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

In re:	)	
City of Marlborough, Massachusetts Easterly Wastewater Treatment Facility	)	NPDES Appeal No. 04-12
NPDES Permit No. MA-0100498	)	

ORDER DENYING PETITION FOR REVIEW

I. *INTRODUCTION*

In a petition dated October 16, 2004, which it filed with the Board on October 18, 2004,[1] the City of Marlborough, Massachusetts (the "City") seeks review of a final National Pollutant Discharge Elimination System ("NPDES")[2] Permit ("Permit") issued to the City on September 16, 2004. *See* Petition for Review (Oct. 18, 2004) ("Petition"). The Permit, issued jointly by United States Environmental Protection Agency, Region I (the "Region") and the Massachusetts Department of Environmental Protection ("MADEP"),[3] authorizes continued discharges from the City's Easterly Wastewater Treatment Facility ("Facility"). The City raises numerous objections to the Region's permit determination, the bulk of which concern the

[1] Documents are "filed" with the Board on the date they are *received*.

[2] Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources into waters of the United States must have a permit in order for the discharge to be lawful. CWA § 301, 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System is one of the principal permitting programs under the CWA. *See* CWA § 402, 33 U.S.C. § 1342.

[3] Although EPA issues NPDES permits in Massachusetts, the State maintains permitting authority under Massachusetts law. *See* Mass. Gen. Laws ch. 21, § 43 (2004); Mass. Regs. Code tit. 314 (2004). When the Region issues an NPDES permit in Massachusetts, MADEP jointly issues a permit under State law. *Id*.; *see also In re Westborough*, 10 E.A.D. 297, 300 n.2 (EAB 2002).

Permit's total phosphorous seasonal discharge limitations and related conditions. The City also objects to the Region's conduct during the permitting process. In particular, the City argues that the Region did not comply with the Agency's permitting regulations and acted in a biased and arbitrary and capricious manner. In a response filed on December 3, 2004, the Region argues, *inter alia*, that the Board should deny the petition because the City has not satisfied the requirements for obtaining review under 40 C.F.R. § 124.19, that the phosphorous limitations at issue in the appeal are attributable to state certification and are, therefore, not reviewable by the Board,[4] and that the bulk of the City's arguments are irrelevant to the instant proceeding because they relate to a previously withdrawn permit. *See* Response to Petitions for Review of Permit Determination at 17-24 (Dec. 3, 2004) ("Region's Response"). For the reasons stated below, we deny the City's petition for review.

II. *FACTUAL AND PROCEDURAL BACKGROUND*

The Facility is a 5.5 million gallon per day ("mgd") wastewater treatment facility discharging wastewater effluent into Hop Brook. Hop Brook then flows northeast through four instream ponds -- Hager Pond, Grist Mill Pond, Carding Mill Pond, and Stearns Mill Pond ("the ponds") -- until it reaches the Sudbury River. *See* 2004 Fact Sheet at 1-3, Exhibit 10 to Region's Response ("Fact Sheet").[5] The Facility's effluent comprises between 50% and 99% of the flow in Hop Brook, depending on the time of year, and approximately 95% of the phosphorous load. *Id*. at 3. It is undisputed that both Hop Brook and the ponds suffer from eutrophication, driven

[4] State certification is discussed in sections III.A and III.B.2 *infra*.

[5] The exhibits accompanying the Region's Response will be referred to as "R.Exh." followed by the exhibit number.

primarily by nutrients such as phosphorous entering the Brook. *Id*. Eutrophication is a process by which a water body suffocates from receiving more nutrients (such as phosphorous) than it can assimilate. The excess nutrients promote the growth of nuisance algae and aquatic plants that then decay in a process generating strong odors and resulting in lower dissolved oxygen levels. *See id.* When left unchecked, eutrophication is a serious problem that can deplete the oxygen necessary for aquatic life to survive. In the present case, the problems associated with this condition include reduced aesthetic value, odor from decaying vegetation, severely limited usability of the ponds for recreational activities, and the degradation of the system as a suitable habitat for fish and other desirable aquatic fauna. *See* Nutrient Impact Evaluation of Hop Brook in Marlborough and Sudbury, Massachusetts at 1 (Oct. 2000) (R.Exh. 6).

MADEP has designated the portion of Hop Brook into which the Facility discharges as a "Class B" water body. Fact Sheet at 2. Under Massachusetts water quality standards, Class B waters are designated as a habitat for fish, other aquatic life, and wildlife, and for primary and secondary contact recreation. Further, the waters "shall be suitable for irrigation and other agricultural uses and for compatible industrial cooling and process uses * * * [and] shall have consistently good aesthetic value." Mass. Regs. Code tit. 314, § 4.05(3)(b) (2004); Fact Sheet at 2. In addition to water quality criteria specific to Class B waters, Massachusetts imposes minimum narrative water quality criteria applicable to all surface waters. In relevant part, the narrative criteria provide:

> (a) Aesthetics - All surface waters shall be free from pollutants in concentrations or combinations that settle to form objectionable deposits; float as debris, scum or other matter to form nuisances; produce objectionable odor, color, taste or turbidity; or produce undesirable or nuisance species of aquatic life.

> (b) Bottom Pollutants or Alterations - All surface waters shall be free from pollutants in concentrations or combinations or from alterations that adversely affect the physical or chemical nature of the bottom, interfere with the propagation of fish or shellfish, or adversely affect populations of non-mobile or sessile benthic organisms.
> (c) Nutrients - Shall not exceed the site-specific limits necessary to control accelerated or cultural eutrophication * * *.

