

# IN RE SCITUATE WASTEWATER TREATMENT PLANT

NPDES Appeal No. 04-17

## *ORDER DENYING REVIEW*

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Decided April 19, 2006

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### Syllabus

On November 22, 2004, Region I (“Region”) of the United States Environmental Protection Agency (“EPA”) issued National Pollutant Discharge Elimination System (“NPDES”) Permit No. MA0102695 to the Town of Scituate, Massachusetts (“Scituate” or “Town”), pursuant to section 402 of the Clean Water Act (“CWA”), 33 U.S.C. § 1342. The permit authorizes discharges of wastewater from the Scituate Wastewater Treatment Plant (“WWTP”), a 1.6 million gallon-per-day advanced treatment facility that the Town has owned and operated since 1965 and periodically upgraded over the years. The WWTP discharges treated wastewater to a 2,000-foot-long tidal creek that runs through a salt marsh and empties into the Herring River, which leads to the North River and ultimately to the Atlantic Ocean. On December 27, 2004, Scituate filed a petition for review of the NPDES permit pursuant to EPA’s permitting regulations at 40 C.F.R. part 124, requesting on a number of grounds that the permit be remanded to the Region for further consideration.

Held: The petition for review of NPDES Permit No. MA0102695 is denied. The Environmental Appeals Board (“Board”) finds that Scituate made no showing of clear error, abuse of discretion, or important policy matter warranting Board review of the permit. The Board’s primary holdings are as follows:

- (1) Adherence to Permit Issuance Rules. First, Scituate contends that the Region failed to observe with adequate precision the procedural requirements of 40 C.F.R. § 124.15 pertaining to permit issuance. The Board finds otherwise, holding that the Regional Administrator’s authorized representative properly issued the permit, caused it to be served on interested parties by mail, and appropriately notified those parties of the procedures for appealing a permit decision under 40 C.F.R. § 124.19.
- (2) Elimination of Mixing Zone and Dilution Analysis for Toxic Pollutants. Second, Scituate argues that the Region’s decision to eliminate use of the tidal creek as a mixing zone for toxic pollutants such as copper, nickel, and zinc, and thus to deny to Scituate the benefit of the dilution such a zone affords, is clearly erroneous and an important public policy matter necessitating Board review. The Town advances a series of challenges to the Region’s analysis, consisting primarily of objections to the Region’s decisions to impose new, more stringent effluent limits on the WWTP’s discharges of copper, nickel, and zinc, which resulted from the elimination of the mixing zone. The Board holds the following with respect to these challenges:

- (a) Waters of the United States. Scituate presents a belated argument that the tidal creek is not a water of the United States protected under the CWA. The Board finds that this argument was neither preserved for review nor properly presented in this forum and thus denies review on this basis. The Board notes that even if the argument were properly preserved and presented, the Town's failure to introduce evidence of the purportedly artificial construction of the creek, and to distinguish multiple federal cases holding that manmade waters are legitimately protected under the CWA, would have precluded a grant of review on this basis.
- (b) Need for Effluent Limits for Copper, Nickel, and Zinc. Scituate argues that EPA has not provided any documentation that the WWTP is discharging toxic materials in toxic concentrations or that water quality has been adversely affected. The Board finds that, again, this argument was not adequately raised below and thus is not preserved for review here. The Board notes that even if the argument were properly preserved, the Town's failure to come forward with competing effluent data or other technical information of any kind to rebut the Region's data and conclusions in this regard would have precluded a grant of review on this basis.
- (c) Applicable Water Quality Standards. Scituate claims that the Region based the new metals effluent limits on "Gold Book" water quality standards, but the Board again finds that the Town did not mention this issue during the comment period and that the issue is thus not preserved for review. The Board notes further that Scituate's claim is factually in error in any event, as the Region based the effluent limits on other water quality criteria, not Gold Book standards.
- (d) Reliance on Prior Regulatory Approvals. Scituate contends that it had made substantial WWTP upgrades in reliance on EPA and other agency approvals of facility upgrade plans based on the mixing zone. The Board finds that Scituate's arguments in this regard merely restate the Town's comments on this subject rather than attempt to rebut the Region's responses to those comments below. Accordingly, the Board finds no basis for a grant of review on this ground.
- (e) Compliance Through Issuance of Consent Order. Scituate argues that the new effluent limits for copper, nickel, and zinc are unachievable and that the Region recognized this fact by offering to enter into an administrative consent order to assist the Town in complying with the limits. The Board finds otherwise, holding that in issuing the permit the Region did what the facts and law required it to do under these circumstances. Cost and technological con-

siderations are not appropriate factors for consideration in establishing water quality-based effluent limits. The Board holds that the Region's offer to negotiate a consent order merely signaled the Region's awareness of the challenges the Town faces and the Region's willingness to work to find a path for compliance with the CWA that reflects the Town's reality.

- (3) Effluent Limits for Biochemical Oxygen Demand, Total Suspended Solids, and Total Nitrogen. Third, Scituate claims that the Region failed to adequately respond to its comments suggesting relaxation of the effluent limits for carbonaceous biochemical oxygen demand and total suspended solids. The Board finds that these limits are attributable to the state water quality certification for this permit and, thus, challenges to the limits must be adjudicated in state court. Scituate also contends that a concentration limit for total nitrogen discharges is unnecessary, but the Board rejects that claim because it was not raised during the comment period and thus is not preserved for review before the Board.

***Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.***

***Opinion of the Board by Judge Fulton:***

On November 22, 2004, Region I of the United States Environmental Protection Agency ("EPA" or "Agency") issued a National Pollutant Discharge Elimination System ("NPDES") permit to the Town of Scituate, Massachusetts ("Scituate" or "Town"), pursuant to section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342. The permit authorizes discharges of wastewater from the Scituate Wastewater Treatment Plant ("WWTP"), a 1.6 million gallon-per-day advanced treatment facility that the Town has owned and operated since 1965 and physically upgraded in 1980 and 2000. The WWTP discharges treated wastewater to an approximately 2,000-foot-long tidal creek that runs through a salt marsh and empties into the Herring River, which leads to the North River and then to Massachusetts Bay and the Atlantic Ocean.

On December 27, 2004, the Town filed with the Environmental Appeals Board ("Board") a petition for review of the NPDES permit, requesting on several grounds that the permit be remanded to Region I for further consideration. The Board stayed Scituate's appeal at the request of the parties while they entered into settlement negotiations. On June 15, 2005, the parties reported that negotiations had failed and asked the Board to lift the stay. The Board accepted further briefing from the parties at that time, and now, for the reasons set forth below, we deny the petition for review.

## I. BACKGROUND

### A. Statutory and Regulatory Background

In 1972, Congress enacted the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA § 101(a), 33 U.S.C. § 1251(a). To achieve this objective, the Act prohibits the discharge of pollutants into the waters of the United States unless such discharge complies with a CWA permit. CWA § 301(a), 33 U.S.C. § 1311(a). The CWA permitting program of relevance in the instant case is the NPDES program, set forth at section 402 of the CWA, 33 U.S.C. § 1342, and implementing regulations EPA developed at 40 C.F.R. part 122. NPDES permits typically contain provisions that address two central and interrelated CWA elements: (1) water quality standards, which generally are promulgated by states and approved by EPA; and (2) effluent limitations, which are established by EPA on an industry basis or developed in the context of individual permit decisions. *See* CWA §§ 301, 303, 304(b), 33 U.S.C. §§ 1311, 1313, 1314(b); 40 C.F.R. pts. 122, 125, 131.

State water quality standards are comprised of three distinct components: (1) one or more “*designated uses*” (e.g., public water supply, agriculture, primary- or secondary-contact recreation such as swimming or fishing) for each water body or water body segment in the state; (2) “*water quality criteria*” expressed in (a) numerical concentration levels for short (“acute”) or longer (“chronic”) exposure times, and/or (b) narrative statements specifying the amounts of various pollutants that may be present in the water without impairing the designated uses; and (3) an “*antidegradation*” provision, which prohibits discharges that would degrade water quality below that necessary to maintain the “existing uses” (as opposed to “designated uses”) of a water body. CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10-.12. Under section 401(a) of the CWA, EPA may not issue an NPDES permit to a proposed discharger until the state in which the discharger is located “certifies” that the permit contains conditions necessary to assure compliance with the state’s water quality standards. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1); 40 C.F.R. §§ 124.53(a), .55(a)(2). Alternatively, the state may choose to waive such certification. *See* CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 124.53(a).

Effluent limitations, for their part, control pollutant discharges into the waters of the United States by restricting the types and amounts of particular pollutants a permitted entity may lawfully discharge. CWA § 304(b), 33 U.S.C. § 1314(b); 40 C.F.R. § 122.44. Effluent limitations are either “technology-based” or “water quality-based,” whichever is more stringent. CWA §§ 301(b)(1)(C), 302, 33 U.S.C. §§ 1311(b)(1)(C), 1312. Technology-based effluent limitations are generally developed on an industry-by-industry basis and establish a minimum level of treatment that is technologically available and economically achievable for

facilities within a specific industry.<sup>1</sup> CWA §§ 301(b), 304(b), 33 U.S.C. §§ 1311(b), 1314(b); 40 C.F.R. pt. 125, subpt. A; *see* 40 C.F.R. pts. 405-471 (effluent limitations guidelines for various point source categories). Water quality-based effluent limitations (“WQBELs”), on the other hand, are designed to ensure that state water quality standards are met regardless of the decisions made with respect to technology and economics in establishing technology-based limits.

WQBELs, which are at issue in this appeal, are derived on the basis of the second component of water quality standards, i.e., the numeric or narrative water quality criteria for various pollutants established for particular water bodies. Under the federal regulations implementing the NPDES program, permit issuers must determine whether a given point source discharge “causes, has the reasonable potential to cause, or contributes to” an exceedance of the narrative or numeric criteria for various pollutants set forth in state water quality standards. 40 C.F.R. § 122.44(d)(1)(ii). This regulatory requirement, sometimes described as the “reasonable potential analysis,” provides in full:

When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative or numeric criteria within a [s]tate water quality standard, the permitting authority shall use procedures [that] account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water.

