IN RE ARECIBO & AGUADILLA REGIONAL WASTEWATER TREATMENT PLANTS

NPDES Appeal Nos. 02-09 & 03-05

ORDER DENYING REVIEW

Decided March 10, 2005

Syllabus

Petitioners seek to overturn two decisions by the U.S. Environmental Protection Agency ("EPA or Agency") Region II (the "Region") granting requests for modification or waiver of secondary treatment standards pursuant to section 301(h) of the Clean Water Act ("CWA"). The Puerto Rico Aqueduct and Sewer Authority ("PRASA") requested the waivers for two of its regional waste water treatment plants ("WWTP") that discharge into the ocean — the Arecibo WWTP and the Aguadilla WWTP. Section 301(h) of the CWA allows for waivers from secondary treatment standards with respect to WWTPs that discharge into the ocean, provided that the plants meet the criteria set forth in CWA § 301(h)(1) to (9) and its implementing regulations.

Petitioners do not challenge the Region's determination that PRASA now fully complies with the substantive requirements for obtaining the waivers for the Arecibo and Aguadilla WWTPs. Instead, Petitioners challenge the Region's decision solely on procedural grounds, alleging that PRASA failed to meet certain time deadlines and arguing that such failure bars the Region from issuing the waivers.

Petitioners make three main arguments: (1) the Region violated the section 301(h) implementing regulations (specifically, 40 C.F.R. §§ 125.59(d)(1) and (d)(3)) by allowing PRASA to make multiple untimely revisions to its waiver applications; (2) the Region violated the section 301(h) implementing regulations (specifically, 40 C.F.R. § 125.65) by granting the waivers despite PRASA's failure to comply with an August 1996 regulatory deadline for having an urban area pretreatment program ("UAPP"); and (3) the Region has, by allowing such an extended application process in this matter, essentially eviscerated the purpose and intent of the CWA. Petitioners request that the Environmental Appeals Board (the "Board") revoke the waivers and order PRASA to comply with secondary treatment standards.

Held: For the following reasons the Board denies review of the Petitions:

(1) *Arguments Regarding Untimely Revisions:*

(a) *Alleged Violations of Section 125.59(d)(1):* Section 125.59(d)(1) provides the opportunity for section 301(h) applicants to revise their original applications *once* after EPA makes a tentative decision on the original application. Petitioners do not question the timeliness of the applications PRASA submit-

ted for the Arecibo and Aguadilla WWTPs in 1985 and 1987, respectively. Rather, Petitioners claim that the Region approved treatment levels that differ from the ones PRASA proposed in its revised applications and that the Region's approval is therefore tantamount to allowing PRASA to make a second untimely revision. The Board rejects Petitioners' argument on procedural grounds because the argument was not raised during the public comment period on the draft permit.

(b) *Alleged Violations of Sections 125.59(d)(3) and 125.59(f)(2)(ii):* Petitioners claim that the Region violated a so-called one year deadline in sections 125.59(d)(3) and 125.59(f)(2)(ii) by allowing PRASA to supplement its applications in an untimely manner. Petitioners complain that PRASA submitted additional information between 1987 and 2002 that the Region should not have considered in its decisionmaking. Petitioners assert that the Region's consideration of such information constitutes a *de facto* revision to the applications. Petitioners also complain that none of PRASA's submissions were accompanied by a revised application in violation of section 125.59(f)(2)(ii).

(i) *No Obligation to Submit a Revised Application With Additional Information:* The regulations do not require applicants authorized or requested to submit additional information under section 125.59(g)(1) to submit a new application with such information. Contrary to Petitioners' assertions, the submission of a revised application under section 125.59(d)(3) is discretionary.

(ii) *The One-Year Deadline for the Submission of Additional Information Does Not Serve as a Bar to Consideration of Subsequently Submitted Information:* Petitioners err in contending that the one year period for the submission of additional information set forth in section 125.59(g)(1) is a one-time event that started to run after PRASA filed its revised applications under section 125.59(d)(1). Furthermore, section 125.59(g)(1) does not restrict the Region from making, at any time, successive, multiple requests or authorizations for additional information.

(iii) *The Permit Issuer Can Rely on All the Information in the Record When Making Section 301(h) Determinations:* Contrary to Petitioners' suggestions, the regulations do not limit the type of information the permit issuer can rely on in a final section 301(h) determination, or restrict the information the permitting authority can use to information gathered and submitted pursuant to a section 125.59(g)(1) request, or to information submitted up until the filing of a revised application pursuant to section 125.59(d)(1). The regulations governing the decisionmaking process for NPDES permits are the same regulations that apply to issuance of waiver applications. These regulations require the permit issuer to consider, when making permit decisions, *all information* available in the administrative record.

(iv) *The Region's Consideration of Post-1987 Information Does Not Amount to De Facto Revisions:* Petitioners' assertion that by considering post-1987 information the Region ignored the revised applications and substituted additional revised applications is without foundation. Section 125.59(h) allows the Agency to tentatively approve or disapprove an application based on demonstrations made by the applicant.

> In these cases, the Region tentatively approved the applications in 1988 and 1989, conditioning final approval on the resolution of outstanding issues. Thus, section 125.59(h) sanctions any post-1987 submissions relating to these conditions. In addition, the final approvals were contingent upon PRASA's compliance with the UAPP requirements, which did not come into effect until 1994. Thus, any post-1994 information submitted to show compliance with the UAPP requirements was properly considered by the Region.

(2) *The UAPP Deadline — Whether the Region Clearly Erred in Issuing the Waivers Despite PRASA's Failure to Comply with the August 1996 Deadline:* The regulations at 40 C.F.R. § 125.29(e)(2) do not mandate that the Agency deny a waiver request based on failure to meet the August 9, 1996 deadline set forth in 40 C.F.R. § 125.59(f)(3)(ii)(A). The Board rejects Petitioners' suggestion that the August 9, 1996 deadline possesses jurisdictional attributes barring the Agency from issuing the waivers. The unusual, if not unique, circumstances of these cases justify the Region's decision to allow PRASA additional time to fully comply with the UAPP requirements. Having found that the August 9, 1996 deadline was not intended as a jurisdictional deadline, and given the very particular circumstances surrounding PRASA and its efforts to comply with the deadline, the Board does not find abuse of discretion in the Region's decision to allow PRASA additional time to show full compliance with all the UAPP requirements.

(3) *Alleged Violation of Purpose and Intent of CWA:* By not deciding on the waivers at an earlier date, the Region did not violate any statutory or regulatory obligations set forth in the CWA, for neither the statute nor its implementing regulations prescribe a deadline for the Agency to act on such waivers. The Board also finds no contravention of Congressional intent on the Region's part.

Before Environmental Appeals Judges Scott C. Fulton and Kathie A. Stein.[1]

Opinion of the Board by Judge Stein:

I. *INTRODUCTION*

Petitioners in these consolidated cases seek to overturn decisions by U.S. Environmental Protection Agency ("EPA or Agency") Region II (the "Region") granting a request to modify secondary treatment standards[2] for each of two wastewater treatment plants ("WWTPs"), Arecibo and Aguadilla. The WWTPs are located in coastal areas of Puerto Rico and discharge treated wastewater into the ocean. The plants' operating entity, the Puerto Rico Aqueduct and Sewer Author-

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[1] Judge Ronald L. McCallum participated in the oral argument of this case, but retired effective December 31, 2004, before the Board issued this decision. Pursuant to 40 C.F.R. § 1.25(e)(1), this matter is being decided by a two-member panel.

[2] *See infra* Part II.A (defining secondary treatment standards).

ity ("PRASA"), requested the modifications. Section 301(h) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(h), provides relief from secondary treatment standards to certain WWTPs[3] that discharge into the ocean, and it authorizes EPA to grant modifications or waivers of this kind. To qualify for a section 301(h) modification or waiver, the applicant must demonstrate that the plant will meet a separate set of standards designed to protect the ocean environment.[4]

Coralations, Inc. and Centro de Acción Ambiental, Inc. (the "Arecibo Petitioners") filed the first petition for review on October 16, 2002, and the Comité de Ciudadanos Aguadenos en Defensa del Ambiente, Inc., Coralations, Inc., Centro de Acción Ambiental, Inc., and Mayaguezanos por la Salud y el Ambiente, Inc. (the "Aguadilla Petitioners") filed the second petition on April 9, 2003. Because the legal issues and facts pertinent to each petition are virtually identical or otherwise bear close similarities, the Environmental Appeals Board (the "Board") consolidated the two cases for purposes of ruling on the petitions.

The Arecibo and Aguadilla Petitioners' (collectively "the Petitioners") arguments and allegations fall into three general groupings: (1) the Region violated the section 301(h) implementing regulations (specifically, 40 C.F.R. §§ 125.59(d)(1) and (d)(3)) by allowing PRASA to make multiple untimely revisions to its waiver applications; (2) the Region violated the section 301(h) implementing regulations (specifically, 40 C.F.R. § 125.65) by granting the waivers despite PRASA's failure to comply with an August 1996 regulatory deadline for having an urban area pretreatment program ("UAPP");[5] and (3) the Region has, by allowing such an extended application process in this matter, essentially eviscerated the purpose and intent of the CWA. Based on the foregoing, Petitioners contend that the Region should have disapproved the waivers, and request that the Board revoke the waivers and order PRASA to comply with secondary treatment standards.

Before discussing the case in any significant detail, we observe that Petitioners do not challenge the Region's determination that PRASA now fully complies with the substantive requirements for obtaining a section 301(h) waiver from the secondary treatment standards. That is, Petitioners do not dispute that PRASA ultimately complied with the substantive provisions in 33 U.S.C. section 301(h)(1) to (9). Instead, Petitioners challenge the Region's decision solely on procedural grounds. The issues Petitioners seek to raise relate primarily to PRASA's alleged failure to meet certain time deadlines and Petitioners' contention

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[3] Specifically, CWA § 301(h) applies to municipal WWTPs, like PRASA's Arecibo and Aguadilla WWTPs. These plants are also known as publicly owned treatment works or "POTWs" for short. *See infra* note 13 (defining the term "POTW").

[4] *See* CWA § 301(h)(1)-(9), 33 U.S.C. § 301(h)(1)-(9); 40 C.F.R. §§ 125.56-.68.

[5] *See infra* Part II.B.5 (discussing the urban area pretreatment program and its requirements).

that such failure should bar the Region from issuing the waivers. Petitioners further contend that the statute and the regulations governing secondary treatment modification limit, in the context of section 301(h) waivers, the permitting authority's otherwise broad authority to manage the permitting process. In their view, tools ordinarily available to the permit issuer such as further investigating an application or soliciting information from an applicant are not fully available to the permit issuer when deciding on section 301(h) applications but instead can be exercised only within certain time constraints. Finally, Petitioners assert that the Region purposefully postponed considering PRASA's applications until it was certain that PRASA satisfied the regulatory requirements for obtaining the waivers.

These cases have a long and complex procedural history, which dates back to 1979 when PRASA first sought waivers from the secondary treatment standards.[6] Over twenty years passed before the Region made the final decisions to grant the waivers in 2002 (Arecibo) and 2003 (Aguadilla). The length of time it took the Region to make a final determination on each waiver application is naturally a source of concern. Nevertheless, upon close examination, this turn of events is not without explanation. Notably, the delay took place in the context of an intricate statutory and regulatory framework that underwent numerous transformations between 1979 and 1994. Moreover, during much of this time, PRASA was subject to administrative and judicial orders designed to bring not only these two facilities, but also ninety others for which PRASA was responsible,[7] under regulatory and court supervision to ensure eventual compliance with the CWA.[8]

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[6] PRASA submitted more than ten waiver applications for various WWTPs owned and operated by PRASA, including applications for the Arecibo and the Aguadilla facilities.

[7] As explained more fully below, *see infra* Part IV.C.2.c, PRASA, the entity that operates the Arecibo and Aguadilla WWTPs, is in an unusual situation. Unlike many entities in charge of a small number of municipal WWTPs (or POTWs), PRASA, a public corporation created under the laws of the Commonwealth of Puerto Rico to provide potable water and wastewater treatment, is responsible for all the POTWs in the Commonwealth. In 1979, when PRASA first applied for the waivers, PRASA owned and operated ninety-two facilities, all subject to secondary treatment standards. This number decreased over the years as PRASA has undergone major plant improvements by, among other things, decommissioning plants, relocating discharges, and converting existing facilities into regional plants. At the time the Region issued the waivers at stake, PRASA had decreased the number of POTWs it operated from ninety-two to sixty-four.

[8] In 1978 EPA sued PRASA because its ninety-two plants did not comply with CWA requirements. That same year, EPA and PRASA reached a settlement, which the parties implemented through a final judgment the United States District Court for the District of Puerto Rico entered. PRASA, however, did not meet the terms of the settlement, and EPA brought lawsuits again in 1983, 1985, and 1988. As a consequence, upon the parties' request, the District Court amended the 1978 final judgment from time to time to reflect the then-current state of affairs. *See, e.g., United States v. PRASA*, Nos. 78-0038 (TR) & 83-0105 (TR) (D.P.R. Feb. 22, 1985) (Order Further Amending the Final Judgment)

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Finally, the CWA does not actually establish a formal deadline by which the Agency must act on section 301(h) applications. Although there is a deadline for applicants to submit their waiver requests,[9] the Agency itself is under no comparable obligation to act on those requests by a date certain. While this in itself does not excuse delay, the lack of a statutory deadline for the Agency to act must be factored into the disposition of Petitioners' appeals.

The remedy Petitioners request — that we require PRASA to meet secondary treatment standards — factors significantly into our analysis. Indeed, the prospect of requiring PRASA to meet such requirements at this stage of the process, long after PRASA has satisfied the substantive requirements for a waiver from secondary treatment standards, carries daunting implications. By enacting section 301(h), Congress in effect declared that meeting the section 301(h) standards for ocean discharges constitutes an environmentally acceptable substitute for meeting secondary treatment requirements. As a consequence, as long as PRASA qualifies for a section 301(h) waiver,[10] the environmental utility of mandating secondary treatment remains dubious. Thus, we must consider whether to impose the burden and costs of secondary treatment solely because of procedural failures and not because Congress mandated such treatment from an environmental protection perspective.[11] We explore these issues in more detail below.

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(the "1985 Court Order"); *United States v. PRASA*, Nos. 78-0038 (TR) & 83-0105 (TR) (D.P.R. Sept. 26, 1988) (Supplemental Consent Order) (the "1988 Court Order").

The EPA also initiated administrative actions against PRASA, which the parties settled. In 1994, for instance, EPA issued several orders, consolidated in one document entitled "Orders on Consent EPA-CWA-II-94-101 thru 135," against PRASA's WWTPs for PRASA's failure to implement certain pretreatment regulations. *See* Arecibo Administrative Record ("AR") 15 (Orders on Consent, EPA-CWA-II-94-101 thru 135 (Sept. 29, 1994)) (the "1994 Consent Order"). In 1997, the EPA issued two additional orders, one each for the Aguadilla and the Arecibo WWTPs. *See* Arecibo AR 25 (Order EPA-CWA-II-97-145 (Sept. 16, 1997)); Aguadilla AR 24 (Order EPA-CWA-II-97-144 (Sept. 16, 1997)).

[9] *See* CWA § 301(j)(1)(A), 33 U.S.C. § 1311(j)(1)(A); *see also* Part II.B *infra* (explaining evolution of deadline).

[10] These modifications or waivers are effective only for the term of the modified permit. Permits themselves are good for five years, *see* 40 C.F.R. § 122.46(a), at which point POTWs desiring to continue their discharges under a section 301(h) modified permit need to apply for permit renewal along with a request for a section 301(h) modification. *See id.* § 125.59(c)(4).

[11] Significantly, Congress enacted section 301(h) for the expressed purpose of helping coastal WWTPs avoid costs associated with secondary treatment so long as the WWTP seeking relief could meet the criteria set forth in section 301(h). *See NRDC, Inc. v. EPA*, 656 F.2d 768, 784 (D.C. Cir. 1981) ("The purpose of section 1311(h) [301(h)] is to permit some coastal municipal sewage treatment plants to avoid costs associated with secondary treatment so long as environmental standards can be maintained. *If a treatment plant can discharge a pollutant and meet the criteria of section 1311(h) unnecessary expenditures may be avoided*.") (emphasis added). At oral argument, counsel for the Re-
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We begin our analysis in Part II by discussing the applicable statutory and regulatory background, followed by Part III, in which we describe the procedural history of each section 301(h) permit modification. Part IV begins with a description of the procedural rules governing section 301(h) determinations, the scope of Board review and the threshold procedural requirements that apply to those seeking Board review. In Part IV we analyze the issues raised on appeal, which, in turn, necessitates a detailed look at the underlying regulations and related issues. Part IV concludes with an analysis of Petitioners' arguments concerning the Region's delay in approving the waivers.

For the reasons set forth below, we deny review of the Region's decisions to grant the waivers.

II. *STATUTORY AND REGULATORY BACKGROUND*

The CWA prohibits discharging any pollutant to waters of the United States from a point source,[12] unless the discharge complies with the requirements of the statute. *See* CWA § 301(a), 33 U.S.C. § 1311(a). Section 402 of the CWA constitutes the principal provision authorizing discharges of pollutants, provided that the discharger satisfies certain stringent statutory requirements. *See* CWA § 402(a), 33 U.S.C. § 1342(a). This section establishes a permitting regime known as the "national pollutant discharge elimination system" — or NPDES program, for short.

