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

In the Matter of:	)	
Town of Newmarket Wastewater Treatment Plant	)	NPDES Appeal No. 12-05
NPDES Permit No. NH0100196	)	

RESPONDENT REGION 1'S OPPOSITION TO PETITIONERS' MOTION FOR RECONSIDERATION

Respectfully submitted,

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INTRODUCTION

Although Petitioners use their Motion for Reconsideration to express their disagreement with the Board over the outcome of this proceeding, including the precise manner and level of detail in which the case was resolved, Petitioners do not "bring to the attention of [the Board] clearly erroneous factual or legal conclusions" to warrant reconsideration. *In re Southern Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992). They, instead, merely restate, repackage, and repurpose their existing arguments, in addition to making new ones. This misapprehends the purpose of a reconsideration motion, where "[a] party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider." *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 99-8 through 99-72, at 3 (EAB Apr. 10, 2000) (Order Denying Motions for Reconsideration). Petitioners' Motion largely consists of improper attempts to reargue in more convincing fashion issues that the Board has already disposed of in its final decision not to review the permit. Petitioners, in addition, attempt to advance facts and arguments that should have been set forth with specificity in their Petition, but were not, and, accordingly, were not preserved. Finally, the various issues Petitioners detail in their Motion and claim the Board or Region either misunderstood or overlooked were indeed understood and considered, but EPA simply came to different conclusions as to their import and meaning, which is a perfectly acceptable, even commonplace, outcome where an expert agency is evaluating scientific data and making predictions against a backdrop of uncertainty. Petitioners remain fixated on the past—their Motion is, in essence, a summary restatement of their Petition—while consistently failing to grapple with the specific reasoning and rationales used by the Board to deny review of the

Region's permit decision. As a consequence, Petitioners fail to demonstrate manifest error of fact or law. The Motion must therefore be denied. *Southern Timber*, 3 E.A.D. at 889.

ARGUMENT

1. Petitioners' Claim That the Board Relied on Generalized and Conclusory Analyses in Upholding the Region's Permitting Determination Regarding Ambient TN Thresholds is Unsubstantiated and Does Not State Grounds for Reconsideration

Petitioners argue that the Board clearly erred by concluding that a "water quality threshold of no more than 0.25-0.30 mg/l TN is necessary to protect eelgrass habitat in the Lamprey River and Great Bay Estuary." *Mot.* at 4. Petitioners declare that the Board's decision was not rational "in light of all the information in the record" or otherwise supported by the record because the Board arrived at its decision by relying on "conclusory statements" and "general averments" by EPA while rejecting countervailing scientific and technical "facts" regarding the nitrogen targets in the Great Bay Nutrient Report, which Petitioners claim amount to "specific evidence relevant to Great Bay." *Id.* at 4-5 (referencing arguments based on Region's FOIA responses and deposition testimony of NHDES staff regarding whether the Great Bay Nutrient Report was based on a cause-and-effect demonstration).

The filing of a motion for reconsideration "should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions." *In re Ariz. Mun. Storm Water NPDES Permits*, NPDES Appeal No. 97-3, at 2 (EAB Aug. 17, 1998) (Order Denying Motion for Reconsideration); *accord In re Hawaii Elec. Light Co.*,

Inc., PSD Appeal Nos. 97-15 through 97-22, at 6 (EAB Mar. 3, 1999) (Order Denying Motion for Reconsideration). It is apparent that Petitioners hold strong opinions about the merits of the Board's decision, but a party cannot meet the threshold for reconsideration by simply attaching arbitrary labels to the record positions of the parties, and then holding up those subjective opinions as if they were factual evidence capable of supporting a finding of manifest error of fact or law on the part of the Board. While Petitioners may view their positions as "documented," "specific" and "relevant" and regard EPA's as "conclusory" and "general," these rhetorical characterizations provide no meaningful basis for the Board to revisit its decision, and moreover, disregard the fact that virtually all of Petitioners' positions, their 'documented specificity' and purported 'relevance' aside, were vigorously disputed below. *See*, *e.g.*, Docket # 23.00 (Region 1's Mem. in Opp'n to the Pet. for Rev.); Docket #23.01 (Appendix A); and Docket # 23.02 (Appendix B). Furthermore, Petitioners' claim is devoid of a single citation demonstrating where its criticisms are actually manifested in the Board's opinion.[1] Similarly, Petitioners do not detail a solitary instance of how exactly the Region's determinations meet their subjective definitions of "conclusory" and "general." Petitioners have simply restated their allegations from the Petition, only this time in more generalized (and even less convincing) fashion. They have, accordingly, not stated any grounds for reconsideration. *In re D.C. Water & Sewer Auth.*, NPDES Appeal Nos. 05-

