

BEFORE THE ENVIRONMENTAL APPEALS BOARD
 U.S. ENVIRONMENTAL PROTECTION AGENCY
 WASHINGTON, D.C.

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ORAL ARGUMENT

 IN RE: :
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 :
 CITY OF RUIDOSO DOWNS AND : NPDES Appeal No.
 VILLAGE OF RUIDOSO WWTP : 17-03
 :
 NPDES Permit No. NM 0029165 :

Tuesday,
 October 30, 2018

Administrative Courtroom
 Room 1152
 EPA East Building
 1201 Constitution Avenue, NW
 Washington, DC

The above-entitled matter came on for
 hearing, pursuant to notice, at 1:00 p.m.

BEFORE:

THE HONORABLE MARY KAY LYNCH
 Environmental Appeals Judge

THE HONORABLE KATHIE A. STEIN
 Environmental Appeals Judge

THE HONORABLE MARY BETH WARD
 Environmental Appeals Judge

APPEARANCES:

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ALSO PRESENT:

EURIKA DURR, Clerk of the Board

IHAB MAHMOUD, Courtroom Technician

* present via video-teleconference

1 P-R-O-C-E-E-D-I-N-G-S

2 12:59 p.m.

3 MS. DURR: All rise. The
4 Environmental Appeals Board of the United States
5 Environmental Protection Agency is now in session
6 for oral argument in re: City of Ruidoso Downs
7 and Village of Ruidoso WWTP, NPDES Permit No.
8 NM0029165, NPDES Appeal No. 17-03, the Honorable
9 Judges Kathie Stein, Mary Kay Lynch, Mary Beth
10 Ward presiding.

11 Please turn off all cell phones and no
12 recording devices allowed. Please be seated.

13 JUDGE LYNCH: Good afternoon,
14 everyone. The Environmental Appeals Board is
15 hearing argument today in the matter of the City
16 of Ruidoso Downs and the Village of Ruidoso Waste
17 Water Treatment Plant. The Rio Hondo Land &
18 Cattle Company has filed an appeal of an NPDES
19 permit issued by EPA Region 6 to the facility
20 which is located in New Mexico.

21 And today's argument will proceed as
22 outlined in the Board's April 12th, 2018 order

1 allocating time for oral argument. Specifically
2 we'll first hear argument from Rio Hondo on its
3 appeal to the Board and Rio Hondo will have 30
4 minutes and up to 5 minutes to reserve for
5 rebuttal. We'll next hear from EPA, who will
6 have 20 minutes and then we'll hear from the
7 permittee City of Ruidoso Downs and Village of
8 Ruidoso Waste Water Treatment Plant for 10
9 minutes.

10 And on behalf of the Board I want to
11 express our appreciation for the effort each of
12 you has put into this case. We've carefully read
13 the pleadings and we're familiar with the
14 administrative record. And the merits briefing
15 is complete. So today this oral argument is an
16 opportunity for the Board to engage with the
17 parties and ask questions regarding the issues
18 that were raised during the public comment
19 proceedings and that were set forth in your
20 briefs.

21 There's a few other preliminary
22 matters that I'd like to note. First is that in

1 addition to people in the courtroom we also have
2 EPA Region 6, and in particular David Gillespie
3 and EPA Region 9, who are observing the oral
4 argument by video conference.

5 And if I could just check to make sure
6 that the folks observing by video conference are
7 able to see and hear? Region 6?

8 MR. GILLESPIE: This is David
9 Gillespie of Region VI. I am observing and I can
10 hear you. Thank you very much.

11 JUDGE LYNCH: And then if you could
12 put your line on mute.

13 And then Region 9?

14 MR. MAHMOUD: They've been muted.

15 JUDGE LYNCH: Okay. I've been told
16 you've been muted and everything is working
17 properly.

18 And then I'd also like to note that we
19 do have a court reporter here today that's
20 transcribing the oral argument, and a transcript
21 of the argument will be posted to the docket in
22 this matter.

1 We do have a few procedural matters
2 that I want to address in a moment, but first I
3 would like each of the parties to introduce
4 yourselves and anyone who's joining you at table
5 today. So if we could start with counsel for Rio
6 Hondo.

7 MR. SUGARMAN: Good afternoon, Judge.
8 I'm pleased to be here this afternoon. Thank you
9 for the opportunity to present the case. My name
10 is Steven Sugarman. I am here on behalf of Rio
11 Hondo Land & Cattle Company.

12 JUDGE LYNCH: Thank you. EPA?

13 MS. PARIKH: Your Honor, Pooja Parikh
14 from the Office of General Counsel representing
15 the EPA. This is Lee Schroer from the Office of
16 General Counsel and Edmund Kendrick from Ruidoso.

17 JUDGE LYNCH: All right. Thank you.
18 And, Mr. Kendrick?

19 MR. KENDRICK: Duplicative, but Ned
20 Kendrick from New Mexico. I'm representing the
21 Village of Ruidoso, New Mexico.

22 JUDGE LYNCH: All right. I appreciate

1 that.

2 So before we begin oral argument, as
3 I mentioned, there are a few procedural matters
4 that I want to briefly address. First, last
5 Friday, October 26th, counsel for Petitioner
6 circulated some documents that we understand you
7 would like to refer to today. And then yesterday
8 a four-page PDF of what was referred to as visual
9 aids was circulated and Mr. Sugarman indicated
10 that he'd like to display those today. So I'd
11 first like to confirm that the counsel for the
12 other parties received those documents.

13 MS. PARIKH: We did.

14 JUDGE LYNCH: All right.

15 MR. KENDRICK: We did.

16 JUDGE LYNCH: All right. Thank you.

17 So, Mr. Sugarman, you can proceed
18 today and reference those documents, but I do
19 want to note that it's not clear that all of the
20 documents are in the administrative record. So
21 for example, in the document that you circulated
22 Friday, the 2000 permit, that does not appear to

1 be in the administrative record, and also the
2 copy that you circulated had handwritten notes
3 on it.

4 And then also the 2016 TMDL excerpt
5 that you circulated was titled, EPA-Approved, and
6 that does not appear to be the 2016 TMDL that's
7 in the administrative record. The document
8 that's in the 2016 version in the administrative
9 record is titled, Final Draft with a date of
10 November 3rd, 2016 on it.

11 And then today we received a motion
12 from EPA seeking to supplement the administrative
13 record with a version of the 2016 TMDL titled,
14 WQCC-Approved TMDL. And I believe WQCC stands for
15 Water Quality Control Commission.

16 Mr. Sugarman, is it correct that you
17 oppose the motion to supplement?

18 MR. SUGARMAN: Your Honor, I do oppose
19 the motion to supplement. If the motion had been
20 styled as -- let me back up. I do believe that
21 the Board has the authority to take official
22 notice of the document under the decision in In

1 re: Russell City Energy.

2 JUDGE LYNCH: And so could you briefly
3 state your objection to the motion?

4 MR. SUGARMAN: Yes, my objection to
5 the motion to supplement the administrative
6 record with the final TMDL is that there has been
7 no showing whatsoever that that particular final
8 document was considered by the EPA permit writer
9 when he reissued the decision. The indications
10 in the record -- I'm taking the record as it came
11 to me. The record indicates that what the permit
12 writer considered was a draft version of the TMDL
13 that had not yet been approved by the EPA.

