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

In the Matter of: City of Manchester NPDES Permit No. NH0100447	NPDES Appeal No. 25-04

EPA REGION 1'S RESPONSE TO THE PETITION FOR REVIEW

Respectfully submitted,

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I. STATEMENT OF THE CASE

Pursuant to 40 C.F.R. § 124.19(b)(2), Region 1 of the U.S. Environmental Protection Agency ("Region") respectfully submits to the Environmental Appeals Board ("EAB" or "Board") this Response to the Petition for Review ("Petition") filed by the Conservation Law Foundation, Inc. ("Petitioner"), in connection with a National Pollutant Discharge Elimination System ("NPDES") Permit ("Permit," Att.A) issued to the City of Manchester, New Hampshire ("Permittee") by the Region under the Clean Water Act ("CWA" or "Act") for discharges from the Manchester Wastewater Treatment Facility ("Facility") to the Merrimack River, Piscataquog River, Baker Brook, Rays Brook, and Unnamed Brook (collectively, "receiving waters").

Petitioner presents three issues: the Region's alleged (1) "failure to consider whether the [Facility's] discharges have a reasonable potential to cause or contribute to a violation of New Hampshire's narrative… water quality standards ["(WQS)"] for toxic substances and designated uses"; (2) "weakening of the benthic survey requirement… with no notice and opportunity for public comment"; and (3) "failure to perform an environmental justice analysis pursuant to [EPA guidance.]" Petition, 2.

Petitioner's claims are procedurally flawed and lack merit. The Region duly considered Petitioner's comments urging additional requirements and analyses beyond those needed to comply with the CWA and explained its legal and technical reasons for declining Petitioner's discretionary requests. The Petitioner in almost all instances repeats its comments and disregards the Region's reasoned responses, failing to clear a basic procedural threshold for Board review. Where Petitioner does confront the Region's responses, it fails to substantiate its allegations, declining to set forth legal or technical reasons why the Permit, as written, does not comply with WQS.

In the case of PFAS, the record is clear that the Region considered the reasonable potential for the discharge to cause an excursion of WQS: the Region concurred with the State's reasonable potential analysis based on proposed water quality criteria for PFAS chemicals that the State considered to be toxic and potentially impacting designated uses. The State's conclusion that the effluent has no reasonable potential to cause or contribute to an excursion of WQS, including the narrative toxics and designated use standards, was consistent with the Region's decision, fully explained on the record, that under the circumstances here, limitations on individual PFAS chemicals were not appropriate at this time because the Permit, as written, ensures compliance with all applicable WQS. In addition to concurring with the State's technical analysis and reasonable interpretation of its own WQS, the Region included a WET limit in the Permit to ensure compliance with the narrative toxicity criteria, a dispositive fact which Petitioner fails to meaningfully confront, and PFAS monitoring, consistent with EPA's multimedia agenda for PFAS. While clearly preferring another approach to PFAS, Petitioner fails to address most aspects of the Region's rationale and generally fails to specifically contest the technical or legal validity of any of the several interlocking elements that together comprise the Region's PFAS approach, one founded on national strategy and detailed below.

Regarding the benthic survey, the Region adjusted the requirement in direct response to comments that questioned the survey's cost and whether there was sufficient basis to conclude the effluent would adversely impact the benthos. The Region reasonably accounted for these concerns by adding a condition such that the survey would only be required if the Region or the State first concludes the discharge is known or suspected to have a detrimental impact on the downstream benthic community, based on evaluation of pertinent data or long-term permit limit exceedances. The Region's rationale was laid out in response to comments, along with examples

of objective factors and information that could be brought to the attention of the agencies by any party and that would trigger a more-tailored survey based on site-specific information. As with PFAS, the Region's rationale accords with the State's interpretation of its own WQS; indeed, the revision mirrored the State's certification of the revised draft permit under section 401 of the Act regarding the extent to which this provision could be made less stringent without violating state WQS. The change, which flowed directly from comments and conformed with language proposed in the State's 401 certification, was a logical outgrowth of the draft proposal and was not required to be re-noticed. Although Petitioner contends the Region effectively removed the requirement, this is not the case, and the survey is still required when triggered by information indicating potential harms to the benthos.

Finally, the Region appropriately declined to conduct a discretionary "environmental justice" analysis recommended in guidance following Executive Orders revoking the authorities for those recommendations. The Region articulated several other reasons why it was declining to conduct the analysis, and Petitioner has not established that the Region abused its discretion in doing so.

For the reasons set forth herein, the Region requests the Board deny review of the Petition.

II. STANDARD OF REVIEW

Petitioner bears the burden of demonstrating that Board review is warranted. *See* 40 C.F.R. § 124.19(a)(4). Petitioner must establish that the challenged permit condition is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion or an important policy consideration that the Board determines warrants review. 40 C.F.R. § 124.19(a)(4)(i). The Board is guided by the principle that its "power to grant review 'should be

only sparingly exercised,' and that 'most permit conditions should be finally determined at the [permit issuer's] level.'" Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980).

A. Petitioner must adhere to procedural requirements.

"In considering a petition… the Board first considers whether the petitioner has met threshold procedural requirements…." *In re Deseret Generation & Transmission Coop.,* 19 E.A.D. 67, 77 (EAB 2024). For example, a petitioner "must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed." 40 C.F.R. § 124.19(a)(4)(i). If a petitioner "raises an issue that the [Region] addressed in… response to comments…, then petitioner must provide a citation to the relevant comment and response and explain why the [Region's] response was clearly erroneous or otherwise warrants review." *Id.* § 124.19(a)(4)(ii). A petitioner's explanation must do so "with specificity." *In re Westborough & Westborough Treatment Plant Bd.*, 10 E.A.D. 297, 305 (EAB 2002); *see also In re City of Attleboro*, 14 E.A.D. 398, 443 (EAB 2009) ("mere allegations of error" or "vague or unsubstantiated claims" are insufficient to warrant review). A "petitioner's failure to address the permit issuer's [RTC] is fatal to its request for review." *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 170 (EAB 2006).

B. Petitioner must demonstrate the Region's findings of fact or conclusions of law are clearly erroneous.

When evaluating a challenged permit decision for clear error, the Board examines the administrative record to determine whether the permit issuer exercised "considered judgment." *In re Springfield Water & Sewer Comm'n*, 18 E.A.D. 430, 439 (EAB 2021). "On matters that are fundamentally technical or scientific in nature, the Board typically defers to a permit issuer's…

expertise… as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record." *In re City of Keene*, 18 E.A.D. 720, 724 (EAB 2022). Petitioner must present "sufficiently specific or compelling evidence or argument that would cast doubt on the thoroughness or rationality of the Region's technical evaluations and conclusions." *In re Env't Disposal Sys., Inc*., 12 E.A.D. 254, 292 (EAB 2005).

C. Alternatively, Petitioner must demonstrate the Region abused its discretion or that the permit decision represents an important policy consideration that the Board should, in its discretion, review.

Petitioner must set forth legal and factual support for any contentions that a permit decision was based on an exercise of discretion or an important policy consideration that the Board should exercise its discretion to review. 40 C.F.R. § 124.19(a)(4). Even where the Board can "well appreciate" a petitioner's "policy argument," it remains "legally constrained to grant review sparingly." *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 522 (EAB 2002). On permitting decisions within the Region's discretion, the Board will uphold a permit issuer's reasonable exercise of discretion if that decision is cogently explained and supported in the record. *E.g.*, *In re Town of Concord*, 16 E.A.D. 514, 531 (EAB 2014) (the Board affords the permit issuer "substantial deference" under an abuse of discretion standard).

III. STATUTORY AND REGULATORY BACKGROUND

"Congress has vested in [EPA] broad discretion to establish conditions for NPDES permits" to achieve the statutory mandates of sections 301, 401 and 402 of the Act. *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992).

A. Water Quality Standards ("WQS")

States develop WQS, subject to EPA approval, comprising: (1) "designated uses", such as public drinking supply, recreation, or wildlife habitat; (2) "water quality criteria" ("WQC")

identifying the level of pollutants that may be present in a water body without impairing those designated uses; and (3) an "antidegradation" provision. *See* CWA § 303(c)(2)(A); 40 C.F.R. §§ 131.10-.12; Att.B, ,6-1, 6-4. WQC "come in two varieties: specific numeric limitations on the concentration of a specific pollutant… or more general narrative statements applicable to a wide set of pollutants." *American Paper Inst. v. United States EPA*, 996 F.2d 346, 349 (D.C. Cir. 1993); 40 C.F.R. § 131.1(b).

States must periodically revise their WQS, subject to EPA approval. 40 C.F.R. §§ 131.20, 130.21. "Until such time as EPA either approves [the] revised state standards or promulgates applicable federal standards that are more stringent," the Region, as permit writer, "is bound" to ensure the permit limits comply with "a state's existing [WQS]." *Keene*, 18 E.A.D. at 751; 40 C.F.R. § 131.21(c); *see also* Att.B, 6-3 ("When writing an NPDES permit, the permit writer must identify and use the state [WQS] in effect for CWA purposes."). Even if a state has already modified its standards and submitted them to EPA for approval, the "revision of the standards is not a *fait accompli*" for CWA purposes until "the Region approves [them]." *Keene,* 18 E.A.D. at 752; 40 C.F.R. § 131.21(c).

i. New Hampshire WQS

N.H. Code Admin. R. Ann. Env-Wq 1703.01 (Designated Uses)

New Hampshire's EPA-approved designated use WQS provides that: "All surface waters shall be classified as provided in N.H. Rev. Stat. Ann. § 485-A:8, based on the standards established therein for class A and class B waters. Each classification shall identify the most sensitive use it is intended to protect." N.H. Code Admin. R. Ann. Env-Wq 1703.01(a) (2025). Furthermore, "[a]ll surface waters shall be restored to meet the water quality criteria for their designated classification including existing and designated uses, and to maintain the chemical,

physical, and biological integrity of surface waters," and "[a]ll surface waters shall provide, wherever attainable, for the protection and propagation of fish, shellfish and wildlife, and for recreation in and on the surface waters." *Id.* at (b), (c).

