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

In the Matter of:	)
City of Nashua Wastewater Treatment Facility	)
NPDES Appeal No. 15-06 NPDES Permit No. NH0100170	)

EPA REGION 1'S RESPONSE TO THE PETITION FOR REVIEW

Respectfully submitted,

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I. INTRODUCTION

This case arises from a final National Pollutant Discharge Elimination System ("NPDES") permit issued by EPA Region 1 to the City of Nashua, New Hampshire. Nashua owns and operates a publicly owned treatment works ("POTW") and two other wastewater treatment facilities whose discharges are subject to NPDES permitting. The permit authorizes discharges of wastewater effluent from the City's POTW wastewater treatment facility ("POTW Treatment Plant") to the Merrimack River, as well as from nine Combined Sewer Overflows ("CSOs") to the Merrimack and Nashua Rivers.

In its Petition ("Pet."), the City objects to various water quality-based effluent limitations ("WQBELs") established for the discharge from the POTW Treatment Plant, including the underlying calculation of critical receiving water flow used to derive those limits. *Pet.* at Sections IV.B-E. Conflicting interpretations of law, including applicable narrative and numeric water quality standards, and disputes over record materials, including EPA technical guidance and raw water quality data, have led to differences of opinion between the Region's experts and the City over the Permit's effluent limits for phosphorus, as well as metals. The Region's determinations, made in an area of unavoidable technical and scientific uncertainty, were adequately explained in the administrative record. Review of these issues should be denied. In almost all cases, the City has simply failed to properly preserve the issue for review. *Id.* at Sections IV.B.1-2, C.1-2, D, F. In all cases, it has failed to carry the particularly heavy burden required to demonstrate grounds for review on these inherently technical issues.

Nashua also challenges what it identifies as "internal" monitoring conditions established for the POTW Treatment Plant's effluent discharges, and for effluent discharges from two other

facilities providing treatment for the City's CSO discharges authorized by the Final Permit ("CSO Treatment Facilities"). *Pet.* at Sections IV.F, G, H. Under Nashua's reading of the Clean Water Act, the Region may only impose limits or conditions at the ultimate outfall point, and is barred as a matter of law from establishing any sampling requirements—indeed, in its view, any requirement at all—pertaining to "internal treatment processes." *Pet*. at 20. Nashua, unsurprisingly, makes no attempt to square this sweeping legal theory with decades of precedent from this Board, or with appellate case law that the City itself relies upon, which unambiguously recognize the broad authority conferred by Congress under the Act upon EPA to monitor discharges from POTWs and other dischargers to waters of the U.S. That authority applies irrespective of whether effluent is discharged from Nashua's POTW Treatment Plant or from Nashua's CSO Treatment Facilities. The CSO Treatment Facilities consist of a Wet Weather Flow Treatment Facility ("WWFTF") and a Screening and Disinfection Facility ("SDF"), which discharge to waters of the U.S either through designated outfalls in the case of the SDF or in the case of the WWFTF, through an outfall at the POTW Treatment Plant. Before being discharged from that outfall to the Merrimack River, the WWFTF flows combine with the POTW Treatment Plant's wastewater effluent flows into a chlorine contact tank, the penultimate stage of treatment prior to final discharge through the POTW Treatment Plant's outfall. The City's Permit contains reasonable monitoring conditions imposed under Sections 308 and 402 of the Act on each of these three regulated point sources. The conditions—explained and supported by the administrative record—were designed to assess compliance with permit limitations and to effectively characterize CSO impacts and assure compliance with CSO control requirements. They do no more than implement Sections 301 and 402(q) of the Act, as Congress intended, and as such, review of these monitoring conditions should be denied. But not for this reason alone.

The City's more fundamental error is to conflate—and confuse—the three distinctly different facilities authorized to discharge under the Permit, and the different regulatory regimes governing them. Nashua is authorized to discharge treated wastewater effluent to the Merrimack River through Outfall 001 from its POTW Treatment Plant that must meet, *inter alia*, technology-based requirements based on "secondary treatment," *see* 33 U.S.C. § 1311(b)(1)(B), as well as any more stringent water quality-based requirements under 33 U.S.C. § 1311(b)(1)(C). CSO discharges, by contrast, are diverted *prior* to reaching the headworks of a POTW Treatment Plant. *See* National Combined Sewer Overflow Control Strategy, 54 Fed. Reg. 37,371 (Sept. 8, 1989). *Ex.* A. Under Section 402(q) of the CWA, these discharges must conform to EPA's "Combined Sewer Overflow (CSO) Control Policy," 59 Fed. Reg. 18,688 (April 19, 1994) ("CSO Policy"). *Ex.* B.

In Nashua's case, there is no dispute that flows from the City's combined sewer system are diverted to the CSO Treatment Facilities before reaching the headworks of the POTW. That a portion of these CSOs may subsequently flow through part of the City's POTW Treatment Plant prior to discharging through an outfall shared by that intervening point source—*i.e.*, Outfall 001— does *not* somehow transform these CSOs into POTW Treatment Plant wastewater effluent flows; does *not* convert these CSO Treatment Facilities to a POTW Treatment Plant (and consequently subject these flows to secondary treatment requirements); and, accordingly, *cannot* support the extreme claim that CSOs discharged from its CSO Facilities through the POTW Treatment Plant are shielded from any NPDES regulation on the grounds that they are mere "internal treatment processes." The mere fact that these flows are channeled from one point source to another point source where they receive additional treatment does not change the character of the discharges or the regulatory requirements applicable to them. They remain CSO discharges subject to NPDES permit requirements under section 402(q), including both

technology-based CSO requirements and water quality-based requirements of the CWA. The Final Permit under review here imposes the appropriate requirements, including imposition of reasonable monitoring requirements. In any event, irrespective of whether Nashua's POTW Treatment Plant or one of its CSO Treatment Facilities is considered the discharger, the same CSO requirements apply and EPA properly imposed monitoring requirements to ensure compliance with those requirements.

Further, because these flows are not diverted from the POTW Treatment Plant after entering its headworks, the WWFTF overflows that are at issue in this appeal cannot be deemed bypasses under EPA regulations at 40 C.F.R. § 122.41(m). Consequently, Nashua's efforts to shoehorn this case into the circumstances addressed in *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) are irrelevant here.

For the reasons set forth below, the Board should deny review of this Petition.

II. STATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. The Clean Water Act

a. NPDES Program

The CWA prohibits any person from discharging any pollutant into waters of the United States from any point source, except as authorized by the Act, which may include issuance of an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(a). Under CWA section 402, EPA may issue NPDES permits for the discharge of pollutants from "point source[s]" if the permit conditions

assure that the discharge complies with certain requirements, including those of sections 301 of the CWA, 33 U.S.C. § 1311.[1]

b. NPDES Effluent Limitations

Section 301 of the CWA provides for two types of effluent limitations to be included in NPDES permits: "technology-based" limitations and "water quality-based" limitations. *See* 33 U.S.C. §§ 1311, 1313. As a class, POTWs must meet technology-based requirements based on "secondary treatment." *See* 33 U.S.C. § 1311(b)(1)(B). Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), of the Act requires that NPDES permits include effluent limits more stringent than technology-based limits whenever necessary to meet, *inter alia*, water quality standards.

c. Establishing Reasonable Potential

EPA's regulations set out the process for the Region to determine whether permit limits are "necessary" to achieve WQS and for the formulation of these requirements. 40 C.F.R. § 122.44(d). Permit writers are first required to determine whether pollutants "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion" of the narrative or numeric criteria set forth in the WQS. *Id.* § 122.44(d)(1)(i). If a discharge is found to cause, have the reasonable potential to cause, or contribute to an excursion of a state water quality criterion, then a permit *must* contain effluent limits as stringent as necessary to achieve the WQS. *Id.* § 122.44(d)(1), (5).

[1] The State of New Hampshire has not obtained NPDES program authorization, and therefore EPA's Region 1 office issues NPDES permits to point source dischargers in New Hampshire.

d. Translating Narrative Water Quality Criteria

EPA in issuing an NPDES permit must translate existing narrative criteria into in-stream numeric concentrations when developing WQBELs. *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 351 (D.C. Cir. 1993) (citations omitted). The process of translating a narrative criterion is specifically governed by 40 C.F.R. § 122.44(d)(1)(vi), which implements Sections 301 and 402 of the Act. That section mandates that the permitting authority must establish effluent limits based on, *inter alia*, a "calculated numeric criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and fully protect the designated use." 40 C.F.R. § 122.44(d)(1)(vi)(A).

e. Combined Sewer Overflows

EPA's CSO Policy "establish[ed] a consistent national approach for controlling discharges from CSOs to the Nation's waters through the [NPDES] program." 59 Fed. Reg. at 18,689. According to the Policy, a combined sewer system ("CSS") is a wastewater collection system owned by a state or municipality that conveys sanitary wastewaters and stormwater through a single-pipe system to the Treatment Plant of a POTW. *Id.* at 18,689. The Policy defines CSO "as the discharge from a CSS at a point prior to the POTW [t]reatment [p]lant." *Id*. CSOs consist of mixtures of domestic sewage, industrial wastewater and stormwater, often containing high levels of pollutants, including suspended solids and oxygen-demanding organic compounds. *Id.* CSOs constitute point sources subject to NPDES permit requirements and are subject to both technology-based and water quality-based effluent limitations in NPDES permits. *Id.* They are not subject to secondary treatment requirements applicable to POTWs. *Id.*

The CSO Policy has three primary goals: (1) to bring wet weather discharge points into compliance with technology-based and water quality-based requirements of the CWA; (2) to

minimize water quality, aquatic biota, and human health impacts from CSOs; and (3) to ensure that if CSOs occur, they occur only as a result of wet weather. *Id.* at 18,689. To achieve these goals, the CSO Policy recommends water quality and technology-based effluent limitations developed using best professional judgment and recommends that each CSS develop and implement a long-term CSO control plan. *See id.* CSO permits must also include a requirement to comply with the state's applicable WQS, no later than the date allowed under those standards, expressed in the form of a narrative limitation. *Id.* at 18,696. The CSO Policy establishes the minimum technology-based requirements as the implementation of nine minimum controls, *see id.* at 18690-18691, which include, *inter alia*, monitoring to effectively characterize CSO impacts and the efficacy of CSO controls.

