effluent limit for aluminum in the Final Permit compared to the Draft. *Pet.* At 23-24. Petitioner asserts that the Region failed to explain why it used newer stream flow data (1993-2012) when it revisited its 7Q10 calculations in response to numerous public comments. *Id.* Petitioner further asserts that it was error for the Region to incorporate "wastewater treatment plant flow data only for the months of June through September and only for the years 2010 through 2012," arguing that "[u]sing treatment plant flows for only recent years *may* overestimate the contribution from these discharges (*assuming* their discharge flows were less in earlier years) and decrease the calculated amount of natural flow in the River." *Id.* at 24 (emphases added).

As noted, Section IV.A.3, *supra*, the Region revisited the 7Q10 calculations after receiving comments about the clarity of those calculations in the Fact Sheet to the Draft Permit, *see* RTC at 33, 42, 44. The Region recalculated the 7Q10 for the river at the permitted facility using the most recent data available for the Lowell and Maynard gages. The decision by the Region to use the most currently available data set to represent prevailing receiving water flow is logical and rational in light of the Region's obligations

under the Act to "assure" compliance with WQS, especially where no issue has been raised over the integrity of that data. Petitioner does not challenge the representativeness of that data or raise any facts to demonstrate that the use of current data is not reflective of current conditions, and has failed to explain how the Region's use of such data is clearly erroneous.

Review of the issue of which "wastewater treatment plant flow" data the Region should have used must likewise be denied. Inasmuch as Petitioner now objects to the use of such data for only the months of June through September, the argument must fail because that issue was not preserved. 40 C.F.R. § 124.19(a)(4)(ii). The issue was readily ascertainable, because the Region used data limited to June through September in the Draft Permit, albeit for different years. *Compare* Ex. 3 (FS) Appendix B *with* Ex. 4 (RTC) Appendix A at 2.[19] Petitioner's general objection to the use of more recent treatment plant discharge data in the Final Permit (2010-2012) than in the Draft Permit (2009-2010) must also fail because Petitioner has neglected to "demonstrate" that the Region's method was "clearly erroneous." 40 C.F.R. § 124.19(a)(4)(i). Instead, Petitioner readily concedes that it has merely *assumed* that treatment plant discharge flows were lower in earlier years and that, consequently, the use of more recent data related to treatment plant discharge flows "*may*" result in a lower calculated 7Q10 of the river at the facility. *Pet.* at 24 (emphasis added). Such speculative arguments cannot carry the day. *Three Mountain Power*, 10 E.A.D. at 58.

[19] To the extent that Petitioner's brief could be read to encompass an argument that the Region should have used a longer period of record for the treatment plant discharge flow data, that issue was similarly not specifically preserved; no public comments were received objecting to the Region's use of two years of such data (*i.e.*, 2009-2010) in the Draft Permit. *See* Ex. 3 (FS) Appendix B.

d) The Region's Method of Calculating the Aluminum Limit Does Not Constitute Reversible Error

Next, the Town contends that the Region should not have set the monthly average aluminum limit equal to the calculated chronic wasteload allocation because EPA's Technical Support Document for Water Quality-Based Toxics Control ("TSD") "'discourages the use of this approach' since it does not address effluent variability." *Pet.* at 24 (quoting TSD at 104). First, Petitioner has neglected to demonstrate that this issue was raised during the public comment period or offered any explanation as to why the issue was not required to be raised. In fact, no such comment was received during the public comment period and the issue was readily ascertainable, since the Region used the same method in the Draft Permit that Petitioner now complains of in the Final Permit. *Compare* FS at 13-14 *with* RTC Appendix A at 7. Accordingly, this argument should be rejected as unpreserved. 40 C.F.R. § 124.19(a)(4)(ii).

