



**TABLE OF CONTENTS**

**I. STATEMENT OF THE CASE**.....1

    A. Introduction.....1

    B. Statutory and Regulatory Background.....3

        1. The Clean Water Act.....3

            a. Technology-Based Requirements.....5

            b. Water Quality-Based Requirements.....7

            c. Anti-backsliding.....8

    C. Factual and Procedural Background.....8

        1. The Facility.....8

        2. The Receiving Waters and Applicable Water Quality Standard.....9

        3. Receiving Water Impairments.....10

        4. Derivation of Technology- and Water Quality-based TSS Limits.....11

            a. Outfall 001 – Application of Effluent Limitations Guideline,  
                Water Quality Standards, and Anti-backsliding.....12

            b. Outfalls 002, 003 and 004 – Application of Best  
                Professional Judgment, Water Quality Standards, and  
                Anti-backsliding.....14

        5. Permit Proceedings.....20

**II. PRINCIPLES GUIDING BOARD REVIEW**.....20

    A. Standard of Review.....20

    B. Petitioner's Burden on Appeal.....22

**III. ARGUMENT**.....23

    A. EPA Rationally Accounted for Outfall-by-Outfall Differences  
        When Deriving TSS Limitations for Outfalls 002, 003 and 004.....23

    B. Petitioner Failed to Preserve Its Objections to the Permit's  
        Sampling Provisions, and Does Not Demonstrate Any Reviewable Error.....26

    C. Petitioner Failed to Preserve Its Objections to the Permit's  
        WET Provisions, and Does Not Demonstrate Any Inconsistency  
        Between the WET Tables and Corresponding Footnotes.....29

**IV. CONCLUSION**.....31

*Index of Exhibits*

*Table of Authorities*

*Statement of Compliance with Word Limitations*

*Certification of Identical Paper Filing*

*Certificate of Service*

## INDEX OF EXHIBITS

<b>No.</b>	<b>AR No.</b>	<b>Name</b>
1	A.7	Fact Sheet for NPDES Permit No. MA0003531, dated May 27, 2013
2	A.11	Prior NPDES Permit No. MA0003531, dated September 20, 2005
3	A.6	Draft NPDES Permit No. MA0003531, dated May 30, 2013
4	A.1	Final NPDES Permit No. MA0003531, dated January 13, 2015
5	B.1	Response to Comments, dated January 13, 2015
6	D.5	CertainTeed Response to EPA Section 308 Request, dated January 12, 2012, and CertainTeed Response, dated March 20, 2012
7	G.2	DMR Total Suspended Solids Summary (2012-2014)
8	H.8	"Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the Paving and Roofing Materials (Tars and Asphalt) Point Source Category" (July 1975)
9	C.1	Commonwealth of Massachusetts CWA § 401 Certification

## **TABLE OF AUTHORITIES**

### **Federal Cases**

*Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA*, 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2282 (2013)  
*In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd*, 614 F.3d 7, 11-13 (1st Cir. 2010)  
*NRDC v. EPA*, 859 F.2d 156 (D.C. Cir. 1988)  
*E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977)

### **Environmental Appeals Board Cases**

*In re Guam Waterworks Auth.*, NPDES Appeal Nos. 9-15 & 9-16 (EAB Nov. 16, 2011), 15 E.A.D. \_\_\_  
*In re City of Attleboro*, NPDES Appeal No. 08-08 (EAB Sept. 15, 2009), 14 E.A.D. \_\_\_  
*In re Shell Offshore, Inc.*, 13 E.A.D. 357 (EAB 2007)  
*In re Prairie State Generating Co.*, 13 E.A.D. 1 (EAB 2006), *aff'd sub nom. Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007)  
*In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490 (EAB 2006)  
*In re Sumas Energy 2 Generation Facility*, PSD Appeal Nos. 02-10 & 02-11, at 10 (EAB March 25, 2003) (Order Remanding in Part and Denying Review in Part)  
*In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323 (EAB 2002)  
*In re City of Moscow*, 10 E.A.D. 135 (EAB 2001)  
*In re City of Irving*, 10 E.A.D. 111 (EAB 2001), *review denied sub nom. City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003)  
*In re Three Mountain Power, LLC*, 10 E.A.D. 39 (EAB 2001)  
*In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661 (EAB 2001)  
*In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1 (EAB 2000)  
*In re Steel Dynamics, Inc.*, 8 E.A.D. 165 (EAB 2000)  
*In re NE Hub Partners, LP*, 7 E.A.D. 561 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999)  
*In re Ash Grove Cement*, 7 E.A.D. 387 (EAB 1997)  
*In re City of Port St. Joe*, 7 E.A.D. 275 (EAB 1997)  
*In re Hadson Power 14*, 4 E.A.D. 258 (EAB 1992)  
*In re Texas Indus., Inc.*, 2 E.A.D. 277 (Adm'r 1986)

### **Statutes**

33 U.S.C. § 1251  
33 U.S.C. § 1292  
33 U.S.C. § 1311  
33 U.S.C. § 1313  
33 U.S.C. § 1314  
33 U.S.C. § 1318  
33 U.S.C. § 1341  
33 U.S.C. § 1342

## **Regulations**

40 C.F.R. § 122.13  
40 C.F.R. § 122.19  
40 C.F.R. § 122.26  
40 C.F.R. § 122.3  
40 C.F.R. § 122.41  
40 C.F.R. § 122.44  
40 C.F.R. § 122.48  
40 C.F.R. § 124.4  
40 C.F.R. § 131.10-12  
40 C.F.R. § 401.16  
40 C.F.R. § 443.32-33

## I. STATEMENT OF THE CASE

### A. Introduction

Saint-Gobain Corporation petitions the Environmental Appeals Board (“Board”) for review of an National Pollutant Discharge Elimination System (“NPDES”) issued by EPA Region 1 (“Region”) to CertainTeed Corporation (“CertainTeed” or “Permittee”), which is a corporate subsidiary of Saint-Gobain and a manufacturer and distributor of fiberglass/asphalt roofing materials. Located in Norwood, Massachusetts, CertainTeed discharges to the Neponset River, and pursuant to its NPDES permit is subject to technology- and water quality-based effluent limitations, as well as monitoring and reporting requirements. Petitioner contests the Region’s imposition of Total Suspended Solids (“TSS”) limitations on three of four discharge outfalls authorized under the Permit. Petitioner also objects to monitoring and reporting provisions of the Permit, alleging that the Region improperly shortened the time by which certain discharges must be sampled (from thirty minutes in the previous permit to fifteen minutes in this Permit) and that it erroneously expressed the Permit’s Whole Effluent Toxicity (“WET”) requirements.

As to TSS, Petitioner claims that the Region erred by failing to apply TSS limitations derived for Outfall 001 to the three other outfalls on the facility—Outfalls 002 through 004. *See* Petition (“Pet.”) at 7. Although the Region amply explained in the permit record that those other outfalls are factually and legally distinguishable from the Outfall 001, Petitioner maintains, without more, “There is no design data or historical data that supports different TSS limits for the four Outfalls at the CertainTeed facility.” *Id.*

Petitioner must do more than that to warrant review. *In re Texas Indus., Inc.*, 2 E.A.D. 277, 279 (Adm'r 1986) (“Less speculation and more empirical evidence is needed by petitioner to justify review of the permit.”). In addition to lodging a vague, unsubstantiated claim of error, which is belied by the Fact Sheet and which is, in any event, refuted by the Region in the Response to Comments, Petitioner has merely repeated its comments on the Draft Permit, an approach that fatally compromises its Petition for Review. Even had CertainTeed carried its burden on appeal in these respects, that by itself would not result in any change to the challenged TSS limitations, as Petitioner has nowhere explained how its request to relax effluent TSS limits placed by the Region on Outfalls 002 through 004 would comply with applicable anti-backsliding prohibitions, other than generically re-alleging the existence of “technical mistakes,” Pet. at 7, a claim directly rebutted by the Region in the Response to Comments.