Congress incorporated the CSO Policy into CWA § 402(q). 33 U.S.C. § 1342(q). Specifically, the CWA provides that "[e]ach permit, order, or decree issued pursuant to this chapter after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy …." 33 U.S.C. § 1342(q)(1).

B. Factual and Procedural Background

1. The Facilities[2]

a. Dry Weather Conditions

(1) POTW Treatment Plant

Nashua owns and operates a wastewater collection system comprised of 75 percent sanitary sewers, which carry domestic, industrial, and commercial wastewater; and 25 percent combined sewers, which carry domestic, industrial, and commercial wastewater plus

[2] The factual information in Section II.B.1 and 2 is drawn from *Ex.* C (FS) at 4-7, 26,-28, Figure 2 (Nashua WWTF Process Flow Diagram) and Figure 3 (Wet Weather Flow Schematic) and *Ex.* D (Response to Comments) at 1, 27-31.

stormwater runoff. Under dry weather flow conditions, wastewater is conveyed through three interceptor sewers to the POTW Treatment Plant, which collects and treats wastewater generated by users in Nashua and the Town of Hudson, New Hampshire.

The POTW Treatment Plant uses an activated sludge process to provide secondary treatment to wastewater flows up to its 16 million gallons per day (MGD) annual average design flow capacity and up to its peak flow capacity of 38 MGD. From an outfall designated 001, the POTW Treatment Plant discharges wastewater effluent to the Merrimack River.

b. Wet Weather Conditions

(1) CSO Treatment Facilities

Nashua discharges combined sanitary wastewater and stormwater to the Merrimack and Nashua Rivers when the hydraulic capacity of Nashua's POTW Treatment Plant and/or collection system becomes overloaded during storm events. *Ex.* E (Final Permit) at 1, 7-18. In 2005, the City entered into a Consent Decree with EPA and NHDES to address sanitary sewer overflows (SSOs) and CSOs. *Ex.* F (Consent Decree).[3] In accordance with the CSO Policy, the Decree was intended to bring all wet weather discharges from CSOs into compliance with the requirements of the Act, including applicable state WQS. The main elements of the Decree include milestones for achieving levels of CSO control that are expected to result in no discharges of untreated CSOs during a typical year[4] and the development and implementation of a High Flow Management Plan ("HFMP"), for optimizing the treatment of wet-weather flows. In accordance with the Decree, the City undertook various projects to reduce untreated CSOs,

[3] The CD was amended in 2009, adjusting the dates by which to comply with certain milestones.
[4] The specific levels of CSO control for each outfall are described in the Long Term Control Plan (LTCP) submitted by the City in 2003, as amended in 2004. *Ex.* G.

including partial separation of the combined system and construction of the WWFTF and SDF, which were designed to treat some CSO discharges and thereby reduce the frequency and amount of untreated CSOs that would otherwise occur from outfalls operated by the City. Under the Decree, the conditions governing the WWFTF's operation are prescribed in the City's HFMP, dated 2010. *Ex*. H. Pursuant to the Decree, and consistent with the CSO Policy, the diversion of some CSS flows away from the POTW Treatment Plant during wet weather events is considered an interim measure to control discharges of untreated wastewater through CSOs.

The Permit authorizes CSOs for combined flows that exceed the collection system's capacity. The Permit, pursuant to CWA § 402(q) and the CSO Policy, recognizes that CSS flows may be diverted away from the headworks of the Treatment Plant to the CSO Treatment Facilities under the conditions set forth in the HFMP. Other flows in the collection system must be managed in accordance with the Permit's operation and management conditions. While flows introduced to the headworks of the POTW Treatment Plant must receive treatment in accordance with regulatory requirements for flows conveyed to a POTW Treatment Plant, the flows at issue in the Petition, *i.e.*, those diverted to and discharged from the WWFTF or SDF, are regulated as CSOs.

Under the Permit and City's HFMP, flows approaching the POTW Treatment Plant encounter a flow diversion structure prior to the Treatment Plant's headworks. *Ex.* H (HFMP) at 1-7; *Ex.* I (Fact Sheet Figure 3, Wet Weather Flow Schematic, Annotated). That diversion structure allows flows up to 50 MGD to travel to the headworks and diverts greater than 50 MGD to the WWFTF, which can treat up to 60 MGD. CSO discharges from the WWFTF are subsequently combined with primary and secondary effluent in the Treatment Plant's chlorine contact chamber for disinfection prior to being discharged to the Merrimack River through

Outfall 001. Flow in excess of the combined 110 MGD capacity of the POTW Treatment Plant and the WWFTF either overflow from the collection system as CSOs or SSOs or are stored for treatment at the POTW Treatment Plant or the WWFTF when capacity is available.

The City also operates the SDF, a second CSO treatment facility that provides screening and disinfection to combined flows for certain CSO outfalls. The SDF serves as both a CSO treatment facility (*i.e.*, providing screening and disinfection to combined flows, which are then discharged to the Merrimack River through a dedicated outfall) and as a combined flow storage facility. During certain wet weather events, when appropriate to do so, flows can be stored in the SDF and, therefore, there would be flow into the facility, but no discharge to the Merrimack River. These flows are then bled back to the collection system during or after wet weather events if the flows/wet weather events subside enough to accommodate additional flows through the POTW Treatment Plant or the WWFTF.

The Permit includes a monitoring scheme to assess compliance consistent with the particular regulatory schemes that apply to the Treatment Plant effluent (*i.e.*, WQS and secondary treatment) and to CSOs discharged from the WWFTF or SDF (*i.e.*, WQS, technology-based limits, and CSO Policy). The Region has had longstanding concerns over the operation of both the POTW Treatment Plant and CSO Treatment Facilities. The 2000 permit included requirements for monitoring and reporting of information relative to CSO discharges. *Ex.* K (Prior Permit) at 10. However, with the exception of the annual bacteria monitoring, the City failed to submit the required data to either EPA or NHDES. In light of this fact, as well as changes to the City's wastewater collection system (*i.e.*, the implementation of several CSO controls/mitigation measures) and construction of the WWFTF, the Region made a determination that the information provided in the permit

application was not representative of current conditions, and accordingly submitted a letter to Nashua requesting information relative to the collection system, CSO discharges and the WWFTF. *Ex.* N ("2012 letter").

In response to the 2012 letter, the City submitted influent and effluent flow, BOD_5 and TSS data for the WWFTF to EPA and NHDES. The Region's review of the data submitted indicated that flows were being diverted to the WWFTF when they were much lower than the threshold flows in the High Flow Management Plan. *Ex.* M (Memo re "Nashua WWTF – Comments on Information/Data Sent in Response to April 24, 2012 Information Request"). (As noted *supra*, the parameters for the operation of the POTW and the WWFTF are set forth in the City's 2010 HFMP.) There were also gaps in the data which in the Region's view made it difficult to draw conclusions regarding CSO discharges, and the operation of the POTW Treatment Plant and WWFTF during wet weather events, including whether the WWFTF was being operated consistent with the technology-based Nine Minimum Controls. Therefore, in order to gain a better understanding of how the POTW and WWFTF are being operated during wet weather events, the Permit included several monitoring requirements that apply to the POTW Treatment Plant effluent, and to the effluent discharged from the WWFTF, prior to their commingling. Only by monitoring the flows before they are joined in the disinfection unit can the Region assess whether the individual flows from each of the facilities are complying with their respective technology-based limits. And by monitoring the flows after they are joined in the disinfection unit, the Region is able to assess whether the combined flow complies with the Permit's WQBELs.

2. The Receiving Waters and Applicable Water Quality Standards

Under NH Standards, the Merrimack and Nashua Rivers are Class B waters and, as such, are designated as habitat for fish, other aquatic life and wildlife and for primary (*e.g.*, swimming) and secondary contact (*e.g.*, fishing and boating) recreation. RSA 485-A:8, II. [5]

Class B waters are subject to narrative and/or numeric water quality criteria set forth in Env-Wq 1703.03 through 1703.32. A number of these criteria are relevant in circumstances where phosphorus is discharged, because of the potential effects of excessive phosphorus (discussed generally *infra* at Section II.B.3). In particular, Env-Wq 1703.14 provides a narrative water quality criterion for nutrients: Env-Wq 1703.14 (b) prohibits in-stream concentrations of phosphorus in waters "that would impair any existing or designated uses," while Env-Wq 1703.14(c) requires existing discharges of phosphorus that "encourage cultural eutrophication" to be "treated to remove…phosphorus to ensure attainment and maintenance of water quality standards." Cultural eutrophication is defined as "human-induced addition of wastes containing nutrients to surface waters which result in excessive plant growth and/or a decrease in dissolved oxygen." *Id.* 1702.15.

Further, Class B waters must meet a dissolved oxygen ("DO") content of at least 75% saturation based on a daily average, and an instantaneous minimum DO concentration of at least 5 mg/l. *Id.* 1703.07(b).