*Id.* If a discharge is found to cause, have the reasonable potential to cause, or contribute to such an exceedance, the permit writer must calculate WQBELs for the relevant pollutants. 40 C.F.R. § 122.44(d)(1)(i), (iii)-(vi). The permit writer must then compare the resulting WQBELs to any technology-based effluent limits developed for particular pollutants and incorporate the more stringent set of effluent limitations into the permit. CWA §§ 301(b)(1)(C), 302, 33 U.S.C. §§ 1311(b)(1)(C), 1312; 40 C.F.R. § 122.44(d). Notably, EPA has developed technical guidance for permit issuers to use in developing WQBELs. *See, e.g.*, Office of Water, U.S. EPA, EPA/505/2-90-001, *Technical Support Document for Water Quality-Based Toxics Control* ch. 3 (Mar. 1991); *see also* Office of Water,

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<sup>1</sup> In some cases, no industry-specific effluent limitations guidelines exist. In those instances, permit issuers must use their “best professional judgment” to establish appropriate technology-based effluent limitations on a case-by-case basis. CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1); 40 C.F.R. §§ 122.44, 125.3.

U.S. EPA, EPA-833-B-96-003, *U.S. EPA NPDES Permit Writers' Manual* ch. 6 (Dec. 1996).

### B. *Factual and Procedural Background*

The Town of Scituate owns and operates a municipal sewerage system that collects domestic sewage and other forms of wastewater from residential homes and commercial businesses and transports the wastewater to the Scituate WWTP for treatment. The initial design of the WWTP, which began operations in 1965, provided for treated wastewater to be disposed of by being discharged to the ground through sand beds located near the plant. Scituate upgraded the facility in 1980 and, in 1985, submitted a proposal for further possible improvements, including the diversion of its effluent from the sand beds to an adjacent tidal creek, as the sand beds had begun to lose their ability to absorb the WWTP's discharges. *See* EPA Region I Memorandum in Opposition to Petition for Review attach. E at 2 (Feb. 9, 2005) (EPA Region I, *Draft NPDES Permit No. MA0102695 Fact Sheet 2* (Dec. 22, 2003)) [hereinafter Fact Sheet]; *id.* attach. K at 1-2 (Certificate of the Massachusetts Secretary of Environmental Affairs on the Supplemental Final Environmental Impact Report, Town of Scituate WWTP 1-2 (May 1, 1996)) [hereinafter SFEIR Certificate]. On April 13, 1987, the Massachusetts Department of Environmental Protection ("MADEP") and Scituate entered into a consent order that directed the Town to reevaluate the entire wastewater treatment facility and disposal options for the WWTP's waste streams. *See* SFEIR Certificate at 2.

Subsequently, in 1994, after Scituate had been engaged for a decade or more in a variety of environmental analyses, facilities planning and design studies, and other activities necessary to enlarge and enhance the WWTP's capabilities and performance, MADEP issued another order to Scituate. This order explicitly updated the April 1987 consent order and, in so doing, noted the following:

The hydraulic capacity of the sand beds is frequently exceeded, resulting in overflow of wastewater to a tidal ditch [that] is [a] tributary to the Herring River[,] without approval of [MADEP] and EPA. The Town installed an overflow pipe from the sand beds[,] which allows flows in excess of the beds' capacity to discharge directly to the tidal ditch.

EPA Region I Memorandum in Opposition to Petition for Review attach. J ¶ 3.4, at 2 (MADEP, Administrative Consent Order No. ACO-SE-94-1003 ¶ 3.4, at 2 (Dec. 24, 1994)) [hereinafter 1994 ACO]. MADEP noted that Scituate did not possess a currently valid surface water discharge permit authorizing these kinds of

activities.<sup>2</sup> *Id.* ¶ 3.5, at 2. MADEP then observed that the unpermitted discharges and overflows, which apparently had been ongoing since 1982 or thereabouts, *see* SFEIR Certificate at 1, violated Massachusetts environmental laws and interfered with beneficial uses assigned to the affected waters (i.e., the tidal creek and the Herring River), including: (1) the protection and propagation of fish, other aquatic life, and wildlife; (2) primary- and secondary-contact recreation; and (3) shellfish harvesting. 1994 ACO ¶¶ 3.6-14, at 2-5. These types of beneficial uses are hallmarks of coastal and marine waters characterized as “Class SA” waters under Massachusetts’ water quality standards, *see* Mass. Regs. Code tit. 314, § 4.05(4)(a), and, indeed, both the tidal creek and the Herring River are designated as such waters by the Commonwealth. *See id.* § 4.06(2)(b), (3) & tbl. 29; 1994 ACO ¶ 3.7, at 3; EPA Region I Memorandum in Further Opposition to Petition for Review attach. AA (June 29, 2005) (Metcalf & Eddy, EOE #5512, *Final Facilities Plan and Environmental Impact Report for Wastewater Management*, at I-7-3 (Mar. 1, 1995)) [hereinafter *Facilities Plan/EIR*].

By means of the 1994 ACO, MADEP and Scituate agreed that Scituate would plan, design, and construct a series of WWTP upgrades, including the installation of advanced nitrogen removal and other improvements. 1994 ACO ¶¶ 5.1, 8(k), 9, at 5-6, 8-9. The parties also agreed that the Town would develop and implement a nonpoint source pollution management plan, a drinking water supply corrosion control program, a fish and shellfish quality improvement plan, a growth control plan for new and repaired sewer connections, an infiltration and inflow reduction plan, and a variety of related measures. *Id.* ¶ 5.8, at 7-8. Pursuant to a work schedule set forth in the ACO, Scituate and its consultants developed a facilities plan for the WWTP upgrades, prepared an environmental impact report, filed an application for an NPDES permit, appropriated funding for the project, and took other steps to implement the plant improvements. *See id.* ¶ 5.9, at 8-9.

EPA Region I issued a final NPDES permit to Scituate on January 30, 1997, prior to the completion of all of the facility upgrades (which ultimately occurred in 2000). The final permit authorized the WWTP to discharge treated effluent to the tidal creek. Fact Sheet at 4. The permit established WQBELs for total recoverable copper and whole effluent toxicity using a dilution ratio of 13:1, as calculated at the confluence of the tidal creek and the Herring River. This dilution ratio essentially allowed for use of a 2,000-foot mixing zone over the length of the tidal

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<sup>2</sup> Notably, Region I is responsible for issuing NPDES permits within the Commonwealth of Massachusetts, as the Commonwealth has not received authorization from EPA to administer the NPDES permit program within its borders. However, the Commonwealth nonetheless maintains water pollution control permitting authority under Massachusetts law. *See* Mass. Gen. Laws Ann. ch. 21, § 43. As a general matter, when the Region issues an NPDES permit in Massachusetts, MADEP will jointly issue a water permit pursuant to state law.



creek.<sup>3</sup> *Id.* According to the Region, MADEP established this mixing zone using information derived from the Final Facilities Plan and Environmental Impact Report prepared by Metcalf and Eddy, one of Scituate's environmental consultants. *Id.* MADEP established this mixing zone notwithstanding the fact that the report contained modeling of the WWTP's effluent in the tidal creek and Herring River and acknowledged a lack of dilution during portions of the tidal cycle. The report stated:

Discharge of the effluent from the Scituate [WWTP] to the tidal ditch is considered a discharge into Class SA waters because the ditch is subject to the rise and fall of the tide, and all such waters in Scituate are Class SA. Also, at low tide, the effluent would account for most of the flow in the tidal ditch. There would be little, if any, dilution of the effluent entering the ditch. Therefore, the level of treatment must meet or exceed the water quality criteria for Class SA waters.

Facilities Plan/EIR at I-7-3.

Scituate's 1997 NPDES permit expired on March 31, 2002, and was administratively continued while the Region processed Scituate's application for reissuance of the permit.<sup>4</sup> *See* Fact Sheet at 1. On December 22, 2003, the Region issued a draft version of a new NPDES permit and solicited public comment thereon through January 20, 2004. The draft permit contained, among other things, new WQBELs for total recoverable copper, nickel, and zinc discharges

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<sup>3</sup> A "mixing zone" is an "area[] of water that receive[s] effluent discharges and in which initial dilution occurs." *In re Ketchikan Pulp Co.*, 6 E.A.D. 675, 676 n.3 (EAB 1996). Such a zone "allows a person testing the effluent's effect on the receiving waters to collect samples downstream of the facility rather than at the point of discharge." *Id.* Because the receiving waters act to dilute the effluent, "the effluent could meet water quality standards at the outer edge of the mixing zone even if it would exceed those standards at the point of discharge." *Id.*; *see also In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 469 n.13 (EAB 2004) ("A mixing zone is an area in a water body downstream of the discharge, where the effluent is diluted by the receiving water. Within the mixing zone, [water quality criteria] can be exceeded, but outside of the mixing zone the [criteria] must be met."); *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 338 n.16 (EAB 2002).

<sup>4</sup> NPDES permits are issued for fixed periods of time, not exceeding five years in length. CWA § 402(a)(3), (b)(1)(B), 33 U.S.C. § 1342(a)(3), (b)(1)(B); 40 C.F.R. § 122.46(a). In cases where, as here, EPA is the permit issuer, the conditions of an expired NPDES permit continue in force under the Administrative Procedure Act, 5 U.S.C. § 558(c), until the effective date of a new permit, provided the permittee has submitted a timely and complete application for reissuance of the permit. 40 C.F.R. § 122.6(a); *see In re City of Moscow*, 10 E.A.D. 135, 155 (EAB 2001). Permits "administratively continued" or "extended" in this way remain fully effective and enforceable. 40 C.F.R. § 122.6(b).



that did not reflect use of a mixing zone.<sup>5</sup> The Region noted in this regard that these three metals are toxic to aquatic life at low concentrations and that it had determined, based on discharge monitoring and related data from the Scituate WWTP, that the facility's effluent frequently exceeded water quality criteria for these contaminants. *Id.* at 7, 9-10. Based on this and other factors, the Region decided that a "significant departure" from the conditions of the 1997 permit — i.e., discontinuing use of the mixing zone for toxic pollutants — was warranted. *Id.* at 7.