The designated uses for class B waters include, *inter alia*, "fishing" and "after adequate treatment, … use as water supplies." N.H. Rev. Stat. Ann. § 485-A:8, II. New Hampshire defines the "fish consumption" designated use, applicable to all surface waters, as "waters that can support a population of fish free from toxicants and pathogens that could pose a human health risk to consumers." Att.C, 84-85; Att.D, 10, 103. The standard sets forth numeric criteria for particular pollutants designed to attain those designated uses. N.H. Rev. Stat. Ann. § 485-A:8, II.

N.H. Code Admin. R. Ann. Env-Wq 1703.21 (Toxics Criteria)

New Hampshire's EPA-approved WQC for toxic pollutants is narrative, but incorporates by reference more protective numeric criteria ("safe exposure levels") designed to protect the most sensitive designated use:

> (a) Unless naturally occurring or allowed under Env-Wq 1707, all surface waters shall be free from toxic substances or chemical constituents in concentrations or combinations that:
>
> (1) Injure or are inimical to plants, animals, humans or aquatic life; or
> (2) Persist in the environment or accumulate in aquatic organisms to levels that result in harmful concentrations in:
> a. Edible portions of fish, shellfish, other aquatic life, or
> b. Wildlife that might consume aquatic life.
>
> (b) Unless allowed under Env-Wq 1707 or naturally occurring, concentrations of toxic substances in all surface waters shall not exceed the recommended safe exposure levels of the most sensitive water use shown in Table 1703-1 subject to the notes in Env-Wq 1703.22….

N.H. Code Admin. R. Ann. Env-Wq 1703.21. The referenced Table includes numeric criteria for over 150 chemicals designed to protect aquatic life and human health. *Id.* at Table Env-Wq

1703-1. For some of these chemicals, there is an even more protective numeric criteria when the surface water "is a source for a public water system… or is within 20 miles upstream of any active surface water intake for a public water system…." *Id.* at 1703.22(*l*). The more protective criterion in those instances is the Maximum Contaminant Level ("MCL") for water and fish ingestion criteria. *Id.* at Table 1703-2A. The currently effective, i.e., EPA-approved, table includes MCLs for approximately 17 chemicals, none of which are PFAS. *Id.* In February 2025, however, New Hampshire Department of Environmental Services ("NHDES") revised this table to add MCLs of four PFAS parameters. Att.C, 80. These new standards have been submitted to EPA for review and approval, but EPA has yet to approve them. Att.C, 80; Att.E.

B. "Reasonable Potential"

NPDES permits must include limitations necessary to meet all WQS. CWA § 301(b)(1)(C); 40 C.F.R. §§ 122.43, 122.44(d). Specifically, permits "must control all pollutants … [that] will cause, have the reasonable potential to cause, or contribute to" an exceedance of "any [WQS], including… narrative criteria…." 40 C.F.R. § 122.44(d)(1)(i). "The process for determining whether water quality-based effluents are required under this regulatory provision is commonly referred to as a 'reasonable potential analysis.'" *In re City of Lowell*, 18 E.A.D. 115, 120-21 (EAB 2020); *see* Att.B, at 6-23.

The Board has held that "conducting a reasonable potential analysis is an inherently technical determination" and that *"*[t]he NPDES regulations and guidance do not require EPA to use any particular methodology in determining whether the 'reasonable potential' standard is met…." *City of Lowell*, 18 E.A.D. at 148; *Springfield*, 18 E.A.D at 467-68; *see also In re City of Taunton Dep't of Pub. Works*, 17 E.A.D. 105, 149 (EAB 2016) ("The permissive language [in 40 C.F.R. § 122.44(d)(1)(vi)(A)] is consistent with the 'significant amount of flexibility [a

permitting authority has] in determining whether a particular discharge has reasonable potential to cause an excursion above a water quality criterion.'") (quoting 54 Fed. Reg. 23,868, 23,873 (June 2, 1989)) *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied.*, 586 U.S. 1184 (2019); *see also In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 627 (EAB 2010) ("[A] permit writer will inevitably have some discretion in applying the [narrative] criteria to a particular case.") (quoting *American Paper Inst.*, 996 F.2d at 351). This is particularly true when analyzing reasonable potential with respect to a narrative standard: "The general language of narrative criteria can only take the permit writer so far in her task… the [permit] writer will have to engage in some kind of interpretation to determine what chemical-specific numeric criteria … are most consistent with the state's intent as evinced in its generic standard." *Upper Blackstone*, 14 E.A.D. at 627 (quoting *American Paper Inst.*, 996 F.2d at 351).

C. 401 Certification

"Under CWA section 401, no NPDES permit may be issued until the state certifies (or waives certification) that the permit contains all conditions necessary to assure compliance with the CWA and appropriate state law requirements." *City of Taunton*, 17 E.A.D. at 114; CWA § 401(a)(1); 40 C.F.R. §§ 124.53(a), 124.55(a)(2). The state certification may also include a "statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of [s]tate law, including [WQS]." 40 C.F.R. § 124.53(e)(3). Absent a compelling reason, the Region should ordinarily defer to a state's interpretation of its own WQS, including that made via a 401 certification. *See In re Ina Road Water Pollution Control Facility,* 2 E.A.D. 99, 101 (CJO 1985).

D. CWA § 307(a)

The Act requires EPA to publish a list of toxic pollutants. CWA § 307(a)(1). States must adopt water quality criteria, sufficient to protect designated uses, for such pollutants. 40 C.F.R. § 131.11(a)(2). To date, EPA has not listed any PFAS chemicals as § 307(a) toxic pollutants. *See* 40 C.F.R. § 401.15.

IV. FACTUAL AND PROCEDURAL BACKGROUND

A. The facility and receiving waters

The Facility collects and treats domestic, commercial, and industrial wastewaters from the City of Manchester and from surrounding towns and co-permittees. Att.F, 13. Its design flow is 34 million gallons per day. *Id.* at 13, 15. The Facility provides preliminary, primary, and secondary treatment. *Id.* at 13-14. Biosolids are transferred to the sludge handling process, which culminates in on-site incineration operated by the Permittee. *Id.* at 15.

The receiving waters are all class B waters. Att.F, 16; *see* N.H. Rev. Stat. Ann. § 485-A:8. Several segments of the receiving water have impaired designated uses. Att.F, 17. In each instance where the fish consumption use is impaired, it is due to mercury. Att.F, 17; Att.C, 85; *see also* Att.D, 104.

B. Permit development

The Facility's previous permit, effective May 1, 2015, expired on April 30, 2020, and was administratively continued upon receipt of Permittee's timely re-application. Att.F, 4. The Region issued a draft permit ("Draft Permit"), Att.G, for public comment on April 10, 2024, and later extended the public comment deadline to June 10, 2024. Att.G; Att.C, 1; Att.H. Subsequently, and as described below, the Region issued a revised draft permit ("Revised Draft Permit") on December 18, 2024, and accepted public comments through February 3, 2025. Att.I,

104; Att.C, 1. The Region also elected to hold a public hearing on January 21, 2025. Att.I. The Region issued the Final Permit on November 3, 2025. Att.A, 1.

i. PFAS

EPA is pursuing a multimedia agenda to address PFAS pollution. Att.C, 75. To guide its approach, EPA developed the *PFAS Strategic Roadmap* delineating key Agency actions, e.g., "EPA will propose monitoring requirements at facilities where PFAS are expected or suspected to be present in wastewater… discharges." Att.J, 1, 14; Att.C, 75. This data collection will support the agency's efforts to, *inter alia*, "revise effluent limitation guidelines [] and develop water quality criteria… for PFAS…." Att.K, 1. It is also consistent with the *Permit Writers' Manual's* approach, i.e., "that monitoring data be generated before effluent limitation development whenever possible…." Att.B, 6-23. In short, gathering robust monitoring data is a critical first step in the agency-wide aim of "reduc[ing] PFAS discharges to waterways." Att.J, 14.

Consistent with the *PFAS Strategic Roadmap*, EPA's Office of Water issued guidance with recommended permit conditions for Publicly Owned Treatment Works where EPA is the permit-issuer. Att.K; Att.C, 8; Att.F, 32-34. Specifically, the memo recommends that EPA, as permit issuer, impose quarterly effluent, influent, and biosolids monitoring for PFAS for each of the 40 PFAS parameters detectible by method 1633. Att.K, 4. It also recommends monitoring for Adsorbable Organic Fluorine, if appropriate. *Id.*

As described in the Fact Sheet ("FS"), the Draft Permit proposed these monitoring requirements as recommended and, therefore, as consistent with EPA's overall strategy for PFAS. Att.F, 35; Att.G. The Region received comments both supporting and opposing the draft monitoring requirements. *E.g.*, Att.C, 72, 6. The Region also received comments urging "a more

vigorous approach" to PFAS. *E.g.*, *id.* at 111. Petitioner urged EPA to "analyze the need for effluent limitations and implement necessary effluent limitations." *Id.* at 74-92.

While the Region was considering comments, New Hampshire was updating its toxics WQS to include new water quality criteria for PFAS chemicals. N.H. Code Admin. R. Ann. Env-Wq 1703.21, Table 1703-01; Att.C, 75 n.20, 80; Att.E. These new criteria have not yet been approved by EPA and thus do not apply for CWA purposes, but because they are effective under state law, NHDES considered whether the Permit would ensure compliance with them (and all other applicable state laws) as part of the 401 certification process. 40 C.F.R. §§ 124.53, 124.44; Att.C, 75, 80-81, 89; Att.L, 6. Specifically, NHDES considered comments on its draft 401 certification like those on the Region's Draft Permit: that NHDES must evaluate whether certain data submitted by Petitioner indicates Permittee's effluent "contributes" to violations of the "narrative toxics standard and the designated use provision." Att.L, 5. NHDES noted that the data "was provided in summary format and did not include lab reports to verify the data." *Id.* at 5-6. "However, NHDES reviewed [it] to evaluate if the data, assuming it were verified, would result in the need for effluent permit limits…." *Id.* at 6. As described in detail in NHDES's Response to Comments, NHDES concluded that "the Manchester WWTF's discharge does not have reasonable potential to cause or contribute to an exceedance of the four PFAS water quality criteria in the receiving water, and the permit, as currently written, will ensure that the discharge will comply with New Hampshire's surface [WQS]." *Id.* at 6.