3. Receiving Water Impairments[6]

a. Background

(1) <u>Response Indicators: Chlorophyll *a* and DO</u>

[5] NH Standards are found in N.H. Rev. Stat. Ann. ("RSA") § 485-A and N.H. Code Admin. R. Ann. Env-Wq 1700 et seq. (RSA 485-A and Env-Wq 1700).
[6] The factual information in Section II.B.3 drawn from *Ex.* C (FS) at 11, 19-24 and *Ex.* D (RTC) at 6-10, 34-56.

Phosphorus is the limiting nutrient (*i.e.*, the primary determinant for the growth and reproduction of algal species and communities) for the purposes of cultural eutrophication in freshwater systems, like the Merrimack and Nashua Rivers.

While phosphorus is a causal indicator of eutrophication, chlorophyll *a* and dissolved oxygen are response indicators whose quantities may be correlated with the amount of phytoplankton (suspended plant biomass) present within the system. Elevated concentrations of chlorophyll *a*, excessive algal and macrophyte growth, and levels of dissolved oxygen (both low and supersaturated) are all effects of nutrient enrichment. The relationship between these factors and high instream total phosphorus concentrations is documented in scientific literature, including guidance developed by EPA to address nutrient over enrichment.

Algae are either the direct or indirect cause of most problems related to excessive nutrient enrichment. A photosynthetic pigment called chlorophyll *a* is a sensitive indicator of algal biomass and is the most important biological response variable for nutrient-related problems. Freshwater systems may be characterized as eutrophic at chlorophyll *a* concentrations as low as 6.7 μg/l.

b. Causal Indicators: Phosphorus

EPA has produced several guidance documents that set forth total ambient phosphorus concentrations that are sufficiently stringent to control cultural eutrophication and other adverse nutrient-related impacts. These guidance documents present protective in-stream phosphorus concentrations based on different analytical approaches, one of which is "effects-based."[7] An

[7] Alternatively, the reference-based approach identifies a quantitative set of river characteristics (physical, chemical and biological) that represent conditions in waters in that ecoregion that are minimally impacted by human activities. *Id.* The recommended target for this ecoregion are a total phosphorus concentration of 10 μg/l (0.01 mg/l) and a chlorophyll *a* concentration of 0.63 μg/l.

effects-based approach provides a threshold value above which adverse effects (*i.e.*, water quality impairments) are likely to occur. This approach applies empirical observations of a causal variable (*i.e.*, phosphorus) and a response variable (*i.e.*, chlorophyll *a* as a measure of algal biomass) associated with designated use impairments. The *Gold Book* follows an effects-based approach. The *Gold Book* sets forth maximum threshold concentrations that are designed to prevent or control adverse nutrient-related impacts from occurring. Specifically, the *Gold Book* recommends in-stream phosphorus concentrations of no greater than 0.1 mg/l for any stream not discharging directly to lakes or impoundments. A more recent EPA technical guidance manual, the *Rivers and Streams Nutrient Guidance*, cites to a range of ambient concentrations drawn from the peer-reviewed scientific literature that are sufficiently stringent to control periphyton and plankton (two types of aquatic plant growth commonly associated with eutrophication). This guidance indicates that in-stream phosphorus concentrations between 0.01 mg/l and 0.09 mg/l will be sufficient to control periphyton growth and concentrations between 0.035 mg/l and 0.070 mg/l will be sufficient to control plankton.

c. Trophic Status of the Merrimack River

The Region concluded, based on facts in the administrative record, that the Merrimack River had reached its assimilative capacity for phosphorus and is exhibiting the effects of eutrophication, as evidenced by one of the clearest indicators of cultural eutrophication, chlorophyll *a*, in addition to adverse alterations to the receiving water's DO regime, including episodes of low and supersaturated DO.

(1) <u>Response Indicators in the Receiving Waters</u>

(a) <u>Water Column Algae</u>

Based on its review of available water quality data, the Region observed that chlorophyll *a* and total phosphorus levels increase appreciably upstream to downstream, particularly in the vicinity of the Nashua WWTF, which in the Region's view suggested the receiving water is being negatively impacted by elevated nutrient levels, particularly in the lower reaches that were sampled. Moreover, the Region expected that eutrophic impacts would be more pronounced under critical low flow conditions, as flows recorded at the nearest USGS gaging station located upstream from the Nashua WWTF on the sampling dates for the data presented were an order of magnitude greater than the 7Q10 flow for that gage.

Consistent with these findings, chlorophyll *a* is identified as causing impairment of the primary contact recreation designated use in the segment of the Merrimack River into which the Nashua WWTF discharges in the *State of New Hampshire Final 2010 Section 303(d) Surface Water Quality List.*

(b) Alterations to the Merrimack River's Dissolved Oxygen Regime

The Region also reviewed available DO data for the Merrimack River. Even after acknowledging and accounting for certain discrepancies between two types of DO analyses—field tests and so-called Winkler tests, both of which are valid sampling methods—the Region still concluded that such data raised a significant level of concern regarding instream DO in the Merrimack River. For instance, almost all of the Winkler tests taken on September 21, 2010 both upstream and downstream of the Nashua WWTF discharge were significantly below the applicable minimum DO criterion (approximately 32 out of 33 Winkler tests that day were under 5 mg/l along the Merrimack River).

Furthermore, the Region noted evidence in the record of DO supersaturation, a water quality condition that can be an indicator of eutrophic conditions. Although there were only a

few measurements below the 75% DO saturation criterion, the Region noted that the data report from the July 2010 sampling event indicated significant DO supersaturation (>100%) as well as increased levels of chlorophyll *a* (>15 μg/l) in the vicinity of the WWTF. Analyzing levels of chlorophyll *a* and DO saturation, respectively, along the Merrimack River on July 27, 2010, the Region observed that both DO saturation and chlorophyll *a* levels increase appreciably as the Merrimack River flows from upstream to downstream, particularly in the vicinity of the WWTF.

(2) Causal Indictors in Receiving Waters

Data regarding DO saturation and chlorophyll *a* levels correlate with instream phosphorus concentrations detected in samples of the receiving water that were collected both upstream and downstream from the WWTF, which indicated to the Region that eutrophic effects are present and the current discharge of phosphorus from the WWTF is contributing to these effects. The results of phosphorus and chlorophyll *a* analyses conducted on samples collected within the segment of the receiving water into which the WWTF discharges (both upstream and downstream from the discharge) between 2005-2011 by NHDES and 2010 by the Army Corps of Engineers, indicated that these results were within the ranges identified in the literature as indicative of mesotrophic-eutrophic conditions. The results also exceeded the ecoregional chlorophyll *a* target of 0.63 μg/l, *supra* at Section II.B.3.b, as well as the threshold chlorophyll *a* value of 15 ug/l used by NHDES in listing surface waters as impaired for the primary contact recreation designated uses.

The data presented also revealed that the instream phosphorus concentrations downstream from the discharge exceeded the recommended target of 0.090 mg/l (the Gold Book Criterion of 0.100 mg/l multiplied by a factor of 0.9 to reserve 10% of the assimilative capacity of the receiving water in accordance with the New Hampshire WQSs found at Env-Wq 1705.02)

on two occasions, and that the ecoregional target of 0.63 µg/l (0.00063 mg/l) was exceeded on all occasions.

d. Reasonable Potential Determination and Permit Limit Derivation

(1) Reasonable Potential

Based on the foregoing, EPA concluded there was sufficient evidence of algal growth, as indicated by chlorophyll *a*, and DO alterations (low and supersaturated) in the Merrimack River in the vicinity of the discharge to conclude that New Hampshire's narrative criteria regarding cultural eutrophication are not being met in the receiving waters.

In consideration of the numeric instream phosphorus target determined by the Region to be protective of uses; evidence of ongoing impairments in the receiving water as evidenced by elevated instream concentrations of chlorophyll *a* and total phosphorus; the available effluent and receiving water data; and the projected receiving water concentrations, EPA determined that the discharge of phosphorus from the WWTF has the reasonable potential to cause, or contribute to exceedances of NH WQS and that, accordingly, a phosphorus effluent was "necessary" pursuant to 40 C.F.R. § 122.44(d)(i).

(2) Permit Limit Derivation

To effectively address the documented eutrophication in the Merrimack River, the Region concluded that ambient phosphorus concentrations must be brought within the range (*e.g.*, 0.01 mg/l to 0.09 mg/1) determined by EPA to implement the narrative criteria to fully protect uses, *supra* at Section II.B.3.b, through imposition of a phosphorus limit.

Accounting for available dilution under 7Q10 flow conditions, the Region established a monthly average total phosphorus effluent limit of 0.8 mg/l (imposed April through October) to ensure that the target value of 0.09 mg/l will not be exceeded below the discharge.

4. Permit Proceedings

The City's prior permit expired ten years ago, in 2005. The prior permit did not require any phosphorus controls or monitoring, nor did it reflect the provisions of CWA § 402(q) and the CSO Policy. From July 23, 2013 through November 18, 2013, the Region and NHDES solicited public comments on the Draft Permit developed pursuant to a timely application submitted by the City for the reissuance of its permit to discharge to the designated receiving waters. The Region and NHDES received comments from Nashua; the City of Manchester, NH; and the Nashua River Watershed Association. EPA prepared an RTC, and issued the Final Permit on March 6, 2015.

The City timely appealed.

