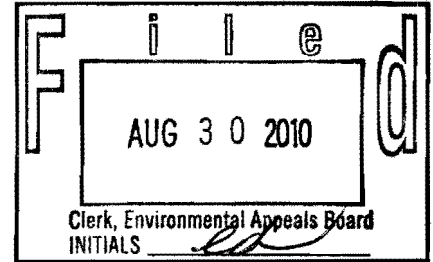


**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re: City of Cambridge)

Permit No. MA 0101974)

) NPDES Appeal No. 09-17
)
)



ORDER DENYING REVIEW

I. STATEMENT OF THE CASE

Petitioner, Stephen H. Kaiser (“Mr. Kaiser” or “Petitioner”), seeks review of a National Pollutant Discharge Elimination System¹ (“NPDES”) permit decision issued by U.S. Environmental Protection Agency (“EPA” or “Agency”) Region 1 (“Region”) that would allow the Department of Public Works from the City of Cambridge, Massachusetts (“Permittee” or “City”) to discharge from its combined sewer system (“CSS”)² under certain wet weather conditions. The Permittee is also participating in the proceedings as an intervenor and opposes the petition.

¹ Under the Clean Water Act (“CWA” or “Act”), persons who discharge pollutants from point sources into waters of the United States must have a permit for the discharge to be lawful. CWA § 301, 33 U.S.C. § 1311. The NPDES program is the principal program under the CWA. CWA § 302, 33 U.S.C. § 1342.

² According to EPA’s Combined Sewer Overflow (“CSO”) Control Policy, a CSS is a wastewater collection system owned by a state or municipality, that conveys sanitary wastewaters and stormwater through a single-pipe system to the treatment plant of a publicly-owned treatment works (“POTW”). Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. 18688, 18689 (April 19, 1994).

At the heart of this appeal is Petitioner's concern about the sufficiency of the permit to evaluate and control alleged inflow from floodwaters into the City's CSS. Petitioner claims that the permit is deficient because it lacks certain elements and requests that the Board modify the permit to incorporate them. For the reasons set forth below, the Environmental Appeals Board ("Board") denies review of the permit.

II. ISSUES ON APPEAL

The issues before the Board for decision are:

1. Did the Petitioner meet his burden to show that the Region clearly erred or abused its discretion by failing to include a provision in the permit that conditions commencement of a drainage project,³ included in the Massachusetts Water Resource Authority's ("MWRA") long-term CSO control plan,⁴ on the completion of the inflow study specified in the permit and the identification of mitigation measures.
2. Did the Petitioner meet his burden to show that the Region clearly erred or abused its discretion in not including the following provisions in the permit:

³ See *infra* note 7 (explaining the drainage project, also referred to by the parties as drainage relief project/plan).

⁴ See *infra* note 7 (explaining the MWRA long-term CSO control plan).

- a) A provision requiring that the inflow study include a “problem statement;”
- b) A provision specifying a schedule for installation of flap gates or similar flow restrictions; and
- c) A provision requiring the permittee to monitor and report data from the “Cambridge monitoring gauges.”

The decision below begins with a brief description of the factual and procedural history of the case (Part III), followed by a summary of the standard of Board review (Part IV), the Board’s analysis of the issues (Part V), the conclusion (Part VI), and the order (Part VII).

III. *FACTUAL AND PROCEDURAL HISTORY*

A. *Factual History*

On July 24, 2009, the Region issued a draft NPDES permit that would allow the City to discharge combined storm water and sanitary wastewater, referred to as combined sewer overflow (“CSO”),⁵ from eleven combined sewer outfalls into the Alewife Brook and Charles River, provided that the City implements the nine minimum controls (“NMC”) specified in the permit.⁶ *See* Administrative Record (“A.R.”) # 6 (“Draft Permit”) at 1-5. From July 24, 2009, to

⁵ The CSO Control Policy defines CSO “as the discharge from a CSS at a point prior to the POTW [t]reatment [p]lant.” Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. at 18689.

⁶ CSOs are considered point sources and as such are subject to NPDES permit requirements, including technology-based and water quality-based requirements. *See* Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. at 18689. The CSO Control Policy establishes “NMCs” that all permittees with CSSs that have CSOs must comply with as part of (continued...)

August 22, 2009, the Region solicited public comments on the draft permit. *See* A.R.# 39.