14 Now it's true, as the EPA said, that
15 they are substantially identical documents, but
16 the chronology of the EPA's approval of the TMDL
17 and their technical analysis of the permit
18 application is simply not clear to me. And --

19 JUDGE LYNCH: Okay. Thank you.

20 MR. SUGARMAN: Okay.

21 JUDGE LYNCH: And we're not going to
22 get into this too much today, but could I ask you

1 to briefly say whether your view is that the two
2 versions are different? Or you may not know, but
3 --

4 MR. SUGARMAN: I haven't got -- I've
5 spoken with Mr. Gillespie who assures me --

6 JUDGE LYNCH: Okay.

7 MR. SUGARMAN: -- that there are only
8 very, very, very minor -- what he characterizes
9 as scrivener errors.

10 JUDGE LYNCH: Okay.

11 MR. SUGARMAN: And I believe that to
12 be the case.

13 JUDGE LYNCH: All right.

14 MR. SUGARMAN: So, yes, I think --

15 JUDGE LYNCH: And then you're -- but
16 at the same time you're asking to rely on a
17 version of the 2016 TMDL that does not appear to
18 be in the administrative record?

19 MR. SUGARMAN: That is true. So I'm
20 going -- if -- if -- if I use that visual aid, I
21 will also be doing so under the Court's
22 indulgence in allowing me to ask the Board to

1 take official notice of the document.

2 JUDGE LYNCH: Well, and you're also --
3 you also relied on the final version in your
4 brief.

5 MR. SUGARMAN: That is true, Your
6 Honor.

7 JUDGE LYNCH: Okay. All right. These
8 are just clarifying questions that I'm asking.

9 And then, EPA, just briefly for
10 purposes of moving forward today, are you
11 representing that the EPA decision maker relied
12 on the WQCC version of the 2016 TMDL?

13 MS. PARIKH: This is the version that
14 is referenced in the region's approval letter for
15 the TMDL.

16 JUDGE LYNCH: All right. Well, it
17 looks like --

18 JUDGE WARD: Could I ask a
19 clarification. So I think your question --

20 JUDGE LYNCH: Well, but --

21 JUDGE WARD: But I think the question
22 you asked was about --

1 JUDGE LYNCH: It was, but --

2 JUDGE WARD: -- it was about a permit,
3 but you referenced the TMDL approval letter. So
4 the -- I think the question was was it considered
5 in the approval of the permit?

6 MS. PARIKH: In the permit I believe
7 we would have relied on the -- there's
8 essentially no difference between the two
9 versions, so I can't --

10 JUDGE LYNCH: Okay. So for -- that's
11 all for today. It looks like we have three
12 different versions of the 2016 TMDL that's been
13 presented to the Board. We will address the
14 status of the various documents later after the
15 oral argument.

16 For today's purposes the parties can
17 proceed and reference the various documents, but
18 please be clear in your argument which version
19 that you're referencing today.

20 All right. Well with that, Mr.
21 Sugarman, you can proceed with your argument.

22 MR. SUGARMAN: Good afternoon.

1 JUDGE LYNCH: oh, excuse me. Mr.
2 Sugarman, did you want to reserve any time for
3 rebuttal?

4 MR. SUGARMAN: Well, I saw that the
5 clock started at 25 minutes, so -- automatically,
6 so --

7 JUDGE LYNCH: So that's a yes?

8 MR. SUGARMAN: That is a yes.

9 JUDGE LYNCH: Do you agree to that?

10 MR. SUGARMAN: Unless I -- am I --

11 JUDGE LYNCH: Do you object?

12 MR. SUGARMAN: -- able to reserve 10
13 minutes, or is that beyond the pale?

14 JUDGE LYNCH: All right. And then you
15 get at least 30 seconds --

16 MR. SUGARMAN: Okay.

17 JUDGE LYNCH: -- for my interruptions,
18 so --

19 MR. SUGARMAN: Okay.

20 JUDGE STEIN: Is he reserving 10 or 5?

21 JUDGE LYNCH: Pardon me?

22 JUDGE STEIN: I was just --

1 JUDGE LYNCH: Judge Stein was
2 wondering whether you're reserving 10 or 5.

3 MR. SUGARMAN: I would prefer to
4 reserve 10, if I could. If that's not within the
5 ambit of the Board's ordinary operating
6 procedures, I'll --

7 JUDGE LYNCH: Ordinarily it's up to
8 five, and so why don't we --

9 (Simultaneous speaking.)

10 MR. SUGARMAN: I'll do five. I want
11 to -- I'm a rule follower. So --

12 JUDGE LYNCH: You now get an extra
13 minute.

14 MR. SUGARMAN: Okay. The Rio Ruidoso
15 is a -- let me back up. I'm going to be -- all
16 of my references to the TMDL in this argument are
17 going to be to the final 2016 TMDL when I'm
18 referring to the TMDL. When I'm referring to the
19 2016 TMDL, I will do my utmost best to make that
20 reference clear.

21 The Rio Ruidoso is a small mountain
22 stream about 30 miles in length that arises in

1 the Sacramento Mountains in South-Central New
2 Mexico. From its source at around 12,000 feet it
3 flows generally eastward through scenic mountain
4 valleys, the tourist town of Ruidoso, small
5 historic villages and farming and ranching lands
6 in the plains until it joins the Rio Hondo at an
7 elevation of 6,000 feet. The Rio Hondo is a
8 tributary of the Pecos River.

9 In New Mexico we have a saying: Agua
10 es vida. That means water is life. And in the
11 case of the Rio Ruidoso that could not be more
12 true. The river for hundreds and hundreds of
13 years prior to the time of settlement by
14 Europeans was the lifeblood of all human
15 habitation on the river. It sustained wildlife,
16 it sustained agriculture and it sustained
17 recreation.

18 Unsurprisingly, however, in an arid
19 environment when there is increasing human
20 development and increasing and competing demands
21 for water, the Rio Ruidoso is under severe stress
22 that has impaired its water quality and that has

1 impaired its designated uses. One of those
2 stressors is the presence of excess plant
3 nutrients in the stream and those plant nutrients
4 impair recreation, fishing, agriculture and
5 ranching use of the stream's waters.

6 The New Mexico Environment Department,
7 which I might refer to over the course of my
8 argument as NMED, first acknowledged the nutrient
9 impairment in the river in the 1990s, and it
10 acknowledges that the impairment continues until
11 today. Specifically, the Environment Department
12 acknowledges that the river is in non-attainment
13 for both total phosphorous and total nitrogen.
14 The receiving segment of the river is on New
15 Mexico's 303(d) list for those particular
16 impairments.

17 Insofar as the specific standards
18 which are to be achieved in the river to attain
19 water quality standards, our concern, New Mexico
20 Environment Department has determined that the
21 appropriate numeric standard for total
22 phosphorous, which I might refer to as TP, is 0.1

1 milligrams per liter.

2 JUDGE LYNCH: And, Mr. Sugarman, if I
3 could ask you a question. You reference and you
4 make a statement in your brief, I just want to
5 confirm it, that it was the 2001 permit that that
6 had a concentration limit for phosphorous but not
7 for nitrogen?

8 MR. SUGARMAN: That is correct, Your
9 Honor. The first -- the plant nutrient effluent
10 limitation in the plant -- in the waste water
11 treatment plant's NPDES permit was incorporated
12 in the 2000 iteration of the permit. I believe
13 that permit has an issuance date perhaps of
14 December 31st, 2000, but an effective date of
15 2001. And the significance of that of course is
16 that that particular concentration limit was
17 added into Ruidoso's permit prior to the time
18 that there was any TMDL that had been created for
19 the impaired water.

20 JUDGE LYNCH: And on that point, as I
21 understand the record, the first TMDL to address
22 nutrients was the 2006 TMDL?

1 MR. SUGARMAN: That is correct, Your
2 Honor, yes.

3 So the --

4 JUDGE WARD: And could I follow up on
5 that? So then the 2007 permit was the first
6 permit that included a nitrogen concentration
7 limit, correct?