III. ARGUMENT

A. The 7Q10 and Dilution Factor Calculations

As noted earlier, EPA's regulations set out a process—known as a "reasonable potential" analysis—whereby the permitting authority determines whether WQBELs for a particular pollutant are "necessary" to achieve WQS. *See* 40 C.F.R. § 122.44(d)(1). EPA guidance recommends that this "reasonable potential" analysis be based on "worst-case" conditions, *In re Washington Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 584 (EAB 2004), which include, among other things, pollutant concentration and flow of both the effluent and the receiving water. As the measure of the critical flow of the receiving water, NH WQS require the use of the 7Q10 flow, Env-Wq 1705.02(a), (d), which is the "lowest average flow which occurs for 7 consecutive days on an annual basis with a recurrence interval of once in 10 years on average." *Id.* 1702.44. If a reasonable potential analysis incorporating, among other things, the 7Q10 flow

indicates that WQBELs are necessary, the permitting authority establishes WQBELs using a dilution factor, which itself is derived by comparing the design flow of the facility and the 7Q10 flow. Finally, in calculating WQBELs for NPDES Permits in New Hampshire, the available dilution is reduced by 10% pursuant to the state's assimilative capacity reserve rule. *Id.* 1705.01.

1. The Issues Regarding the 7Q10 Calculation Are Unpreserved and, in any Case, Do Not Demonstrate Clear Error or Abuse of Discretion

Nashua first asserts that the Region and NHDES used a method of calculating the 7Q10 flow for the Merrimack River at the permitted facility that is clearly erroneous and an abuse of discretion.[8] *Pet.* at 6-9. More specifically, the City contends that it was error to use both Log-Pearson Type III ("LP3") statistics and the Dingman Ratio Proration Method ("DRPM") and that such an approach is not only "contrary" to EPA guidance, but also a misapplication of the DRPM. *Id.* at 6-7. Nashua further claims that EPA and DES erred by incorporating gaging station data for the Merrimack River at Lowell, MA in the calculation, because, it argues, a dam "located just upstream of" this gage "can bias the calculation," and, in Nashua's view results "in an inappropriate and inaccurate" 7Q10 value. *Id.* at 8. The City then presents an alternate calculation, which utilizes LP3 statistics, the Drainage-Area Ratio Approach ("DARA")—another method for calculating 7Q10 flows that is briefly described in a 2003 U.S. Geological Survey publication ("USGS Report")—and, curiously, data from the very same Lowell gage.[9] *Id.* at 8-9. Review on these issues should be denied.

[8] DES performed the 7Q10 flow calculations used by the Region in the NPDES Permit. *See Ex.* C (FS) at Attach. B, vii.

[9] Nashua readily concedes that its use of the Lowell gage data "introduces some bias" into its own calculation, but avers, without explanation, that, "mathematically, the effect of the bias is limited." *Pet.* at 9 and n.5.

As an initial matter, all of Nashua's complaints are unpreserved and it has failed to explain why these issues were not required to be raised during the public comment period. 40 C.F.R. § 124.19 (a)(4)(ii).

As the Region explained in the Fact Sheet to the Permit, the 7Q10 flow of the Merrimack River at the point of discharge was estimated by first applying LP3 statistics to USGS gage data from several locations upstream and downstream of the discharge to calculate the 7Q10 *at each of the gages*. *Ex.* C (FS) at 14 and Attach. B. Next, the Region explained that the 7Q10 flow *immediately below the discharge* was estimated using the calculated 7Q10 flows of the gaged locations and the DRPM rather than the DARA. *Id.* Thus, the Region made clear in the Fact Sheet that DES used LP3 statistics in the first step and the DRPM – and not the DARA – in the second step. *Id.*

Nashau commented that EPA and DES should not use the DRPM, but rather only LP3 statistics.[10] *Ex.* D (RTC) at 3. The Region responded that LP3 statistics alone are not enough, precisely because the river is ungaged at the point of discharge, and repeated that DES had first used LP3 statistics *and then* applied the DRPM for the derivation of the 7Q10 flow in the Draft Permit. *Id.* at 4; *Ex.* C (FS) at 14 and Attach. B. In its comments, the City never argued for the use of the DARA, even though the issue was reasonably ascertainable, especially given that the Region had called specific attention to the fact that the DARA had *not* been used. *Ex.* D (RTC) at 3; *Ex.* C (FS) at 14. Nor did Nashua mention the USGS Report, question the use of the Lowell gage data, or raise any concern about consistency with EPA guidance. *Id.* Nashua raises these issues in the Petition for the first time and then presents its own new calculations that also rely on

[10] Nashua now seems to have abandoned this argument. *See Pet.* at 6-9. Further, the City never explains—or even recognizes—why the number it proposed during the comment period—791 cfs—differs from the one for which it now advocates using the DARA. *Compare Ex.* D (RTC) at 3 *with Pet.* at 9.

data from different periods of record than the Region used. *Compare Pet.* at 9, Attach. 7 *with Ex.* C (FS) at Attach. B. These are all new arguments, and, consequently, should be rejected as unpreserved. *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 229-31 (EAB 2000) (denying review of an issue based on a petitioner's claim that the permit issuer failed to comply with a guidance document not identified in comments).[11]

Even if these issues had been timely raised, the City has failed to demonstrate that the method employed by the agencies constitutes grounds for review. In particular, Petitioner has failed to explain exactly how the method used by DES is "contrary to" EPA guidance. Petitioner's sole support for this assertion appears to be a single citation to the EPA Guidance Manual, *Pet.* at 6, a document that contains no discussion of the DRPM or the DARA, the relative merits of each, or indeed any reference of how to calculate the 7Q10 of a river at an *ungaged* location. As to the claim that the agencies used an "unconventional" approach or otherwise misapplied the DRPM, *see Pet.* at 7-8, in this case Nashua provides *no* support, merely asserting without citation or explanation that this is so. To the contrary, the method employed by DES to estimate the 7Q10 flow at the facility was developed *in consultation with Professor Dingman*. NH DES, *Interim Final Policy on 7Q10 and Withdrawals for Fresh Water Surface Waters* (2002), at 1 ("The policy is based on the use of Dr. S. Lawrence Dingman's equation for calculating 7Q10 *and his responses to my letter to him*….") (emphasis added). Similarly unsubstantiated, and thus insufficient, is Petitioner's argument regarding the Lowell gage—an

[11] Insofar as Petitioner is asserting that the Region should have used a different period of record, the issue is likewise unpreserved, because no comments were submitted to this effect and Petitioner has failed to demonstrate otherwise.

argument that, interestingly, is apparently contradicted by the very USGS Report Petitioner now embraces.[12]

Furthermore, the USGS Report, which was never raised by any commenter and not considered or relied upon by the Region, does not clearly contravene the use of the DRPM. To the extent Petitioner claims that the USGS Report suggests that the DARA is the "best approach" for estimating 7Q10, *see Pet.* at 8, Petitioner has mischaracterized it. The report, which discusses three methods for estimating low-flows (none of which are the DRPM), states only that the DARA "is most appropriate for use when the ungaged site is on the same stream as a stream-gaging station," USGS Report at 7, as opposed to a stream with no gaging station, which is when the other two methods discussed in the report could be used.

Although there may be more than one scientifically valid method for estimating the 7Q10 flow at ungaged locations, *see, e.g.*, *In re Westborough*, 10 E.A.D. 297, 310 (EAB 2002), Nashua has failed to demonstrate that the method employed by DES and the Region in this permit proceeding is clearly erroneous or an abuse of discretion, particularly where the Region stated that the DRPM was used in lieu of the DARA and no public comments were submitted advocating for the DARA or indeed raising any of the other issues Nashua now advances.

2. Petitioner's Arguments Regarding the Dilution Factors Are Unpreserved and Incorrect.

Next, Nashua asserts that EPA used two different methods in Attachments B and I to the Fact Sheet to calculate the dilution factors for the WWTF and the SDF, respectively. *Pet.* at 9-10. Petitioner contends that the formula used for the SDF "should be [the one] used for Permit

[12] The report suggests that data from gages near impoundments might lead to a *higher* 7Q10, rather than, as Petitioner suggests here, a *lower* one. *See* USGS Report at 9 ("[R]eservoir regulation at continuous stream-gaging stations typically *increases low flows and reduces high flows*.") (emphasis added).

calculations," because it "more clearly follows the NPDES Permit Writers' Manual." *Pet.* at 10. The City then presents alternate dilution factors, which are derived, in part, using Nashua's revised 7Q10 estimate discussed *supra* and which Petitioner asserts should have been used in calculations for several pollutants, including phosphorus, copper, lead, and total residual chlorine ("TRC").[13] *Id.* In the next two paragraphs below, the Region explains why Nashua's arguments regarding the dilution factor should be rejected. Petitioner's arguments regarding phosphorus, copper, lead, and TRC are discussed in later sections of this Response.

First, the issue of any purported difference between the methods used to derive the two dilution factors is unpreserved, because no comments raising this issue were submitted. 40 C.F.R. § 124.19 (a)(4)(ii). Although Nashua asserts, without explanation, that this issue was raised in Comments B.1, B.4, B.5, B.23, and C.2, *Pet.* at 9, nothing in those comments raises the specific issue that Nashua now articulates. *See Ex.* D (RTC) at 3-4, 6-15, 29, 35-39. Consequently, review on this issue should be denied.