[1] Petitioners exhort the Board to "reference specific evidence *relevant to Great Bay* that supports EPA's conclusion that a .30 mg/l TN is *necessary to protect eelgrass habitat*," *Mot.* at 4, but never explain why, for example, NHDES and EPA analyses of actual water quality data from the Great Bay estuary are any less "specific" to Great Bay than Petitioners' or how information drawn from EPA technical guidance and academic literature are not "relevant" to Great Bay within the meaning of 40 C.F.R. § 122.44(d)(1)(vi)(A).

02, 07-10, 07-11, and 07-12, at 3-5 (EAB Apr. 23, 2008) (Order Denying Motion for Reconsideration) (explaining that while the permittee clearly disagreed with the Board's conclusion, the permittee had not articulated any clear error in the Board's legal or actual conclusions, but was simply rearguing assertions previously considered and rejected by the Board); *see also In re Envtl. Disposal Sys., Inc.*, UIC Appeal No. 07-03, at 5-8 (EAB Aug. 25, 2008) (Order Denying Motion for Reconsideration and Granting Stay) (concluding that the motion for reconsideration simply reiterated arguments previously considered and rejected by the Board and did not identify any error warranting reconsideration).[2]

2. Petitioners' Claim That the Board Erred in Concluding Petitioners Failed to Provide Specific Record Citations in Their Petition Does Not Constitute Grounds for Reconsideration

Petitioners contend that the Board erred in finding that Petitioners failed to provide specific record citation to support their claims regarding SAB recommendations and the alleged flaws in the Great Bay Nutrient Report, claiming that the relevant citations and supporting documentation were provided over the course of the proceedings in its various submissions to the Board. *Mot.* at 5-6.

Petitioners' argument simply misses the point. It was incumbent on Petitioners to present their arguments with the requisite clarity and detail, including any references and citations to the administrative record that they believed necessary to support their contentions, in the first instance, that is, in their *Petition for Review*. That is, not in their Reply, or their Motion for Reconsideration of Order Granting Amicus Brief, or their Response to Amicus Briefs, much less their Motion to Supplement the Administrative

[2] To the extent Petitioners are requesting reconsideration in Section II.2 of the Motion because they believe the Board's Order did not document its decision making if sufficient detail, that argument is discussed in Section 3.

Record and to Depose the Experts Relied on by EPA. *See Mot.* at 6 (citing numerous post-Petition materials containing specific citations to the administrative record that allegedly support Petitioners' positions).[3] In offering a compendium of record citations and explanations culled from four different briefs post-dating the Petition that Petitioners claim the Board should have relied on in assessing the merits of their claims, Petitioners all but concede that their Petition was not accompanied by the necessary citation to substantiate their claims.[4]

Furthermore, as the Board has repeatedly stated, to obtain review, petitioners must include specific information in support of their allegations, a standard which the Petitions' generalized references to, for instance, lengthy and complex deposition transcripts do not meet. *In re New England Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001) (explaining that "to warrant review allegations must be specific and substantiated"). Accordingly, the Board has consistently denied review of petitions that merely cite, attach, incorporate, or reiterate previously submitted comments. Federal courts have upheld the Board's decisions in these cases. *E.g., In re City of Irving*, 10 E.A.D. 111,

[3] Petitioners' attempt to fully explicate and substantiate their claims by relying on post-Petition briefing comes far too late and cannot be used as a basis to demonstrate manifest error on the part of the Board. Petitioners may not "amend an otherwise inadequate petition" after the fact, *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 438 (EAB 2007). Petitioners' new, more detailed argumentation is the "equivalent to late filed appeals and must be denied on the basis of timeliness." *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999).