In the NPDES context, the CWA requires that permits contain effluent limitations and conditions, which in turn depend upon the classification of the discharger. *See* CWA §§ 301-302, 33 U.S.C. §§ 1311-1312. The CWA treats the Arecibo and Aguadilla WWTPs as "publicly owned treatment works," or POTWs.[13] In general, however, regardless of the discharger's classification, all

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gion indicated that the cost of secondary treatment at these two facilities would likely be in excess of $100 million. *See* Oral Argument Transcript at 46-47.

[12] The CWA defines point source as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." CWA § 502, 33 U.S.C. § 1362.

[13] The term POTW means "a treatment works, as defined by Section 212 of the CWA, that is owned by the State or municipality. This definition includes any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature." U.S. EPA Office of Water, *NPDES Permit Writers' Manual* G-10 (1996); *see* CWA § 212(2)(A), 33 U.S.C. § 1292(2)(A)("[t]he term 'treatment works' means any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature").

NPDES permits contain effluent limitations based on two different types of considerations: those derived from the technology available to treat or remove a pollutant from the discharge, and those necessary to protect the designated and existing uses of the receiving water body. *Id*. The former, commonly referred to as technology-based limitations, reflect a specified level of pollutant-reducing technology required for the type of facility that is seeking a permit, while the latter, referred to as water-quality based effluent limitations, apply when technology-based effluent limits are insufficient to meet water quality standards applicable to the receiving water body.

A. *Secondary Treatment Standards*

Section 301(b)(1)(B) of the CWA provides that POTWs as a class must meet "secondary treatment" standards.[14] These standards are performance-based requirements derived from available wastewater treatment technology, and are not based on water quality standards. *See* CWA § 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B). Congress required POTWs to meet secondary treatment standards, as defined by the EPA, by July 1, 1977.[15] *See* CWA §§ 301(b)(1)(B), 314(d)(1), 33 U.S.C. §§ 1311(b)(1)(B), 1314(d)(1). Based on this mandate, EPA promulgated regulations in 1973 defining secondary treatment standards. EPA based the standards on a combination of physical and biological processes typical for the treatment of pollutants in municipal sewage. *See* 40 C.F.R. pt. 133. Secondary treatment generally concerns the removal of pollutants that deplete the water of oxygen content and increase its acidity. The regulations EPA promulgated establish the minimum level of effluent quality attainable through secondary treat-

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[14] We note as background that "there are three levels of wastewater treatment [namely, primary, secondary and tertiary]. Primary treatment refers to a physical sedimentation process for removing settleable solids. Secondary treatment refers to a physical/biological process for removing solids and pollutants characterized by biological oxygen demand and pH. Tertiary treatment involves processes which remove other pollutants such as non-biodegradable toxics. The statute requires that existing POTWs meet standards based on secondary treatment. Tertiary treatment is ordinarily provided only by industrial dischargers or by specially designed POTWs." *NRDC v. EPA*, 790 F.2d 289, 293 n.2 (3d Cir. 1986) (citations omitted).

[15] Congress amended the CWA and authorized EPA to extend the 1977 secondary treatment compliance deadline for POTWs to July 1, 1988. *See* Municipal Wastewater Treatment Construction Grant Amendments of 1981 ("MWTCGA"), Pub. L. No. 97-117, 95 Stat. 1623. However, Congress provided this extension for POTWs that were required to undergo construction to meet the standards but for which construction could not be completed by the statutory deadline, or where the failure to comply was due to lack of federal construction grant funds. CWA § 301(i)(1), 33 U.S.C. § 1311(i)(1). Essentially this extension was available if the requirements in section 301(i)(1) of the CWA were met. PRASA did not meet the requirements. *See* Arecibo AR 9 (Administrative Order EPA-CWA-II-88-204); Aguadilla AR 16 (Administrative Order EPA-CWA-II-88-203). Congress has not provided any further extension, and EPA cannot grant any extension beyond the July 1, 1988 deadline. *Haw.'s Thousand Friends v. City & County of Honolulu*, 821 F. Supp. 1368, 1374 (D. Haw. 1993).

ment in terms of three parameters: (1) five-day biochemical oxygen demand ("BOD_5");[16] (2) total suspended solids ("TSS");[17] and (3) pH.[18] Accordingly, POTWs must comply with the following conditions:

Parameter	30-Day Average[19]	7-Day Average[20]
BOD_5	30 mg/l	45 mg/l
TSS	30 mg/l	45 mg/l
pH	6-9	---
Removal	85% BOD_5 and TSS	---

See 40 C.F.R. § 133.102.

B. *Modification or "Waiver" of Secondary Treatment Standards*

Under certain circumstances the Administrator may modify or "waive" the secondary treatment standards applicable to POTWs that discharge into ocean waters. Section 301(h) of the CWA allows qualified "municipal marine dischargers" to become, in effect, exempt from the secondary treatment standards noted above. Under section 301(h), "[t]he Administrator, with the concurrence of the State, may issue a[n NPDES] permit * * * which modifies the [secondary treatment requirements]" established under section 301(b)(1)(B). CWA § 301(h), 33 U.S.C. § 1311(h). In lieu of meeting the secondary treatment standards, however, the POTW must meet the separate standards and requirements specified in section 301(h).

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[16] Biochemical oxygen demand ("BOD") is a measure of the rate at which dissolved oxygen is consumed by pollutants in a wastewater sample. BOD_5 refers to the type of test used to measure BOD levels in a sample; it measures BOD levels over a five-day period of time. U.S. EPA Office of Water, *NPDES Permit Writers' Manual* G-2 (1996).

[17] Total suspended solids ("TSS") is a measure of the filterable solids present in a sample. U.S. EPA Office of Water, *NPDES Permit Writers' Manual* G-12 (1996).

[18] This parameter, pH, is a measure of the hydrogen ion concentration of water or wastewater. U.S. EPA Office of Water, *NPDES Permit Writers' Manual* G-8 (1996). It is used to determine whether a water sample is acidic, neutral, or basic. *See id.*

[19] Section 133.101 defines this as "the arithmetic mean of pollutant parameter values of samples collected in a period of 30 consecutive days." 40 C.F.R. § 133.101(b).

[20] Section 133.101 defines this as "the arithmetic mean of pollutant parameter values of samples collected in a period of 7 consecutive days." 40 C.F.R. § 133.101(a).

1. *The 1977 Statute*

Congress first added section 301(h) of the CWA in 1977 at the urging of numerous seaside POTWs that viewed secondary treatment standards as unnecessary to protect the marine environment from municipal ocean discharges. *See* Modification of Secondary Treatment Requirements for Discharges into Marine Waters, 44 Fed. Reg. 34,784 (June 15, 1979) ("Preamble 1979 Regulations"). These POTWs argued that the strong currents and tidal actions of the sea quickly diluted and dispersed wastes discharged into the marine environment. *Id.* Upon consideration of the matter, Congress amended the CWA and provided for the modification of secondary treatment to dispense with, among other things, treatment beyond levels demonstrably needed to protect the environment. *See* S. Rep. No. 95-370, at 45 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4370. Congress established a 270-day deadline, i.e., until September 24, 1978, for submitting applications under section 301(h). Congress, however, did not establish a deadline by which the Agency was to approve or deny the applications. Congress, nonetheless, expected the Administrator to review the applications and immediately reject those that failed to show a substantial likelihood of prevailing on the merits.[21]

2. *The 1978 and 1979 Regulations*

EPA, however, did not promulgate regulations implementing section 301(h) until after the statutory deadline had passed for submitting applications. Because it was unable to publish final regulations before the statutory deadline, on September 5, 1978, the Agency announced in the *Federal Register* that it would receive preliminary applications for modification of secondary treatment standards until September 25, 1978; the notice also prescribed the content requirements for those applications. *See* Modification of Secondary Treatment Requirements for Discharges into Marine Waters, 43 Fed. Reg. 39,398, 39,399 (Sept. 5, 1978). The Agency subsequently promulgated regulations implementing section 301(h) in June 1979, i.e., "the 1979 Regulations."[22] *See* Preamble 1979 Regulations, 44 Fed. Reg. at 34,784.

The 1979 Regulations limited the opportunity to obtain a modification or waiver of secondary treatment requirements to POTWs that had an existing

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[21] *See* S. Rep. No. 95-370, at 43 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4368 ("The Administrator is expected to review any application for a waiver under * * * the secondary treatment provision to determine whether or not there is a substantial likelihood that the discharger will prevail on the merits of the case and if he concludes that there is not, he should reject it immediately so that the applicant may begin to comply with applicable effluent limits.").

[22] In that same year, the Agency issued a technical support document ("TSD") to help POTWs prepare section 301(h) applications. *See* http://www.epa.gov/owow/oceans/regulatory/sec301tech/intro.html.

marine discharge as of December 27, 1977, and had submitted a preliminary waiver application by September 25, 1978. *See id.* at 34,785. In addition, dischargers that were, at the time, meeting effluent limitations based on secondary treatment were not eligible for section 301(h) waivers. *Id.* at 34,798. Qualifying POTWs had until September 13, 1979, to submit final applications.

3. *The Overturning of Certain Provisions of the 1979 Regulations and the Passage of the 1981 Statute*

Some of the eligibility requirements quickly changed. Following a challenge to the 1979 Regulations in the U.S. Court of Appeals for the District of Columbia Circuit, the court overturned those provisions which treated as ineligible those plants that had already achieved secondary treatment. *See NRDC v. EPA*, 656 F.2d 768, 786 (D.C. Cir. 1981). The *NRDC* decision also overturned other provisions of the 1979 Regulations, most notably the prohibition against issuing a section 301(h) modified permit for discharges receiving less than primary treatment.[23]

Shortly thereafter, Congress promulgated the Municipal Wastewater Treatment Construction Grant Amendments of 1981 ("MWTCGA"), Pub. L. No. 97-117, 95 Stat. 1623, which, among other things, amended section 301(h). The amendments clarified that municipalities applying secondary treatment standards were eligible to receive a permit pursuant to section 301(h). Congress also established a new deadline — December 29, 1982 — for submitting applications under section 301(h). *See* CWA § 301(j)(1)(A), 33 U.S.C. § 1311(j)(1)(A). Once again, Congress did not establish a deadline for the Agency to decide upon these applications.

4. *The 1982 Amendments to the Regulations and Section 125.59(d)*

In 1982, in response to the *NRDC* decision and the MWTCGA, EPA amended its 1979 Regulations.[24] *See* Modification of Secondary Treatment

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[23] Primary treatment refers to the practice of removing a portion of suspended solids and organic matter from a wastewater through sedimentation. U.S. EPA Office of Water, *NPDES Permit Writers' Manual* G-9 (1996); *see also supra* note 14. The regulations governing the modification of secondary treatment requirements, 40 C.F.R. pt. 125, subpt. G, define "primary treatment" as "treatment by screening, sedimentation, and skimming adequate to remove at least 30 percent of the biochemical oxygen demanding material and of the suspended solids in the treatment works influent, and disinfection, where appropriate." 40 C.F.R. § 125.58(r).

[24] The Agency also amended its TSD, *see supra* note 22, and issued a Revised Section 301(h) Technical Support Document (U.S. EPA 1982). The Revised Section 301(h) Technical Support Document identified the new regulatory requirements and provided guidance on the preparation of section 301(h) applications. The Agency issued a companion document, Design of 301(h) Monitoring Pro-
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Requirements for Discharges into Marine Waters, 47 Fed. Reg. 53,666 (Nov. 26, 1982) ("1982 Final Rule"); *see also* Modification of Secondary Treatment Requirements for Discharges into Marine Waters, 47 Fed. Reg. 24,921 (June 8, 1982) ("1982 Proposed Rule"). The 1982 amendments incorporated the new statutory deadline for the filing of section 301(h) applications — December 29, 1982, *see* 40 C.F.R. § 125.59(f)(1)(i) — and established, inter alia, procedures for revising the applications, *id.* § 125.59(d). In general, "all applicants," which included existing applicants under the 1979 Regulations, like PRASA, as well as new applicants under the 1982 amended regulations, could revise their original applications to propose, among other things, different treatment levels.[25] 1982 Final Rule, 47 Fed. Reg. at 53,668; 40 C.F.R. § 125.59(d). For instance, the newly promulgated section 125.59(d)(1), which applies to POTWs that, like PRASA, had submitted applications in accordance with the 1979 Regulations, provided a one-time opportunity for these POTWs to amend their original applications. Section 125.59(d)(1) provides in pertinent part: "POTWs which submitted applications in accordance with the June 15, 1979, regulations (44 FR 34784) may revise their applications one time following a tentative decision * * * in accordance with § 125.59(f)(2)(i)." 40 C.F.R. § 125.59(d)(1). According to section 125.59(f)(2)(i), applicants desiring to revise their applications under section 125.59(d)(1) had one year from the date of EPA's tentative decision on their original applications to submit a revised application.[26] *Id.* § 125.59(f)(2)(i)(B). The one-time opportunity under section 125.59(d)(1) was not, however, the only opportunity to revise an application. Section 125.59(d)(3) allowed POTWs that had been requested or authorized by a permitting authority to submit additional information to revise, if so desired, their applications. *See id.* § 125.59(d)(3). Applicants submitting revised applications pursuant to section 125.59(d)(3) were to submit them concurrent with such additional information. *See id.* § 125.59(f)(2)(ii).

(continued)
grams for Municipal Wastewater Dischargers to Marine Waters (U.S. EPA 1982), which provided guidance on the development and implementation of monitoring programs, to meet the requirements in section 301(h).

[25] Recall that the 1979 Regulations did not allow waivers for POTWs proposing less than primary treated effluent or for POTWs already meeting secondary treatment. The 1982 amendments allowed applicants to revise their applications either upward (i.e., to propose improvements in treatment levels and/or improvements in outfall design and location) or downward (i.e., to propose lower treatment levels than those proposed in the original application). 1982 Final Rule, 47 Fed. Reg. at 53,667-68.

[26] *See* 40 C.F.R. § 125.59(h) (tentative decisions on section 301(h) modifications); *see also infra* note 45 (quoting section 125.59(f)(2)(i)(B)).

5. *The 1987 Statute, the 1994 Amendments to the Regulations, and the Urban Area Pretreatment Program*

Congress amended section 301(h) one more time. Section 303 of the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 ("WQA"), added new statutory requirements to section 301(h). Of interest here is the Urban Area Pretreatment Program ("UAPP"), which the WQA amendments incorporated into the existing section 301(h) waiver process by amending section 301(h)(6) of the CWA.

In response to these changes and to build on the experience EPA had acquired through administering the waiver process, the EPA amended its regulations implementing section 301(h) once more in 1994.[27] *See* Modification of Secondary Treatment Requirements for Discharges into Marine Waters, 59 Fed. Reg. 40,642 (Aug. 9, 1994) ("Final Rule 1994 Regulations"). On August 9, 1994, the EPA promulgated the new amendments, adding, among others, section 125.65, which implements the newly enacted UAPP requirements.

Section 125.65 requires each section 301(h) applicant serving a population of 50,000 or more[28] to demonstrate, for each toxic pollutant an industrial discharger introduces into the POTW, that the applicant either: (1) has in effect an "applicable pretreatment requirement;" or (2) has in effect a program that achieves "secondary removal equivalency." 40 C.F.R. § 125.65(b)(1)(i)-(ii). The record shows that PRASA selected the "applicable pretreatment requirement" approach to comply with the UAPP. *See* Arecibo Administrative Record ("AR") 100, at 73 (Region's Response to Comments-Arecibo (Sept. 3, 2002)); Aguadilla AR 103, at 65 (Region's Response to Comments-Aguadilla (Feb. 19, 2003)). Thus, we will not concern ourselves with the "secondary removal equivalency" approach. Section 301(h) applicants selecting the applicable pretreatment requirement approach must have in place pretreatment requirements applicable to the industrial dischargers that discharge into the POTW.[29] In addition, the applicant must demonstrate under either approach that each industrial source introducing waste into its

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[27] The Agency also amended its technical support document, *see supra* note 24, to reflect the new regulatory changes. *See* U.S. EPA Office of Water, *Amended Section 301(h) Technical Support Document* (1994), *available at* http://www.epa.gov/owow/oceans/regulatory/sec301tech/intro.html.

[28] *See* CWA § 301(h)(6), 33 U.S.C. § 1311(h)(6); 40 C.F.R. § 125.65(a).

[29] Applicable pretreatment requirements may take the form of categorical standards, local limits (numeric and/or narrative), or a combination of both. Categorical standards are nationally uniform technology-based limits, promulgated by the EPA under section 307 of the CWA, which are developed for specific industries and for specific toxic pollutants. *See* 40 C.F.R. § 403.6. In contrast, local limits are requirements developed by a POTW, in accordance with 40 C.F.R. pt. 403, based on local conditions and unique requirements at the POTW. *See id.* § 403.5. These limits are primarily intended to protect the POTW from industrial discharges that could interfere with the POTW's treatment processes or pass through the treatment plant into receiving waters and adversely impact water quality or the environment.

POTW complies with all applicable pretreatment requirements, and that the applicant will enforce those requirements. *See* 40 C.F.R. § 125.65(b)(2). PRASA is subject to the UAPP requirements. According to the regulations governing the modification of secondary treatment standards, section 301(h) applicants subject to the UAPP requirements, like PRASA, were to show compliance with these requirements by August 9, 1996. *Id.* § 125.59 (f)(3)(ii)(A).

In sum, as the foregoing discussion of the statutory and regulatory background amply demonstrates, both the statutory provisions and the implementing regulations have undergone several significant revisions since the inception of the section 301(h) waiver program in 1977. It is within this context that we examine Petitioners' challenges to the Region's decision to grant Arecibo's and Aguadilla's section 301(h) modification requests. We now turn to a more detailed examination of the factual and procedural background underlying the Region's decision.