On January 20, 2004, Scituate filed the only comments submitted on the draft permit. *See* EPA Region I Memorandum in Opposition to Petition for Review attach. F (Letter from Alvin C. Firmin, Vice President, Camp Dresser & McKee Inc., to Doug Corb, EPA (Jan. 20, 2004)) [hereinafter Town Comments]. Among other things, the Town objected to new permit conditions that imposed mass limits on nutrient discharges and "strongly contested" the Region's decision to eliminate the mixing zone/dilution analysis for toxic metals, which resulted in more stringent limits on the WWTP's discharges of copper, nickel, and zinc. *Id.* at 1-3. The Region considered Scituate's comments, made several changes to the permit, and prepared a response-to-comments document. On November 22, 2004, the Region issued the response document along with the final NPDES permit authorizing discharges from the WWTP to the tidal creek. *See id.* attach. G (EPA Region I, *Response to Public Comment on NPDES Permit No. MA0102695* (issued Nov. 2004)) [hereinafter RTC]; Petition for Review ex. A (Dec. 27, 2004) (EPA Region I, NPDES Permit No. MA0102695, Town of Scituate Wastewater Treatment Plant (Nov. 22, 2004)) [hereinafter Permit].

On December 27, 2004, the Town of Scituate filed a petition for review of the final NPDES permit. *See* Petition for Review ("Pet'n"). On February 9, 2005, the Region filed a response to the petition. *See* Memorandum in Opposition to Petition for Review ("Resp. Br."). The parties subsequently attempted to settle their disagreements through negotiation and asked the Board to stay the appeal during that process, which the Board proceeded to do. After seeking and receiving several extensions of the stay, the parties reported on June 15, 2005, that negotiations had failed and asked the Board to lift the stay. On June 17, 2005, Scituate sought leave to file a reply to the Region's response to its petition for review, and

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<sup>5</sup> The new permit limits the average monthly discharges of total recoverable copper to 4 micrograms per liter (" $\mu\text{g}/\text{l}$ "), total recoverable nickel to 8  $\mu\text{g}/\text{l}$ , and total recoverable zinc to 86  $\mu\text{g}/\text{l}$ , as compared to the WWTP's prior NPDES permit from 1997, which limited average monthly copper to 41  $\mu\text{g}/\text{l}$  and contained no restrictions on average monthly nickel or zinc discharges. The new permit also limits maximum daily discharges of total copper to 6  $\mu\text{g}/\text{l}$  and total zinc to 95  $\mu\text{g}/\text{l}$ ; maximum daily total nickel discharges are not restricted but must be monitored and reported on an ongoing basis. By contrast, the prior permit limited maximum daily copper discharges to 41  $\mu\text{g}/\text{l}$  and contained no restrictions on maximum daily nickel or zinc discharges. *See* Permit pt. I.A.1, at 2; EPA Region I Memorandum in Opposition to Petition for Review at 4 n.3 (citing 1997 permit).

on June 29, 2005, the Region opposed Scituate's motion and, in the alternative, requested leave to file a surreply to Scituate's reply. The Board granted the motions for supplemental briefing and accepted both Scituate's reply and the Region's surreply. *See* Petitioner's Reply to EPA's Response ("Reply Br."); Respondent's Memorandum in Further Opposition to Petition for Review ("Surreply Br."). The case now stands ready for decision by the Board.

## II. DISCUSSION

### A. Standard of Review

Under the rules governing this proceeding, an NPDES permit ordinarily will not be reviewed unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants Board review. 40 C.F.R. § 124.19(a); 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 341-43, 345-47, 357 (EAB 2002) (remanding portions of NPDES permit pursuant to section 124.19(a)). The Board's analysis of NPDES permits is 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 [permit issuer's] level." 45 Fed. Reg. at 33,412; *accord In re City of Moscow*, 10 E.A.D. 135, 141 (EAB 2001). Importantly, the burden of demonstrating that review is warranted rests with the petitioner. 40 C.F.R. § 124.19(a); *see In re Town of Westborough*, 10 E.A.D. 297, 304 (EAB 2002).

One of the threshold requirements for demonstrating that review is warranted is establishing that an issue raised on appeal has been properly preserved for review by this Board. Petitioners are directed by the EPA permitting rules to "raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing)." 40 C.F.R. § 124.13. This requirement ensures that permit issuers are notified of objections to and/or concerns about their draft permit decisions in advance of their finalization of those decisions, which provides them a window of time in which to consider and address the perceived problems, provide explanations of their analyses of the problems, and make any changes deemed necessary prior to issuing the final permit decisions. The Board has frequently rejected appeals where issues that were reasonably ascertainable during the comment period were not raised at that time but instead are presented for the first time on appeal. *See, e.g., 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); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 519-20 (EAB 2002); *In re New England Plating Co.*, 9 E.A.D. 726, 736-37 (EAB 2001).

In addition, the Board traditionally assigns a heavy burden in permit appeals to petitioners seeking review of issues that are technical in nature. *See, e.g., Phelps Dodge*, 10 E.A.D. at 517-19; *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 201 (EAB 2000). As we have explained:

[W]hen presented with technical issues, we look to determine whether the record demonstrates that the [permit issuer] duly considered the issues raised in the comments and whether the approach ultimately adopted by the [permit issuer] is rational in light of all the information in the record. If we are satisfied that the [permit issuer] gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, we typically will defer to the [permit issuer's] position. 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.

*In re MCN Oil & Gas Co.*, Order Denying Review, UIC Appeal No. 02-03, slip op. at 25-26 n.21 (EAB Sept. 4, 2002) (citations omitted); *accord In re Three Mountain Power, LLC*, 10 E.A.D. 39, 50 (EAB 2001); *Steel Dynamics*, 9 E.A.D. at 180 n.16, 201; *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).

#### B. *Town of Scituate's Arguments on Appeal*

In its petition for review of the NPDES permit, the Town of Scituate raises three primary issues for resolution by this Board. First, Scituate claims that the Region failed to follow the applicable procedures for issuing a permit and, as a consequence, the permit cannot lawfully take effect. Second, Scituate asserts that the Region erred in establishing new, more stringent WQBELs for copper, nickel, and zinc discharges from the WWTP that do not allow for the use of a mixing zone and the dilution effects such a zone offers. Third, Scituate challenges the NPDES permit's limits on the concentration and mass of carbonaceous biochemical oxygen demand, total suspended solids, and total nitrogen discharged from the WWTP. We address each of these issues in turn below.

##### 1. *Threshold Procedural Issue: Adherence to Permit Issuance Rules*

To begin, Scituate contends that the Region failed to observe with adequate precision several of the procedural requirements set forth in section 124.15 of

EPA's permitting regulations. In particular, the Town alleges that the Regional Administrator did not sign or otherwise issue the NPDES permit decision or notify Scituate, the permit applicant, that a permit decision had been reached, as the Regional Administrator is required to do under the terms of section 124.15. Pet'n at 6. Scituate also alleges that neither the permit itself nor the cover letter accompanying the permit contained an explicit reference to section 124.19 of the permitting rules, which lays out the procedures for appealing an EPA permit decision to the Environmental Appeals Board. *Id.* Accordingly, Scituate argues that the Region erred in issuing the permit and thus the permit cannot take effect. *Id.*

We disagree with Scituate's interpretation of the permitting rules and find no procedural irregularities in the Region's issuance of this permit. First, the rules require that an NPDES permit be issued by the "Regional Administrator" and that the "Regional Administrator" notify the permit applicant of the final permit decision. 40 C.F.R. § 124.15(a). As the Region points out, *see* Resp. Br. at 2, the term "Regional Administrator," as used in these regulations, is defined to mean either the Regional Administrator personally or the "authorized representative" of the Regional Administrator. 40 C.F.R. § 124.2. In this instance, the permit is signed by the Director of the Region's Office of Ecosystem Protection ("OES Director"), *see* Permit at 1, and that person is, in fact, the properly authorized representative of the Regional Administrator in the NPDES permit issuance context. *See* Resp. Br. attach. B (EPA Region I Delegation of Authority, Delegation No. 2-20 (Sept. 29, 1995)) (delegating authority to issue NPDES permits in Region I to OES Director). Accordingly, it was entirely appropriate that the permit was signed and notice given to Scituate and other interested parties through mailing of the permit by the OES Director, and not by the Regional Administrator herself.<sup>6</sup>

The permitting rules also require that the notice of permit issuance "include reference to the procedures for appealing a decision on a[n] \* \* \* NPDES permit under § 124.19 of this part." 40 C.F.R. § 124.15(a). Here, a cover letter mailed with the permit informed recipients that if they wished to contest any provision of the permit, they could submit a petition to the Board as outlined in an enclosure containing "information relative to appeals and stays of NPDES permits." *See* Pet'n ex. A (Letter from Roger Janson, Director, Municipal Permits Branch, EPA Region I, to Anthony Antonello, Director, Department of Public Works, Town of

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<sup>6</sup> It is no impediment to proper fulfillment of the procedural rules that a member of the OES Director's staff signed the cover letter accompanying the permit. *See* Pet'n ex. A (Letter from Roger Janson, Director, Municipal Permits Branch, EPA Region I, to Anthony Antonello, Director, Department of Public Works, Town of Scituate (Nov. 23, 2004)). The Region argues that the provision requiring notification by the Regional Administrator "should be read reasonably to mean that the Regional Administrator or his authorized representative must ensure that notice is given, not that he or she must personally give the notice." Resp. Br. at 2-3. We agree. In this case, the OES Director signed and issued Scituate's NPDES permit and caused it to be served on Scituate by mail, thereby fully complying with the requirements of 40 C.F.R. § 124.15(a).