Nashua is also simply mistaken. The dilution factors in Attachments B and I follow the same method. In Attachment I, which the City sees as adhering to the NPDES Permit Writers' Manual, the Region calculated the dilution factor by: 1) adding the 7Q10 flow of the river immediately upstream of the permitted discharge (759.4 cfs) to the design flow of the SDF (141 cfs), 2) dividing the sum by the design flow of the SDF, and 3) multiplying the ensuing quotient by 0.9 to account for the state's assimilative capacity rule. In Attachment B, leaving aside the necessary conversion of units (*i.e.*, cfs and MGD), the agencies essentially performed the same operation. That is, they divided the sum of the 7Q10 flow of the river immediately upstream of

[13] Notably, the "revised" dilution factor Nashua presents for the SDF is based solely on its claim that the Region erred in calculating the 7Q10 and does not turn on any argument presented in Section IV.C of the Petition for Review. *Compare Pet.* at 10 *with Ex.* C (FS) at Attachment I.

the permitted discharge (759.4 cfs) and the design flow of the WWTF (24.7 cfs) and multiplied the resulting quotient by 0.9. *Ex.* C (FS) at Attach. B. Nashua's mistake is overlooking that the 7Q10 value of 784.1 cfs represents the "7Q10 flow of the Merrimack River *just downstream of the Nashua WWTF*." *Id.* at Attach. B, viii (emphasis added). In other words, the methods are the same; it is just that, in calculating the dilution factor for the WWTF, the first step used in the case of the SDF was unnecessary, because the 7Q10 value *immediately downstream of the discharge* had already been calculated. *Id.* In addition, Nashua has not explained how the Region's method of calculating the dilution factors is in any way inconsistent with the NPDES Permit Writers' Manual.

B. Phosphorus

1. The Permit's Phosphorus Limit Was Properly Derived and Supported by the Administrative Record

a. Representative Sampling

Nashua contends that the Region erred by using all available sampling points in the administrative record when calculating the Permit's effluent limitation for phosphorus. *Pet.* at 11-12. In the City's view, the Region should have limited its consideration to the two most recent data points, on the grounds that they would be more representative of current conditions in the receiving waters and, moreover, would fall within the 5-year period utilized by NHDES in its CWA § 303(d) listing decisions, as recommended by New Hampshire's CALM. *Id.* at 11. Additionally, Nashua proposes using four additional—albeit extra-record—data points from spring of 2012 on the theory that they would be still more representative due to their comparatively recent vintage. *Id.* at 12.

In comments on the Draft Permit, the City of Manchester described two alleged deficiencies with the October 5, 2007 sample that Petitioner seeks to exclude from consideration.

First, Manchester claimed that the sample should be removed from the data set under consideration by the Region because it fell outside the season during which the permit limit was in effect. *Ex.* D (RTC) at 36. The Region responded that the premise of the comment was incorrect, and clarified that the permit limit was in effect from April 1 through October 31, as indicated in the Fact Sheet, and that the October 1 date set forth in the Draft Permit was a clerical error. Second, the commenter argued that use of the data was inconsistent with the CALM, and for that reason should not be considered. In response, the Region declined to establish a temporal cut off for considering receiving water data that were before it during the permit development process solely because of non-binding state listing guidance or because of the data's age. *Id.* ("EPA is authorized to consider the best information reasonably available at the time of permit issuance, and is not bound by any definitive limitations regarding the age of data in making its permitting judgments.") The Region also noted that "EPA's inclusion of data collected on 10/5/2007 in its analysis is appropriate since this date falls within the selected data review period and is also within the season in which the proposed phosphorus limit would be in effect." *Id.* at 36.

The City does not confront the Region's substantive explanation of how it determined the parameters for the sampling set, including its rejection of the CALM as failing to provide an appropriate boundary for categorically excluding data for the purposes of permit development as non-representative purely on the basis of age. The City's decision to merely restate Manchester's original objection without confronting the Region's response does not merit review. Further, clear error or reviewable exercise of discretion is not established simply because petitioner presents a difference of opinion or alternative theory regarding a technical matter, which at most is all the City has managed in this instance.

The City has not, moreover, offered any substantiation that the sample it seeks to exclude is in fact unrepresentative or would otherwise skew the sample set—it only asserts that eight years is too long as if that fact were self-evidently true, whereas five years is not—an approach that is insufficient to garner review where technical issues are at stake.[14] *See In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 638 (EAB 2010) ("The District's argument that this data point is an 'outlier,' without more, is not a persuasive explanation as to why the data utilized by the Region is not representative."). The City's lapse is only heightened where the question concerns representativeness of data and choice of sampling sets relied upon by the permit issuer in making its decision, as the Board generally leaves such choices to the discretion of the permitting authority.

The City's other contention—that the Region should utilize more recent data from 2012 in its permit calculations—is unpreserved as well as unpersuasive. In its Petition, the City provides no explanation why these specific data points were not submitted to the Region during the public comment period, which occurred in 2013, or why at the very least they were not provided to the Region for inclusion into the administrative record prior to Final Permit issuance. "Allowing a petitioner to raise for the first time on appeal concerns that could have been brought to the attention of the permitting authority, would leave the [] permit system open-ended, frustrating the objective of repose and introducing intolerable delay." *In re Sumas Energy 2 Generation Facility*, PSD Appeal No. 02-10 & 02-11, slip op. at 10 (EAB, March 25, 2003). The City has ignored this procedural prerequisite, this necessary step designed "to ensure that the

[14] Nashua's reliance on comments made by EPA counsel during oral argument in the Town of Concord matter is misplaced. *In re Town of Concord*, NPDES Appeal No. 13-08, slip op. at 14. That case was remanded in part because "the permit issuer did not make those conclusions in the administrative record, nor explain in any detail the other adjustments to the calculation," which the Region has done here.

permitting authority first has the opportunity to address permit objections, and to give some finality to the permitting process." *In re City of Marlborough,* 12 E.A.D. 235, 244 n.13 (EAB 2005).

Further, the City has provided no argument of how introduction of these data at this late stage of the proceedings is consistent with NPDES permit procedures or general principles of administrative law. EPA is required to base its final permit decision on the administrative record, 40 C.F.R. § 124.18(a), which "shall be complete on the date the final permit is issued," *id.* § 124.18(c). Moreover, the City readily concedes that, even had the Region factored in the late-arriving data, reasonable potential exists and a phosphorus effluent limitation is, therefore, "necessary" under 301(b)(1)(C) and 40 C.F.R. § 122.44(d)(1)(ii). *Pet*. at 12.[15]

Consistent with this Board and judicial precedent, countenancing further delay is untenable under the circumstances here. The City's permit is long expired and contains neither a phosphorus effluent limitation nor phosphorus monitoring condition. Given the receiving water impairments documented by the Region in the administrative record and the need to address nutrient impacts expeditiously through the imposition of necessary controls, there is no reason for the Board to depart from the regulations or precedent and forestall imposition of necessary phosphorus controls pending new data or studies.

b. The City Waived Its Mass Limitation Argument and the Region's Decision to Impose a Concentration-based Limit Was Reasonable and Supported by the Record

[15] Further eroding the impact of these data is that fact, unnoted in the Petition, that the two results of 2 ug/l are for samples that were collected as field and equipment blanks, using deionized water rather than samples of the receiving waters, and should not be used.

Nashua argues that the Region clearly erred by establishing a concentration-based limit for the Nashua Facility, where it had imposed mass-based limitations on three other municipal dischargers to the Merrimack River. *Pet.* at 12. By treating "similarly situated entities differently," the City asserts that the Region violated the Equal Protection Clause of the United States Constitution. *Id.* at 12-13.

Nashua's arguments are, in the first instance, procedurally barred, as they were not presented anywhere below, although both the substantive (*i.e.*, mass versus concentration-based limits) and legal dimensions (*i.e.*, equal protection) of the issue were reasonably ascertainable. Accordingly, they are waived. Nashua was on notice well before the public comment period that another POTW on the Merrimack had received mass-only phosphorus limitations, but unlike that facility and indeed the two others facilities cited in the Petition, the City failed to request a mass-based approach. Board review is hardly justified under these circumstances. *In re ConocoPhillips Co.*, 13 E.A.D. 768, 800-04 (EAB 2007) (rejecting as unpreserved arguments regarding the applicability of *Massachusetts v. EPA* where petitioners had failed to argue in their comments that the case required the regulation of greenhouse gas emissions in the permit at issue).

On the merits, the Supreme Court has explained that, with respect to government actions "which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments," the principles underlying equal protection are "not violated when one person is treated differently from others." *Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 603 (2008). In order to establish a "class of one" claim, as Nashua appears to assert, a party must show that it has intentionally been treated differently than others with whom it is "similarly situated." *E.g., Engquist*, 553 U.S. at 603. The City fails to make such a showing. While Petitioner may believe that the other wastewater facilities on the Merrimack River are so

"similarly situated" as to render differing effluent limitations Constitutionally defective, this is mere uncorroborated and unsubstantiated inference insufficient to establish an equal protection claim, or to disturb the Region's technical judgments. *In re City of Attleboro*, 14 E.A.D. 398, 422 (EAB 2009). In any event, a mere disparity in permit limits between facilities is not "by itself a matter warranting review." *In re City of Port St. Joe*, 7 E.A.D. 275, 305 n.44 (EAB 1997) .