Petitioner’s objections to the Permit’s monitoring requirements are similarly unworthy of Board review. Petitioner objects to an alleged lack of clarity in the Region’s expression of WET-related monitoring requirements, but declined to bring this matter to the Region’s attention during the public comment period, although the issue was reasonably ascertainable. *See* Pet. at 8. In fact, a careful reading of the Permit reveals the matter to be perfectly clear, as the Region demonstrates in the pages below. Similarly, Petitioner’s concerns over a permit condition requiring sampling within fifteen minutes of discharges from Outfalls 002 through 004 has been raised for the first time in the Petition. *Id.* Not only has the Petitioner procedurally defaulted by raising its objection too late, its position is without merit.

For these reasons, and as explained below, the Board should deny the Petition.

## **B. Statutory and Regulatory Background**

### **1. The Clean Water Act**

Congress enacted the Clean Water Act (“CWA” or “Act”), 33 U.S.C. §§ 1251-1387, “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” CWA § 101(a), 33 U.S.C. § 1251(a). To achieve this objective, the Act prohibits the discharge of pollutants into the waters of the United States, unless authorized by an NPDES or other CWA permit. *See* CWA §§ 301(a), 402, 33 U.S.C. §§ 1311(a), 1342. NPDES permits contain provisions that address two statutory mechanisms for protecting water quality: (1) effluent limitations, which are established by EPA on an industry basis or developed in the context of individual permit decisions; and (2) water quality standards, which generally are promulgated by states and approved by EPA. *See* CWA §§ 301, 303, 304(b), 33 U.S.C. §§ 1311, 1313, 1314(b); 40 C.F.R. pts. 122, 125, 131.

Effluent limitations control pollutant discharges into the waters of the United States by restricting the types and amounts of particular pollutants a permitted entity may lawfully discharge. CWA §§ 301(b), 304(b), 33 U.S.C. §§ 1311(b), 1314(b); 40 C.F.R. § 122.44. Water quality standards, by contrast, are comprised of three components: (1) “designated uses” of a water body, such as public drinking supply, recreation, or wildlife habitat; (2) “water quality criteria,” expressed in numeric or narrative form, specifying the quantities of various pollutants that may be present in the water body without impairing the designated uses; and (3) an “antidegradation” provision that protects existing uses and high quality waters. CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10-.12. CWA regulations expressly authorize States to establish either numeric (quantitative) or narrative (qualitative) water quality

criteria, or both. *See* 40 C.F.R. §§ 131.3(b), 131.11(b). The statute and regulations prohibit permitting authorities from issuing NPDES permits that fail to ensure compliance with the water quality standards of all affected states. CWA §§ 301(b)(1)(C), 401(a)(1)-(2), 33 U.S.C. §§ 1311(b)(1)(C), 1341(a)(1)-(2); 40 C.F.R. §§ 122.4(d), .44(d)(1).<sup>1</sup>

Section 301 of the CWA provides for two types of effluent limitations to be included in NPDES permits: “technology-based” limitations and “water quality-based” limitations. CWA §§ 301, 303, 304(b), 33 U.S.C. § 1311, 1313, 1314(b); 40 C.F.R. Parts 122, 125, 131. Technology-based limitations, generally developed on an industry-by-industry basis, reflect a specified level of pollutant-reducing technology available and economically achievable for the type of facility being permitted. CWA § 301(b). Water quality-based effluent limits, on the other hand, are designed to ensure that state water quality standards are met regardless of the technological and economic factors that inform the derivation of technology-based limitations. In particular, section 301(b)(1)(C) of the CWA requires achievement of “any more stringent limitation [than the technology-based requirements set forth in Section 301(b)(1)(A) and (B)], including those necessary to meet water quality standards...established pursuant to any State law or regulation....” Thus, NPDES permits must contain effluent limitations necessary to attain and maintain water quality standards, without consideration of the cost, availability or effectiveness

---

<sup>1</sup> The Commonwealth of Massachusetts has not obtained NPDES program authorization. Therefore, Region 1 issues NPDES permits to point source dischargers in Massachusetts. Although the Region administers the NPDES program in Massachusetts, the Commonwealth maintains separate, independent permitting authority over surface water discharges pursuant to the Massachusetts Clean Waters Act. *See* Mass. Gen. Laws Ann. Ch. 21 § 43. While the federal and state permits have separate legal foundations, the Region and the Massachusetts Department of Environmental Protection (“MassDEP”) typically coordinate their respective permitting efforts and simultaneously issue the two permits using a single document. *See generally In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 497 n.5 (EAB 2006). MassDEP issued a state permit with identical limitations.

of treatment technologies. *See Upper Blackstone Water Pollution Abatement Dist. v. U.S. EPA*, 690 F.3d 9, 33 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2282 (2013).

**a. Technology-Based Requirements**

Technology-based controls represent the minimum level of control that must be imposed under Sections 301(b) and 402 of the CWA. *See* 40 C.F.R. § 125 Subpart A. The CWA requires two increasingly stringent levels of technology-based controls for existing dischargers. The first level of control is the best practicable control technology currently available (“BPT”) standard for all pollutants. Effluent limitations reflecting BPT were to be met by July 1, 1977. *See* 33 U.S.C. §§ 1311(b)(1)(A), 1314(b)(1)(B). *Id.* The CWA sets forth a number of factors that EPA is to consider in determining the BPT level of control. 33 U.S.C. § 1314(b)(1)(B). *See also* 40 C.F.R. § 125.3(d)(1). The second level of control is either the best conventional pollutant control technology (“BCT”) standard for conventional pollutants or the best available technology economically achievable (“BAT”) for toxic and non-conventional pollutants. *See* 33 U.S.C. §§ 1311(b)(1)(A), 1311(b)(2)(A), and 1311(b)(2)(E).

Effluent limitations for conventional pollutants reflecting BCT were to be met by March 31, 1989. *See* 33 U.S.C. §§ 1311(b)(2)(E), 1314(b)(4)(B); *see also* 40 C.F.R. § 401.16 (conventional pollutants include biochemical oxygen demand (BOD), total suspended solids (TSS) (nonfilterable), pH, fecal coliform, oil and grease). The CWA sets forth a number of factors that EPA must consider in determining the BCT level of control. 33 U.S.C. § 1314(b)(4)(B); 40 C.F.R. § 125.3(d)(2)(i).

Discharges of toxics and “nonconventional” pollutants (*i.e.*, pollutants that are neither “toxic” nor “conventional”) from existing point sources were required to comply by March 31,

1989, with effluent limitations based on BAT. *See* 33 U.S.C. § 1311(b)(2)(A) and (F); *see also* 40 C.F.R. § 401.15 (list of toxic pollutants). The BAT level of control requires compliance with:

“effluent limitations . . . which . . . shall require application of the best available technology economically achievable . . ., which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the [EPA] Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him . . . that such elimination is technologically and economically achievable . . . as determined in accordance with regulations issued by the [EPA] Administrator pursuant to section 1314(b)(2) of this title . . . .”

33 U.S.C. § 1311(b)(2)(A). That is, after considering the statutory factors specified in 33 U.S.C. § 1314(b)(2)(B), EPA must require effluent limitations that could be met by use of the most effective pollution control technologies that are technologically and economically achievable, and that will result in reasonable progress toward eliminating the discharge of the pollutant(s) in question. 33 U.S.C. § 1314(b)(2)(B); 40 C.F.R. § 125.3(d)(3).

The CWA provides two alternative methods for giving effect to its technology standards. First, EPA can issue a regulation for an industrial category (*e.g.*, for paper mills). Industrial categories may, in turn, be broken down into sub-categories based on factors such as the type of processes used or the location of the facilities (*e.g.*, effluent limitations may be tailored for different types of paper mills). EPA then determines the pollution reduction method(s) that represent(s) the appropriate level of control for that industrial category (*e.g.*, BAT or BCT), and sets the effluent limitations for particular pollutants or indicator pollutants based on the use of that method. These industrial category-wide (or sub-category-wide) effluent limitations are referred to as Effluent Limitations Guidelines (ELGs). Once a pertinent ELG has been developed, it governs that the limits that must be included in a facility’s permit. *See* 40 C.F.R. § 125.3(c)(1). *See generally* *E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977).