Scituate (Nov. 23, 2004)). The enclosure in turn contained detailed information regarding the filing of such an appeal, including both a reference to and an actual copy of section 124.19 of the regulations. *See* Resp. Br. attach. D (“Appealing/Contesting NPDES Permits” enclosure); Pet’n ex. A (same, on final three pages). This is entirely adequate to fulfill the notification requirements of the permitting regulations. We find no procedural error on the Region’s part with respect to Scituate’s allegations in this regard, and therefore review on these grounds is denied.

## *2. Elimination of Mixing Zone and Dilution Analysis for Toxic Pollutants*

Next, Scituate argues that the Region’s decision to eliminate use of the tidal creek as a mixing zone for toxic pollutants such as copper, nickel, and zinc, and the concomitant elimination of the dilution effects such a zone affords, is clearly erroneous and an important public policy matter necessitating Board review. Pet’n at 7. In comments on the draft NPDES permit, Scituate “strongly contested” the Region’s decision to abandon the mixing zone, as the elimination of the zone meant that effluent limits for toxic pollutants would no longer be established to protect water quality at the confluence of the tidal creek and Herring River, where dilution could offer some degree of cushioning for relatively higher pollutant loads. *See* Town Comments at 2. Rather, such limits would now be established to protect water quality at the WWTP’s point of discharge into the tidal creek, where, at low tide, no meaningful dilution is available. In response to Scituate’s comments objecting to this change, the Region explained:

Calculating the limits for metals based on the assumption that there is no dilution is appropriate since, as acknowledged in the Town’s Final Facilities Plan and Environmental Impact Report, there is little if any dilution of the effluent entering the receiving water during low tide. Effluent data submitted by the Town (discussed in the Fact Sheet) shows that significant levels of toxic metals are being discharged into the receiving water/tidal creek. The regulatory agencies can no longer base toxic effluent limits on the assumption of dilution that does not exist, since doing this would continue to allow for the accumulation of toxic pollutants, in an extended area, at levels [that] have deleterious effects on aquatic organisms. Thus the continuation of a mixing zone for toxics is not appropriate under [Massachusetts water quality standards].

RTC at 5.

On appeal, Scituate comes forward with a series of challenges to the Region's response. *See* Pet'n at 7-9. Scituate argues, in essence, that: (1) the tidal creek is not a "receiving water" and thus is not a protected water of the United States; (2) the Region failed to provide evidence that the WWTP's discharges have an adverse impact on water quality and thus that new WQBELs are needed for copper, nickel, and zinc; (3) the Region imposed default effluent limitations for these three metals rather than deriving particularized limits using site-specific information for the tidal creek and Herring River; (4) the Town constructed all the recent facility upgrades, which cost millions of dollars to local taxpayers, in reliance on the 1994 ACO and state and federal agency approvals of its facility plans and under the assumption that the WWTP would not need substantial reconstruction to meet new NPDES permit limits; and (5) the Region's suggestion that it issue an administrative order to assist Scituate in complying with the terms of its new permit suggests that even the Agency believes the metals limits are unattainable. *See id.* As discussed below, we do not find merit in any of these arguments.

*a. Tidal Creek as Waters of the United States*

In an argument only obliquely presented in its initial brief but the subject of elaboration in its reply brief, Scituate challenges the Region's treatment of the tidal creek as a water of the United States that must be protected under the CWA. In its initial brief, Scituate asserts that its new NPDES permit authorizes discharges "to the Herring River" and that "the current method [i.e., set forth in the 1997 NPDES permit] by which effluent is transported to the receiving waters received extensive scrutiny and, ultimately, the approval of all permitting agencies." Pet'n at 1, 8-9. In its reply brief, the Town argues more explicitly that the "so-called tidal creek" is "not a receiving water but rather is a simple man-made ditch that transports the treated [e]ffluent to the Herring River." Reply Br. at 3. By emphasizing its view that the tidal creek is a "manmade ditch" rather than a receiving water, Scituate implies that such a water body cannot legally be considered a water of the United States due to its purportedly artificial character. The conclusion that logically flows from this premise (if true) is that the Region erred in treating discharges into the tidal creek as regulable under the CWA and therefore erred in eliminating the mixing zone, as the WWTP's discharges can be regulated under the CWA only when they reach the Herring River (where dilution effects are generally available). As such, this argument is pivotal to Scituate's permit appeal.

In its response to Scituate's petition, the Region contends that the Town "erroneously characterizes" the tidal creek as being the "method by which effluent is transported to the receiving waters," noting that the tidal creek itself is the designated receiving water in this case, not the Herring River. *See* Resp. Br. at 7 n.7. In response to the more refined arguments in Scituate's reply brief, the Region points out that the Town argued in its comments on the draft permit that the creek should retain its designation as a mixing zone. Surreply Br. at 4. The Region ex-

plains that mixing zones can be designated only within receiving waters, so by claiming in its reply that the tidal creek is not a receiving water, the Town “is both contradicting itself and raising a new issue.” *Id.* (citing Office of Water, U.S. EPA, EPA/505/2-90-001, *Technical Support Document for Water Quality-Based Toxics Control* 69-70 (Mar. 1991)). The Region urges the Board to deny review of the permit on the basis of this issue because, in its view, the issue was not fairly raised in Scituate’s comments or as part of its initial appeal but rather was squarely presented only at the reply brief stage of the proceedings. *Id.* at 4-5.

As a general matter, parties that submit comments on draft permits are expected to present their concerns with sufficient precision and specificity as to alert the permitting authorities to the significant issues of interest and provide them an opportunity to respond to those issues prior to finalization of the permits. In this regard, our cases regularly reference the following principle of administrative law: “The effective, efficient and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final.” *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999); *accord, e.g., In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 481 (EAB 2004); *In re Mille Lacs Wastewater Treatment Facility*, 11 E.A.D. 356, 376 (EAB 2004); *In re Gov’t of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 339 (EAB 2002). “In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary.” *In re Union County Res. Recovery Facility*, 3 E.A.D. 455, 456 (Adm’r 1990), *quoted in, e.g., In re City of Marlborough*, 12 E.A.D. 235, 244 n.13 (EAB 2005); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 517-19 (EAB 2002). Such adjustments and explanations form the basis for any appeal of a final permit decision, and thus the accountability of the permit issuer for providing a full, meaningful response to comments is tempered by the commenter’s own responsibility to convey its thoughts clearly in the first instance. As the United States Court of Appeals for the District of Columbia Circuit has explained:

[T]he “dialogue” between administrative agencies and the public “is a two-way street.” \* \* \* Just as “the opportunity to comment is meaningless unless the agency responds to significant points raised by the public,” \* \* \* so too is the agency’s opportunity to *respond* to those comments meaningless unless the interested party clearly states its position.

*Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1520 (D.C. Cir. 1988) (citations omitted), *cert. denied*, 489 U.S. 1078 (1989), *quoted in Mille Lacs*, 11 E.A.D. at 376; *Gov’t of D.C. Storm Sewer Sys.*, 10 E.A.D. at 340; *In re RockGen Energy Ctr.*, 8 E.A.D. 536, 548 (EAB 1999).



In this regard, it is well settled that under the Agency's permitting regulations, permit issuers need not "guess the meaning behind imprecise comments," *In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002), and are "under no obligation to speculate about possible concerns that were not articulated in the comments." *In re New England Plating Co.*, 9 E.A.D. 726, 735 (EAB 2001); *accord, e.g., Teck Cominco*, 11 E.A.D. at 481; *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 229-31 (EAB 2000); *In re Sutter Power Plant*, 8 E.A.D. 680, 694 (EAB 1999). Instead, a petitioner "must have raised during the public comment period the specific argument that the petitioner seeks to raise on appeal; it is not sufficient for the petitioner to have raised a more general or related argument during the public comment period." *Gov't of D.C. Storm Sewer Sys.*, 10 E.A.D. at 339; *accord Mille Lacs*, 11 E.A.D. at 376; *RockGen*, 8 E.A.D. at 547-48. Generalized or vaguely enunciated concerns warrant no formal, particularized response and are not preserved for review on appeal.<sup>7</sup> *See, e.g., Marlborough*, 12 E.A.D. at 242-44 (comment on length of time an interim phosphorus limit will be in effect is inadequate basis for preserving for appeal a challenge to the stringency of the limit); *Teck Cominco*, 11 E.A.D. at 479-82 (comment on Alaska's water quality criteria fails to provide basis for appeal of suspended solids effluent limit that allegedly violates Alaska's antidegradation rule); *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 54-55 (EAB 1995) (comment alleging sludge testing is unnecessary is not sufficient to preserve for appeal the question of legal authority to require any sludge testing).

In this case, Scituate has not identified any passage in its comments where, in keeping with 40 C.F.R. § 124.19(a), it explicitly questioned the Region's legal determination that the tidal creek is a protected water of the United States under the CWA and/or asserted that the creek is merely a (presumably unregulated) "manmade ditch." Our own inspection of Scituate's comments reveals only that, in the first sentence of Comment No. 3, the Town indirectly mentioned its view that the Herring River constitutes the relevant receiving waters here. Town Comments at 2. Scituate presents similar elliptical references to this issue in its petition for review, as described above. *See Pet'n* at 1, 8-9.

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<sup>7</sup> Our prior decisions have noted one narrow exception to this general rule:

In limited circumstances, this Board has considered the merits of an issue not specifically raised in comments below where the specific issue raised in the petition is very closely related to challenges raised during the comment period, and the [permit issuer] had the opportunity to address the concerns in its response to comments.