Furthermore, the TSD discourages, but does not prohibit this approach, *see* Ex. 12 (TSD) at 104 (AR I.3), and, thus, its use can hardly amount to "clear error." The use of this method is a matter of discretion – a technical judgment to which the Board should defer.[20]

[20] Petitioner has neglected to note that the reason EPA discourages this practice is that the resultant effluent limits may not be stringent enough and that, even if a permittee complies with an effluent limit derived using this method, there could still be regular violations of the chronic criterion. Ex. 12 (TSD) at 104. In other words, if the Region had used a different approach, the aluminum limit might actually have been more stringent, contrary to Petitioner's unsupported assertion that use of the TSD methods would result in a less stringent limit.

e) Petitioner Fails to Demonstrate that the Region Erred by Using Effluent Data for the Period January 2009 to January 2011 in its Reasonable Potential Analysis for Aluminum

Petitioner next contends that the Region erred by using effluent data from January 2009 through January 2011 in its reasonable potential analysis for aluminum, and, instead, should have used more recent data. *Pet.* at 24-25. Petitioner alleges that such data show that the facility is discharging lower aluminum concentrations, which, if used in the reasonable potential analysis "accompanied by the application of site specific criteria," "may well" show that there is no reasonable potential for the discharge to cause or contribute to the violation of WQS. *Id.* at 24-25.

This argument should be rejected for several reasons. First, the argument is unpreserved. Petitioner could have raised the issue during the comment period, which expired in August 2012. Second, Petitioner's argument is *entirely* speculative. Not only has it failed to present any new data or calculations for support, but Petitioner has premised the argument on the application of a site-specific criterion *that does not exist*. *See* Pet. at 25; *see also* Section IV.A.3.a, *supra*. Furthermore, Petitioner itself is not even convinced of the effect any of this would have, declaring only that unspecified, newer data, together with the application of a non-existent site-specific criterion, "***may*** well lead to a conclusion that an effluent limitation is not needed." *Pet.* at 25 (emphasis added). Petitioner speculates, but fails to demonstrate, that the Region's permit decision is clearly erroneous.

f) The Region Did Not Err by Not Including a Seasonally Varying Aluminum Limit

Finally, Petitioner argues that it was error for the Region not to include a seasonally varying aluminum limit. *Pet.* at 25. Once again, however, Petitioner makes no attempt to demonstrate that this issue was raised during the public comment period, nor does it offer any explanation why it was not required to be raised. *See* Ex. 3 (Draft Permit) at Section I.A.1 (including a year-round aluminum limit). Thus, the issue was not preserved and should be rejected. Furthermore, Petitioner has failed to cite any authority requiring the establishment of seasonal limits for aluminum in this case. The Region is clearly authorized to develop year-round limits for aluminum, and Petitioner has provided no reason or substantiated data that would justify a departure in this case. Accordingly, Petitioner has failed to establish clear error or an abuse of discretion.

B. MONITORING AND REPORTING

1. The Monitoring and Reporting Requirements in the Permit Do Not Warrant Board Review

Petitioner challenges the Region's placement of certain monitoring and reporting requirements in the permit related to the operation and maintenance of Concord WWTP's collection system and the duty to mitigate permit violations that have a reasonable likelihood of adversely affecting human health or the environment, alleging that the Region lacks legal authority to impose these requirements and, furthermore, claiming that it failed to adequately respond to the Town's comments. *Pet.* at 33-35. Petitioner also contests the Region's decision to place monitoring and reporting requirements on internal treatment plant processes pertaining to nutrient removal. *Pet.* at 36-37. Finally, the Town claims that the Region's inclusion of a quarterly monitoring requirement for DEHP was not supported by the record. *Pet.* at 31-33. Review should be denied of these issues,

which are in many cases raised for the first time on appeal, and which in most cases ignore the actual basis for the Region's determinations.

a) Petitioner's Contention that the Region Lacks Authority to Impose Conditions Regarding Collection System Mapping, Planning and Reporting Beyond Part Two Standard Conditions Was Not Preserved Below and Does Not Warrant Board Review