The Region considered the State's analysis, which represents the State's interpretation of its own WQS with respect to PFAS, in evaluating comments urging the Region to impose PFAS requirements beyond monitoring. Att.C, 89 ("NHDES's analysis and conclusion… provides additional support that effluent limits for PFAS are not necessary in this permit to protect [WQS]

at this time."). The Region also described in the record that it "has chosen a Whole Effluent Toxicity (WET) approach to ensure Permittee's discharge does not violate [the toxics] water quality criterion," consistent with guidance. Att.C, 81; Att.B, 6-11 through 6-12. That is:

> The WET approach is useful for complex effluents where it might be infeasible to identify and regulate all toxic pollutants in the effluent or where parameter-specific effluent limitations are set, but the combined effects of multiple pollutants are suspected to be problematic. The WET approach allows a permit writer to implement numeric criteria for toxicity included in a state's water quality standards or to be protective of a narrative "no toxics in toxic amounts" criterion. Like the parameter-specific approach, the WET approach allows permitting authorities to control toxicity in effluents before toxic impacts occur or may be used to help return water quality to a level that will meet designated uses.

Att.B, 6-11 through 6-12. *See also* Att.F, 31-32 ("The inclusion of the WET requirements… will assure that the Facility does not discharge… pollutants… in amounts that would be toxic to aquatic life or human health."). The Response to Comments ("RTC") also provided additional rationales for the Region's approach to PFAS: there has been no determination that the receiving water is impaired for use due to PFAS (Att.C, 85); there is currently no EPA-approved WQS for PFAS (Att.C, 83, 89); EPA has not included PFAS chemicals on the list of toxic pollutants under CWA § 307(a) (Att.C, 81); "Given that Method 1633 was not fully multi-lab validated until January 2024, any data collected before this time would not be consistent with EPA's national approach" (Att.C, 76); and the State has certified that the Permit, as written, complies with all state WQS (Att.C, 89).

Satisfied that the Permit complies with all WQS and that the approach of gathering additional, reliable data via monitoring requirements before establishing a PFAS-specific effluent limit is consistent with EPA guidance, the Region was not persuaded by the comments urging additional PFAS requirements based on the record before it. On the other side of the coin, the Region confirmed that the draft monitoring requirements implemented EPA guidance and

policy objectives and were consistent with its CWA monitoring authority and was therefore not persuaded by comments urging their removal. *E.g.*, Att.C, 7.

Finally, the Region was persuaded by Petitioner's comment to consider reopening the Permit with respect to PFAS if circumstances change during the permit term. *Id.* at 90-91. In issuing the Final Permit, the Region explained:

> EPA agrees that PFAS may pose risks to human health and aquatic life. As described elsewhere, the data gathered in accordance with the permit's monitoring requirements will help EPA to better understand these risks and take future action, if appropriate, to reduce those risks. If, for example, the state determines that the receiving water is impaired for a designated use due to PFAS, or if EPA approves the state's water quality criteria for PFAS, EPA will consider the available data and/or use best professional judgment to determine if there is reasonable potential for the discharge to cause or contribute to a violation of the designated use standards or any other applicable water quality standard and, if so, propose an appropriate effluent limitation.

Att.C, 85. As noted in the record, the data used in the reasonable potential analysis were "provided in summary format and did not include lab reports to verify the data." Att.L, 5-6. The Region considered the State's analysis of the data because it was the best available at the time. The data collected pursuant to the Permit's monitoring requirements is expected to be more reliable than the data used in the State's analysis of Petitioner's data, so the State or the Region may reach a different conclusion regarding reasonable potential once those data have been collected, and/or if any applicable standards change, even during the permit term. Att.C, 76 ("EPA's approach to PFAS… is to use Method 1633… to ensure that permitting decisions are based on consistent, verified, and robust datasets. Given that Method 1633 was not fully multi-lab validated until January 2024, any data collected before this time would not be consistent with EPA's national approach.").

ii. Benthic survey

The Draft Permit included a narrative requirement that, "The discharge shall be free from substances in kind or quantity that settle to form harmful benthic deposits; float as foam, debris, scum or other visible substances; produce odor, color, taste or turbidity that is not naturally occurring and would render the surface water unsuitable for its designated uses; result in the dominance of nuisance species; or interfere with recreational activities." Att.G, 11. After issuing the Draft Permit in April 2024 and in light of then-pending litigation before the Supreme Court on narrative standards,[1] the Region decided it would be prudent to provide "more specific requirements" relating to the benthic and other narrative requirements, to "provide more direction to the Permittee as to how to ensure compliance with the respective narrative [WQS]." Att.M, 4. To do so and to ensure the discharge continued to protect WQS, the Region issued a Revised Draft Permit in December 2024 which removed the narrative benthic requirement and instead proposed a benthic survey to be conducted once per permit term as described in Permit Part I.G.5. Att.I, 5, 12, 36-37. The Region explained that "the results of the benthic survey will assist EPA in the development of any future permit conditions needed to ensure compliance with" N.H. Code Admin. R. Ann. Env-Wq 1703.03(c)(1), which requires "all surface waters shall be free from substances in kind or quantity that… settle to form harmful benthic deposits," and with Env-Wq 1703.08(b), which requires that Class B waters "shall contain no benthic deposits that have a detrimental impact on the benthic community, unless naturally occurring." Att.M, 9-10.

[1] In *City & County of San Francisco v. EPA*, 604 U.S. 334 (2025), the Court held that CWA § 1311(b)(1)(C) does not authorize "end-result" provisions in NPDES permits. To avoid an "end-result" requirement, the Region included additional permit requirements in the Revised Draft Permit "designed to gather information needed to establish requirements and/or effluent limitations on the discharge in the future." Att.C, 136.

Some commenters opposed the benthic survey. For example, the Permittee highlighted the cost of the survey, how state WQS already prohibit discharges harmful to the benthic community, and how existing effluent monitoring requirements already provide information regarding impacts on the river's ecosystem. Att.C, 117-18, 126-27. Other comments described data indicating that historic pollution reduction in the Merrimack River has resulted in the reestablishment of benthic fauna, casting doubt on whether the receiving water's benthic fauna are at risk. *Id.* at 118, 127, 163.

In January 2025, New Hampshire proposed language in its draft 401 certification such that the benthic survey would only be required if NHDES or EPA were notified in writing that "benthic deposits from the discharge are known or suspected to have a detrimental impact on downstream benthic communities." Att.L, 8. In response to Petitioner's comments, NHDES explained how the proposed benthic survey is "more protective" than the previous permit's end-result provisions since the survey is a "specific path forward to address a potential violation." *Id.* at 9. Any resulting data would help identify violations of WQS and allow EPA and/or NHDES to take appropriate action. *Id.* NHDES also cited the permit's effluent limitations for metals and total suspended solids, and the Region's addition of monthly monitoring for aesthetics, as "further protection" to ensure continuous monitoring information will be available. *Id.* In the final 401 certification, NHDES explained how the Permit includes effluent limitations "already expected to be protective of the benthic community, specifically those in N.H. Code Admin. R. Ann. Env-Wq 1703.03(c)(1)(a) and 1703.08," leading to NHDES's position that a survey should only be required for a discharge that is "known or suspected to have a detrimental impact on a downstream benthic community." Att.N, 4. NHDES affirmed the Permit would still comply with

WQS if the benthic survey requirement was revised such that the Permittee was only required to complete the survey if notified. Att.L, 9.

In response to comments and consistent with the State's interpretation of its own WQS, the Region revised the benthic survey requirement in the Final Permit. Att.A, 32; *see* Att.C, 5, 119. The requirement to conduct a benthic survey may be triggered based on data from "[v]isual observations, benthic sample results, or long-term permit exceedances [that] could indicate that the facility's effluent is having a detrimental impact on the downstream benthic community health." Att.A, 32. After becoming aware of any of these potential triggers, the existence of which could be established and provided to the agencies by any party including Petitioner, either EPA or NHDES would notify the Permittee to conduct a benthic survey. *Id.*

iii. "Environmental justice"

The Region received comments on the Draft Permit urging it to apply recommendations expressed in EPA's *Addressing Environmental Justice and Equity in NPDES Permitting* ("EJ Guidance"), Att.O. *E.g.*, Att.C, 70-71. This guidance has been rescinded.[2]

In January 2025, the President issued Executive Orders ("EOs") that revoked or abolished the EOs on which the EJ Guidance had been based. Att.Q; Att.R; Att.C, 72. The Region considered these EOs in making its Final Permit decision. Prior to the issuance of the EOs, the Region had considered the EJ Guidance and determined a "fit for purpose" analysis was not warranted because the Permit "fully protects all… [WQS] and does not allow any increased water quality impacts to the environment or human health…, and the Permit's PFAS monitoring

[2] *See EPA Announces Relaunch of Guidance Document Website, Advances Transparency of Trump Administration* (Aug. 13, 2025) ("EPA's Guidance Portal… is designed to be a one-stop shop to help users… locate… EPA's active guidance documents…." The EJ Guidance is not included in the referenced EPA Guidance Portal.). After permit issuance, the Region was made aware that the guidance had been rescinded. Therefore, the recission did not form part of the Region's permit decision and is not reflected in the Certified Index of the Administrative Record.

requirements are equivalent to those in other recent [permits] and include PFAS monitoring requirements consistent with EPA guidance…." Att.C, 72. The EOs were an additional rationale for not conducting the fit for purpose analysis. *Id.* The Region did, however, "provid[e] multiple methods for public comment," and, prior to the EOs, conduct a "screening to identify existing environmental justice concerns," consistent with the EJ Guidance. Att.O, 3; Att.P; Att.I.