8 MR. SUGARMAN: That is correct.

9 JUDGE WARD: After the TMDL was issued
10 in 2006?

11 MR. SUGARMAN: The 2007 permit was the
12 first permit to include an effluent limitation
13 for TN and that came after the time that the TMDL
14 had been adopted and approved.

15 JUDGE LYNCH: And so is one way to
16 read the 2007 permit to be that the limit for
17 nitrogen was based on the 2006 TMDL?

18 MR. SUGARMAN: Well, that is the way
19 the EPA urges the Board to read the permit, but
20 that's not the way the history reads. The way
21 the history reads is --

22 JUDGE LYNCH: Well, can you -- in

1 terms of the history can you tell us what in the
2 record shows that it was not based on the 2006
3 TMDL?

4 MR. SUGARMAN: Yes, I can. The 2000
5 permit fact sheet specifically indicates --

6 JUDGE LYNCH: And is that in the
7 record?

8 MR. SUGARMAN: It is. It's one of the
9 documents that I gave to the Court, rather than I
10 sent to the Board last week.

11 JUDGE LYNCH: The 2000 fact sheet?

12 MR. SUGARMAN: The 2000 permit.

13 JUDGE LYNCH: Okay. I thought you
14 said the fact sheet, but go ahead.

15 JUDGE STEIN: The permit or the fact
16 sheet?

17 MR. SUGARMAN: Pardon me?

18 JUDGE STEIN: You just --

19 JUDGE LYNCH: What you -- go ahead.

20 JUDGE STEIN: You just referred to the
21 2000 permit fact sheet.

22 MR. SUGARMAN: Yes.

1 JUDGE STEIN: That's different from
2 the 2000 permit.

3 MR. SUGARMAN: Yes.

4 JUDGE STEIN: Am I correct that
5 neither of those documents are in the
6 administrative record?

7 MR. SUGARMAN: Neither of those
8 documents are in the administrative record, Judge
9 Stein. That's correct.

10 JUDGE STEIN: And then --

11 MR. SUGARMAN: But the permit.

12 JUDGE LYNCH: Just to clarify --

13 JUDGE STEIN: -- why should we be
14 considering them?

15 MR. SUGARMAN: I am asking the Board
16 to consider them under the Board's authority to
17 take official notice of an EPA document.

18 JUDGE STEIN: So is this a new
19 argument that you're asking us to consider?

20 MR. SUGARMAN: No, this is not a new
21 argument. What I am doing for the Board is I'm
22 laying out the history of the derivation of the

1 concentration standard and I'm explaining that it
2 does not derive from any TMDL or Wasteload
3 Allocation. Both nutrient standards, both the
4 standard for TN, which was first adopted into the
5 2007 permit, and the TP standard, which was first
6 adopted into the 2000 permit. The TN standard,
7 which was first adopted into the 2007 permit --

8 JUDGE LYNCH: One year following the

9 --

10 MR. SUGARMAN: One year following --

11 JUDGE LYNCH: -- 2006 TMDL. So where
12 in the record does it show us that the EPA did
13 not rely on that 2006 TMDL?

14 MR. SUGARMAN: Your Honor, the 2000 --
15 if I may, the 2000 permit indicates that the 0.1
16 milligram/liter was selected to conform to water
17 quality standards. Subsequently, the New Mexico
18 Environment determined -- Department made a
19 determination that to manage and regulate total
20 nitrogen in the river, which is subject to a
21 narrative standard and not numerics -- and not a
22 numeric standard, that it was important to

1 maintain a ratio of 10 to 1 of TN to TP. That is
2 in the record.

3 And what the 2007 permit did is it
4 selected the -- selected a WQBL for total
5 nitrogen that would achieve that 10 to 1 ratio
6 that the Department had determined was necessary
7 for attainment of water quality standards.

8 JUDGE LYNCH: And why can't the limit
9 be based on both the 2006 TMDL and the water
10 quality standards?

11 MR. SUGARMAN: Well, the reason that
12 it -- it might be in some other case, but that's
13 not the case that we have here.

14 JUDGE LYNCH: Show me in the record
15 where it indicates that it's not.

16 MR. SUGARMAN: Where the total
17 nitrogen limit says that it -- I'm sorry, where
18 the record says that the total nitrogen limit is
19 not based on a -- let me answer your question
20 this way: To the extent that the total nitrogen
21 limit is based on a TMDL, first of all, the 2006
22 TMDL and then subsequently on the 2016 TMDL,

1 which, as you know, is an issue which my client
2 disputes, the 2006 TMDL determined that the mass
3 load limitation that was incorporated into the
4 2017 permit equated to 2.41 milligrams per liter.
5 That is what the total mass load -- if you
6 translate the mass load limit into a
7 concentration limit, that's what you come up
8 with. So --

9 JUDGE LYNCH: And you're not
10 challenging the mass load for phosphorous,
11 correct?

12 MR. SUGARMAN: I am not challenging
13 the mass load limit for phosphorous.

14 JUDGE LYNCH: And your argument about
15 the prior limits not being based on the TMDL are
16 focused on the concentration-based limits?

17 MR. SUGARMAN: Yes, I will -- I -- my
18 -- I concede that the mass load limit for total
19 nitrogen, which I am challenging here, is based
20 on a Wasteload Allocation from a TMDL. That is
21 in fact the case. And let me state in this forum
22 I am not challenging that particular Wasteload

1 Allocation as arbitrary and capricious for the
2 purposes for which it serves in a TMDL.

3 As you know, my argument is just as
4 this Court -- as this Board held in the case of
5 In re: City of Moscow, there is no requirement
6 for the EPA to make -- to have equivalent -- to
7 copy and paste a Wasteload Allocation from a TMDL
8 into a subsequent NPDES permit. It is true that
9 a limit in a permit must be consistent with a
10 Wasteload Allocation in a TMDL. That is beyond
11 dispute.

12 But it's also equally beyond dispute,
13 Your Honors, that what a Wasteload Allocation is
14 a maximum amount of water that can be -- or a
15 pollutant that can be discharged from a regulated
16 point source. This Board has held numerous times
17 that there is no requirement for the EPA to make
18 those two values equal; that is, the WLA and the
19 water quality-based effluent limitation.

20 JUDGE LYNCH: It doesn't preclude it?

21 MR. SUGARMAN: It certainly doesn't
22 preclude it, but what does preclude it are two

1 absolutely inviolable rules, and those are the
2 terms and conditions of an NPDES permit must
3 assure attainment of water quality standards.

4 The second rule is that an --

5 JUDGE LYNCH: To do that they'd have
6 to consider the TMDL and be consistent with the
7 TMDL under the regulations.

8 MR. SUGARMAN: I do -- of course I do.
9 I mean, that's what the statute says, that's what
10 the regulation says, but I think that this case
11 -- for purposes of this case it's really
12 important to keep our eyes on what that
13 consistency requirement means. And the policy
14 ramifications of simply lifting a WLA from a
15 TMDL, which as you know has a -- can have a
16 relatively long shelf life in saying this
17 Wasteload Allocation is going to be the water
18 quality-based effluent limitation that will be
19 applied to this point source facility for the
20 entire lifetime of the TMDL.

21 JUDGE WARD: Mr. Sugarman, could I
22 jump in here? So back to the 2006 TMDL and the

1 2007 permit, would you agree that the limits, the
2 concentration limits for nitrogen and phosphorous
3 in the 2000 permit --

4 MR. SUGARMAN: 2000?

5 JUDGE WARD: -- 2007 permit line up
6 with the 2006 TMDL, putting aside what they're --
7 it's based on? But they line up, do they not?