The Town contends that the Region has no "authority to prescribe the detailed mechanisms or steps by which a permittee is to achieve compliance" with standard NPDES conditions, such as 40 C.F.R. § 122.41(e) ("Proper Operation and Maintenance"), which requires the proper operation and maintenance of all wastewater treatment systems and related facilities installed or used to achieve permit conditions, and 40 C.F.R. § 122.41(d) ("Duty to Mitigate"), requiring permittees to take all reasonable steps to minimize or prevent any discharge in violation of the permit which has the reasonable likelihood of adversely affecting human health or the environment. On this theory, Petitioner concludes that EPA lacks the ability under the CWA to include any requirements concerning collection system mapping, planning and reporting requirements set out in Part 1.C of the permit. *Pet.* at 33-35. Petitioner postulates that the generalized language of these NPDES regulations occupy the field of what may be required in an NPDES permit related to a POTW's operation and maintenance and that the Region may not impose any further specific conditions to ensure the regulations' effective implementation.[21] The Region, in Petitioner's view, may do no more than cut

[21] The Town's arguments appear to be based solely on 122.41(e) ("Proper Operation and Maintenance") with no reference made to 122.41(d) ("Duty to Mitigate"), even though the Region expressly relied on this latter provision as an independent ground for imposing additional permit conditions related to collection system maintenance and operation. Ex. 3 (FS) at 20; *see In re Westborough*, 10 E.A.D. 297, 311-12 (EAB 2002)

and paste the text of these provisions into the NPDES permit, leaving any further interpretation and implementation to the Town.

The Board need not reach the merits of this argument, however, as the issue was not raised with the specificity required to meet threshold procedural requirements. In its comments, the Town offered the following statements without any elaboration or supporting analysis: "These [collection system mapping, planning and reporting] conditions also expand greatly upon what could be reasonably be [sic] considered NPDESauthority." Ex. 4 (RTC) at 13. Conclusory allegations such as this are simply inadequate to preserve an issue for review. *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708,723 (EAB 2006) ("Generalized or vaguely enunciated concerns warrant no formal, particularized response and are not preserved for review on appeal."). Where an "issue is raised only generically during the public comment period, the permit issuer is not required to provide more than a generic justification for its decision, and the petitioners cannot raise more specific concerns for the first time on appeal." *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 251 n.12 (EAB 1999).

Unsurprisingly, even on appeal, Petitioner cannot muster a single citation to any statute, regulation, judicial or administrative decision, preamble, or guidance document to support its legal theory, under which EPA is constrained in its authority to impose specific conditions related to more general regulations. Contrary to its view, 40 C.F.R. § 122.44(i), and CWA §§ 308(a)(A) and 402(a)(2) "provide broad authority to require owners and operators of point sources to establish monitoring methods and to prescribe

---

("declin[ing] to second-guess the Region's technical judgments and explanations for rejecting [petitioner's] alternate approach" where petitioner failed to address Region's substantive responses to comments on these technical issues).

permit conditions for data collection and reporting."[22] *In re Alyeska Seafoods, Inc.*, NPDES Appeal No. 03-03, slip op. at 23 (EAB Apr. 4, 2004) (Order Denying Review); *In re NPDES Permit for Wastewater Treatment Facility of Union Township*, NPDES Appeal Nos. 00-26 & 00-28, at 18 (EAB, Jan. 23, 2001) (Order Denying Petitions for Review) ("[T]he Administrator has broad discretion to establish the reporting requirements in NPDES permits."); *In re City of Moscow*, 10 E.A.D. 135, 170 (EAB 2001) (emphasizing that such "data play a crucial role in fulfilling the objectives of the CWA and its implementing regulations"). Specific monitoring requirements to assure permit compliance are set forth under § 122.44(i), which requires, among other things, monitoring of the mass of each pollutant, volume of effluent, and "*[o]ther measurements as appropriate*…." (emphasis added). Section 122.44(i) also requires reporting of monitoring results, the frequency of which is to be established on a case-by-case basis but in no case less than once per year. *Id.* Furthermore, 40 C.F.R. § 122.44(d) requires NPDES permits to include "any requirements…necessary to… [a]chieve water quality standards. . . including State narrative criteria for water quality," and is thus similarly

---

[22] Section 402(a)(2) provides that the conditions of an NPDES permit may include "conditions on data and information collection, reporting, and such other requirements as [the Administrator] deems appropriate."