In addition, a party must show that there is no rational basis for the government's differential treatment. *E.g.*, *Engquist*, 553 U.S. at 603. In fact, EPA guidance recognizes concentration- and mass-based limitation as equally legitimate modes of expressing effluent limitations, and Nashua has nowhere explained why the selection of one valid, protective approach over another somehow raises a Constitutional question.[16]

For all these reasons, review of this issue should be denied.

c. EPA Reasonably Accounted for Phosphorus Load Reductions from Upstream Communities in its Reasonable Potential Determination

Nashua next alleges that the Region failed "to consider the actual impacts" of contemplated load reductions in the receiving waters from upstream wastewater treatment facilities, as well as a pending draft MS4 permit, and to account for them in its reasonable

[16] A mass only limit can prove advantageous to dischargers because when POTW flows are low, the concentration of phosphorus in the effluent can be higher. However, if the POTW were to discharge at the design flow of 16 MGD or greater, the effluent TP concentration in order to achieve the mass only limit is actually slightly more stringent than a concentration limit based upon the design flow. Here, effluent data summarized in the Fact Sheet shows wide variability in the flows during the months when the effluent limit would be in effect (April – October), at times exceeding the design flow. *Ex.* L.

potential calculations. *Pet.* at 13. In light of these alleged lapses, the City requests a compliance schedule in order to collect additional phosphorus data to reassess the Final Permit limit. *Id.*

In fact, the Region considered existing controls on point sources and potential changes in upstream conditions when assessing reasonable potential consistent with 40 C.F.R. § 122.44(d)(1)(ii). However, the Region disagreed with the commenter's assertion that these controls as yet represented actual, determinate reductions, and noted that the commenter had in any event overstated the magnitude of the impact of any future reductions on the reasonable potential analysis. *Ex.* D (RTC) at 40-43. The Region thus concluded that factoring in future, speculative and unrealized reductions into the Permit's reasonable potential calculations would be premature and thus not justified. The City has failed to meet threshold procedural requirements for seeking Board review by not substantively confronting the Region's response. Nashua's failure to grapple with the Region's response is particularly consequential where technical determinations are at issue. Although Nashua again generically alleges that upstream improvements "have, *or are in the process of*, significantly reducing the phosphorus effluent levels, which has or will continue to have a beneficial impact on the overall phosphorus levels upstream of the NWTF[,]" *Pet.* at 14 (emphasis added), this uncorroborated and ambiguous assertion is insufficient to disturb the Region's technical determination.

d. EPA's Reliance on the Gold Book Recommendations to Implement New Hampshire's Narrative Nutrient Criteria Was Authorized Under Applicable Regulations and Was Adequately Supported by the Record

Nashua asserts that the Region clearly erred by applying the Gold Book value of 0.1 mg/l as a water quality criterion to control the effects of cultural eutrophication in the Merrimack River, and contends that the Region was obligated to undertake unspecified site-specific studies

and to collect additional data prior to translating the narrative criteria into a numeric effluent limitation. *Pet.* at 15.

The City has done no more than rehash objections to the Draft Permit, without substantively confronting the Region's response, *compare Ex.* D (RTC) at 74-75 *with Pet.* at 15, warranting denial of review.

On the merits, the City travels a well-worn path, terminating with denial of review. The Region's reliance on the *Gold Book* as one source of relevant information to establish an ambient water quality target that will fully protect designated uses under 40 C.F.R. § 122.44(d) has been addressed and affirmed by this Board on *three* separate occasions, and has been upheld by the First Circuit Court of Appeals. *In re Upper Blackstone Water Pollution Abatement Dist.*, NPDES Appeal Nos. 10-09 through 10-12, slip op. at 7 (EAB Mar. 31, 2011), *aff'd*, 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 133 S. Ct. 2382 (May 13, 2013); *In re City of Attleboro*, 14 E.A.D. 398 (EAB 2009); *see generally, In re Town of Newmarket*, NPDES Appeal No. 12-05 (EAB Dec. 2, 2013) (Order Denying Review). Although those cases involved questions (resolved in EPA's favor) over precisely the methodology used in this proceeding—*i.e.*, use of EPA guidance, along with site-specific information such as phosphorus effluent data, as well as ambient chlorophyll *a* and dissolved oxygen data, to establish reasonable potential and derive a protective phosphorus WQBEL—the Petition whistles past them as if they did not exist.

As in those instances, the Region set the phosphorus limit in accordance with its longstanding regulations and with full consideration of actual water quality conditions in the Merrimack River. According to the City, Region 1's selection of the Permit's 0.8 mg/l phosphorus limit was arbitrary because EPA simply picked a national number and did not demonstrate how it relates to addressing impairment of the designated uses of receiving waters in this case. *Pet.* at 14-16. The City is incorrect. Region 1 did not reflexively apply the instream

target of 0.1 mg/l from EPA's national guidance documents with no consideration of site-specific circumstances. Rather, the Region evaluated a range of EPA criteria recommendations and carefully considered what instream criterion would be appropriate given the objective of fully protecting designated uses in the receiving waters. *Ex.* C (FS) at 19-20; *Ex.* D (RTC) at 6-10, 46-50, 75-76. The Region in fact showed the link between the chosen phosphorus limit and impairment of the Merrimack River, describing the effects of cultural eutrophication on the river in great detail, including elevated chlorophyll *a* and DO impacts, and discussing in specific terms how a 0.8 mg/l limit would address that impairment. *Id.* The Region even explicitly considered factors that might make the values from the national guidance inapplicable, but found no reason to treat the Merrimack River differently from other, similar water bodies. *Ex.* D (RTC) at 75-76. Nor does the City identify any such factors in its Petition. Review of this issue should be denied.

C. The Copper, Lead, and TRC Effluent Limitations were Properly Derived.

1. Copper and Lead

Nashua next contends that the Region erred or abused its discretion in calculating effluent limitations for copper and lead in the Final Permit. *Pet.* at 16-18. In addition to repeating its earlier claim that the Region used an erroneously derived 7Q10 flow value in the effluent limit calculations—an issue the Region reiterates should be denied, Section III.A.1, *supra*— Nashua asserts that the Region's calculations should include additional data submitted with the Petition that, in Petitioner's view, demonstrate that there is no reasonable potential for the discharge of lead to violate numeric criteria and that the average monthly limit for copper in the permit should be revised. *Pet.* at 16-18. With respect to copper, Nashua further contends that a site-specific Water-Effect Ratio study may demonstrate that a higher limit, or no limit at all, is appropriate. *Id.* at 16-17. Nashua requests that an appropriate compliance schedule be developed to allow it

to undertake such a study and that the copper limit in the Final Permit be held in abeyance until such a study is completed. *Id*. Review of these issues should be denied.

First, it is not evident from the text of the Petition, but Nashua appears to agree with the Region on the concentration of copper in both the WWTF's discharge (32.42 µg/l) and the Merrimack River upstream of that discharge (2 µg/l) as those values are used in the mass-balance equations to assess reasonable potential and calculate appropriate effluent limitations. *Compare Pet*. at 18 (Table 1) *with Ex.* C (FS) at 18 (Table 2). The only point of disagreement in the mass-balance equations for copper, therefore, appears to be the 7Q10 flow of the river, *id.*, making any new copper data irrelevant to Petitioner's claim that the copper limit should be revised. But with respect to Nashua's arguments regarding the 7Q10, the Region reiterates that the City has failed not only to preserve the issue, but also to demonstrate clear error or abuse of discretion, Section III.A.1, *supra*. Accordingly, Nashua has failed to demonstrate that the copper limit in the permit is clearly erroneous or an abuse of discretion.

With respect to lead, however, Nashua apparently disagrees with the Region not only on the appropriate 7Q10 method—an issue the Region reiterates should be denied—but also on the ambient concentration of lead upstream of the discharge. *Compare Pet.* at 18 *with Ex.* C (FS) at 18. For support for a lower ambient concentration, Nashua points to new data, including data that were available during the public comment period, but impermissibly fails to explain why it has waited until this late stage to demand that the Region consider it. Review should be denied on this basis. *Pet.* at 16-18.

Likewise, Nashua's contentions regarding a Water-Effect Ratio ("WER") for copper fail to demonstrate clear error or abuse of discretion. First, Petitioner's request for time to complete a WER study was never raised during the public comment period and is, therefore, unpreserved. 40 C.F.R. § 124.19(a)(4)(ii). Regardless, the Region was required to apply the currently existing

aquatic life criteria for copper, *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 614-16 (EAB 2006),which, pursuant to NH WQS, are 3.64 ug/l (acute freshwater criterion) and 2.74 ug/l (chronic freshwater criterion), Env-Wq 1703.21-.23. Although New Hampshire's WQS do allow a permit applicant to propose site-specific criteria, the applicant must demonstrate to DES that such criteria will protect the existing and designated uses of the receiving water. Env-Wq 1704.01, .03. (The acceptable methods an applicant may use are referenced in Env-Wq 1703.22(d) and 1704.02(b) and include EPA guidance on WERs). If DES agrees with an applicant's proposal, then DES amends its WQS to incorporate the particular site-specific criteria, *id.* 1704.03, which are then subject to EPA review and approval, 40 C.F.R. § 131.20; *see generally* AR I.14 (Water Quality Standards Handbook) at Section 3.7. But none of this has happened, and "[t]he Region had no obligation to wait." *In re Town of Concord*, NPDES Appeal No. 13-08, slip op. at 16 (EAB Aug. 28, 2014); *cf. City of Attleboro*, 14 E.A.D. at 458-60.