During that period, the Region received five sets of written comments, including comments from Mr. Kaiser. *See* A.R.#s 26-30.

Mr. Kaiser's comments focused primarily on concerns regarding the potential effects of a drainage project⁷ on the Alewife watershed, and its impact on the City's CSS. A.R.# 28 (Letter from Stephen Kaiser to Mr. George Papadopoulos (EPA)) ("Comment Letter") at 2-4. Mr. Kaiser commented that the drainage project would increase flooding in the Alewife Brook watershed, which would also result in additional inflow into the City's CSS. *See id.* at 2-3. In his comment letter Mr. Kaiser identified what he understood were problems with the drainage project and the elements that in his opinion needed to be addressed "by planners, engineering

⁶(...continued)
the technology-based effluent limitations for CSOs. *See id.* at 18690-91.

⁷ The CSO Control Policy requires permittees with CSSs to develop a long-term CSO control plan. Combined Sewer Overflow (CSO) Control Policy, 59 Fed. Reg. at 18690-91. MWRA is responsible for all combined sewer outfalls that are hydraulically connected to its collection system, including the combined sewer outfalls owned and operated by the City. *See* Region's 1 Memorandum in Opposition of Petition for Review ("Region's Response") at 5; A.R.#7 ("Fact Sheet") at 8. In 1997, MWRA completed its final CSO control plan, which includes a drainage project to reduce the frequency and volume of CSO discharges in the Alewife Brook watershed. *See* A.R.# 23 (Notice of Project Change for the Long Term CSO Control Plan for Alewife Brook) ("NPC") Chapter 1. This is the drainage project that is the subject of Mr. Kaiser's concerns and comments.

Hydraulic relief projects, such as this one, as well as separation of sewers for wastewater and stormwater, and floatable control measures, are implemented, in part, to satisfy a federal court order. *See* Region's Response at 4 (*citing U.S. v. Metro. Dist. Comm'n*, No. 85-0489, 2005 WL 2542921 (D. Mass 2005)); A.R.#20 (Federal Court Order); A.R.#12 ("Final Permit") Att. E.

designers, and the permitting agency.” *Id.* at 4. His comment letter summarized these problems as follows:

1. There is no plan at any time in the future for the full separation of combined sewers in Cambridge;
2. The drainage plan proposed by Cambridge will worsen flooding conditions in Alewife Brook, and will increase brook inflow into MWRA interceptor sewers during major storms, with SSO [sanitary sewer overflow] problems worsened downstream. Cambridge has adopted no mitigation plan;
3. The failure to install flap gates on all remaining CSO pipes in Cambridge will result in no reduction in the brook flood inflow through CSO structures into MWRA interceptor sewers. Such flap gates are needed;
4. There is inadequate data and circulated information on the interaction between flooding and sewer overflows (both CSO and SSO). More measurements with greater accuracy need to be made.

Id. at 4. In essence, Mr. Kaiser alleged that the drainage project would worsen flooding conditions in Alewife Brook, and would increase inflow from Alewife Brook into the City’s CSS during major storms. *Id.* at 4. To prevent inflow into the City’s CSS, Mr. Kaiser recommended

the installation of flap gates on the City's CSO outfalls. *Id.* In addition, Mr. Kaiser expressed concerns about the adequacy of available information and data on the interaction between flooding and sewer overflows, and recommended that the permit require the City to calibrate, and report data from, two existing stream gauges (referred to by the parties as the "Cambridge monitoring gauges"). *Id.* at 4-5.

On September 30, 2009, the Region issued its response to comments and the final permit decision. *See* Final Permit; A.R.# 13 (Response to Comments for Final NPDES Permit) ("RTC"). Based on the comments received and information on the drainage project the City had submitted, the Region decided to incorporate additional requirements in Part I.D.5 of the draft permit "to require the [P]ermittee to assess the potential for river inflow into the City's CSS in the Alewife Brook watershed and if such potential exists, an assessment of the cost, feasibility, and effectiveness of installing inflow controls." RTC at 1, 10-11 (Response to Comment C3); *Compare* Draft Permit at 6 *with* Final Permit at 6.⁸ Specifically, the permit now requires that the second Annual NMC Report (due April 30, 2011) include:

⁸ Part I.D. of the permit, entitled Annual Report, requires the Permittee to submit an annual report by April 30th of each year that includes the elements identified in subsections D.1 through D.6. *See* Final Permit at 5. In the draft permit, subsection D.5 only required that the annual report include: (1) "[a] summary of modifications to the approved NMC program that had been evaluated and a description of those [that] will be implemented during the [next] year;" and (2) an updated NMC plan reviewing the current controls and updating them to enhance their effectiveness. Draft Permit at 6. The Region modified subsection D.5 by adding the inflow study that is the subject of this appeal.