Second, when EPA has not developed an ELG for a particular industry, or has not addressed a particular pollutant discharged by an industry as part of the rulemaking, the CWA authorizes the Agency to use its Best Professional Judgment (BPJ) to develop permit limits based on a case-by-case, site-specific application of the relevant technology-based level of control. *See* 33 U.S.C. § 1342(a)(1)(B); 40 C.F.R. § 125.3(c)(2). *See NRDC v. EPA*, 859 F.2d 156, 199 (D.C. Cir. 1988) (“BPJ limits constitute case-specific determinations of the appropriate technology-based limitations for a particular point source.”).

**b. Water Quality-Based Requirements**

Under the federal regulations implementing the NPDES program, permit issuers are required to determine whether a given point source discharge “causes, has the reasonable potential to cause, or contributes to” an exceedance of the narrative or numeric criteria for various pollutants set forth in state water quality standards. *See* 40 C.F.R. § 122.44(d)(1)(ii). This regulatory requirement, sometimes described as the “reasonable potential analysis” requirement, provides in full: When determining whether a discharge causes, has the reasonable potential to cause, or contributes to an instream excursion above a narrative or numeric criteria within a [s]tate water quality standard, the permitting authority shall use procedures [that] account for existing controls on point and nonpoint sources of pollution, the variability of the pollutant or pollutant parameter in the effluent, the sensitivity of the species to toxicity testing (when evaluating whole effluent toxicity), and where appropriate, the dilution of the effluent in the receiving water. *Id.*

If a discharge is found to cause, have the reasonable potential to cause, or contribute to exceedances of numeric or narrative state water quality criteria, the permit writer must calculate water quality-based effluent limitations (“WQBELs”) for the relevant pollutants. 40 C.F.R. §

122.44(d)(1)(i), (iii)-(vi). The permit writer must then compare the resulting WQBELs to any technology-based effluent limitations developed for particular pollutants and incorporate the more stringent set of effluent limitations into the permit. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1).

**c. Anti-backsliding**

A permit may not be renewed, reissued or modified with less stringent limitations or conditions (including those based on BPJ) than those contained in the previous permit unless in compliance with the anti-backsliding requirements of the CWA. *See* CWA §§ 402(o); 303(d)(4); 33 U.S.C. §§ 1342(o); 1313(d)(4) ; 40 CFR § 122.44(l).

**C. Factual and Procedural Background**

**1. The Facility**

CertainTeed Corporation manufactures and distributes fiberglass/asphalt roofing materials at an industrial facility located in Norwood, Massachusetts (the “Facility”). Ex. 1 (Fact Sheet) (AR A.7) at 5. The Facility also produces its own granule materials for manufacturing of shingles through a rock crushing operation. *Id.* It is located adjacent to the Neponset River, and is authorized under the Permit to discharge from four outfalls—001, 002, 003 and 004—to that body of water.<sup>2</sup> *Id.* 5-6. The Neponset River is part of the Boston Harbor watershed and flows into Dorchester Bay. *Id.* at 6.

The Facility consists of a roofing materials manufacturing building located in the central portion of the property (the “roofing plant”); covered storage and production buildings located

---

<sup>2</sup> There are nearly two dozen additional outfalls through which the Facility discharges to the Neponset River; these other outfalls are permitted through EPA Region 1’s 2008 Multi-Sector General Permit.

roughly north and south of the roofing plant, an aboveground storage tank (AST) farm (the “tank farm”); an asphalt blow still AST farm (the “still yard”); and paved storage, parking and access areas. Ex. 1 (Fact Sheet) at 5. The Facility also includes a granule processing plant (the “granule plant”), solar reflective granule manufacturing plant, a stone pile, an office building, a covered storage building, and paved parking and access areas. *Id.*

The Facility is approximately one quarter mile upstream of the confluence of the Neponset River and Hawes Brook and just below the Bird Pond Dam. Ex. 1 (Fact Sheet) at 6. The Neponset River flows from west to east along the northern edge of the Facility property. *Id.* at 5. This segment is 13.2 miles in length from the outlet of the Neponset Reservoir in Foxborough to the confluence with the East Branch of the Neponset River in Canton. *Id.* at 6.

The Facility discharges process water, contact and noncontact cooling water, boiler condensate, boiler blowdown, and stormwater runoff from Outfalls 001, 002, 003, and 004 to the Neponset River. Ex. 1 (Fact Sheet) at 5-6. Specifically, Outfall 001 consists of treated contact cooling water that overflows from a cooling water system used to cool asphalt-coated roofing shingles. *Id.* Outfall 002 consists of treated contact process water (*i.e.*, cleaning and dust control water), non-contact cooling water, boiler condensate, boiler blowdown, and stormwater from the granule plant that drains into the Facility’s stormwater system. *Id.* Outfalls 003 and 004 consist of treated stormwater from the tank farm and still yard, respectively. *Id.*

## **2. The Receiving Waters and Applicable Water Quality Standards**

The Facility discharges into a reach of the Neponset River that has been classified by the Commonwealth in its Surface Water Quality Standards, 314 Mass. Code Regs. 4.00 *et seq.* (“Massachusetts Standards”) as a Class B Warm Water Fishery. As a Class B Warm Water Fishery, it is designated as a habitat for fish, other aquatic life and wildlife and for primary (*e.g.*,

swimming) and secondary (*e.g.*, fishing and boating) contact recreation. 314 C.M.R. §§ 4.05(3)(b), 4.06 (Table 15). These waters must be free from floating, suspended and settleable solids in concentrations and combinations that would impair any use assigned to this Class, that would cause aesthetically objectionable conditions, or that would impair the benthic biota or degrade the chemical composition of the bottom. 314 C.M.R. § 4.05(3)(b)(5) (Solids). They must also be free from color and turbidity in concentrations or combinations that are aesthetically objectionable or would impair any use assigned to this Class. *Id.* at 4.05(3)(b)(6) (Color and Turbidity).

In addition to criteria specific to Class B waters, Massachusetts imposes minimum narrative criteria applicable to all surface waters, including aesthetics (“free from pollutants in concentrations or combinations that settle to form objectionable deposits; float as debris, scum or other matter to form nuisances; produce objectionable odor, color, taste or turbidity; or produce undesirable or nuisance species of aquatic life”); bottom pollutants and alterations (“free from pollutants in concentrations or combinations or from alterations that adversely affect the physical or chemical nature of the bottom, interfere with the propagation of fish or shellfish, or adversely affect populations of non-mobile or sessile benthic organisms”); and toxics (“free from pollutants in concentrations that are toxic to humans, aquatic life or wildlife”). *See* 314 C.M.R. § 4.05(5)(a),(b), (e) and (c).

### **3. Receiving Water Impairments**

Section 303(d) of the Act requires states to identify those water bodies that are not expected to meet surface water quality standards after the implementation of technology-based controls and, as such require the development of a total maximum daily loads. The Neponset River segment MA73-01, which receives the Facility’s discharges, is listed as a Category 5

“Waters Requiring a TMDL” on the Massachusetts Year 2012 Integrated List of Waters (CWA Sections 303d and 305b)<sup>3</sup> for dichlorodiphenyltrichloroethane (DDT), *Escherichia coli* (*E. coli*), excess algal growth, dissolved oxygen, polychlorinated biphenyls (PCBs) in fish tissue, phosphorus (total), sedimentation/siltation, total suspended solids (TSS), turbidity, and other (not specified). Ex. 1 (Fact Sheet) at 6-7. *See also* Neponset River Watershed 2004 Water Quality Assessment Report. MassDEP Division of Watershed Management, Worcester, Massachusetts; February 2010, Report Number: CN170.4 at 6 (describing water quality impairments in the segment that receives the Facility’s discharge).<sup>4</sup>

#### **4. Derivation of Technology- and Water Quality-based TSS Limits**

CertainTeed’s previous permit, which the Region issued September 20, 2005 and expired on November 30, 2010, included effluent limitations on TSS discharges from Outfalls 001 through 004. Ex. 2 (Prior Permit) (AR A.11). From May 30, 2014 through July 12, 2014, the Region solicited public comments on a Draft Permit. Ex. 3 (AR B.1). In developing the Draft Permit, the Region individually evaluated each outfall to determine the limitations necessary to comply with technology-based requirements under the Act, as well as to meet Massachusetts Surface Water Quality Standards, including anti-degradation requirements. *See* Ex. 1 (Fact Sheet) sections 3, 5.3 through 5.6, 7.1.2, 7.2.2 and 7.3.2. The limits were also assessed relative to anti-backsliding requirements of Section 402(o) of the Act. *Id.* at section 5.4.

