BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

In re: City of Manchester, New Hampshire Department of Public Works NPDES Permit No. NH0100447	)	NPDES Appeal No. 25-04

RESPONSE OF THE CITY OF MANCHESTER, NEW HAMPSHIRE TO CONSERVATION LAW FOUNDATION'S PETITION FOR REVIEW OF CITY OF MANCHESTER WASTEWATER TREATMENT FACILITY AND 15 COMBINED SEWER OVERFLOW (CSO) OUTFALLS NPDES PERMIT ISSUED BY REGION 1

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I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(b), the City of Manchester, New Hampshire (the "City"), by and through its attorneys McLane Middleton, Professional Association, responds to Conservation Law Foundation's ("CLF") Petition for Review (the "Petition") and moves the Environmental Appeals Board ("Board") to deny the Petition. The National Pollutant Discharge Elimination System ("NPDES") permit issued to the City's wastewater treatment facility by the Environmental Protection Agency, Region 1 (the "Region") followed, and was based on, a comprehensive review of both the scientific facts available and the legal confines under which the Region is required to operate. CLF's Petition fails to allege error in any finding of fact, conclusion of law, or exercise of discretion sufficient for the Board to accept the Petition. 40 C.F.R. § 124.19(a)(4)(i). For these reasons, and as further discussed below, the Petition should be denied.

CLF's Petition should be denied for two fundamental reasons. First, the Petition fails to establish that any finding of fact or conclusion of law in the Region's permit decision was clearly erroneous. 40 C.F.R. § 124.19(a)(4)(i)(A). Second, it does not challenge any exercise of discretion or raise policy considerations within the Region's delegated authority to consider. 40 C.F.R. § 124.19(a)(4)(i)(B).

Further, CLF raised the same concerns in its Petition that it previously raised during the notice-and-comment period; yet those concerns were addressed by the Region in the final permit issued on November 3, 2025 ("Final Permit") and in EPA's response to CLF's comments. Simply, the Petition fails to identify any allegation of law or fact or other alleged deficiency that the Region failed to consider.

CLF's contentions fall into three principal categories: (1) EPA purportedly failed to conduct a reasonable potential analysis for PFAS; (2) EPA reduced benthic monitoring

requirements and (3) EPA decided not to conduct an Environmental Justice ("EJ") review. All of these issues were raised during the comment period and addressed in EPA's responses. The administrative record demonstrates that the Region evaluated and provided rational and clear explanations, consistent with its statutory obligations, on each of the above issues. Reconsideration is not required when the Region has already meaningfully engaged with and responded to the substance of CLF's concerns. *See In re Peabody W. Coal Co.,* 12 E.A.D. 22, 33 (EAB 2005); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 666 (EAB 2006) ("A petitioner may not simply reiterate comments made during the public comment period but rather must substantively confront the permit issuer's subsequent explanations.").

Reasonable Potential Analysis

As an agency subject to the Administrative Procedure Act ("APA"), EPA acted within its express authority when declining to conduct a reasonable potential analysis for PFAS in the Final Permit. As it did in its public comments, CLF reasserts that the Region erred by failing to conduct a reasonable potential analysis for PFAS and did not meaningfully address these concerns in its response to comments, constituting an abuse of discretion.

Yet, a "reasonable potential analysis" occurs only if the permit writer makes a determination that a certain pollutant, in this case PFAS, "[is] or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality."[1] In order for the Region to make this determination, it requires an applicable numeric water quality standard for PFAS, which has not yet been established.[2] In instances such as this, where no federal PFAS

[1] 40 C.F.R. § 122.44(d)(1)(i). *See also* EPA Response to Comment No. 55.
[2] *See* EPA Response to Comment No. 55. *See also* Press Release, U.S. EPA, EPA Announces It Will Keep Maximum Contaminant Levels for PFOA, PFOS (May 14, 2025), https://www.epa.gov/newsreleases/epa-announces-it-will-keep-maximum-contaminant-levels-pfoa-pfos.

standard for surface waters is mandated, the Region must use its "best professional judgment" to establish appropriate technology-based limits.[3] The Region acted within its discretion[4] to implement a Whole Effluent Toxicity ("WET") testing approach to monitor the City's effluent on a quarterly basis for PFAS. The Region's WET approach is common and routinely used in circumstances such as this when there is no enforceable surface water quality standard.

Benthic Survey

The Region's modification of the benthic survey from "once per permit term" to occurring only, if "benthic deposits from the discharge are known or suspected to have a detrimental impact on downstream benthic communities . . .", is a logical outgrowth of the permitting process.[5] It is well established that a final permit issued by an agency does not need to be identical to the draft permit as that would "be antithetical to the whole concept of notice and comment" and it is rather the "expectation that the final rules will be somewhat different" from what was originally proposed.[6] The elimination of an automatic benthic surveying requirement was in direct response to the City's comment that conducting a survey once per permit term would be futile given the unique benthic environment already present in the Merrimack River, due to a history of industrial contamination, as well as the success of the reestablishment of certain benthic fauna attributable to State regulations already in place.[7]

The record shows that the City commented on benthic communities supporting the modification made in the Final Permit. Given the existence of the comments made by the City

[3] *See In re Arizona Public Service Co.*, 18 E.A.D. 245, 291-92 (EAB 2020) ("Specifically, the statute states that the Administrator may impose such conditions 'as the Administrator determines are necessary' to carry out the provisions of the Act....").
[4] *See* CWA §§ 208(e), 301, 302, 303, 306, 307.
[5] *See* EPA Response to Comment No. 71.
[6] *See NRDC, Inc. v. EPA*, 279 F. 3d 1180 (9th Cir. 2002) (a logical outgrowth of the draft permit is one that the interested parties can reasonably anticipate in the final permit).
[7] *See* Comment No. 71; EPA Response to Comment No. 71.

and the Region's responses—and lack of any comment by CLF—during the public notice-and-comment period, the modification of the benthic survey requirement was a logical outgrowth of the Draft Permit and not a fundamental change that requires this Board to review EPA's discretionary decision-making regarding monitoring.

Environmental Justice Analysis

The Region's decision to refrain from conducting an EJ analysis is not clearly erroneous as a matter of law. CLF argues that the Region failed to adhere to EPA's 2024 Program Policy titled "Addressing Environmental Justice and Equity in NPDES Permitting" ("Program Policy"),[8] which identifies *recommended, but not required,* practices for EPA to follow when issuing a NPDES permit. This Program Policy was created in response to a series of Executive Orders issued by Presidents Clinton and Biden that were rescinded by three Executive Orders issued by President Trump. The Region cites these in its response to comments.[9] In particular, E.O. 14151 directly repeals prior Executive Orders that had suggested that an EJ review be conducted by EPA when issuing permits.[10] CLF does not cite any statutory or regulatory authority or standard that requires, as a matter of law, such a review. Instead, such review is merely a recommendation or "useful tool." Nevertheless, the Region has ensured that the Final Permit fully protects both the environment and human health.

[8] *See* U.S. ENV'T. PROT. AGENCY, NPDES PROGRAM POLICY ADDRESSING ENVIRONMENTAL JUSTICE AND EQUITY IN NPDES PERMITTING (2024), https://www.epa.gov/system/files/documents/2024-01/npdes-ej-program-guidance-principles-recommended-practices-january-2024.pdf.
[9] *See* EPA Response to Comment No. 49.
[10] *See* Angela C. Jones, *Trump Administration Environmental-Justice-Related Executive Orders: Potential Implications for EPA Programs*, CONGRESS.GOV (Feb. 24, 2025), https://www.congress.gov/crs-product/IF12922.

II. STANDARD OF REVIEW

For a NPDES permitting decision to be reviewed by the Board, a petition 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). A petition must also demonstrate that each challenge to the permit decision is based on a) a clearly erroneous finding of fact or law or b) an exercise of discretion or important policy consideration that the Board should, in its discretion, review. 40 § C.F.R. 124.19(a)(4)(i). To meet this high burden, which CLF bears,[11] CLF must include specific information to support their restated allegation, and not "simply repeat objections made during the comment period." *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000).

To determine if the Region's decision making constitutes an "abuse of discretion", the Board considers whether the Region "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *In re Upper Blackstone Water Pollution Abatement District*, 690 F.3d 9, 20 (1st Cir. 2012). In exercising "omnibus discretion … acts of discretion must be adequately explained and justified." *In re Ash Grove*, 7 E.A.D. 387, 397 (EAB 1997).

[11] 40 C.F.R. § 124.19(a)(4)(ii). *See also In re Cape Wind Associates LLC,* 15 E.A.D. 327, 330 (EAB 2011) ("Petitioners bear the burden of demonstrating that review is warranted, and Petitioners must raise specific objections to the permit and explain why the permit issuer's previous response to those objections is clearly erroneous or otherwise warrants review."); *In re Power Holdings of Illinois, LLC*, 14 E.A.D. 723, 725 (EAB 2010) ("The burden of demonstrating that review is warranted rests with the petitioner, who must raise objections to the permit and explain why the permit issuer's previous response to those objections is clearly erroneous or otherwise warrants review.").

As is the case here, the Board should refuse to grant review to the petitioners who have merely reiterated or attached comments they previously submitted to the Region regarding the draft permit, without meaningfully engaging EPA's responses to those comments. *City of Pittsfield, Mass. V. U.S. E.P.A.*, 614 F.3d 7, 11 (1st Cir. 2010). CLF has not met the foundation for a petition to proceed, namely, CLF has failed to explain why the Region's responses to its comments were clearly erroneous. Here, instead of explaining to the Board why the Region's detailed responses to its comments were clearly erroneous, CLF simply repackaged its comments and the EPA's response to its petition to the Board. *Michigan Dept. Of Environmental Quality v. U.S. EPA*, 318 F.3d 705, 708 (6th Cir. 2003).

The Board should defer to the Region's permitting decisions.[12] The rationale for deference to the Region's decisions is particularly strong when the Region is evaluating scientific data within its technical expertise. "[I]n an area characterized by scientific and technological uncertainty[,] ... the EAB must proceed with particular caution, avoiding all temptation to direct the agency in a choice between rational alternatives." *Intl. Fabricare Inst. v. US EPA*, 972 F.2d 384, 389 (D.C. Cir. 1992) (citing *Environmental Defense Fund, Inc. v. Costle,* 578 F.2d 337, 339 (D.C.Cir.1978)).

Based on these standards, CLF's petition fails to raise any issue that should be reconsidered by the Board.

[12] *See In re Jordan Development Co., L.L.C.*, 18 E.A.D. 1, 21 (EAB 2019) ("The Board typically will defer to permit issuers' well-explained and –supported judgments about technical matters...."); *In re B.J. Carney Indus*., 7 E.A.D. 171, 194 (EAB 1997) ("there is a strong presumption against entertaining challenges to the validity of a regulation in an administrative enforcement proceeding ...'and a review of a regulation will not be granted absent the most compelling circumstances'") (quoting *In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994)).

III. FACTUAL BACKGROUND

The City owns and operates a wastewater treatment facility ("WWTF") that discharges treated effluent to the Merrimack River, Piscataquog River, and several smaller brooks, serving the majority of Manchester, and portions of Bedford, Goffstown, and Londonderry, New Hampshire. The facility operates under an administratively continued NPDES permit originally issued in 2015, following the City's timely and complete application for permit reissuance in 2019. The City's wastewater collection system includes 55% sanitary sewers and 45% combined sewers and 15 remaining combined sewer overflow ("CSO") outfalls that discharge during certain wet weather events and are regulated under the NPDES program. Of the 15 remaining CSO outfalls, two discharge to the Piscataquog River (adjacent to Bass Island and immediately upstream of the river's confluence with the Merrimack River), two discharge to the Merrimack River from the west side of the city, and 11 discharge to the Merrimack River from the east side of the city (including Tannery Brook and Ray Brook). The City first submitted a Long-Term Control Plan ("LTCP") in 1995 and revised it in 2010 after completing a prior CSO compliance program.