V. ARGUMENT

A. The Region determined there was no reasonable potential for the effluent to cause an excursion above WQS, explained this determination on the record, and included PFAS monitoring requirements consistent with guidance.

Petitioner makes two main arguments related to PFAS. First, Petitioner argues the Region "failed to meaningfully address" Petitioner's comments on the Draft Permit. Petition, 18. In Petitioner's view, the Region "avoided" and "failed to meaningfully address" Petitioner's comments that the Permittee's discharge may have reasonable potential to cause an exceedance of narrative WQS and inadequately responded to data Petitioner submitted. *Id.* at 18-20. Second, Petitioner challenges the Region's treatment of PFAS on the merits, arguing the Region should have analyzed whether Permittee's discharge will cause, have reasonable potential to cause, or contribute to a violation of two narrative WQS: N.H. Code Admin. R. Ann. Env-Wq 1703.01(b) (fish consumption designated use) and 1703.21(a) (toxics). *Id.* at 22-30.

Neither argument is supported by the record. Petitioner merely restates Petitioner's objections from comments and ignores the Region's responses to them. As Petitioner has failed to meaningfully grapple with or substantively confront the Region's approach, review must be denied.

i. The Region considered Petitioner's comments and expressly relied on Petitioner's data in concluding that the effluent has no reasonable potential to violate WQS.

In Petitioner's view, the Region failed to meaningfully address its comments and "avoided" considering whether the effluent violates New Hampshire's narrative WQS for toxics and for the fish consumption designated use. Petition, 18-20. This assertion contradicts the record. In response to Petitioner's comments concerning the reasonable potential of the effluent to cause or contribute to an excursion of the toxics standard, the Region explained that it reviewed and "concurred" with the State's analysis and conclusion that the effluent has no reasonable potential to cause or contribute to an excursion of the new, state-proposed criteria for toxics (Att.L, 6; Att.C, 89) and that it has chosen a WET approach to ensure the Permittee's discharge does not violate the narrative WQS for toxics (Att.C, 81-82). The Region additionally explained that EPA has not yet listed any PFAS contaminants as toxic pollutants under CWA § 307(a) (Att.C, 81) and noted that the State did not, as part of its 401 certification, indicate that an effluent limit for any PFAS contaminants was necessary to comport with state law (Att.C, 82).

In response to Petitioner's comments regarding the fish consumption designated use standard, the Region explained that: the State has not determined that the receiving water's fish consumption designated use is impaired due to PFAS (Att.C, 85); the data collected in accordance with the Permit's monitoring requirements will increase understanding of potential risks to human health and aquatic life from PFAS (Att.C, 85); New Hampshire's 401 certification indicates the State agrees effluent limits are unnecessary to meet the requirements of state law (Att.C, 85); and, NHDES's analysis, with which the Region concurred, showed no reasonable potential to violate WQS (Att.C, 85, 89).

The Region also explained that it may reopen and modify or reissue the Permit if new standards take effect during the permit term (Att.C, 82), and that the Region's approach

comports with EPA's PFAS guidance. Att.C, 75. In short: the record reflects that the Region "articulate[d] with reasonable clarity the reasons for its conclusions and the significance of crucial facts it relied upon in reaching those conclusions." *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417 (EAB 1997) (citation omitted); Att.C, 73-91.

Rather than engage with the Region's responses, Petitioner repackages its comments, urging the Region to consider its data and conduct a reasonable potential analysis, concluding that because the Region did not reach Petitioner's desired technical conclusion, the Region must have ignored its comments. Petitioner states the Region did not acknowledge that PFAS are toxic within the meaning of N.H. Code Admin. R. Ann. Env-1703.21(a), without acknowledging the reasonable potential analysis of that standard or rebutting the Region's considered responses on this topic. Petition, 19. Similarly, Petitioner suggests, without legal or factual support, that WET testing does not ensure the discharge complies with N.H. Code Admin. R. Ann. Env-Wq 1703.21(a) with respect to PFAS. Petition, 19. Most strikingly, Petitioner relies heavily on the erroneous premise that the "Region failed to conduct a reasonable potential analysis" without any acknowledgement of the RTC's description of the State's analysis in the record and the Region's concurrence with it. Att.C, 89; Att.L, 5-7. This failure to confront the Region's response, particularly on such a central issue, fatally dooms Petitioner's argument. *See City of Taunton*, 17 E.A.D. at 154; *In re City of Pittsfield*, NPDES Appeal No. 08-19, 1, 10-11 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd*, 614 F.3d 7 (1st Cir. 2010). Overall, Petitioner leaves the Region's analysis unrebutted and, logically, leaves the Board "with a record that supports the Region's approach." *Westborough*, 10 E.A.D. at 311.

Petitioner's argument that the Region "refused to substantively consider" "the City's monthly PFAS monitoring data (Att.S), the Battelle Study (Att.T), and the Pickard Study (Att.U)

also fails. Petition, 28, 18. The City's monitoring data summarizes influent, effluent, sludge, ash, septic, and landfill leachate data for four PFAS parameters from 2019-2023. Att.S. The Battelle Study evaluates the fate and transport of PFAS from an "undisclosed" wastewater treatment plant with a sewage sludge incinerator. Att.T. The Pickard Study concerns PFAS bioaccumulation in fish tissue based on samples from New Hampshire. Att.U. All three studies are part of the administrative record.[3] Petitioner argues *In re Washington Aqueduct Water Supply Sys.*, 11 E.A.D. 565 (EAB 2004), supports its position. Petition, 21. The Region disagrees. The petitioner in *Washington Aqueduct* "submitted three sets of data showing higher quantities of various metals being discharged by the [permittee] … than EPA had detected…" to support its position that the effluent had reasonable potential to exceed applicable standards. 11 E.A.D. at 586-87. In response to these data, Region III "simply stated, 'EPA stands by the results of its… sampling.'" *Id.* at 587 (citation omitted). The Board remanded the permit, reasoning, *inter alia*, that Region III "seemingly exhibit[ed] an unwillingness to engage other data that might complicate the reasonable potential analysis…." *Id.* at 589.

A dispositive difference between the record here and that in *Washington Aqueduct* is that here, the Region relied heavily on the 2019-2023 Monitoring Reports submitted by Petitioner and described the data's use in response to comments.[4] Att.C, 89; Att.L, 5-6 (together describing that "NHDES reviewed the provided data summary to evaluate if the data, assuming it were

[3] Petitioner references, for the first time in its Petition, a fourth study. Petition, 10. As Petitioner readily admits, these data "were not submitted during the public comment period." *Id.* at 10 n.47. These data, which were never provided to the Region prior to permit issuance, are not part of the administrative record and are not properly before the Board. *See Motion to Strike.*

[4] Petitioner quotes a portion of the RTC, noting it does not mention the Pickard Study. Petition, 20. In response to that comment (#51), the Region noted "that the commenter submitted the 'Battelle study' and 'City of Manchester WWTF PFAS Monitoring Reports (2019–23)' as attachments to its public comments, and these data are therefore already part of the administrative record for this proceeding." Att.C, 76. Response 51 did not specifically identify the Pickard Study as part of the record because it was not referenced in the comment. All three studies are part of the administrative record. *See* Administrative Record Index.

verified, would result in the need for effluent permit limits…." and EPA "concurs" with this reasonable potential analysis and conclusion). This is therefore decidedly not an instance where the Region was "unwilling" to engage Petitioner's data or one "leaving [the Board] to guess as to whether or not the Region dismissed [the] data for valid reasons or failed to consider them." *Washington Aqueduct*, 11 E.A.D. at 589. To the contrary: Petitioner is "unwilling" to engage with the record's reasonable potential analysis conducted using its own data.

Petitioner argues the Region failed to consider the Battelle Study and the Pickard Study. Petition, 20. Both studies lacked "significance," however, and thus did not warrant particularized responses. 40 C.F.R. § 124.17(a)(2); *Citizens for Clean Air v. EPA*, 959 F.2d 839, 845 (9th Cir. 1992) ("[C]omments must be *significant* enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern.") (emphasis in original) (citations omitted). Petitioner submitted the Battelle Study to establish that "PFAS are consistently 'present in the effluent' of the [Facility]" Att.C, 79. Petitioner submitted the Pickard Study to establish that PFAS chemicals bioaccumulate in edible fish tissue gathered from Merrimack River locations. Att.C, 86-87, 89. The Region was already aware that "PFAS chemicals are persistent in the environment" and likely present in POTW discharges (especially those with many industrial users, such as Permittee) and had, accordingly, decided to approach the issue in the manner "recommended in EPA's *PFAS Strategic Roadmap* and in… *Addressing PFAS Discharges in EPA Issued NPDES Permits*…." Att.F, 34-35. The confirmation that PFAS are present in the effluent (based on the Battelle study) and that PFAS bioaccumulate in fish tissue (based on the Pickard study) only added additional support for the Region's—and the Agency's—prior decisions to address PFAS pollution in wastewater and did not necessitate an alternate permitting approach. The Region further notes that the Battelle study was based on an

"undisclosed" location and thus not clearly identified as the Permittee's facility. Petitioner cannot establish clear error or abuse of discretion on the basis that the Region did not specifically respond to these insignificant comments, particularly because "[t]he selection of representative data for the analysis under section 122.44(d)(1) is a technical judgment that falls within the permit issuer's discretion and technical expertise." *Upper Blackstone*, 14 E.A.D. at 607-08; *see also In re Circle T. Feedlot, Inc*., 14 E.A.D. 653, 675 (EAB 2010) ("while a point-by-point rebuttal on each and every point raised by commenters might have helped … the public understand the Region's rationale more clearly, 'the absence of such a direct response is not grounds for granting review … where [the permit issuer's] general explanation in its response to comments was sufficient to articulate the basis of its decision.'") (citations omitted).