Mass. Regs. Code tit. 314, § 4.05(5)(a)-(c) (2004).[6] During the permitting process, the Region determined that eutrophication caused by phosphorous loading has resulted in violations of the Massachusetts water quality standards for Hop Brook, including the above-cited narrative water quality criteria. *See* Fact Sheet at 3. The Region found that although both storm water runoff and sediment also released phosphorous into Hop Brook, "the vast majority of phosphorous entering Hop Brook is from the facility." *Id*. at 4. Because of the impairment, and after evaluating technical guidance as well as studies about the effects of phosphorous on Hop Brook, the Region determined that a phosphorous effluent limitation of 0.1 milligrams per liter (" mg/l") for the period of April 1 through November 30 was necessary to achieve the State's water quality standards. *See* Permit Cond. I.A.1 (R. Exh. 13).[7] As stated above, the bulk of the City's arguments in its petition for review relate to this Permit condition.

The Region originally issued the NPDES permit under which the City currently discharges in September of 1988, and that permit expired in 1993. The Region, however,

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[6] The State anti-degradation provisions contain an additional requirement related to cultural eutrophication (i.e., over-enrichment of nutrient levels caused by human activities) requiring that any existing point source discharge containing nutrients in concentrations that encourage eutrophication apply the "highest and best practical treatment to remove such nutrients." Mass. Regs. Code tit. 314, § 4.04(5) (2004).

[7] The Permit also contains a compliance schedule for meeting the phosphorous limit. *See* Permit Cond. I.E.

administratively extended that permit following the City's timely application for a renewed permit in February of 1993.[8] The Region issued a draft permit for the Facility in 1996 and a final permit decision on July 30, 1999 ("1999 Final Permit"). Fact Sheet at 2; Region's Response at 13. Before the 1999 Final Permit went into effect, however, two parties, the City and the Hop Brook Protection Association, timely filed requests for an evidentiary hearing with the Regional Administrator.[9] *See* Petition at 4. On June 13, 2000, citing ongoing attempts to resolve the permit disputes through mediation, the Region withdrew its 1999 Final Permit decision pursuant to its authority under 40 C.F.R. § 124.19(d).[10] *See* Letter from Linda M. Murphy, Director,

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[8] Under 40 C.F.R. § 122.6, an expiring federal permit may continue in effect after its expiration date in circumstances where, as here, the permittee timely files an application for permit renewal and the application is undergoing Agency review.

[9] Procedures for issuing, modifying, revoking, or terminating permits are governed generally by 40 C.F.R. part 124. Prior to June 14, 2000, the rules governing petitions for review of NPDES permitting decisions were set out in 40 C.F.R. § 124.91. These rules did not provide for an appeal directly to the Board. Instead, a person seeking review of an NPDES permitting decision was required to first request an evidentiary hearing before the Regional Administrator. The denial of the request for an evidentiary hearing, or issues arising from the evidentiary hearing, if held, were then appealable to the Board. On May 15, 2000, the Agency published "Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two." *See* 65 Fed Reg. 30,886 (May 15, 2000). The rules, effective June 14, 2000, revised the procedures for decision making with respect to NPDES permits. 40 C.F.R. pt. 124. Among other changes, these rules eliminated evidentiary hearings, providing instead a direct appeal to the Board. Addressing transition issues, section 124.21, as amended by 65 Fed. Reg. 30,886, 30,911, provides that for "any NPDES permit decision for which a request for evidentiary hearing was filed on or prior to June 13, 2000 but was neither granted nor denied prior to that date, the Regional Administrator shall, no later than July 14, 2000, notify the requester that the request for evidentiary hearing is being returned without prejudice. * * * [T]he requester may file an appeal with the Board, * * * no later than August 13, 2000." 40 C.F.R. § 124.21(c)(3) (2000).

[10] Section 124.19(d) provides, in part:

> The Regional Administrator, at any time prior to the rendering of a decision [by the Environmental Appeals Board] to grant or deny review of a permit decision, may, * * * withdraw the permit and prepare a new draft permit under § 124.6

(continued...)

Office of Ecosystem Protection, U.S. EPA Region I, to Mayor William J. Mauro, Jr., City of Marlborough, MA (June 13, 2000) ("2000 Withdrawal Letter") (R. Exh. 19).[11]

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[10](...continued)
addressing the portions so withdrawn. The new draft permit shall proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to this part.

40 C.F.R. § 124.19(d). It is uncontested that the withdrawal took place prior to a Board decision to either grant or deny review of the permit decision.

[11] The Region states that the above-referenced 2000 Withdrawal Letter incorrectly cited to 40 C.F.R. § 124.60(b) as authority to withdraw its 1999 permit decision. *See* Region's Response to Comments at 1 (2004) (R. Exh. 30); Region's Response at 53. As the Region explained in its 2004 Response to Comments:

> At the time the City filed its request for an evidentiary hearing on the permit issued July 30, 1999, EPA's regulations provided, at 124.60(b), that "[t]he Regional Administrator, at any time prior to the rendering of an initial decision in a formal hearing on a permit, may withdraw the permit and prepare a new draft permit under 40 CFR 124.6 addressing the portions so withdrawn." The regulations further provided that such new draft permit "shall proceed through the same process of public comment and opportunity for public hearings as would apply to any other draft permit subject to this part." When EPA revised the NPDES permit regulations in May 2000, the above-cited provision at 40 C.F.R. § 124.60(b) was moved to 40 C.F.R. § 124.19(d).