On July 10, 2020, the Region, the United States Department of Justice, the New Hampshire Department of Environmental Services ("NHDES"), the New Hampshire Department of Justice, and the City entered into a Consent Decree establishing a 20-year binding schedule to implement the 2010 LTCP's CSO control measures.[13] Subject to the Consent Decree, the City has undertaken substantial plant upgrades and system improvements to reduce CSO discharges. The Consent Decree contemplates that the City will incur costs of approximately $271 million

[13] The Petition unlawfully seeks to impose additional conditions beyond the scope of the Consent Decree, and therefore, should not be considered by the Board.

(in June 2019 dollars). The Region issued the original draft of the Permit on March 25, 2024 ("Original Draft Permit"). After going through the required notice-and-comment period, a revised draft permit was issued by the Region on December 16, 2024 ("Revised Draft Permit"). On May 13, 2025, NHDES issued a water quality certificate confirming that the conditions of the NPDES permit would meet and satisfy state numeric and narrative water quality standards.[14] After another period of notice-and-comment, the Region then issued the Final Permit on November 3, 2025.

IV. ARGUMENT

A. The Region did not err in declining to conduct a reasonable potential analysis ("RPA") for PFAS.

CLF wrongly contends that the Region was required to conduct an RPA for PFAS using New Hampshire's narrative water quality standards (specifically N.H. Code. Admin. R. Env-Wq 1703.21(a) and 1703.01(b)). The Region acted within its discretion in declining to perform an RPA for per- and polyfluoroalkyl substances ("PFAS") under New Hampshire's narrative water-quality standards. No EPA-approved numeric water-quality criteria exist for PFAS in New Hampshire, and current law does not require the Region to derive or apply novel numeric thresholds from general State narrative provisions. The Region's approach to addressing the source of PFAS, without imposing unsubstantiated effluent limits, is sufficient to implement the Clean Water Act ("CWA") and avoids the kind of vague, unenforceable permit.[15]

[14] Attachment A: NHDES Water Quality Certificate, WQC 2025-NHG0100447 (May 13, 2025).
[15] *See City and Cnty. of San Francisco, California v. Env't Prot. Agency,* 604 U.S. 334, 346-348 (2025) (the CWA does not authorize EPA to impose NPDES permit requirements that condition permitholders' compliance on whether receiving waters meet applicable water quality standards and that EPA cannot simply tell a permittee to ensure that the end result is reached without a concrete plan for achieving the desired result").

Before conducting an RPA, the EPA must find that a substance has "some degree of certainty rather than a mere possibility" of violating State standards. *City of Taunton, Massachusetts v. United States Env't Prot. Agency*, 895 F.3d 120, 133 (1st Cir. 2018) (emphasis added). CLF has not cited any reports, scientific studies, or precedent when EPA has, or could have, set a numeric permit limit for PFAS based solely on a narrative standard. At best, CLF's claims rise only to vague and unsupported conclusions, all of which were addressed by EPA's response to comments. And, consistent with Board precedence, the Board should uphold the Region's reasonable interpretation of State water quality standards and EPA policy since the Region's rationale is cogently and adequately explained in the Final Permit Fact Sheet and Response to Comments and is consistent with the law. *In re: GSP Merrimack LLC* 18 E.A.D. 524, 528 (EAB 2021).

In challenging EPA's conclusion to not perform an RPA, CLF asks the Board to substitute its own judgment on highly technical and scientific matters. To the extent the Board agrees to hear CLFs petition, it would have wide-ranging adverse consequences on hundreds, if not thousands, of WWTFs across the country. Such expansive and complicated policy matters should be left to the Region and EPA Headquarters to implement.

1. The City does not manufacture or use PFAS—EPA's Policy is to reduce PFAS from the source.

The City's wastewater treatment infrastructure is in place to safely return sewage and industrial wastewater to the environment to protect public health and the environment. The City is a passive receiver of PFAS; it does not use, manufacture, or create PFAS. PFAS may only be

present (if at all) due to certain industrial and manufacturing operations that discharge its industrial wastewater to the City's WWTF.[16]

i. EPA's Policies Suggest that EPA Permit Writers Leverage NPDES Permits to Address PFAS at the source.

EPA's stated policy regarding PFAS is to "reduce PFAS discharges to waterways <u>*at the source*</u> and obtain more comprehensive information through monitoring of the sources of PFAS and quantity of PFAS discharged by those sources." *Memorandum re: Addressing PFAS Discharges in EPA-Issued NPDES Permit and Expectations Where EPA is the Pretreatment Control Authority*, April 28, 2022, at 1 (the "NPDES PFAS Policy") (internal quotations omitted).

The City, as a public entity supported solely through public funds, cannot be responsible for addressing contaminants that it did not cause or create and for those constituents that the WWTF was not built to treat or eliminate. Consistent with EPA's NPDES PFAS Policy, the Final Permit requires the City to utilize Method 1633A to monitor for PFAS analytes and report

[16] CLF erroneously argues that the City accepts "PFAS-contaminated landfill leachate." That statement is incorrect. NHDES previously investigated these claims. In dismissing CLF's claims, NHDES stated in pertinent part:

> The Manchester landfill is a capped, unlined facility and, as such, lacks both a liner and a leachate collection system. The figure of 100,000 gallons per day referenced in your correspondence does not represent the volume of leachate generated from the landfill. Instead, it reflects the volume of groundwater intercepted by the Front Street Interceptor and conveyed to the WWTF. According to the DPW, the only known source of flow into the Front Street Interceptor is groundwater located beneath Front Street. The volume of water conveyed to the WWTF is influenced by the Interceptor's depth relative to the groundwater table and its proximity to the Merrimack River. This flow rate should not be interpreted as an indicator of leachate volume originating from the landfill. Because the landfill is capped, contamination of groundwater beneath the landfill is primarily a function of whether groundwater comes into direct contact with the bottom of the landfill.

Attachment C, (Letter from NHDES' Waste Management Division Director, Michael Wimsatt, P.G., to CLF, dated December 1, 2025). Moreover, based on conversations with CLF, the City does not accept leachate from other landfills.

the results of that monitoring to NetDMR until "there is an analytical method approved in 40 CFR Part 136 for PFAS."[17]

EPA's own *Strategic Roadmap: EPA's Commitments to Action 2021 – 2024*, acknowledges that it has limited authority to regulate or place limits on PFAS (the "Strategic Roadmap"). EPA's policy (which is guidance and not a rule)[18] seeks to:

> Leverage federally issued NPDES permits to reduce PFAS discharges.
>
> EPA will propose monitoring requirements at facilities where PFAS are expected or suspected to be present in wastewater and stormwater discharges, using EPA's recently published analytical method 1633, which covers 40 unique PFAS. In addition, EPA will propose, as appropriate, that NPDES permits: 1) contain conditions based on product elimination and substitution when a reasonable alternative to using PFAS is available in the industrial process; 2) require best management practices to address PFAS-containing firefighting foams for stormwater permits; 3) require enhanced public notification and engagement with downstream communities and public water systems; and 4) require pretreatment programs to include source control and best management practices to protect wastewater treatment plant discharges and biosolid applications.

Id. at 14.

Obtaining information through inventorying, sampling, and monitoring is necessary before EPA could conceivably develop any surface water quality criteria (numeric or narrative) to support technology-based and water quality-based effluent limits for PFAS.[19]

While CLF argues that monitoring requirements are not enough to implement EPA's policy to "leverag[e] NPDES permitting to reduce PFAS discharges to waterways," such a

[17] *See* 2025 Final NPDES Permit No. NH0100447, p. 10. The City has challenged the monitoring of effluent for PFAS in its petition.
[18] *See* U.S. ENV'T. PROT. AGENCY, PFAS STRATEGIC ROADMAP: EPA'S COMMITMENTS TO ACTION 2021-2024, (2021),
[19] *See* Memorandum from Radhika Fox, Assistant Administrator of the Env't Prot. Agency at p. 1 (Apr. 28, 2022), https://wwwepa.gov/system/files/documents/2022-04/npdes_pfas-memo.pdf.

statement is unsupported in the law and contrary to the requirements of the CWA. EPA has discretion to require a permittee to monitor and report on substances in its effluent.[20]

The NPDES PFAS Policy also encourages publicly owned treatment works ("POTWs") to update its industrial user inventory and to locate probable users that may discharge PFAS, require best management practices and pollution prevention at those industrial users to prevent PFAS discharges *to* the POTW, and develop best management practices or local limits for industrial users.[21]

ii. The CWA's POTW Pretreatment Program is explicitly designed to require industrial users of a sewer system to pretreat its industrial wastewater to remove pollutants that are not susceptible to treatment.

Addressing PFAS at the source is already contemplated through the CWA's pretreatment program for POTWs and is included in the Final Permit, which the City does not challenge. Accordingly, nothing further is required and CLF's Petition should be rejected. The objective of EPA's pretreatment regulations are as follows:

> (a) To prevent the introduction of pollutants into POTWs which will interfere with the operation of a POTW, including interference with its use or disposal of municipal sludge;
>
> (b) To prevent the introduction of pollutants into POTWs which will pass through the treatment works or otherwise be incompatible with such works; and

[20] *See NRDC v. Costle*, 568 F.2d 1369, 1380 (D.C.Cir. 1977) (EPA has clear authority to "require a permittee simply to monitor and report effluent levels"). *See also* EPA Response to Comment No. 53:

> 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.

[21] *See* Fox *supra* note 19 at pp. 3-4.

> (c) To improve opportunities to recycle and reclaim municipal and industrial wastewaters and sludges.

40 C.F.R. § 403.2. Accordingly, any pollutant that is not susceptible to treatment at the POTW, or would be otherwise incompatible with the treatment works, must go through "pretreatment" before discharging to the POTW. "Pretreatment" is defined as:

> the reduction of the amount of pollutants, the elimination of pollutants, or the alterations of the nature of pollutant properties in wastewater prior to or in lieu of discharging or otherwise introducing such pollutants into a POTW. The reduction or alteration may be obtained by physical, chemical or biological processes, process changes or by other means, except as prohibited by § 403.6(d). Appropriate pretreatment technology includes control equipment, such as equalization tanks or facilities, for protection against surges or slug loadings that might interfere with or otherwise be incompatible with the POTW. . . .

40 C.F.R. § 403.3(s).

Consistent with the CWA's pretreatment program, the Final Permit requires the City to conduct annual sampling of several industrial discharges into the POTW for PFAS. *See* Permit Part at § (I)(E)(6). According to the EPA, sampling and identification of industries is necessary to determine the source of PFAS influent to POTWs. Unless and until the regulated community and agencies understand the source of PFAS, it is premature to establish any enforceable PFAS limit in a NPDES permit. [22]

2. The Merrimack River is not impaired for PFAS, and therefore, there is no exceedance of any water quality criteria.

The Merrimack River is not impaired for PFAS and there is no evidence that the River exceeds any narrative criteria for PFAS.[23] In fact, NHDES PFAS Sampling Dashboard

[22] The EPA incorporated these structural safeguards for the monitoring of discharges from industrial users into its decision-making process and nothing further is warranted. *Blackstone* at 27-28.