On the merits, Petitioner argues the Region clearly erred by "avoiding the reasonable potential analysis by citing a lack of EPA-approved standards" and "us[ing] numeric criteria as a sole proxy for narrative criteria." Petition, 23, 24. Petitioner relies on *Upper Blackstone*, 14 E.A.D. 577 (EAB 2020), for the principle that the Region may conduct a reasonable potential analysis and set effluent limitations even where there is no numeric standard. Petition, 24-26. Petitioner argues the Region ignored "crucial facts" in the record and is taking an "improper 'wait and see' approach" to PFAS. Petition, 26.

Foremost, the premise driving Petitioner's arguments—that the record lacks a reasonable potential analysis—fails upon a simple review of the facts: the RTC describes that the Region reviewed and concurred with the State's reasonable potential analysis, which was conducted using record data submitted by Petitioner. Att.C, 89; Att.L, 6. That is:

> the state… conducted a reasonable potential analysis using recent state-adopted (but not EPA-approved) PFAS MCLs. … NHDES concluded that "The results of this evaluation… show that [Permittee's] discharge does not have reasonable potential to cause or contribute to an exceedance of the [proposed] PFAS water quality criteria, and

> the permit, as currently written, will ensure that the discharge will comply with New Hampshire's [WQS].

Att.C, 81. Although the state standards have not yet been approved by EPA and thus are inapplicable for CWA purposes, the Region reviewed and concurred with the State's analysis because it represents the State's interpretation of its own WQS as to which PFAS chemicals are toxic and might potentially impair designated uses, a conclusion to which the Region will defer absent a compelling reason. Att.L, 6; *In re City of Moscow*, 10 E.A.D. 135, 154 (EAB 2001) (holding the Region must have a "compelling reason" for not following a state's interpretation of a state regulation).

While Petitioner may have preferred another methodology to analyze reasonable potential—though it does not specify what that approach might be—this technical decision is committed to EPA's discretion. *Springfield*, 18 E.A.D. at 468 ("'[C]onducting a reasonable potential analysis is an inherently technical determination.'") (citations omitted). Here, the Region opted to rely on a reasonable potential analysis that accorded with the *Permit Writers' Manual*. *See* Att.L, 6 ("NHDES completed this evaluation using EPA's 'Reasonable Potential and Limits Calculations' methodology outlined in Appendix B of the [FS]…."); *see* Att.B, 6-23 through 6-30. "NPDES regulations and guidance do not require EPA to use any particular methodology in determining whether the 'reasonable potential' standard is met, but rather significant flexibility is accorded when making this technical determination." *Springfield*, 18 E.A.D. at 467-68. Review is not warranted "simply because the petitioner presents a difference of opinion or alternative theory regarding a technical matter." *In re Gen. Elec. Co.*, 17 E.A.D. 434, 446-47 (EAB 2018).

It is also not the case that EPA used "numeric criteria as a sole proxy for narrative criteria." Petition, 24. This reductionist view ignores the context—thoroughly explained in the

record—in which step-wise decisions were made regarding regulation of PFAS in accordance with EPA's PFAS strategy, which called for, among other measures, the collection of robust, reliable datasets to support developing numeric criteria and, if warranted, imposing limitations on that class of chemicals, which is precisely what the Permit mandates. The lack of reliable data and other actionable information was an independent reason for not pursuing individualized PFAS limits at this time. *See* Att.C, 76 ("EPA's approach to PFAS… is to use Method 1633… to ensure that permitting decisions are based on consistent, verified, and robust datasets. Given that Method 1633 was not fully multi-lab validated until January 2024, any data collected before this time would not be consistent with EPA's national approach.").

Petitioner's arguments also fail because they ignore the fact that the Permit contains an effluent limit designed to ensure compliance with the narrative toxics standard: a WET limit. Att.C, 81; Att.F, 31-32. As described in the RTC and the FS, the Region chose this approach consistent with EPA guidance. Att.C, 81-82 ("Effluent limitations… may be based on a parameter-specific approach or a WET testing approach to implementing [WQS]" and "[t]he WET approach is useful [for example]… where it might be infeasible to identify and regulate all toxic pollutants in the effluent.") (quoting Att.B); Att.F, 31-32 ("WET requirements… will assure that the Facility does not discharge combinations of pollutants in amounts that would be toxic to aquatic life or human health."). Although Petitioner may have preferred chemical-specific limits for PFAS, Petitioner has not demonstrated clear error in the Region's choice to approach the issue via a WET limit instead. Att.C, 81. In fact, Petitioner does not address the various dimensions of the Region's technical decision at all, a grievous misstep. *See* Petition, 22-27 (e.g., no rebuttal to WET approach (*see* Att.C, 81-82); no rebuttal to explanation that EPA has not listed PFAS chemicals under § 307(a) authority (*see* Att.C, 81); no rebuttal to explanation

that the State did not include more stringent PFAS requirements as a condition of its 401 certification (*see* Att.C, 82); no rebuttal to explanation that the State has not made a determination the water is impaired for fish consumption due to PFAS (*see* Att. C, 85); *Env't Disposal Sys.*, 12 E.A.D. at 292 (A petitioner must present "sufficiently specific or compelling evidence or argument that would cast doubt on the thoroughness or rationality of the Region's technical evaluations and conclusions.").

Petitioner has not established that the Region committed clear error by ignoring "crucial facts," i.e., the Pickard Study and the Merrimack River Sampling Memorandum. Petition, 26-27. Petitioner's argument that both studies demonstrate the "presence of PFAS in fish near the [Facility]" is unavailing because the Pickard Study is not significant to this permitting action, as described in Part V.A.*i*., much less "crucial." Petition, 27. The "Merrimack River Sampling Memorandum" presents no ground for review because it is not part of the administrative record; as Petitioner admits, it was "conducted after the public comment period for the Permit closed." Petition, 10; *see* Motion to Strike.

Petitioner also cannot establish clear error based on *Upper Blackstone.* The Region agrees with Petitioner that there is no need to "wait and see" when it is clear, as it was in *Upper Blackstone*, that "the substantial weight of scientific evidence in the record [establishes] that, even if the precise relative contribution is uncertain, the [permittee's] discharges are a significant contributor of [pollutants] to the [receiving water] … that frequently violates [WQS]." *Upper Blackstone*, 14 E.A.D. at 600. In *Upper Blackstone*, it was "clear that eutrophication in the [receiving waters] has reached a level where it is adversely affecting… the physical, chemical, or biological integrity of the habitat, … and the designated uses of the water." *Id.* at 596 (internal citation omitted); *see also*, *e.g.*, *id.* at 593 ("[T]here is more than sufficient evidence in the record

to establish that the [receiving waters] are severely impaired by nitrogen-driven eutrophication."). Here, in contrast, it is not clear that PFAS is adversely affecting the receiving water. Unlike in *Upper Blackstone*, where the Region "correctly supported its decision noting that Rhode Island has listed the [receiving waters] on its section 303(d) list of waters impaired for nutrients…," *id.* at 597, here, "the state has not made a determination that the receiving water is impaired for fish consumption due to PFAS." Att.C, 85. In any event, as described above in Part IV.B.*i.* to the extent the Region is "waiting and seeing," it is doing so consistent with EPA guidance, which outlines a methodical approach to reducing PFAS in regulated waterways, beginning first with robust data collection.

Petitioner states that *Upper Blackstone* establishes that although numeric criteria are useful in conducting reasonable potential analyses of narrative standards, they are not always necessary. The Region concurs. To the extent the Region suggested otherwise in response to comments (e.g., "[G]iven that there are no surface water quality criteria for PFAS, EPA has no way to determine whether a given level of PFAS causes or contributes to a violation of the narrative standard for toxics." Att.C, 83), these statements must be considered against all the information in the RTC, specifically, in the context of the EPA's multimedia PFAS agenda, to which the Region was adhering, which called for the development of approvable state water quality criteria and collection of additional data to support PFAS-specific limitations. And, of course, the Region did in the end make such a determination by evaluating the state's reasonable potential analysis. "[I]nartful though it may be," it is insufficient to demonstrate clear error. *City of Moscow*, 10 E.A.D. at 145-46.

The Region disagrees with Petitioner, however, that *Upper Blackstone* compels a different permitting result here. Although numeric criteria are indeed not the "sole proxy" for

narrative criteria, Petitioner has, as described above, not established clear error in the reasonable potential analysis of the proposed numeric criteria. Petition, 24. As the Board has recognized, the "[permit] writer will have to engage in some kind of interpretation to determine what chemical-specific *numeric* criteria… are most consistent with the state's intent as evinced in its generic standard," and here, the State and the Region have determined that the proposed PFAS criteria that were used in the reasonable potential analysis are most consistent with the state's intent evinced in the narrative toxics standard. *In re Town of Newmarket*, 16 E.A.D. 182, 203 (EAB 2013), quoting *American Paper Inst.*, 996 F.2d at 351 (emphasis in original); Att.L, 6; Att.C, 89; *see also* 40 C.F.R. § 122.44(d)(1)(vi)(A) (permitting authorities may apply proposed state criteria when interpreting narrative WQS).

The numeric toxics criteria are also an inherently useful proxy for the narrative designated use standard. The State conducted the reasonable potential analysis in response to Petitioner's comments concerning both the toxics and the designated use standards. Att.L, 5-6. Furthermore, the analysis evaluated state criteria explicitly derived to protect, *inter alia*, human fish ingestion. *Id.* at 5-6; Att.C, 89. All water quality criteria are written to protect designated uses. 40 C.F.R. §§ 131.2, 131.3, 131.6(c), 131.11(a)(1); *see also* Att.B, 6-4 ("§ 131.11(a) requires states to adopt water quality criteria … to include sufficient parameters or constituents to protect the designated use"); Att.D, pg. 6 ("Criteria are designed to protect the designated uses of all surface waters…."). There is a particularly clear connection between New Hampshire's toxics standard and its designated use standards. N.H. Code Admin. R. Ann. Env-Wq 1703.21(a)(2)(a) ("all surface waters shall be free from toxic substances… in concentrations or combinations that… persist in the environment or accumulate in aquatic organisms to levels that result in harmful concentrations in: edible portions of fish…."); Att.D, pg. 103-04 (New

Hampshire identifies impairment of the fish consumption use by reference to the toxics standard.) Therefore, the unrebutted record reasonable potential analysis of proposed state criteria is a particularly good proxy for the narrative standards Petitioner is concerned with: if there is no reasonable potential to cause or contribute to an exceedance of those proposed PFAS criteria, there is necessarily no reasonable potential to cause or contribute to an exceedance of any corresponding human health, water, or fish ingestion criteria either.