III. *FACTUAL AND PROCEDURAL BACKGROUND*

A. *Request for Modification of Secondary Treatment Standards for PRASA Arecibo*

On September 13, 1979, PRASA submitted its first section 301(h) application for the Arecibo WWTP, requesting a modification of two of the secondary treatment requirements — the BOD and TSS requirements. *See* Arecibo AR 100, at 10 (Region's Response to Comments-Arecibo (Sept. 3, 2002)). The Puerto Rico Environmental Quality Board ("EQB") refused to concur on the waiver request because the proposed modified discharge would contravene EQB's water quality standards. *See* Arecibo AR 2 (EPA's Tentative Decision to Deny Arecibo Application for 301(h) Waiver (Oct. 10, 1984)) (explaining EQB's decision). Because concurrence of the EQB is a prerequisite to EPA's grant of a waiver,[30] the Region tentatively denied PRASA's application on October 10, 1984. *Id.*

Accordingly, pursuant to section 125.59(d)(1), PRASA had until October 10, 1985 — one year after the Region's tentative denial of the application — to revise and submit its new application.[31] On December 3, 1985, i.e., within one

[30] Pursuant to section 301(h), the Agency needs concurrence of the state or territory where discharges will occur before it can approve a section 301(h) request. CWA § 301(h), 33 U.S.C. § 1311(h).

[31] As noted previously, pursuant to the 1982 amendments to the regulations, POTWs like PRASA Arecibo had one year after a tentative decision to resubmit their applications. 40 C.F.R. § 125.59(d)(1), (f)(2)(i).

year of the revised tentative denial date,[32] PRASA submitted a revised application (sometimes referred to by the parties as a "second-round application"). *See* Arecibo AR 5 (Application for a Waiver of Secondary Treatment for the Arecibo WWTP (Dec. 3, 1985)). The Region requested additional information from PRASA on November 24, 1986, and PRASA responded to the Region's request on March 16, 1987. Arecibo AR 6 (EPA Letter to PRASA regarding Bioassay Mixing Zone Studies (Nov. 24, 1986)).

On July 19, 1989, the Region tentatively approved PRASA's request. Arecibo AR 11 (EPA's Tentative Decision Document (July 19, 1989)) ("1989 Tentative Approval"). The Region conditioned final approval of PRASA's section 301(h) request on resolving several matters, among them, EPA's issuing a guidance document[33] on the new UAPP requirements in section 301(h)(6).[34] *Id*. at 7. At the time, EPA was developing guidance to implement the new statutory requirements enacted in 1987. *Id*. Therefore, the Region could not make a final determination on the UAPP aspects of the 301(h) waiver request. The Region thus decided to wait until the Agency finalized the UAPP requirements before granting final approval for PRASA's request. *Id.*

On January 24, 1991, the Agency made available, for public comment, a draft technical support document. It also proposed amendments to the regulations implementing section 301(h), which incorporated the new statutory requirements (UAPP) mandated by section 303 of the WQA of 1987. *See supra* Part II.B.2. The Agency finalized the regulations and technical support document in 1994.

Under the new regulatory framework implementing the UAPP, EPA required permittees and applicants to whom EPA had issued final or tentative decisions on their section 301(h) requests to submit a letter of intent, on or before November 7, 1994, demonstrating how they planned to comply with the UAPP requirements. *See* 40 C.F.R. § 125.59(e)(1), (f)(3)(i). PRASA submitted its letter

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[32] The record shows that PRASA did not receive the original October 10, 1984 tentative denial decision; for that reason, the Region agreed to set a new date, December 3, 1984, for the tentative denial. Arecibo AR 3 (EPA's Letter to PRASA (Jan. 18, 1985)). Consequently, the deadline for PRASA's resubmittal became December 3, 1985. *Id.*

[33] *See* U.S. EPA Office of Water, *Amended Section 301(h) Technical Support Document* (1994); *see also supra* note 27 and accompanying text.

[34] EPA's other conditions required PRASA to develop a post-waiver monitoring program (a section 301(h)(3) requirement) and an adequate schedule of activities to limit the entrance of toxic pollutants from nonindustrial sources into the Arecibo WWTP (a section 301(h)(7) requirement). 1989 Tentative Approval at 7. EPA also required PRASA to submit a certification addressing compliance with the Endangered Species Act, 16 U.S.C. §§ 1531-1544. *Id.*

of intent on November 7, 1994,[35] choosing the "applicable pretreatment requirement" approach instead of the "secondary removal equivalency" approach to comply with the UAPP requirements.[36] Arecibo AR 16 (Letter of Intent (Nov. 7, 1994)). In its letter of intent, PRASA explained that, for purposes of demonstrating how it would comply, it would follow the schedules set in the 1994 Consent Order,[37] which required PRASA to take appropriate enforcement action against noncomplying significant industrial users ("SIUs") and evaluate and develop local limits[38] for the Arecibo WWTP by February 28, 1997.[39] *Id*. at 2.

In a letter dated February 27, 1995, the Region informed PRASA that although PRASA's proposed compliance date exceeded the August 9, 1996 regulatory deadline, the Agency would not disapprove the waiver request solely on that basis. *See* Arecibo AR 17, at 3 (Response to November 7, 1994 Letter of Intent (Feb. 27, 1995)) (stating that "EPA will not take any actions to disapprove the plan or deny PRASA's application * * * based solely on this deficiency so long as PRASA is meeting the terms of the September 29, 1994 Consent Order.").

On May 29, 1996 — approximately two months before the regulatory deadline — PRASA submitted reports on the evaluation of local limits for the Arecibo WWTP. Arecibo AR 100, at 74 (Region's Response to Comments-Arecibo). The Region, however, found that the reports were incomplete. *Id*. On September 16, 1997, the Region issued an Administrative Order ("the 1997 Administrative Order"), requiring PRASA to undertake additional analyses and extending PRASA's deadline for the submission of local limits and the incorporation of approved local limits into industrial user permits. *See* Arecibo AR 25, at 4 (Order EPA-CWA-II-97-145 (Sept. 16, 1997)). According to the 1997 Administrative Order, PRASA was to complete the technical analysis and numeric local limits for the Arecibo WWTP by April 30, 1998, and adopt and incorporate approved local limits into industrial permits by September 30, 1998. *Id.* PRASA met the April

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[35] The record before us does not show activity related to PRASA's section 301(h) applications in the period between the Tentative Approval, issued on July 19, 1989, and November 7, 1994, when PRASA filed its letter of intent. The record, however, shows some communications related to PRASA's compliance with the pretreatment program and other NPDES and state regulatory requirements.

[36] *See supra* note 29 and accompanying text (explaining the "applicable pretreatment requirement" approach); *see also infra* Part IV.C.2.a (discussing the UAPP requirements).

[37] *See supra* note 8.

[38] *See supra* note 29 (defining the term "local limits").

[39] The 1994 Consent Order addressed PRASA's failure to implement some of the requirements in 40 C.F.R. part 403 — the General Pretreatment Regulations. *See infra* note 76 (discussing interplay between part 403 and the UAPP requirements). According to the 1994 Consent Order, PRASA was to complete a technical evaluation of local limits by November 30, 1996, for the Aguadilla WWTP, and February 28, 1997, for the Arecibo WWTP. *See* 1994 Consent Order ¶ 4, at 5 & attach. A.

deadline, and the Region approved PRASA's local limits on May 1998. *See* Arecibo AR 100, at 74 (Region's Response to Comments-Arecibo). The record shows that PRASA also met the September 1998 deadline. Arecibo AR 74, at 49 (EPA's Proposed Section 301(h) Decision Document (Oct. 25, 2000)).

In October 2000, the Region issued a decision document proposing to grant PRASA's 301(h) application, and proposing to issue a modified NPDES permit to incorporate the terms of the waiver from meeting secondary treatment requirements. *Id*. The Region opened the public comment period and held a public hearing on December 4, 2000. Thereafter, the Region extended the public comment period from January 31, 2001, to March 31, 2001. Arecibo AR 81 (Transcript of the Public Hearing (Dec. 4, 2000)); Arecibo AR 82 (EPA's Letter to Fernando Betancourt Granting Extension of Public Comment Period (Dec. 13, 2000)). On September 3, 2002, the Region issued a final decision granting PRASA's section 301(h) request. The Region also issued a modified NPDES permit for the Arecibo WWTP. Arecibo AR 98 (Final Decision on the Arecibo RWWTP Section 301(h) Permit (Sept. 3, 2002)).

On October 16, 2002, the Arecibo Petitioners timely filed a petition for review challenging the Region's decision to grant the waivers. *See* Petition for Review. On November 18, 2002, in accordance with a time frame the Environmental Appeals Board (the "Board") set, Petitioners filed a supporting brief. *See* Petitioner's Brief in Support of Petition for Review ("Arecibo Brief"). The Region filed a response on January 24, 2003. *See* Response to Petition for Review ("Region's Response to Arecibo Brief"). On February 3, 2003, Petitioners filed a reply brief. *See* Petitioners' Reply Brief ("Arecibo Reply").

B. *Request for Modification of Secondary Treatment Standards for PRASA Aguadilla*

On September 12, 1979, PRASA submitted an original section 301(h) application for the Aguadilla WWTP requesting modification of the BOD and TSS requirements. *See* Aguadilla AR 103, at 7 (Region's Response to Comments-Aguadilla (Feb. 19, 2003)). The Region tentatively denied the application on March 19, 1986, because of EQB's negative determination.[40] Aguadilla AR 8 (EPA's Tentative Decision to Deny Aguadilla Application for 301(h) Waiver (Mar. 19, 1986)). A year later, on March 19, 1987, PRASA submitted a revised application (or "second-round application") in accordance with the applicable reg-

[40] In its tentative decision denying PRASA's request for a waiver for the Aguadilla WWTP, the Region explained that the EQB had notified it in writing that the proposed modification would contravene EQB's water quality standards. Thus, absent EQB's concurrence, the Region could not review PRASA's request. Aguadilla AR 8 (EPA's Tentative Decision to Deny Aguadilla Application for 301(h) Waiver (Mar. 19, 1986)).

ulations. Aguadilla AR 7 (PRASA Revised Second Round 301(h) Application (Mar. 19, 1987)). On September 30, 1988, the Region tentatively approved PRASA's request. Aguadilla AR 15 (EPA's Tentative Decision Document (Sept. 30, 1988)) ("1988 Tentative Approval"). As it did with Arecibo, the Region waited until the Agency made a final determination regarding the UAPP requirements before approving PRASA's request.[41] *Id*.

PRASA also chose the "applicable pretreatment requirement" approach to comply with the UAPP requirements for the Aguadilla WWTP, and proposed to follow the compliance schedules set in the 1994 Consent Order. *See* Aguadilla AR 32 (Letter of Intent (Nov. 7, 1994)). The 1994 Consent Order established November 30, 1996, as the deadline for the evaluation and development of local limits. *See* 1994 Consent Order ¶ 4, at 5 & attach. A. In response to PRASA's letter of intent, the Region again explained, as it did for Arecibo, that it would not deny PRASA's section 301(h) request because of PRASA's failure to comply with the August 9, 1996 regulatory deadline. *See* Aguadilla AR 33, at 4 (Response to November 7, 1994 Letter of Intent (Feb. 27, 1995)).

PRASA submitted its evaluation of local limits for the Aguadilla WWTP on May 29, 1996, approximately two months before the August 9, 1996 deadline, but the Region found that the reports were incomplete. *See* Aguadilla AR 103, at 65 (Region's Response to Comments-Aguadilla). The Region thereafter extended PRASA's deadline. *See* Aguadilla AR 42, at 4 (Order EPA-CWA-II-97-144 (Sept. 16, 1997)). PRASA then had until March 31, 1998, to complete the technical analysis and numeric local limits for the Aguadilla WWTP, and until August 31, 1998, to adopt and incorporate approved local limits into industrial permits. *Id*. PRASA met the March deadline, and the Region approved PRASA's local limits on May 1998. *See* Aguadilla AR 103 (Region's Response to Comments-Aguadilla (Feb. 19, 2003)). The record shows that PRASA also met the August deadline. Aguadilla AR 88, at 46 (EPA's Proposed Section 301(h) Decision Document (Aug. 10, 2000)).

On August 10, 2000, EPA issued a decision document proposing to grant PRASA's request, and proposing to issue a section 301(h) modified NPDES permit. *See id*. The Region held a public hearing on the draft permit and section 301(h) approval on September 21, 2000. *See* Aguadilla AR 92 (Public Hearing Transcript (Sept. 21, 2000)). On February 19, 2003, the Region issued a final decision granting PRASA's section 301(h) request; the Region also issued a modi-

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[41] The Region also conditioned final approval of PRASA's request on the resolution of various other matters. Specifically, the Region required PRASA to develop a post-waiver monitoring program and a schedule of activities to limit the entrance of toxic pollutants from nonindustrial sources into the POTW. *See* 1988 Tentative Approval at 7. The Region also required PRASA to comply with certain EQB conditions (i.e., marine water quality criteria and water quality standards) and to submit a certification of compliance with the Endangered Species Act, 16 U.S.C. §§ 1531-1544. *Id.*

fied NPDES permit for the Aguadilla WWTP. Aguadilla AR 104 (EPA Final Decision on the Aguadilla RWWTP 301(h) Permit (Feb. 19, 2003)); Aguadilla AR 105 (EPA Authorization to Discharge NPDES Permit (Feb. 19, 2003)).

On April 9, 2003, the Aguadilla Petitioners filed a petition for review and supporting brief challenging the Region's decision to grant PRASA's request for a section 301(h) waiver for the Aguadilla WWTP. *See* Petition for Review; Petitioners' Brief in Support of Petition for Review ("Aguadilla Brief"). The Region filed a response on June 6, 2003. *See* Response to Petition for Review ("Region's Response to Aguadilla Brief"). On June 24, 2003, Petitioners filed a reply brief. *See* Petitioners' Reply Brief ("Aguadilla Reply").

Given the similarities of both petitions, the Board consolidated the two cases. *See* Order Granting Motions for Leave to File Reply Brief, Scheduling Oral Argument and Consolidation (EAB June 30, 2003). In addition, given the complexities of the issues on appeal, the Board scheduled oral argument, which it held on October 23, 2003.[42] *See* Order Rescheduling Oral Argument (EAB Sept. 24, 2003).

IV. *DISCUSSION*

A. *Procedural Rules Governing Section 301(h) Determinations*

Part 124 of 40 C.F.R., entitled "Procedures for Decisionmaking," governs the procedures for making section 301(h) determinations. 40 C.F.R. § 125.59(i)(4)(i) ("[a]ny section 301(h) modification permit shall[] * * * [b]e issued in accordance with the procedures set forth in 40 CFR part 124"); *id.* § 125.59(i)(5) ("[a]ppeals of section 301(h) determinations shall be governed by the procedures in 40 CFR part 124"). The terms and conditions of a section 301(h) waiver become operational by their incorporation into an NPDES permit; that is, by modifying an existing NPDES permit — hence the term "section 301(h) modified permit." *See* 40 C.F.R. § 125.56. Section 124.5 prescribes the procedures for NPDES permit modifications, which include section 301(h) modified permits. *Id.* § 124.5 (prescribing rules for, inter alia, the modification and reissuance of NPDES permits). In sum, the same procedural rules governing the issuance of NPDES permits apply to section 301(h) determinations.

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[42] The Board originally scheduled oral argument for September 28, 2003. However, the federal government's offices in Washington, D.C., closed on that date because of Hurricane Isabel. Therefore, the Board rescheduled oral argument for October 23, 2003. *See* Order Rescheduling Oral Argument (EAB Sept. 24, 2003).

B. *Scope of Board Review and Threshold Requirements*

Under the part 124 rules governing this proceeding, we will not ordinarily review an NPDES permit decision, or in this case a section 301(h) permit modification, unless we determine that the Region based its decision on a clearly erroneous finding of fact or conclusion of law or the decision involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a); *see In re Phelps Dodge Corp.*, 10 E.A.D. 460, 471 (EAB 2002); *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 333 (EAB 2002). The Board analyzes NPDES petitions for review, guided by the preamble to the part 124 permitting regulations, which states that the Board's power of review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the [r]egional level." 45 Fed. Reg. 33,290, 33,412 (May 19,1980); *accord In re City of Moscow*, 10 E.A.D. 135, 141 (EAB 2001).

The petitioner bears the burden of demonstrating that the Board should review the permit. The petitioner must state any objections to the permit and explain why the permit issuer's previous response to those objections evidences clear error, an abuse of discretion, or otherwise warrants review. 40 C.F.R. § 124.19; *see City of Moscow*, 10 E.A.D. at141; *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 71 (EAB 1998). In addition, a petitioner seeking review must demonstrate that any issues it raised on appeal have been preserved for Board review. 40 C.F.R. §§ 124.13, .19; *see City of Moscow*, 10 E.A.D. at 140-41; *In re City of Phoenix*, 9 E.A.D. 515, 524-25 (EAB 2000), *appeal dismissed per stipulation*, Doc. No. 01-70263 (9th Cir. Mar. 21, 2002). More specifically, the applicable regulations provide that a petition for review "shall include a statement of the reasons for review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations."[43] 40 C.F.R. § 124.19(a) (emphasis added); *see City of Moscow*, 10 E.A.D. at 141.