[23] EPA Response to Comment No. 54 ("The receiving water is impaired for the fish consumption designated use due to mercury. Fact Sheet, 17. At this time, the state has not made a determination that the receiving water is impaired for fish consumption due to PFAS. EPA notes again that although the state has adopted WQS for four PFAS chemicals, EPA has not approved those standards.").

demonstrates that water samples from the Merrimack River immediately downstream of the City's WWTF discharge point(s) do not come close exceeding NHDES's drinking water standards for PFAS.[24]

CLF relies on N.H. Code. Admin. R. Env-Wq 1703.01(b) for the proposition that PFAS violate surface water criteria for their designated classification including existing and designated uses. However, CLF fails to account for the assimilative capacity of the Merrimack River for PFAS, which assesses the "chemical, physical, biological, and radiological alterations that can occur without causing violations of applicable water quality criteria or impairing any existing or designated uses." Env-Wq 1702.03. Without taking the assimilative capacity of the River into account, the setting of PFAS limits would lack a technical basis and be arbitrary.

For EPA or NHDES to conclude that there may be a reasonable potential for PFAS to exceed water quality standards, the agencies must have had evidence to establish "some degree of certainty greater than a mere possibility."[25] Here, there is no evidence in the administrative record that would have formed the basis for the Region to make such a finding. Indeed, if NHDES had concluded there could be a potential that the City's discharge could cause or contribute to an exceedance of State water quality standards (numeric or narrative), it could have included additional requirements or limitations for PFAS in its water quality certificate. NHDES did not reach such a conclusion. As such, the Board should not supplant the Region's and NHDES's reasoning with its own judgment on such complicated scientific and technical matters.

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[24] *See NHDES PFAS Sampling Dashboard,* NHDES, https://nhdes.maps.arcgis.com/apps/dashboards/78fe1cb292af4cefbd49f281c43c658d (last accessed January 28, 2026) (demonstrating that Stations 508 and 81041 showing non-detect at one location and 2.4 ppt PFOA and 1.17 ppt PFOS at the other.).

[25] *See Taunton,* 895 F.3d at 133 (holding that "reasonable potential" means some degree of certainty higher than mere possibility); *In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 599 n.29 (EAB 2010) (leaving the "reasonable potential" judgment to the permit writer.).

3. Neither the State nor EPA have regulatory authority to impose permit conditions on the discharge of PFAS from POTWs.

i. There are no applicable water quality standards for PFAS that could impose a limit or other treatment requirements in the NPDES permit.

CLF erroneously argues the State of New Hampshire has lawfully adopted enforceable water quality standards for PFAS. To make this assertion, CLF relies on 40 C.F.R. § 131.21, which sets timeframes for EPA to review the submission of State proposed water quality standards. While this regulation establishes time deadlines for EPA to issue approval or disapproval, it does not provide that EPA's failure to approve or disapprove within those timeframes means that the proposed standards have been accepted or that EPA's review has been approved. *Compare* 40 C.F.R. § 131.21(a) *with* 40 C.F.R. § 403.18(d)(3) ("If the Approval Authority does not notify the POTW within 45 days of its decision to approve or deny the modification, or to treat the modification as substantial . . . the POTW may implement the modification"), *and* 33 U.S.C. § 1341(a) ("If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application."). *See also City and County of San Francisco v. EPA* 604 U.S. at 344 ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). Accordingly, there are no applicable numeric standards for PFAS and requiring EPA to impose any effluent limitation would, therefore, be clearly erroneous.

ii. Neither the State's narrative water quality standards nor its water quality policies establish a method to translate narrative standards into identifiable technology-based or water quality-based numeric standards.

The EAB should give a high level of deference to EPA's determination that PFAS will not have a reasonable potential to cause or contribute to an exceedance of water quality standards and its decision not to conduct a RAP. *See Taunton*, 895 F.3d at 137 (Under the NPDES regulations, the permitting authority has a "significant amount of flexibility in determining whether a particular discharge has a reasonable potential to cause an excursion above a water quality criterion.").

When assessing a complex administrative statute, like those the EPA is charged with administering, EAB is particularly mindful that an agency's decision should not be overturned so long as it falls within a "zone of reasonableness." *See, e.g., Nat'l Mar. Safety Ass'n,* 649 F.3d at 752; *Solite Corp. v. EPA,* 952 F.2d 473, 488 (D.C.Cir.1991) (per curiam) (judicial deference is warranted when EPA imposes standards within a "zone of reasonableness"); *Kennecott v. U.S.E.P.A.,* 780 F.2d 445, 450 (4th Cir. 1985) (EPA's "conclusions with respect to data and analysis need only fall within a 'zone of reasonableness'"). When the agency follows the proper procedures and acts with a reasonable basis, both its choice of scientific data and interpretation and application of that data to real world conditions are entitled to deference.

Moreover, the scientific and technical nature of the EPA's decision-making increases EAB's level of deference. *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (explaining that when an agency is acting "within its area of special expertise, at the frontiers of science.... as opposed to [making] simple findings of fact, a reviewing court must generally be at its most deferential"); *P.R. Aqueduct & Sewer Auth. v. E.P.A.,* 35 F.3d 600, 604 (1st.Cir. 2000) (stating that "an agency deserves an extra measure of deference with regard to

factual questions involving scientific matters in its area of expertise"). CLF's argument that the Region should have conducted an RPA is an allegation concerning the Region's interpretation and application of scientific data in the administrative record, for which EPA is entitled to significant deference.

The State of New Hampshire has not developed a method to translate narrative criteria into numeric criteria and CLF has not proposed or described any method to do so. 40 C.F.R. § 122.44(d)(1)(vi) provides for three methods for the permitting authority to set a numeric limit that supports a narrative standard. However, each one of these methods is unavailable here because (1) the State does not have approved standards or policies interpreting narrative water quality criteria for PFAS; (2) PFAS is not listed as a pollutant published under section 304(a), and (3) there are no indicator parameters for PFAS. *See* 40 C.F.R. § 122.44(d)(1)(vi)(A)–(C). CLF has not discussed, let alone, referenced these requirements in its Petition. Without the materials required in 40 C.F.R. § 122.44(d)(1)(vi)(A)–(C), EPA could not have conducted an RPA even if it were required to do so.

CLF's reliance on *In re Upper Blackstone Water Pollution Abatement District*, 690 F.3d 9 (1st.Cir. 2012) for the proposition that EPA must conduct an RPA to achieve compliance with narrative standards is misplaced. *Upper Blackstone* does not address under what conditions the Region is required to conduct an RPA. Instead, that case focused on whether an actual numeric limit, used to implement a narrative standard, was supported by the record. The circumstances here are entirely distinguishable. In *Upper Blackstone*, both Massachusetts and Rhode Island determined that the Blackstone River, among other surface water bodies, failed to meet state narrative water quality standards for nitrogen and phosphorous, and therefore, needed to adopt a numeric limit to implement narrative standards. In this case, there is no such finding.

In *Upper Blackstone*, it was readily apparent that the discharge of phosphorous and nitrogen caused eutrophication and algae blooms in the receiving water, thereby violating narrative water quality standards for swimming and fishing. Due to the algae blooms, Rhode Island in particular was "forced to close down some of the [Narragansett] Bay's beaches and commercial fishing grounds entirely, measures which damage state tourism and recreation businesses, and which place the state's commercial fishing and shell fishing industries in jeopardy." *Id*. at 12.

Conversely, in the Merrimack River, there is no readily apparent evidence (visual, aesthetics, odor) that minute levels of PFAS that may be in the River (or discharged to the River) have <u>*any*</u> effect on the receiving body. CLF has only provided EPA with three studies, none of which have been peer reviewed, and all of which the Region reviewed and determined that a finding of a violation of narrative standards was not supported or warranted.[26] Such determination is entitled to substantial deference.

Also in *Upper Blackstone*, EPA and the States had ample additional peer-reviewed models, technical reports, and guidance documents to support the translation of narrative criteria into numeric criteria. For example, regarding nitrogen, EPA relied on a University of Rhode Island Marine Ecosystems Research Laboratory model, which was peer reviewed, published in a scientific journal, and has been used by EPA, RIDEM, and other groups to understand the relationship between nitrogen loadings and cultural eutrophication in Narragansett Bay. *Upper*

[26] "[A]dmission of uncertainties where they exist," "public exposure of the assumptions and data incorporated into the analysis," "the acceptance and consideration of public comment," and, ultimately, a decision that reflects the rule of reason, are the structural features of reasoned, publicly accountable science-based agency decision making. *Sierra Club,* 657 F.2d at 334 & n. 130; *see also Nat'l Mar. Safety Ass'n v. Occupational Safety & Health Admin.,* 649 F.3d 743, 752 (D.C.Cir.2011), *cert. denied,*—— U.S. ––––, 132 S.Ct. 1960, 182 L.Ed.2d 770 (2012).

Blackstone, 690 F.3d at 26. This model was also used in developing national guidance for nutrient reduction in water systems. *Id.* EPA and RIDEM also had extensive water quality studies of the receiving waters, which culminated in an *Evaluation of Nitrogen Targets and WWTF Load Reductions for the Providence and Seekonk Rivers* (2004).

EPA and RIDEM also had ample additional scientific studies that were used in translating narrative criteria into numeric limits for phosphorous. For example, the agencies had a national action plan for the development of numeric nutrient criteria, technical guidance on rivers and streams, ambient water quality criteria recommendations, among others, all of which informed the agencies decisions in setting numeric limits based on narrative criteria. *Id*. at 30–31. In this matter, neither EPA nor NHDES have any supplemental information.

4. EPA Considered, and Responded to, All of CLF's comments Regarding PFAS.

The record demonstrates that the Region fully considered the relevant factors and information submitted by CLF. EPA "need not address every comment, but it must respond in a reasoned manner to those that raise significant problems." *City of Waukesha v. EPA*, 320 F.3d 228, 258 (D.C.Cir. 2003). Nevertheless, "'[t]he failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not based on a consideration of the relevant factors.'" *Id.* (emphasis added).

Here, CLF specifically argues that EPA did not consider or respond to the "Pickard Study." However, EPA reviewed all documents submitted by CLF that purported to provide new evidence and summarized its reasons for declining to set a PFAS effluent limitation in the Final Permit.[27] EPA's responses demonstrate that the agency considered and rejected the petitioner's

[27] *See e.g.,* EPA Response to Comment Nos. 50–56 (assessing and providing significant rationale in rejecting CLF's claims and purported evidence).

arguments, including the "Pickard Study," which is all the APA requires. *Id. See also Intl. Fabricare Inst. v. U.S. E.P.A.*, 972 F.2d 384, 392–93 (D.C.Cir. 1992) (concluding that EPA adequately addressed the petitioner's human epidemiological data even though each submitted study was not specifically identified in EPA's response to comments).

5. NHDES concluded that the City's effluent would not have the reasonable potential to cause or contribute to an exceedance of PFAS.

On May 13, 2025, NHDES issued a water quality certification pursuant to CWA § 401 confirming that the Revised Draft Permit, as drafted, would ensure compliance with all State water quality standards, including its proposed numeric surface water quality standards for PFAS and the State's narrative standards. In reaching its determination, NHDES analyzed the City's discharges using EPA's "Reasonable Potential and Limits Calculation" methodology to assess the discharges in relation to the Merrimack River, and concluded that the 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 [NPDES] permit, as currently written, will ensure that the discharge will comply with New Hampshire's surface water quality standards."[28]

If the State were to conclude that more stringent regulations than those in the Permit are necessary to meet the requirements of the CWA, the State would have included such requirements in its Certification. Here, the State concluded that PFAS limitations were not necessary to meet the requirements of State law.[29]

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[28] *See New Hampshire Department of Environmental Services Response to Comments, Water Quality Certification 2025-NH0100447* at 6–7 (May 13, 2025).

[29] *See* EPA's Response to Comment No. 53 at 82:

> If the state believes that conditions more stringent than those contained in the Draft Permit are necessary to meet the requirements of either CWA §§ 208(e), 301, 302, 303, 306 and 307, or applicable requirements of state law including state water quality standards, the state should include such conditions in its certification of the permit. Here, the state has not included an effluent limit for any PFAS contaminants, indicating that the state agrees such effluent limits are not necessary to meet the requirements of state law.