In summary, Petitioner has fallen far short of the standard for demonstrating clear error. The record contains an unrebutted analysis that the effluent does not have reasonable potential to cause or contribute to a violation of WQS, an unchallenged WET limit, and unaddressed supplemental rationales for the Region's permitting approach for PFAS. Petitioner reprises the same data it did in comments without any acknowledgment of the Region's responsive technical analysis, much less any explanation of how the data should lead to a different technical conclusion. Att.C, 89; Att.L, 6. Petitioner does not rebut the method used, the technical conclusion, or any other aspect of the record reasonable potential analysis, and it has, accordingly, failed to demonstrate grounds for review. *City of Lowell*, 18 E.A.D. at 157.

ii. Petitioner has not demonstrated abuse of discretion.

Petitioner next argues the Region abused its discretion by offering an "inconsistent and conflicting" explanation for its refusal to substantively consider data and for its refusal to conduct a reasonable potential analysis for PFAS. Petition, 28. It is an abuse of discretion, Petitioner posits, for the Region to indicate in response to comments that although it could not consider data available now that was not collected via Method 1633 and therefore is "not consistent with EPA's national approach," it could consider that same data in the future. *Id.*

Petitioner's arguments fail on their factual premises alone. Again, the record contains a reasonable potential analysis, so Petitioner simply cannot establish abuse of discretion based on its alleged absence. Petitioner argues "[i]f the Region can consider pre-2024 data 'in future permit reissuance,' it must consider the data for this permit," apparently unaware of the record materials indicating that the Region did, in fact, consider Petitioner's data in this permit issuance, even though those data were "provided in summary format and did not include lab reports to verify the data" or were otherwise insignificant and cumulative, such as the Batelle and Pickard studies. Att.L, 5; Att.C, 89. As described in the RTC, the Region would, in a future permit reissuance, again consider these data in conjunction with newer, more reliable data collected pursuant to the Permit's monitoring requirements, to re-evaluate whether the effluent has reasonable potential to exceed any standards that may be in effect at that time. Att.C, 76. Petitioner cannot hope to establish abuse of discretion if it cannot accurately recount the record.

Petitioner also argues the Region abused its discretion by "relying on the lack of EPA-approved standards to avoid a reasonable potential analysis while failing to acknowledge that it bears responsibility for the lack of standards." Petition, 29. Petitioner's argument fails because, as described, the record does contain a reasonable potential analysis. The timeliness of the Region's approval of new standards is beyond the scope of this appeal. *See* 40 C.F.R. § 124.19 (providing for review of, *inter alia*, NPDES final permit decisions – not WQS approvals); *City of Moscow*, 10 E.A.D. at 160-61 (explaining that Board jurisdiction "does not ordinarily extend to considerations of the validity of prior, predicate regulatory decisions that are reviewable in other fora"). The record, furthermore, addresses the possibility of new standards taking effect during the permit term, as requested in Petitioner's comments. Att., 82-83. Under these circumstances, Petitioner cannot establish abuse of discretion.

iii. Petitioner has not demonstrated this is a policy issue warranting Board review.

Petitioner ends its PFAS argument with a conclusory allegation that, "the Region's refusal to address documented PFAS pollution… through permit *reduction* requirements (not just monitoring requirements), despite available PFAS data from the WWTF and a general recognition among EPA and scientists that WWTFs contribute to the serious PFAS pollution problem, is an important policy consideration that the Board should review…." Petition, 30 (emphasis in original).

To the extent Petitioner implicitly presents the same grounds it presented in claiming the Region clearly erred or abused its discretion, this indicates the correct standard of review is, in fact, clear error or abuse of discretion. If Petitioner cannot establish the Region clearly erred or abused its discretion, it should not prevail via this attempted second bite at the apple.

Additionally, the Agency has already outlined a comprehensive strategy for PFAS pollution. Therefore, there is no policy dispute or uncertainty for the Board to entertain. This is an instance of a permitting authority acting with neither undue haste nor hesitation on a difficult technical and environmental issue, in accordance with an approach endorsed by EPA. The Region explained the rationales animating its overall PFAS permitting strategy and rationally accounted for regulatory uncertainty, data gaps, and other relevant factors when fashioning the path forward, including a mechanism to revisit the PFAS issue within the permit term should facts warrant. The Region, moreover, explicitly detailed this permitting pathway in the record. Where the Region's approach to implementing policy was "legitimate and legally authorized," *Phelps Dodge Corp.*, 10 E.A.D. at 460, the Board must deny review.

B. The Region was not required to re-notice the benthic survey requirement and adequately justified the change on the record.

Petitioner makes four principal arguments related to the benthic survey requirement. First, Petitioner asserts the Region erred by "significantly altering" the requirement without reopening the public comment period. Petition, 30-32. Second, the Region erred by relying on NHDES's 401 certification condition to justify the change without providing "crucial facts" or "its own fact-based analysis." Petition, 32, 34. Third, the Region erred by "not adequately explain[ing] how the weakened provision will ensure compliance with water quality requirements." Petition, 35. Finally, the Region improperly considered costs to establish a requirement under CWA § 301(b)(1)(C) and committed an abuse of discretion "by asserting conflicting explanations in its [RTC]." Petition, 34-35.

Petitioner fails to establish clear legal error or abuse of discretion. Review should be denied.

i. The final benthic survey requirement is a logical outgrowth of the proposal.

Petitioner argues the Region erred by altering the benthic survey requirement without reopening public comments. Petition, 32. In Petitioner's view, the Final Permit's benthic survey requirement is "not a logical outgrowth" of the Revised Draft Permit because parties "could not have reasonably anticipated" the Region would change the requirement to be triggered only upon written notice. *Id.* Petitioner fails to demonstrate this permit term is not a logical outgrowth of the proposal, and review must be denied.

A final permit can incorporate changes from the draft without necessitating additional public comment. *In re D.C. Water & Sewer Auth.,* 13 E.A.D. 714, 758-59 (EAB 2008) ("A final permit need not be identical to the corresponding draft permit and, indeed '[t]hat would be antithetical to the whole concept of notice and comment.") (quoting *NRDC v. EPA*, 279 F.3d

1180, 1186 (9th Cir. 2002)). Additional notice and comment is unnecessary for a final permit that differs from, but is a logical outgrowth of, the draft. *City of Taunton v. EPA*, 895 F.3d 120, 130 n.10 (1st Cir. 2018). In determining whether a changed provision is a logical outgrowth, the "'essential inquiry' is whether interested parties reasonably could have anticipated the final permit condition from the draft permit." *Springfield*, 18 E.A.D. at 451 (citation omitted). "This inquiry is fact based and case-specific, and so the Board carefully examines the 'evolution of the permit condition at issue' and the permit issuer's 'corresponding explanatory statements.'" *Id.*

Here, the Final Permit's benthic survey requirement grows logically from the Revised Draft Permit. The Revised Draft Permit proposed an automatic benthic survey requirement. Att.I, 112. The Permittee opposed the requirement, explaining how state WQS already prohibit discharges that cause harmful impacts to the benthic community and that the reduction of pollutants in the Merrimack River has resulted in the reestablishment of benthic fauna. Att.C, 117-18, 127. The Permittee noted the cost and resources necessary for such a survey, especially when the complexity of the river system (i.e., "variability in sediment composition, flow dynamics, and the presence of other pollution sources") makes it "logistically challenging to conduct a meaningful survey that could provide scientifically defensible results." *Id.* at 118. The Permittee also characterized the survey as "redundant" since other effluent monitoring in the Permit would provide information regarding the discharge's impact on the benthic community. *Id.*

The Region acknowledged the "uncertainty regarding the potential impacts to the benthic community" and the expense associated with benthic surveys in larger rivers such as the Merrimack River. *Id.* at 119. The Region also highlighted the State's draft 401 certification, which included proposed language regarding the benthic survey requirement: the survey would

be required only if NHDES or EPA were "notified in writing … that benthic deposits from the discharge are known or suspected to have a detrimental impact on downstream benthic communities…." *Id.* at 118. The State's rationale, quoted in the Region's response, is that effluent limitations in the Permit for total suspended solids and metals are "already expected to be protective of the benthic community in the vicinity of the facility's outfall and meet surface [WQS]." *Id.*; *see* Att.L, 8. The Region ultimately agreed with the Permittee and the State that "the requirement to conduct such an expensive benthic survey should be reserved for WWTFs that are 'known or suspected to have a detrimental impact' on the benthic environment." Att.C, 118.

In response to the concerns raised in comments and consistent with the State's interpretation of its own WQS, the Final Permit includes triggering language requiring the survey "[i]f notified in writing by NHDES or EPA that benthic deposits from the discharge are known or suspected to have a detrimental impact on downstream benthic communities." Permit, 32. The triggering language flows directly from comments concerning cost and questioning the need for the monitoring requirement. Att.C, 117-18, 126-27; *see supra* Part IV.B.*ii*. The Region considered these concerns in tandem, concluding the survey's high cost is most warranted in situations where there is a reasonable indication of non-compliance – i.e., when visual observations, benthic sample results, and long-term permit exceedances could indicate a potential change in either the sediments or settleable solids downstream of the outfall as compared to upstream of the outfall. Att.A, 32; Att.C, 119; *see Town of Concord*, 16 E.A.D. at 532 (finding it foreseeable that the Region would alter the pH limit in light of public comments questioning the Region's rationale); *Springfield,* 18 E.A.D. at 452 ("[I]t was foreseeable that the

Region might alter the [total nitrogen limit] … in light of public comments specifically calling for that limit to be recalculated….").