The regulations further require that persons who seek review of a permit decision "must raise *all reasonably ascertainable issues* and submit *all reasonably available arguments* supporting their position by the close of the comment period." 40 C.F.R. § 124.13 (emphasis added). The Board has consistently construed section 124.13 as requiring that all reasonably ascertainable issues and arguments be raised *during* the public comment period to be preserved for review by the Board. *City of Phoenix*, 9 E.A.D. at 524; *accord Phelps Dodge Corp.*, 10 E.A.D. at 519-20 (dismissing issues due to petitioner's failure to demonstrate that issues were raised during the public comment period). Adhering to the requirements in

[43] Raising an issue during the public comment period is not required if the issue first arose as a result of changes the Region made to the permit between the draft and the final permit. *See* 40 C.F.R. § 124.19.

40 C.F.R. § 124.13 ensures that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final, thereby promoting the Agency's longstanding policy that most permit issues should be resolved at the regional level, and providing predictability and finality to the permitting process. *In re New England Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001).

Finally, comments submitted during the comment period must be sufficiently specific. In evaluating whether to review an issue on appeal, this Board frequently has emphasized that the issue to be reviewed must have been *specifically raised* during the comment period. *New England Plating*, 9 E.A.D. at 732; *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 230-31 (EAB 2000); *In re Maui Elec. Co.*, 8 E.A.D. 1, 9 (EAB 1998). On this basis, we have often denied review of issues raised on appeal that the commenter did not raise with the requisite specificity during the public comment period. *See, e.g.*, *New England Plating*, 9 E.A.D. at 732; *Maui*, 8 E.A.D. at 9-12; *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 54-55 (EAB 1995); *In re Pollution Control Indus. of Ind., Inc.*, 4 E.A.D. 162, 166-69 (EAB 1992).

With this as background, we now proceed to analyze Petitioners' arguments.

C. *Analysis*

1. *Arguments Regarding Untimely Revisions*

Petitioners make a two-part argument in support of their allegation that the Region allowed PRASA to make multiple untimely revisions to the waiver applications. *See* Arecibo Brief at 6-11; Aguadilla Brief at 6-11. First, Petitioners argue that the Region violated 40 C.F.R. § 125.59(d)(1) by allowing PRASA to revise the applications more than one time. Arecibo Brief at 8; Aguadilla Brief at 8. We address this claim in Part IV.C.1.a immediately below. Second, Petitioners argue that the Region violated 40 C.F.R. § 125.59(d)(3) and related provisions by allowing PRASA to supplement the applications far beyond the one-year period those provisions authorize. In Petitioners' view, this alleged untimely supplementation constituted *de facto* revisions. *See* Arecibo Brief at 5, 9; Aguadilla Brief at 4, 9. We analyze this second set of claims in Part IV.C.1.b.

a. *Alleged Violations of Section 125.59(d)(1)*

i. *Arguments on Appeal*

According to Petitioners, the Region violated section 125.59(d)(1) by allowing PRASA to revise the applications more than one time. As noted earlier, section 125.59(d)(1) provides the opportunity for section 301(h) applicants to revise their original applications *once* after EPA makes a tentative decision on the original application. Section 125.59(d)(1) reads as follows:

> (d) Revisions to applications.
>
> (1) POTWs which submitted applications in accordance with the June 15, 1979, regulations (44 FR 34784) *may revise their applications one time following a tentative decision*[44] to propose changes to treatment levels and/or outfall and diffuser location and design in accordance with § 125.59(f)(2)(i).

40 C.F.R. § 125.59(d)(1) (emphasis added). Section 125.59(d)(1) also establishes a deadline for submitting the one-time revised applications. It does this by virtue of the cross-reference to section 125.59(f)(2)(i).[45] In accordance with section 125.59(f)(2)(i)(B), PRASA had one year after the Region's tentative decision on the original application (Arecibo-1984 and Aguadilla-1986) to submit a revised application. PRASA timely submitted revised applications for Arecibo and Aguadilla in 1985 and 1987, respectively, and PRASA did not submit any other application thereafter for either of the two facilities.

On appeal, Petitioners do not question the timeliness of the 1985 and 1987 revised applications. *See* Arecibo Brief at 7 ("This was PRASA's one time revision under § 125.59(d)(1)"); *see also* Aguadilla Brief at 7 (same). Rather, Petitioners contend that the Region allowed untimely revisions in 1999, when, according to Petitioners, PRASA achieved compliance with primary treatment requirements[46] by installing "enhanced treatment by use of chemical addition (polymer) to increase solid removal." Arecibo Brief at 7. Petitioners argue that this "enhanced" treatment is a "change to treatment levels within the meaning of section 125.59(d)(1)," *id.*, and that by approving the 1999 treatment level, "[i]n effect, then, EPA allowed PRASA to submit an untimely second revision to its waiver application in 1999." *Id.* at 8; *see also* Aguadilla Brief at 8 (same). Petitioners point to the difference in proposed discharge limits and proposed treatment

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[44] *See* 40 C.F.R. § 125.59(h) ("The administrator shall grant a tentative approval or a tentative denial of a section 301(h) modified permit application.").

[45] Section 125.59(f)(2)(i) provides in pertinent part:

> (i) Applicants desiring to revise their applications under § 125.59 (d)(1) or (d)(2) must:
>
> * * *
>
> (B) Submit the revised application as described for new applications in § 125.59(f)(1) either *within one year of the date of EPA's tentative decision on their original application* or within one year of November 26, 1982, if a tentative decision has already been made, whichever is later.

40 C.F.R. § 125.59(f)(2)(i)(B) (emphasis added).

[46] *See supra* note 23 (defining primary treatment).

processes between the original applications (1979), the revised applications (1985 and 1987), and the final permits (issued in 2002 and 2003) to support their conclusion that the use of chemicals to increase solid removal constituted a "change to treatment levels within the meaning of section 125.59(d)(1)."[47] Arecibo Brief at 7-8 ("A comparison of the treatment limits for the three different treatment processes supports this conclusion"); Aguadilla Brief at 6-7 (same). In their reply brief, the Aguadilla Petitioners summarize their arguments as follows:

> Petitioners contend that EPA effectively allowed PRASA to make an untimely and illegal second revision to its waiver application in 1999, by approving a 1999 treatment level, not the treatment levels in PRASA's 1979 original application or its 1987 [referring to Aguadilla's revised application] first revised application. Section 125.59(d)(1) expressly defines a revised application in

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[47] The following table illustrates Petitioners' argument:

ARECIBO			
Treatment Limits	**Original Application (1979)**	**Revised Application (1985)**	**Final Permit (2002)**
BOD mg/l	100	280	120
TSS mg/l	88	120	110
Treatment Process: Primary	Two sedimentation tanks and effluent chlorination	Screening, grit removal, primary sedimentation, and effluent chlorination	Screening, grit removal, primary sedimentation, effluent chlorination, *and chemical addition (polymer)*

AGUADILLA			
Treatment Limits	**Original Application (1979)**	**Revised Application (1987)**	**Final Permit (2003)**
BOD mg/l	147	180	106
TSS mg/l	9	71	70
Treatment Process: Primary	Grit removal, clarification, and effluent chlorination	Screening, grit removal, primary sedimentation, and effluent chlorination	Screening, grit removal, primary sedimentation, effluent chlorination, *and chemical addition (polymer)*

See Arecibo Brief at 8; Aguadilla Brief at 7.

> terms of "changes to treatment levels." EPA admits that the permit "does not incorporate the 'treatment levels' that PRASA sought in its 1987 revised application." *Thus, since EPA approved a different treatment level, it effectively considered a second, post-1987 revised application in violation of § 125.59(d)(1).*

Aguadilla Reply at 2 (citations omitted) (emphasis added).

In brief, the discharge limits and treatment processes the Region ultimately approved differ from the ones PRASA proposed in its revised applications.[48] In Petitioners' view, this difference amounts to, or is indicative of, a second untimely revision. Arecibo Brief at 8; Aguadilla Brief at 8. Unfortunately for Petitioners, and as discussed more fully below, Petitioners failed to preserve this argument for appeal. We therefore reject it on procedural grounds.

ii. *Petitioners Failed to Preserve Arguments Raised on Appeal*

Our examination of the record does not show that the arguments Petitioners now raise on appeal were raised during the public comment period on the draft permit.[49] Significantly, the arguments raised during the comment period pertaining to untimely revisions revolved around the *amount of information section 301(h) applicants may submit*. In this context, Petitioners claimed that by allowing the submission of what Petitioners deemed untimely information, the Region extended the application deadline. Petitioners' comment read as follows:

> EPA regulations clearly establish a limit on *the amount of additional information that may be submitted by an applicant* and that EPA has, in the case of the Arecibo RWWTP, exceeded its statutory and regulatory authority and has illegally extended the Arecibo RWWTP 301(h) application deadline indefinitely, until EPA believed it had sufficient data to approve the Arecibo RWWTP second round 301(h) application. This violates the rule [i.e., 40 C.F.R. § 125.59(d)(1), (f)(2)(i)(B)] that revised applications must be submitted within one year of a tentative

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[48] *See supra* note 47.

[49] As explained earlier, *see supra* Part IV.B, persons seeking review of a permit must demonstrate that any issues or arguments raised on appeal were previously raised during the public comment period on the draft permit, or were not reasonably ascertainable or available at that time. *See* 40 C.F.R. §§ 124.13, .19(a).

> decision on the original application, and allows such applications to be submitted 14 to 18 years later.

Arecibo AR 100, at 8 (Region's Response to Comments-Arecibo) (emphasis added); Aguadilla AR 103, at 6 (Region's Response to Comments-Aguadilla) (same). As Petitioners' foregoing comments plainly demonstrate, they question the *amount of information a section 301(h) applicant may submit* and also, at bottom, the Region's authority to entertain information the applicant submits fourteen to eighteen years after the tentative decision on the original application. On appeal, however, Petitioners question the Region's *decision to approve treatment levels and permit limits that differ from those the permit applicant proposed in its revised application.* Nowhere in Petitioners' comments do they refer to the alleged difference in treatment levels between the revised applications and the final permit and demonstrate how that amounts to a second untimely revision. The arguments Petitioners raise on appeal in support of their allegation that the Region allowed untimely revisions to the applications are thus distinctly different from the ones they raised during the public comment period. Indeed, the Region's response to comments attests to this point. In responding to Petitioners' comments, the Region focused on the specific concern brought to its attention at the time, that is, the applicant's submissions and the Region's consideration of allegedly untimely submitted information. The Region's response clearly shows that it did not infer (nor should it have been expected to infer) from Petitioners' comments the arguments Petitioners now raise on appeal. Specifically, the Region responded to Petitioners' comments as follows:

> EPA disagrees with the commenters' interpretation *that there is a finite amount of information an applicant can submit in pursuit of a 301(h) waiver*. The 301(h) regulations allow the applicant to request an opportunity to submit additional data and EPA to authorize or request an applicant to submit additional data.
>
> * * *
>
> Since the 301(h) regulations do not limit the amount of data EPA may use to make 301(h) decisions, EPA believes it would be inappropriate not to use all available data when making 301(h) decisions. Therefore, EPA uses all available, relevant data, including data presented by PRASA in its 1985 second round 301(h) application and data submitted by PRASA in its Eight Quarterly Monitoring Reports.

Arecibo AR 100, at 10 (Region's Response to Comments-Arecibo) (emphasis added) (citations omitted); Aguadilla AR 103, at 8 (Region's Response to Com-

ments-Aguadilla) (same). Nothing in the Region's response to comments indicates that the Region viewed Petitioners' challenge to the amount of information the applicant submitted as a challenge to the Region's decision to incorporate, in PRASA's 301(h) modified NPDES permits, limits that differ from the ones PRASA proposed in its revised applications, or as encompassing the array of arguments Petitioners now assert on appeal. As explained earlier in this decision, *see supra* Part IV.B, adhering to the requirement that issues and their supporting arguments be raised for the first time during the public comment period is necessary to ensure that the Region has a fair opportunity to respond to the issues and address any potential problems with the draft permits before they become final, promoting in this way predictability and finality in the permitting process. *See In re New England Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001).

Moreover, Petitioners have not shown that these arguments were not reasonably available during the public comment period.[50] Although the original (1979) applications were not available for public review,[51]the revised applications (1985 and 1987) along with the proposed section 301(h) decision documents and draft NPDES permits were available during the public comment period. Thus, by comparing such documents Petitioners could have raised during the public comment period the arguments they now raise on appeal — that the use of chemicals to increase solid removal, and the difference in treatment limits between the 1985 and 1987 revised applications and the final permits constitute a change to treatment levels within the meaning of section 125.59(d)(1), and that such change constitutes a second untimely revision.

Because Petitioners' arguments on appeal in support of their allegation that the Region allowed untimely revisions in violation of section 125.59(d)(1) were not raised for the Region's consideration during the public comment period, we will not entertain them on appeal.

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[50] *See supra* note 49 (stating that persons seeking Board review must *demonstrate* that arguments were raised during the public comment period or were otherwise not reasonably available); *see also* 40 C.F.R. § 124.13 ("all persons * * * who believe any condition of a draft permit is inappropriate * * * *must raise all reasonably ascertainable issues and submit all reasonably available arguments* supporting their position by the close of the public comment period"); *In re Avon Custom Mixing*, 10 E.A.D. 700, 708 n.16 (EAB 2002) (noting Petitioners' failure to provide any documentation indicating that argument was not reasonably available during public comment period).

Moreover, neither the Petitions nor the record before us indicates that these arguments were raised by another commenter during the public comment period. *See Avon Custom*, 10 E.A.D. at 705 ("a petitioner seeking review must demonstrate to the Board, inter alia, that any issues raised in the petition were raised *by someone* during the public comment") (emphasis added).

[51] The Region explained in its response to comments that it was unable to locate the 1979 applications, but that it relied on other documents in the record, such as a report reviewing the 1979 applications, for information regarding these applications. *See* AR 100, at 9 (Region's Response to Comments-Arecibo)*; see also* Region's Response to Arecibo Brief at 3 n.5.

iii. *In Any Event, There Was No Clear Error*

Moreover, even if Petitioners' arguments had been preserved we would have denied review. Petitioners' argument — that the Region's approval of treatment levels that differ from the ones PRASA proposed in its revised applications amounts to a second untimely revision — is based on a false premise, i.e., that the permit issuer must either approve or disapprove a filed application on an "as is" basis. *See* Aguadilla Reply Brief at 5. The Aguadilla Petitioners belatedly argued this point as follows:

> EPA's action violates fundamental notions about what an application is, and who can revise it. * * * *EPA must take the application as it finds it*, and deny a defective application unless it is revised to correct its defects. EPA found that the treatment levels in the 1987 revised application were inadequate. It therefore should have denied the application. *Instead, EPA effectively revised the application on its own a second time to include the more stringent treatment levels necessary to meet 301(h).* In doing so, EPA excused PRASA's two inadequate applications, and gave it an illegal third bite of the apple by allowing to file a second revised application.

Aguadilla Reply Brief at 5 (emphasis added).[52]

In essence, Petitioners claim that the permit issuer lacks authority to impose permit conditions different than those the applicant proposed. Petitioners further expanded on this view during oral argument. There they contrasted the general NPDES permitting process with that of the section 301(h) secondary treatment modifications and implied that the secondary treatment modification process differs from other aspects of the NPDES application process where it is not uncommon for the permit issuer to propose permit limits that differ from what the applicant proposes in its application. *See* Oral Argument Transcript at 26-27.

Petitioners' views are simply mistaken. Significantly, Petitioners have not provided any statutory or regulatory authority, other than section 125.59(d)(1), to support their proposition that the permit issuer has no authority to impose in the

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[52] Petitioners' attempt to use their Reply Brief to substantiate their claim with new arguments is tardy. Petitioners should have raised all their claims and supporting arguments in their petitions. This Board has generally denied petitioner's efforts to supplement deficient appeals, because, as stated in prior Board cases, "allowing petitioners to do so typically constitutes an unwarranted expansion of a party's appeal right and prejudices the permittee's interest in the timely resolution of the permitting process." *In re Carlota Copper Co.*, 11 E.A.D. 692, 736 (EAB 2004); *see, e.g., In re Zion Energy, LLC*, 9 E.A.D. 701, 707 (EAB 2001); *In re Rohm & Haas Co.*, 9 E.A.D. 499, 514 n.23 (EAB 2000).

section 301(h) context permit conditions different from those the applicant proposed. Moreover, Petitioners' interpretation of section 125.59(d)(1) expands the scope of the regulations far beyond any reasonable construction thereof. Notably, this section specifically addresses POTWs — the applicant — and its right to revise an application under certain circumstances, i.e., those set forth in 125.59(d)(1). It does not address the permit issuer's rights, let alone the permit issuer's authority to impose permit conditions different from those an applicant proposes. 40 C.F.R. § 125.59(d)(1) ("*POTWs* which submitted applications in accordance with the June 15, 1979, regulations (44 FR 34784) *may revise their applications one time following a tentative decision* to propose changes to treatment levels and/or outfall and diffuser location and design in accordance with § 125.59(f)(2)(i)") (emphasis added). Thus, as we read this section, the one-time limitation on revisions applies to POTW-initiated proposals, specifically, proposals by the POTW for changes in treatment levels and changes in outfall and diffuser location and design. The language of the provision simply does not cover the permit issuer, and certainly does not constrain the permit issuer's authority to impose permit conditions.