Region's Response to Comments at 1 (2004) (R. Exh. 30). In its response to this petition, the Region states that the citation constituted harmless error as section 124.19(b) provides for substantively identical withdrawal powers and the incorrect citation did not impact the Region's underlying authority to withdraw the 1999 permit. Region's Response at 53. However, as noted above, because the new regulations did not become effective until June 14, 2000, and because the letter withdrawing the permit is dated June 13, 2000, it does not appear that the Region's citation to 40 C.F.R. § 124.60(b) was incorrect. In any case, even if the citation were incorrect, we agree with the Region that both provisions would have allowed the Region to withdraw the permit decision and that any error in citation would not alter the fact that the Region withdrew the permit.

With regard to the City's request for an evidentiary hearing on the 1999 permit pursuant to the now-superseded regulations providing for such a hearing, the City alleges that the request is still pending because the Region never responded. The City states that "under the circumstances of this case, the City once again reiterates its right to an evidentiary hearing."
(continued...)

On November 13, 2001, the Region and MADEP issued a draft permit for public comment. *See* R. Exh. 20. After receiving comments, the Region, in consultation with MADEP, notified interested parties that they would revise the draft permit and distribute a new draft permit for public comment. *See* Letter from Elizabeth F. Mason, Senior Assistant Regional Counsel, Region I, (Mar. 18, 2002) (R.Exh. 22). The Region and MADEP issued a revised draft permit on December 12, 2003, and sought public comment. *See* Draft Permit (R. Exh. 23). The Region and MADEP held a public hearing on January 14, 2004, at which numerous parties, including the City, participated. *See* Hearing Transcript (Jan. 14, 2004) (R. Exh. 25).

On September 8, 2004, MADEP certified the draft permit in accordance with section 401(a) of the CWA, 33 U.S.C. § 1341(a). *See* Letter from Glen Haas, Director, Division of Watershed Management, MADEP, to Brian Pitt, Chief, Massachusetts NPDES Permit Program Unit, U.S. EPA Region I (Sept. 8, 2004) (R. Exh. 27). Section 401(a)(1) of the CWA requires all NPDES permit applicants to obtain a certification from the appropriate state agency that the permit will comply with all applicable federal effluent limitations and state water quality standards. *See* CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). The regulations provide that EPA may not issue a permit until the state in which the discharge originates grants or waives

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[11](...continued)
Petition at 59. Because the evidentiary request became moot when the permit was withdrawn, however, the City's assertion that its request is still pending is without merit. *See In re City of Port St. Joe*, 5 E.A.D. 6, 9 (EAB 1994) ("The withdrawal of the subject permit clearly moots any request for an evidentiary hearing on it."). To the extent that the City is challenging the May 2000 regulations eliminating evidentiary hearings, the City's challenge is rejected. *See In re USGen New England, Inc. Brayton Point Station*, NPDES Appeal No. 03-12 (Order Denying Motion for Evidentiary Hearing) (EAB, July 23, 2004), 11 E.A.D. ___ (declining to entertain challenge to the validity of the regulations in the context of a permit appeal).

certification. 40 C.F.R. § 124.53(a). Thereafter, on September 16, 2004, the Region and MADEP issued the Permit along with a response to comments. The City's petition for review followed.[12]

III. *DISCUSSION*

A. *Standard of Review*

In proceedings under 40 C.F.R. § 124.19(a), the Board generally will not grant review unless the petition for review establishes that the permit condition in question is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that the Board determines warrants review. 40 C.F.R. § 124.19(a); *see In re Carlota Copper Co.,* NPDES Appeal Nos. 00-23 & 02-06, slip op. at 21 (EAB, Sept. 30, 2004), 11 E.A.D. ___; *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 333 (EAB 2002). The Board analyzes NPDES permits guided by the preamble to the part 124 permitting regulations, which states that the Board's power of review "should be only sparingly exercised." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re Teck Cominco Alaska, Inc.*, NPDES Appeal No. 03-09, slip op. at 21 (EAB, June 15, 2004), 11 E.A.D. ___. In addition, Agency policy favors final adjudication of most permits at the regional level. 45 Fed. Reg. at 33,412; *see also Carlota*, slip op. at 21; *Teck Cominco*, slip op. at 21-22. The petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a)(1)-(2); *see In re Amerada Hess Corp.*, PSD Appeal No. 04-03, slip op. at 11 (EAB, Feb. 1, 2005), 12 E.A.D. ___.

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[12] With the Board's permission, the Conservation Law Foundation filed an amicus brief in this matter. Brief of Conservation Law Foundation, Amicus Curiae (Jan. 28, 2005).

As previously stated, section 401 of the CWA, 33 U.S.C. § 1341, calls upon states to certify (or alternatively to waive or deny certification) that any effluent limits or monitoring requirements in an NPDES permit will comply with the applicable provisions of the CWA and with any appropriate state requirements set forth in such certification. Where the state specifies in such certification that certain permit conditions and limitations are necessary in order to comply with state law and cannot be made less stringent and still comply with state law, the regulations provide that such conditions are considered "attributable to State certification." *See* 40 C.F.R. § 124.53(e); *In re City of Fitchburg*, 5 E.A.D. 93, 98 (EAB 1994). The NPDES regulations expressly provide that "[r]eview and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures" established in the federal regulations. 40 C.F.R. § 124.55(e); *see Roosevelt Campobello Int'l. v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982). Accordingly, as the Board has previously stated, the Agency lacks authority to look behind a state certification issued pursuant to CWA § 401 for the purpose of relaxing a requirement of that certification. *In re Gen. Elec. Co*., 4 E.A.D. 468, 470-71 (EAB 1993).