8 MR. SUGARMAN: There's a reason for
9 that, Your Honor. I do admit that.

10 JUDGE WARD: Okay.

11 MR. SUGARMAN: And the reason is that
12 what happened is that in the 2006 TMDL the New
13 Mexico Environment Department said what is our
14 water quality standard, either numeric or
15 translated narrative in the Rio Ruidoso that we
16 have to achieve in order to attain water quality
17 standards? They used that end point of -- or
18 rather they used that end point -- or, I'm sorry,
19 it wasn't an end point. They used those
20 particular standards in their equation to
21 calculate what the mass load limits would be at
22 the then-current flow rate of the plant.

1 So it is absolutely correct, Your
2 Honor. I cannot tell you that those numbers: 0.1
3 and 1.0, do not appear in the body of the 2006
4 TMDL. They do in fact, but they are not
5 Wasteload Allocations and they are not Load
6 Allocations. What a -- an allocation is just
7 what it says.

8 JUDGE LYNCH: So where in the record
9 do we look to determine whether the 2012 effluent
10 limits were based on the TMDL?

11 MR. SUGARMAN: Well, what the 2000 and
12 -- the only place I can point you -- well, I can
13 point you to two places: The limits were the
14 same. They remain the same from the two thousand
15 -- the final limits of the 2007 permit were
16 picked up as the final limits of the 2012 permit.
17 And whatever reasoning was there, the only sort
18 of look that we get into that black box is that
19 the 2012 permit fact sheet indicates that the
20 concentration limits were carried forward in the
21 words of the permit writer in 2012 from the 2007
22 permit.

1 JUDGE STEIN: But what you seem to
2 make a -- hang your hat on is carried forward
3 language or brought forward language, but I don't
4 know that it has any legal significance. I mean,
5 the mere fact that there was a number in a prior
6 permit and that number finds its way into a
7 current permit, we don't know why that is. The
8 permit writer could have looked at the prior
9 permit, looked at the TMDL, made a determination
10 that that number is still appropriate. And I
11 think that your argument seems to treat the
12 brought forward language as almost as if it's
13 some legal doctrine that has legal significance.
14 And if that's the case, can you point me to why
15 that is the case?

16 MR. SUGARMAN: Your Honor, I --

17 JUDGE STEIN: I mean, I think it's
18 just words that were used by a permit writer in
19 the course of a permitting proceeding. So it
20 doesn't --

21 MR. SUGARMAN: It does, but I will go
22 back to the answer that I just had given to a

1 question that was posed to me by Judge Ward.
2 Those numbers appear on the pages of the 2006
3 TMDL, but they are not a Wasteload Allocation or
4 a Load Allocation. That's what -- the language
5 that we're talking about is the language of the
6 backsliding prohibition and the exception to the
7 backsliding prohibition.

8 The exception that's applicable in
9 this case or that would be applicable but for the
10 safety clause of the anti-backsliding statute
11 says that the permit that is going -- the
12 existing permit to be revised, the existing
13 limitation has to be based on that Wasteload
14 Allocation or other -- a TMDL, the Wasteload
15 Allocation of a TMDL or some other Wasteload
16 Allocation. And that does not -- that has not
17 happened here, Judge Stein. Yes, those numbers
18 appear in the 2006 TMDL, but they are not Load
19 Allocations. Those are New Mexico's water
20 quality standards, numeric and translated
21 narrative, and that's why they appear in that
22 document, not because they serve any sort of role

1 --

2 JUDGE STEIN: Well, how do we know why
3 they appear in the document? I mean, you're --

4 MR. SUGARMAN: Well, you can look --

5 JUDGE STEIN: -- making an argument
6 about why they do appear, but --

7 MR. SUGARMAN: Your Honor, I suggest the
8 2006 TMDL is in the record and I suggest that you
9 look through that document itself to see whether
10 it is an allocation, which is a requirement for
11 application of the backsliding exception. If it
12 is not a Wasteload Allocation that is in a TMDL
13 or someplace else, we're simply not in that arena
14 where the exception even comes into play.

15 I see my time is getting short.
16 Rather than spend -- I'm happy to talk about this
17 --

18 JUDGE WARD: If I could ask one more
19 question --

20 MR. SUGARMAN: Yes.

21 JUDGE WARD: -- on the 2006 TMDL? So
22 it included -- it did include Wasteload

1 Allocations but it also included in that document
2 what the concentration limitations would be
3 associated with those Wasteload Allocations.

4 MR. SUGARMAN: What the 2006 document
5 did, Judge Ward, is it said this is what New
6 Mexico's water quality standards are for the
7 receiving water for TN and TP. This is what the
8 flow from the plant is at the current rate of
9 discharge. Multiply those two numbers and you'll
10 come with the mass load limitation, the Wasteload
11 Allocation for the plant. Those were the -- that
12 was the role that those numbers played in this
13 2006 TMDL.

14 JUDGE WARD: And it included
15 concentration figures as well, yes?

16 MR. SUGARMAN: Well, that's what I'm
17 saying.

18 JUDGE WARD: Yes.

19 MR. SUGARMAN: The concentration
20 figures were used in that particular way. You
21 take flow and then you multiply it by 0.1 and
22 then you get a TP mass limit. You take flow and

1 then you multiply that by 1.0, which was the
2 limit that New Mexico determined to be
3 appropriate to attain water quality standards,
4 and then you get a mass load limitation for TN.
5 But again, those numbers are stated as water
6 quality standard numbers that were going to be
7 applied to the volume of discharge so that the
8 mass load limits could be determined. They are
9 not allocations, Wasteload Allocations of any
10 sort.

11 JUDGE WARD: But I suppose the TMDL in
12 2006 confirmed, at least as to phosphorous, that
13 the concentration limit in the 2001 permit was in
14 fact correct and didn't need to be changed. I
15 mean, that's another way to look at it, right?

16 MR. SUGARMAN: The 2006 TMDL -- in the
17 2006 TL, yes, the -- they thought that the --
18 even though a TMDL had not existed at the time
19 that the 2000 permit was initially adopted, the
20 2006 TMDL endorses the approach or -- that was
21 used. It doesn't really endorse the approach.
22 It just basically said this is -- it endorsed the

1 water quality standard.

2 JUDGE WARD: But didn't -- in 2006
3 didn't the state need to take a look at all the
4 data since 2000 or 2001, since issuance of the
5 permit for this facility, to make sure that it
6 was correct and that a decision was made that
7 this is the correct set of figures for purposes
8 of this water segment and for purposes of a TMDL
9 in 2006?

10 MR. SUGARMAN: Well, hopefully the --
11 both the New Mexico Environment Department and
12 the EPA both did that.

13 JUDGE WARD: Yes.

14 MR. SUGARMAN: Those numbers were
15 determined to be correct in 2000. They were
16 incorporated into the 2006 permit. They were --
17 I mean, the 2006 TMDL. They were incorporated
18 into the 2007 permit. They were incorporated
19 into the 2012 permit. Now we have a situation
20 where the functional effluent will have a
21 concentration of 2.41, but there is no
22 concentration which in itself of course would be

1 in my contention a violation of the anti-
2 backsliding rule. But the EPA --

3 JUDGE LYNCH: Well, Petitioner go
4 ahead. If you want to finish your thought, I
5 have a question.

6 MR. SUGARMAN: But the EPA has gone
7 even farther and what it's done is it's deleted
8 all concentration limitations entirely. That's a
9 completely different step.

10 What I would like --

11 JUDGE LYNCH: So my question goes to
12 that point, counsel. In terms of the
13 concentration limits, isn't it in the EPA's
14 discretion whether or not to include
15 concentration limits in addition to mass limits?