Our review of the regulatory history of section 125.59(d)(1) confirms our interpretation that the purpose of section 125.59(d)(1) was to provide a right to POTWs that had submitted applications under the 1979 Regulations, specifically to revise their applications one more time after a tentative decision by the permit issuer. The Agency promulgated section 125.59(d)(1) in 1982. The preamble of the final 1982 amendments makes clear that the Agency created this provision to provide POTWs that had submitted applications under the 1979 Regulations with the opportunity to propose different treatment levels, i.e., propose lower treatment levels than those proposed in the original application, or to the contrary, propose improvements in treatment levels.[53] *See* 1982 Final Rule, 47 Fed. Reg. 53,666, 53,668 (Nov. 26, 1982). Recall that under the 1979 Regulations, applicants proposing discharges receiving less than primary treatment and those already achieving secondary treatment could not obtain section 301(h) waiver;[54] but that in 1982 the Agency amended the regulations to allow POTWs to propose different treatment levels than those originally proposed. *See* Proposed Rule 1982, 47 Fed. Reg. at 24,921; 1982 Final Rule, 47 Fed. Reg. at 53,668. There is no indication in the preamble of the 1982 amendments that the Agency, by promulgating section 125.59(d)(1), intended to accomplish anything other than clarifying that applicants may revise their applications to propose different treatment levels. Thus, contrary to Petitioners' suggestion, the regulations did not address the question of

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[53] *See also supra* note 25.

[54] For a discussion of the regulatory history of section 125.59, see Preamble 1979 Regulations, 44 Fed. Reg. 34,784, 34,817 (June 15, 1979); *NRDC, Inc. v. EPA*, 656 F.2d 768 (D.C. Cir. 1981); Proposed Rule 1982, 47 Fed. Reg. 24,921 (June 8, 1982); and 1982 Final Rule, 47 Fed. Reg. at 53,668.

EPA's authority as permit issuer to review and revise applications or impose permit conditions different from those sought by the applicant.

In sum, there is nothing in section 125.59(d)(1) circumscribing the permit issuer's role in the way Petitioners' suggest, nor does the preamble to this provision suggest that EPA intended to restrict its role as the permitting authority to the perfunctory role of approving or disapproving limitations applicants proposed. Had the Agency intended to so drastically restrict its authority, it surely would have stated this limitation expressly. Notably, the regulations establishing the criteria for modifying secondary treatment requirements contain a number of prohibitions on the issuance of section 301(h) modifications, *see* 40 C.F.R. § 125.59(b), none of which include a limitation or prohibition of the sort Petitioners claim.[55]

Moreover, contrary to Petitioners' assertions, the regulations provide the same generic procedures for waiver applications under section 301(h) as for regular NPDES permits. 40 C.F.R. § 125.59(i)(4)(i). Specifically, section 125.59(i)(4) provides: "[a]ny section 301(h) modification permit shall[] * * * [b]e issued in accordance with the procedures set forth in 40 C.F.R. part 124," that is, the procedures for NPDES permit decisions. *Id.* § 125.59(i)(4)(i). We therefore reject Petitioners' suggestion that there is a difference between the regular NPDES permitting process and the secondary treatment modification process, at least as it pertains to the permit issuer's role in changing effluent limitations proposed by a permit applicant.[56]

Finally, to rule otherwise would be unfair to PRASA, which timely filed revised applications and did not request the changes the Region imposed. For all the foregoing reasons, even if the issue were preserved, we would have denied

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[55] Similarly, the statute's provision of a deadline for the filing of section 301(h) applications, *see* CWA § 301(j)(1)(A), 33 U.S.C. § 1311(j)(1)(A), does not provide evidence that the Agency was required to accept or deny the applications as filed. The statute does not prescribe any limitations on the content of the applications, nor does it limit the Agency's role in approving or disapproving section 301(h) waivers. To the contrary, the statute states: "The Administrator, with the concurrence of the State, may issue a permit under section 1342 of this title which modifies the requirements * * * [of secondary treatment standards applicable to POTWs that discharge into marine waters] if the applicant demonstrates *to the satisfaction of the Administrator* that" it meets the criteria set forth in section 301(h)(1)-(9). CWA § 301(h), 33 U.S.C. § 1311(h) (emphasis added). This language shows that the Agency had authority to set up, as deemed appropriate, the regulatory program that would implement section 301(h), which it did, and we have found no evidence that in doing so the Agency intended to curtail its ordinary prerogatives in the way Petitioners suggest. This language equally shows that the Agency retains discretion as to whether or not to grant a section 301(h) waiver, and therefore by implication also retains discretion on what conditions to impose in a modified permit.

[56] See discussion *supra* Part IV.A (Procedural Rules Governing Section 301(h) Determinations); *see also infra* Part IV.C.1.b.v (explaining that the issuance of a section 301(h) waiver is no different procedurally from the issuance of a regular NPDES permit).

review. There is no basis for concluding that the Region lacks authority to modify the applicant's proposed limits.

b. *Alleged Violations of Sections 125.59(d)(3) and 125.59(f)(2)(ii)*

As noted in Part IV.C.1 of this decision, Petitioners claim that the Region also violated sections 125.59(d)(3) and 125.59(f)(2)(ii) by allowing supplementation of the applications beyond the deadline those provisions allegedly established. *See* Arecibo Brief at 5, 9; Aguadilla Brief at 4, 9. In Petitioners' view, those provisions establish a one-year grace period for the submission of supplemental information after an applicant has filed a revised application. Thus, Petitioners believe that any information submitted beyond the time frame those provisions allowed is untimely and the decisionmaker cannot consider such information in ruling on section 301(h) applications. We disagree.

i. *The Regulations: Sections 125.59(d)(3), 125.59(f)(2)(ii), and 125.59(g)*

We begin by examining section 125.59(d)(3), which provides waiver applicants with the opportunity to revise their applications under certain circumstances. The regulations make clear that this opportunity is in addition to the one-time opportunity allowed under section 125.59(d)(1) discussed in the previous section. Section 125.59(d)(3) reads as follows:

> (3) Applicants authorized or requested to submit additional information under § 125.59(g) *may submit a revised application* in accordance with § 125.59(f)(2)(ii) where such additional information supports changes in proposed treatment levels and/or outfall location and diffuser design. *The opportunity for such revision shall be in addition to the one-time revision allowed under § 125.59(d)(1) and (2).*

40 C.F.R. § 125.59(d)(3) (emphasis added). Accordingly, an applicant that the Agency authorizes or requests to submit additional information may, if it desires, submit a revised application. At least three limitations appear on the face of the regulations. First, if the applicant submits a revised application, it must submit it at the same time as the additional information. Section 125.59(f)(2)(ii) stipulates that "[a]pplicants desiring to revise their applications under § 125.59(d)(3) must submit the revised application as described for new applications in § 125.59(f)(1) *concurrent with submission of the additional information under § 125.59(g).*" *Id.* § 125.59(f)(2)(ii) (emphasis added). Regarding the additional information submitted pursuant to section 125.59(g), the regulations specify that it be submitted within a year of the authorization or request. *Id.* § 125.59(g)(1) ("the Administra-

tor may authorize or request an applicant to submit additional information by a specified date not to exceed one year from the date of authorization or request"). Finally, revised applications are limited to cases where "such additional information supports changes in proposed treatment levels and/or outfall location and diffuser design."

ii. *Arguments Raised on Appeal*

Petitioners' chief point of contention regarding section 125.59(d)(3) is that PRASA submitted information over a period of time ranging from approximately 1987 to 2002 that the Region should not have considered in its decisionmaking. Petitioners also contend that PRASA did not accompany its submissions with a revised application during this period. According to Petitioners, PRASA's post-1987 submissions were untimely, contrary to the requirements of section 125.59(d)(3). Petitioners construe this section, in conjunction with the qualifying language supplied by sections 125.59(f)(2)(ii) and 125.59(g), as providing only a "limited" opportunity for PRASA to submit additional information in order to "revise" its section 301(h) waiver application. *See* Arecibo Brief at 9; Aguadilla Brief at 8. Petitioners apparently believe that the one-year period for submission of additional information under 125.59(g)(1) is a one-time event. According to the Arecibo Petitioners, this limited opportunity started to run, at the latest, in November of 1986 for the Arecibo WWTP, the date the Region allegedly made the last information request under section 125.59(g)(1) for this facility.[57] *See* Arecibo Brief at 10. The Aguadilla Petitioners, for their part, challenge all post-1987 information, contending that the Region never made a formal request of information for the Aguadilla facility under section 125.59(g)(1). *See* Aguadilla Brief at 9. Thus, according to the Aguadilla Petitioners, any information submitted after March of 1987, the date PRASA submitted its second round or revised application for the Aguadilla WWTP under section 125.59(d)(1), was untimely. *See* Aguadilla Brief at 9-10.

Petitioners seem to believe that the Agency only had one year, starting from the filing of a revised application under section 125.59(d)(1), to seek additional information from a section 301(h) applicant, and suggest that in making a final determination on a section 301(h) application the decisionmaker can only rely on the information that has been provided up to the point of the applicant's response

[57] Petitioners claim that the Region made an earlier information request from PRASA Arecibo in October of 1986. Arecibo Brief at 10. Both the October and November 1986 requests postdate the date PRASA filed its second-round application for the Arecibo WWTP (i.e., its revised application pursuant to section 125.59(d)(1)), which PRASA filed on December 3, 1985.

to the Agency's last section 125.59(g)(1) request, and no other information.[58] Thus, Petitioners argue that the Region improperly considered, among other things, "a new 1999 mixing zone application, a new 1999 NPDES application, monthly discharge monitoring reports through March 2002, four whole effluent toxicity tests conducted in 1997-2000, and eight monitoring reports in 1999-2002 concerning compliance with water quality standards." Arecibo Brief at 10-11; Aguadilla Brief at 10-11. By considering this information, Petitioners claim the Region "gave PRASA an unlimited ability to revise its application at any time, up to and until [the Region] decided [PRASA] met § 301(h)'s requirements." Arecibo Brief at 10; Aguadilla Brief at 10. As a result, Petitioners argue that the Region, in making its final section 301(h) determination, relied on "belated" and "unauthorized" information, *see* Arecibo Brief at 10, without which "PRASA's application could not have been approved." *Id.* at 11. As Petitioners summarize their argument in chief:

> There is no reasonable reading of EPA's regulations that would allow it [referring to the Region] to use information submitted regardless of its timeliness and regardless of whether it accompanied a revised application. Yet that is what EPA has done in this case. Instead of a one-time opportunity to revise its application [apparently referring to section 125.59(d)(1)], plus a one-year grace period to submit additional information [apparently referring to section 125.59(d)(3)], EPA gave PRASA an unlimited ability to revise its application at any time, up to and until EPA decided it met [section] 301(h)'s requirements. This is a clear violation of the regulations.
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> * * * EPA therefore essentially ignored the 1985 revised application and substituted an additional 1999-2002 revised application with information that was submitted beyond the statutory and regulatory deadline [apparently referring to the application deadline].

Arecibo Brief at 10-11.

In brief, Petitioners believe that any information submitted pursuant to a section 125.59(g)(1) request must be accompanied by a revised application, and

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[58] For example, Petitioners contend that the Region should not have considered certain later-filed documents in its section 301(h) determinations. *See* Arecibo Reply at 4 (arguing that in its response to the Arecibo Brief the Region cited "later documents [referring to, among others, administrative enforcement orders and section 308 information requests] that do not even purport to be information requests pursuant to § 125.59(g)(1)").

that the one-year period for the submission of additional information set forth in section 125.59(g)(1) is a one-time event that started to run after PRASA filed its revised applications under 125.59(d)(1). Petitioners also believe that the Agency, when making section 301(h) determinations, can only consider information submitted pursuant to section 125.59(g)(1). In other words, Petitioners believe that the Agency had one year to seek additional information from a section 301(h) applicant, and that in making its final determination, the Agency can only rely on information submitted during the "one-year grace period." Moreover, Petitioners believe that by considering post-1987 information the Region allowed *de facto* revisions to the applications that should not have been allowed or considered by the Agency.[59]

We disagree, finding a number of difficulties with Petitioners' argument. Perhaps chief among them is the fact that it runs counter to the goal inherent in the permitting process that, to the maximum extent possible, permit decisions be fully informed by all relevant and available information. It is difficult to fathom a policy rationale for denying permit decisionmakers access to potentially relevant and instructive information; yet, this is precisely where Petitioners' arguments carry. The ultimate resting place of Petitioners' argument is even more troublesome: That, even though the relevant information indicates that the substantive requirements for a section 301(h) waiver have been satisfied, the waivers should, because of these procedural informational anomalies, be undone, and PRASA should be required to spend millions of dollars on secondary treatment that, under the circumstances, appears to be unnecessary. Again, we find this a fairly remarkable proposition, and highly questionable in terms of policy outcome. Not surprisingly, as discussed below, we find scant legal support for such conclusions.

As explained more fully below, Petitioners base their arguments on a crabbed reading of sections 125.59(d)(3), 125.59(f)(2)(ii), and 125.59(g)(1). Petitioners erroneously construe what was intended as an opportunity for section 301(h) applicants to revise their applications as a limitation on the permitting authority and its discretion to exercise ordinary decisionmaking prerogatives. Our analysis of Petitioners' claims follows.

iii. *No Obligation to Submit a Revised Application with Additional Information*

The first flaw in Petitioners' interpretation is their erroneous view that the regulations require applicants submitting new information under section 125.59(g)(1) to submit a new application with such additional information.

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[59] In replying to the Region's response to the Arecibo Brief, the Arecibo Petitioners state their claim as follows: "EPA could make an end run around its one-time revision rule by waiting until it received enough new information to construct a *de facto* new application." Arecibo Reply at 5.

Because PRASA's submissions of additional information were not accompanied by revised applications, Petitioners claim that the Region violated section 125.59(f)(2)(ii). Contrary to Petitioners' assertions, the submission of a revised application under section 125.59(d)(3) is discretionary. Section 125.59(d)(3) employs the permissive "may" in reference to filing a revised application, i.e., an applicant "*may* submit a revised application" when submitting additional information in response to a request or authorization from the Region. *See* 40 C.F.R. § 125.59(d)(3). Petitioners offer no reason for construing the word "may" in a manner that deviates from its ordinary meaning.[60] Accordingly, the regulations do not require an applicant to submit an application if the applicant does not want to revise its application when it submits additional information pursuant to section 125.59(g).

If an applicant wants to revise its application in conjunction with the submission of new information, the applicant is clearly obligated to submit the revised application at the same time as the additional information, i.e., within one year after the authorization or request. However, Petitioners are mistaken when they argue that the Region violated section 125.59(f)(2)(ii) by allowing PRASA to submit additional information unaccompanied by a revised application.

iv. *The One-Year Deadline for the Submission of Additional Information Does Not Serve as a Bar to Consideration of Subsequently Submitted Information*

Petitioners also err in their challenge to all post-1987 information. While the regulations Petitioners cite establish a deadline for the submission of additional information by an applicant that has been requested or authorized by the Agency to make such submissions, the regulations do not establish a deadline for the Agency to make a request or grant authorization.

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[60] This is the plain language reading of the regulation. A fundamental canon of statutory construction is that if language is plain and unambiguous it must be given effect. *See Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2002) ("The first step in a statutory construction case is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case."); *In re Sultan Chemists, Inc.*, 9 E.A.D. 323, 331 (EAB 2000) ("In construing statutes, words should be interpreted where possible in their ordinary, everyday senses.") (citing *Crane v. Comm'r of Internal Revenue*, 331 U.S. 1 (1947)); *see also In re City of Moscow*, 10 E.A.D. 135, 143 (EAB 2001) (same rules of construction apply to administrative regulations as apply to statutes) (citing *Rucker v. Wabash R.R. Co.*, 418 F.2d 146, 149 (7th Cir. 1969)). Because Petitioners have not persuaded us otherwise, we see no reason to deviate from this canon.

As noted earlier in this decision, three limitations appear of the face of the regulations,[61] and none of them limit the request, authorization, submission, or consideration of additional information in the way Petitioners propound. Petitioners seem to rely primarily on the time-related restriction in section 125.59(g)(1). Section 125.59(g)(1) establishes a one-year deadline for the applicant's submission of additional information, once the Region either authorizes or requests the applicant to submit additional information. As explained above, Petitioners appear to believe that the one year deadline is also a deadline on the Agency, and that the Region only had one-year after the filing of revised applications under section 125.59(d)(1) to either authorize or request additional information from an applicant. However, the section 125.59(g)(1) deadline applies to the applicant, who must submit the additional information within "one year from the date of authorization or request,"[62] and not to the Agency. *See* 40 C.F.R. 125.59(g)(1). Significantly, the deadline in section 125.59(g)(1) revolves around "the date of authorization or request," and not the filing of a revised application as Petitioners propound. We do not agree with the inferences Petitioners draw as they arrive at the conclusion, mistaken at best, that the permitting authority had one year from the date of a revised application to authorize or request the submission of additional information.[63] Section 125.59(g)(1) does not restrict the Region from making, at any time, successive, multiple requests or authorizations for additional information; it only requires the applicant to submit the additional information

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[61] *See supra* Part IV.C.1.b.i (identifying the limitations that appear on the face of the regulations Petitioners cite as follows: (a) if an applicant submits a revised application under section 125.59(d)(3) the application must be submitted with the additional information; (b) additional information under 125.59(g)(1) must be submitted within one year of the request or authorization; and (c) revised applications under section 125.59(d)(3) are limited to circumstances where the additional information supports changes in proposed treatment levels and/or outfall location and diffuser design).

[62] Significantly, Petitioners have not identified any specific instance in which PRASA did not meet this deadline, that is, where the Region either authorized or requested information from PRASA pursuant to section 125.59(g)(1), and PRASA subsequently failed to submit the information within one year of the date of such request or authorization.

Even if there were an instance in which the one-year limitation was exceeded, it is by no means clear that any such delay would automatically preclude the Region from considering the late-submitted information. As discussed in Part IV.C.2.c, *infra*, non-statutory deadlines, established for procedural reasons, are subject to relaxation by the Agency in appropriate circumstances. We need not, however, decide the applicability of that principle here, since, as noted, Petitioners' briefs have not actually joined the issue.