Section 308(a) authorizes the Agency to impose monitoring requirements on any point source:

> Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard …; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard…; *or (4) carrying out section[]…1342…of this title [CWA § 402]:*

33 U.S.C. § 1318(a)(A) (emphasis added).

broad in scope. *See In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D 661, 672 (EAB 2001) ("In view of the breadth of CWA § 308(a) and 40 C.F.R. § 122.44(d), the regulation cited by the Town—40 C.F.R. § 122.44(i)—is appropriately viewed as establishing a floor, rather than a ceiling, for monitoring requirements in permits."); *see Union Township*, at 18-19 (citing *United States v. Hartz Constr. Co.*, 2000 WL 1220919, at *4-5 (N.D. Ill. Aug. 17, 2000) ("The court discerns no reasonable basis…for limiting the EPA's discretion to requesting only that information that is expressly called for by regulation, rather than simply making reasonable requests, as the statute itself provides.")); *see also* 40 C.F.R. §122.4(d) (prohibiting permit issuance when the imposition of conditions cannot assure compliance with water quality standards).

Against this backdrop, the Petitioner's primary claim of error—that EPA lacks "the authority to prescribe" supplemental conditions to implement 40 C.F.R. § 122.41(e)—is, in addition to being unsupported, entirely unpersuasive. This is especially true where, as here, the conditions imposed were expressly tied to ensuring compliance with permit conditions and achievement of WQS, including through the prevention of SSOs. The permit prohibits SSOs. *See* Ex. 5 (Final Permit) at Part 1.B ("Unauthorized Discharges"). SSOs contain pollutants (*i.e.*, bacteria, TSS, floatables, etc.) that are likely to cause or contribute to water quality standards violations. *See, e.g.*, Report to Congress on the Impacts and Control of CSOs and SSOs (EPA 833-R-04-001) (August 2004), at Chapter 5.1.[23] As the Region outlined in the Fact Sheet, at 20:

> Proper operation of collection systems is critical to prevent blockages and equipment failures that would cause overflows of the collection system (sanitary

[23] http://www.epa.gov/npdes/pubs/csossoRTC2004_chapter05.pdf (last visited October 31, 2013).

> sewer overflows, or SSOs), and to limit the amount of non-wastewater flow entering the collection system (inflow and infiltration or I/I). I/I in a collection system can pose a significant environmental problem because it may displace wastewater flow and thereby cause, or contribute to causing, SSOs. Moreover, I/I could reduce the capacity and efficiency of the treatment plant and cause bypasses of secondary treatment. Therefore, reducing I/I will help to minimize any SSOs and maximize the flow receiving proper treatment at the treatment plant.

See also Ex. 4 (RTC) at13-14. Where the monitoring or reporting "relates to maintaining a State water quality standard…nothing in the CWA or the implementing regulations…constrain[s] the Region's authority to include…monitoring provision[s]." *Ashland*, 9 E.A.D. at 672. It is unremarkable, then, that the Region should be allowed to invest Part II standard conditions with "particularized meaning," and need not be constrained, as Petitioner would have it, to merely transcribing the general regulation. *Moscow*, 10 E.A.D. at 169-72 (upholding permit with condition that "tracks verbatim the language of section 122.41(e)" and another related condition "specifically requiring the development and submission of a QAPP and detailing the content and elements of the QAPP"). EPA's decision to include particularized, in addition to generalized, conditions in the permit was reasonable and consistent with its responsibilities under the Act, particularly given the environmental imperatives identified by the Region as driving the collection system requirements (*e.g.*, SSO prevention) and receiving water conditions.

Finally, Petitioner's interpretation is not supported by the plain language of the regulation. Although Petitioner makes much of the lack of any express reference to mapping and O&M plans in the list of specific examples of proper O&M included in the regulation, *Pet.* at 34, the Town ignores the fact that the list is preceded by the word "includes," which establishes that the list is non-exclusive.