B. *The City's Petition*

1. *Arguments Related to the 1999 Final Permit*

The City asserts that the Region acted in an arbitrary and capricious manner and failed to follow applicable permitting regulations in its actions leading up to the issuance of the 1999 Final Permit. In particular, the City argues that: (1) the Region improperly refused to accept MADEP's interpretation of water quality standards relating to the phosphorous limitations

(Petition at 30-38); (2) the Region entered into an illegal contract or otherwise colluded with the Hop Brook Protection Association regarding the Permit's phosphorous effluent limitation (*id*. at 38-41); (3) the Region ignored the results of technical assistance reports prepared by an EPA contractor, Tetra Tech, Inc., relating to the need for phosphorous effluent limitations in the City's permit (*id*. at 41-46); and (4) the Region failed to adequately consider or respond to comments on the 1996 draft permit (*id.* at 50).[13]

Upon review, however, the Board concludes that because the above arguments relate to a permit withdrawn by the Region on June 13, 2000, the City's arguments are not relevant to the permit before us.[14] *See In re City of Port St. Joe*, 5 E.A.D. 6, 9 (EAB 1994) (holding that the Board will not review conditions of a withdrawn permit); *cf*. *In re City of Phoenix, Squaw Peak & Deer Valley Water Treatment Plants*, 9 E.A.D. 515, 527 (EAB 2000) (where permit issuance is spread over a number of years, and is comprised of several permit iterations, the permit issuer

[13] Although the City's Petition states that this argument also applies to subsequent permits, the only support provided for this assertion is a table prepared by the City showing alleged inadequacies in the Region's responses to public comments on the 1996 draft permit. Thus, to the extent that this argument applies to the 2004 Final Permit, it lacks the specificity necessary to support review by this Board. *See In re Phelps Dodge Corp.*, 10 E.A.D. 460, 496 (EAB 2002) (petitioner must present issues with sufficient specificity in order to justify review) (citing *In re Steel Dynamics, Inc.,* 9 E.A.D. 165, 235-36 (EAB 2000)).

[14] In its response, the Region states that the City cites to internal MADEP emails and memoranda that relate solely to the 1999 Final Permit. The Region states that these documents were not part of the administrative record for the 1999 Final Permit and argues that the Board should therefore strike references to the documents. Region's Response at 22. However, because the documents relate to the 1999 Final Permit, and because we conclude that the City's arguments relating to that permit are not relevant to the permit currently before us, we need not reach this issue. Similarly, we need not reach the Region's request to strike references to documents relating solely to mediation proceedings for a 1999 state permit issued by MADEP as any arguments related to that permit are not relevant to the issues before us.

need not search through the administrative record for comments submitted by anyone at anytime). The City's arguments in this regard are therefore rejected as a basis to review the 2004 Final Permit.[15]

2. *Arguments Related to Phosphorous Limitation*

The bulk of the City's objections to the September 16, 2004 Final Permit, as well as those listed above relating to the 1999 Final Permit, directly or indirectly concern the Permit's phosphorous limitation of 0.1 mg/l for the period of April 1 through November 30.[16] *See* Final Permit Cond. I.A.1 (R. Exh. 13). In particular, the City argues, *inter alia,* that the Board should review the Permit's phosphorous limitation because: (1) the Region used incorrect treatment standards, Petition at 46-47; (2) the Region failed to follow the Total Maximum Daily Load regulations, *id.* at 47-48; (3) the "'joint permit' process is a sham" because the Region incorrectly interpreted state water quality standards and forced this interpretation on MADEP, *id*. at 48; (4) the Region failed to follow statutory or regulatory mandates by failing to provide adequate support for the phosphorous limitation and failing to consider the costs, *id.* at 49-50; and (5) the Region lacked jurisdiction to issue the phosphorous limitations,[17] *id.* at 51-52.

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[15] To the extent that the City is arguing that the process leading up to issuance of the 1999 Final Permit somehow extended to or tainted the process leading to the 2004 Permit, we find no evidence in the record before us that would support such an assertion, nor does the City make the argument in any convincing fashion or cite to anything that would support it. We also note that the Region denies that its handling of the 1999 Final Permit issuance was in any way improper.

[16] Indeed, the first page of the City's Petition states, in part, that "[t]he issue involved in this appeal relates to the appropriateness of the total phosphorous seasonal discharge limitation (and related requirements) included in Part I.A.1. of the permit." City's Petition at 1.

[17] The City suggests that the Region lacks jurisdiction to impose a phosphorous limitation or address eutrophication issues affecting the above-mentioned ponds downstream from Hop
(continued...)