16 MR. SUGARMAN: Absolutely it is in the
17 EPA's discretion, but once a limit has been set,
18 it cannot be deleted. The EPA has discretion to
19 issue or to exercise its considered judgment in
20 the determination of all effluent limitations in
21 a permit. And once those are stated, those
22 become subject to the safety clause of the anti-

1 backsliding statute.

2 JUDGE LYNCH: Well, and they first
3 become subject to the exceptions to the
4 backsliding provisions in 304(d)4.

5 MR. SUGARMAN: Well, I was hoping not
6 to use any of my visual aids, but what I have --
7 I mean, what I'm going to do is this little --
8 the green line here -- I'm sorry --

9 JUDGE LYNCH: And this chart is --
10 just for purposes of the transcript the chart
11 that you're referencing is from the 2010 EPA
12 Permit Writer's Manual?

13 MR. SUGARMAN: This is -- yes. Yes,
14 that's correct. This is page 75 from the Permit
15 Writer's Manual. It's titled, Exhibit 7-2,
16 Application of Anti-Backsliding Requirements.
17 And what this chart makes clear is that even if
18 the TMDL -- right here, this box says, okay, is
19 the existing limit based on a TMDL or WLA? Okay.
20 Yes. Is attainment of water quality standards
21 assured including anti-degradation? For the sake
22 of argument I'm going to say yes --

1 JUDGE LYNCH: Right.

2 MR. SUGARMAN: -- although that's not
3 my position. Even still, what you see is that at
4 the bottom of the chart the EPA has an incredibly
5 important winnowing function that it has to
6 fulfill right there and that --

7 JUDGE LYNCH: And what goes into that
8 -- in your view what goes into that winnowing
9 process?

10 MR. SUGARMAN: Technical analysis,
11 which has not been done in this case.

12 JUDGE LYNCH: But what's --

13 MR. SUGARMAN: There is no -- I'm
14 sorry, may I ask --

15 JUDGE LYNCH: Yes, go ahead.

16 MR. SUGARMAN: There is not a shred of
17 technical analysis performed by the EPA permit
18 writer in the record of this case. The only
19 analysis we have that justifies this permit is
20 that, well, the TMDL said it was going to be
21 okay, so it's going to be okay. That is not
22 considered judgment, Your Honor.

1 And I would -- I have to submit that
2 under the extraordinary circumstances of this
3 case where the permit contemplates doubling the
4 amount of discharge of TN that is going to be
5 discharged into a stream that is already a non-
6 attainment for TN without any offsetting
7 discharges that you have to ask yourself, well,
8 what -- where is the considered judgment? How is
9 it that the permit writer could make that sort of
10 fantastical leap of faith, that you can just
11 throw more TN at a problem and it's going to --
12 and the TN pollution is going to be resolved?
13 You just can't do that.

14 JUDGE LYNCH: Let's add a minute to
15 your time. But I have a follow-up question on
16 your chart. If you could --

17 MR. SUGARMAN: Yes, I'm sorry.

18 JUDGE LYNCH: -- put that back. So
19 what I want to understand from your perspective
20 is if EPA -- in this box it says is attainment of
21 water quality standards assured? So they said
22 yes. So what is different from their

1 determination in your view that water quality
2 standards go up one?

3 MR. SUGARMAN: I see.

4 JUDGE LYNCH: No.

5 MR. SUGARMAN: I will tell you.

6 JUDGE LYNCH: Yes, so what's different
7 between them making a determination that water
8 quality standards were assured from saying that
9 there's going to be a violation of water quality
10 standards?

11 MR. SUGARMAN: This is the really,
12 really interesting question that's -- also has
13 pretty important policy consequences for the
14 administration of the Clean Water Act. These are
15 two different analyses. This box right here
16 refers to if all -- assuming that all of the
17 Loading Allocations that are set out in the TMDL,
18 including the Load Allocations; and Wasteload
19 Allocations are achieved there, the water quality
20 standards will be attained. That's what this box
21 is about, whether -- this is basically an
22 analysis that's done on the regulating

1 authority's modeling of what the assimilative
2 capacity is.

3 This box is something different. This
4 box is will the permit actually attain -- assure
5 attainment of water quality standards? The boxes
6 are different. And this is a point that the 9th
7 Circuit thought to --

8 JUDGE STEIN: Hold on. Which is
9 different?

10 MR. SUGARMAN: Pardon me?

11 JUDGE STEIN: The language is
12 different or the underlying standard is
13 different?

14 MR. SUGARMAN: The underlying --

15 JUDGE STEIN: I mean, I understand
16 that the words of the statute are not identical
17 in these two places.

18 MR. SUGARMAN: They're completely
19 different. The whole -- it's not just a semantic
20 difference. It's completely -- it's a completely
21 different animal and --

22 JUDGE STEIN: Why?

1 MR. SUGARMAN: Because for the reasons
2 that the 9th Circuit stated in the Friends of
3 Pinto Creek v. U.S. EPA case which reversed this
4 Board's decision in the In re: Carlota case.
5 Because the TM -- a TMDL, as I just stated, said
6 it will assure attainment of water quality
7 standards upon the assumption that all of the
8 Load Allocations in the TMDL are met. Here what
9 we know is that the Load Allocations in the 2006
10 TMDL are nowhere near being met. In fact, the
11 current Load Allocation, all of the discharge
12 into the stream exceeds the target load by 73
13 percent.

14 JUDGE LYNCH: But, Mr. Sugarman, that
15 prior permit was operating under interim limits.

16 MR. SUGARMAN: Yes, this is -- that is
17 the sum and substance of Mr. Kendrick's argument.
18 And on that particular issue I would simply refer
19 the Board to 40 C.F.R. 122.44(1)(1), which
20 clarifies that the -- insofar as backsliding
21 analysis is concerned the reference standard that
22 you have to use is the final effluent limitation

1 that was included in a permit.

2 JUDGE STEIN: The Carlota case to my
3 recollection did not deal with a modification of
4 a TMDL.

5 MR. SUGARMAN: No, the --

6 JUDGE STEIN: My understanding is it
7 dealt with an entirely different provision of the
8 Clean Water Act.

9 MR. SUGARMAN: What the Carlota case
10 did -- in the Carlota case what the 9th Circuit
11 said was that the requirement of 40 C.F.R.
12 122.44(d) requiring assurances of attainment of
13 water quality standards operates completely
14 separately and independently from all other Clean
15 Water Act regulations and provisions. That is
16 the --

17 JUDGE STEIN: Mr. Sugarman --

18 MR. SUGARMAN: I -- that is -- and
19 that -- if I had -- and I know that I'm way over
20 time. If we're going to give my argument on the
21 mass load limitation relaxation, that would be
22 the way that I would structure the sum and

1 substance of my argument, that the EPA permit
2 writer may not simply parrot a WLA from a TMDL,
3 especially in an instance like this one where the
4 Loading Allocations are already exceeded.

5 Also just like in Friends of Pinto
6 Creek there are no plans that the New Mexico
7 Environment Department has to achieve those Load
8 Allocations. What the TMDL says is that they
9 will adopt a Phase 2 TMDL watershed-based plan at
10 some indeterminate point in the future to make
11 sure that the budget works out just the way it's
12 supposed to.

13 JUDGE LYNCH: Mr. Sugarman, is this
14 argument about the difference between these two
15 analyses in these provisions a new argument,
16 because you don't appear to make it in your
17 brief?

18 MR. SUGARMAN: No, Your Honor, it's --

19 JUDGE LYNCH: Your brief --

20 MR. SUGARMAN: -- absolutely --

21 (Simultaneous speaking.)