[4] Even as to the Petition itself, Petitioners claims regarding the adequacy of citation are questionable. For instance, Petitioners represent, *Mot.* at 6, that the Petition contained "specific page citations" at page 44 n. 48, but that is not the case. That footnote reads: "EPA emails with the State confirmed that EPA knew that methodologies employed in the 2009 Nutrient Criteria document were not based on a cause-and-effect demonstration but were mere correlations. (Exhibit 6)"). Exhibit 6, in turn, does not contain specific page citations but generally sets forth Petitioners' interpretations of selected deposition testimony with generic references to "Trowbridge Deposition" and "Short Deposition."

129-30 (EAB 2001), *review denied sub nom. City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003).

Petitioners seek to address facial deficiencies in their Petition by latching onto the Board's requirement that the Region's permitting determination must be rational "in light of all the information in the record" to be upheld. *Mot.* at 6. On the basis of this language, Petitioners essentially claim that it is the Board's obligation to piece together support for Petitioners arguments, even if this information was not specified in the Petition. Petitioners cannot, however, foist this obligation onto the Board. Petitioners bear a threshold procedural obligation to file specific, substantiated, fully-formed arguments in their Petition. *See, e.g., In re Dominion Energy Brayton Point, LLC ("Dominion I"),* 12 E.A.D. 490, 563-64 n.114 (EAB 2006) ("[W]e do not find any support for Petitioner's argument and will not scour the record to find documents that support it."); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 507 n.39 (EAB 2002) ("It is not our duty in an adversarial proceeding to comb the record and make a party's argument for it."); *In re Louisiana-Pacific Corp.*, 2 E.A.D. 800, 802 (CJO 1989); *accord U.S. Structures, Inc. v. J.P. Structures, Inc.*, 130 F.3d 1185, 1191 (6th Cir. 1997) (noting that the "court is not required to search the record for some piece of evidence" that might make party's case for it); *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 463-64 (5th Cir. 1996) (same).

For all the reasons above, Petitioners have not stated grounds for reconsideration.

3. Petitioners' Allegation That the Board Departed From Its Ordinary Standard of Review and Prior Board Precedent is Unsupported and Does Not State Grounds for Reconsideration

Petitioners allege that the Board's decision to deny review of the Region's permitting determination resulted from application of a new standard of review inconsistent with controlling Board precedent. *Mot.* at 9. Petitioners specifically accuse the Board of parroting the Region's allegedly "conclusory" responses without demonstrating how they "refuted" Petitioners' "non-conclusory record information." *Id.*

Petitioners decline to identify the "controlling Board decisions" with which the Board's decision purportedly ran afoul. It is, in fact, Petitioners who fail to grasp the operation of the Board's customary standard of review, which was applied in a straightforward manner in this case. Foremost, under that standard, Petitioners bear the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a). While Petitioners are free to proffer argument based on the blanket and unsubstantiated assumption that their own interpretations of record evidence are beyond cavil and well supported, while the Region's responses are *per se* conclusory and mechanically accepted by the Board, that device, in addition to being unpersuasive, does nothing to advance its request for this Board to reconsider its decision, nor of course to shift the burden on appeal, which continues to rest squarely with Petitioners. *In re Rohm & Haas Co.*, 9 E.A.D. 499, 504 (EAB 2000). Undoubtedly, Petitioners are heavily invested in their own technical and scientific positions, but the status of these views as "fact" rather than argument, supposition and conjecture is a matter of debate, as evidenced by the Region's detailed objections to the Petitioners' claims below, including the four portrayed as "basic factual issues" over which the Board allegedly erred.[5]

[5] Items raised on pages 57-60 of the Petition, and referenced at Mot. at 11, are addressed at pages 12-16 of Appendix A of the Region's Memorandum in Opposition to the Petition for Review. Items raised on pages 57-62 of the Petition, Mot. at 11, are addressed at