B. The Benthic Survey Requirements were adopted as a logical outgrowth of the notice-and-comment period.

CLF's claim that it lacked notice or an opportunity to comment on the benthic survey requirement of the Final Permit is without merit.[30] The procedural history and administrative record clearly demonstrate that CLF had the required notice and opportunity to raise its concerns, and the Final Permit's modification of the benthic monitoring requirement was a permissible and reasonable response to comments. Therefore, CLF has waived any argument regarding the benthic survey requirement. *See Upper Blackstone*, 690 F.3d at 30 (finding that a petitioner waived an argument by failing to present it to the EPA during the permitting process). Furthermore, the modification of the benthic survey requirement was a logical outgrowth of the City's own comments on the Revised Draft Permit provision, and thus, the Region was not required to reopen a public comment period due to the change.[31]

Under 40 C.F.R. § 124.17, when a final permit decision is issued, the agency must provide a written response to public comments. The response must identify any changes made from the draft permit and explain the reasons for those changes, as well as address all significant comments raised during the public comment period or any other hearing.

The Original Draft NPDES Permit contained no requirement for benthic surveys. CLF did not submit any comment regarding the lack of benthic monitoring during the original notice-and-comment period, nor did it request that such monitoring be added. When EPA issued the Revised Draft Permit including a benthic monitoring requirement to occur "once per permit term

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[30] *See* 40 C.F.R. 124.13. *See also In re City of Phoenix, Arizona*, 9 E.A.D. 515, 524 (EAB 2000) ("The Board has consistently construed section 124.13 as requiring that all reasonably ascertainable issues and arguments be raised during the public comment period to be preserved for review by the Board.").

[31] *See In re: City of Palmdale,* 15 E.A.D. 700, 714 (2012) ("A permitting authority is not required to reopen a public comment period based on changes it makes to the permit, as long as the changes are the 'logical outgrowth' of the public comment process.").

. . . during the third calendar quarter," CLF did not submit comments seeking additional monitoring requirements.[32] Under the APA and NPDES regulations, an agency is not obligated to anticipate or solicit comments on issues not raised or reasonably foreseeable at the time of the original permit.[33] By failing to comment on the lack of benthic monitoring during two public comment periods, CLF cannot now claim that it did not have notice of the potential for a revised permit condition.[34]

The City submitted specific comments on the Revised Draft Permit explaining that, given the unique characteristics of the Merrimack River—including its long history of contamination from mill operations[35]—an automatic benthic survey requirement would constitute over-monitoring and be disproportionate to environmental objectives.[36] The administrative record shows that the Region considered these comments on the Revised Draft Permit in its Final Permit.[37]

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[32] *See* Revised Draft Permit, NPDES , p. 12, ¶ 23. ("During the third calendar quarter *(i.e*. July through September) that begins at least 12 months after the effective date of the permit, a benthic survey shall be conducted once per permit term to assess impacts from the discharge on aquatic life in the benthic environment."); Part I.G.5.

[33] *See* 40 C.F.R. 124.13; *In re Christian County Generation LLC*, 13 E.A.D. 449 (EAB 2008) ("The Board has routinely denied review where an issue was reasonably ascertainable but was not raised during the comment period on the draft permit.").

[34] *See In re GSP Merrimack L.L.C.*, 18 E.A.D. 524, 552 (2021) (explaining the key question is "whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule.").

[35] The record demonstrates that the benthic environment of the Merrimack River has been permanently altered by historical industrial activity, including decades of contamination from former mill operations. See Comment No. 71; EPA Response to Comment No. 71. These legacy impacts and have long shaped the composition and condition of the benthic environment and predate the permitted discharge. And, as the City discussed in its comments, frequent surveying of benthic conditions are not a reliable or proportionate indicator of compliance for the permitted discharge.

[36] *See* Comment No. 71.

[37] *See* Final Permit, NPDES p. 32, ¶ 5. (reflecting the change in benthic surveying requirements in response to public notice-and-comment on the Revised Draft Permit).

> If 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, the Permittee shall conduct a benthic survey within one year of the notification to assess

In response, the Final Permit modified the benthic requirement such that it is triggered "if notified in writing by NHDES or EPA that benthic deposits from the discharge are known or suspected to have detrimental impact on downstream benthic communities."[38] If this notification occurs, "[p]ermittee shall conduct a benthic survey within one year of the notification to assess potential impacts from the discharge ...."[39] This modification is a clear and logical response to the City's comments and EPA explained its reasoning for the change.[40] There is no inconsistent, conflicting, or ambiguous decision-making on the part of the Region in modifying the condition to address the City's valid concern.

The modification in the Final Permit is a standard, non-substantive adjustment that falls squarely within the Region's discretion and is a logical outgrowth of the original provision. Agencies are entitled to revise permit conditions based on public comments and administrative

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> potential impacts from the discharge on aquatic life in the benthic environment. Visual observations, benthic sample results, or long-term permit limit exceedances could indicate a potential change in either the sediments or settleable solids downstream of the outfall as compared to upstream of the outfall. Such a change could indicate that the facility's effluent is having a detrimental impact on the downstream benthic community health.

Id. See also In re Gov't of D.C. Mun. Sep. Storm Sewer Sys., 10 E.A.D. 323, 342 (EAB 2002) (The whole permitting record "must demonstrate that the permit issuer duly considered the issue raised in the comments and ultimately adopted an approach that is rational in light of all information in the record.").

[38] *See* Final Permit p. 32

[39] *Id.*

[40] *See* EPA Response to Comment No. 71:

> EPA acknowledges that there is uncertainty regarding the potential impacts to the benthic community from this discharge. While EPA expects that facilities with a smaller dilution factor will have a higher potential to impact the downstream benthic community, EPA also acknowledges that benthic surveys can be expensive (especially in larger rivers such as the Merrimack River). EPA agrees with the comment as well as with NHDES 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.

determinations, and the law does not require repetition of the notice-and-comment process when the change is a reasoned adjustment or "logical outgrowth" within the scope of the draft.[41]

Here, the change merely refined the trigger mechanism for benthic surveys; it did not reduce existing obligations beyond the scope of what was included in the Revised Draft Permit. The Final Permit's revision was a direct response to comments submitted by the City.[42] The Final Permit's trigger-based benthic survey requirement is still consistent with the CWA and its implementing regulations because it provides monitoring that is sufficient to assess compliance and protect water quality. The CWA requires that NPDES permits include monitoring conditions necessary to ensure compliance with effluent limitations and water quality standards; it does not require routine or automatic biological monitoring when such monitoring would not meaningfully achieve those objectives.[43] The final benthic surveying requirement thus falls squarely in the range of monitoring approaches authorized by the CWA and reflects the Region's reasonable exercise of discretion

C. EPA lacks authority to consider Environmental Justice when issuing NPDES permit decisions.

CLF's argument that the Region should have conducted an EJ analysis is in error for two main reasons: (1) EPA lacks statutory or regulatory authority to consider EJ; and (2) the Trump Administration's repeal of all EJ policies prohibits EPA from considering EJ.[44] Further, neither

[41] *See NRDC v. U.S. E.P.A.*, 279 F.3d 1180, 1186 ("[T]he final permit issued by the agency need not be identical to the draft permit. That would be antithetical to the whole concept of notice and comment."). *See also First Am. Discount Corp. v. Commodity Futures Trading Comm'n*, 222 F.3d 1008, 1015 (D.C.Cir.2000) ("The law does not require that every alteration in a proposed rule be reissued for notice and comment."); *South Terminal Corp. V. E.P.A.*, 504 F.2d 646, 659 ("Parties have no right to insist that a rule remain frozen in its vestigial form...[t]he requirement of submission of a proposed rule for comment does not automatically generate a new opportunity for comment merely because the rule promulgated by the agency differs from the rule it proposed, partly at least in response to submissions.").
[42] *See* Comment No. 71; EPA Response to Comment No. 71.
[43] *See* 40 C.F.R. § 122.42.
[44] *See* Memorandum from Jeffrey A. Hall, Acting Assistant Administrator to EPA Regional Directors, Deputies, and Counsel (Mar. 12, 2025), https://www.epa.gov/system/files/documents/2025-03/necimemo-

the identified Executive Orders (now repealed) nor the policies issued pursuant to those orders, create any private right of action or allow for judicial review of EPA's decisions under the policy.

1. CLF does not, and cannot, identify any statutory or regulatory authority authorizing EPA to consider EJ.

CLF does not identify any statute, regulation, case law or other enforceable legal authority to support its argument that EPA should have performed an EJ analysis. Nor can it. The EPA's prior directives to consider EJ in its decision-making were grounded in policies that arose out of Clinton and Biden era Executive Orders. Specifically, CLF points to a former NPDES Program Policy called "Addressing Environmental Justice and Equity in NPDES Permitting" and argues that the Region "erred and abused its discretion" in failing to implement the policy. Yet, as CLF is undoubtedly aware, the Trump Administration revoked all Executive Orders issued during prior administrations purporting to establish EJ initiatives or programs[45] and, as a by operation of the revocation, also repealed all existing EJ policies and programs established under

20250312.pdf. (Explaining the implementation of the Trump Administration Executive Orders including the removal of all EJ programs and policy).

[45] Between January 20-21, 2025, President Trump issued Executive Orders 14148, 14151, and 14173, which collectively dismantled prior federal climate, EJ, and DEI initiatives by revoking earlier executive orders and directing agencies to eliminate related programs and offices. These orders rescind key Clinton and Biden-era actions on EJ and terminate any affiliated programs to the maximum extent allowed by law, and require agencies to report on associated programs, budgets, personnel, and grantees. Together, the Executive Orders instruct federal agencies, including EPA, to terminate policies and programs related to EJ. *See generally* E.O. 14148, "Initial Recissions of Harmful Executive Orders and Actions," signed by President Trump on January 20, 2025, revokes E.O.s 14008 ("Tackling the Climate Crisis at Home and Abroad") and 14096 ("Revitalizing Our Nation's Commitment to Environmental Justice for All"), among other E.O.s; E.O. 14173, "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," signed by President Trump on January 21, 2025, revokes E.O. 12898 ("Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations"); E.O. 14173 directing "all executive departments and agencies (agencies) to terminate all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders, and requirements."; and E.O. 14151, "Ending Radical and Wasteful Government DEI Programs and Preferencing," signed by President Trump on January 20, 2025, directs each agency to "terminate, to the maximum extent allowed by law, all DEI, DEIA, and 'environmental justice' offices and positions."

the prior EO authority. These Presidential mandates fundamentally altered the legal landscape and discontinued EPA's inclusion of EJ policy in permitting.[46]

As a matter of law, the effect of the Trump Administration's revocation of EJ policies was to strip the Region of any authority to consider EJ in NPDES permit decisions. The Region's not performing an EJ analysis, therefore, was not an act of discretion, it was a requirement of law. As the law stands today, and at the time of the Region's permit issuance, there is no lawful basis under which the Region could consider EJ in its permitting decision. The Region acted squarely within the limits of its delegated authority.