2. Total Residual Chlorine

Petitioner next contends that the Region's calculated effluent limits for Total Residual Chlorine ("TRC") for Outfall 001 and for the SDF are clearly erroneous. *Pet.* at 19. But Petitioner offers no new argument, instead merely repeating its earlier claims that the Region used erroneous methods to derive the 7Q10 flow and the dilution factors and asserting that, consequently, the TRC limits are clearly erroneous. *Id.*. For all the reasons discussed earlier, review of this issue should be denied. Sections III.A.1, .2, *supra.*

D. The CWA Authorizes the Permit's Monitoring and Reporting Requirements and the Administrative Record Supports Their Inclusion in the Permit

The City challenges several monitoring conditions of the Final Permit, arguing the Act does not authorize EPA to impose either monitoring requirements or effluent limitations on

internal treatment processes of a point source subject to an NPDES permit. *Pet.* at 20. For this proposition, the City leans heavily on the Eighth Circuit decision in *Iowa League of Cities*, 711 F.3d 844, 877 (8th Cir. 2013), and that case's citation to *Am. Iron and Steel* v. EPA, 115 F.3d 979, 996 (D.C. Cir. 1997). *Id.* Not only are these cases irrelevant to the monitoring and reporting requirements at issue, as described below, but the City's legal theory directly conflicts with a long line of Board precedent on the breadth of authority conferred on the Region by the Act to impose reasonable reporting and monitoring requirements on owners and operators of "point sources," without reference to whether that person even has a permit. That authority, found in Section 308 of the Act, is supplemented in this case by Section 402, as the discharges from the City, which include discharges from POTW Treatment Plant and CSO Treatment Facilities, as well as its CSO outfalls, are governed by the NPDES program. Under Section 402(a)(2), an NPDES permit may include "conditions on data and information collection, reporting, and such other requirements as [the Administrator] deems appropriate." Given the command of CWA § 402(q) that "[e]ach permit, order, or decree issued pursuant to this chapter after December 21, 2000 for a discharge from a municipal combined storm and sanitary sewer shall conform to the Combined Sewer Overflow Control Policy ….", the sampling provisions at issue here are appropriate, designed as they are to assess consistency with the CSO Policy, including implementation of the Nine Minimum Controls, and more stringent limitations developed in accordance with the Act.

"It is well established that permit writers enjoy broad authority under the CWA and regulations to prescribe municipal data collection and reporting requirements." *Town of Concord*, slip op. at 39. Contrary to Petitioner's view that the Region is prohibited from imposing monitoring and reporting conditions on "internal treatment processes" of the POTW Treatment Plant (a factual characterization with which the Region disagrees, because the CSO

Treatment Facilities are distinct from the POTW Treatment Plant, as discussed *infra*), CWA §§ 308(a)(A), 402(a)(2) and implementing regulations provide broad legal authority to require owners and operators of point sources to establish monitoring methods and to prescribe permit conditions for data collection and reporting, and are not expressly or impliedly delimited to the end of the pipe. CWA § 308(a)(A), 33 U.S.C. § 1318(a)(A) (specifying that permittees must provide records, reports, and other information EPA reasonably requires); CWA § 402(a)(2), 33 U.S.C. § 1342(a)(2) (requiring permittees to provide data and other information EPA deems appropriate); 40 C.F.R. § 122.41(h) (permittees shall furnish "any information" needed to determine permit compliance); 40 C.F.R. § 122.44(i) (permittees must supply monitoring data and other measurements as appropriate).

Against this backdrop, the Petitioner's primary claim of error underlying its challenge to the monitoring and reporting conditions—that EPA is barred under Section 308 and 402 from prescribing such conditions on internal treatment process flow on facilities even though their discharges are from point sources—is entirely unpersuasive. *Pet.* at Sections IV.F, G and H.

There is, furthermore, no basis to conclude under the Board's precedent construing Sections 308(a) and 402(a)(2) of the Act, and implementing regulations, that the monitoring conditions at issue here are clearly erroneous simply because they pertain to processes that occur at a remove from the outfall. First, as explained above, the monitoring is necessary because it is necessary to assess compliance with distinct limits applicable to the CSO treatment plants[17]—the WWFTF and the SDF, which may discharge through the POTW Treatment Plant under certain flow conditions. Second, even if it were considered a single plant, the monitoring is reasonable and it is within the EPA authority to include in NPDES permits. *In re Westborough*, 10 E.A.D.

[17] Under the CWA and CSO Policy, the Permit regulates these facilities as CSO treatment facilities. *Ex.* C (FS) at 28.

297, 316-17 (EAB 2002) (requiring monitoring of the actual influent of phosphorus coming into the headworks of the Westborough POTW from industrial and other sources discharging waste into the sewer system prior to treatment by the POTW, and noting "The regulatory scheme clearly anticipates that both discharges *from* and discharges *into* POTWs are subject to regulation by means of NPDES permits."). *See, .e.g., Town of Concord*, slip op. at 38-40; *In re Charles River Pollution Control Dist.*, NPDES Appeal No. 14-01 (EAB Feb. 2, 2015) (holding that the Region has authority under the Clean Water Act and EPA's regulations to include municipal satellite collection systems as co-permittees and subject them to monitoring and reporting requirements). Indeed, the authority to impose effluent limitations on internal waste streams, and associated monitoring requirements, is expressly recognized in EPA's regulations. 40 C.F.R. § 122.45(h).

The City's challenges to the Permit's monitoring and reporting requirements fail to establish any grounds for review. The City first objects to Part I.A.1 footnote 3, which requires the City to collect samples of the POTW Treatment Plant effluent at a location prior to the flow combining with the effluent from the WWFTF on the grounds that this monitoring impermissibly intrudes on the internal operations of the POTW. *Pet.* at IV.G. As a threshold matter, this issue is waived, as no commenter challenged Part 1.A.1 footnote 3. Petitioners are required to provide a specific citation to the administrative record that each issue being raised in the petition was raised during the public comment period. 40 C.F.R. § 124.19(a)(4)(ii). The City cites to Comment B.10 of the Response to Comments, but that refers to a request by the City to remove an entirely different condition—footnote 3 from Part 1.B.5.a of the Final Permit. The language of Part 1.A.1 footnote 3 was identical in the Draft and Final Permits. If Nashua took issue with the formulation of the Part 1.A.1 footnote 3, it was required to raise its specific objection to that language in its comments, a failure that warrants denial of review.

The City's late-filed objection is in any event without merit. The Region's authority to impose monitoring and reporting conditions is greatest when, as here, the requirement is expressly tied to ensuring compliance with permit conditions and achievement of WQSs. Flows that reach the WWFTF are diverted away from the POTW Treatment Plant process at the flow diversion structure (prior to the POTW Treatment Plant headworks) before commingling with POTW Treatment Plant effluent in the chlorine contact chamber, from which the combined effluent cascades to the outfall chamber and is discharged to the Merrimack River through Outfall 001. The Permit requires sampling of the POTW Treatment Plant effluent prior to its combination with CSO discharges from the WWFTF in order to "determin[e] compliance with the technology-based effluent limitations for BOD, TSS and pH" applicable to the POTW Treatment Plant. *Ex.* E (Final Permit) at Part 1.A.1 Footnote 3. Unless samples of the POTW Treatment Plant flows are taken prior to commingling of the effluent and combined sewer overflows, the Region cannot determine based on this combined stream whether the POTW Treatment Plant effluent is complying with secondary treatment requirements, a problem compounded by the lack of transparency and data with respect to operation of the City's WWFTF and whether it is operating in accordance with the CSO Policy, as described in Section II.B.1.(b) *supra*.

Similarly unfounded is the City's objection to the monitoring-only requirements set forth in Part 1.B.5.a footnotes 1, 2, 3, 6, and 7 of the Final Permit. In its Response to Comments, EPA clarified that it was utilizing monitoring on influent and effluent to the CSO Treatment Facilities to assess "consistency" with the High Flow Management Plan and the "effectiveness" of the Nine Minimum Controls. *Ex.* D (RTC) at 28. The monitoring requirements to which the City objects do nothing more than assess ongoing compliance with permit conditions, including those that have not even been challenged by the City. *Ex.* E (Final Permit) at, *e.g.,* Part 1.B.1.a

(requiring implementation of the Nine Minimum Controls); Part 1.C ("Special Conditions") ("During periods of wet weather, the wastewater treatment facility, and the wet weather flow treatment facility shall be operated in a manner consistent with the City of Nashua's High Flow Management Plan[.]"); Part 1.D ("Unauthorized Discharges"). The monitoring requirements of the Permit were specifically grounded in compliance concerns related to the CSO-related provisions of the Permit, which is entirely in keeping with Board precedent.[18] The Board has repeatedly held that where monitoring relates to requirements under Section 301, as is the case at hand, there is nothing in the CWA or its implementing regulations that would constrain the Region's authority to include such conditions. *In re Westborough*, 10 E.A.D. at 317.

The Region's decision to impose monitoring requirements for BOD and TSS on the WWFTF and the underlying rationale articulated in the Response to Comments was reasonable and amply supported in the record. *Ex.* D (RTC) at 5. The Region explained that, like many communities served by combined wastewater collection systems, the City's wastewater treatment facilities are affected by the intensity, duration and frequency of wet weather events. *Id.* Since the issuance of the 2000 permit, the Region noted that the City has made significant investments in its wastewater collection system and treatment facilities to address the impacts of wet weather events. *Id.* However, the Region also observed that it lacked data with respect to periods when the WWFTF is operated, which was a reason in EPA's judgment for keeping the monitoring requirements as written in the Draft Permit. *Id.* In consideration of these site-specific factors, EPA determined that the BOD_5 and TSS monitoring requirements in the Final

[18] The City claims that, "In arguing it has authority to impose monitoring and reporting, the Region is imposing monitoring and reporting requirements as if the WWFTF is a bypass." *Pet.* at 21. As explained above, the Region's rationale for imposing monitoring and reporting requirements was crafted to assess conformity with the CSO Policy under 402(q). It was not based on the bypass rule at 40 C.F.R. § 122.41(m).

Permit were necessary to generate data to fully and adequately characterize the effluent quality and assess treatment efficiencies under varying flow conditions, including when the WWFTF is operated. *Id.*

In its Petition, the City ignores this rationale, repeatedly citing *Iowa League of Cities* as a mantra, which it construes as limiting *all* of EPA's regulatory authority over POTWs and CSO discharges to the end of the outfall pipe. Nashua is obviously free to disagree with the Region's explanations, but may not simply ignore material portions of the Region's response and still hope to garner review.