*In re New England Plating Co.*, 9 E.A.D. 726, 732-33 (EAB 2001) (citing cases). This doctrine has been rarely applied and generally only in circumstances where the permit issuer has actually addressed the closely related concerns in its response to comments. *Teck Cominco*, 11 E.A.D. at 482 n.21; *see, e.g., In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 64 n.9 (EAB 1997); *In re P.R. Elec. Power Auth.*, 6 E.A.D. 253, 257 n.5 (EAB 1995).

Upon consideration, we conclude that Scituate has mischaracterized the permit in its various filings, as the permit clearly states that the Scituate WWTP is authorized to discharge “to receiving waters named Tidal creek to Herring River.” Permit at 1 (emphasis added). Moreover, we agree with the Region that the Town did not clearly raise, during the public comment period or in the petition for review, the specific issue of the tidal creek’s legal status as a water of the United States, despite the fact that this issue was reasonably ascertainable at the outset of these permitting proceedings. Instead, the Town raises this claim for the first time in its reply brief, without any attempt to explain why the Board should consider an issue introduced at such a late point in the proceedings. See Reply Br. at 3. In these circumstances, we will not consider the merits of the issue. By failing to raise the argument in its comments on the draft permit, Scituate failed to preserve the argument for review on appeal. Furthermore, by failing to raise the argument in its petition, Scituate failed to present a timely appeal on this issue. See, e.g., *Marlborough*, 12 E.A.D. at 242-44; *Teck Cominco*, 11 E.A.D. at 479-82; *Steel Dynamics*, 9 E.A.D. at 219-20 n.62; *Sutter*, 8 E.A.D. at 692-95; *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999); *Fla. Pulp & Paper*, 6 E.A.D. at 54-55. The Board will not entertain a claim raised for the first time in a reply brief filed on appeal.

Notably, even if this question had been properly raised and preserved for appeal, we would still deny review on this basis. Scituate has at best merely implied through its arguments that a “manmade ditch” cannot legally be considered a water of the United States under the CWA; it has not supported that position with any evidence that the tidal creek is in fact artificial or any legal precedent that holds similar artificial water bodies to be unregulated under the Act. The Region disputes the notion that the tidal creek is artificial, pointing to a map that shows the creek to be a meandering water that runs through a wetlands area adjacent to the Atlantic Ocean, which in the Region’s view suggests the creek is not wholly manmade. Surreply Br. at 4. Even assuming for the sake of argument that the creek has an artificial origin, however, it bears noting that a large body of federal cases has established that artificially constructed water bodies of various types generally qualify for the protections of the CWA.<sup>8</sup> See, e.g., *Treacy v. Newdunn*

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<sup>8</sup> We are aware that on February 21, 2006, the United States Supreme Court heard arguments in *Rapanos v. United States* and *Carabell v. U.S. Army Corps of Engineers*. The questions presented to the Court in *Rapanos* were: (1) whether the CWA prohibition on discharges to “navigable waters” extends to nonnavigable waters that are not adjacent to a navigable water; and (2) whether the extension of CWA jurisdiction to every intrastate wetland with any sort of hydrological connection to navigable waters (no matter how tenuous or remote) exceeds Congress’ power to regulate interstate commerce. The questions in *Carabell* were: (1) whether CWA jurisdiction extends to wetlands that are hydrologically isolated from any other waters of the United States; and (2) whether the limits on Congress’ authority to regulate interstate commerce precludes an interpretation of the CWA that would extend federal authority to wetlands that are hydrologically isolated from any waters of the United States. Given the nature of the questions presented in these cases, we do not expect that the Court will

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*Assocs., L.L.P.*, 344 F.3d 407, 417 (4th Cir. 2003) (manmade ditches under interstate highway constitute waters of the United States), *cert. denied sub nom. Newdunn Assocs., L.L.P. v. U.S. Army Corps of Eng'rs*, 541 U.S. 972 (2004); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532-34 (9th Cir. 2001) (manmade irrigation canals are waters of the United States); *United States v. Eidson*, 108 F.3d 1336, 1341-43 (11th Cir.) (storm drainage ditch qualifies as water of the United States), *cert. denied*, 522 U.S. 899 & 1004 (1997); *Leslie Salt Co. v. United States*, 896 F.2d 354, 360 (9th Cir. 1990) (“courts have uniformly included artificially created waters in the [federal government’s] jurisdiction under the [CWA]”) (citing cases), *cert. denied*, 498 U.S. 1126 (1991). In light of Scituate’s failure both to make the case that the creek is in fact artificial and to demonstrate why the case law cited above does not lead to the conclusion that the creek, even if artificial, should be considered a water of the United States under the CWA, we would find no basis for a grant of review of the permit on this ground even if the issue had been preserved and timely raised.

b. *Impact on Water Quality/Need for WQBELs for Copper, Nickel, and Zinc*

Next, Scituate takes the position that “EPA has not provided any documentation that the [T]own is discharging toxic materials in toxic concentrations or that water quality has been [adversely affected].” Pet’n at 7. Scituate acknowledges that permit limits can become more rigorous over time, but it claims that there is “[no] evidence whatsoever” in the permitting record “that the current vessel for transport of the effluent (within the mixing zone/ditch) is resulting in adverse impacts of any kind.” *Id.* at 8. In the Town’s view, the Region’s allegedly wholly unsupported decision to impose new WQBELs for copper, nickel, and zinc is arbitrary and capricious, clearly erroneous, and an important public policy concern that warrants review by this Board. *Id.* at 7-9.

The Region interprets these arguments as a challenge to its determinations that there is a “reasonable potential” for the WWTP’s effluent discharges to cause or contribute to exceedances of Massachusetts’ water quality criteria for total recoverable copper, nickel, and zinc, and hence a need for new WQBELs for these pollutants. Resp. Br. at 5. The Region points out that in comments on the draft NPDES permit, Scituate did not raise concerns about the purported amounts of toxic materials being discharged by the WWTP or about such discharges’ alleged effects on water quality in the receiving waters. According to the Region, these issues were reasonably ascertainable during the public comment period and

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(continued)

address the particular issue of concern here — i.e., whether artificially created water bodies both proximate to and having a clear hydrological connection with a navigable water qualify for protection under the CWA.

should have been raised then, in compliance with EPA's permitting rules at 40 C.F.R. § 124.13. Resp. Br. at 6. Because they were not so raised, the Region contends, they have not been preserved for appeal and, thus, review on these bases should be denied. *Id.* (citing *In re New England Plating Co.*, 9 E.A.D. 726 (EAB 2001)).

In reply, Scituate characterizes the Region's position as one based on an unduly narrow reading of the Town's comments. Reply Br. at 2. Scituate argues that it objected in those comments to an EPA-proffered solution to the mixing zone issue — i.e., the construction of a pipe from the existing discharge point to the Herring River — by stating that such construction would be costly, would likely result in significant environmental impacts, and would not change the water quality in the Herring River. *Id.* Based on these comments (and particularly the latter point regarding water quality), the Town argues that it did in fact raise the issue of Massachusetts' water quality criteria and the lack of scientific data in the record to support a need for new metals effluent limits. *Id.* The Town also contends that the Region admitted in its response brief that there is merely a potential for adverse impacts to aquatic organisms in the tidal creek. *Id.* at 4. On this point, Scituate claims that the record is devoid of any data or evidence whatsoever that aquatic organisms even exist in the mixing zone. *Id.* Scituate concludes by arguing that the Region should have conducted a site-specific analysis of potential impacts on the environment, or at least should have explained its position in greater detail, prior to reissuing an NPDES permit with such dramatically altered conditions. *Id.*

In response, the Region asserts that in both its petition and its reply brief, Scituate is raising new issues that were not brought to the Region's attention below, including the purported lack of scientific evidence to support the need for new WQBELs for copper, nickel, and zinc and the allegedly erroneous failure to conduct a site-specific study prior to imposing the more stringent effluent limits. Surreply Br. at 1-2. The Region argues that such issues have not been properly preserved for adjudication in this forum. With respect to Scituate's specific attempt to associate its arguments on appeal with its comments on the draft permit, the Region asserts, "Whether outfall relocation will help the water quality in the Herring River and whether the permit limits are correctly calculated to protect the water quality of the Tidal Creek obviously are different issues." *Id.* The Region observes that outfall relocation is merely one of several compliance options; it is not a condition of the permit and thus is not a proper issue in this permit appeal. *Id.* at 2 n.1. The Region therefore urges the Board to "follow its consistent practice and deny review of the newly raised issues." *Id.* at 2.