22 JUDGE LYNCH: -- the same.

1 MR. SUGARMAN: This is an argument
2 that explains why the safety clause of the anti-
3 backsliding statute, which I explain prohibits
4 the permit conditions that were adopted in this
5 case, how you reconcile that with the backsliding
6 exception.

7 JUDGE STEIN: But did you cite this in
8 your brief, the Carlota case?

9 MR. SUGARMAN: I do not.

10 JUDGE STEIN: This proposition?

11 MR. SUGARMAN: I do not.

12 JUDGE STEIN: I have one additional
13 question, which goes to burden, and that is whose
14 burden is it to demonstrate that the region based
15 or did not base the 2012 concentration limits on
16 the 2006 TMDL? Is that Petitioner's burden or is
17 that the Agency's burden?

18 MR. SUGARMAN: The burden in this case
19 can be stated like this: The EPA has the -- the
20 EPA permit writer has the obligation to exercise
21 his or her considered judgment in reviewing all
22 of the information in the record. And if the EPA

1 writer cannot reconcile inconsistencies in the
2 record or internal contradictions in the record,
3 either in a document like we see in the TMDL or
4 between the TMDL and the water quality-based
5 effluent limitation, then this Board may not
6 sustain that permit writer's decision. It is
7 ultimately the permit writer's burden to exercise
8 considered judgment to demonstrate that water
9 quality standards will be attained.

10 JUDGE STEIN: So are you suggesting
11 that it's not Petitioner's burden to establish
12 clear error? I mean, I think the Board's case
13 law on that front --

14 (Simultaneous speaking.)

15 MR. SUGARMAN: No, it is my burden to
16 establish clear error. Of course I concede that
17 point. That's what the regulations say.

18 JUDGE LYNCH: We have one additional
19 question before --

20 JUDGE STEIN: I thought Judge Ward had
21 a follow up.

22 JUDGE LYNCH: Yes, she does. We have

1 one additional question.

2 JUDGE STEIN: Okay.

3 JUDGE LYNCH: Thanks.

4 JUDGE WARD: So I'm going to take you
5 back to the 2006 and 2016 TMDL and the 2007
6 permit. I think this also applies to the 2012
7 permit.

8 You've cited us to Chapter 7 which --
9 of the Permit Writer's Manual which talks about
10 applying the anti-degradation standard, but
11 before you get to Chapter 7, Chapter 6 speaks to
12 the setting of the water quality-based effluent
13 limitations. In that chapter, at least the 2010
14 manual; and I haven't checked the earlier manual,
15 but at least the 2010 manual refers to doing so
16 in reference to the TMDLs that may exist.

17 So before you even get to the question
18 of anti-backsliding and what prior permit limits
19 were in place, you start with what the water
20 quality standard, any applicable TMDL, to
21 determine the water quality-based effluent
22 limitation. And reading the manual that way it

1 seems that if you're reading of the timeline of
2 the 2006 TMDL and the 2007 permit is that we
3 would presume perhaps that they followed that
4 process, that order of operations, if you will,
5 in terms of setting the limits at that time and
6 then again in 2012.

7 MR. SUGARMAN: But --

8 JUDGE WARD: So why isn't that the
9 right way to read it?

10 MR. SUGARMAN: No, no, no, that's a
11 fine way to read it. And what you're doing is
12 you're bringing us back to the fact that this
13 Board has a rule, which I acknowledge applies in
14 this case, which is that a permit limitation must
15 be consistent with a TMDL. That is true. And
16 I'm supposing that's what Chapter 6 says, Judge
17 Ward.

18 But it's important to go back to this
19 Board's decisions to find out, well, what does
20 that consistency determination actually mean? It
21 does not mean, I can assure you; this Board has
22 held many times, that the effluent limitation

1 needs to be identical to the Wasteload
2 Allocation. In fact, in one of -- it just
3 doesn't.

4 JUDGE LYNCH: It doesn't prevent it --

5 MR. SUGARMAN: Pardon?

6 JUDGE LYNCH: -- from being the same?

7 MR. SUGARMAN: It doesn't prevent it
8 from being the same, but it doesn't require it to
9 be the same. What the statute and the
10 regulations require is that the EPA not issue a
11 permit that will -- that cannot provide
12 assurances of attainment of water quality
13 standards.

14 JUDGE WARD: I think that is a
15 response that goes to or is in support of your
16 challenge to the 2017 permit. I'm really focused
17 though on the 2007 and 2012 permits where in fact
18 it is not only consistent, it seems, what I heard
19 -- understood you to say earlier, it is in
20 alignment with. It basically tracks not just the
21 2001 permit say for phosphorous, but the 2007
22 permit also tracks and is consistent, if not kind

1 of -- it is identical to what was set forth in
2 the 2006 TMDL.

3 And that a fair reading then, it seems
4 to me -- and I'd like your response to the
5 contrary, if you have one. A fair reading to me
6 seems to be a permit writer in 2007 must have
7 necessity -- or necessarily looked at the 2006
8 TMDL in setting the limits, and then after having
9 done so only at that point looked at the prior
10 limits to ensure there was no backsliding.

11 MR. SUGARMAN: Of course it is
12 absolutely the case that the permit writer in
13 2007 looked to the 2006 TMDL. That is clear and
14 that's clear on the face of the permit itself.

15 For purposes of my argument, however,
16 I'm not saying that those effluent limitations
17 have not been there forever until 2017. In fact,
18 they have been. My argument is that despite the
19 fact that those numbers: the 0.1 and 1.0 for TP
20 and TN, respectively, appeared in the TMDL, they
21 are not Wasteload Allocations or Load Allocations
22 as that phrase is used in the anti-backsliding

1 exception.

2 JUDGE WARD: I did have one more. I'm
3 sorry. So then on the 2016 TMDL your -- what I
4 understood you to argue previously or earlier was
5 that the permit writer here didn't do anything
6 more than just look to that and then apply it in
7 this case. In your comments did you cite to any
8 information post the EPA approval of the 2016
9 TMDL that you believe was overlooked?

10 MR. SUGARMAN: By the EPA permit
11 writer? Yes, I did. I overlooked the fact that
12 -- I mean, I noted to the permit writer that what
13 he was proposing to do in a river that was in
14 non-attainment status for total nitrogen as he
15 was proposing to cut and paste from the TMDL a
16 mass load limitation that would double the amount
17 of TN into a river that was already polluted with
18 that parameter without any offsetting decrease.

19 JUDGE WARD: But was there any new
20 information or new data post the EPA approval of
21 the 2016 TMDL that you pointed out the permit
22 writer needed to consider?

1 MR. SUGARMAN: No, I -- what I --
2 there was none. I believe that what I pointed
3 out to the EPA permit writer was that the 2006
4 TMDL said if we want to assure attainment of
5 water quality standards in New Mexico, we cannot
6 add anymore nitrogen to the system, period. I
7 brought that to his attention. That wasn't
8 subsequent to the 2016 TMDL. That was in the
9 2016 TMDL. And I also pointed out to the permit
10 writer that the Environment Department had
11 acknowledged in the 2016 TMDL that the stream was
12 still -- is still in a non-attainment status for
13 nutrients.