---

<sup>3</sup> Massachusetts Year 2012 Integrated List of Waters, Final Listing of the Condition of Massachusetts’ Waters Pursuant to Sections 305(b), 314 and 303(d) of the Clean Water Act. MassDEP Division of Watershed Management Watershed Planning Program, Worcester, Massachusetts; January 2012, Report Number CN400.0.  
<http://www.mass.gov/eea/docs/dep/water/resources/07v5/12list2.pdf>.

<sup>4</sup> <http://mass.gov/eea/docs/dep/water/resources/71wqar09/73wqar10.pdf>.

As in the Prior Permit, the Region proposed the Draft Permit to include, *inter alia*, technology- and water quality-based effluent limitations for TSS on Outfalls 001 through 004. Ex. 1 (Fact Sheet) at sections 3, 5.3 through 5.6, 7.1.2, 7.2.2 and 7.3.2. In establishing TSS limitations in the permit reissuance, EPA reevaluated and affirmed all TSS limits as they were established for Outfalls 002, 003 and 004 in the Prior Permit. *Compare* Ex. 3 (Draft Permit) Parts I.A.1-4 *with* Ex. 2 (Prior Permit) Parts I.A.1-4. As to Outfall 001, the Region retained the existing concentration-based TSS limit as in the Prior Permit, but the Draft Permit proposed an additional mass-based TSS limitation derived from the applicable ELG for the Paving and Roofing Material Point Source Category, 40 C.F.R. part 443. Ex. 1 (Fact Sheet) at section 7.1.2. EPA confirmed that these technology-based effluent limitations, established on a case-by-case basis using Best Professional Judgment (with the exception of the mass-based limit for Outfall 001), also ensured compliance with the narrative standard in Massachusetts' Surface Water Quality Standards applicable to the classification of the receiving water. *Id.* at sections 7.1.2, 7.2.2 and 7.3.2.

**a. Outfall 001 – Application of Effluent Limitations Guideline, Water Quality Standards, and Anti-backsliding**

EPA has promulgated technology-based ELGs representing BPT at 40 C.F.R. § 443.32 and for BAT at 40 C.F.R. § 443.33 for process wastewater in the Paving and Roofing Materials Point Source Category, Subpart C., Asphalt Roofing Subcategory for existing sources. Outfall 001 consists of contact process water from operations under SIC 2952 (Asphalt Felts and Coatings) treated by sedimentation first in an interior trough followed by exterior parallel concrete basins with turbidity curtain and surface skimmer. *See* Ex. 1 (Fact Sheet) at sections 6.1 and 6.2. The limits derived for Outfall 001 are production normalized mass-based limits

based on ELGs for BPT in 40 C.F.R. § 443.32 and for BAT in 40 C.F.R. § 443.33 for process wastewater in the Paving and Roofing Materials Point Source Category, Subpart C., Asphalt Roofing Subcategory for existing sources).<sup>5</sup> Ex. 1 (Fact Sheet) at section 7.1.2. Because the TSS limits calculated for BAT were more protective than BPT, the Permit included a maximum daily limit of 68 lbs/day and an average monthly limit of 46 lbs/day for TSS based on BAT limitations.<sup>6</sup> *Id.*

The Region also imposed a daily maximum concentration-based limit of 70 mg/L and a monthly limit of 40 mg/L for TSS. These limits were identical to the Prior Permit and were maintained, *inter alia*, to meet the anti-backsliding prohibition for limits established in the Prior Permit. The Region concluded that no exception to that prohibition applied. Ex. 1 (Fact Sheet) at sections 7.1.2 and 5.4. Additionally, as described in above, *supra* at Section I.B.1.3, the Neponset River is impaired and requires a TMDL for sedimentation/siltation, TSS, and turbidity. Given the impairment to the Neponset River and the concentrations of TSS measured in effluent from the Facility, the Draft Permit maintained the concentration-based limits for maximum daily and monthly average TSS of 70 mg/L and 40 mg/L, respectively. *Id.* at section 7.1.2.

---

<sup>5</sup> In this ELG, BAT, and not BCT, was established for TSS, as the ELG was promulgated in 1975, predating the advent of BCT, which was not added to the CWA until 1977. BCT was meant to replace BAT for control of conventional pollutants, but EPA never promulgated BCT-based limits for this category. Therefore, BAT-based limits, and not BCT, apply to TSS for this point source category.

<sup>6</sup> During the permit issuance process, EPA identified the omission of a mass-based limits required under the applicable ELG. Ex. 1 (Fact Sheet) at section 7.1.2. The June 24, 1975 permit properly contained both production-normalized limits based on ELGs in the Paving and Roofing Materials Point Source Category, Subpart C, Asphalt Roofing Subcategory and concentration-based maximum daily and monthly average limits of 70 mg/L and 40 mg/L, respectively, based on the treatment technology applied to the effluent. *Id.* The permit modification of July 26, 1976 updated the production-normalized limits to account for increased production at the Facility, but failed to carry over the ELG-based limits. *Id.*

**b. Outfalls 002, 003 and 004 – Application of Best Professional Judgment, Water Quality Standards, and Anti-backsliding**

Unlike Outfall 001, the Region concluded that the Paving and Roofing Point Source Category ELG did not apply to limits for TSS at Outfalls 002, 003 and 004, which are composed of effluent from industrial categories not subject to the ELG. *See* Ex. 1 (Fact Sheet) at 11-12; *see also* Ex. 5 (RTC) at Response to Comment A5, A8 and A12. The ELG for process wastewater in the asphalt felts and coatings subcategory (SIC 2952), which resulted in the establishment of new technology-based mass-based TSS limits at Outfall 001, does not apply to limits for TSS at Outfalls 002, 003 and 004, as Outfalls 002, 003 and 004 do not consist of process wastewater in the asphalt felts and coatings subcategory as defined in 40 C.F.R. § 443 subpart C and described in EPA’s development document for this ELG.<sup>7</sup>

In the absence of technology-based effluent guidelines, the Region establishes effluent limitations on a case-by-case basis using BPJ pursuant to Section 402(a)(1)(B). This involved consideration of the relative performance of alternative pollution reduction methods, including methods in use at other facilities, as well as the pertinent factors specified in Section 304(b) of

---

<sup>7</sup> Ex. 7 (“Development Document for Effluent Limitations Guidelines and New Source Performance Standards for the Paving and Roofing Materials (Tars and Asphalt) Point Source Category” (July 1975) (“ELG Development Document”) (AR H.8). The manufacturing process for asphalt roofing materials in the asphalt felts and coatings subcategory (SIC 2952) is described in terms of the production line, where raw materials are combined and/or applied, but not themselves manufactured. *Id.* at 23. The manufacturing process takes place at the facility site inside the roofing plant building. Water is used in the manufacture of asphalt roofing materials in this subcategory (SIC 2952) “to cool the product and process controls.” *Id.* at 38. The facility uses water which generates wastewater discharges only with respect to cooling the product and only discharges this type of wastewater via Outfall 001. Ex. 1 (Fact Sheet) at sections 2, 6.2.1, Attachment 4.

the CWA, 33 U.S.C. § 1314(b) and 40 C.F.R. § 125.3(d). *Id.* This analysis resulted in more stringent concentration-based effluent limitations for Outfalls 002 through 004 than those imposed on Outfall 001, as informed by the differences in effluent types (especially differences in the industrial categories applicable to the operations at different portions of the facility site),<sup>8</sup> differences in the specific types of treatment applied at each outfall, and the performance data for