The Town's allegation that the Region failed to respond to its comments is incorrect. *Pet.* at 34. The Region's response to comments reaffirmed its Fact Sheet position for the need and basis for the collection systems requirements, noting the relationship between proper operation and maintenance, permit compliance, and receiving water quality. While the Town broadly asserted its view that the collection system requirements should be "significantly modified" to be made more general, it only provided one specific example of objectionable permit language—"For example, the statement 'Such map(s) shall include, but not be limited to the following' should be stricken as it imposes a subjective and unattainable limit for compliance." Ex. 4 (RTC) at 13. The Region grappled with this request but did not find it persuasive. *Id.* at 14. As the Region explained, that offending language was not meant to create unrealistic burdens on the permittee, but was meant to provide it with flexibility in adapting its mapping exercise to the particular circumstances of its collection system. *Id.* Second, the Town requested the Region to strike the requirement for an annual report in its entirety, but failed to include any specific supporting justification. *Id.* at 13. The Region demurred, stating that the Town "has not cited any unique circumstances that merit an exemption from this requirement." *Id.* at 14. The Region "need not guess the meaning behind imprecise comments." *In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002). The Region's general response to this generic request was adequate. *Encogen*, 8 E.A.D. at 251 n.12.

Petitioner's other claims of error turn on a common theme—that it was the Region's burden to demonstrate that the Town's collection system procedures were deficient before the Region could impose additional requirements. *Pet.* at 34-35. But the

Town's comments said nothing about the need for the Region to show that the Town's plans could not satisfy section 122.41(e) as a prerequisite to imposing more specific requirements; instead, with respect to the nature of their existing collection system maintenance and operation efforts, the Town merely made unsubstantiated and vague assertions that its existing plans were sufficiently "robust" and that the Region's new requirements would be burdensome to comply with. Ex. 4 (RTC) at 13. *Encogen*, 8 E.A.D. at 251 n.12 (Where an "issue is raised only generically during the public comment period, the permit issuer is not required to provide more than a generic justification for its decision, and the petitioners cannot raise more specific concerns for the first time on appeal."). Moreover, the Town may not erect an arbitrary evidentiary hurdle on appeal and then accuse the Region of having failed to produce facts and analysis sufficient to overcome it as basis for clear error; the burden of demonstrating that review is warranted rests squarely with the petitioner, not the Region. 40 C.F.R. § 124.19(a); *see In re Rohm & Haas Co.*, 9 E.A.D. 499, 504 (EAB 2000). Even so, Concord provides only rhetoric, not substantiated fact, about the extent of its efforts, essentially repeating its comments that its efforts are "robust"; that Concord "knows" its obligations under 40 C.F.R. § 122.41(e); that "it works for the Town"; and that these efforts "have worked to achieve" the specific regulatory requirement of 40 C.F.R. § 122.41(e). *Pet.* at 34-35. It implies that it is complying with unspecified "industry practices and standards," but declines to note what those might be. *Id.* This is wholly insufficient to obtain review. *Moscow*, 10 E.A.D. at 172 (denying review that permit reporting requirement was "unreasonably burdensome" where permittee had not "substantiated its claim with evidence").[24]

[24] Again, the Town completely ignores the Region's arguments concerning the Duty to

b) The Town's Arguments Regarding Monitoring Related to Nutrient Removal Processes Are Waived and Do Not Warrant Board Review

The Town makes two arguments regarding the permit requirement that the Town submit the "chemical dosing rate for all chemicals added for the purpose of phosphorus removal." Ex. 5 (Final Permit) at 3 (Part I.A.1, footnote 7); *Pet.* at 36. Although the Town suggests that they are preserved because they are "[c]onnected with the Region's O&M and reporting requirements," the Town was obligated to have raised these specific issues in its comments below. It failed to do so, and the arguments are therefore waived. *DCM S4*, 10 E.A.D. 323, 339-40 (EAB 2002).[25]

c) The Region's Decision to Impose DEHP Monitoring Was Rationally Based in the Record and Should be Upheld

The Town alleges that the Region clearly erred in its decision to impose a monitoring requirement for Di(2-ethylhexyl) Phthalate, or DEHP, and furthermore failed to respond to the Town's comments. *Pet.* 31-33. The Town has not carried its burden of

---

Mitigate, which was an independent reason for imposing the monitoring and reporting conditions, and efforts to have this permit condition remanded must fail for this reason as well.