CLF takes great leaps to contend that the Trump Administration's executive orders revoked only the prior executive orders that established EJ framework but did not revoke the NPDES Program Policy itself.[47] That reading is incorrect. The NPDES Program Policy would not exist, but for, the revoked Executive Orders. President Trump's executive orders expressly rescinded prior EJ-related executive orders and directed all agencies to "terminate, to the maximum extent allowed by law, all DEI, DEIA and environmental justice offices and positions."[48] CLF attempts to preserve the NPDES Program Policy by parsing isolated terms such as "enforcement" and "compliance assurance work" and arguing that they do not encompass permitting, elevating semantics over substance.[49] The executive orders must be read as a whole, and their clear purpose and effect was to dismantle EJ policy and infrastructure in its entirety.[50]

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[46] *See* Exec. Order No. 14096, 88 Fed. Reg. 25251 (Apr. 21, 2023).
[47] *See* Conservation Law Foundation, Petition for Review, at p. 39 (Dec. 3, 2025).
[48] *See* Executive Order 14151, 90 CFR 8339 (2025).
[49] *See* Conservation Law Foundation, Petition for Review, at p. 40 (Dec. 3, 2025).
[50] *See Russo v. Frasure*, 371 F. Supp. 3d 586, 590-91 (E.D. Mo. 2018) ("Language is ambiguous if it is reasonably open to different constructions. However a court must not 'unreasonably distort the language of a policy or exercise inventive powers for the purpose of creating an ambiguity when none exists."); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is

Accordingly, because EPA's EJ authority is a plain question of law, i.e. not a matter within the discretion of the agency, CLF erred in its contention that the Region's decision to follow the Trump Administration's EJ prohibition was clearly erroneous.

2. The revoked NPDES Program Policy is a guidance document without the force of law.

Further, the NPDES Program Policy is a guidance document intended to instruct internal practices or advise the public of the agency's methodologies. A policy, by its nature, does not carry the force of law and is not enforceable. Whether or not an agency adhered to a policy, therefore, cannot support a cause of action because they do not create binding obligations.[51]

To be clear, the City's position does not reflect opposition to EJ policy objectives; rather, the City raises the limitations on EPA's authority pursuant to the APA and following the Trump Administration's executive actions, which bind EPA. The Supreme Court has made it clear that agencies may no longer substitute policy preference for legal authority or impose substantive requirements through agency discretion. *See Loper Bright Enterprises v. Raimondo,* 144 S. Ct. 2244, 2247 (2004) (holding that the APA "requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority"). Contrary to CLF's position, the law holds that were EPA to implement the now revoked EJ policy, or to require EJ compliance in the Final Permit, such action would constitute an unlawful expansion of agency power.

determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole").

[51] *See Pars v. Central Intelligence Agency*, 295 F. Supp. 3d 1, 4 (D.D.C. 2018) ("As an initial matter, 'the only agency action that can be compelled under the APA is action legally *required*' ... executive orders without specific foundation in congressional action are not judicially enforceable in private civil suits.").

3. Executive Orders do not create a private right of action or provide a basis for judicial review of agency actions.

Executive orders govern the internal management of the Executive Branch and do not carry the force of law nor create enforceable rights unless they expressly provide for them.[52] Both President Clinton and President Biden's executive orders, for example, contain explicit language that prohibit individuals from pursuing a private right of action or seeking judicial review of agency action.[53] When an executive order expressly disclaims any private right of action, as all EJ executive orders do, it signals that the order is intended solely to guide internal executive branch operations, not to confer enforceable rights to the public.[54] The executive orders do not create any basis for CLF's claim.

The absence of any remedial provision in the relevant executive orders is dispositive. Where the President has not specified who may enforce an order, against whom, or through what means, courts will not imply a cause of action.[55] Allowing private enforcement in these circumstances would improperly create rights and remedies that the President did not authorize

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[52] *See California v. Environmental Protection Agency*, 72 F.4th 308, 318 (D.C. Cir. 2023) (holding that executive "orders simply serve as presidential directives to agency officials to consider certain policies when making regulatory decisions. They do not create free-standing private rights to enforce such policies because an executive order is not "law" within the meaning of the Constitution or the APA.").

[53] See Exec. Order No. 12898, 59 Fed. Reg. 32 (Feb. 16, 1994)

> This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.

See also Exec. Order No. 14008, 86 Fed. Reg. 19 (Feb. 1, 2021) ("This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person."); Exec. Order No. 14096, 88 Fed. Reg. 25251 (Apr. 21, 2023).

[54] *See supra note* 48.

[55] See supra note 51.

and that Congress did not enact. For these reasons, claims predicated on the alleged violations of the Clinton or Biden Executive Orders, or policies issued thereunder, fail as a matter of law.

4. The City's discharge of treated effluence does not increase environmental impacts that warrant an EJ Analysis.

Despite the lack of authority to address EJ in its permit decisions, the Region nevertheless responded to CLF's comments and explained with specificity why an EJ analysis was deemed unnecessary or unproductive and outside of the federal policy. The Region explained that (1) the permit already protects water quality standards; (2) the permit does not increase pollution; (3) the PFAS monitoring requirements in the permit are the same as those applied in other communities' permits; and (4) the facility's air emissions (sludge incinerator) are regulated separately by the State. At its core, the Region determined the Final Permit fully protects water quality standards and involves no relaxation of environmental protections and, therefore, does not create new or exacerbated impacts on any community, including EJ communities. The Final Permit ensures that its reissuance "fully protects all updated water quality standards and does not allow any increased water quality impacts to the environment or human health."[56] CLF's claims regarding PFAS, particularly as applied to EJ, do not give rise to a contention for this Board to consider.

D. CLF's concerns about the City's sewage sludge incinerator are raised in the wrong forum and under the wrong permitting regime.

Finally, the Region has fully addressed concerns regarding the monitoring and reporting of PFAS emissions from the City's sewage sludge incinerator.[57] The Region has already explained that the applicable requirements for sewage sludge incineration are set forth in 40 C.F.R. Part 503, Subpart E, which are self-implementing and require compliance regardless of

[56] *See* EPA Response to Comment No. 49.
[57] See EPA Response to Comment No. 62.

permit issuance.[58] These regulations establish detailed obligations for sludge incinerators but notably do not mandate the monitoring or reporting of PFAS. The Final Permit reflects all technical standards required under Section 405(d) of the CWA. As such, the Region concluded that additional PFAS-specific monitoring and reporting conditions are not necessary in the Final Permit.

CLF also raised concerns regarding air emissions and the cumulative impacts the Final Permit may have on air quality. The Final Permit is issued solely under the authority of the CWA and is limited in scope to the regulation of discharges to surface waters. It does not authorize, regulate, or impose any requirements related to air emissions. The Final Permit's provisions for PFAS are exclusively to the control of effluent discharges and are designed to ensure compliance with applicable water quality standards.[59] Air emissions, including any potential cumulative impacts to air quality are not addressed by this permit and not within the review or regulatory authority of this NPDES permitting action.

Accordingly, alleged concerns regarding air emissions fall entirely outside the scope of NPDES permitting.

V. CONCLUSION

For the foregoing reasons, the City of Manchester respectfully requests that the Environmental Appeals Board deny the Petition for Review. CLF has not demonstrated any clear error of fact or law in the Region's permitting decision, nor identified an important policy consideration that was ignored or misapplied. To the contrary, the record shows that the Region engaged thoughtfully with each of the issues appropriately and exercised its judgment within the bounds of its legal authority. Accordingly, CLF's Petition should be denied.

[58] 40 C.F.R. § 503.3(b).
[59] *See* EPA Response to Comment No. 62.

Respectfully submitted,

CITY OF MANCHESTER, NEW HAMPSHIRE

By its Attorneys,

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Date: January 30, 2026

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STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this petition for review, including all relevant portions and exclusive of attachments, contains less than 14,000 words.

/s/Adam M. Dumville

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Date: January 30, 2026

LIST OF ATTACHMENTS

ATTACHMENT A – NHDES Water Quality Certificate for Permit No. WQC 2025-NH0100447 (May 13, 2025)

ATTAHCMENT B – NHDES Response to Comments to Water Quality Certificate (May 13, 2025)

ATTACHMENT C – Letter from NHDES' Waste Management Division Director, Michael Wimsatt, P.G., to CLF, dated December 1, 2025

CERTIFICATE OF SERVICE

I, Adam M. Dumville, hereby certify that on this 30th day of January 2026, I served a copy of the foregoing Response on the parties identified below by the Environmental Appeals Board electronic filing system, U.S. first-class mail, postage pre-paid:

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Dated on the 30th day of January, 2026

/s/Adam M. Dumville

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Date: January 30, 2026

ATTACHMENT A

New Hampshire Department of Environmental Services
WATER QUALITY CERTIFICATION

In Fulfillment of RSA 485-A:12, III

Certification Number	WQC 2025-NH0100447
Federal Permit Requiring Section 401 Water Quality Certification	Manchester Wastewater Treatment Facility Individual National Pollutant Discharge Elimination System Permit (NH0100447)
Activity Description	Discharges of wastewater and stormwater from the Manchester Wastewater Treatment Facility and 15 combined sewer overflow outfalls
Activity Location	Manchester
Potentially Affected Surface Waters Near the Activity (other affected surface waters may exist)	Merrimack River (NHRIV700060803-14-02, NHRIV700060803-14-01, NHIMP700060802-04) Piscataquog River (NHRIV700060607-22) Rays Brook (NHRIV700060802-15) Baker Brook (NHRIV700060803-08) Unnamed Brook (NHRIV700060803-17)
Receipt Date of Request for Certification	December 18, 2024
Reasonable Period of Time	6 months
Decision	Granted with Conditions
Date of Issuance	Signature Date

A. INTRODUCTION

On December 18, 2024, the New Hampshire Department of Environmental Services (NHDES) received a request from the U.S. Environmental Protection Agency Region 1 (EPA), the permitting authority for National Pollutant Discharge Elimination System (NPDES) permits in New Hampshire, to certify the draft Manchester Wastewater Treatment Facility (WWTF) Individual NPDES Permit (NH0100447) in accordance with Clean Water Act Section 401(a)(1) and pursuant to 40 CFR Section 124.55.

The purpose of the certification is to ensure that the Manchester WWTF Individual NPDES Permit is drafted in a manner that complies with New Hampshire's surface water quality standards specified under Title L RSA 485-A and New Hampshire Code of Administrative Rules Env-Wq 1700.

B. PERMIT DESCRIPTION

EPA is issuing the Manchester WWTF Individual NPDES Permit to authorize the discharge of wastewater and stormwater from the Manchester WWTF and 15 combined sewer overflow (CSO) outfalls to the Merrimack River, Piscataquog River, Rays Brook, Baker Brook, and an Unnamed Brook. The permit establishes effluent limitations, monitoring requirements, reporting requirements, and other conditions for these discharges to meet water quality standards in the receiving waters.

EPA gave public notice of the availability of the draft Manchester WWTF Individual NPDES Permit on December 18, 2024. The public notice provided a public comment period until February 3, 2025 and stated that the draft permit and fact sheet could be obtained on EPA's website:

NH0100447 Draft Manchester WWTF Individual NPDES Permit

C. DECISION

Based on a review of the draft permit, and subject to conditions included herein, NHDES has determined that the permit, as currently written, will ensure that the discharges will comply with New Hampshire's surface water quality standards specified under Title L RSA 485-A and New Hampshire Code of Administrative Rules Env-Wq 1700. NHDES hereby grants this certification in accordance with 40 CFR 121.7(d) and 40 CFR 124.53(e), subject to the conditions in Section D. CERTIFICATION CONDITIONS.

D. CERTIFICATION CONDITIONS

The following conditions shall be included in the permit to ensure that the discharges will comply with New Hampshire's surface water quality standards:

1. The Permittee shall not at any time, either alone or in conjunction with any person or persons, cause directly or indirectly the discharge of waste into the said receiving water unless it has been treated in such a manner as will not lower the legislated water quality classification of, or interfere with the uses assigned to, said water by the New Hampshire Legislature.

   This condition assures compliance with RSA 485-A:12.