Based on this record, Petitioner could have "reasonably anticipated" the change to the benthic survey requirement from draft to final based on public comments and the State's 401 certification. Furthermore, although Petitioner expresses surprise at the Final Permit's triggering language, Petitioner commented on the State's proposal of the same language in its draft 401 certification *before* the Region issued the Final Permit. Att.L, 8. As in *Springfield*, where a statement at a public meeting "revealed an evolution" in the Region's approach, the State's interpretation of its own WQS expressed in the 401 certification—the issuance of which Petitioner was aware—"revealed" the possibility of an evolution in the Region's assessment of the automatic benthic survey requirement, as it was foreseeable the Region would consider public comments and the State's interpretation in determining the final contours of the survey requirement. 18 E.A.D. at 454; Att.C, 119; Att.L, 8.

Contrary to Petitioner's hyperbolic assertion, the Region did not remove the proposed benthic survey requirement. Petition, 33. Rather, the survey requirement remains materially unchanged from the proposal; the change at issue here, following logically from the draft, is the addition of triggering language to ensure that "only if the discharge is likely to have a detrimental impact will it be subject to the requirement." Att.C, 119. The revision simply inserts a layer of agency technical judgment and establishes a threshold notification which, as described by the Region, accounts for the expensive nature of benthic surveys and the information casting doubt on whether the discharge impacts the benthic community in a complex river system such as the Merrimack River. *Id.* at 118-19. The Final Permit expresses clear metrics which could

trigger the requirement, upon which Permittee will be required to conduct the survey exactly as substantively proposed. Att.A, 32; Att.C, 119-20.

The Region considers multiple factors in deciding whether to reopen a comment period, including "whether the record adequately explains the agency's reasoning so that a dissatisfied party can develop a permit appeal, and the significance of adding delay to the particular permit proceedings." *E.g.*, *In re City of Palmdale*, 15 E.A.D. 700, 715 (EAB 2012) (citations omitted). The very fact that Petitioner brings a substantive challenge to the final requirements based on the Region's rationale expressed in the record is evidence that its ability to develop an appeal was unimpeded. *See* Petition, 30-35; Att.C, 118-20; Att.M, 9-10. The Region clearly explained the need for triggering language in response to comments and this explanation was more than sufficient to enable Petitioner to fully raise this issue on appeal. *See Palmdale*, 15 E.A.D. at 716; *Concord*, 16 E.A.D. at 533 (holding the Region's explanation was "sufficient to allow [Petitioner] to develop arguments on appeal" where the Region "directly responded" to comments and "provided a substantive reason for changing the [permit] limit").

The status of the Permit is another reason militating against the Region exercising its discretion to re-propose. The previous permit has been administratively continued since April 2020. *Supra* Part IV.B. The Region public noticed the Permit twice, and re-noticing for a third time to solicit comments on the addition of triggering language to the benthic survey requirement would have added considerable and needless delay when the Region already had the information it required to make a decision. *See Springfield*, 18 E.A.D. at 454-55. "These factors support the Region's decision not to provide a third notice and-comment period." *Id.* at 454. For a Petitioner that decries delay in regulating PFAS, accelerating the effectiveness of this provision and collection of additional data, if necessary, should be a welcome outcome.

Against this backdrop, the Region was not required to re-notice the benthic survey requirement. Petitioner offers nothing substantive to support its contention that the Final Permit was not a logical outgrowth of the draft. Petitioner has not established that the Region clearly erred in declining to re-notice the benthic survey requirement. The Board must deny review.

ii. The Region articulated with reasonable clarity its conclusion that the benthic survey requirement complies with WQS and properly relied on the State 401 certification and cost considerations.

Petitioner argues the Region erred by "not adequately explain[ing]" how the benthic survey requirement will ensure compliance with WQS. Petition, 33. Petitioner also argues the Region erred by relying on NHDES's 401 certification and cost concerns raised by the Permittee to justify the revision. Petition, 34-35. The Board gives substantial deference to the permit issuer's technical judgment, and Petitioner again fails to establish clear error. *See In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001).

The Region proposed the benthic survey requirement "to assess impacts from the discharge to aquatic life in the benthic environment." Att.I, 112. The Region agreed—to a degree—with Permittee's detailed comments casting doubt on the effluent's harm to the benthic community and explained that an automatic survey would not be appropriate given this information. Att.C, 118-19. The results of the survey, if triggered, will still "assist the Region in the development of any future permit conditions needed to ensure compliance" with WQS and Petitioner does not offer any arguments to the contrary. Att.I, 113; *see* Att.C, 121; Petition, 32-33. The Final Permit includes a non-exhaustive list of examples of what could indicate a potential impact on downstream benthic community health, including "[v]isual observations, benthic sample results, or long term-permit exceedances." Att.A, 32; Att.C, 120.

Petitioner makes the conclusory argument that the Region cannot demonstrate compliance with WQS absent an automatic benthic survey. Petition, 33. Petitioner argues the record explanation of "uncertainty regarding the potential impacts to the benthic community from the discharge" necessitates an automatic benthic survey to establish WQS compliance. Att.C, 119; Petition, 33. In doing so, Petitioner misconstrues the Region's reasonably clear point, intended to account for uncertainty in a manner that was neither too stringent nor too lax, but that struck a reasonable and protective middle ground considering the views of the public and the state. Petitioner fails to engage with the Region's explanation or provide any specific information or evidence to support its claim. Petition, 33; *see Env't Disposal Sys.*, 12 E.A.D. at 292. Petitioner's argument essentially amounts to a view that uncertainty is a one-way ratchet, obligating the Region to adopt the most stringent among all reasonable and available approaches—but this is inconsistent with Board precedent. *See In re Dominion Energy Brayton Point, L.L.C*, 13 E.A.D. 407, 426 (EAB 2007) ("In the face of unavoidable scientific uncertainty, the Region is authorized, if not required, to exercise reasonable discretion and judgment."); *e.g.*, *Upper Blackstone*, 14 E.A.D. at 618 (finding the Region's consideration of scientific uncertainty in its analysis did not require it to adopt the more stringent limit available but instead left room for the exercise of agency discretion).

Petitioner additionally disregards the long-standing principle that a Region should defer to a state's interpretation of its own WQS, including that made via a 401 certification, absent a compelling reason to conclude otherwise. *See Ina Road Water Pollution Control Facility,* 2 E.A.D. at 101; *supra* Part II.B. Here, the Region properly relied on the rationale in NHDES' final 401 certification, i.e. "[b]ecause the permit includes effluent limitations on parameters such as total suspended solids and metals, it is already expected to be protective of the benthic

community … and meet surface [WQS]." Att.C, 119; Att.N, 4. In response to Petitioner's comments on the draft 401 certification, NHDES also highlighted the Region's addition of monthly aesthetics monitoring and how the associated reporting will provide continuous information on whether the discharge may be impacting the downstream benthic community. Att.L, 9. Notably, "NHDES has not received any evidence to date that the cumulative effect of all effluent limitations and monitoring requirements is not sufficiently protective of the benthic environment." *Id.* Likewise, the Region was not presented with information in the public comment period that the Permit did not protect WQS or the benthic community. The Region had no compelling reason to depart from the State's interpretation or exclude it from consideration, and Petitioner has not presented a reason here.

Lastly, Petitioner argues the Region "erred by considering cost" and "abused its discretion by asserting conflicting explanations" for cost considerations. Petition, 34-35. Petitioner highlights the Region's acknowledgment that "CWA section 301(b)(1)(c) requires effluent limits to meet [WQS], without exception for cost…" and takes issue with the Region's reliance on cost in justifying the revision to the benthic survey requirement. Petition, 34 n.144, 34-35.

Petitioner's argument is misplaced. The Region cannot consider costs in setting *effluent limitations*[5] under CWA section 301(b)(1)(c), but may do so with respect to monitoring requirements,[6] e.g., surveys. *See* Att.B, 8-1-3 ("The permit writer should establish monitoring frequences… considering the need for data and, as appropriate, the potential cost to the

[5] *See* 33 U.S.C. § 1362(11) (defining effluent limitation as "any restriction established… on quantities, rates, and concentrations" of pollutants).

[6] *See* 40 C.F.R. § 122.48 ("All permits shall specify… [r]equired monitoring…."); *id.* § 122.44(i) (permittees must supply monitoring data and other measurements as appropriate).

permittee."). Petitioner conflates monitoring requirements with effluent limitations when attempting to argue the Region improperly considered cost in establishing the benthic survey requirement. Petition, 34-35. A benthic survey is not an effluent limitation, and EPA reasonably accounted for the significant costs associated with conducting benthic surveys in the Merrimack River in revising the requirement. Att.C, 119.

In sum, the Region has "articulate[d] with reasonable clarity the reasons for its conclusions and the significance of crucial facts it relied upon in reaching those conclusions." *Ash Grove Cement Co*., 7 E.A.D. at 417 (citation omitted). Contrary to Petitioner's argument, the Region did not err in relying on NHDES's 401 certification or cost considerations. Petition, 34-35. Petitioner has not met its heavy burden of demonstrating clear error and has not set forth legal or factual support that the Region abused its discretion. *See supra* Part II.B-C. Review must therefore be denied.

C. The Region acted within its discretion and adequately described its decision to not apply "environmental justice" recommendations.

Petitioner argues the Region erred or abused its discretion by declining to consider the guidance document *Addressing Environmental Justice and Equity in NPDES Permitting* ("EJ Guidance") and by "engag[ing] in no analysis or consideration of environmental justice concerns." Petition, 35, 37. Specifically, Petitioner claims the Region should have, consistent with the EJ Guidance, conducted a "fit for purpose environmental justice analysis" and held an in-person public hearing.[7] *Id.* at 36-37. Petitioner also contests the Region's "muddled and unclear" response to comments and the Region's "misunderstanding" of the EJ Guidance. *Id.* at 38, 44. Finally, Petitioner argues that "to the extent the Region's response relies on the notion

[7] The Region held a public hearing in response to Petitioner's and other comments. Att.C, 109-10. Petitioner does not provide legal or factual support for its contention that a discretionary public hearing must be "in person." Petition, 37; *see* 40 C.F.R. §§ 124.12 (no "in person" requirement), 124.19(a)(4)(1).

that the [EJ Guidance] is no longer in effect, its position is both clearly erroneous as a matter of fact and law and is an important policy consideration warranting the Board's review…." *Id.* at 38-39.