14 JUDGE LYNCH: And the 2016 TMDL though
15 also discussed other strategies to manage
16 nutrients, right?

17 MR. SUGARMAN: There are all sorts of
18 strategies, Your Honor. I have strategies
19 myself. But implementation strategies, you can
20 look on the very first paragraph of that section
21 of the TMDL. Those are not regulatory. Those
22 are ideas that NMED has that it divines --

1 JUDGE LYNCH: Are you -- yes.

2 MR. SUGARMAN: And that paragraph says
3 these are recommendations that the EPA is not
4 bound to follow or adhere to. And again, Judge
5 Lynch, on that particular matter again it's
6 important to recognize that what the 2016 TMDL
7 does is it says, well, we do have a need to
8 reduce total loading in the system, so what we're
9 going to do is we're going to develop at some
10 point in the future a watershed-based plan which
11 they characterize as TMDL Phase 2. They don't
12 say when they're going to do that. They just say
13 this is what we're going to do in order to get --

14 JUDGE LYNCH: Do you agree that the
15 2016 TMDL, the validity of that is not before the
16 Board?

17 MR. SUGARMAN: I do.

18 JUDGE LYNCH: All right. So with that
19 we'll conclude your argument. You'll have time
20 for rebuttal, but let's add -- I think we need to
21 add four minutes to EPA's time if they need that.

22 MS. PARIKH: You've just heard from

1 Petitioner's counsel that the revised limits in
2 this permit will not attain standards. What I
3 would like to bring the focus back to is the
4 fundamental fact that these permit limits were
5 revised based on a revised TMDL that EPA approved
6 recently as assuring the attainment of water
7 quality standards.

8 All of the technical issues and
9 disputes that the Petitioner has raised are
10 really all about the TMDL. The flow assumptions,
11 the ratios, the increase in mass loadings to an
12 impaired water body. That all goes to the
13 sufficiency of the TMDL and whether that TMDL was
14 set at a level necessary to meet water quality
15 standards.

16 The Board has previously in the City
17 of Moscow case that challenges to the sufficiency
18 of a TMDL are not properly before the Board in
19 the context of a permit appeal which the
20 Petitioner has just acknowledged he agrees with.

21 There is of course a forum to address
22 the technical disputes that the Petitioner has

1 with the TMDL: in a state court challenging the
2 TMDL, which the Petitioner has already availed
3 itself of; those proceedings are under way, or in
4 a district court, federal district court
5 challenging EPA's approval of that TMDL.

6 JUDGE LYNCH: Counsel, can I ask --
7 interject a question here? In terms of the water
8 quality standards, does EPA see a difference in
9 the required analysis between the provision under
10 303(d)(4) of assuring water quality standards
11 between that and the savings clause in 402(o)3
12 that talks about no violations of water quality
13 standards?

14 MS. PARIKH: There is no fundamental
15 difference between the two. Both of them are
16 about assuring attainment of water quality
17 standards. I'll note that the savings clause
18 also refers to -- the chart that Petitioner had
19 pointed to also refers to ensuring that effluent
20 guidelines are met, but in terms of the savings
21 clause at 402(o)3 and the requirement to assure
22 attainment -- that the revised limit assure

1 attainment of standards in 303(d)(4)(A). I don't
2 see a fundamental difference between the two.

3 JUDGE LYNCH: And in practice in
4 303(d)(4)(a) is one way to assure water quality
5 standards revising a TMDL?

6 MS. PARIKH: That is absolutely one
7 way to assure -- one way to demonstrate that the
8 revised limits would assure attainment of water
9 quality standards would be to point to a TMDL
10 that has made that determination, which is what
11 the permit writer relied on in this particular
12 case. And I'd like to offer three reasons why
13 the permit writer's reliance on the TMDL was
14 reasonable in this situation.

15 First I'll point out that this is --

16 JUDGE LYNCH: And which TMDL are you
17 talking about?

18 MS. PARIKH: I am referencing the TMDL
19 that is in the record, which is the November 3rd,
20 2016 version that was --

21 JUDGE LYNCH: Okay.

22 MS. PARIKH: -- submitted for

1 technical review. The first reason I'd offer is
2 that this is a recent TMDL. The TMDL was
3 approved just seven months prior to issuance of
4 the permit. We're not talking about the kind of
5 situation where you have an old TMDL, where
6 there's new information to suggest that the
7 information underlying the assumptions in the
8 prior TMDL have -- has changed or is somehow
9 inaccurate.

10 In this situation; this brings me to
11 my second point, there is no new information.
12 All of the information was considered by the
13 approver of the TMDL. It was all submitted as
14 part of the TMDL issuance process. It was before
15 the EPA when EPA approved the TMDL and the
16 Petitioner has not offered any new data or
17 analysis as the Petitioner's counsel conceded.

18 What the Petitioner submitted as part
19 of the permitting proceeding was essentially a
20 summary of its comments that were submitted on
21 the TMDL and then an attachment of those
22 comments, but there was simply no new information

1 for the permit writer to consider here.

2 And thirdly I would offer that our
3 regulations contemplate that a permit writer
4 would rely on the TMDL by requiring that the
5 permit include limits consistent with the
6 assumptions and requirements of the TMDL.

7 Completely agree that this does not mean blind
8 deference to a Wasteload Allocation in a TMDL.

9 Certainly a permit writer can deviate
10 from a Wasteload Allocation in a TMDL where there
11 is information to support that, but where, as
12 here, there is no new information that the EPA
13 did not already consider in approving the TMDL it
14 is reasonable and certainly not an abuse of
15 discretion for the permit writer to rely on all
16 of the analysis that went into that TMDL issuance
17 and approval.

18 And that analysis is extensive. It
19 includes state interpretations of its water
20 quality standards. It includes technical and
21 policy and scientific judgments. It includes
22 modeling and calculations. And there's nothing

1 that requires a permit writer to supplant all of
2 that analysis with his or her own in the context
3 of an individual permit issuance where that
4 permit writer has no new information before it
5 that was not already considered by the EPA in
6 that prior action.

7 JUDGE LYNCH: Can I take us back to
8 the 2012 limits. Where in the record do we look
9 to determine whether the 2012 limits were based
10 on the 2006 TMDL?

11 MS. PARIKH: You would look to the
12 2006 TMDL which has a Wasteload Allocation, a
13 concentration-based allocation that is almost
14 identical to the one that was included in the
15 2012 permit. And I would also add that the
16 language in 303(d)(4)(a), it does refer to based
17 on a TMDL, but it also refers to based on a TMDL
18 or other Wasteload Allocation.

19 And EPA has interpreted the term
20 "other Wasteload Allocation" or the term
21 "Wasteload Allocation" to mean not just a
22 Wasteload Allocation that is developed in the

1 context of a TMDL, but a Wasteload Allocation can
2 refer more generally to a pre-TMDL situation
3 where you develop a water quality-based effluent
4 limit for an individual permit. The reference in
5 the statute is not just to a TMDL.

6 JUDGE STEIN: Why wouldn't we look to
7 the 2012 fact sheet as evidence of whether or not
8 the 2012 limits were based on the 2006 TMDL?

9 MS. PARIKH: My recollection of that
10 fact sheet is that it does not explicitly say
11 that we are including this limit based on the
12 TMDL, but the lack of an explicit statement
13 saying that the limits are based on the TMDL does
14 not mean that the limits were not based on the
15 TMDL particularly given the requirement in the
16 regulation that permit limits be consistent with
17 the assumptions and requirements of the TMDL.

18 JUDGE LYNCH: And do you agree with
19 Petitioner that the two thousand -- I'll call it
20 the 2001 permit did not have a limit for
21 nitrogen, but just a concentration limit for
22 phosphorous?

1 MS. PARIKH: It did not have a limit
2 for nitrogen. I believe it had both a
3 concentration-based limit and a mass-based limit
4 for phosphorous.

5 JUDGE LYNCH: And we can -- we'll
6 potentially follow up on this later, but does EPA
7 have an official copy of that permit?