[25] In any event, the Region's determinations were rational in light of all the information in the record and the Town has not offered any evidence of compelling error. While the Region recognizes that influent flow levels and influent quality affect the amount of chemicals needed to comply with the phosphorus limit, a significant decrease in chemical use on days when effluent sampling for phosphorus is not required or a significant increase in chemical use on days when phosphorus sampling is required is an indication that the effluent sampling data reported to EPA may not be representative of actual phosphorus levels being discharged. The collection of this additional operational data will help determine the adequacy of the phosphorus monitoring frequency. As stated in the Fact Sheet and in the RTC, the rationale for this requirement is that reporting of chemical dosing levels will provide verification that nutrient removal occurs throughout the month. Ex. 3 (FS) at 11; Ex. 4 (RTC) Appendix A, at 4.

demonstrating grounds for review, and is unable to demonstrate error—much less clear or compelling error—of fact or law, or abuse of discretion, by the Region.

The Region included the monitoring requirement in the Draft Permit after the compound was detected in pollutant scans of Concord WWTP effluent conducted for the NPDES reissuance application. Ex. 3 (FS) at 17. DEHP is a probable human carcinogen and a priority pollutant subject to nationally recommended EPA criteria. *See* Section I.A.1, *supra*; Ex. 3 (FS) at Appendix G. Based on the limited data before it, the Region did not conclude that the amount of the pollutant in the discharge had a reasonable potential to cause or contribute to an exceedance of water quality standards, but included monitoring requirements to "help EPA determine if water quality standards are being met and assist in future permit limit development, if needed." Ex. 4 (FS) at 19. In coming to its determination, EPA also noted that "the Concord River is a drinking water source for towns downstream." Ex. 4 (FS) at 18.

Petitioner contends that the Region erred by retaining the monitoring requirement for DEHP in the Final Permit. It rests its claim on four assertions, fashioned as the Region's 'acknowledgements' regarding various technical details as if they were facial concessions of error, which they are not. Moreover, "mere allegations of error" without specific supporting information are insufficient to warrant review. *In re New England Plating*, 9 E.A.D. 726, 737 (EAB 2001).

First, the Town cites to the lack of reasonable potential to cause or contribute to a WQS violation as a reason for removing the monitoring limit. *Pet.* at 31-32. This is irrelevant, as the Region did not impose the monitoring requirement based on a reasonable potential finding. Furthermore, reasonable potential is not required prior to

imposing a monitoring requirement on a pollutant. *See Ashland*, 9 E.A.D. at 671-72 (upholding inclusion of monitoring for a pollutant where Region concluded no reasonable potential for the pollutant existed); *In re City of Port St. Joe*, 7 E.A.D. 275, 311 (EAB 1997) ("Section 301(a) of the [CWA], expressly prohibits the discharge of *any* pollutant without an NPDES permit. Therefore, the Region has clear authority to investigate, through the mechanism of a monitoring requirement, whether pollutants are present in the discharge of a regulated facility."). Rather, the Region indicated that further data collection would assist in it in determining *whether* there was reasonable potential and, furthermore, would provide federal agencies and the Town of Billerica with information to manage drinking water resources. *See Ashland*, 9 E.A.D. at 671-72 (rejecting petitioner's argument that "'monitoring requirements designed to generate data for future regulatory activity are not' authorized under 40 C.F.R. § 122.44(i)"). Both the National Park Service and OARS supported EPA's precautionary approach, citing DEHP's role as a carcinogen and endocrine disruptor and its potential impact on human health. *See* Ex. 4 (RTC) at 37 (NPS Comment No. D1, emphasizing the "potential health effects (both as a carcinogen and as an endocrine disrupter), especially to residents of Billerica who will drink Concord River water.") and 26 (OARS Comment No. C2).