Moreover, in order to garner review, the petitioner "must demonstrate with specificity in the petition *why the Region's prior response to those objections* is clearly erroneous or otherwise merits review." *In re Westborough*, 10 E.A.D. 297, 305 (EAB 2002) (emphasis added). To meet this requirement, petitioners must provide specific citation to the relevant comment and response in the Response to Comments document and explain *why* the response to the comment was clearly erroneous or otherwise warrants review. 40 C.F.R. § 124.19(a). Accordingly, "mere allegations of error" or "vague or unsubstantiated claims" are not enough to warrant review. *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 32, 45, 61, 74 (EAB Sept. 15, 2009). Although it is clear that to obtain review a petitioner must "explain why, in light of the permit issuer's rationale, the permit is clearly erroneous or otherwise deserving of review," *In re Peabody W. Coal Co*., 12 E.A.D. 22, 33 (EAB 2005), Petitioners consistently failed to "substantively confront," *Attleboro*, slip op. at 11, material aspects of the Region's, and now the Board's, actual basis of decision, as repeatedly pointed out in the Region's Opposition to the Petition for Review and in the Board's Order.[6]

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pages 12-17 of Appendix A. Items raised in pages 62-67 and 72-74 of the Petition, Mot. at 11-12, are addressed at pages 17-23 and 29-31, respectively, of Appendix A. Items raised on pages 72-74 of the Petition, Mot. at 12, are addressed at pages 29-31 of Appendix A.

[6] Federal circuit courts of appeal have upheld this Board requirement that a petitioner must substantively confront the permit issuer's response to the petitioner's previous objections. *City of Pittsfield v. EPA*, 614 F.3d 7, 11-13 (1st Cir. 2010), *aff'g In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review); *Mich. Dep't of Envtl. Quality v. EPA*, 318 F.3d 705, 708 (6th Cir. 2003) ("[Petitioner] simply repackag[ing] its comments and the EPA's response as unmediated appendices to its Petition to the Board…does not satisfy the burden of showing entitlement to review."), *aff'g In re Wastewater Treatment Fac. of Union Twp*., NPDES Appeal Nos. 00-26 & 00-28 (EAB Jan. 23, 2001) (Order Denying Petitions for Review); *LeBlanc v. EPA*, 310 Fed. Appx. 770, 775 (6th Cir. 2009) (concluding that the Board correctly found petitioners to have procedurally defaulted where petitioners merely restated "grievances"

In addition to misapprehending the threshold burden they confront, Petitioners' argument also reflects a flawed understanding of the Board's standard of review on technical matters. Clear error or reviewable exercise of discretion is not established simply because petitioner presents a difference of opinion or alternative theory regarding a technical matter. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001). Moreover, where the science in an area is uncertain, a contrary opinion urged by a petitioner will neither establish that a rational, adequately explained judgment by the Region is clearly in error nor overcome the Board's traditional deference to regional technical determinations. *Dominion I*, 12 E.A.D. at 510-11. If conflicting views of the Region and a petitioner indicate "bona fide differences of expert opinion or judgment on a technical issue, the Board typically will defer to the Region." *Id*. at 562. Accordingly, the requirement that the Region's decision be "rational in light of all the information in the record" does not necessitate the Board to first "disprove" Petitioners' multiform technical and scientific arguments and interpretations, even if Petitioners opt to treat them as verified fact, which as evidenced by the Region's Response to Comments and briefing in this matter, they demonstrably are not. The mere existence of divergent views and record positions is an ordinary aspect of administrative decision making, particularly against a backdrop of scientific uncertainty and technical complexity; there is no requirement or precedent for the proposition that each commenter's contrary view first must be refuted or disproven before an administrative agency is allowed to act in carrying

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without offering reasons why the permit issuer's responses were clearly erroneous or otherwise warranted review), *aff'g In re Core Energy, LLC*, UIC Appeal No. 07-02 (EAB Dec. 19, 2007) (Order Denying Review).