2. Any person responsible for a bypass or upset at a wastewater facility shall give immediate notice of the bypass or upset to all public or privately owned water systems drawing water within 20 miles downstream of the point of discharge, regardless of whether or not the water systems are on the same receiving water or on another surface water to which the receiving water is tributary. The Permittee shall maintain a list of all persons, including their telephone numbers, who are to be notified immediately by telephone. In addition, written notification, which shall be postmarked within three days of the bypass or upset, shall be sent to such persons.

   Note that per RSA 485-A:2XIX, "wastewater facility" is defined as the structures, equipment, and processes required to collect, convey, and treat domestic and industrial wastes, and dispose of the effluent and sludge.

   This condition assures compliance with RSA 485-A:13(I)(c).

3. Any person proposing to construct or modify any of the following shall submit an application for a sewer connection permit to NHDES:

    a. Any extension of a collector or interceptor, whether public or private, regardless of flow

    b. Any wastewater connection or other discharge in excess of 5,000 gallons per day

    c. Any wastewater connection or other discharge to a WWTF operating in excess of 80 percent design flow capacity or design loading capacity, based on actual average flow or loadings for three consecutive months

    d. Any industrial wastewater connection or change in existing discharge of industrial wastewater, regardless of quality or quantity

    e. Any sewage pumping station greater than 50 gallons per minute or serving more than one building

    f. Any proposed sewer that serves more than one building or that requires a manhole at the connection

    This condition assures compliance with Env-Wq 703.07(a).

4. At a frequency no less than once every five years, the Permittee shall submit to NHDES:

    a. A copy of its current sewer use ordinance, if it has been revised without department approval subsequent to any previous submittal to the department, or a certification that no changes have been made.

    b. A current list of all significant indirect dischargers to the POTW. At a minimum, the list shall include for each significant indirect discharger: its name and address, the name and daytime telephone number of a contact person, products manufactured, industrial processes used, existing pretreatment processes, and discharge permit status.

    c. A list of all permitted indirect dischargers.

    d. A certification that the municipality is strictly enforcing its sewer use ordinance and all discharge permits it has issued.

    This condition assures compliance with Env-Wq 305.21.

5. When the effluent discharged for a period of three consecutive months exceeds 80 percent of the design flow or design loading capacity of the facility, the Permittee shall submit to NHDES a projection of flows and loadings up to the time when the design capacity of the facility will be reached, and a program for maintaining satisfactory treatment levels consistent with approved water quality management plans. Before the design flow will be reached, or whenever treatment necessary to achieve permit limits cannot be assured, the Permittee may be required to submit plans for facility improvements.

This condition assures that adequate planning will be conducted so that flows or loads to a facility do not exceed the facility's design capacity. If flows or loads exceed the facility's design capacity, the effluent may not receive complete treatment and could result in water quality impacts if discharged.

E. 40 CFR 124.53(e) STATEMENTS

In accordance with 40 CFR 124.53(e), which states, "State certification on a draft permit may include a statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards," the following changes can be made to the permit without violating state water quality standards:

1. An allowance for a revision to the pH limits:

   The pH range of 6.5 to 8.0 Standard Units (S.U.) must be achieved in the final effluent unless the Permittee can demonstrate to NHDES: 1) that the range should be widened due to naturally occurring conditions in the receiving water; or 2) that the naturally occurring receiving water pH is not significantly altered by the Permittee's discharge. The scope of any demonstration project must receive prior approval from NHDES. In no case, shall the above procedure result in pH limits outside the range of 6.0 to 9.0 S.U., which is the federal effluent limitation guideline regulation for pH for secondary treatment and is found in 40 CFR § 133.102(c).

2. A revision to Part I.G.5 Benthic Survey, as indicated in bold below:

   "~~During the third calendar quarter (i.e., July through September) that begins at least 12 months after the effective date of the permit~~ **If 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,** the Permittee shall conduct a benthic survey ~~once per permit term~~ **within one year of the notification** to assess **those** impacts ~~from the discharge~~ on aquatic life in the benthic environment. ***Visual observations, benthic sample results, or long-term permit limit exceedances could indicate a potential change in either the sediments or settleable solids downstream of the outfall as compared to upstream of the outfall. Such a change could indicate that the facility's effluent is having a detrimental impact on the downstream benthic community health.***"

   Because 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 in the vicinity of the facility's outfall and meet surface water quality standards, specifically those in Env-Wq 1703.03(c)(1)(a) and 1703.08. NHDES' position is that a benthic survey should only be required if benthic deposits from a discharge are known or suspected to have a detrimental impact on a downstream benthic community and more specific benthic data is necessary to determine if additional protections are needed.

F. ENFORCEMENT

Certification conditions are subject to enforcement mechanisms available to the federal licensing or permitting agency and to the state of New Hampshire, including those provided under RSA 485-A:12, I and RSA 485-A:12, III.

G. PUBLIC NOTICE

NHDES gave public notice of the availability of the draft certification on January 9, 2025. The public notice provided a 30-day public comment period and stated that the draft certification could be obtained on NHDES' website.

H. APPEAL PROCESS

Any person aggrieved by this decision may appeal to the New Hampshire Water Council. Information regarding appealing a decision made by NHDES can be found on the NHDES website. A link to the New Hampshire Water Council's rules is available on the New Hampshire Environmental Council website (or more directly at the Water Council page). Copies of the rules can also be obtained by contacting the NHDES Public Information Center at (603) 271-2975.

I. SIGNATURE AND DATE

Digitally signed by
Rene J. Pelletier
Date: 2025.05.13
09:08:25 -04'00'

Rene J. Pelletier, P.G., Director
NHDES Water Division

Date

cc: Ted Diers, Assistant Director, NHDES WD
Tracy Wood, P.E., Administrator, NHDES WD-WWEB
David Neils, Administrator, NHDES WD-WMB

ATTACHMENT B

New Hampshire Department of Environmental Services
Response to Comments
Water Quality Certification 2025-NH0100447
Manchester Wastewater Treatment Facility Individual NPDES Permit (NH0100447)
May 13, 2025

From January 9, 2025 through February 8, 2025, the New Hampshire Department of Environmental Services (NHDES) Wastewater Engineering Bureau (WWEB) solicited public comments on a draft version of Water Quality Certification 2025-NH0100447 (Certification) for the U.S. Environmental Protection Agency's (EPA) Manchester Wastewater Treatment Facility (WWTF) Individual National Pollutant Discharge Elimination System (NPDES) Permit (NH0100447). NHDES is preparing the Certification in response to a request from EPA in accordance with Clean Water Act Section 401(a)(1) and pursuant to 40 CFR Section 124.55. The purpose of the Certification is to ensure that the Manchester WWTF Individual NPDES Permit is drafted in a manner that complies with New Hampshire's surface water quality standards specified under Title L RSA 485-A and New Hampshire Code of Administrative Rules Env-Wq 1700.

During the public comment period, NHDES received comments from Jillian Aicher and Tom Irwin of Conservation Law Foundation. In the first section of this document, NHDES includes the comments that NHDES received in italicized font and provides responses to those comments in plain text.

The comments below were copied into this document and do not contain all original images, formatting, footnotes, links, and/or attachments. To obtain an original copy of the comments that were submitted to NHDES, please contact Hayley Franz at hayley.g.franz@des.nh.gov or (603) 271-0671.

NHDES revised the Certification as a result of comments received on the draft Certification and summarizes the revisions at the end of this document.

The final Certification and this Response to Comments document are posted on NHDES' website. If you have questions regarding the final Certification or have difficulty accessing a copy, please contact Hayley Franz at (603) 271-0671 or hayley.g.franz@des.nh.gov.

Response to Comments

A. Comments from Jillian Aicher and Tom Irwin – Conservation Law Foundation ("CLF")

A-1. The Department Must Consider and Address Record Evidence of PFAS Discharges and Emissions, Revise its Certification Evaluation, and Deny Certification Based on PFAS Contributions.

COMMENT: The draft 401 certification fails to evaluate the water quality impacts of, or even mention, PFAS contributions from the Manchester WWTF and its incinerator. Thus, the Department ostensibly failed to "develop a record to support its determination that an activity will or will not comply with applicable water quality requirements" with respect to PFAS.

NHDES Response:

EPA is the permitting authority for NPDES permits in New Hampshire. Per 40 CFR 122.44, the permitting authority is required to include permit limits and conditions in NPDES permits that will ensure state and federal water quality standards applicable to the designated receiving water are met. They prepare either a fact sheet or a statement of basis for draft permits, per 40 CFR 124.7 and 124.8, which explain in detail how the draft permit will ensure state and federal water quality standards are met.

EPA posted a draft individual NPDES permit for the Manchester WWTF, with a corresponding fact sheet, for public notice from April 10, 2024 through May 10, 2024 ("original draft permit"). They later posted a revised draft individual NPDES permit for the Manchester WWTF, with a corresponding statement of basis, from December 18, 2024 through February 3, 2025 ("revised draft permit"). The explanations of how the draft permit and revised draft permit meet state and federal water quality standards were included in these documents. NHDES' Certification provided a link to these documents and included all information required by the federal regulations in 40 CFR 121.7(d).

The "record to support its determination that an activity will or will not comply with applicable water quality requirements" with respect to PFAS is included on pages 33-35 of EPA's fact sheet for the original draft permit[1], which is linked in the Certification.

In addition, see the response below discussing NHDES' additional review based on revisions to state water quality standards since the public notice of EPA's draft permits and the Certification.

COMMENT: To the contrary, the Department granted certification on June 6, 2024 in a brief, one-page document stating that "[t]he permit, as currently written, will ensure" compliance with water quality standards and that "no conditions" in the Original Draft Permit "can be made less stringent[.]" Then, when EPA issued a Revised Draft Permit with less stringent provisions that omit narrative limitations, the Department issued a brief, five-page draft certification only 22 days later. The brevity of both certification documents, the Department's failure to address water quality impacts of PFAS, and the Department's proposal to grant certification of a less protective Revised Draft Permit despite the Department's initial statement that the permit cannot "be made less stringent" indicate that the Department "pre-determined" the certification result before evaluating the water quality impacts of the Manchester WWTF and its incinerator. See Islander E. Pipeline Co., LLC v. McCarthy, 525 F.3d 141, 149 (2d Cir. 2008). These factors, individually and collectively, would render finalization of the draft certification unlawful and unreasonable.

[1] https://www.epa.gov/system/files/documents/2024-04/draftnh0100447permit-2024.pdf

NHDES Response:

As discussed above, NHDES provided a link in the Certification to EPA's original draft permit and fact sheet and revised draft permit and statement of basis, which explain in detail how the draft permits will ensure state and federal water quality standards are met. The Certification includes all information required by the federal regulations in 40 CFR 121.7(d).

EPA can no longer include end result conditions in permits, per *City and County of San Francisco, California v. Environmental Protection Agency,* 604 U.S. ____(March 4, 2025)[2]. As such, EPA replaced the end result provisions in the original draft permit with alternative requirements in the revised draft permit and explained how those alternative requirements will continue to protect water quality standards in the revised draft permit's statement of basis. NHDES concurred with EPA's assessment that the alternative provisions are equally or more protective than the provisions they replaced.

COMMENT: The Department's draft certification is also premised on standards that are outdated and contrary to the language of EPA's current regulations. The Department must conduct an evaluation consistent with existing regulatory requirements and, after doing so, must deny certification due to the PFAS-related impacts of the WWTF on the Merrimack River.