As stated above, however, on September 8, 2004, the Commonwealth of Massachusetts certified the Permit at issue in this matter in accordance with CWA § 401(a), 33 U.S.C. § 1341(a). The certification letter stated, in part:

> [MADEP] has reviewed the revised draft permit and has determined that the permit conditions will achieve compliance with Sections 208(e), 301, 302, 303, 306, and 307 of the Federal Act, and with the provisions of the Massachusetts Clean Waters Act, * * * and the regulations promulgated thereunder, including the narrative nutrient criteria at 314 CMR 4.05(5).
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> With respect to the existing nutrient impairment of the downstream receiving water, Hop Brook * * *, [MADEP] believes that the draft permit limit of 0.1 mg/L of total phosphorous, expressed as a sixty (60) day seasonal rolling average, is the maximum allowable concentration necessary to meet the designated uses of the receiving water.
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> Further, the final discharge limitations specified in Part I.A. and Part I.B. represent the maximum allowable pollutant loadings and concentrations to meet Massachusetts Water Quality Standards.

Letter from Glen Haas, Director, Division of Watershed Management, MADEP, to Brian Pitt, Chief, Massachusetts NPDES Permit Program Unit, U.S. EPA Region I (Sept. 8, 2004) (R. Exh. 27). Because this letter makes clear that the permit conditions limiting discharges of phosphorous in permit conditions I.A and I.B cannot be made less stringent and still comply with State law, these conditions are "attributable to State certification" and, therefore, may not be

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[17](...continued)
Brook because such ponds are the result of manmade alterations to the area's hydrology. The City, however, provides no support for such a limitation on the reach of the Clean Water Act. *See United States v. Rapanos*, 339 F.3d 447, 453 (6th Cir. 2003) (federal jurisdiction properly asserted over wetlands adjacent to 100-year-old manmade drain that ultimately flows into a navigable water); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (man-made irrigation canals are waters of the United States); *Leslie Salt Co. v. United States*, 896 F.2d 354, 358 (9th Cir. 1990) (Congress intended to regulate local aquatic ecosystems regardless of their origin).

reviewed in this forum. *See In re City of Fitchburg*, 5 E.A.D. 93 (EAB 1994) (denying petitions for review where contested permit conditions were attributable to state certification).[18]

3. *Miscellaneous Legal Objections*

The City raises fourteen of what it refers to as "miscellaneous legal objections" to the Permit. These are:

- EPA's arbitrary attempt to force the City to needlessly expend millions of dollars violates the doctrine of separation of powers.
- EPA is attempting to impose on the City permit conditions for which no statutory standards exist; the attempted imposition of such permit conditions constitutes an impermissible exercise of uncontrolled and untrammeled discretionary authority to engage in lawmaking.
- EPA's actions in connection with the permit conditions to which the City objects constitute *ultra vires* acts.
- EPA's actions in connection with the permit conditions to which the City objects constitute violations of the doctrine of nondelegation.
- EPA's attempt to impose permit conditions that arbitrarily would force the City to spend millions of dollars against its will constitutes an illegal effort to impose a tax or financial burden on the City. It is an unfunded mandate.
- The actions taken by EPA employees to cause the issuance of those permit conditions to which the City objects constitutes impermissible subdelegations of authority.
- EPA's issuance of the permit conditions to which the City objects under the circumstances here violates procedural due process requirements.
- EPA's issuance of the permit violated statutory and regulatory procedural requirements.
- EPA's issuance of the permit conditions to which the City objects is not supported by substantial evidence upon consideration of the entire record.
- EPA, in the issuance of the permit conditions to which the City objects, relied on evidence lacking indicia of reliability and probative value.
- EPA has articulated no intelligible principles to explain how it arrived at the phosphorous limits contained in the final permit.

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[18] The Region has requested that the Board strike references to certain documents cited in the City's Petition in support of the City's objection to the Permit's phosphorous limitation. *See* Region's Response at 24. However, because we conclude that the phosphorous limit is not reviewable in this forum, we need not reach this issue.

- The EPA phosphorous limitations and conditions appear to represent an attempt by EPA to arrive at an impermissible political compromise. [MADEP] permitting officials were subjected to intense political and bureaucratic pressure exerted by regional EPA officials.
- The failure by EPA to identify and explain the basis of the technical reports relied upon and the use of unacknowledged information raises questions of fundamental fairness and seriously undermines the integrity of the permitting process. This is especially so where, as here, the unnecessary expenditure of tens of millions of dollars is at stake.
- EPA's issuance of the Final Permit violates the Paperwork Reduction Act.

Petition at 52-54. The City provides no additional evidence, explanation, or analysis in support of these assertions. As the Board has repeatedly stated, mere allegations of error are insufficient to support review. *See In re Phelps Dodge Corp.*, 10 E.A.D. 460, 496 (EAB 2002) (petitioner must present issues with sufficient specificity in order to justify review) (citing *In re Steel Dynamics, Inc.,* 9 E.A.D. 165, 235-36 (EAB 2000)); *In re City of Moscow,* 10 E.A.D. 135, 172 (EAB 2001) (the Board has often denied review of arguments that are vague and unsubstantiated); *In re Broward County,* 4 E.A.D. 705, 709 (EAB 1993) (denying review where issues are not stated with specificity). Because the City has failed to state its objections with sufficient specificity, review is denied on the above-listed assertions.[19]

4. *Critiques*

Finally, the Petition contains "critiques" of twenty of the Region's responses to comments on the draft permit, many of which are simply vague objections to the Region's

[19] To the extent that the City is challenging the constitutionality of the CWA or its implementing regulations, review is denied. *See City of Irving*, 10 E.A.D. 111, 124 (EAB 2001) (constitutional questions are generally reserved to the federal courts; the Board has repeatedly refused to entertain challenges to the constitutionality of statutes and Agency regulations themselves).

Responses. *See* Petition at 54-62. None of these critiques convince us that the Region's Permit determination was erroneous or otherwise warrants review.