out its statutory and regulatory obligations. *See, e.g., Upper Blackstone Water Pollution Abatement Dist. v. U. S. EPA*, 690 F.3d 9, 24 (1st Cir. 2012).[7] Rather, the Board's review fully contemplates instances where differences of technical opinion remain even as it upholds the Region's determinations. *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 (3rd Cir. 1999); *accord Dominion I*, 12 E.A.D. at 510-11; *In re Gov't of D.C. Mun. Separate Storm Sewer Sys*., 10 E.A.D. 323, 348-49 (EAB 2002). Petitioners, it appears, have a problem not with the allegedly new standard of review of employed in this case, but with the Board's ordinary standard of review, mirroring that of the federal courts, in which the Board typically gives deference to the Region on technical matters within the Agency's expertise, but this differing point of view does not constitute grounds for reconsideration.

The chief failing of Petitioners' argument, however, is the mere allegation, both unwarranted and unsupported, that EPA's responses did not adequately encompass the issues properly raised by the Coalition in its Petition, or that the Board in assessing all the information in the record did not enunciate rules that would adequately dispose of the issues in the case.[8] Indeed, Petitioners never squarely confront the Board's holding in the case regarding the need for cause-and-effect demonstrations, scientific certainty in the

[7] "[R]ecognizing…the developing nature of [the field]…[t]he [EPA] Administrator may apply his expertise to draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as 'fact,' and the like." *Id.* at 24 (quoting *Ethyl Corp. v.EPA*, 541 F.2d 1, 27-28 (D.C. Cir. 1976).

[8] Petitioners also argue that the manner in which the Board decided the case deprived them of due process, *Mot.* at 9, without ever explaining what "due process" rights have been violated by the Board's purportedly new standard of review, or how. Vague and unsupported allegations do not provide any basis for reconsidering the Board's decision.

context of NPDES permitting, or the types of information that may be relied upon in translating a narrative water quality standard into a numeric effluent limitation. Ultimately, Petitioners are attempting to bolster arguments that the Board has already considered and rejected as a basis for review.[9] Because Petitioners are merely rearguing details of their case, and do not otherwise explain in the Motion how the Board's dispositive reasoning contained a manifest error of fact or law, the Board should deny reconsideration of these issues. *In re Southern Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992).[10]

4. Petitioners Fail to Show That the Board Made a Mistake of Law or Fact With Respect to the Decision of the U.S. District Court in *City of Dover* or that the Board Erred in Concluding that 40 C.F.R. § 131.21 is Inapplicable to this Permit Proceeding

[9] Petitioners broadly allege "all…major scientific issues documented in the briefing…were not refuted by the Region's responses." *Mot.* at 11. Petitioners also allege without any supporting demonstration that "the Board…nowhere explained how the specific evidence on the record actually supports the Region's position." *Mot*. at 9. Such generic allegations, advanced without substantiation, are facially insufficient grounds for the Board to overturn its decision. It is simply incorrect to represent that the Region did not offer rebuttals to each of the Coalition's timely claims, *see*, *e.g.*, *Mem. in Opp'n to the Pet. for Rev.*, Appendix A and B, or that the Board did not accompany its affirming decision with reference to the specific record materials supportive of the Region's position. *In re Town of Newmarket*, NPDES Appeal No. 12-05, slip op. at, *e.g.*, 29-34 (EAB Dec. 2, 2013). Understandably, Petitioners wish to diminish those specific references to the "State, CLF, the 2010 peer review or other third party 'support' of the Region's overall position," *Mot.* at 9, but they do not, and cannot, offer any persuasive rationale why this Board should arbitrarily dispense with expert assessments drawn from a broad-based, independent collection of federal, state, academic and NGO entities that are supportive of the Region's position to side with the dissenting views of what is, after all, another "third party," *i.e.*, Petitioners.

[10] Petitioners also impermissibly use the reconsideration motion to provide additional argument and commentary that did not appear in the Petition. *See Mot.* at 11-13. Petitioners "should have made its best case in its petition," notably with respect to NOAA analyses and Valiela, and has "waived submission of this material by its late submission in the form of a motion for reconsideration." *In re Hawaii Elec. Light Co., Inc.*, PSD Appeal Nos. 97-15 through 97-22, at 9 (EAB, Mar. 3, 1999) (Order Denying Motion for Reconsideration).