[63] Petitioners' time frame would imply that the Agency had to make a final determination promptly after the submissions; otherwise, it would run the risk of basing its decision on outdated information. The idea that the Region had to make its determination shortly after the filing of a revised application makes little sense in light of section 125.59(h), which authorizes the issuance of tentative decisions upon an applicant's showing that it will comply with all section 301(h) requirements based on an Administrator's approved schedule. *See* 40 C.F.R. § 125.59(h). As we explained more fully in Part IV.C.1.b.vi below, embedded in this section is the notion that exchanges of information will occur during the period allocated for achieving compliance.

within one year of the request. In sum, there is nothing in section 125.59(g)(1) suggesting that the decisionmaker only had a "one-year grace period" to request or authorize the submission of information from a section 301(h) applicant after a revised application had been filed.

According to the record, the Region made other section 125.59(g)(1) requests, which submissions the Region considered in making its final determination. *See* Arecibo AR 74, at 1 (EPA's Proposed Section 301(h) Decision Document (Oct. 25, 2000)) (stating that the Region based the proposed final determination on, inter alia, the additional information submittals of March 1987, June 1988, August 1988, and February 1989). In light of all the above, we do not find the consideration of such information to be in violation of sections 125.59(d)(3), 125.59(f)(2)(ii), and 125.59(g)(1) as Petitioners suggest.

v. *The Permit Issuer Can Rely on All the Information in the Record When Making Section 301(h) Determinations*

Likewise, the regulations do not, as Petitioners suggest, limit the type of information the permit issuer can rely on in a final section 301(h) determination, or restrict the information the permitting authority can use to information gathered and submitted pursuant to a section 125.59(g)(1) request, or to information submitted up until the filing of a revised application pursuant to section 125.59(d)(1).[64] Petitioners have not provided any other support for these propositions.

To suggest that the most current information should not be considered by the Region in making its final decision on the section 301(h) applications would, without more, appear to be unsound from a policy perspective. The process of informed decisionmaking — presumably a universal public policy goal — is normally enhanced by the acquisition of more information. We therefore agree with the Region when it states:

> It would not be appropriate to have made a final section 301(h) decision without reviewing all of the information before it at the time of the final decision. The review must

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[64] As noted above, the Arecibo Petitioners argue that any information submitted after November 1987 — a year after the Region's November 1986 information request under section 125.59(g) — is untimely and thus the Region erred by relying on such information. *See* Arecibo Brief at 10-11. This information request followed Arecibo's second-round application, that is, the revised application submitted pursuant to section 125.59(d)(1). The Aguadilla Petitioners, for their part, argue that all information submitted after March of 1987 — after PRASA submitted its revised application for the Aguadilla WWTP under section 125.59(d)(1) — was untimely and should not have been considered by the Region. *See* Aguadilla Brief at 10-11.

> include both that information submitted to the EPA in regard to the Section 301(h) application and any other information contained in the Region's files that is relevant to the determination of whether PRASA has demonstrated compliance with the nine criteria set out in Section 301(h).

Region's Response to Arecibo Brief at 17. In the instant cases, for example, the Region tentatively approved the waivers well before it issued the final determinations (i.e., Arecibo in 1989 and Aguadilla in 1988); thus, review of the most recent data was particularly important in these cases to confirm that the findings made in the tentative decisions still held true.[65] *See, e.g.*, Arecibo AR 74 (EPA's Proposed Section 301(h) Decision Document (Oct. 25, 2000)) (comparing conditions at time of tentative approval with current conditions).

Moreover, failure to consider all information in the record when making a section 301(h) determination would be contrary to the procedural rules governing permit issuance. As we observed earlier, the same permit issuance procedures that govern renewal of a permit also govern section 301(h) modifications, and the issuance of a waiver application is no different procedurally than the issuance of a regular NPDES permit. The regulations governing the decisionmaking process for NPDES permits require the permit issuer to consider, when making permit decisions, all information available in the administrative record, which includes *any documents* in the supporting file for the permit. *See* 40 C.F.R. §§ 124.9, .18 (requiring the permit issuer to base draft permits and final permit decisions on the administrative record and explaining that the administrative record for any final permit consists of, inter alia, "other documents contained in the supporting file for the permit"). In considering a section 301(h) permit modification, there is nothing exceptional in expecting the decisionmaker to consider any and all information in the record.

Ordinarily, the information gathering and decisionmaking process for a permit is a dynamic one: information flows between the applicant and the Agency,

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[65] For instance, the Region found at the time of the tentative approval that the Arecibo WWTP modified discharge would not cause a violation of state water quality standards, would not impact public water supplies, and would not interfere with the protection and propagation of a balanced indigenous population of marine life. *See* 1989 Tentative Approval at 5-6. It seems perfectly logical that in reevaluating such findings the Region would review the most current information to verify that such findings in the context of the final approval still prevail. Petitioners question, inter alia, the Region's consideration of certain monitoring reports concerning compliance with water quality standards. *See, e.g.*, Arecibo Brief at 10-14 (challenging the Region's consideration of "eight monitoring reports in 1999-2002 concerning compliance with water quality standards"). Such consideration was, in our view, necessary to verify the 1989 findings. Thus, we find no clear error on the Region's part in considering such reports.

the Agency may find it necessary or appropriate to gather additional information or request the applicant to submit new information, new developments may transpire, and issues may arise when the public formally participates in the process.[66] This evolving state of affairs in which issues of potential concern are identified, developed, crystalized, and resolved based on appropriate information (including new information) is present throughout the different stages of permit development and issuance. For instance, the regulations provide for the gathering of information even after the Region determines that an application is complete. Section 124.3 states that after the Region determines that an application is complete, it may request additional information from an applicant "to clarify, modify, or supplement previously submitted material." 40 C.F.R. § 124.3(c). This section states further that a "[r]equest for such additional information will not render an application incomplete." *Id.* Thus, absent unequivocal language limiting the type of information the decisionmaker can use when deciding on a section 301(h) waiver or constraining the submission of information to a specific stage, these general rules apply. While some of the information the Region considered might not have been submitted specifically pursuant to a section 125.59(g)(1) request,[67] to the extent that such information relates to the determination of whether the applicant complies with the criteria in section 301(h) and bears on the issuance of the modified permits, the Region did not err in considering it. Thus, we cannot rule that by considering post-1987 information the Region relied on "belated" and "unauthorized" information. Indeed, the permit issuance process and the public interest are unquestionably served by decisions that are fully informed.

In addition, Petitioners' reading of the foregoing regulations ignore the broad information-gathering authority the CWA confers upon the Administrator. For instance, section 308 of the CWA provides that "whenever required to carry out the objectives of the [CWA]" the Administrator may instruct owners and operators of point sources to "provide such other information as he [or she] may reasonably require." CWA § 308(a)(A), 33 U.S.C. § 1318(a)(A). The Agency may,

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[66] *See generally* 40 C.F.R. § 124.17 (explaining that the Region can add new materials to the administrative record as new points evolve during the public comment period); *id.* §§ 124.10, .11 (providing for public participation).

[67] Indeed, the Region in its response to the Arecibo Brief explains that, in reaching its decision, it considered information submitted pursuant to separate statutory and regulatory provisions that operate independently of section 125.59(g)(1). *See* Region's Response to Arecibo Brief at 14. This seems to hold true for some of the submissions Petitioners question. For instance, Petitioners question the Region's consideration of a 1999 mixing zone application, an EQB requirement, and some other NPDES permit requirements that operate separately from section 125.59(g)(1), such as a 1999 NPDES renewal application, monthly discharge monitoring reports, and whole effluent toxicity tests. It seems tenuous under these circumstances to suggest that submission of a permit renewal application and other submissions made to satisfy different statutory and regulatory requirements should be viewed as untimely submissions of additional information requested or authorized by the Region in accordance with section 125.59(g)(1). In any event, to the extent that these submissions relate to the issuance of a modified permit, the Region did not clearly err by considering them in its decisionmaking process.

pursuant to CWA § 308(a), seek information to, among other things, aid enforcement, *develop permit limitations* and effluent standards, *and generate whatever information* it needs to carry out its statutory responsibilities. *In re Simpson Paper Co.*, 3 E.A.D. 541, 549 (CJO 1991). The Agency may exercise the authority section 308 confers at any time, to, inter alia, "elicit information from the discharger *without regard to the presence* or absence *of similar* or even identical *information requirements.*" *Id.* (emphasis added).[68] Accordingly, if needed to aid and guide the Agency in its decisionmaking, the Agency may, at any time, under the authority conferred by section 308, request any such information from any owner or operator of a point source, as the Agency deems reasonable.[69] It follows then that section 125.59(g)(1) is not the only information-gathering tool available to the decisionmaker when evaluating section 301(h) applications; hence the decisionmaker's authority to gather information pertaining to a section 301(h) waiver cannot be a one-time event, nor can the consideration of information be restricted to that submitted with a revised application or a section 125.59(g)(1) request.

vi. *The Region's Consideration of Post-1987 Information Does Not Amount to De Facto Revisions*

Finally, we reject Petitioners' contention that the various submissions of data after the revised or second-round applications constituted *de facto* revisions. While some of the most recent information might have been necessary for PRASA to show full compliance with the statutory requirements[70] and thus might have played an important role in the Region's final decision to issue the waivers, we do not agree with Petitioners' statement that by considering the most recent information the Region essentially ignored the revised applications and substituted additional revised applications. Such an interpretation not only erroneously assumes, as explained above, that the permit issuer has no authority to consider all information in the record when making section 301(h) determinations, it also

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[68] *Accord In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 468 n.11 (EAB 2004) (stating that "[s]ection 308 of the CWA grants the EPA Administrator broad authority to require owners and operators of point sources to, among other things, 'provide any such other information as [the Administrator] may reasonably require'") (quoting CWA § 308(a)(4)(A), 33 U.S.C. § 318(a)(4)(A)); *In re Liquid Air P.R. Corp.*, 5 E.A.D. 247, 261-62 n.24 (EAB 1994)(noting that section 308's broad information-gathering authority may be used to aid enforcement, to develop permit limitations and effluent standards, and to generate whatever information the Agency needs to carry out its statutory responsibilities, subject only to a reasonableness standard).

[69] In its response to the Arecibo Brief, the Region explains that the record before it contained, among other matters, information submitted in response to section 308 information request letters. Region's Response to Arecibo Brief at 14.

[70] As noted above, *see supra* notes 67 & 69, not all the most recent information the Region considered was submitted to show compliance with section 301(h).

would render inoperative and defeat the purpose of section 125.59(h). Section 125.59(h) allows the Agency to tentatively approve or disapprove an application based on demonstrations made by the applicant. *See* 40 C.F.R. § 125.59(h). Section 125.59(h) provides in pertinent part:

> To qualify for a tentative approval, the applicant shall demonstrate to the satisfaction of the Administrator that it is using good faith means to come into compliance with all the requirements of this subpart and that it will meet all such requirements based on a schedule approved by the Administrator.

40 C.F.R. § 125.59(h). The very fact that the regulations contemplate the issuance of tentative decisions and the development of schedules to comply with the different requirements in section 301(h), followed by a final decision to approve or deny an application, suggests that the interval between these events will be used to evaluate existing data and potentially gather or at least consider additional data. Otherwise, there would be little need for tentative decisions. If the Agency were not going to entertain the possibility of additional data being submitted after a revised application, there would be no need for a tentative decision; the Agency could simply approve or disapprove the application as submitted. Thus, Petitioners' challenge to all post-1987 information must fail.

In the instant cases, the Region tentatively approved PRASA's section 301(h) applications in 1988 and 1989, conditioning final approval on the resolution of various matters.[71] To the extent that post-1987 submissions relate to these conditions, section 125.59(h) sanctions such submissions.[72] Moreover, the tentative approval decision documents stated that modified NPDES permits were not to be issued until a final determination regarding the UAPP requirements had been made. *See supra* Parts III.A-.B. The regulations implementing the UAPP requirements did not come into effect until 1994, and, as explained more fully in Part IV.C.2 below, the Region made its final determination regarding PRASA's

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[71] *See supra* notes 34 & 41 and accompanying text. Petitioners, however, have not articulated a challenge to these conditions, nor have they challenged the tentative approvals. Even if we were to read Petitioners' arguments as entailing a challenge to the tentative approvals, and the conditions therein, we would have to deny review for Petitioners have failed to raise any substantive issues pertaining to the tentative approvals. Petitioners' only challenge is that the information relied upon by the Region in its decisionmaking was untimely. *See In re New England Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001) ("This Board has held that 'mere allegations of error' are not enough to warrant review. * * * Therefore, to warrant review allegations must be specific and substantiated.") (citations omitted).

[72] That seems to be the case of certain pretreatment compliance reports and waiver demonstration studies submitted after 1987, which the Region considered. *See* Arecibo AR 74, at 1 (EPA's Proposed Section 301(h) Decision Document (Oct. 25, 2000)).

compliance with the UAPP requirements in 1998. In addition, the 1994 amendments to the regulations not only implemented the statutory requirements of the UAPP, but they implemented the statutory criteria pertaining to primary or equivalent treatment, which also applies to PRASA. Therefore, any information submitted after 1994 pertaining to these requirements was relevant to the final decision on the waiver applications and properly considered by the Region.

Because the Petitioners have not otherwise shown that section 125.59(d)(3), and related sections cited therein, bar the Region from accepting, requesting, or authorizing post-1987 submissions of additional information by PRASA, it logically follows that these sections of the regulations do not bar the Region from considering the additional information. In conclusion, Petitioners have failed to demonstrate that PRASA's post-1987 submissions of information and the Region's consideration thereof was in error and therefore warrants review.[73]

2. *The UAPP Deadline — Whether the Region Clearly Erred in Issuing the Waivers Despite PRASA's Failure to Comply with the August 1996 Deadline*

Petitioners argue next that the Region erroneously issued the waivers because PRASA failed to meet the August 9, 1996 deadline for complying with the UAPP as section 125.59(f)(3)(ii)(A) requires. Arecibo Brief at 11-13; Aguadilla Brief at 11-13. There is no dispute that PRASA failed to fully meet all the UAPP requirements by August 9, 1996.[74] Rather, the dispute concerns the consequences

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[73] We also question more fundamentally the suitability of a "*de facto* application" concept in this circumstance. As noted, section 125.59(d)(3) employs the permissive "may" in reference to filing a revised application, i.e., an applicant "*may* submit a revised application" (emphasis added) when submitting additional information in response to a request or authorization from the Region. Petitioners have not presented any reason why "may" should not be read in a manner consistent with its ordinary meaning, which, in the context of section 125.59(d)(3), is to give an applicant a choice of submitting or not submitting a revised application when responding to a request or authorization for additional information. Thus, from the applicant's standpoint, the regulations treat information submissions by applicants and applications as separate matters. While dischargable in tandem, they are nonetheless distinct, and it is difficult to see how an applicant can be viewed as "applying" for anything when only submitting information without indicating a corresponding need for action. The permit authority is simply not an applicant; accordingly, it is difficult to see how its decision, based on newly acquired information, to adjust a permit somehow could ever be viewed as applicational in nature. In any case, whether or not any information-based adjustments to PRASA's permit are the product of a *de facto* application would not seem to matter, for in either event — given that the issue of timeliness is not in question — they would fall within scope of section 125.59(d)(3). Therefore, we reject any contention that the additional submissions constitute *de facto* revisions to PRASA's section 301(h) applications.

[74] *See infra* notes 77-78 (explaining that the Region allowed PRASA to show compliance with certain aspects of the UAPP, i.e., technical analysis of local limits and adoption and incorporation of approved local limits into industrial permits, after the August 9, 1996 deadline). Pursuant to administrative orders the Region issued in 1997, *see id.*, PRASA submitted its complete analysis of local

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of such failure. We now consider whether the Region retained discretion to allow PRASA to meet the UAPP requirements at a later date and whether the Region clearly erred or abused its discretion in issuing the waivers despite PRASA's admitted failure to comply with the deadline. Before analyzing these issues, we first turn to the UAPP requirements and to the procedural history of PRASA's efforts to comply with these requirements.

a. *Overview of the UAPP Requirements*

As previously noted, the UAPP requirements apply to PRASA. Therefore, PRASA must demonstrate: (1) that it has an "applicable pretreatment requirement" in effect for each toxic pollutant an industrial discharger introduces into its POTW;[75] and (2) that each industrial source introducing waste into its POTW is in compliance with all pretreatment requirements, and PRASA will enforce those requirements. *See* 40 C.F.R. § 125.65(b)(1)-(2). The regulations established August 9, 1996, as the deadline for section 301(h) applicants to demonstrate compliance with the UAPP requirements. *See* 40 C.F.R. § 125.59(f)(3)(ii)(A).

To comply with the UAPP requirements, PRASA selected the "applicable pretreatment requirement" approach, rather than the "secondary removal equivalency" approach, presumably because similar requirements applied to its POTWs under 40 C.F.R. part 403.[76] *See* Arecibo AR 100, at 74 (Region's Response to Comments-Arecibo); Aguadilla AR 103, at 65 (Region's Response to Comments-Aguadilla). Indeed, the 1994 Consent Order required PRASA to develop local limits under part 403 for the Aguadilla and Arecibo POTWs by

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limits on March 25, 1998 (Aguadilla) and April 28, 1998 (Arecibo). Arecibo AR 36 (Transmittal of Development of Local Limits); Aguadilla AR 51 (Development of Local Limits). As explained in Parts III.A and III.B of this decision, the Region did not approve PRASA's local limits until May 1998.