In this case, Scituate's comments on the draft permit pertaining to the new WQBELs for copper, nickel, and zinc focused on a purported "unreasonable burden" being placed on the Town after it had recently expended millions of dollars

to upgrade the WWTP in accordance with the 1994 ACO and assorted approvals by regulatory agencies. Scituate commented as follows:

The [T]own's existing NPDES permit was based on a 13:1 dilution factor in the receiving waters (Herring River). The tidal ditch conveying plant effluent to the Herring River was permitted as a mixing zone. The point of discharge for loading calculations was the confluence of the tidal creek and the Herring River. As noted in the Fact Sheet [on the new draft NPDES permit], "The point where dilution is measured for toxic pollutants *has been re-evaluated by EPA during this permit reissuance* (emphasis added) \* \* \* ." The Town strongly contests this re-evaluation and subsequent reduction in dilution[,] which is resulting in increased stringency for copper, nickel and zinc discharges. As noted in the Fact Sheet, the [T]own evaluated alternate discharge methods, including an ocean outfall, during Facilities Planning. The current course of action was selected based on facilities planning, environmental impacts, and approval by the regulatory agencies. Construction of the current facilities and discharge to the current point were implemented under an Administrative Consent Order, ACO-SE-94-1003. The [T]own maintained complete compliance with all terms, conditions and schedule of the ACO. To reverse findings and concurrences leading to a multi-million dollar facility upgrade through discretionary reasoning during the next round of permit reissuance places an unreasonable burden on the Town of Scituate. To further aggravate the situation, EPA representatives verbally indicated that the current dilution would be acceptable if the [T]own were to build a pipe from the current discharge point to the Herring River. Construction of such a pipe would be costly and likely result in significantly more environmental impact during construction (if even allowed) than current practice, with no change in the water quality of the Herring River. \* \* \*

#### Town Comments at 2.

It would be far too great a stretch, on the basis of these comments, to find that Scituate voiced objections to the technical bases for the new metals WQBELs. Indeed, upon examination, we find no mention in the Town's comments of the scientific data underlying the Region's determination that the WWTP's discharges have a reasonable potential to exceed Massachusetts' water

quality criteria for copper, nickel, and zinc. Notably, those data consisted of Scituate's own Discharge Monitoring Report ("DMR") information from October 2001, its 2001 NPDES permit application, whole effluent toxicity ("WET") tests from March 2001 and May 2002, and wastewater studies from 1995, as well as the water quality criteria themselves. *See* Fact Sheet at 9 tbl. & nn.1-4. Instead of challenging these data points as unrepresentative, contaminated, or otherwise flawed in some way, Scituate appeared most troubled by its view that the reduction of dilution effects caused by the Region's elimination of the mixing zone had led to the imposition of the more stringent metals limits. *See* Town Comments at 2 ("The Town strongly contests this re-evaluation and subsequent reduction in dilution[,] which is resulting in increased stringency for copper, nickel and zinc discharges."). Even here, however, Scituate failed to draw any connection between changes in the dilution analysis and the Region's comparisons of actual effluent data to water quality criteria to determine reasonable potential for exceedances. In light of these facts, we hold that the Region was not reasonably alerted during the public comment period to the fact that the Town believed EPA had not "provided any documentation that [Scituate] is discharging toxic materials in toxic concentrations or that water quality has been [adversely affected]," as Scituate now contends on appeal. *See* Pet'n at 7. As the Region rightly claims, Scituate's arguments on this issue have not been preserved for appeal.<sup>9</sup>

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<sup>9</sup> Even if we were to find these objections to be properly before the Board, Scituate's arguments would still fail. As mentioned, the Region relied on DMR data, WET test results, and other information about the concentrations of metals in the WWTP's effluent stream to evaluate whether the facility has a reasonable potential to cause or contribute to exceedances of state water quality criteria. As held above, we proceed on the assumption that the tidal creek is, along with the Herring River, subject to these criteria. The Region concluded that under the 1997 NPDES permit, the tidal creek has become a "toxic mixing zone," as no dilution is available during a portion of each tidal cycle (i.e., at low tide) and the WWTP's discharges frequently exceed acute and chronic water quality criteria for copper, nickel, and zinc. *See* Fact Sheet at 4-7, 9-10. Scituate has not come forward with any competing DMR, WET test, or wastewater data or other technical information of any kind to demonstrate that the Region's conclusions in this regard were erroneous. The Town does not even challenge the critical finding that there is no dilution in the tidal creek at low tide. Instead, the Town merely asserts, without support or counterbalancing evidence of any kind, that the Region did not provide ample scientific documentation of its conclusion that WWTP discharges have a reasonable potential to exceed water quality criteria for copper, nickel, and zinc. The record indicates otherwise, and Scituate's protestation is plainly insufficient as a showing of clear error, abuse of discretion, or other basis for granting review of this permit decision. *See, e.g., In re Carlota Copper Co.*, 11 E.A.D. 692, 720 (EAB 2004) (Board "traditionally defer[s] to the technical expertise of the permit issuer in the absence of compelling or persuasive evidence or argument to the contrary"), *appeal docketed*, No. 05-70785 (9th Cir. Feb. 16, 2005); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 517-19 (EAB 2002) (same); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001) (Board assigns "heavy burden" to petitioners seeking review of technical issues; "clear error or a reviewable exercise of discretion is not established simply because the petitioner presents a difference of opinion or alternative theory regarding a technical matter"). Review would therefore have been denied on this basis even if it had been properly raised on appeal.

c. *Applicable Water Quality Standards*

On a related topic, Scituate argues next that the Region's decision to impose new WQBELs for copper, nickel, and zinc discharges "[was] based on Gold Book Standards, which have been under continuous scrutiny regarding the impact of low level metal concentrations in highly treated effluents." Pet'n at 7. The Region contends, as it did in the foregoing two sections, that the Town's argument regarding these Gold Book criteria was not preserved for adjudication in this forum because Scituate failed to raise it in the comments submitted on the draft permit. Resp. Br. at 6. Scituate does not reply to the Region's contentions in this regard. See Reply Br. at 2-7.

By way of background, under section 304(a) of the CWA, the Agency is required to publish and periodically update ambient water quality criteria that reflect the "latest scientific knowledge" and that can be used by states to develop water quality criteria for application within their borders. 33 U.S.C. § 1314(a). In accordance with section 304(a), EPA published nationwide water quality criteria, known as the "Gold Book Standards," in 1986.<sup>10</sup> See Office of Water, U.S. EPA, Doc. No. EPA 440/5-86-001, *Quality Criteria for Water 1986* (May 1, 1986), available at <http://www.epa.gov/waterscience/criteria/goldbook.pdf>. These standards have since been superseded by more recent versions of the ambient water quality criteria. See, e.g., Office of Water, U.S. EPA, *National Recommended Water Quality Criteria History* (last visited Apr. 2006), available at <http://www.epa.gov/waterscience/criteria/history.htm>.

Based on our review of the Town's comments, we agree with the Region that any complaints pertaining to the Region's alleged use of Gold Book Standards in establishing the new WQBELs have not been preserved for review, as there is no mention whatsoever in Scituate's comments of those Standards, any purported application of those Standards to the reasonable potential analysis in this case, or any technical deficiencies that may or may not be inherent in those Standards. See Town Comments at 2-3. Moreover, we note that the Region did not, in fact, even use the Gold Book Standards in establishing the WQBELs at issue here. Resp. Br. at 6 n.6. Instead, the Region employed nationwide water quality criteria updated in 2002 in calculating the WWTP's effluent limits. See Fact Sheet at 9-10 (using acute and chronic criteria for copper, nickel, and zinc set forth in EPA's National Recommended Water Quality Criteria, 63 Fed. Reg. 68,354, 68,357 (Dec. 10, 1998), and Office of Water, U.S. EPA, Doc.

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<sup>10</sup> EPA and its predecessor agencies have historically issued ambient water quality criteria on a periodic basis, beginning in 1968 with the "Green Book," followed by the "Blue Book" in 1973, the "Red Book" in 1976, and the "Gold Book" in 1986. These "Books" have since been superseded by more recent revised versions of the ambient water quality criteria, which the Agency (less colorfully) now simply publishes as scientific reports and reprints in the *Federal Register*.



No. EPA-822-R-02-047, *National Recommended Water Quality Criteria: 2002*, at 12-13 (Nov. 2002)).

As the Region explains, it developed Scituate's metals limits specifically to meet the "Toxic Pollutants" requirement in the Massachusetts water quality standards, which provides that "[a]ll surface waters shall be free from pollutants in concentrations or combinations that are toxic to humans, aquatic life, or wildlife." Resp. Br. at 5 (quoting Mass. Regs. Code tit. 314, § 4.05(5)(e)). Massachusetts implements this toxics requirement by specifying:

Where [MADEP] determines that a specific pollutant not otherwise listed in [the Massachusetts Surface Water Quality Standards] could reasonably be expected to adversely [a]ffect existing or designated uses, [MADEP] shall use the recommended limit published by EPA pursuant to [s]ection 304(a) of the [CWA] as the allowable receiving water concentrations for the affected waters unless a site-specific limit is established.

Mass. Regs. Code tit. 314, § 4.05(5)(e). According to the Region, copper, nickel, and zinc are not "otherwise listed" in Massachusetts' water quality standards, and no site-specific limits for these pollutants have been developed for the tidal creek, so the Region applied the Agency's recommended limits in Scituate's permit. Resp. Br. at 5. We see no irregularities in the manner in which the Region derived the WQBELs for copper, nickel, and zinc here, and Scituate has given us no basis to conclude otherwise.

In sum, the Town's Gold Book argument is not preserved for review, and even if it had been so preserved, review on this ground would have been denied because the Town failed to raise a legitimate challenge to the Region's basis for development of WQBELs for copper, nickel, and zinc discharges from the WWTP.

#### *d. Reliance on Prior Regulatory Approvals*

Next, in comments on the draft permit, Scituate noted that during the facilities planning process undertaken pursuant to the 1994 ACO, the Town evaluated alternate discharge methods for the WWTP, including situating the plant's effluent outfall on the tidal creek adjacent to the plant or constructing a pipeline to the Herring River or Atlantic Ocean and moving the outfall to one or the other of those locations. *See, e.g.*, Town Comments at 2. Scituate reported that it selected the current method of wastewater disposal, i.e., through the tidal creek to the Herring River, on the basis of that planning process and associated environmental

impact studies and facility approvals from various regulatory agencies.<sup>11</sup> *See id.* The Town claimed that in constructing the new WWTP, it fully complied with all the terms of the 1994 ACO and, thus, “[t]o reverse findings and concurrences leading to a multi-million dollar facility upgrade through discretionary reasoning during the next round of permit reissuance,” as the Region has allegedly done in this case, places an “unreasonable burden” on the Town. *Id.*

The Region responded to these comments by explaining, among other things, that EPA revisits all aspects of NPDES permits every five years, consistent with the CWA’s goal of restoring and maintaining the chemical, physical, and biological integrity of the Nation’s waters. RTC at 5; *see supra* note 4 (explaining that under the CWA, NPDES permit terms may not exceed five years in length). According to the Region, the clear intent of the statute is to ensure that NPDES permit requirements are updated on a regular basis rather than left in effect, unexamined and unchanged, for long periods of time. *See* RTC at 5. The Region asserted that nothing in the facilities planning process or environmental reviews conducted pursuant to the 1994 ACO precluded the establishment of new, more stringent toxics limits under the federal NPDES program. *Id.* at 5-6. Indeed, argued the Region, the Final Facilities Plan and Environmental Impact Report prepared for the WWTP did not purport to establish effluent limits for wastewater discharges at all but rather simply recognized the fact that little or no dilution occurs in the tidal creek at low tide and thus the level of wastewater treatment provided by the Town should meet or exceed the water quality criteria for Class SA waters. *Id.* at 5. In the cycle of the NPDES process giving rise to the permit before us, the Region found documented levels of metals discharges from the WWTP high enough to cause concern about toxicity in the receiving waters, precipitated partly by the fact that the Town’s efforts to reduce toxics in its effluent had not been as successful as anticipated when the 1997 NPDES permit was issued. *Id.* Noting the absence of dilution at low tide to offset toxic discharge effects, the Region explained:

The regulatory agencies can no longer base toxic effluent limits on the assumption of dilution that does not exist, since doing this would continue to allow for the accumulation of the toxic pollutants, in an extended area, at levels [that] have deleterious effects on aquatic organisms. Thus the continuation of a mixing zone for toxics is not appropriate under [Massachusetts water quality standards].