First, the draft certification is incorrectly premised on "reasonable assurance" language, stating that "the permit will provide reasonable assurance that the discharges will comply with New Hampshire's surface water quality standards[.]" However, as detailed above, EPA explicitly removed the "reasonable assurance" phrase from 401 certification regulations. The statute requires the certifying state to determine that the permittee "will comply" with water quality requirements, 33 U.S.C. § 1341(a)(1), (d), and the current rules intentionally include the "will comply" language as well. 40 C.F.R. § 121.7(c)–(e). That language places a higher burden on the state to scrutinize water quality impacts of the activity at issue and to protect the state's surface water resources. The Department must therefore analyze whether the WWTF's operations under the Revised Draft NPDES permit—including its releases of PFAS with no effluent limits or source control requirements—"will comply" with state surface water quality standards prohibiting harmful levels of toxic pollutants and protecting fish consumption and aquatic life.

NHDES Response:

Each condition in the Certification notes that *"This condition assures compliance with [RSA citation]."* The "reasonable assurance" language that introduces the conditions was inserted due to a drafting error when NHDES changed the format of the Certification, and it does not reflect a

[2] https://www.supremecourt.gov/opinions/24pdf/23-753_f2bh.pdf

change in the quality or conclusions of the review. The "reasonable assurance" language has been corrected in the final certification as noted in the Summary of Changes below.

See the discussions above and below regarding EPA and NHDES' evaluation of PFAS from the Manchester WWTF's discharge.

COMMENT: In addition, the draft certification indicates that the Department considered only the impact of the WWTF's discharge—rather than all WWTF activities, including sewage sludge incineration—in its evaluation. The draft certification states that "the permit will provide reasonable assurance that the discharges will comply with New Hampshire's surface water quality standards[.]" The current rules, however, require states to consider not only the water quality impacts of discharges, but also all water quality impacts of the permitted activity. The Department must therefore consider the impacts of the WWTF's discharges of PFAS, and the incinerator's emissions of PFAS, on the Merrimack River.

NHDES Response:

40 CFR 121.3 states, "The certifying authority's evaluation is limited to the water quality-related impacts from the activity subject to the Federal license or permit, including the activity's construction and operation."

Therefore, NHDES limited its evaluation to the permitted activities. Other activities from the facility with water quality impacts may be covered under separate permits. For example, stormwater discharges from the facility are authorized under EPA's Multi-Sector General Permit (NHR053125).

The information provided by permittee, EPA, and the commenters did not indicate water quality impacts from Fluidized Bed Incinerator (FBI) emissions.

The commentors provide as CLF Exhibit B a copy of a study, Brannon A. Seay *et. al., Per- and polyfluoroalkyl substances fate and transport at a wastewater treatment plant with a collocated sewage sludge incinerator*, 493 Science of the Total Environment, 162356 (August 1, 2024). The study is relevant in that it appears to involve the Manchester WWTF. The study's authors concluded, "Nearly all environmental discharges of PFAS from the WWTP went to the adjacent river, with <0.5% being landfilled or emitted to the atmosphere. Consistent with these results, dispersion modeling showed the stack gas plume's contribution to ambient air PFAS concentrations within the modeled domain were negligible on both study days." This conclusion that the ambient air concentrations from the FBI were negligible does not indicate the need for certification conditions relating water quality impacts from the FBI emissions. The commenters did not provide any additional information or data supporting the need for certification conditions, or separate permit coverage, related to water quality impacts from the FBI emissions.

COMMENT: After evaluating the impacts of the WWTF's PFAS discharges and emissions based on data in the attached exhibits and otherwise collected by the Department as part of its analysis, the Department must deny certification, or at least condition certification on PFAS effluent limitations and source control, because it cannot determine that the Manchester WWTF will comply with state water quality standards. Both the narrative toxics standard and the designated use provisions require water quality that is safe for human health (including fish consumption) and aquatic life. The PFAS compounds detected in the Manchester WWTF's effluent likely contribute to violations of those standards.

For example, PFOS has been detected in edible fish in the Merrimack River at levels reaching 7.914 parts per billion (ppb). That level is harmful if consumed, as it closely approaches the 8.41 ppb level at which eating one standard serving of fish is equivalent to drinking water at 2,400 times EPA's PFOS health advisory level for an entire month. Given that the WWTF has discharged PFOS into the Merrimack River since the City began monitoring in 2019 (and likely since a much earlier time), the WWTF is likely contributing to those harmful concentrations in violation of New Hampshire's narrative toxics standard and fish consumption designated use. The EPA's Draft Permit for the WWTF contains no effluent limits or source control measures to reduce the PFAS entering or exiting the WWTF; thus, the permit will not remedy the harmful water quality impacts of the WWTF's PFAS contributions.

Because the Department cannot certify that the permitted WWTF and incineration activities will comply with water quality requirements considering PFAS discharges and air emissions from the Manchester WWTF, the Department must deny 401 certification or condition certification upon EPA including appropriately protective effluent limitations or source control measures for PFAS. See 33 U.S.C. § 1341(a)(1), (d).

NHDES Response:

On February 25, 2025, NHDES adopted revisions to New Hampshire Code of Administrative Rules Env-Wq 1700 to require the use of the maximum contaminant levels (MCLs) of four PFAS parameters as the Protection of Human Health Water and Fish Ingestion 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. The four PFAS parameters are perfluorohexane sulfonic acid (PFHxS), perfluorononanoic acid (PFNA), perfluorooctane sulfonic acid (PFOS), and perfluorooctanoic Acid (PFOA). The Manchester WWTF is located within 20 miles upstream of a drinking water intake, so these MCLs apply as the surface water quality criteria in the Merrimack River at the location of the Manchester WWTF outfall.

In CLF Exhibit A, the commenters provided data that is referenced as "City of Manchester WWTF PFAS Monitoring Reports (2019-2023)" in the commenters' letter. The data was provided in summary format and did not include lab reports to verify the data. These reports were not

provided to NHDES upon request. NHDES notes that any Certification condition would need to be based on verified data.

However, NHDES reviewed the provided data summary to evaluate if the data, assuming it were verified, would result in the need for effluent permit limits for the Manchester WWTF. NHDES completed this evaluation using EPA's "Reasonable Potential and Limits Calculations" methodology outlined in Appendix B of the fact sheet for the original draft permit. In lieu of the 7Q10 flow upstream of the outfall, NHDES used the harmonic mean flow of the Merrimack River upstream of the outfall per Env-Wq 1705.02 (c), which says, "For non-tidal rivers and streams, permit limits for all human health criteria for carcinogens shall be developed based on the long-term harmonic mean flow, which is the number of daily flow measurements divided by the sum of the reciprocals of the daily flows." This flow was calculated using data from the USGS Merrimack River at Manchester, NH stream gage (01090500). NHDES' Environmental Monitoring Database contains one sample for the four PFAS parameters on the Merrimack River upstream of the Manchester WWTF at Station 27-MER on August 18, 2017. All parameters were non-detect, resulting in the use of zero as the upstream concentration. The results of this evaluation are summarized in Table 1 below and show 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 water quality standards.

Table 1. Manchester WWTF Effluent PFAS Reasonable Potential Evaluation

Parameter	**Q_d**	**C_d**	**Q_s**	**C_s**	**$Q_r=Q_d+Q_s$**	**$C_r=(Q_dC_d+Q_sC_s)/Q_r$**	**MCL**	**MCL*0.9**	**Reasonable Potential**
Units	**cfs**	**ng/L**	**cfs**	**ng/L**	**cfs**	**ng/L**	**ng/l**	**ng/l**	**C_r>MCL*0.9**
PFNA	53	0.0	3004	0	3057	0.00	11	10	No
PFHxS	53	7.6	3004	0	3057	0.131	18.0	16.2	No
PFOA	53	18.4	3004	0	3057	0.317	12	10.8	No
PFOS	53	16.4	3004	0	3057	0.282	15	13.5	No

Q_d = permitted discharge flow of the Manchester WWTF
Q_s = harmonic mean flow of the Merrimack River upstream of the Manchester WWTF
Q_r = resulting flow in the Merrimack River downstream of the Manchester WWTF
C_d = concentration of the pollutant in the Manchester WWTF effluent
C_s = concentration of the pollutant in the Merrimack River upstream of the Manchester WWTF
C_r = resulting concentration of the pollutant in the Merrimack River downstream of the Manchester WWTF

The revised draft permit requires the facility to conduct quarterly influent and effluent sampling of 40 PFAS parameters. This data will be used to continue to monitor and evaluate the need for permit limitations.

It also requires annual sampling of certain industrial users for the same 40 PFAS parameters, and the submittal of a summary of those sampling results in an annual report.

The results of this evaluation show that no revisions are needed to the final Certification, and the Manchester WWTF individual NPDES permit will ensure compliance with water quality standards.

A-2. The Department Must Strengthen Conditions in Any Future 401 Certification for the Manchester WWTF NPDES Permit.

COMMENT: The Department's draft certification conditions do not ensure that the WWTF's activities will comply with New Hampshire's water quality standards. Any future certification for the Manchester WWTF's NPDES Permit must update its conditions to ensure compliance, as set forth below.

First, the Department's certification conditions should account for the fact that EPA's Revised Draft Permit removed narrative provisions, constraining EPA's ability to ensure compliance with New Hampshire's water quality standards and criteria through the permit. For example, as described in CLF's January 30, 2025 comments on the Revised Draft Permit, appended as Exhibit D, the Revised Draft Permit removed a narrative provision from the Original Draft NPDES Permit that stated: "The discharge shall not cause a violation of the water quality standards of the receiving water." The Revised Draft Permit also removed a provision that incorporated the language of New Hampshire's narrative criteria for toxic pollutants.

In place of the narrative provisions, the Revised Draft Permit includes enhanced Whole Effluent Toxicity requirements and a Pollutant Scan for specified pollutants. However, EPA implicitly recognized that the new monitoring provisions do not cover all pollutants encapsulated by the state narrative water quality standards. The agency's Revised Draft Permit acknowledges that Whole Effluent Toxicity requirements may not capture "other sources of toxic effects (including to human health)" and that the Pollutant Scan includes "many" but not all "common toxic pollutants." The narrative provisions in the Original Draft Permit, on the other hand, covered pollutants that the permittee did not list on its application but that nonetheless may violate water quality standards. See Ohio Valley Env't Coal., Inc. v. Marfork Coal Co., 966 F. Supp. 2d 667, 685 (S.D.W. Va. 2013) (permit provisions incorporating state water quality standards function "[a]s a backstop" that "protects water quality standards that [the permitting authority] did not anticipate would be threatened based on the discharge levels reported in a permit application.").

The Department's draft certification fails to respond to, or address in any way, the Revised Draft Permit's elimination of narrative provisions directly pertaining to the state's surface water quality standards. Rather, the conditions cite only two statutory provisions and two regulatory provisions, without explaining how the certification conditions will ensure compliance with the remaining state water quality standards and criteria. The Department's failure to address the

removal of narrative provisions pertaining to the state's surface water quality standards directly conflicts with the statement in the June 10, 2024 certification for the Original Draft Permit that "no conditions" in the Original Draft Permit "can be made less stringent[.]"To ensure that the permitted activity will comply with New Hampshire's water quality standards, in a future certification, the Department must include a condition stating that "The discharge shall not cause or contribute to a violation of the water quality standards of the receiving water."

NHDES Response:

See response to Comment A-1. Discussion regarding the replacement of the end result provisions with alternative provisions is included in EPA's statement of basis for the revised draft permit, which was linked in the draft Certification. DES concurs with EPA's assessment that these alternative provisions are equally or more protective than the provisions they replaced.

COMMENT: Second, the Department's revision to EPA's proposed benthic study permit requirement conflicts with the purpose of 401 certification to ensure compliance with water quality standards. The Department's proposed revision also incorrectly interprets the state water quality regulations it references. The proposed revision would remove an automatic permit requirement that Manchester WWTF conduct a benthic survey and would add a prerequisite to trigger the study requirement. The proposed prerequisite is a notification from the Department or EPA that benthic deposits are "known or suspected to have a detrimental impact on downstream benthic communities."