[75] *See supra* note 29 and accompanying text (explaining that PRASA selected the "applicable pretreatment requirement" approach, as opposed to the "secondary removal equivalency" approach, to meet the UAPP requirements).

[76] Part 403, also known as the General Pretreatment Regulations, imposes obligations on POTWs and Indirect Dischargers (i.e., industrial sources that discharge pollutants into a POTW) aimed at controlling pollutants that pass through or interfere with treatment processes in POTWs. *See* 40 C.F.R. § 403.1(a). In particular, 40 C.F.R. § 403.8 requires certain POTWs to develop local limits (i.e., pretreatment requirements developed by a POTW based on local conditions) or otherwise demonstrate that local limits are unnecessary. The 1994 Consent Order, *see supra* note 8, required PRASA to determine the need for local limits for several of its WWTPs, including Arecibo and Aguadilla, by the deadlines specified in the Order.

The UAPP also requires that certain POTWs develop local limits. Although the UAPP requirements "apply in addition to any applicable requirements of 40 C.F.R. part 403 and do not waive or substitute for the part 403 requirements in any way," 40 C.F.R. § 125.65(a)(2), local limits developed to meet the UAPP requirements must be consistent with part 403. 40 C.F.R. § 125.65(c)(2)(i).

November 30, 1996, and February 28, 1997, respectively.[77] Since local limits are also a component of the UAPP's "applicable pretreatment requirement" approach, *see supra* note 29, and must be consistent with part 403, PRASA apparently concluded that by complying with the deadlines the Consent Order already set for developing local limits under part 403 it would also be complying with the UAPP requirements.[78] As noted earlier, the Region approved this approach of using the 1994 Consent Order deadlines for UAPP compliance. *See* Arecibo AR 17 (Response to November 7, 1994 Letter of Intent (Feb. 27, 1995)).

In order to satisfy the "applicable pretreatment requirement" for toxic pollutants, PRASA first needed to conduct technical studies to determine the need for local limits. *See* 40 C.F.R. § 125.65(c)(1); *see also* 1994 Consent Order at 4; Arecibo AR 25, at 2 (Order EPA-CWA-II-97-145 (Sept. 16, 1997)); Aguadilla AR 24, at 2 (Order EPA-CWA-II-97-144 (Sept. 16, 1997)). If it needed to impose such local limits to control toxic pollutants, PRASA then needed to develop such limits and incorporate them into industrial users permits. *See* 40 C.F.R. § 125.65(c)(2); *see also* 1994 Consent Order at 4; Arecibo AR 25, at 2 (Order EPA-CWA-II-97-145); Aguadilla AR 24, at 2 (Order EPA-CWA-II-97-144). PRASA also had to show that the industrial dischargers using the Arecibo and Aguadilla WWTPs complied with all pretreatment requirements, and that PRASA could enforce those requirements. 40 C.F.R. § 125.65(b)(2).

b. *Whether the Region Possessed Discretion to Delay Compliance with the UAPP Requirements*

As noted above, Petitioners argue that because PRASA failed to meet the August 9, 1996 regulatory deadline the Region erred in issuing the waivers. Arecibo Brief at 11-13; Aguadilla Brief at 11-13. The regulations required PRASA to show compliance by that date, Petitioners reason, but PRASA did not do so until after the deadline had passed. *See* Arecibo Brief at 11; Aguadilla Brief at 12. In Petitioners' words, the August 9, 1996 deadline is a mandatory, "hard and fast deadline," and for that reason the Region should have disapproved the section 301(h) modifications. Arecibo Brief at 11; Aguadilla Brief at 12. Petitioners claim

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[77] As noted earlier in this decision, *see supra* note 8, the Region issued two administrative orders in 1997, one each for the Arecibo and Aguadilla WWTPs, extending the 1994 Consent Order deadlines. The orders allowed PRASA until March 31, 1998 (Aguadilla) and April 30, 1998 (Arecibo) to complete the technical analysis of local limits, and until August 31, 1998 (Aguadilla) and September 30, 1998 (Arecibo) to adopt and incorporate approved local limits into industrial permits. Arecibo AR 25 (Order EPA-CWA-II-97-145 (Sept. 16, 1997)); Aguadilla AR 42 (Order EPA-CWA-II-97-144 (Sept. 16, 1997)).

[78] In its November 7, 1994 letter of intent to the Region explaining how it would achieve compliance with the UAPP requirements, PRASA stated that in developing local limits under the UAPP it would follow the deadlines already set in the 1994 Consent Order. *See e.g.*, Arecibo AR 16 (Letter of Intent (Nov. 7, 1994)).

that the Region lacks discretion to ignore noncompliance with the regulatory deadline. Arecibo Brief at 13; Aguadilla Brief at 13. Petitioners apparently believe the deadline possesses jurisdictional attributes,[79] for Petitioners argue that because PRASA failed to meet the deadline the Region's sole option was to deny the waivers.

The Region argues that it possessed discretion to grant PRASA additional time to fully comply with the UAPP requirements, as well as discretion to deny an application for failure to meet the deadline. The Region further argues that the regulations do not dictate how this discretion is to be exercised. *See* Region's Response to Arecibo Brief at 18-20; Region's Response to Aguadilla Brief at 24. In a consistent vein, in its response to comments, the Region similarly stated that it exercised its discretion to excuse strict compliance with the deadline to allow PRASA the necessary time to develop plant-specific local limits. Arecibo AR 100, at 74 (Region's Response to Comments-Arecibo); Aguadilla AR 103, at 65 (Region's Response to Comments-Aguadilla). The Region cites section 125.59(e)(2), which states: "If the applicant does not meet these schedules for compliance, EPA *may* deny the application on that basis." 40 C.F.R. § 125.59 (e)(2) (emphasis added). In its Response to the Aguadilla Petition, the Region further explains that it reasonably established a different deadline in an enforcement proceeding it initiated before it established the August 9, 1996 date in a nationally applicable rulemaking. Region's Response to Aguadilla Brief at 24 (referring to the enforcement proceedings culminating in the 1994 and 1997 Administrative Orders).

We turn now to section 125.59(e), and — because it is cross-referenced in that section — to section 125.59(f)(3)(ii), which establishes the August 9, 1996 deadline. The relevant text in section 125.59(e) reads as follows:

> (e) Submittal of additional information to demonstrate compliance with §§ 125.60 [primary or equivalent treatment requirements] and 125.65 [UAPP requirements].
>
> (1) On or before the deadline established in paragraph (f)(3) of this section, applicants shall submit a letter of intent to demonstrate compliance with §§ 125.60 and 125.65. The letter of intent is subject to approval by the Administrator based on the requirements of this paragraph and paragraph (f)(3) of this section. The letter of intent shall consist of the following:

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[79] Black's Law Dictionary defines the term "agency jurisdiction" as "the regulatory or adjudicative power of a government agency over a subject matter or matters." Black's Law Dictionary (8th ed. 2004).

> * * *
>
> (ii) For compliance with § 125.65 [UAPP]: * * *
>
> (B) A project plan for achieving compliance. The project plan shall include any necessary data collection activities, submittal of additional information, and/or development of appropriate pretreatment limits to demonstrate compliance with § 125.65. The Administrator will review the project plan and may require revisions prior to submission of the additional information.
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> * * *
>
> (2) *The information required under this paragraph must be submitted in accordance with the schedules in § 125.59(f)(3)(ii). If the applicant does not meet these schedules for compliance, EPA may deny the application on that basis.*

40 C.F.R. § 125.59(e) (emphasis added). For its part, section 125.59(f)(3)(ii) reads:

> (3) Deadline for additional information to demonstrate compliance with §§ 125.60 and 125.65 [UAPP].
>
> * * *
>
> (ii) The project plan submitted under § 125.59(e)(1) shall ensure that *the applicant meets all the requirements of* §§ 125.60 and *125.65 [UAPP] by* the following deadlines:
>
> (A) By *August 9, 1996* * * * .

40 C.F.R. § 125.59(f)(3)(ii)(A) (emphasis added).

It is clear from the last sentence in section 125.59(e)(2) — "[i]f the applicant does not meet these schedules for compliance, EPA may deny the application on that basis"-- that the Agency may base denial of a waiver application on the failure to comply with the "schedules of compliance" set forth in section 125.59(f)(3)(ii). It is equally clear from the quoted language that the regulations on their face grant the Agency leeway on how to exercise this authority and do

not mandate that the Agency deny a request on this basis.[80] Indeed, if the Agency lacked such discretion one would expect that the mandatory word "shall" would appear instead of the permissive word "may." Therefore, we agree with the Region that section 125.59(e)(2) allows the Region to exercise its discretion as to whether to deny the waiver application in the case of PRASA's failure to meet the August 9, 1996 deadline.[81]

Finally, we must reject Petitioners' arguments about the "hard and fast" nature of the UAPP deadline. We are reluctant to impose the extreme sanction of denial of the applications when nowhere do the statute, the regulations, or the preamble to the regulations[82] mandate denial for missing the deadline. *See, e.g.*, *Kelso v. U.S. Dep't of State*, 13 F. Supp. 2d 12, 15 (D.D.C. 1998) (stating that "the contours of a mandatory deadline are established by the scope of the specific sanctions that the statute or regulation prescribes"). Although the regulations and the preamble to the regulations advise applicants of the potential consequences of missing the deadline, they do not specify the sanction Petitioners seek — that an applicant's failure to meet the deadline results in the automatic denial of the application.

We also disagree with Petitioners' suggestion that the August 9, 1996 deadline possesses jurisdictional attributes barring the Agency from issuing the waivers. Neither the regulations nor their preamble state or imply that the Agency would forfeit its authority to approve an otherwise valid application in the event an applicant misses the deadline. Moreover, the procedural requirement at stake — compliance with the regulatory deadline — does not emanate from the statute, and it appears the Agency chose this date principally to provide the regulated community a date certain for showing compliance and not because it held any other particular significance. Thus, we follow the approach in *Health Systems Agency v. Norman*, 589 F.2d 486 (10th Cir. 1978). In *Health Systems* the Tenth Circuit overturned a trial court's decision that a state agency — the Department of Health, Education, and Welfare ("HEW") — lacked discretion to accept late applications. *Id.* at 489. Health Systems missed the application deadline (for a condi-

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[80] *See supra* note 60 (stating that if language is plain and unambiguous it must be given effect).

[81] Petitioners also attempt to bolster their position by citing to sections 125.59(h) and (j) to establish that the compliance schedules for the UAPP do not extend beyond August 1996. *See* Arecibo Brief at 11; Aguadilla Brief at 12; Oral Argument Transcript at 17. However, this adds little to the arguments because no one disputes that there is a deadline of August 9, 1996, and PRASA missed it. The point of contention is whether the Agency is compelled to deny the 301(h) waiver if the deadline is missed. As just explained, it can deny the waiver — pursuant to section 125.59(e)(2) — but is not required to do so.

[82] Neither the final rule nor the proposed rule contain language in their preambles mandating denial for missing this deadline. *See* Final Rule 1994 Regulations, 59 Fed. Reg. 40,642 (Aug. 9, 1994); Modification of Secondary Treatment Requirements for Discharges into Marine Waters, 56 Fed. Reg. 2814 (Jan. 24, 1991) (the "1991 Proposed Rule").

tional designation as the Health Systems Agency for Oklahoma) and filed a late application with HEW. HEW did not accept the late application because the published noticed contained no provision waiving the deadline. Health Systems sought a remedy in federal court. The trial court ruled against Health Systems, holding that the deadline was jurisdictional and that HEW lacked discretion to accept the late application. The Tenth Circuit reversed the trial court's decision on the grounds that: (1) the application deadline was not statutory; (2) the regulatory deadline was one HEW administratively chose to ensure that it would receive applications in sufficient time to review them and complete the designation process; and (3) the fact that the deadline was published in the *Federal Register* did not alter the applicability of the general principle of discretion. *Id.* at 490.

Moreover, we reject Petitioners' arguments that the Agency's statements in the preamble of the proposed rule constitute a relinquishment of authority or jurisdiction. Petitioners point to language in the 1991 preamble of the Proposed Rule where the Agency stated that it would grant in no case more than two years to achieve compliance with the UAPP requirements.[83] Arecibo Brief at 11; Aguadilla Brief at 12 (citing Modification of Secondary Treatment Requirements for Discharges into Marine Waters, 56 Fed. Reg. 2814, 2821 (Jan. 24, 1991) (the "1991 Proposed Rule")). That the Agency expressed in the preamble of the proposed rules its intention to hold applicants to strict compliance with the deadline does not in itself convert the deadline into a "hard and fast" deadline depriving the Agency from exercising any discretionary authority. We view those statements as an attempt to prompt applicants to action, not to self-limit the Agency's scope of authority. Therefore, we decline to breathe jurisdictional characteristics into the regulatory deadline based on the statements in the preamble.[84]

Because there is no statutory mandate or clear regulatory language establishing a jurisdictional deadline, we cannot conclude that the Region lacked any discretion to relax compliance with the regulatory deadline.

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[83] The Agency did not reiterate this view in the preamble to the final rule. *See* Final Rule 1994 Regulations, 59 Fed. Reg. 40,642 (Aug. 9, 1994).

[84] Notably, in addressing comments on the 1991 Proposed Rule, the Agency recognized that for some applicants compliance with a two-year deadline from the date of promulgation of the regulations may be more difficult than for others. The Agency adhered to the two-year time frame for complying with the UAPP requirements that the Agency proposed in 1991, in part because "none of the commenters opposing the two-year deadline provided persuasive information demonstrating why [the] deadline could not be met." Final Rule 1994 Regulations, 59 Fed. Reg. 40,642, 40,647 (Aug. 9, 1994). This statement by the Agency can be read as signaling its willingness to consider, if properly persuaded, relaxing compliance with the deadline. Significantly, the Agency responded to a specific commenter, that, like PRASA, was subject to "court-order deadlines and consent decree time-lines." *Id*. In response to a question about how to reconcile the regulatory deadline with the "court-order" and "consent decree time-lines," the Agency stated that "the commenter will have to comply with the deadlines included in the consent decree." *Id.* In PRASA's case, for instance, the "consent decree," which would be the 1994 Consent Order, established deadlines beyond the regulatory two-year time frame.

c. *Whether the Region Abused Its Discretion in Allowing PRASA to Meet the UAPP Requirements After August 9, 1996*

We now consider whether, despite the absence of a jurisdictional deadline, the Region abused its discretion by allowing PRASA to meet the UAPP requirements after August 9, 1996. Our analysis follows.

Upon consideration of the record, we find that the Region's decision to relax the August 9, 1996 deadline comports with the principle that "it is always within the discretion of an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." *See Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970); *see also Neighborhood T.V. Co. v. FCC*, 742 F.2d 629, 636 (D.C. Cir. 1984) ("Where, as here, the rule governs information that the agency requires before it will consider a filing by one it regulates, courts have been especially apt to allow agencies much leeway in granting waivers to their own rules."); *Health Sys. Agency v. Norman*, 589 F.2d 486, 490 n.5 (10th Cir. 1978) ("It has also been noted that 'an administrative agency is not a slave of its own regulations.' * * * These cases are not inconsistent with opinions stating that an agency is bound by its own regulations.").

As explained more fully below, our examination of the record shows that the unusual, if not unique, circumstances of these cases justify the Region's decision to allow PRASA additional time to fully comply with the UAPP requirements.[85] We therefore conclude that the Region did not abuse its discretion.

In its response to comments, the Region explained some of the reasons why it decided to give PRASA additional time to show compliance with the UAPP requirements. The Region pointed to PRASA's attempt to comply with the August 9, 1996 deadline by submitting its technical evaluation of local limits for the Arecibo and Aguadilla POTWs on May 29, 1996 — approximately two months prior to the deadline — and to its continuing cooperation with EPA after that date to perfect its evaluation. Arecibo AR 100, at 74 (Region's Response to Comments-Arecibo); Aguadilla AR 103, at 65 (Region's Response to Comments-Aguadilla). The Region also noted that PRASA already had an approved pretreatment program in place that included an enforcement response plan and most of the pretreatment requirements necessary to comply with section 125.65.

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[85] *Cf. Taylor v. Md. Sch. for the Blind*, 409 F. Supp. 148, 154 (D. Md. 1976)("an agency may be justified in violating a regulation by showing that the party is in fact differently situated than those to whom the regulation is applied") (citing *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970)), *aff'd*, 542 F.2d 1169 (4th Cir. 1976); *In re Borden, Inc.*, 1 E.A.D. 895, 897 n.8 (CJO 1984); *In re Waste Tech. Indus.*, 1 E.A.D. 831, 836 (Adm'r 1984).

Arecibo AR 100, at 74 (Region's Response to Comments-Arecibo); Aguadilla AR 103, at 65 (Region's Response to Comments-Aguadilla).

While we find this rationale reasonable, the Region's response to comments if anything understates the fullness of PRASA's unusual situation.[86] The particular circumstances besetting PRASA bear mention, for the unusual nature of PRASA's situation provides perhaps the strongest justification for the Region's decision to allow PRASA additional time to comply with the UAPP requirements. At oral argument the Region put into context PRASA's situation; there the Region explained that, with the possible exception of the Honolulu system, PRASA was the only applicant "that had multiple large plants that required the UAPP programs to be put in place. The other POTWs that applied [for section 301(h) waivers] either have one large or, in some cases, many smaller plants that don't require the UAPP programs." Oral Argument Transcript at 57.