The Coalition argues that the Board erred in allegedly failing to address the issue of whether draft water quality criteria may be used in the course of determining whether a water body is impaired under 303(d). Petitioners claim that the Board's decision resulted from it misunderstanding the "status and findings" of *City of Dover v. U.S. EPA*, NO. 12-CV-01994-JDB (filed Dec. 13, 2012).

Notwithstanding Petitioners' claim to the contrary, the Board's decision accurately characterized the U.S. District Court's substantive decision on the original claims in the complaint pertaining to whether the Great Bay Nutrient Report was a water quality standard subject to the provisions of Part 131—the only purpose for which the case citation was used. As the Board accurately noted, the Court in that case found that, *inter alia*, the Great Bay Nutrient Report was not a new or revised water quality standard that would be subject to a nondiscretionary duty by EPA to review and approve or disapprove. Despite Petitioners' misleading suggestion to the contrary, the Court's November 15, 2013 decision granting the Coalition's motion to amend its complaint emphatically does not reverse its dismissal with prejudice with respect to the original claims. *See City of Dover v. EPA*, No. 12-1994, 2013 U.S. Dist. LEXIS 162889 (D.D.C. Nov. 15, 2013). In particular, the Court's holding that the Great Bay Nutrient Report does not constitute a revised water quality standard that EPA had a mandatory duty to review remains unaltered. *Id.* at *14 ("To be clear, the Court does not disturb its previous judgment that the claims asserted by plaintiffs in their initial complaint, Counts I and II, are dismissed with prejudice."); *see also City of Dover v. EPA*, No. 12-1994, 2013 U.S. Dist. LEXIS 106331, *16-*18 (D.D.C. July 30, 2013). Thus, it is hardly "clear error," *see Mot.* at 14-17, for the Board to have cited to the Court's earlier decision for this

proposition, EAB Dec. 2, 2013 Order at 62-63. And although the Court has allowed the Coalition to amend its complaint in *City of Dover* with a brand new claim challenging EPA's approvals of New Hampshire's 2008 and 2010 303(d) lists of impaired waters to avoid the possibly preclusive effect of its initial judgment, *City of Dover*, 2013 U.S. Dist. LEXIS 162889, at *9, *13, the Board never cites to *City of Dover* regarding this claim, but rather, explicitly recognizes that such a claim was not before it in the permit proceeding, EAB Dec. 2, 2013 Order at 62 n.28. The Board relied on the District Court decision to support a specific proposition—that the Great Bay Nutrient Report was not a water quality standard—and Petitioners point to no explanation or authority contradicting the Board's conclusion in that regard.

Furthermore, Petitioners treat the Court's decision to allow plaintiffs to amend their complaint to include an APA claim over EPA approvals of state listing decisions under section 303(d) – a claim that EPA has moved to dismiss – as if equivalent to the Court deciding the merits in their favor. *Mot.* at 16 ("The 2009 criteria *cannot*, as a matter of law, be used to declare Great Bay nitrogen impaired."). The Court, of course, did nothing of the sort. Additionally, even if the Court's November 2013 decision were relevant to the Board's decision in this proceeding, the Coalition has failed to explain why it could not have brought that decision to the Board's attention during the pendency of the permit proceeding (*i.e.*, prior to the Board's Order of December 2, 2013). Thus, the Coalition's effort to do so now should be rejected as an improper attempt to offer evidence that could reasonably have been raised earlier in the proceeding. *In re Russell City Energy, LLC*, PSD Appeal Nos. 10-01 to 10-05, at 3 (EAB Dec. 17, 2010) (Order Denying Motion and Supplemental Motion for Reconsideration and/or Clarification and

Stay) (citing *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877,890 (9th Cir. 2000)); *see also In re Ariz. Mun. Storm Water NPDES Permits*, NPDES Appeal No. 97-9, at 2 (EAB Aug. 17, 1998) (Order Denying Motion for Reconsideration). [11]