---

<sup>8</sup> While Outfall 001 consists of process wastewater resulting from the manufacturing of asphalt roofing materials as mentioned above, *Outfall 002* is composed of process wastewater in the mineral mining industrial point-source category, minerals and earths, ground or otherwise treated subcategory (SIC 3295) resulting from the manufacture of rock granules. *Outfalls 003 and 004* do not consist of process wastewater, rather, storm water from areas adjacent to tank farms used to store petroleum products and by-products including asphalt. Ex. 1 (Fact Sheet) at sections 2, 6.2.1, Attachment 2, 4. The ELG Development Document notes that while a raw material such as felt is used in the manufacturing process for asphalt roofing materials, and several facilities at the time produced their own felt for this use, the felt-making process is covered under a separate ELG. Ex. 8 at 38. Similarly, while rock granules and asphalt are raw materials used in the process of manufacturing asphalt roofing materials, the production of rock granules (ELG for certain subcategories at 40 C.F.R. § 446, SIC 3295) and the storage of petroleum products and byproducts (ELG for certain activities at 40 C.F.R. § 442, SIC 5171) are processes covered by separate industrial categories with separate ELGs for certain subcategories and/or processes. The aforementioned ELGs do not include the subcategories applicable to the facility granule plant or tank farms. The ELG Development Document further states that pollutants in non-process wastewater are not included. Ex. 8 at 41.

A proportion of effluent discharged from Outfall 002 and effluent discharged from Outfalls 003 and 004 consists of non-process wastewater, specifically, storm water associated with industrial activity. Ex. 5 (RTC) at Response to Comments A.5, A.8 and A.12. Discharges of storm water from Outfall 002 consist of runoff from the drainage area surrounding only the granule plant and discharges of storm water from outfalls 003 and 004 consist of storm water runoff from only the aboveground storage tank farms used to store petroleum products and by-products. Ex. 1 (Fact Sheet) at Attachment 2. The ELG Development Document makes note of runoff from a facility which utilizes an asphalt oxidizing tower, where surrounding grounds may become saturated with oil and grease. However, the development document states that surface runoff containing oil and grease is “usually sewered. Ex. 8 at 39. The Facility does not sewer runoff from areas surrounding its asphalt storage tanks, and absent further consideration of storm water relative to the ELG applicable to the asphalt felts and coatings subcategory, the ELG cited by the petitioner was not utilized as a supporting basis for case-by-case TSS limits at Outfalls 002, 003 and 004. *See* Ex. 1 (Fact Sheet) at 11-12; *see also* Ex. 5 (RTC) at Response to Comment A5, A8 and A12.

TSS at each outfall, as described below. Ex. 1 (Fact Sheet) at sections 2, 6.2.1, 7.1.2, 7.2.2, 7.3.2, Attachment 2, 3 and 4; Ex. 5 (RTC) at Response to Comments at A.5, A.8, and A.12. And, in its Fact Sheet and Response to Comments, the Region fully explained its rationale for imposing differing TSS limitations on Outfall 001 than those placed upon Outfalls 002 through 004. Ex. 1 (Fact Sheet) at sections 7.1.2, 7.2.2, 7.3.2; Ex. 5 (RTC) at Response to Comments at A.5, A.8 and A.12.

#### *Outfall 002*

Outfall 002 consists of non-contact cooling water, boiler blowdown, and boiler condensate from the operation of machinery used to manufacture crushed rock granules (SIC 3295), contact process water used for dust control and cleaning during the manufacturing of crushed rock granules, and stormwater from the pervious and impervious surfaces adjacent to the portion of the Facility engaged only in the manufacturing of crushed rock granules. Ex. 1 (Fact Sheet) at sections 6.2.1, Attachment 2 and 4. The Permit requires that the effluent from these operations be managed by Best Management Practices, including site-specific requirements pertaining to solids minimization, as described in a Stormwater Pollution Prevention Plan in alignment with EPA's Multi-Sector General Permit, and meet numeric technology-based effluent limitations based on treatment by sedimentation in an exterior unlined infiltration basin. Ex. 4 (Final Permit) Parts I.A.2 and I.D.1.c; Ex. 1 (Fact Sheet) sections 6.2.1, 7.1.2 and 7.1.4, Attachment 2 and 4; Ex. 6 (Response to Section 308 Information Request). The numeric limits - a monthly average TSS limit of 20 mg/L and maximum daily limit of 30 mg/L - were included in the NPDES permit issued in 2005, and are based on the treatment of the effluent by sedimentation. Ex. 5 (RTC) at Response to Comment A.5; Ex. 1 (Fact Sheet) at section 7.1.2.

The non-numeric technology-based limits are expected to reduce concentrations of TSS to at least the benchmark monitoring threshold for stormwater associated with industrial activity under EPA's 2008 Multi-Sector General Permit, 100 mg/L, a monthly average concentration. Ex. 5 (RTC) at Response to Comment A.5. Additional treatment consists of retention and infiltration in an existing infiltration basin capable of achieving a design removal rate of 80% of the TSS load entering the treatment system, based on the treatment system design. *Id.* at 7. An 80% reduction of the expected monthly average influent TSS concentration of 100 mg/L yields a monthly average TSS limit of 20 mg/L for TSS at Outfall 002. *Id.* The daily maximum limit was established to allow for variability above the derived limit such that the effluent will still meet the monthly average limit overall. Ex. 4 (Final Permit) Part I.A.2. and Part I.D.1.; Ex. 1 (Fact Sheet) section 7.2.2 and Attachment 3; Ex. 5 (RTC) Response to Comment A5; Ex. 7 (DMR TSS Data Summary).

#### *Outfall 003*

Outfall 003 consists of storm water runoff from an impervious area enclosed around aboveground tanks used primarily for storing petroleum products and by-products, especially asphalt. Ex. 1 (Fact Sheet) sections 2, 6.2.1, and Attachment 2; Ex. 6 (Response to Section 308 Information Request). Based on this use, EPA identified this discharge as storm water associated with industrial activity, and considered the limits in the context of a comparable industrial activity, SIC 5171 (Petroleum Bulk Stations & Terminals). Ex. 5 (RTC) at Response to Comment A.8. The Permit requires that the storm water from this activity be managed by Best Management Practices, including site-specific requirements pertaining to solids minimization, as described in a Stormwater Pollution Prevention Plan in alignment with EPA's Multi-Sector General Permit, and meet numeric technology-based effluent limitations based on treatment by

flotation in an exterior oil/water separator. Ex. 4 (Final Permit) Parts I.A.3. and I.D.1.c.; Ex. 1 (Fact Sheet) sections 2, 6.2.1, 7.3.1, 7.3.2 and Attachment 4; Ex. 6 (Response to Section 308 Information Request). The numeric TSS limits – a maximum daily limit of 15 mg/L and a monthly average limit of 10 mg/L – were also included in the individual NPDES permit issued in 2005. Ex. 5 (RTC) at Response to Comment A8.

The non-numeric technology-based limits are expected to reduce concentrations of TSS to at least the benchmark monitoring threshold for stormwater associated with industrial activity under EPA's 2008 Multi-Sector General Permit, 100 mg/L, a monthly average concentration. Ex. 5 (RTC) at Response to Comment A.8 with cross reference to Response to Comment A.5. Additional treatment consists of transfer and treatment through a sump pump and an aboveground 20 gallon per minute oil/water separator, which has proven capable of meeting a monthly average concentration of 10 mg/L, as demonstrated by performance data since 2012. Ex. 1 (Fact Sheet) Fact Sheet sections 2, 6.2.1, 7.3.1, 7.3.2; Ex. 5 (RTC) at Response to Comment A.8; Ex. 6 (Response to Section 308 Information request); Ex. 7 (DMR TSS Data Summary).