As explained earlier in this decision,[87] in 1979 PRASA owned and operated approximately ninety-two separate wastewater treatment plants around the island of Puerto Rico, all subject to secondary treatment standards. PRASA had been subject to court orders since 1978 to facilitate compliance with, among other CWA requirements, secondary treatment standards. In a 1985 court order the United States District Court for the District of Puerto Rico established a plant-by-plant physical improvement plan devised to bring PRASA into compliance with the CWA and its implementing regulations. *See United States v. PRASA*, Nos. 78-0038 (TR) & 83-0105 (TR), at 31 (D.P.R. Feb. 22, 1985) (Order Further Amending the Final Judgment) (the "1985 Court Order"). The 1985 Court Order established a schedule of compliance for each of PRASA's plants, so that PRASA did not have to come into compliance with secondary treatment standards all at once for each of the ninety-two plants. *See id*.

Meanwhile, PRASA was waiting for the Region's evaluation of its various waiver applications,[88] which PRASA had timely filed in 1979. *See* Oral Argument Transcript at 44-43; Aguadilla AR 43 (Letter from EPA to Cindy Gines-Sanchez

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[86] The Board takes official notice of relevant non-record information contained in the judicial proceedings relating to PRASA's compliance with the Clean Water Act. *See, e.g., United States v. PRASA*, Nos. 78-0038 (TR) & 83-0105 (TR) (D.P.R. Feb. 22, 1985) (Order Further Amending the Final Judgment); *United States v. PRASA*, Nos. 78-0038 (TR) & 83-0105 (TR) (D.P.R. Sept. 26, 1988) (Supplemental Consent Order). The Board generally regards public documents of this kind as appropriate for official notice. *See, e.g., In re City of Denison*, 4 E.A.D. 414, 419 n.8 (EAB 1992) (taking official notice of administrative order not part of proceeding before Board); *In re Hawaiian Commercial & Sugar Co.*, 4 E.A.D. 95, 102 n.13 (EAB 1992) (taking official notice of guidance document).

[87] *See supra* note 7.

[88] The Region received a total of twelve section 301(h) applications from PRASA. *See* Aguadilla AR 43.

re: Response to EPA letter dated February 28 and August 1, 1997 (Sept. 22, 1997)). The Region denied some of the applications and PRASA withdrew others. By 1993 the Region possessed seven remaining applications from PRASA that required evaluation. Oral Argument Transcript at 44-43; *see* Aguadilla AR 43. Throughout this period PRASA undertook major plant improvements under the terms of the 1985 Court Order and subsequent supplemental orders, i.e., the 1988 Court Order.[89] This led to an overall reduction of plants, such that by 2002 PRASA had sixty-four WWTPs.

On September 29, 1994, following the approach the United States District Court for the District of Puerto Rico used in the 1985 and 1988 Court Orders, the Region issued an order on consent — the 1994 Consent Order[90] — establishing schedules of compliance for PRASA to implement and enforce the provisions of its industrial pretreatment program, a part 403 requirement.[91] *See* 1994 Consent Order. The 1994 Consent Order required PRASA to develop written evaluations of local limits for thirty-five of its plants (the Aguadilla and Arecibo WWTPs were part of this group). Oral Argument Transcript at 47; 1994 Consent Order attach. A. Although PRASA's industrial pretreatment program had island-wide limits for categorical industrial users and significant industrial users, PRASA was now required to determine the need for local limits and develop them where necessary. Arecibo AR 100, at 73 (Region's Response to Comments-Arecibo); Aguadilla AR 103, at 64 (Region's Response to Comments-Aguadilla). The idea, which mirrored the approach the district court employed, was for PRASA to develop limits for each plant one at a time, and not all at once. According to the 1994 Consent Order, PRASA was to complete its technical evaluation of local limits by November 30, 1996, for its Aguadilla WWTP, and by February 28, 1997, for the Arecibo WWTP. 1994 Consent Order attach. A.

As will be recalled, section 301(h) applicants to whom EPA had issued final or tentative decisions were to submit a letter of intent by November 7, 1994, explaining how they were planning to achieve compliance with the UAPP requirements. In its letter PRASA explained that it would follow the "applicable pretreatment" approach to comply with the UAPP requirements and that in achieving compliance it would follow the deadlines set in the 1994 Consent Order. The Region approved this approach and allowed PRASA to follow the schedules set in the 1994 Consent Order, as opposed to the August 9, 1996 deadline, mainly because the part 403 requirements that PRASA had to comply with pursuant to the

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[89] The 1988 Supplemental Consent Order required PRASA to, among other things, implement and enforce its pretreatment program in accordance with the provisions of 40 C.F.R. §§ 403.8-.9. *See United States v. PRASA*, Nos. 78-0038 (TR) & 83-0105 (TR) (D. P.R. Sept. 26, 1988) (Supplemental Consent Order) (the "1988 Court Order"); *see also supra* note 8.

[90] *See supra* note 8.

[91] *See supra* note 76.

1994 Consent Order were similar to the UAPP requirements.[92] We do not find this deviation from the prescribed deadline unreasonable under the circumstances.

PRASA, however, was unable to meet the deadlines specified in the 1994 Consent Order. Apparently, PRASA believed that it had to complete mixing zone validation studies, an EQB requirement, prior to developing local limits. *See* Aguadilla AR 43. The Region clarified to PRASA that such studies were not necessary prior to developing and implementing local limits. *See id.* In light of PRASA's failure to comply with the deadlines set forth in the 1994 Consent Order, the Region issued two additional administrative orders, extending PRASA's deadline for the submission of local limits and the incorporation of such limits into industrial user permits. Arecibo AR 25 (Order EPA-CWA-II-97-145 (Sept. 16, 1997)) (allowing PRASA until April 30, 1998, to complete technical analysis of local limits and until September 30, 1998, to adopt and incorporate approved local limits into industrial permits); Aguadilla AR 42 (Order EPA-CWA-II-97-144 (Sept. 16, 1997)) (allowing PRASA until March 31, 1998, to complete the technical analysis of local limits and until August 31, 1998, to adopt and incorporate the approved local limits into industrial permits). While it could be argued that the Region was overly generous by giving PRASA yet another opportunity for compliance, the Region's leniency does not strike us as an abuse of discretion, given that PRASA had to comply with similar pretreatment requirements at its other plants — at least thirty three of them.

Having found that the August 9, 1996 deadline was not intended as a jurisdictional deadline, and given the very particular circumstances surrounding PRASA and its efforts to comply with the deadline, we do not find abuse of discretion in the Region's decision to allow PRASA additional time to show full compliance with all the UAPP requirements.

3. *Alleged Violation of Purpose and Intent of CWA*

Petitioners' final argument is that the Region has eviscerated the purpose and intent of the CWA by attempting an end-run around the regulations and by delaying the processing of the waiver applications. *See* Arecibo Brief at 13; Aguadilla Brief at 14. According to Petitioners, "by not ruling for so long, EPA has given PRASA a 25-year, de facto exemption from the secondary treatment requirements that all POTWS were supposed to meet by 1977." Arecibo Brief at 13; Aguadilla Brief at 14.

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[92] *See supra* note 76 and accompanying text. In addition, PRASA was to developed local limits for three other facilities. *See* Aguadilla AR 43 (explaining that the Region tentatively approved PRASA's section 301(h) waiver applications for five WWTPs, i.e., Aguadilla, Arecibo, Bayamón, Carolina, and Ponce).

Petitioners cite two excerpts from a Senate Report on the 1977 amendments to the CWA for the proposition that the Region's delay is contrary to Congress' intent. Arecibo Brief at 14; Aguadilla Brief at 14. Petitioners argue that Congress intended the section 301(h) waiver program to be "a limited exception that should be carried out without delay," and "that EPA would rule on waivers expeditiously, and would act to ensure prompt compliance with water quality standards." Arecibo Brief at 14; Aguadilla Brief at 14-15. The first excerpt Petitioners cite expresses a congressional committee's expectation[93] that the Administrator establish an expeditious process for determining the validity of certain applications for exceptions and proceed swiftly to enforce effluent limitations.[94] At the outset we observe that these specific statements do not apply here. The congressional committee made these statements in the context of nonmunicipal dischargers when addressing the amendments to the Industrial Program[95] and did not use the same language when addressing the amendments applicable to municipal dischargers, or POTWs.[96] However, the second excerpt Petitioners cite is on point, for it specifically addresses modifications under section 301(h). *See* Arecibo Brief at 14. The excerpt reads as follows:

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[93] The Senate Committee on Environment and Public Works submitted the report, S. Rep. No. 95-370 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326.

[94] The complete passage from the Senate report reads as follows:

> Even without the State water quality standards/effluent limits question the delays in section 316(a) would be unfortunate and indefensible. Similar delays under the waivers in this act would be disastrous to this program [referring to the Industrial program]. The committee expects the Administrator to establish an expeditious process for determining the validity of applications for exemptions [referring to the exemptions available to industrial sources under the bill, i.e., modification of the best available technology requirement] and to proceed swiftly to enforce effluent limitations applicable to pollutants for which there are no water quality standards or which would clearly interfere with attainment and maintenance of that water quality which assures the protection of public water supplies and the protection and propagation of a balanced, indigenous population of fish, shellfish and wildlife, and allows recreational activities, in and on the water. Only in this way can these waivers be useful, both to the source which needs to know as early as possible what will be required and to the environment which will benefit from reduction of discharges of pollutants.

S. Rep. No. 95-370, at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4334.

[95] The various amendments contemplated by the bill under scrutiny included, among other things, changes to the Industrial Program, that is changes to statutory requirements applicable to nonmunicipal dischargers.

[96] *See* S. Rep. No. 95-370, at 2-6 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4328-4333 (statements pertaining to municipal dischargers).

> The Administrator is expected to review any application for a waiver under * * * the secondary treatment provision [referring to the modification of the secondary treatment requirement applicable to POTWs under section 301(h)] to determine whether or not there is a substantial likelihood that the discharger will prevail on the merits of the case, and if he [or she] concludes that there is not, he [or she] should reject it immediately so that the applicant may begin to comply with applicable effluent limits.

S. Rep. No. 95-370, at 43 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4368. Petitioners further contend that "[t]he ultimate consequence [of the Region's determination] is that 25 years after the Congressional promise that all POTWs would achieve secondary treatment by 1977,[97] Puerto Rico's marine environment will continue to be degraded indefinitely by effluents that fail to meet that treatment standard." *See* Arecibo Brief at 5, 13-15; Aguadilla Brief 5, 14-15.

The Region for its part argues that the statute does not prescribe a date by which the EPA had to render a tentative or a final decision. Region's Response to Arecibo Brief at 22; Region's Response to Aguadilla Brief at 30-31 ("Congress set a deadline for initiation of the process, but not for conclusion"). Moreover, the Region adds, it reviewed PRASA's second-round applications expeditiously — referring to the tentative approval of PRASA's second-round applications, which PRASA filed in 1985 (Arecibo) and 1987 (Aguadilla), and the Region tentatively approved them in 1988 (Aguadilla) and 1989 (Arecibo). Region's Response to Arecibo Brief at 22; Region's Response to Aguadilla Brief at 30.

Indeed, as noted in the introductory part of this decision, neither the CWA nor its implementing regulations prescribe a deadline for the Agency to act on section 301(h) applications. Congress did establish a deadline for the filing of applications. This, however, does not indicate that Congress expected the Agency to immediately decide whether to grant or deny an application on the merits. While it would have been desirable for the Region to have decided on the waivers at an earlier date, by not doing so the Region did not violate any statutory or regulatory obligations set forth in the CWA. We acknowledge that this in itself does not excuse agency delay, but we nonetheless agree with the Region's suggestion that Congress' decision not to impose a date by which the Agency had to act on these applications should be factored into our analysis. We find telling the fact that Congress choose not to impose a deadline on the Agency, and rather relied on the Agency's judgment and discretionary authority to process these applications appropriately, on a case-by-case basis.

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[97] *See supra* Part II.A (explaining that POTWs were to meet secondary treatment standards by July 1, 1977).

As explained in Part IV.C.2.c, the section preceding this discussion, we have found no evidence of abuse of discretion on the Region's part. Recall that the statute and the applicable regulations were amended several times, not only after PRASA's first applications, but also after the Region had tentatively approved PRASA's requests,[98] adding new intricate statutory and regulatory requirements that invariably contributed to the delays.[99] But most significantly, PRASA's unusual, if not unique, situation, added to an already complicated process and made it lengthier still. In light of all this, we cannot conclude that the Region's delay in making a final determination on PRASA's applications was unreasonable.[100]

Petitioners also fail to persuade us that the Region's actions violated congressional intent. The congressional excerpt applicable here speaks of an expectation that the Administrator *review* the applications and determine whether there is a *substantial likelihood* that the discharger will prevail on the merits. The congressional committee also expected the Agency to immediately reject those applications that showed no substantial likelihood of prevailing on the merits so that "the applicant may begin to comply with applicable effluent limits," that is, begin compliance with secondary treatment standards. As the Region's response points out, the Region reviewed the applications early on in the process. First, the Region tentatively denied the applications in 1984 (Arecibo) and in 1986 (Aguadilla). PRASA then proceeded to submit revised applications pursuant to 40 C.F.R. § 125.59(d)(1). The Region, once again, reviewed PRASA's applications, this time PRASA's second-round applications, and decided to tentatively approve the waivers (Aguadilla in 1988 and Arecibo in 1989). By tentatively approving PRASA's second-round applications, the Region, in our view, determined that there was a substantial likelihood that PRASA would prevail on the merits. Peti-

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[98] *See supra* Part II (outlining the 1977, 1981, and 1987 amendments to the CWA, as well as the 1977 and 1979 regulations, the overturning of some provisions in the 1979 regulations, and the 1982 and 1994 amendments to the 1979 regulations).

[99] As noted earlier, the 1987 amendments to section 301(h) and its implementing regulations, promulgated by EPA in 1994, added new requirements that PRASA had to comply with, i.e., the UAPP and the primary or equivalent treatment requirements.

[100] It strikes us as relevant that in this case about deadlines and delays, Petitioners did not seek relief at an earlier stage. The Administrative Procedure Act ("APA") provides precisely such a remedy for a party seeking to compel agency action. *See* APA § 555(b), 5 U.S.C. § 555(b) (directing agencies to conclude matters presented to them "within a reasonable time"); APA § 558(c), 5 U.S.C. § 558(c) (establishing duty to promptly act on license (permit) applications); APA § 706(1), U.S.C. § 706(1) (authorizing reviewing court to compel agency action that is "unreasonably delayed"). Thus, Petitioners could have brought an action in federal court earlier in the process to compel agency action. While, given our analysis, we think it unlikely that Petitioners would have prevailed on their claim, at least Petitioners would have been on record insisting on compliance with procedural deadlines at a time that seems to us more appropriate. Instead, Petitioners waited until PRASA undertook significant efforts to comply with the requirements of section 301(h) and the Agency made a final determination on the merits, to raise only challenges about timing rather than substance.

tioners have given us no reason to second-guess these determinations.[101]

In any event, PRASA has been at all times subject to compliance with secondary treatment requirements. Petitioners' arguments overlook the fact that the filing of a waiver application under section 301(h) does not excuse noncompliance with the secondary treatment requirements during the pendency of the application.[102] Thus, Petitioners' claim that by not ruling for so long EPA has given PRASA a twenty five year *de facto* exemption from secondary treatment standards is without merit.[103]

Furthermore, we do not agree with Petitioners' assertion that "Puerto Rico's marine environment will continue to be degraded indefinitely by effluents that fail to meet [secondary] treatment standards." Arecibo Brief at 5; Aguadilla Brief at 5. Congress declared, in effect, that meeting the requirements for obtaining a waiver is an environmentally acceptable substitute for meeting secondary treatment requirements, which means that compliance with the criteria set forth in section 301(h) provides, at least in the eyes of the Clean Water Act, a comparable level of protection as that afforded by secondary treatment.

Moreover, after considering the equities, we conclude that it makes no sense for us to deny the waivers under these circumstances where no one contends that PRASA has not met the substantive requirements for obtaining the waivers and the Region approved of the delays in question based on the unusual, if not unique, circumstances PRASA encountered. Denying the waivers at this point would clearly undo the considerable efforts that PRASA and the Region took to meet the applicable requirements and lead to a significant expenditure of public resources,

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[101] *See supra* note 71 (explaining that Petitioners have not challenged the tentative approvals).

[102] *See Haw.'s Thousand Friends v. City & County of Honolulu*, 821 F. Supp. 1368, 1393 (D. Haw. 1993) ("The pendency of a section 301(h) waiver and other permit modification applications does not excuse noncompliance with the Act in the interim.").

[103] PRASA undisputably has been out of compliance with secondary treatment standards for some time. However, the Agency has already pursued the normal means for addressing noncompliance. Specifically, when, as here, a POTW does not come into compliance, the Agency typically brings an enforcement action against the POTW. In most instances, this results in a consent decree that requires the POTW to undertake action to comply by a date certain, and sometimes to pay monetary penalties and/or undertake corrective measures. The consent decree does not excuse the noncompliance but instead imposes a regimen of Agency enforcement and court supervision over the POTW to ensure that it comes into compliance. For many years PRASA has been governed by various court and administrative orders aimed at bringing PRASA into compliance with secondary treatment standards. *See supra* note 8. It would seem, therefore, that the two facilities are now in compliance and it would serve no statutory purpose to require the facilities to meet secondary treatment requirements at this time.

without any corresponding environmental benefit.[104]

V. *CONCLUSION*

For all the foregoing reasons, we deny review of the petitions.

So ordered.

[104] There is no information in the record to suggest that any significant, tangible environmental benefits would flow from requiring PRASA to construct secondary treatment facilities at the two plants now that each plant meets the waiver requirements. As noted previously, the burden of demonstrating that review is warranted rests with petitioners, who must do more than merely allege error; petitioners must substantiate their allegations. *See, e.g., In re New England Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001).