1) an assessment of the potential for inflow from Alewife Brook to
* * * the combined sewer system through the existing regulator
structures over a range of flood conditions and corresponding
Brook levels[;] and 2) an assessment of the cost, feasibility, and
effectiveness of installing inflow controls on the remaining CSO
outfalls if flow does enter the combined sewer system more
frequently than the 100 year storm.

Final Permit at 6. The sufficiency of this provision, which the parties refer to as the “inflow study,” and the permit’s adequacy to control alleged inflow into the City’s CSS from floodwaters, are the focus of this appeal.

B. Procedural History Before the Board

On November 2, 2009, Mr. Kaiser filed a timely petition seeking review of the permit decision the Region issued allowing the City of Cambridge to discharge from its CSS. *See* Petition for Review of EPA Permit Decision: NPDES Permit No. MA0101974 (for) the City of Cambridge, Massachusetts (“Petition”). Shortly thereafter, the Permittee filed a motion requesting leave to intervene as a party respondent in this appeal, which the Board granted by Order dated December 9, 2009. On December 17, 2009, the Region moved for a 60-day stay of the proceedings to allow the parties to work toward resolution of this matter through settlement discussions, which the Board granted. Unfortunately, the parties were unable to make progress towards a settlement agreement and the Board, upon request, lifted the stay and established a

deadline for the filing of responses. Both the Region and the Permittee filed timely responses to the Petition. *See* Region's Response; [City's] Response to Petition for Review ("City's Response"). The case now stands ready for Board resolution.

IV. STANDARD OF REVIEW

In determining whether to grant review of a petition filed under 40 C.F.R. § 124.19(a), the Board first considers whether the petitioner has met threshold procedural requirements such as, *inter alia*, issue preservation. *See* 40 C.F.R. § 124.19; *In re Circle T Feedlot, Inc.*, NPDES Appeal Nos. 09-02 & 09-03, slip op. at 4 (EAB June 7, 2010), 14 E.A.D. __; *In re Beeland Group LLC*, UIC Appeal No. 08-02, slip op. at 8 (EAB Oct. 3, 2008), 14 E.A.D. __; *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006). For instance, a petitioner must demonstrate that any issues and arguments it raises on appeal have been preserved for Board review, unless the issues or arguments were not reasonably ascertainable. 40 C.F.R. §§ 124.13, .19; *see In re City of Moscow*, 10 E.A.D. 135, 141 (EAB 2001); *In re City of Phoenix*, 9 E.A.D. 515, 524 (EAB 2000), *appeal dismissed per stip.*, No. 01-70263 (9th Cir. Mar. 21, 2002). The Board has frequently rejected appeals where issues that were reasonably ascertainable during the comment period were not raised at that time but instead were presented for the first time on appeal. *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 717 (EAB 2006), *appeal dismissed per stip.*, No. 06-1817 (1st Cir. Aug. 4, 2006); *In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 120-22 (EAB 2005); *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 590-91 (EAB 2004). Assuming that a petitioner satisfies all threshold procedural obligations, the Board then evaluates the petition on its merits to determine if review is warranted. *Indeck Elwood*, 13 E.A.D. at 143.

Ordinarily, the Board will not grant review of an NPDES permit decision unless the permit conditions at issue are based on clearly erroneous findings of fact or conclusions of law or involve important policy considerations that the Board, in its discretion, should review. 40 C.F.R. § 124.19(a); *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 332-33 (EAB 2002) (“*D.C. MS4*”); *In re City of Irving Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 111, 122 (EAB 2001), *pet. for review denied*, *City of Abilene v. U.S. EPA*, 325 F.3d 657 (5th Cir. 2003) (consolidated with *City of Irving v. U.S. EPA*). The Board analyzes petitions for review guided by the caution in the preamble to the Part 124 permitting regulations that the Board’s power of review “should be only sparingly exercised.” Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). This reflects EPA’s policy that favors final adjudication of most permits at the permit issuer’s level. *Id.* at 33,412.