Critiques one and two relate to the City's request for an evidentiary hearing on the 1999 Final Permit and the Region's responses to the City's assertions regarding the failure to act on the request. *Id*. at 54-59. As stated above, however, as well as in the Region's Response to Comments (*see* Response to Comments at 1-2 (R. Exh. 30)), because the Region withdrew the 1999 Final Permit, the evidentiary hearing request became moot. *See supra* note 11.

In Critique three the City characterizes the Region's response as "confusing." Petition at 59. In its comments on the draft permit, the City had questioned the legal authority of MADEP to withdraw the 1999 State permit. The Region responded by explaining MADEP's authority and the Region's rationale for withdrawing the permit. Response to Comments at 2 (R. Exh. 30). It is unclear what the City finds confusing about this response. Further, neither the 1999 Final Permit nor the State's authority to withdraw a state-issued permit is properly before this Board.

Critique five[20] concerns the Permit's phosphorous limitation. In commenting on the draft permit, the City objected to the imposition of the 0.1 mg/l phosphorous limitation and questioned MADEP's authority to require such a limitation. Petition at 59. The City is unsatisfied with the Region's response because, according to the City, the Region fails to recognize that "DEP has

[20] Critique four states: "Response 4 concedes that the state permit appeal is still pending." Petition at 59. This comment lacks the specificity necessary to justify further review.

not yet spoken" on this issue "and is powerless to do so" because the State permit is currently on appeal. Petition at 59. As stated above, however, because the State of Massachusetts certified the draft permit in accordance with section 401(a) of the CWA, 33 U.S.C. § 1341(a), and stated that the 0.1 mg/l phosphorous limitation cannot be made less stringent and still comply with State law, this Board is without jurisdiction to review that limitation. *See supra* Part III.B.2.

In Critique six the City asserts that the Region ignored the City's comment concerning negative impacts on the Hop Brook System from dam construction, shallow water levels, nutrients in the sediment, the lack of pond management, nutrient recycling, and nonpoint sources of nutrients. Petition at 59-60; Letter from Donald L. Anglehart, to David Pincumbe and Glenn Haas, U.S. EPA Region I, Re: Supplemental Comments on Draft Permit, at ¶ 6 (Jan. 26, 2004) (R.Exh. 11) ("City's Comments"). In addition, the City posed the following question: "In light of the demise of the construction grants program, what is the position of EPA and [MADEP] with respect to funding capital and operating expenses related to actions required by the permit?" City's Comments at ¶ 6. The Region responded to this comment by acknowledging that although other factors contribute to the impairment associated with nutrient loadings to the system, a large percentage of the phosphorous in the system originates from the Facility, and that nonpoint sources of phosphorous amount to a small fraction of the total loadings of phosphorous. Response to Comments at 4. In particular, the Region stated, in part:

> Dams, shallow water and nutrient recycling all play a significant role relative to the impairment associated with nutrient loadings to the system. However, a large percentage of the sediment phosphorous that is available for recycling originated from the Treatment Plant discharge and the ponds are significantly shallower than historic depths due to the accumulation of organic material resulting from the nutrient enrichment. While most of the Hop Brook ponds are in the Town of

> Sudbury, non-point sources and storm water sources of phosphorous have been documented to be a small fraction of the total loadings of phosphorous * * *..

Id. With regard to the City's question on funding capital, the Region stated: "It is the position of the agencies that capital and operating expenses should be funded from sewer use charges. A low interest loan may be available from MADEP through the State Revolving Fund (SRF) Program to help reduce the capital cost." *Id.* Upon review, we conclude that the Region provided an adequate response to the City's comment. In particular, we conclude that the Region satisfied its obligation to give this comment serious consideration at the time the Region made the Permit decision. *See* 40 C.F.R. § 124.17(a)(2) (Region must "[b]riefly describe and respond to all significant comments."); *In re Hillman Power Co.*, 10 E.A.D. 673, 696 n.20 (EAB 2002) (response need only be thorough enough to encompass the issue raised by the commenter); *In re NE Hub Partners, L.P.,* 7 E.A.D. 561, 583 (EAB 1998) (response to comments document need only demonstrate that all significant comments were considered even if the Region ultimately disagrees with the substance of the comments.).

In Critique seven, the City asserts that the Region did not adequately respond to its comment questioning whether the record contained adequate support for the Permit's phosphorous limitation. In its comments, the City cited to an October 2000 report prepared by ENSR International for MADEP on Nutrient loadings in Hop Brook ("ENSR Report"). *See* City's Comments ¶ 7. According to the City, the ENSR report shows that the Permit's phosphorous limitation will not be effective in reducing nutrient levels and that other measures such as storm water management would be more effective. *Id.* In response, the Region acknowledged that storm water contributes some phosphorous to the Hop Brook system. The

Region concluded, however, that "the overwhelming majority of phosphorous loading to the Hop Brook system comes from the [City's] discharge and must be controlled before the process of recovery can be complete." Response to Comments at 4-5. We find nothing inadequate in the Region's response, especially since the Region provided commenters with record support for this conclusion in both its response to this and other similar comments as well as in the Fact Sheet.[21] *See, e.g.,* Fact Sheet at 3-8; Response to Comments at 3-7, 10-12. In any case, as stated above, because the phosphorous limitation is attributable to State certification, it is not reviewable in this forum.