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<sup>11</sup> Accordingly, the final NPDES permit, and this appeal, appear to flow proximately from the Town’s preference to continue discharging into the tidal creek rather than to construct a pipeline that would allow for direct discharge into the Herring River. As discussed in Part II.B.2.e below, we gather that the Region remains open to the pipeline option as an alternate strategy for achieving compliance with the requirements of the CWA, should Scituate, having now witnessed the full implications of continuing to discharge into the tidal creek, wish to reconsider the pipeline option.

*Id.*

On appeal, Scituate argues in essence that it expended millions of taxpayer dollars in reliance on EPA and other agency approvals of the WWTP Facilities Plan, the 1994 ACO, and/or the 1997 NPDES permit, and thus the Board should grant review of the Region's new permit decision because that decision arbitrarily and capriciously imposes WQBELs that are unattainable by the expensive new facility. *See* Pet'n at 7-9; *see also* Reply Br. at 4-7. Scituate claims that EPA itself approved the Facilities Plan and the 1994 ACO governing the WWTP upgrades, Pet'n at 7, and the Town purports to be "amazed" that "the very same agency that issued an Administrative Order approving the mixing zone now has imposed an admittedly unattainable permit term." *Id.* Scituate also claims that in applying to renew its NPDES permit shortly after completion of the upgrades to the facility, it never contemplated that the new permit might contain terms that would require a "massive reconstruction" of a project that had been approved by the regulatory agencies just five years previously. *Id.*

In response, the Region contends that the Town's claims with respect to purported EPA approvals of plans and orders are "demonstrably false," citing various documents that show that MADEP, not EPA, issued the 1994 ACO, and that several state agencies, not EPA, approved the Facilities Plan. Resp. Br. at 15; *see id.* attachs. J-Q. The Region then proceeds to present a lengthy defense on the merits to Scituate's appellate arguments, contending, among other things, that the analysis of dilution effects upon which the 1997 NPDES permit terms and WQBELs were based contained technical errors and, thus, it was appropriate for the Agency to correct those errors in the course of reissuing the NPDES permit this time. *See* Resp. Br. at 13-18.

While we agree with the Region that MADEP and other state agencies, rather than EPA, approved and issued the 1994 ACO and the Facilities Plan, *see* Resp. Br. at 15 & attachs. J-Q, and thus find the portions of Scituate's arguments laying responsibility for these matters at EPA's doorstep to be incorrect, we need not delve into all of the responsive arguments presented by the Region on this front. This is because Scituate's appellate arguments on this topic are mere repetitions of its comments on the draft permit, without any attempt to rebut the Region's specific responses to comments on this issue in any way. As mentioned above, the Region explained in its response to comments document that none of the activities, approvals, or conditions of the Facilities Plan, 1994 ACO, or environmental impact studies established any basis for prohibiting the Agency from setting more stringent WQBELs proposed in the draft NPDES permit and embraced in the final permit. RTC at 5-6. The Region also stated that "it is unreasonable for the Town to say that the EPA and MADEP must ignore the new information regarding lack of success in toxics control and allow a mixing zone, based on MADEP approval of a Town Facilities Plan." *Id.* at 5. Scituate ignores these and the Region's other related responses to comments and chooses instead to simply

repeat that the Region abused its permitting discretion by arbitrarily and capriciously imposing new WQBELs that will cause the Town to alter some facets of the way it treats or discharges wastewater, at great additional expense.

Under the permitting regulations, review may be granted of a permit condition if a petitioner demonstrates that the condition is based on (a) a finding of fact or conclusion of law that is clearly erroneous or (b) an exercise of discretion or important policy consideration that warrants Board review. 40 C.F.R. § 124.19(a). The Board has frequently held in this regard that mere repetition on appeal of comments already addressed by the permit issuer does not meet this standard of review. Instead, to obtain review of a permit decision, petitioners must include specific information in support of their allegations to demonstrate why the permit issuer's response to the petitioner's comments below (i.e., the permit issuer's basis for its permit decision) is clearly erroneous, an abuse of permitting discretion, or otherwise warrants review. *See, e.g., In re Newmont Nev. Energy Inv., LLC*, 12 E.A.D. 429, 470-71, 472, 487-88 (EAB 2005); *In re City of Marlborough*, 12 E.A.D. 235, 239-40 (EAB 2005); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 508-09, 518-19 (EAB 2002). This Scituate has plainly failed to do. Because Scituate has not advanced any reasoned basis in fact, law, or discretion for us to second-guess the Region's decision to impose more stringent WQBELs on the basis of new toxics discharge information, review is denied on this ground.

e. *Compliance Through Consultation and Issuance of Subsequent Administrative Consent Order*

Scituate argues that the new WQBELs for copper, nickel, and zinc are "impossible to achieve" and that the Region expressly acknowledged this by suggesting, in its response to comments, that the Town work with the Region through the vehicle of an administrative consent order to find reasonable ways to achieve compliance with the limits. Pet'n at 8; *see* RTC at 6. Scituate believes that by indicating its willingness to enter into a consent agreement that purportedly will allow some form of noncompliance with the new limits, the Region provides evidence that the limits are not actually necessary. Pet'n at 8. Scituate concludes by claiming that the Region's consent order suggestion "operates to circumvent the legitimate permitting process," "vests EPA with the opportunity to impose additional conditions without the benefit of public comments and notice," and "should not be countenanced." *Id.*

In answer, the Region clarifies that it stated in its response to comments that the new WQBELs will be "difficult," not "impossible," for the WWTP to achieve. Hence, it explained that it has a program in place for working with municipalities to address the task of meeting toxic metals limitations in low- or no-dilution streams in a reasonable manner, through the issuance of administrative consent orders. Resp. Br. at 12; *see* RTC at 6. The Region notes that if any compliance measures are developed in the course of consultation that require environmental

or public review (e.g., under the Massachusetts Environmental Policy Act), such measures would of course undergo the requisite reviews in accordance with applicable law. Resp. Br. at 12 n.11. The Region also contends that it has done in this case only what is environmentally and legally required on the facts before it. The Region claims in this regard that cost and technological considerations may not be considered in establishing WQBELs, so Scituate's arguments stressing the high costs and technological difficulties of achieving the new limits are misplaced. *Id.* at 11-12 (citing *In re Mass. Corr. Inst. Bridgewater*, Order Dismissing Petition for Review, NPDES Appeal No. 00-09, at 10-11 (EAB Oct. 16, 2000)).

Under the CWA, permit limits must be set at the levels needed to meet water quality standards. CWA §§ 301(b)(1)(C), 302, 33 U.S.C. §§ 1311(b)(1)(C), 1312; see 40 C.F.R. § 122.44(d). As discussed in Part II.B.2.b above, the record contains unrebutted evidence that the Scituate WWTP's discharges exceed applicable water quality criteria for copper, nickel, and zinc, and thus the Region incorporated WQBELs for those pollutants into the NPDES permit. The Region did not consider the costs Scituate would incur in attempting to meet these effluent limits, for, as the Region argues, it is well settled that costs and technological considerations are not appropriate factors to consider in the course of establishing WQBELs. Resp. Br. at 11-12; see *In re Town of Westborough*, 10 E.A.D. 297, 312 (EAB 2002); *In re City of Moscow*, 10 E.A.D. 135, 168 (EAB 2001); *In re New England Plating Co.*, 9 E.A.D. 726, 738-39 (EAB 2001); *In re City of Fayetteville*, 2 E.A.D. 594, 600-01 (CJO 1988). Accordingly, we do not find that the Region acted "in callous disregard for the Town's fiscal and environmental welfare," Reply Br. at 6, as Scituate contends. Rather, the Region did what the facts and law required it to do. Its suggestion that it would work with the Town to find reasonable ways to achieve the goals of the CWA in this instance reflects an awareness on the Region's part of the Town's reality and a willingness to continue to work to find a path for compliance with the CWA that appreciates that reality.<sup>12</sup> We do not regard the anticipation of a possible compliance order as an admission by the Region that the permit terms are inappropriate. Such orders are often deployed in circumstances such as these where strict and immediate compliance with permit terms dictated by the CWA may be particularly challenging.

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<sup>12</sup> The ways in which environmental protection mandated by the CWA could be achieved in this case could include, perhaps, the construction of a pipeline and new outfall location on the Herring River, the requirement of enhancements in pretreatment controls for dischargers to the WWTP, or any number of other possibilities. We would assume that if the new pipeline course is pursued, at some point the permit would need to be amended to reflect the new point of discharge. To the extent that Scituate's appeal challenges data, effects, costs, or other factors pertaining to an alternative discharge point of this kind, we reject these arguments as irrelevant. See Pet'n at 3-4, 7-9; Reply Br. at 2, 5-6. The NPDES permit at issue in this case does not contain any terms or conditions regarding such a pipeline, and the pipeline is merely one of several options that may be considered as a means of achieving the WQBELs at issue. Accordingly, these pipeline-related arguments will not be considered in this appeal. See 40 C.F.R. § 124.19(a) (Board has jurisdiction in permit appeals to review conditions of permit decisions).