A petitioner seeking review of a permit provision bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a)(1)-(2). In order to show clear error, the petitioner must state its objections to the permit and explain why the permit issuer’s previous response to those objections is clearly erroneous, an abuse of discretion, or otherwise warrants review. 40 C.F.R. § 124.19(a); *see In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 668 (EAB 2001); *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 71-72 (EAB 1998). A petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer’s subsequent explanations. *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005); *accord, In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 666 (EAB 2006).

Finally, a petitioner seeking review of issues that are technical in nature bears a heavy burden because the Board generally gives substantial deference to the permit issuer on questions of technical judgment. *Town of Ashland*, 9 E.A.D. at 667; *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567-68 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999). For technical issues, the Board determines whether the record demonstrates that the permit issuer considered the issues raised in the comments and whether the approach the permit issuer ultimately adopted is rational in light of all of the information in the record. *Dominion Energy*, 12 E.A.D. at 510; *D.C. MS4*, 10 E.A.D. at 348; *NE Hub*, 7 E.A.D. at 568. If the Board is satisfied that the permit issuer gave due consideration to comments received and adopted an approach in the final permit decision that is rational, the Board typically will defer to the permit issuer's position. *NE Hub*, 7 E.A.D. at 568.

V. ANALYSIS

As noted in Part I *supra*, Petitioner questions the adequacy of the permit to protect the City's CSS from inflow during flood events, arguing that the permit lacks certain elements. According to Petitioner, the permit should: (1) prohibit the construction of the drainage project until "the analysis and report on inflow and necessary mitigation has been completed,"⁹ Petition at 2-3; (2) require the Permittee to include a "problem statement" with the April 30, 2010 annual report,¹⁰ *id.* at 3;

⁹ As relief from this alleged deficiency, Mr. Kaiser requests that the permit be modified to include the following language between permit conditions I.C.3 and I.C.4: "the permit[t]ee shall take no action to increase flood levels in Alewife Brook, in particular to construct the drainage relief project heretofore known as Contract 12." Petition at 3, ¶ 1.

¹⁰ As relief, Mr. Kaiser requests that section I.D.5 be modified so that the first annual
(continued...)

(3) provide a schedule for the installation of flap gates or similar flow restrictions to prevent inflow from the Alewife Brook watershed into the City's CSOs during wet conditions, *id.*; and (4) require the Permittee to monitor, and report data from, the Cambridge monitoring gauges, *id.* at 4.

The Board begins its analysis by determining whether the arguments raised in the Petition meet threshold procedural requirements.¹¹ As noted earlier in this decision, a party seeking review must demonstrate, among other things, that any issues and supporting arguments were preserved for

¹⁰(...continued)

report include an "initial statement of the inflow problem in terms of the potential for inflow from Alewife Brook under flood conditions." Petition at 4, ¶ 4.

¹¹ As noted earlier, the City is also participating in this appeal and opposes Mr. Kaiser's Petition. The City's first opposing argument is that the matters on which Petitioner seeks Board review are outside of the Board's jurisdiction. *See* City's Response at 2-5. The City claims that the Petition does not challenge any of the conditions in the permit, that rather the Petitioner is contesting the absence of conditions. *Id.* at 2. The City adds that "[i]nstead of addressing any of the NPDES Permit conditions, the Petition is a misguided attempt to challenge the [drainage] Project, which is outside the scope of the NPDES Permit and therefore is outside the scope of the Board's jurisdiction." *Id.* at 3.

The Board disagrees with the City. The Petition alleges that the permit lacks certain elements and claims that the drainage project will increase local flooding and inflow into the City's CSS. The Board reads these arguments as a challenge to the adequacy and sufficiency of Part I.D.5, and the permit in general. It is only to that extent that the Board will entertain Petitioner's arguments. As the Board has stated in the past, part 124 authorizes the Board to review any condition of the permit decision, 40 C.F.R. § 124.19(a), as well as the permit decision in its entirety. *Circle T Feedlot*, slip. op at 5 n.1, 14 E.A.D. ___ (citations omitted). In addition, the Board entertains challenges that relate to a permit issuer's alleged failure to include permit conditions. *See, e.g., In re Conoco Phillips, Co.*, 13 E.A.B. 768, 800-805 (EAB 2008) (entertaining argument that permitting authority erred by not imposing permit limits to control greenhouse gas emissions); *Indeck Elwood*, 13 E.A.D. at 186 (discussing merits of petitioner's argument that the permit issuer failed to include an emission limit for flouride); *In re Envtl. Disp. Sys.*, 12 E.A.D. 254, 265-67 (entertaining series of challenges to the permit issuer's alleged failure to include various conditions in a permit). Accordingly, the Board rejects the City's argument that the issues raised in the Petition are outside Board jurisdiction.