Critique eight takes issue with the Region's response to the City's comment on the merits of dam removal, presumably as an alternative to the Permit's phosphorous limitation. According

[21] While the City may disagree with the Region's conclusions, it has not shown that the Region's determination was clearly erroneous. As the Board has previously stated, 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. *In re Washington Aqueduct Water Supply Sys.*, NPDES Appeal No. 03-06, slip op. at 12 (EAB, July 29, 2004), 11 E.A.D. ___ ; *In re Teck Cominco Alaska, Inc.*, NPDES Appeal No. 03-09, slip op. at 22 (EAB, June 15, 2004), 11 E.A.D. ___; *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 334 (EAB 2002). Our review of the administrative record for the Permit confirms that the permitting process complied with all regulatory requirements, and that the Region's decision to include the disputed phosphorous limitation had ample support in the record. *See* Fact Sheet at 3-7. At best, the City has established that some portions of the record might also support alternatives to the Region's decision regarding an appropriate effluent limitation for phosphorous. However, where, as here, the Region's rationale for a permitting decision that is essentially technical in nature is adequately explained and supported by the record, the Board will typically defer to the Region's position. *See In re Peabody W. Coal Co.*, CAA Appeal No. 04-01, slip op. at 16-17 (EAB, Feb. 18, 2005) (where "'the views of the Region and the petitioner indicate bona fide differences of expert opinion or judgment on a technical issue,' deference to the Region's decision is generally appropriate if 'the record demonstrates that the Region duly considered the issues raised in the comments and if the approach ultimately selected by the Region is rational in light of all of the information in the record.'"), 12 E.A.D. ___ (quoting *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567-68 (EAB 1998)).

to the City, the Region failed to provide specific references supporting the need for a high level of nutrient control for the Facility. However, the specific comment the Region was responding to involved the benefits of dam removal. *See* Response to Comments at 5; City's Comments ¶ 8. The Region provided an adequate response to this comment. In particular, the Region stated:

> Removal of the dams would lessen the impact of the nutrient enrichment but would not, in the opinion of the agencies, eliminate the need for a high level of nutrient control from the Treatment Plant. If dams were removed without increased treatment at the Treatment Plant, instead of floating algae, we would expect to see a shift toward periphyton and attached algae growth. With additional treatment, however, dam removal would be beneficial in providing a somewhat greater ability to assimilate phosphorous. In addition, a free flowing stream has the added benefit of improving the habitat of the natural indigenous population of fish that originally inhabited the system. Dam removal/partial breaching should be considered as part of a comprehensive evaluation of sediment management.

Response to Comments at 5. The City has not convinced us that the Region's response was in any way inadequate. In particular, we conclude that the Region satisfied its obligation to give serious consideration to this comment at the time the Region made the Permit decision. *See NE Hub*, 7 E.A.D. at 583. Further, as stated above, because the phosphorous limitation is attributable to State certification, it is not reviewable in this forum.

In Critique ten[22] the City asserts that the Region failed to provide sufficient support for its statement that a phosphorous limitation of 0.1mg/l is necessary in this case. In the response at issue, however, the Region was responding to the City's vague statement that the ENSR Report noted some methodological and technical uncertainties in the permitting process. In response, the Region, citing studies listed in the Fact Sheet, stated that it relied on the best available

[22] Critique 9 states only that the Region's Response is "completely unresponsive." This comment is too vague to justify further review.

information.[23] We see nothing inappropriate or inadequate in this response. Further, as stated above, because the phosphorous limitation is attributable to State certification, it is not reviewable in this forum.

In Critique eleven, the City argues that Footnote No. 2 for Parts I.A.1 and I.A.2. of the Permit should be revised. Petition at 60-61. In particular, it argues that the flow limit should be defined as an average annual flow limit. In response to an identical comment on the draft permit, the Region rejected such a change and stated, in part, that the change would allow an "increase in the amount of sewerage that could be connected to the system, and, consequently, an increased amount of phosphorous loading." Response to Comments at 6. Because the City has failed to indicate why the Region's response to this comment was erroneous or otherwise warrants review, review is denied on this issue.[24] Similarly, we deny review of the City's assertion in Critique twelve (Petition at 61), that the Permit's interim limitation of 0.5 mg/l total phosphorous should be relaxed, because the City fails to indicate why the Region's response to an identical comment raised during the comment period was erroneous. *See* City's Comments ¶ 12; Response to Comments at 6-7.

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[23] *See supra* note 21.

[24] *See Mich. Dep't of Envt'l. Quality v. EPA*, 318 F.3d 705, 708 (6th Cir. 2003) (affirming EAB's denial of review where petitioner merely restated previous objections without sufficiently explaining why the EPA's responses were clearly erroneous); *In re Westborough*, 10 E.A.D. 297, 305 (EAB 2002) (a petitioner must demonstrate why the Region's prior response to its objections was clearly erroneous or otherwise merits review); *In re Envotech, L.P.,* 6 E.A.D. 260, 268 (EAB 1996) (same).