The Department states that the permit's effluent limitations on total suspended solids and metals already protect the benthic community near the WWTF's outfall and "meet surface water quality standards, specifically those in Env-Wq 1703.03(c)(1)(a) and 1703.08." However, neither Env-Wq 1703.03(c)(1)(a) nor 1703.08 narrowly apply to total suspended solids, metals, or other pollutants with specific numeric limitations in the permit. Rather, Env-Wq 1703.03(c)(1)(a) states that surface water shall be "free from substances in kind or quantity" that form harmful benthic deposits, and 1703.08(b) requires that "Class B waters shall contain no benthic deposits that have a detrimental impact on the benthic community, unless naturally occurring." Without an automatically-required benthic survey, the Department and EPA cannot make the requisite identification of harmful benthic deposits, rendering the proposed revision valueless for ensuring water quality standard compliance.

NHDES Response:

The Manchester WWTF's current permit includes a requirement that the "discharge shall be adequately treated to ensure that the surface water remains free from pollutants in concentrations or combinations that settle to form harmful deposits." EPA's original draft permit included requirements that the "discharge shall be free from substances in kind or quantity that settle to form harmful benthic deposits" and that the "discharge shall not result in benthic deposits that have a detrimental impact on the benthic community."

These requirements were included in accordance with Env-Wq 1703.03(c)(1)(a) which requires "All surface waters shall be free from substances in kind or quantity that settle to form harmful benthic deposits" and 1703.08 which requires that "Class B waters shall contain no benthic deposits that have a detrimental impact on the benthic community, unless naturally occurring."

As these provisions were included as end result requirements without specified monitoring, compliance action related to a violation of these requirements would be initiated by an observation or evidence from the permittee, the regulatory agencies, or the public. In this way, NHDES' proposed language requiring a triggering event to initiate a benthic survey is as protective as the above referenced permit language. Section I.G.5, with NHDES' proposed language, is then more protective than the above referenced permit language by requiring the benthic survey as a specific path forward to address a potential violation. The benthic survey requirements are outlined in the permit and the survey is to be completed by a certified professional macroinvertebrate taxonomist. The resulting data, prepared by a certified professional, can help to determine if a violation of the above referenced water quality standards has occurred and if the facility may be contributing to that violation. If a violation has occurred and the facility may be contributing to the violation, EPA and/or NHDES will have data to determine appropriate action.

Adding further protection is EPA's addition of monthly aesthetics monitoring to Part I.A.1, which requires the permittee to "conduct a visual inspection of the receiving water in the vicinity of the outfall and report any changes in the receiving water that may be caused by…the presence or absence of any visible settleable solids." This reporting will ensure continuous monitoring that will provide information to EPA and NHDES on whether there may be deposits from the discharge that may be impacting the downstream benthic communities. This will be the minimum level of monitoring, and it can be supplemented by additional information from the permittee or other interested parties.

As discussed in NHDES' draft Certification, the permit already includes effluent limitations, such as, but not limited to, metals and total suspended solids. Other limits include flow, CBOD, pH, Escherichia coli, total phosphorus, ammonia, and whole effluent toxicity. The permit also includes numerous other monitoring requirements so that EPA and NHDES can continue to assess the need for any additional limitations. 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. The commenter has not provided specific concerns regarding benthic community health in the vicinity of the Manchester WWTF outfall, or data or observational evidence to support those concerns.

Therefore, NHDES has determined that the permit with the revision to Part I.G.5 included in the draft Certification will assure compliance with New Hampshire's surface water quality standards and state law.

NHDES determined it is important to note this way in which the draft permit can be made less stringent without violating water quality standards. Requiring an expensive and time-consuming benthic survey for a wastewater treatment facility without justified concern for the benthic community health downstream of the facility is excessive and more than what is necessary to ensure that the discharge will comply with New Hampshire's surface water quality standards in the receiving water.

COMMENT: Third, DES should include a condition requiring PFAS monitoring of fish in the receiving water of the Manchester WWTF using method 1633. As discussed above, data shows that the Manchester WWTF discharges and emits PFAS, which can bioaccumulate in aquatic life to levels that harm humans and water quality. In addition, EPA has recommended that states monitor several PFAS compounds in fish and shellfish that "have been found to occur in the edible tissue of fish and shellfish at concentrations that may be of concern for human health."

NHDES Response:

See response to Comment A-1, discussing NHDES' reasonable potential evaluation using the current Protection of Human Health Water and Fish Ingestion criteria for PFAS in New Hampshire Code of Administrative Rules Env-Wq 1700.

Summary of Changes to the Certification

1. Revision of Section A. Introduction

Per NHDES' response to Comment A-1, NHDES has made changes, indicated in bold below, to Section A of the Certification.

*The purpose of the certification is to **ensure** ~~provide reasonable assurance~~ that the Manchester WWTF Individual NPDES Permit is drafted in a manner that complies with New Hampshire's surface water quality standards specified under Title L RSA 485-A and New Hampshire Code of Administrative Rules Env-Wq 1700.*

2. Revision of Section C. Decision

Per NHDES' response to Comment A-1, NHDES has made changes, indicated in bold below, to Section C of the Certification.

*Based on a review of the draft permit, and subject to conditions included herein, NHDES has determined that the permit**, as currently written,** will **ensure** ~~provide reasonable assurance~~ that the discharges will comply with New Hampshire's surface water quality standards specified under Title L RSA 485-A and New Hampshire Code of Administrative Rules Env-Wq 1700. NHDES hereby grants this certification in accordance with 40 CFR 121.7(d) and 40 CFR 124.53(e), subject to the conditions in Section D. CERTIFICATION CONDITIONS.*

3. Revision of Section D. Certification Conditions

Per NHDES' response to Comment A-1, NHDES has made changes, indicated in bold below, to Section D of the Certification.

*The following conditions shall be included in the permit to **ensure** ~~provide reasonable assurance~~ that the discharges will comply with New Hampshire's surface water quality standards:…*

4. Revision of Item 2 in Section E. 40 CFR 124.53(e) Statements

As a result of public comments received on Draft Water Quality Certification 2024-NHG590000 for EPA's Medium Wastewater Treatment Facility General NPDES Permit, NHDES has made minor changes, underlined below, to the proposed revision to Part I.G.5 Benthic Survey.

*~~During the third calendar quarter (i.e., July through September) that begins at least 12 months after the effective date of the permit~~ **If notified <u>in writing</u> by NHDES or EPA that benthic deposits from the discharge are known or suspected to have a detrimental impact on downstream benthic communities,** the Permittee shall conduct a benthic survey **<u>within one year of the notification</u>** ~~once per permit term~~ to assess **those** impacts ~~from the discharge~~ on aquatic life in the benthic environment. **<u>Visual observations, benthic sample results, or long-term permit limit exceedances</u>***

could indicate a potential change in either the sediments or settleable solids downstream of the outfall as compared to upstream of the outfall. Such a change could indicate that the facility's effluent is having a detrimental impact on the downstream benthic community health.

ATTACHMENT C

The State of New Hampshire

DEPARTMENT OF ENVIRONMENTAL SERVICES

Robert R. Scott, Commissioner

December 1, 2025

Jillian Aicher, Equal Justice Works Legal Fellow
Tom Irwin, Vice President, New Hampshire
Conservation Law Foundation
27 North Main Street
Via Email Only: jaicher@clf.org, tirwin@clf.org

Dear Attorneys Aicher and Irwin:

On July 22, 2025, I responded to your inquiry regarding the potential flow of per- and polyfluoroalkyl substances (PFAS) from the closed Manchester landfill to the Manchester Wastewater Treatment Facility (WWTF). Following that correspondence, you submitted a series of follow-up questions in your letter dated September 22, 2025.

In response to your additional questions, my staff and I met with personnel from the Manchester Department of Public Works (DPW) and conducted a site visit to the landfill alongside DPW representatives. Below, I address each of your questions in turn.

1. Did the NHDES Waste Management Division coordinate with the NHDES Industrial Pretreatment Program to analyze the PFAS monthly monitoring reports provided by CLF and/or obtain additional data on the PFAS content of the Manchester municipal landfill leachate?

The U.S. Environmental Protection Agency (EPA) is the Approval Authority over which Manchester's Industrial Pretreatment Program is regulated, not NHDES. We have discussed the concerns you raised with NHDES's Industrial Pretreatment Program. However, without a NPDES permit limit, there is no control mechanism to support action at this time.

2. In response to CLF's January 2025 letter, did NHDES staff conduct an on-site investigation of the landfill cap's integrity? We urge NHDES to do so.

NHDES has not conducted a detailed on-site assessment of the integrity of the landfill cap. However, the Department has not received any information indicating the cap has been damaged. Additionally, the City's Landfill Inspection Report, dated May 16, 2025 and prepared by its consultant, reports no issues with the cap's condition.

While NHDES did not perform an independent evaluation of the cap's integrity during our site visit, our observations were consistent with the consultant's findings, and we saw no evidence to suggest that the report is inaccurate.

3. Did NHDES do any independent outreach to the Manchester WWTF to confirm the pathway of leachate from the Manchester municipal landfill to the Manchester WWTF and the daily volume of leachate flowing from the landfill to the WWTF? We urge NHDES to do so.

5. Do other closed landfills in New Hampshire generate 100,000 gallons of leachate per day, or does the Manchester municipal landfill generate more leachate than other closed landfills?

I have combined the response to questions 3 and 5 as they are related.

The Manchester landfill is a capped, unlined facility and, as such, lacks both a liner and a leachate collection system. The figure of 100,000 gallons per day referenced in your correspondence does not represent the volume of leachate generated from the landfill. Instead, it reflects the volume of groundwater intercepted by the Front Street Interceptor and conveyed to the WWTF. According to the DPW, the only known source of flow into the Front Street Interceptor is groundwater located beneath Front Street. The volume of water conveyed to the WWTF is influenced by the Interceptor's depth relative to the groundwater table and its proximity to the Merrimack River. This flow rate should not be interpreted as an indicator of leachate volume originating from the landfill.

Because the landfill is capped, contamination of groundwater beneath the landfill is primarily a function of whether groundwater comes into direct contact with the bottom of the landfill. As I referenced in my July 22, 2025 letter, the Northwest Interceptor is engineered to lower groundwater depth beneath the landfill, thereby reducing or preventing direct groundwater contact with landfill refuse. Given that the efficacy of the Northwest Interceptor has not been assessed in recent years, we intend to work with the City to undertake such an evaluation.

4. Your letter asserts that the Manchester municipal landfill leachate mixes with groundwater and undergoes "beneficial treatment at the WWTF." It is our understanding that the Manchester WWTF does not provide treatment for or otherwise remove PFAS chemicals. Please inform us if this is not the case. If it is, we urge NHDES to form and implement strategies to reduce the PFAS flowing via leachate from the landfill to the WWTF.

I can clarify what was intended by "beneficial treatment at the WWTF" in my last letter. We are aware that groundwater captured by the Front Street Interceptor is impacted by contaminants derived from the waste mass of the Manchester landfill. Those groundwater impacts extend beyond PFAS contamination, and beneficial treatment does occur for some non-PFAS contaminants.

<u>CONCLUSION</u>

As I noted in my last letter, PFAS represents perhaps the greatest contaminant challenge NHDES has faced. After meeting with personnel from the Manchester DPW and walking the landfill itself, NHDES is satisfied that, given current limitations in treatment technology and subject to

any necessary modifications to the northwest interceptor trench, the City is properly managing PFAS contamination of groundwater caused by Manchester's closed landfill.

Sincerely,

Waste Management Division

Digitally signed by Waste Management Division
Date: 2025.12.01 14:14:44 -05'00'

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