Petitioner's other claims of error must be rejected. They are, in the first instance, procedurally barred. Petitioners use their reconsideration motion to argue their APA claim regarding prior EPA approvals of state 303(d) impairment listing decisions and the Alaska Rule, *Mot.* at 15-17, in a level of detail that is nowhere apparent in the Petition for Review and that were reasonably available, as the Region explained in its Response to Comment that the water quality standards approval procedures were not applicable to this action. *See* A.R. B1 (RTC) at 70. It is simply too late for Petitioners to attempt to argue their case in a more convincing fashion or to raise new legal arguments. *In re Michigan CAFO Gen. Permit*, NPDES Appeal No. 02-11, at 3 (EAB, July 8, 2003) (Order Denying Motion for Reconsideration); *Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) ("Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence…. Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time." (citation omitted)).

Moreover, Petitioners arguments do not even address the actual basis of the Board's decision to uphold the Region's determination that a nitrogen effluent limitation was "necessary," which in the Board's opinion turned on the "reasonable potential"

[11] Surely it was foreseeable that the Board might consider the Court's July 2013 Order dismissing an identical claim raised by the Coalition in this proceeding. *See Pet.* at 46-49 & n.52. Indeed, the Coalition itself directed the Board's attention to the District Court's July 2013 Order in a Notice of Supplemental Authority filed with the Board on September 23, 2013. Docket # 59.

provisions of the NPDES regulations, not, as Petitioners assert, whether there is a "confirmed exceedance" of the water quality standard. *Mot.* at 15. Petitioners similarly do not confront the Board's interpretation of the text of section 122.44(d)(1)(vi), with its reference to "proposed criteria" or "relevant information," in the Board's assessment of the role played by the Great Bay Nutrient Report in this permit proceeding. *In re Town of Newmarket*, NPDES Appeal No. 12-05, slip op. at 28-29 (EAB Dec. 2, 2013). The Coalition does not come to grips with record evidence relied on by the Board that the Region did *not* in this separate NPDES proceeding treat the recommendations in the Great Bay Nutrient Report as legally binding either for the purpose of its reasonable potential determination or derivation of permit limit, but rather used it as one source of information among many. Petitioners simply cannot show clear error in the Board's decision by ignoring the actual basis of that decision.

5. Petitioners Fail to Show That the Board Made a Mistake of Law or Fact With Respect to the Cause-and-Effect Issue

The Coalition contends that the Board failed to address the Coalition's "primary" argument that a cause and effect demonstration must occur under the state's narrative water quality criterion prior to imposing an effluent limitation for nitrogen. *Mot.* at 18. Under Petitioners' theory, the "first step" of implementing a state water quality standard under 40 C.F.R. § 122.44(d)(1) consists of a threshold cause-and-effect demonstration proving that an ambient concentration of a pollutant actually caused the water quality impairment. *Mot.* at 18. Petitioners essentially argue that the provisions of 40 C.F.R. § 122.44(d)(1), including EPA's reasonable potential provisions, do not even become operative absent a conclusive cause-and-effect demonstration indicating that in-stream concentrations of nitrogen are causing a narrative water quality standards violation.

Petitioners have not articulated any grounds for reconsideration. First, the argument was not raised in the Petition and is therefore waived. *In re Hawaii Elec. Light Co., Inc.*, PSD Appeal Nos. 97-15 through 97-22, at 9 (EAB, Mar. 3, 1999) (Order Denying Motion for Reconsideration) (rejecting on waiver grounds argument that was "only obliquely stated" in the petition). [12] Even if the argument were properly raised, it must be rejected on the grounds that a motion for reconsideration is not "an opportunity to reargue the case in a more convincing fashion." *In re Southern Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992); *accord Russell City*, at 2.