#### *Outfall 004*

Outfall 004 consists of storm water runoff from an impervious area enclosed around aboveground tanks used primarily for storing petroleum by-products, especially asphalt. Ex. 1 (Fact Sheet) sections 2, 6.2.1, and Attachment 2; Ex. 6 (Response to Section 308 Information request). Based on this use, EPA identified this discharge as storm water associated with industrial activity, and considered the limits in the context of a comparable industrial activity, SIC 5171 (Petroleum Bulk Stations & Terminals). Ex. 5 (RTC) at Response to Comment 12 with cross reference to Response to Comment A.8. The Permit requires that the storm water

from this activity be managed by Best Management Practices, including site-specific requirements pertaining to solids minimization, as described in a Stormwater Pollution Prevention Plan in alignment with EPA's Multi-Sector General Permit, and meet numeric technology-based effluent limitations based on treatment by flotation in an exterior oil/water separator. Ex. 4 (Final Permit) Parts I.A.4. and I.D.1.c; Ex. 1 (Fact Sheet) at sections 2, 6.2.1, 7.3.1, 7.3.2 and Attachment 4; Ex. 6 (Response to Section 308 Information Request). The numeric TSS limits – a maximum daily limit of 15 mg/L (at issue in the petition) and a monthly average limit of 10 mg/L – were included in the individual NPDES permit issued in 2005. Ex. 5 (RTC) at Response to Comment A.12 with cross reference to Response to Comment A.8.

The non-numeric technology-based limits are expected to reduce concentrations of TSS to at least the benchmark monitoring threshold for stormwater associated with industrial activity under EPA's 2008 Multi-Sector General Permit, 100 mg/L, a monthly average concentration. Ex. 5 (RTC) at Response to Comment A.12. cross reference to Response to Comment A.8. and Response to Comment A.5. Additional treatment consists of transfer and treatment through a sump pump and an aboveground 100 gallon per minute oil/water separator capable of meeting a threshold to 10 mg/L, as demonstrated by actual performance data since 2012. Ex. 1 (Fact Sheet) sections 2, 6.2.1, 7.3.1, 7.3.2; Ex. 5 (RTC) at Response to Comment A.8; Ex. 6 (Response to Section 308 Information Request); Ex. 7 (DMR TSS Summary).

Furthermore, in terms of water quality, the Neponset River is impaired for sedimentation/siltation, TSS, and turbidity. Given the impairment to the Neponset River and the concentrations of TSS measured in effluent from the Facility, the Permit maintained the concentration-based limits for maximum daily and monthly average TSS of 30 mg/L and 20 mg/L, respectively, for Outfall 002, and 10 mg/L and 15 mg/L for Outfalls 003 and 004, in order

to ensure compliance with applicable water quality standards. Ex. 1 (Fact Sheet) at sections 7.2.2 and 7.2.3. Ex. 5 (RTC) at Responses to Comments A.5, A.8 and A.12. The limitations were also retained to be consistent with applicable anti-backsliding requirements. *Id.*

## **5. Permit Proceedings**

The Region received comments on the Permit from only one party, Patrick Widman, the plant manager of the Facility. Upon preparing a Response to Comments and obtaining certification from the Commonwealth of Massachusetts, Ex. 9 (Certification) (AR C.1), the Region issued the permit on January 13, 2015.

CertainTeed timely appealed.

## **II. PRINCIPLES GUIDING BOARD REVIEW**

Section 124.19 of Title 40 of the Code of Federal Regulations governs Board review of an NPDES permit. In any appeal from a permit decision issued under part 124, the petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19.

### **A. Standard of Review**

Under 40 C.F.R. § 124.19, the Board has discretion to grant or deny review of a permit decision. Ordinarily, the Board will deny review of a permit decision and thus not remand it unless the permit decision either is based on a clearly erroneous finding of fact or conclusion of law, or involves a matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a)(4)(i)(A)-(B); *accord, e.g., In re Prairie State Generating Co.*, 13 E.A.D. 1, 10 (EAB 2006), *aff'd sub nom. Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007).

When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit

issuer exercised his or her “considered judgment.” *See, e.g., In re Steel Dynamics, Inc.*, 8 E.A.D. 165, 191, 224-25 (EAB 2000). The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied upon when reaching its conclusion. *E.g., In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007). As a whole, the record must demonstrate that the permit issuer “duly considered the issues raised in the comments” and ultimately adopted an approach that “is rational in light of all information in the record.” *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002); *accord In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001); *In re NE Hub Partners, LP*, 7 E.A.D. 561, 567-68 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3d Cir. 1999). On matters that are fundamentally technical or scientific in nature, the Board typically will defer to a permit issuer's technical expertise and experience, as long as the permit issuer adequately explains its rationale and supports its reasoning in the administrative record. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 510 (EAB 2006) (the Board generally defers to the Region on technical determinations where the Region's approach was rational in light of all the information in the record).

In reviewing an exercise of discretion by the permitting authority, the Board applies an abuse of discretion standard. *See In re Guam Waterworks Auth.*, NPDES Appeal Nos. 9-15 & 9-16, slip op. at 9 n.7 (EAB Nov. 16, 2011), 15 E.A.D. The Board will uphold a permitting authority's reasonable exercise of discretion if that decision is cogently explained and supported in the record. *See In re Ash Grove Cement*, 7 E.A.D. 387, 397 (EAB 1997) (“[A]cts of discretion must be adequately explained and justified.”).

## **B. Petitioner's Burden on Appeal**

The burden of demonstrating that the Board should review a permit rests with the petitioner. 40 C.F.R. § 124.19(a)(1)-(2). A petitioner seeking review must demonstrate that any issues and arguments it raises on appeal have been preserved for Board review, unless the issues or arguments were not reasonably ascertainable before the close of the public comment period. 40 C.F.R. §§ 124.13, .19(a); *see In re City of Moscow*, 10 E.A.D. 135, 141, 149-50 (EAB 2001). In other words, the regulations require that persons who seek review of a permit decision “must raise *all reasonably ascertainable issues* and submit *all reasonably available arguments* supporting their position by the close of the public comment period” on the draft permit. 40 C.F.R. § 124.13 (emphases added).

Assuming that the issues have been preserved, the petitioner must specifically state its objections to the permit and explain why the permit issuer's previous response to those comments was clearly erroneous or otherwise warrants review. 40 C.F.R. § 124.19(a); *see, e.g., In re City of Irving*, 10 E.A.D. 111, 129-30 (EAB 2001), *review denied sub nom. City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003). The Board consistently has denied review of petitions that merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit. *E.g., In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd*, 614 F.3d 7, 11-13 (1st Cir. 2010); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) (“Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review.”).

Finally, as CertainTeed is aware, Petitioners may *not* raise new issues or arguments in either in any reply brief, 40 C.F.R. § 124.19(c)(1), as “[A]llowing a petitioner to raise for the

first time on appeal concerns that could have been brought to the attention of the permitting authority, would leave the [] permit system open-ended, frustrating the objective of repose and introducing intolerable delay.” *In re Sumas Energy 2 Generation Facility*, PSD Appeal Nos. 02-10 & 02-11, at 10 (EAB March 25, 2003) (Order Remanding in Part and Denying Review in Part).

### III. ARGUMENT

#### A. EPA Rationally Accounted for Outfall-by-Outfall Differences When Deriving TSS Limitations for Outfalls 002, 003 and 004

Petitioner contends that the Region erred by treating the four discharges authorized under the permit—from Outfall 001, Outfall 002, Outfall 003 and Outfall 004—differently for the purposes of setting TSS limitations. *Pet.* at 7-8. Petitioner alleges, without further substantiation, that “[t]here is no design data or historical record that supports different TSS limits for the four Outfalls at the CertainTeed facility.” *Id.* at 7. It contends, again without more, that the Region “did not substantiate the TSS limits for Outfalls 002, 003 and 004.” *Id.* In Petitioner’s opinion, such limits were established “in error” as the result of uncorrected (and unspecified) ‘mistakes,’ and “are not supported by activity at the site.” *Id.* at 7.