Board review. That is, that the issues or supporting arguments were raised during the public comment period, unless the issues were not reasonably ascertainable and/or the arguments were not reasonably available. *See supra* Part IV; 40 C.F.R. § 124.13.

A. *Were the Arguments Petitioner Raises Preserved for Board Review?*

The Board's examination of the record reveals that the first argument Petitioner raises was not preserved for Board review. More specifically, Petitioner's argument that the permit should prohibit the construction of the drainage project until "the analysis and report on inflow and necessary mitigation has been completed" was not raised, but was known and could have been raised during the public comment period. Therefore, does not meet threshold procedural requirements.

At no time did Petitioner request that the permit prohibit or delay construction of the drainage project. Instead, Mr. Kaiser generally raised concerns about potential flooding problems associated with the drainage project and the need for a mitigation plan.¹² *See* Comment Letter at 2-4. Even though the inflow study was added to the permit after the public comment period, a request to include a permit condition prohibiting commencement of the drainage project until additional information had been gathered could have been raised during the public comment period.¹³ As the

¹² The City asserted, contrary to Mr. Kaiser's comments that the drainage project would cause flooding problems, that the project would not exacerbate flood conditions in the watershed. *See* Region's Response at 8 (*citing* NPC Chapter 8).

¹³ Notably, the relief Mr. Kaiser requests to address this alleged deficiency is to add a new permit condition between I.C.3 and I.C.4. *See* Petition at 3, ¶ 1. Both of those permit conditions were part of the draft permit, and Mr. Kaiser could have requested the same relief in his comment letter.

Board has noted on numerous occasions, adherence to the requirements in 40 C.F.R. § 124.13 is necessary to ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final. *In re New Eng. Plating*, 9 E.A.D. 726, 732 (EAB 2001); *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249-250 (EAB 1999). Thus, to allow this argument to be raised at this late date would undermine the Agency's longstanding policy that most permit issues should be resolved at the Regional level, and to provide predictability and finality to the permitting process. *E.g., In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 53 (EAB 1995); *Sutter Power Plant*, 8 E.A.D. at 687 ("The intent of these rules is to ensure that the permitting authority * * * has the first opportunity to address any objections to the permit, and that the permit process will have some finality."). Because Mr. Kaiser's request, that the permit include a prohibition on proceeding with construction of the drainage project until certain conditions are met, was not preserved for review, the Board denies review of the permit on this basis.¹⁴

¹⁴ Accordingly, the Board need not address the merits of the request, nor need it address the other arguments Mr. Kaiser raises in connection with this request. *See* Petition at 2-3 (claiming that "EPA has incorrectly represented the flooding consequences of these drainage plans and their intimate connection with approved plans for combined sewer separation," and that "EPA has failed to recognize how these drainage modifications will result in increased local flooding and inflow into the sewer system.").

B. *Did the Petitioner Meet His Burden to Show that the Region Clearly Erred or Abused its Discretion in Not Including in the Permit the Provisions Petitioner Proposes?*

Since the remaining arguments were raised below or relate to the provision the Region modified after the public comment period, the Board proceeds to determine whether Petitioner has met his burden of showing that the Region clearly erred or abused its discretion by failing to include: (1) a problem statement; (2) a schedule for the installation of flap gates or other flow restrictions; and (3) a requirement to monitor and report data from the “Cambridge monitoring gauges.”