Secondly, Petitioners can only arrive at this specious conclusion by reading the state water quality standard in isolation, while studiously avoiding the federal regulatory regime designed to give those standards effect. Petitioners' insistence on cause-and-effect cannot be reconciled with plain language of 40 C.F.R. § 122.44(d)(1)(i), which states that an effluent limitation is "necessary" where pollutants in the discharge have a "reasonable potential" to cause or contribute to a water quality standards violation, nor with its preamble, *see* 54 Fed. Reg. 23,868 (June 2, 1989), nor with Board precedent, *see, e.g.*, *In re Upper Blackstone Water Pollution Abatement Dist.*, NPDES Appeal Nos. 08-11 to 08-18 & 09-06 (EAB May 28, 2010), nor with federal court decisions, *see, e.g.*, *Upper Blackstone Water Pollution Abatement Dist. v. U. S. EPA*, 690 F.3d 9 (1st Cir.

[12] In their Petition, Petitioners did not make the specific arguments they make in the Motion relating to the point in the regulatory process at which the reasonable potential provision of 40 C.F.R. § 122.44(d)(1)(i) becomes applicable. To the contrary, in "step two" of its proposed methodology for imposing a water quality-based effluent limitation under 122.44(d)(1), it described the need to demonstrate that the water quality standard violation is being "caused by a pollutant discharge," while ignoring the role of reasonable potential all together. *Pet.* at 42. Petitioners' adjusted claim is simply an untimely and unconvincing attempt to argue a variation on its basic position in a more convincing fashion, but the Board has broadly rejected the need for cause-and-effect demonstrations under section 122.44(d)(1).

2012). The Board, to be sure, did not 'misunderstand' Petitioners' cause-and-effect argument, but decisively rejected it as plainly inconsistent with the Clean Water Act and implementing regulations. *In re Town of Newmarket*, NPDES Appeal No. 12-05, slip op. at 54 n.23 (EAB Dec. 2, 2013).

6. Petitioners Fail to Show That the Board Made a Mistake of Law or Fact With Respect to the Stressor-Response Issue

Petitioners contend that the Board improperly disposed of arguments based on the April 2010 SAB Report and the November 2010 Stressor-Response Guidance. *Mot.* at 19-20. Petitioners claim that the Region erred by relying on the Great Bay Nutrient Report, because that analysis allegedly did not conform to the "requirements" of the SAB Report and Guidance and did not qualify as a 'scientifically acceptable weight of the evidence approach under those documents. *Id.* at 20.

Petitioners do not demonstrate clear error on the part of the Board, omitting as they do material portions of the Board's rationale on these issues. Petitioners reassert their arguments (conjoined with additional impermissible detail and specific reproduction and citation from the record not contained anywhere below) while ignoring the Board's baseline and dispositive determination regarding the negligible regulatory import of the SAB Report and Stressor-Guidance on the Region's permitting determination. The Board concluded,

> The SAB recommendations on the draft *Stressor-Response Guidance* are neither binding on the Agency nor directly applicable to the Region's determination of effluent limits for the Newmarket permit. The recommendations were offered for the far more general purpose of developing methodologies to establish nutrient criteria, which have broad applicability and implications. They do not specifically address the case specific determinations that permitting authorities must make to establish permit effluent limits.

EAB Dec. 2, 2013 Order, at 44. Petitioners take no issue with the Board's determinative conclusion and accompanying analysis regarding the immateriality of these two documents to permit proceedings generally. Nor do Petitioners substantively confront the Board's citation to the Region's explanation that the Great Bay Nutrient Report was but one of many sources of information and lines of evidence used by the Region in identifying a protective ambient total nitrogen target. Against this backdrop, Petitioners are in no position to assert that SAB recommendations or nutrient criteria stressor-response guidance tangential to NPDES permit deliberations under section 122.44(d) could form the basis for reversing the Board's decision, especially where the Region acted consistently with these guidance documents.

CONCLUSION

In light of the foregoing, the Region submits that the Motion should be denied.

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this motion contains less than 7000 words in accordance with 40 C.F.R. § 124.19(d)(3).

Dated: January 3, 2014

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Samir Bukhari

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition to the Petitioners' Motion for Reconsideration, in connection with NPDES Appeal No. 12-05, was sent to the following persons in the manner indicated:

By Electronic Filing:

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