Second, the Town states that DEHP breaks down quickly in the presence of oxygen in a stream, citing to the Region's assumptions regarding background concentrations upstream of the Concord WWTP in Appendix A of the Response to Comments, but draws an unsubstantiated conclusion that "DEHP will dissipate quickly, long before it ever has the potential to impact the Billerica water supply intake." *Pet.* at 32. The Town's claim that DEHP will dissipate quickly could have been raised during

the comment period based on the Region's Fact Sheet analysis, but it was not and therefore is waived. *Pet.* at 32; Ex. 3 (FS) at17. Furthermore, Petitioner offers no reference to water quality data or analysis, or modeling, or scientific literature, to support this assertion. Moreover, the Town does not address information in the record that suggests DEHP may persist in the environment under some circumstances. Ex. 3 (FS) at Appendix G (indicating that DEHP "attaches strongly to soil particles" and "does not break down easily when it is deep in the soil or at the bottom of lakes or rivers.").

Third, Petitioner states that DEHP is ubiquitous, *Pet.* at 32, but fails to demonstrate why this fact renders the imposition of the monitoring requirement clearly erroneous. The fact that a priority pollutant is "ubiquitous" only heightens the concern that there are preexisting background concentrations of DEHP, a factor relevant to whether pollutants in a discharge have a reasonable potential to cause or contribute to a violation of WQS; all this counsels in favor of, not against, appropriate monitoring like that contained in the permit. *See* 40 C.F.R. § 122.44(d)(1)(ii).

Further, the Town asserts that the Region acknowledged that sampling and analysis can give rise to detections of DEHP. *Pet.* at 32. Concord's implication that the data in this case are suspect is unaccompanied by any further factual development or analysis. A mere allegation of error, particularly on a technical issue, is insufficient to demonstrate error. Moreover, the Town's observation that DEHP sampling and analysis can yield erroneous results only emphasizes the need to gather additional information so that regulatory decisions can be made based upon a sufficient amount of accurate data.

The Town, in addition, claims that the Region provided no response to its comments that an "opt-out" provision be added to the permit "if such monitoring

provides no value." *Pet.* at 32-33. In fact, the Region's response indicated that it disagreed with the very premise of the comment, reaffirming its continuing view that monitoring would indeed be of "value." Ex. 4 RTC at 17. The Region indicated that "there is not yet sufficient data to require an effluent limit for DEHP"; that existing effluent data showing pollutant concentrations above the human health criteria had raised concerns, particularly given that the Town of Billerica's drinking water comes from the river water downstream of Concord's wastewater discharge; and that monitoring over the term of the permit would be valuable to the other agencies that manage the Concord River. *Id.* The Town's vague reference to "no value" was adequately encompassed by the Region's response, in which it clearly evinced its position that data yielded by ongoing monitoring would have value. The Region's responses must "address[] the *essence* of each [significant] issue raised," *In re NE Hub Partners, LP*, 7 E.A.D. 561, 583 (EAB 1998) (emphasis added), and should be "thorough enough to adequately encompass the issues raised" by the commenter, *In re Hillman Power Co*, 10 E.A.D. 673, 696-97 & n.20 (EAB 2002); *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 29 (EAB Sept. 15, 2009) (noting that Region does not have any "obligation to address with specificity each individual illustrative point" of a comment so long as the general concern is addressed). To the extent that the Petitioner feels that new information indicates that there is "no value" to the data, it is free to pursue a permit modification, or to request that the monitoring requirement be removed at permit reissuance.

V. CONCLUSION

The Petition should be denied.

Respectfully submitted,

_____

Samir Bukhari
Assistant Regional Counsel
Michael Curley
Assistant Regional Counsel

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this response to the petition for review contains less than 14,000 words in accordance with 40 C.F.R. § 124.19(d)(3).

.

Dated: October 31, 2013

_____

Samir Bukhari

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to the Petition for Review and Statement of Compliance with Word Limitations, in the matter of Town of Concord, Massachusetts, NPDES Appeal No. 13-08, were served on the following persons in the manner indicated:

By Electronic Filing and Overnight Mail:

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3334
Washington, DC 20004

By Overnight Mail:

Robert D. Cox, Jr., Esq.
Norman E. Bartlett, II, Esq.
Bowditch & Dewey
311 Main Street
P.O. Box 15156
Worcester, MA 01615-0156

Dated: October 31, 2013

_____
Samir Bukhari