1. *Problem Statement*

The next element allegedly missing from the permit is a requirement to include a problem statement in the first annual report required by Part I.D.¹⁵ Petitioner argues that the permit requirement for the inflow study should have specified an “inflow problem statement”¹⁶ * * * as a preliminary to the [inflow] study report the next year.” Petition at 3, ¶ 2. According to Petitioner, “[t]he absence of such a problem statement could undermine the goal of EPA for a meaningful and useful study and report by the [P]ermittee on the subject matter of stream inflow.” *Id.* Petitioner adds that “[a] clear and accurate problem statement is one of the major components in a useful and accurate inflow study to avoid any increase in such inflow and to assure compliance with

¹⁵ Part I.D requires the Permittee to submit a report every year. The first annual report was due April 30, 2010. *See* Permit at 5-6. The assessments required under the inflow study, Part I.D.5, must be submitted with the second annual report, due on April 11, 2011.

¹⁶ Mr. Kaiser does not elaborate on what an “inflow problem statement” should entail.

NM[C]¹⁷#4.” *Id.* In essence, Petitioner implies that the lack of a problem statement compromises the integrity and value of the inflow study.¹⁸

The Region argues that the permit’s requirement for an inflow study contains sufficient parameters to promote the development of useful and accurate information about stream inflow from Alewife Brook. Region’s Response at 17. The Region requests that the Board deny review of this issue because Mr. Kaiser has failed to demonstrate why the absence of such a provision in the permit constitutes clear error. *Id.*

The Board agrees with the Region. Petitioner’s arguments fall far short of showing clear error. As explained earlier in this decision, a petitioner seeking review of technical issues, like the issue here, bears a heavy burden. In order to show clear error a petitioner must do more than simply present a different opinion or alternative theory regarding a technical matter. *Scituate*, 12 E.A.D.

¹⁷ In his Petition Mr. Kaiser refers to NMH#4, which the Board assumes is a typographical error.

¹⁸ Petitioner’s main focus in the Petition seems to be the inclusion of a problem statement with the first annual report, which Petitioner also refers to as the “initial statement.” See Petition at 3, ¶ 2 (*Claims for Review of Certain Sections of the Permit*). In addition to the alleged failure to include a problem statement, the Petition also seems to request that a second item be included in Part I.D.5 of the permit. Specifically, in the section entitled *Petition for Relief with Respect to Permit No. MA0101974*, see Petition at 3-4, Petitioner requests that a “progress report” be included in the third annual report. Petition at 3-4, ¶ 5 (“Insert at the end of Section D.5. ‘The Third Annual Report (due April 30, 2012) shall include a progress report on evaluations of the initial study and any plans for action to seek compliance with NMC#4.’”). Other than this reference to a “progress report” the Petition makes no other reference to this request. To the extent that Mr. Kaiser intended to raise this point as a separate issue on appeal, the Board denies review on the same basis it denies review of the request that a problem statement be included in Part I.D.5.

at 718 (“Clear error or reviewable exercise of discretion are not established simply because the petitioner presents a different opinion or alternative theory regarding a technical matter, particularly when the alternative theory is unsubstantiated.”) (citations omitted); *see also DC MS4*, 10 E.A.D. at 334; *NE Hub Partners*, 7 E.A.D. at 567-68. A petitioner must substantiate its opinion or alternative theory with relevant and credible evidence, and demonstrate that the Region’s decision is clearly erroneous. *See e.g., In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 32 (EAB Sept. 15, 2009), 14 E.A.D. ___ (“[A] petitioner must support its allegations with solid evidence that demonstrates how the permit issuer clearly erred in its decision making.”).

Other than merely expressing his desire that the permit include a problem or initial statement, and a “progress report,”¹⁹ Petitioner has not substantiated his arguments. For instance, Petitioner has not explained what would be included in a problem statement or, more importantly, why the inflow study as currently designed is deficient without a problem statement. Conclusory assertions such as Petitioner’s argument that the absence of a problem statement could undermine EPA’s goal for a meaningful and useful study do not come close to meeting the requisite burden of proof.

Unlike Petitioner, who did not present a reasoned basis for his requested problem statement, the Region does explain why a problem statement is not necessary in this case. *See* Region’s Response at 17-19. The Region points out that the permit already requires a full evaluation of any inflow problems, as well as potential solutions to any such problems. *Id.* at 18. Indeed, the permit requires that the Permittee first determine whether a problem exists (i.e., assessment of potential for

¹⁹ *See supra* note 18.

inflow from Alewife Brook to the CSS through existing structures over a range of flood conditions), and if the study reveals that such is the case, the permit then requires the Permittee to assess the installation of inflow controls (i.e., assessment of cost, feasibility and effectiveness of installing inflow controls). *See* Permit at 6. The Region adds that “the [P]ermittee must document and transmit to the Region the results from these assessments,” and that the information from the assessments “would likely contain information resembling an inflow problem statement, if applicable, in addition to any necessary proposed solutions.” Region’s Response at 18. In fact, the permit requires the Permittee to include in the April 30, 2011 report (the second report) the assessments specified in Part I.D.5.