In faulting the Region for imposing different TSS limits on different outfalls, Petitioner has done no more than restate—in large part verbatim—its objections on the Draft Permit, while entirely ignoring the Region’s considered response to those concerns, other than quoting, word-for-word, the Region’s description of the change to TSS limitations for Outfall 001. *Compare* *Pet.* at 5-10 *with* Ex. 5 (RTC) at 3-11. This is insufficient to garner Board review. It is axiomatic under this Board’s precedent that, “Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the

permitting authority's response to those objections warrants review." *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000); *In re Hadson Power 14*, 4 E.A.D. 258, 294-95 (EAB 1992) (denying review where petitioners merely reiterated comments on draft permit and attached a copy of their comments without addressing permit issuer's responses to comments).

Petitioner's approach is especially unavailing in the context of a challenge to the technical basis for a permit's effluent limitation. "[I]n a challenge to technical issues, a petitioner [is expected] to present [the Board] with references to studies, reports or other materials that provide relevant, detailed, and specific facts and data about permitting matters that were not adequately considered by a permit issuer." *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 32 (EAB Sept. 15, 2009). In light of this standard, Petitioner's uncorroborated assertions are plainly insufficient to disturb the Region's technical judgments and, for this reason, review must be denied.<sup>9</sup>

Although Petitioner predictably seeks uniform application of the *least* stringent TSS limitation across all the permitted outfalls, the Region decision to account for outfall-by-outfall differences in deriving TSS was, in addition to being rational, required, under the Act and

---

<sup>9</sup> Petitioner's claim that the Region failed to consider "the amount of discharge" and "how the discharge occurs," *Pet.* at 7, in deriving limits for Outfalls 002 through 004 is entirely unsupported and contradicted by the Administrative Record. Specifically, the processes by which effluent is generated is discussed in section 6.1 of the Fact Sheet. Ex. 1. The outfalls, including the treatment process is primarily discussed in section 6.2.1 of the Fact Sheet. The dilution factor and appropriate measure of production, including additional information regarding the frequency, magnitude and duration, are discussed in sections 6.2.2 and 6.2.3 of the Fact Sheet. Actual measurements of the effluents with respect to flow and TSS are summarized in section 7.1.1 and 7.1.2 for Outfall 001, section 7.2.1 and 7.2.2 for Outfall 002 and section 7.3.1 and 7.3.2 for Outfalls 003 and 004, with data tables appended in Attachment 3 of the Fact Sheet. With respect to TSS limits, the Response to Public Comments also provides additional information regarding the characteristics the Region considered in retaining technology-based limits established on a case-by-case basis using best professional judgment. Ex. 5 (RTC) at Response to Comments A1, A3, A5, A6, A8 and A12.

implementing regulations, and gave credence to all the information in the record. It should not be surprising that different outfalls may be subject to different limitations. As explained in the Fact Sheet and Response to Comments, outfalls at this Facility differ in effluent type and quality, method of treatment, and discharge volume, frequency and duration such that identical limitations for TSS are not appropriate. Ex. 1 (Fact Sheet) at Cover page and sections 2, 6.2.1, 7.1.2, 7.2.2, and 7.3.2; Permit Part I.A.1 through 4; Ex. 5 (RTC) at 7, 9 and 10. The fact that the Region has accounted for a variety of discharge-specific circumstances, as well as the operation of technology and water quality-based requirements of Section 301, in deriving permit effluent limitations for the Facility, is a natural outcome of the Act, not a cause for Board review. For this reason, a mere disparity in permit limits at a facility is not “by itself a matter warranting review.” *In re City of Port St. Joe*, 7 E.A.D. 275, 305 n.44 (EAB 1997); accord *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 36, 41 (EAB Sept. 15, 2009).

The Region duly considered each of the concerns raised by Petitioner in its comments on the Draft Permit, as is evident from the Permit record. In comments submitted on the Draft Permit, the Permittee requested that the Region relax the limits for Outfalls 002, 003 and 004 to equal Outfall 001’s concentration-based limits—comments which are restated in the introduction and argument of the Petition. Ex. 5 (RTC) at Comment A5, A8, and A12. EPA denied this request in its Response to Comments, and outlined how “design data or historical record” and technology- and water- quality bases support the limits at each outfall to demonstrate that the original limits were not “established in error.” Ex. 5 (RTC) at 5-7, 8-9 and 10. Although Petitioner complains that it is unreasonable for the outfall with the highest frequency and volume of discharge to be afforded the highest limits, *Pet.* at 7 and 9, this observation does not constitute grounds for Board review, where the Region has amply explained how the record does not

support higher limits for TSS at Outfalls 002, 003 and 004. Ex. 4 (RTC) at Response to Comment A5, A8 and A12. Specifically, the Region explained that the concentrations-based effluent limitations on Outfalls 002, 003, and 004, were being maintained in the permit reissuance based on the type of treatment and performance data. Ex. 1 (Fact Sheet) at pages 9, 10 and 13-15; Ex. 5 (RTC) at Responses to Comments A.8 and A.12; *supra* at Section I.C.4 (describing derivation of TSS permit limits). These limits, as with TSS limits at each of the outfalls, are technology-based limits established on a case-by-case basis based on Best Professional Judgment as authorized under Section 402(a)(1)(B) of the Act and 40 C.F.R. 125. Ex. 1 (Fact Sheet) at 8. The Region also explained that the limits were required to meet anti-backsliding and to ensure water quality standards are met. *Id.* at 14.

For all the reasons above, the Board should deny review of this issue.

**B. Petitioner Failed to Preserve Its Objections to the Permit's Sampling Provisions, and Does Not Demonstrate Any Reviewable Error**

Petitioner next contends that the Region abused its discretion by imposing a requirement to collect samples for certain parameters from Outfalls 001 through 004 within the first fifteen minutes of a discharge, a change from the existing permit that required stormwater samples to be taken within the first 30 minutes of the discharge if certain storm event characteristics were met. *See* Pet. 6; Ex. 4 (Final Permit) at 10 (Parts I.A.1-4 footnote 3).

But this argument was not presented anywhere in the proceedings below, though it was clearly available. The footnote included in the Final Permit is identical to the sample type footnote included in the Draft Permit, except that any requirement pertaining to a composite sample was removed as a result of a request by the Permittee made during the public comment

period to change composite samples to grab samples at Outfalls 002, 003 and 004.<sup>10</sup> The issue is, accordingly, waived. *In re Upper Blackstone Water Pollution Abatement Dist.*, NPDES Appeal Nos. 10-09 through 10-12, slip op. at 7 (EAB Mar. 31, 2011), *aff'd*, 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2382 (May 13, 2013).

On the merits, CertainTeed has failed to even characterize the permit condition accurately and cannot, as a consequence, demonstrate any basis for review. Contrary to Petitioner's claim that the Permit requires, without exception, sampling within fifteen minutes of a discharge, the actual permit condition is considerably more nuanced, stating:

“Grab samples shall be taken during the first 15 minutes of the initiation of the discharge where practicable, but in no case later than within the first hour of discharge. If collection of sample(s) during the first 15 minutes of discharge is impracticable, the Permittee shall submit a description of why the collection of the sample(s) during the first 15 minutes was impracticable.” *See* Ex. 3 (Final Permit) at Part 1.A.1-4 footnote 3.

Petitioner's unsubstantiated conjecture that sampling within fifteen minutes of a discharge “would be virtually impossible, especially given the winter weather in MA[,]” and Petitioner's claim that it “would virtually impossible to collect a sample during the ‘first flush’ if the event occurred when the facility is not operating or no one is available to collect the sample,” Pet. at 6, do not constitute grounds for review, *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 58 (EAB 2001) (“The Board will not overturn a permit provision based on speculative arguments.”).