Petitioner has not demonstrated the Region clearly erred or abused its discretion. A "key feature of policy and guidance documents is that such documents leave room for discretion on the part of agency decisionmakers who are applying the guidance." *Ash Grove Cement Co*., 7 E.A.D. at 402 n.13. "When reviewing permit challenges based on environmental justice, the Board evaluates whether the permit issuer reasonably considered the contested issues and explained how it exercised the discretion it has within the confines of existing law." *Deseret*, 19 E.A.D. at 79 (EAB 2024). The permit record contains a reasoned explanation of why the Region exercised its discretion to not conduct a fit for purpose analysis. Att.C, 72. The Board must deny review.

i. The Region articulated its decision with reasonable clarity.

Petitioner claims the Region clearly erred and abused its discretion in providing an "ambiguous" response to Petitioner's comments. Petition, 38. Specifically, Petitioner claims the first paragraph of the response discusses an EO revoking prior EOs upon which the guidance was based, "[w]hile the second paragraph indicates the Region's recognition that the Program policy remains in effect" because it "suggests the Region 'has discretion to either conduct, or not' the … analysis urged by Petitioner." *Id.*

The Region disagrees its Response is ambiguous. "While guidance documents are valuable tools in aiding the Agency's deliberative processes…, they do not confer any rights nor are they binding." *City of Attleboro*, 14 E.A.D. at 438 n.71; *see also In re Wyo. Ref. Co*., 2 E.A.D. 221, 225 (CJO 1986) (explaining the fundamental principle of administrative law that

informal documents of an Agency do not confer any substantive or procedural rights upon the public). Similarly, the Region's decision to apply recommendations from guidance is discretionary. Att.C, 72; *Ash Grove Cement Co*., 7 E.A.D. at 402 n.13. The RTC describes several reasons why the Region exercised its discretion to not conduct a fit for purpose analysis: the Permit complies with all applicable law by protecting WQS; the Region is using the same approach to PFAS it has used in other permits; this approach to PFAS is consistent with a different guidance document; and this permitting action does not authorize incinerator emissions, a topic raised in comment. Att.C, 72. This existing posture regarding the fit for purpose analysis was only reinforced when the EOs upon which the EJ Guidance was based were rescinded by the President. *Id.* The RTC clearly articulates complementary reasons for the Region's permitting decision, satisfying 40 C.F.R. § 124.17. Petitioner cannot establish clear error or abuse of discretion.

ii. The Region's approach was reasonable regardless of the status of the guidance.

Petitioner makes three arguments regarding the status of the guidance document: it has not been revoked (Petition, 39-40); if it has been revoked, then that reversal or change of a prior policy was not supported by a reasoned explanation (Petition, 40-42); and the status of the guidance is an important policy matter warranting the Board's review (Petition, 42).

As noted above, the Agency retracted the guidance before final action on the permit. *Supra* Part IV.B.*iii*. That said, whether or not the guidance was effective at the time of permit issuance is not determinative, as the record contains a reasoned basis, described above, for not applying the EJ Guidance in the manner advocated by Petitioner. For this reason, the Region disagrees with Petitioner's characterization that "the Region's response relies on the notion that [the EJ Guidance] is no longer in effect." Petition, 38. Rather, the Region interpreted the

President's revocation of the EOs as another factor weighing strongly against conducting a fit for purpose analysis, which only supported the Region's other rationales for not doing so, all within its discretion. Att.C, 72. A decision in favor of Petitioner "would only serve to satisfy academic concerns, but would have no effect on the outcome," as even if the EJ guidance were in effect at time of permit issuance, the Region would have retained the discretion to not implement the recommendations in it so long as it provides a reasoned explanation, which it did here and which is sufficient to dispose of the issue in the Region's favor. Petition, 42, 41; *In re Spokane Reg'l Waste-to-Energy*, 2 E.A.D. 809, 815 (Adm'r 1989); *Ash Grove Cement Co*., 7 E.A.D. at 402 n.13.

iii. The Region appropriately exercised its discretion in declining to conduct the requested analysis because the Permit already ensures compliance with WQS.

Petitioner claims the Region clearly erred or abused its discretion by declining to conduct "an environmental justice analysis" on the grounds that the Permit already ensures compliance with WQS because, in Petitioner's view, the Permit does not do so. Petition, 43. Had the Region done such an analysis, Petitioner claims, "it may have reached… a different substantive result with respect to… Env-Wq 1703.21(a) and 1703.01(b)…." *Id.* In Petitioner's view, "the Region also abused its discretion by failing to provide a cogent explanation for why [the Permit's compliance with WQS] renders the [EJ Guidance] inapplicable*." Id.* at 44.

Petitioner's speculative argument that the requested analysis may have led to a "different substantive result" with respect to N.H. Code Admin. R. Ann. Env-Wq 1703.21(a) and Env-Wq 1703.01(b) fails because Petitioner did not raise it in comments, though it could have. 40 C.F.R. §§ 124.13, 124.19(a)(4)(ii). It further fails procedurally because Petitioner does not provide any "legal and factual support" for this position on appeal. 40 C.F.R. § 124.19(a)(4)(i).

Petitioner's argument also fails on the merits, because it relies on a faulty premise that the Permit does not ensure compliance with N.H. Code Admin. R. Ann. Env-Wq 1703.21(a) and Env-Wq 1703.01(b), a position which, as discussed in Part V.A., Petitioner has not established and does not square with the record. As "the Region cannot… condition a permit based on environmental justice considerations where the permittee has demonstrated full compliance with the statutory and regulatory requirements," *Deseret,* 19 E.A.D. at 80-81, the Board must deny review.

iv. The Region appropriately exercised its discretion in declining to conduct the requested analysis because the Permit does not allow any increased water quality impacts to the environment or human health.

Petitioner claims the Region clearly erred and abused its discretion by not conducting the requested analysis on the grounds that the Permit does not allow any increased water quality impacts to the environment or human health. Petition, 44. Petitioner maintains that the EJ Guidance "may justify *reducing* – as opposed to *not increasing* – PFAS discharges…." *Id.*

Petitioner does not provide "legal or factual support" for its position that the EJ Guidance supports "reducing" PFAS discharges or for its position that the "the Permit does *not* prevent any 'increased' water quality impacts…." Petition, 44; 40 C.F.R. § 124.19(a)(4)(i). As described in Part V.C.*iii*, because the Permit complies with statutory and regulatory requirements, Petitioner cannot demonstrate clear error or abuse of discretion on this issue, and the Board must deny review. *Deseret*, 19 E.A.D. at 81.

v. The Region appropriately declined to exercise its discretion to conduct the requested analysis because the Permit's PFAS requirements are equivalent to those in comparable permits.

Petitioner argues the Region clearly erred and abused its discretion by not conducting the requested analysis on the grounds that the Permit's PFAS monitoring requirements are

equivalent to those in other recent permits, when the EJ Guidance "highlights" that analyses should be "evaluated on a permit-by-permit basis." Petition, 45. The Region's decision, Petitioner argues, "rests on a clearly erroneous interpretation of the [EJ Guidance]" and the Region abused its discretion by inadequately explaining its position. *Id.*

As described in Part V.C.*i*, the Region articulated several permit-specific reasons why it decided, within its discretion, not to conduct the analysis. Att.C, 72. The explanation that the Permit's treatment of PFAS is equivalent to that of comparable permits further supports that the Permit fully protects all WQS and that the Permit is consistent with EPA guidance for addressing PFAS in wastewater. *Id.* As described in Part V.C.*iii*, Petitioner cannot demonstrate clear error or abuse of discretion when the Permit complies with all WQS. *Deseret*, 19 E.A.D. at 81. This outcome is particularly appropriate where the Region reasoned that authorities underlying the EJ Guidance no longer apply. Att.C, 49. The Board must deny review.

vi. Petitioner does not confront the Region's response to its sludge incineration comments.

Finally, Petitioner claims the Region clearly erred and abused its discretion by not considering PFAS emissions from the WWTF's sludge-burning incinerator. Petition, 46. Petitioner describes that the Region "avoided" Petitioner's requested analysis by describing that the Permit does not independently establish emissions limitations for the incinerator when the Region should have, in Petitioner's view, considered "the cumulative impacts of PFAS exposures." *Id.*

An "environmental justice analysis 'need not consider emissions that are beyond the scope of the permit action.'" *Deseret*, 19 E.A.D. at 81 (citation omitted). Petitioner alludes to 40 C.F.R. Part 503 but does not explain why these regulations support its position. *See* 40 C.F.R. § 124.19(a)(4)(i). Nor does Petitioner confront the RTC's explanation that 40 C.F.R. Part 503

"do[es] not require PFAS monitoring or reporting." Att.C, 108; *see* 40 C.F.R. § 124.19(a)(4)(ii). The Board must deny review.

VI. CONCLUSION AND REQUEST FOR ORAL ARGUMENT

As stated herein, the Board should deny review. The Region concurs with Petitioner's request for oral argument.

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this response to the petition for review contains fewer than 14,000 words, in accordance with 40 C.F.R. § 124.19(d)(3).

Dated by electronic signature

KRISTEN SCHERB

Digitally signed by KRISTEN SCHERB
Date: 2026.01.30 15:32:52 -05'00'

Kristen Scherb, Esq.
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CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below a copy of the foregoing Response to the Petition for Review and Statement of Compliance with Word Limitations, in connection with *In re City of Manchester*, NPDES Appeal No. 25-04, was sent to the following persons in the manner indicated:

By electronic filing, authorized by the Board's Sept. 29, 2025 standing order:

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