If the provision requiring an inflow study suffers from any shortcomings, they have not been adequately identified or substantiated in the Petition. Petitioner has not shown that either a problem statement or a progress report is necessary to ensure a successful inflow study. Absent such a showing, the Board is in no position to second-guess the Region’s judgment. Because Petitioner has not shown clear error or an abuse of discretion, the Board declines to review the permit on these grounds.

2. Schedule for the Installation of Flap Gates or Other Flow Restrictions

The next element allegedly missing from the permit is a schedule for the installation of flap gates or inflow controls. *See* Petition at 3, ¶ 3. According to Mr. Kaiser, the permit “should have specified a schedule for flap gates or similar flow restrictions to allow for single-directional overflow only from CSOs and to prevent the reverse directional inflow of Alewife Brook floodwaters into the

CSO and MWRA interceptor system.” *Id.* Mr. Kaiser adds that “[s]uch a requirement would be conditional upon the results of the inflow study in Section D.5.” *Id.*

Mr. Kaiser raised similar concerns in his comment letter where he argued that “the failure to install flap gates on all remaining CSO pipes in Cambridge will result in no reduction in the brook flood inflow through CSO structures into MWRA interceptor sewers” and that “[s]uch flap gates are needed.” Comment Letter at 4. In response to Mr. Kaiser’s concerns about the potential inflow problems and lack of flap gates, the Region modified the permit to require the inflow study, which, as previously noted, requires the City to assess the potential for river inflow into the City’s CSS from the Alewife Brook watershed and to assess the cost, feasibility, and effectiveness of installing inflow controls on the remaining CSO facilities. *See* Permit at 6 (Part I.D.5); RTC at 10-11 (Response to Comment C3). In its response to comments, the Region explained that the information from the inflow study “could establish a solid basis for requiring inflow controls in the future.” RTC at 11.

On appeal, Mr. Kaiser slightly refined his comment that flap gates are needed, requesting that the permit now include a schedule for the installation of flap gates or other inflow controls “conditional upon the results of the inflow study.” Petition at 3, ¶ 3. Essentially, he requests that the permit include a schedule for the installation of inflow controls if the inflow study shows a need for such controls.

The Region opposes this request. In its view, the incorporation of such a schedule is premature, since at this point the scope of any inflow problems, or even if there are any such

problems, is unknown. *See* Region's Response at 19-20. The Region adds that "[i]f the inflow study reveals the need for and feasibility of installing inflow controls on the City's CSO outfalls, the Region could modify the permit to include these requirements." *Id.* at 19.

The Board is not persuaded that the Region clearly erred by not incorporating the provision Mr. Kaiser proposes. First, the Board finds that the Region adequately addressed the concerns Mr. Kaiser raised during the public comment period, and finds no clear error in the approach the Region adopted in response to those concerns. Specifically, the Region adopted a phased approach of first determining whether an inflow problem exists, and if so, evaluating how to control such problem in a feasible and cost effective manner. On appeal Mr. Kaiser does not explain why the approach the Region adopted in response to his comments is clearly erroneous. Rather, although slightly refined (i.e., that the permit include a schedule for the installation of inflow controls, if the inflow study shows they are needed), the appeal continues to echo Mr. Kaiser's desire that the permit incorporate a requirement for the installation of inflow controls. However, neither his comments below nor his appeal shows that such controls are necessary now.