In fact, the City's reliance on the Eighth Circuit decision in *Iowa League of Cities* and the D.C. Circuit decision in *American Iron and Steel* is badly misplaced. The *Iowa* decision, binding precedent in the 8th Circuit, addressed in part, how EPA may exercise its authority under the CWA to determine whether a particular diversion at the POTW constituted a bypass under section 122.41(m). The court concluded that EPA could not make this determination by applying secondary treatment limitations to internal treatment processes. 711 F.3d 844, 877-88. By contrast, the monitoring required in Part 1.B.5.a of this Permit is necessary to assess the compliance of two distinctly different treatment facilities, one a secondary treatment plant, the other a CSO treatment facility that discharges CSOs to waters of the U.S. via a disinfection unit and outfall shared with the POTW Treatment Plant. *Iowa League of Cities* did not address the extent of a permit issuer's ability to impose monitoring and sampling conditions on influent or effluent flows from POTW or from CSO discharges, which are not subject to secondary treatment requirements. As explained above, monitoring "upstream" of the disinfection unit prior to flows commingling is necessary to assess compliance with technology limits of the individual wastestreams. Monitoring of the flows after they are joined is necessary to assess compliance with specific limits necessary to achieve WQS. Further, this Region's assertion of

its sampling authority is entirely consistent with *American Iron and Steel,* 115 F.3d at 995 (D.C. Cir. 1997) ("We agree with the EPA that the CWA contemplates the imposition of monitoring and reporting requirements for internal plant sources. Section 402(a)(2) authorizes the Administrator to prescribe conditions for permits 'including conditions on data and information collection to insure that the water quality standards are met.'"). Based on a mistaken premise, Nashua's objections to monitoring and sampling conditions imposed on the City's CSO flows do not present any basis for review.[19]

The City's challenge to Part I.B.5.b footnote 3 of the Permit, requiring sampling at the SDF "anytime there is a flow into the SDF," on the grounds the condition is an effluent limitation on internal treatment processes is unconvincing, for these same reasons. *Pet.* at IV.H. Combined flows enter the SDF prior to reaching the headworks of the POTW. Although the SDF may serve as a combined flow storage facility, which may, under appropriate conditions, release flow back into the collection system for treatment at the POTW Treatment Plant, the SDF also serves as a stand-alone CSO treatment facility (*i.e.*, providing screening and disinfection to combined flows, which are then discharged to the Merrimack River through a dedicated outfall). Thus, the Region retained that requirement over the objections of the City, citing back to it concerns over whether the treatment facilities were operating in a manner consistent with the LTCP and the Nine Minimum Controls. *Ex.* D (RTC) at 30. Influent as well as effluent flow monitoring requirements were included in the Permit in order to provide information as to how

[19] The City also challenges the sampling requirement on the grounds that it is unable to sample at the WWFTF and SDF "nor does the design of the WWFTF or the SDF incorporate any ability to sample "influent and effluent concentrations" of BOD_5 and TSS." *Pet.* 23. This is incorrect; Nashua does in fact have the ability to sample the influent and effluent of the WWFTF and submitted influent and effluent data to the Region in 2012. Nashua's fair notice arguments, *Pet.* at 24, were in any event not raised below and are thus waived.

the facility was being operated, the types of wet weather events that trigger a discharge from the SDF, and the types of wet weather events that would result in storage of flows versus discharge to the receiving water. In light of the Region's explanations, and the failure of the City to demonstrate any clear error in the Region's decision to impose sampling requirement on the SDF, the Board should deny review.

E. EPA's Definition of Dry Weather Was Reasonable and Supported by the Administrative Record

The City contends that the Region's definition of dry weather is overly restrictive, maintaining that under the Final Permit "there is still insufficient time to allow the flow to pass through the facilities, in the event of certain wet weather storms." *Pet.* 25. To cure this alleged shortcoming, the City proposes a specific new definition of "distinct rainfall event" for inclusion into the Permit to accommodate the City's concerns regarding the time it may take for flows resulting from wet weather events to pass through the collection system and treatment facilities. *Id.*

In its comments on Draft Permit Parts I.A.4 and I.B.2.d, the City opted for a different formulation. There, Nashua argued that the timeframe should be "at least 24-hours" after a storm event and the City "should be allowed to determine on a case-by-case basis whether the system flows contain precipitation-derived flow." *Ex.* D (RTC) at 19-21. The Region addressed the City's underlying concern but declined to adopt the City's suggestion in its entirety. *Id.* Nowhere in the comments did any party suggest adding the specific definition the City tardily proposes for "distinct rainfall events," although the issue was reasonably ascertainable. The issue is waived. Additionally, while the City generically alleges (as in its comments) that the Region's definition is inconsistent with the CSO Policy and guidance, it fails to support, much less explain, that claim in any way. Mere allegations of error are insufficient to support review.

F. The Region's Decision to Include a Protective Narrative Condition Stated in Terms of Water Quality Standards was Reasonable and Adequately Explained in the Record

Nashua's objection to a Final Permit condition prohibiting the discharge from causing a violation of WQSs of the receiving stream does not present any grounds for Board review. *Pet.* at 26. The City asserts that the Permit's effluent limitations and conditions have been imposed to "protect water quality," and if the City is complying with those requirements, then its discharge cannot violate WQS. *Id.*

The City has done no more than restate, almost verbatim, its essential objections on the Draft Permit, without substantively confronting the Region's response. *Compare Pet.* at 26 *with Ex.* D (RTC) at 18 and 21. Accordingly, review of this issue should be denied.

In those responses, the Region agreed that the Permit's effluent limitations and conditions were written to ensure the discharge complied with WQS, but disagreed that it lacked authority under the Act to impose a narrative permit condition stated in terms of WQS. *Ex.* D (RTC) at 18. *Northwest Envtl. Advocates v. City of Portland*, 56 F.3d 979, 990 (9th Cir. 1995) (concluding that "the statutory language, legislative history, and case law authorize citizens to enforce permit conditions stated in terms of water quality standards"). While compliance with an NPDES permit is, as a general matter, deemed compliance with, *inter alia*, Section 301, the permit shield provisions of the Act and implementing regulations do not uniformly immunize Nashua from all conceivable impacts of its discharge on water quality. 33 U.S.C. § 1342(k); CWA § 402(k). For this reason, the Region then articulated why it decided to exercise that authority to include "a more general, narrative, preventative permit provision," explaining that "EPA cannot reasonably be expected to anticipate all the water quality issues arising from a discharge," and the provision would allow EPA to address, as one example, "ongoing water

quality impairments caused or contributed to by such circumstances as changes in effluent quality that might otherwise meet permit conditions" or, as another, "the discharge of pollutants not identified in the City's permit application." *Ex.* D (RTC) at 18. "Congress has vested in the Administrator [of EPA] broad discretion to establish conditions for NPDES permits" in order to achieve these statutory mandate of establishing effluent limitations to attain and maintain WQS. *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992). The narrative condition at issue here was fashioned to ensure full implementation of Sections 301(b)(1)(C) and 402, and the City has not explained why this approach is clearly erroneous. As the Region further explained, *Ex.* D (RTC) at 21, inclusion of the narrative condition at issue is, furthermore, consistent with the CSO Policy, 59 Fed. Reg. 18688, 18696 (requiring NPDES permits to include narrative limitation mandating compliance with applicable WQS no later than the date allowed under the State's WQS). The Region's decision to retain the Permit condition as a prophylactic was cogently explained and supported in the record, warranting denial of review on the merits as well.

G. Nashua Has Waived Its Challenge to the Nine Minimum Controls

Nashua contends that certain annual reporting requirements related to the Nine Minimum Controls are unclear, outlining specific objections, posing questions and proposing changes to language in four separate provisions of the Final Permit. *Pet.* at 27. Although these specific objections to the Permit were reasonably ascertainable during the public comments period—the language in the Draft and Final Permits is identical in relevant respects—Nashua for reasons that are not explained failed to raise them. Nashua has, accordingly, procedurally defaulted and review should be denied on this basis.

In its comments on the Draft Permit, Nashua alleged only that some "reporting requirements are unclear, such as the requirement to report precipitation data for each day of the

year as opposed to only days where a discharge actually occurred." *Ex.* D (RTC) at 25. The Region duly considered this specific concern regarding precipitation data, concurred, and consequently made clarifying revisions in the Final Permit. The Region was not under any obligation to go further and guess the meaning behind Nashua's imprecise comment. Nashua has declined to provide any explanation for why it brought these proposed changes to the Permit language at this late stage in the proceedings, despite the requirement to do so, 40 C.F.R. § 124.19(a)(4)(ii), and cannot in any event argue that the issues were not reasonably ascertainable during the public comment period, as the permit conditions at issue did not change between the Draft and Final Permit. As it routinely does, the Board on these grounds should deny review.

IV. CONCLUSION

The Region requests that the Board deny the Petition.

Respectfully submitted,

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Assistant Regional Counsels

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that the Region's Response to the Petition for Review in the matter of Nashua Wastewater Treatment Facility, NPDES Appeal No. 15-06, contains less than 14,000 words in accordance with 40 C.F.R. § 124.19(d)(3).

Dated: May 13, 2015

Respectfully submitted,

_____

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CERTIFICATION OF IDENTICAL PAPER FILING

I certify that the enclosed Response to the Petition for Review, and exhibits thereto, are identical copies of those filed electronically in this matter by EPA Region 1 with the Environmental Appeals Board on May13, 2015.

Dated: May 13, 2015

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response to the Petition for Review and Statement of Compliance with Word Limitations, in the matter of Nashua Wastewater Treatment Facility, NPDES Appeal No. 15-06, were served on the following persons in the manner indicated:

By Electronic Filing and Overnight Mail:

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