In Critique fifteen,[25] the City asserts that the Region's response to comment 15 "ignores the pending [state] appeals relating to the phosphorous limit, minimizes likely environmental harm that could result from a lower phosphorous limit," and does not explain how it determined that only a moderate increase in sewer rates would be required. City's Petition at 61. The City also argues that the Region ignores the fact that the City has two wastewater treatment plants that will undergo upgrading in the near future and that the Region should be required to provide cost estimates related to the phosphorous-related requirements of the Permit. *Id*. In comment 15 on the draft permit, the City argued that the 0.1 mg/l phosphorous limitation would cause undue financial hardship on the City without improving water quality. City's Comments at ¶ 15. The City suggested a compliance schedule allowing it to it make less expensive improvements "in an effort to achieve a 0.2 mg/l limit for phosphorous." *Id*. The Region responded that a 0.2 mg/l limit would not be sufficient to meet water quality standards and that the 0.1 limit would result in a significant net improvement in water quality. Response to Comments at 7. The Region acknowledged that an increase in sewer rates might be required but that such an increase would be a moderate one. *Id*. In particular, the Region stated:

> The administrative record supports the conclusion that a 0.2 mg/l total phosphorous limit is not sufficiently stringent to achieve water quality standards (see, for example the ENSR Report, Chapter 15, recommending a phosphorous concentration of at least 0.03 mg/l). While we acknowledge that there might be a short term increase in the rate of sediment recycling of nutrients as a result of the new phosphorous limit * * * we believe that there will be a significant net improvement in water quality as a result of the substantial reduction in the point source loading of phosphorous. The agencies believe that the 0.1 mg/l phosphorous limit can be achieved with a moderate increase in the sewer use rates

[25] The critiques are not numbered in consecutive order. Rather, the numbers correspond to the number assigned by the Region to a particular response. For the sake of clarity, we will refer to the critiques using the same numbers used by the City.

> * * * and that the sewer rates will be well within EPA's affordability guidelines * * *.

Id. Upon review, we conclude that the Region adequately responded to the concerns raised in the comment. Further, as stated above, because the phosphorous limitation is attributable to State certification, it is not reviewable in this forum.[26]

In comment 16 on the draft permit, the City expressed concern that a statement in the Fact Sheet referring to the evaluation of sediment remediation alternatives "ignores very real budgetary, legal, and financial constraints." City's Comments ¶ 16. As explained in the Region's Response to Comments, however, no such activities are required by the Permit. Rather, the Region explained that "[b]y imposing a 0.1 mg/l phosphorous limit, and allowing the City to explore alternatives described in the adaptive management approach, the agencies are allowing the City maximum flexibility in choosing how to deal with achieving water quality standards." Region's Response at 8; *see also id.* at 12 (Response #30). In Critiques number sixteen and thirty the City again raises this issue and refers to the Agency's approach as "economic blackmail." Because the City fails to indicate why the Region's responses to comments on this issue were erroneous or otherwise warrant review, review is denied. *See Mich.*

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[26] Further, as the Region points out in its response, the status of the pending state appeal was not ignored but was addressed in Response No. 4. *See* Response to Comments at 3. In addition, in its response to comment 7, the Region concluded that the 0.1 mg/l phosphorous limitation would result in a long-term improvement in water quality. Response to Comments at 4-5. Regarding the City's claim of affordability, the Region explained in response to comments 15 and 20 that in setting permit limits necessary to meet water quality standards, costs and technological considerations are not a factor. *See* Response to Comments at 7, 9; *see also In re New England Plating Co.*, 9 E.A.D. 726, 738 (EAB 2001) (cost considerations play no role in the setting of effluent limits). Thus, the City's assertions that the Region ignored its concerns is rejected.

Dep't of Envt'l. Quality v. EPA, 318 F.3d 705, 708 (6th Cir. 2003) (affirming EAB's denial of review where petitioner merely restated previous objections without sufficiently explaining why the EPA's responses were clearly erroneous); *In re Westborough*, 10 E.A.D. 297, 305 (EAB 2002) (a petitioner must demonstrate why the Region's prior response to its objections was clearly erroneous or otherwise merits review); *In re Envotech, L.P.,* 6 E.A.D. 260, 268 (EAB 1996) (same).

> Finally, in Critiques seventeen and twenty the City states that:
>
> All guidance documents considered or relied on in any way in connection with this permitting process, from the time of filing of the renewal application in February 1993, should be included and indexed in the administrative record, with explanatory annotations as to when they were added to the administrative record, when they were discussed or considered, and by whom.

Petition at 62. However, because this argument was not raised during the comment period, it was not preserved for review.[27] *See* 40 C.F.R. § 124.13; *Westborough*, 10 E.A.D. at 304.

[27] Critique twenty-five states: "[w]e respectfully disagree with the Region's analysis." Petition at 62. Critique twenty-seven states: "[n]ote the statement that the state has identified the technology standard for this facility as 0.2 mg/l." *Id*. And Critique thirty-six states "[n]ote the statement that the antidegradation provision in 314 C.M.R. § 4.04 does not apply in this situation." *Id*. We find these statements too vague to require further review.

IV. *CONCLUSION*

For the reasons stated above, the City's Petition for Review of the Permit is DENIED in all respects.[28]

So ordered.[29]

ENVIRONMENTAL APPEALS BOARD

Dated: March 11, 2005

By: /s/
Kathie A. Stein
Environmental Appeals Judge

[28] The Town of Sudbury, Massachusetts has also filed a petition for review in this matter objecting to certain permit conditions. Petition for Review (Oct. 19, 2004) (designated as NPDES Appeal No. 04-13). The Board will address the issues raised in that petition at a later date.

[29] The panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich and Kathie A. Stein.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Petition for Review in the matter of City of Marlborough Easterly Wastewater Treatment Facility, NPDES Appeal No. 04-12, were sent to the following persons in the manner indicated:

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Date: March 11, 2005

/s/
Annette Duncan
Secretary