Moreover, while the Petitioner has requested the change for Outfalls 001, 002, 003 and 004, it presents an argument pertaining only to Outfall 002. With regard to Outfall 002, Petitioner states that the sample type requirement in footnote 3 is based on collecting a sample during the “first flush.” The Region did not, in fact, rely on this basis in the permit record, nor

---

<sup>10</sup> Ex. 5 (RTC) at Response to Comment A3, Comment and Response to Comment A6, and Comment and Response to Comment A9.

did the Region utilize the term “first flush” with respect to discharges from Outfall 002. Rather, the Region stated, “[i]n order to collect information representative of discharges from this outfall, EPA is establishing requirements for Outfall 002 *when discharging*, rather than in connection with certain-sized precipitation events.” (emphasis added). Ex. 1 (Fact Sheet) at 22. Specifically, the Region determined that discharges at Outfall 002 do not discharge with a frequency attributable to a qualifying storm event under the regulation. Ex. 1 (Fact Sheet) at section 6.2.2 and section 7.2.1. Because discharges at Outfall 002 no longer have to meet precipitation event size and frequency typical of stormwater-only sampling programs, the Region concluded that initiation of grab sampling within fifteen minutes of the discharge will yield data representative of the discharges, consistent with the Act and regulations. CWA § 308(a); 40 C.F.R. §§ 122.41(j), .44(i) and .48.<sup>11</sup> Ex. 5 (RTC) at Comment and Response to Comment A2, A3, A6, and A9.

It is well established that permit writers enjoy broad authority under the CWA and regulations to prescribe data collection and reporting requirements. *See* CWA § 308(a)(A), 33 U.S.C. § 1318(a)(A) (specifying that permittees must provide records, reports, and other information EPA reasonably requires); CWA § 402(a)(2), 33 U.S.C. § 1342(a)(2) (requiring permittees to provide data and other information EPA deems appropriate); 40 C.F.R. § 122.41(h) (permittees shall furnish “any information” needed to determine permit compliance); 40 C.F.R. § 122.44(i) (permittees must supply monitoring data and other measurements as appropriate); *see*

---

<sup>11</sup> Outfalls 003 and 004 are operator-activated discharges that, while associated with storm events, do not necessarily correspond with the timing of a qualifying storm event. This manual mode of operation, which would presumably involve the participation of Facility staff or contractors, would seem to alleviate Petitioner’s concern about a discharge occurring “when the facility is not operating or no one is available to collect the sample.”

also, e.g., *In re City of Moscow*, 10 E.A.D. 135, 170-71 (EAB 2001) (holding that EPA has “broad authority” to impose information-gathering requirements on permittees); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 671-72 (EAB 2001) (holding that CWA confers “broad authority” on permit issuers to require monitoring and information from permittees). The Board has held that, “for a petitioner to raise a material issue of fact as to whether an information gathering requirement in a permit is unreasonable and therefore exceeds the Agency’s authority under Section 308(a), a petitioner must cite evidence sufficient to support a finding that there is no basis in fact for the Agency to require information in the first place.” *Port St. Joe*, 7 E.A.D. at 310. This Petitioner has failed to do. In this case, the Permit writer articulated the grounds for the monitoring condition, while anticipating, and adequately addressing, the concerns the Petitioner has belatedly raised for the first time in its Petition. Review should be accordingly be denied.

C. **Petitioner Failed to Preserve Its Objections to the Permit’s WET Provisions, and Does Not Demonstrate Any Inconsistency Between the WET Tables and Corresponding Footnotes**

Petitioner mistakenly perceives a discrepancy in the Permit’s Whole Effluent Toxicity testing requirements, pointing to differences between the effluent parameters listed in the Effluent Limitations and Monitoring Requirements Table in Parts 1.A.1 and 1.A.2 and a footnote to that table. *Compare* Parts 1.A.1 and 1.A.2 *with* Parts 1.A.1 and 1.A.2 footnote 16. *Pet.* at 9. CertainTeed observes that the footnote lists additional sampling requirements for total solids, total dissolved solids and total residual chlorine. *Id.*

Petitioner is too late in raising this specific issue. Petitioner's objection to this permit language is unpreserved. The issue was surely ascertainable, as Petitioner commented on some

differences between sampling requirements in the Tables and footnotes pertaining to sampling requirements for certain metals, but made no mention of a purported inconsistency relating to total solids, total dissolved solids or total residual chlorine. Ex. 5 (RTC) at Response to Comment A13. A party “must have raised during the public comment period the specific argument that the petitioner seeks to raise on appeal; it is not sufficient for the petitioner to have raised a more general or related argument during the public comment period.” *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 339 (EAB 2002).

In any event, Petitioner has not demonstrated any reviewable error. The inconsistency alleged in the Petition relates to the chemical analysis requirement for total residual chlorine, total solids and total dissolved solids for 100 percent effluent as noted in the tables in Part I.A.1. and 2. and footnote 16. As background, the reissued permit contains requirements for Whole Effluent Toxicity at Outfalls 001 and 002. Ex. 4 (Final Permit) Part I.A.1. and Part I.A.2.; Ex. 1 (Fact Sheet) section 7.1.9 and 7.2.5. Specifically, the Table for Part I.A.1. and 2. requires *effluent* (*i.e.*, 100 percent effluent) to be analyzed for certain parameters, including total residual chlorine, total solids, and total dissolved solids. In addition, the Table for Part I.A.1. and 2. requires the *receiving water* (*i.e.*, zero percent effluent) to be analyzed for hardness, alkalinity, pH, specific conductance, ammonia, total organic carbon, cadmium, copper, lead, nickel, zinc, aluminum, antimony, iron, manganese, chromium, calcium, magnesium, phosphorus. Ex. 4 (Final Permit) at 10. Total residual chlorine, total solids and total dissolved solids are not listed in the Table as being subject to receiving water toxicity testing requirements because the Permit does *not* require them to be so tested. Footnote 16 is fully consistent with this fact, and states “[t]otal residual chlorine, total solids and total dissolved solids must also be reported for 100% effluent.” Ex. 4 (Final Permit) at 2-5. Upon examination of the Permit, there is in fact no

discrepancy in testing requirements between the Part 1A.1 and 2 Tables and corresponding footnote. Consequently, review of this issue should be denied.

#### **IV. CONCLUSION**

For all the reasons above, the Petition should be denied.

Respectfully submitted,

---

Samir Bukhari  
US Environmental Protection Agency  
Office of Regional Counsel, Region 1  
5 Post Office Square - Suite 100  
Mail Code: ORA18-1  
Boston, MA 02109-3912  
Tel: (617) 918-1095  
Fax: (617) 918-0095  
E-mail: bukhari.samir@epa.gov

**STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS**

I hereby certify that the Region's Response to the Petition for Review in the matter of CertainTeed Corporation, NPDES Appeal No. 15-01, contains less than 14,000 words in accordance with 40 C.F.R. § 124.19(d)(3).

Dated: March 13, 2015

Respectfully submitted,

---

Samir Bukhari  
US Environmental Protection Agency  
Office of Regional Counsel, Region I  
5 Post Office Square - Suite 100  
Mail Code: ORA18-1  
Boston, MA 02109-3912  
Tel: (617) 918-1095  
Fax: (617) 918-0095  
E-mail: bukhari.samir@epa.gov

**CERTIFICATION OF IDENTICAL PAPER FILING**

I certify that the enclosed Response to the Petition for Review, and exhibits thereto, are identical copies of those filed electronically in this matter by EPA Region 1 with the Environmental Appeals Board on March 13, 2015.

Dated: March 13, 2015

Respectfully submitted,

---

Samir Bukhari  
US Environmental Protection Agency  
Office of Regional Counsel, Region 1  
5 Post Office Square - Suite 100  
Mail Code: ORA18-1  
Boston, MA 02109-3912  
Tel: (617) 918-1095  
Fax: (617) 918-0095  
E-mail: bukhari.samir@epa.gov

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Response to the Petition for Review, in the matter of CertainTeed Corporation, NPDES Appeal No. 15-01, was served on the following persons in the manner indicated:

By Electronic Filing and Overnight Mail:

Ms. Eurika Durr  
Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1201 Constitution Avenue, NW  
U.S. EPA East Building, Room 3334  
Washington, DC 20004

By U.S. Mail:

Lauren P. Alterman,  
VP, EHS and In-House Counsel EHS  
CertainTeed Corporation's Parent  
Saint-Gobain Corporation  
750 E. Swedesford Road  
Valley Forge, PA 19482

Dated: March 13, 2015

\_\_\_\_\_  
Samir Bukhari