In short, on the record before us, we find no clear error, abuse of discretion, or other reason to grant review of the Region's permit decision on this ground.

*f. Conclusion Pertaining to the Mixing Zone Issues*

Scituate's appeal is interwoven with repeated claims that the Region arbitrarily exercised its permitting authority in this case and that such unreasonable exercise of power is an important matter of public policy that warrants Board review. For the reasons expressed in the preceding paragraphs, we do not agree. Instead, we find that the Town has failed to carry its burden of demonstrating that the Region erred, acted arbitrarily and capriciously, or abused its discretion in issuing the WWTP's final NPDES permit. Thus, review of the permit is denied on all the foregoing bases.

*3. Effluent Limits for CBOD, TSS, and TN*

As a final challenge, Scituate raises several arguments pertaining to permit conditions that impose mass- or concentration-based effluent limits on carbonaceous biochemical oxygen demand ("CBOD"),<sup>13</sup> total suspended solids ("TSS"), and total nitrogen ("TN") discharges from the WWTP. First, Scituate objects to the Region's response to its comments suggesting changes to permit conditions that impose average monthly mass limits on CBOD and TSS discharges. Scituate claims that the Region's response failed to address the concerns identified in its comments and, as a result, the Region's findings with respect to the CBOD and TSS mass limits are clearly erroneous. Pet'n at 9. Second, Scituate argues that a permit condition imposing a concentration limit on discharges of TN serves no purpose because, in its view, all evidence in the record indicates that the mass limit for TN will ensure water quality criteria are protected regardless of the volume of wastewater flow through the WWTP. *Id.*

*a. CBOD and TSS Limits*

With respect to the CBOD and TSS claims, Scituate commented that the mass limits should be adjusted to an annual rolling average (rather than a monthly average) or eliminated from the permit. Town Comments at 2. Scituate pointed out that the mass limits in the permit are based on the concentration limits (which are 10 milligrams per liter for each pollutant) and the average plant flow (1.6 million gallons per day) and, as a consequence, the limits would be more difficult to meet when actual flow rates exceed the average flow rate. *Id.* at 1-2. The Re-

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<sup>13</sup> This pollutant is also referred to as "BOD" or "BOD<sub>5</sub>" in the briefs and materials in the administrative record. For consistency's sake, we will use the acronym "CBOD" throughout this opinion to indicate carbonaceous biochemical oxygen demand.

gion rejected Scituate's suggested changes to the mass limits, explaining, among other things, the following:

If an annual average flow is used to calculate mass limits, a peak flow which is 1.6 times the design flow could result in a discharge of 213 lbs/day or a 62% increase in [C]BOD or TSS loading[,] which is inconsistent with Massachusetts anti-degradation requirements. In addition, the discharge of [C]BOD and TSS results in impacts on water quality [that] are immediate (e.g., low dissolved oxygen) in the receiving water.

Because of the potential immediate impacts from [C]BOD and TSS, EPA and MADEP determined that it is most appropriate to include concentration and mass limits for [C]BOD and TSS using a monthly average flow, rather than a rolling average. \* \* \* Furthermore, the MADEP has specifically required the monthly average mass limits for [C]BOD and TSS as a condition of the section 401 water quality certification required by the Clean Water Act.

RTC at 3-4.

On appeal, Scituate alleges that the Region's response is inadequate "because the average design flow was used to determine mass limits ( $10 \times 8.34 \times 1.6$  (average annual design flow) = 133[,] which is [the] permit limit)." Pet'n at 9; *accord id.* at 5. Scituate does not elaborate further on this argument. The Region, for its part, asserts that it incorporated the average monthly mass limits for CBOD and TSS into the permit because MADEP required them as conditions of Massachusetts' CWA section 401 water quality certification determination. Resp. Br. at 18. The Region then cites what it labels a "well established" principle that the Board lacks jurisdiction to review permit conditions attributable to state water quality certification decisions. *Id.* at 19 (citing *Roosevelt Campobello Int'l Park Comm'n v. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982); *In re Gen. Elec. Co.*, 4 E.A.D. 468, 470-72 (EAB 1993)). According to the Region, the proper place for adjudication of Scituate's challenge to these limits is a state forum, not this Board. *Id.*

Under EPA permitting rules specifically applicable in the NPDES context, the Agency has provided that "[r]eview and appeals of limitations and conditions attributable to [s]tate certification shall be made through the applicable procedures of the [s]tate and may *not* be made through the procedures in this part." 40 C.F.R. § 124.55(e)(emphasis added). The pivotal jurisdictional question is whether the conditions at issue are "attributable to state certification" — if they



are, section 124.55(e) of the regulations dictates that their legality be adjudicated in a state court rather than by the Board. The term “attributable to state certification” is not defined in the regulations, but the Board has interpreted it as follows:

If the [s]tate’s certification letter communicates the idea that a particular permit requirement is necessary to ensure compliance with a [s]tate water quality standard and cannot be made less stringent and still comply with the standard, the permit requirement is said to be “attributable to [s]tate certification.” \* \* \*

If, on the other hand, the certification letter leaves open the possibility that the permit condition could be made less stringent and still comply with the [s]tate water quality standard, the permit condition is not “attributable to [s]tate certification” and is subject to further challenge with the Agency pursuant to the procedures in 40 C.F.R. part 124.

*In re D.C. Dep’t of Public Works*, 6 E.A.D. 470, 474 (EAB 1996) (citing *In re Boise Cascade Corp.*, 4 E.A.D. 478, 483 n.7 (EAB 1993); *In re Gen. Elec. Co.*, 4 E.A.D. 468, 471-72 (EAB 1993)). In other words, “the regulations only bar review where the petitioner argues that the permit’s conditions *should be less stringent*, but the state certified that the conditions *may not be made less stringent*.” *In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 488 (EAB 2004).

This fact pattern is precisely the situation we are confronted with today. Scituate contends that the mass-based permit limits for CBOD and TSS discharges should be made less stringent or eliminated completely, but Massachusetts certified that these particular conditions are necessary to achieve the Commonwealth’s water quality standards. In its CWA section 401 water quality certification letter to EPA, MADEP stated that it was imposing the monthly mass limits for CBOD and TSS as state certification requirements, pursuant to the Commonwealth’s surface water quality antidegradation provision that governs the protection of existing uses of water bodies. Resp. Br. attach. S, at 1-2 (Letter from Glenn Haas, Director, Division of Watershed Management, MADEP, to Brian Pitt, Chief, Massachusetts NPDES Permit Program Unit, EPA Region I, at 1-2 (Nov. 2, 2004)) [hereinafter Water Quality Certification Letter]. The antidegradation provision provides, “In all cases[,] existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.” Mass. Regs. Code tit. 314, § 4.04(1). There is no intimation in Massachusetts’ letter that the mass-based limits could be made less stringent or eliminated and still ensure water quality would not degrade. *See* Water Quality Certification Letter at 1 (stating that MADEP “is requiring the following conditions in the permit as state certification requirements: \* \* \* [m]ass monthly limits for [CBOD] and [TSS]” pur-

suant to Mass. Regs. Code tit. 314, § 4.04(1), the state antidegradation requirements). Therefore, the CBOD and TSS mass limits in Scituate's permit can fairly be labeled as "attributable to state certification," and, as the Region rightly argues, the Board has no jurisdiction to review them. Resp. Br. at 19; *see Gen. Elec.*, 4 E.A.D. at 470-73 (denying review of whole effluent toxicity testing requirements that are "attributable to state certification"); *In re Champion Int'l Corp.*, 3 E.A.D. 309, 311-14 (CJO 1990) (denying review of dioxin limit that is "attributable to state certification"); *see also Boise Cascade*, 4 E.A.D. at 483 n.7 (holding that because of ambiguity in certification letters, dissolved oxygen permit conditions cannot be deemed "attributable to state certification"). Review is thus denied on this basis.

#### b. TN Limit

With respect to Scituate's claim that the concentration limit for TN is unnecessary and should be removed from the permit, the Region argues that Scituate did not comment on this issue during the public comment period and thus may not raise it for the first time on appeal. Resp. Br. at 19-20. The Region argues that this issue was reasonably ascertainable during the draft permit stage of the permitting proceedings and that, by failing to raise it in comments on the draft permit, Scituate lost its opportunity to challenge the TN limit in subsequent proceedings. *Id.* (citing 40 C.F.R. §§ 124.13, .19(a); *In re New England Plating Co.*, 9 E.A.D. 726 (EAB 2001)).

As mentioned above, petitioners are required to raise all reasonably ascertainable issues during the public comment period "in order to give the permit issuer the opportunity to make timely and appropriate adjustments to the permit determination or include an explanation of why the requested changes are not necessary." *New England Plating*, 9 E.A.D. at 736; *see In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 120-23 (EAB 2005); *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 590-91 (EAB 2004). Issues not so raised are not preserved for appeal, as the "important policy of providing for efficiency, predictability, and finality in the permit process" would be undermined were such issues accepted as legitimate bases for appeal. 9 E.A.D. at 737; *see In re City of Marlborough*, 12 E.A.D. 235, 244 n.13 (EAB 2005); *In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 479-82 (EAB 2004). It does appear that Scituate failed to abide by this well-established principle. *See* Pet'n at 1-2, 4-5, 9-10. Accordingly, we deny review on this basis.

### III. CONCLUSION

For the foregoing reasons, the Town of Scituate's petition for review of NPDES Permit No. MA0102695 is denied.