Second, the appeal does not show that the schedules now requested are either required by law or even necessary. Mr. Kaiser does not identify any authority, and the Board is unaware of any, that mandates the permitting authority to include a permit requirement similar to the one Petitioner proposes. In that sense the incorporation of a schedule for the installation of flap gates or other flow restrictions falls within the realm of Agency discretion. *See e.g., City of Attleboro*, slip op. at 40-41, 14 E.A.D. ___ (reviewing permitting authority's decision for abuse of discretion after concluding

that permit issuer had no legal obligation to modify certain permit limitations in the manner permittee suggested). In addition, this matter is technical in nature. As previously noted, the Board generally gives substantial deference to the permit issuer on questions of technical judgment. *Town of Ashland*, 9 E.A.D. at 667; *NE Hub Partners*, 7 E.A.D. at 567-68. Absent a showing that the permit issuer had an obligation to include the requested provision, or that the provision is necessary, the Board has no basis to second-guess the Region's technical determination. Because Petitioner has not shown clear error or an abuse of discretion, the Board declines to review the permit on these grounds.

(3) *Monitoring and Reporting from the "Cambridge Monitoring Gauges"*

The last element Petitioner alleges the permit lacks is monitoring and data collection from the "Cambridge monitoring gauges." On appeal, Mr. Kaiser asserts that the permit should "have recognized the Cambridge monitoring gauges" and "should require that data from these gauges be summarized in the Annual Reports [i.e., Part I.D] to include wet weather conditions and especially major floods." Petition at 3, ¶ 4.

In his comments below, Mr. Kaiser made similar arguments claiming that "[p]roper monitoring should include information both on flooding/rainfall and CSO activity (both discharge and inflow)," and that "Cambridge must calibrate and report regularly on data from [its] two existing stream monitors." Comment Letter at 5. In response to these comments, the Region explained that it was not aware that the City of Cambridge operated and maintained "stream monitors," and

clarified who operates and maintains stream gauges in the watershed.²⁰ RTC at 11 (Response to Comment C6). The Region argued that the permit monitoring requirements “contain sufficient detail to determine compliance with the permit and progress on implementing CSO controls” and that additional monitoring can be required in the future if additional data are needed. *Id.* The Region also noted that the permit requires the City to quantify the frequency and volume of all CSO events, as well as to provide information on precipitation events. *Id.*

The Board finds no clear error in the Region’s response to comments. Indeed, permit condition I.D. requires the Permittee to submit a report every year that includes, among other things, activation frequencies and discharge volumes for each CSO, and precipitation information, including total rainfall, peak intensity, and average intensity. Permit at 5 (I.D.1-.2). Mr. Kaiser’s Petition does not substantively address the Region’s response to comments. As stated earlier in this decision, a petitioner may not simply reiterate comments made during the public comment period, a person seeking review must substantively confront the permit issuer’s response to comments. *Peabody*, 12 E.A.D. at 33. While on appeal Mr. Kaiser claims that the data from the “Cambridge monitoring gauges” are an “essential element in understanding the nature of CSO from Alewife Brook and in rendering a preliminary calculation of the duration and volume of such inflow during a specified storm condition,” Petition at 3, he does not explain what additional information data from these gauges will provide, why such data are necessary, or why the current permit monitoring conditions

²⁰ RTC at 11-12 (Response to Comment C6) (“The Agencies are not aware that Cambridge operates and maintains any ‘stream monitors.’ USGS continues to operate and maintain a stream gauge on Alewife Brook near Arlington, data from which is available in real-time on line. The Mystic River Watershed Association appears to operate a seasonal instream monitor on Alewife Brook.”).

and the Region's explanation in its response to comments fail to address his concerns. In sum, Petitioner does not explain why the response to comments is clearly erroneous or an abuse of discretion. In light of these flaws, the Board declines review of the permit on this basis.

VI. CONCLUSIONS OF LAW

Based on the foregoing discussion, the Board concludes that Petitioner failed to meet his burden of showing that:

1. His request that the permit include a provision prohibiting the construction of the drainage project until certain conditions are met was preserved for Board review; and
2. The Region clearly erred or abused its discretion by not including in the Permit the provisions he identifies in his appeal.

VII. ORDER

The Board denies review of the permit on the grounds Petitioner proposed.

So ordered.²¹

Dated:

August 30, 2010

ENVIRONMENTAL APPEALS BOARD

Anna L. Wolgast
Anna L. Wolgast
Environmental Appeals Judge

²¹ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, and Anna L. Wolgast.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of City of Cambridge, NPDES Appeal No. 09-17, were sent to the following persons in the manner indicated:

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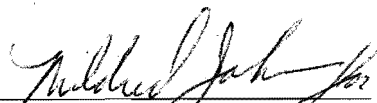
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Dated: AUG 30 2010


Annette Duncan
Secretary