8 MS. PARIKH: I am sure one could be
9 found.

10 JUDGE LYNCH: All right. And then
11 another question I had for EPA based on the
12 briefs is if the Board were to conclude that the
13 permit revisions are consistent with the
14 backsliding exception, would we need to expressly
15 decide whether there was in fact backsliding?
16 And one of the reasons I ask that question is I
17 was not clear from EPA's briefs what your
18 position on that was, whether there was actually
19 backsliding.

20 MS. PARIKH: I think we would concede
21 that the permit limit between the 2012 permit and
22 the 2017 permit with respect to total nitrogen --

1 the mass-based limit went from 18.9 to 37.8. I
2 think we would concede that that limit is less
3 stringent. And the concentration-based limits
4 were removed in the 2017 permit. So I don't
5 think that we would disagree that the permit
6 limits have been made less stringent.

7 Our position is that the -- that such
8 revision is in accordance with the exceptions
9 provided in the statute that specifically allow
10 for the revision of permit limits based on
11 revised TMDLs essentially because the end point
12 is the same. It's about getting to water quality
13 standards and you have a new plan to get there
14 and the statute allows the -- for limits to be
15 revised in accordance with that new plan.

16 JUDGE WARD: Counsel, could you
17 address Mr. Sugarman's argument that the 2007
18 permit limits -- well, that the 2006 TMDL
19 reflected the concentration limits that appeared
20 in the 2007 permits and 2012, but that those
21 concentration limits in the TMDL weren't really
22 part of the TMDL, were developed external to the

1 TMDL, and so the permit limits themselves the
2 following year are also not based on the TMDL? I
3 think this is an also an argument they make at
4 page 6 and 7 of their petition.

5 MS. PARIKH: The TMDL specifically
6 includes a section titled, "Wasteload
7 Allocations," and it includes the concentration
8 limit as a Wasteload Allocation of the TMDL.

9 JUDGE WARD: For this plant?

10 MS. PARIKH: This plant is the only
11 plant source on the water body, so the Wasteload
12 Allocation would apply specifically with respect
13 to this plant.

14 JUDGE WARD: So you read the 2006 TMDL
15 as in fact --

16 MS. PARIKH: Containing --

17 JUDGE WARD: -- making a decision in
18 containing and approving at that point in time
19 those as the appropriate Wasteload Allocations as
20 translated into concentration limits for this
21 plant?

22 MS. PARIKH: Correct.

1 JUDGE LYNCH: So I had a question
2 about the concentration limits. Petitioner
3 argues that the concentration limits are
4 necessary in addition to the mass limits.
5 Explain for us EPA's determination that the
6 concentration limits were not necessary.

7 MS. PARIKH: The permit did not
8 include concentration-based limits because in
9 being consistent with the TMDL, which removed
10 those concentration Wasteload Allocations and
11 indicated in the implementation section of the
12 TMDL that such concentration-based limits were
13 not needed.

14 JUDGE LYNCH: And what was the
15 rationale for that?

16 MS. PARIKH: That is a technical
17 question that the TMDL does address to some
18 degree by explaining that nutrient impairments
19 are very different than impairments for acute
20 toxicity where the need to protect against those
21 acute toxic effects requires concentration-based
22 limits.

1 JUDGE WARD: Are you saying then that
2 the concentration -- putting a concentration
3 limit in the 2017 permit would have been
4 inconsistent with the 2016 TMDL?

5 MS. PARIKH: It would not have been
6 inconsistent. Certainly the term "consistent"
7 with the assumptions and requirements of the TMDL
8 does allow the permit writer to deviate from
9 what's in the TMDL where there's information to
10 support that, but where you have a TMDL that was
11 approved by EPA as attaining water quality
12 standard and that TMDL indicates that
13 concentration-based limits are not needed, it
14 would not -- it was not unreasonable for the
15 permit writer to determine that those limits were
16 not needed in this permit absent any additional
17 information that was before the permit writer.

18 JUDGE WARD: And is that a -- that's
19 a separate question. So that's a separate
20 question that the permit writer needed to
21 consider, separate from the reasonableness of
22 relying on the TMDL itself? In other words, once

1 you -- is it reasonable to rely on the TMDL. The
2 permit writer, your argument is, is reasonable in
3 doing so. Separate question: Do you need to
4 have concentration limits in addition to mass-
5 based limits? The permit writer needed to also
6 consider that question independently on this
7 record. Is that right?

8 MS. PARIKH: The permit writer would
9 consider what limits are necessary to meet water
10 quality standards. And in this particular case
11 the permit writer looked to the TMDL which
12 considered that question and reasonably relied on
13 the judgment in the TMDL that such concentration-
14 based limits were not needed for this water body.

15 JUDGE WARD: And I think the other
16 point that Mr. Sugarman makes which perhaps you
17 could address -- I think the -- just maybe the
18 intuitive appeal I think he's trying to point out
19 is the fact that this water body is not meeting
20 water quality standards and yet we're increasing
21 the limits for -- or the amount of nitrogen and
22 phosphorous this plant can discharge. How do

1 those things square up?

2 MS. PARIKH: That is a technical
3 question which I will address, but I will sort of
4 first note that this really -- the question
5 really does -- like many of the questions that
6 Petitioner has raised, really do go to the
7 sufficiency of the TMDL. How does the TMDL allow
8 for increased discharges of nitrogen to a water
9 body that's already impaired and how does that --
10 how is that at a level that will meet standards?
11 So it really does go to the sufficiency of the
12 TMDL, which I don't think is properly before the
13 Board.

14 But to address sort of the technical
15 question in terms of how the permit writer could
16 reasonably find as a technical matter that the
17 limits would assure attainment of standards, I'll
18 point out that first of all the TMDL indicates
19 the stream is impaired for nutrients, but
20 marginally so.

21 And I'll also note that although the
22 Petitioner's counsel paints a picture of a water

1 body in which the permit is authorizing a
2 doubling of the mass loads of total nitrogen,
3 that actually does not comport with the reality
4 of the situation. The total point source
5 loadings from this facility have been
6 dramatically reducing over the years. So if you
7 look at the 2007 permit, the effective limit in
8 that permit, the limit that the facility was
9 meeting was 195 pounds per day or 130 pounds per
10 day depending on temperatures. You compare that
11 to the current permit limit which is currently
12 effective of 37.8 pounds per day. That's a
13 pretty dramatic reduction.

14 And in addition, the -- Ruidoso is
15 also committed to achieving certain non-point
16 source reductions including attaching septic
17 systems, 200 septic systems to the sewer line
18 which can also have a significant impact in terms
19 of non-point source reductions. In the record it
20 indicates that connecting only 30 -- sorry, 80
21 septic systems to the sewer line can reduce point --
22 reduce total nitrogen by 5.1 pounds per day.

1 So it's not unreasonable for the
2 permit writer to conclude based on these -- the
3 significant reductions in point source loadings
4 to the water body and the expected non-point
5 source reductions that the limits would assure
6 attainment with water quality standards.

7 JUDGE STEIN: I have a question which
8 I don't know whether you're prepared to address,
9 but Mr. Sugarman in his argument referred to the
10 9th Circuit decision in Carlota, which he did not
11 cite in his brief. And I'm wondering whether
12 you're in a position to say whether or not the
13 Agency agrees with his characterization of the
14 significance of that case for this case.

15 MS. PARIKH: I would request that we
16 get the opportunity to provide supplemental
17 briefing on that issue, if the Board would like
18 to hear on that --

19 JUDGE STEIN: We'll decide that later.

20 JUDGE LYNCH: We'll take that under
21 advisement and we'll consider that. Thank you.

22 JUDGE LYNCH: I had a follow-up

1 question to the question Judge Ward asked about
2 the permit writer's determination of -- before he
3 issued the permit of assuring water quality
4 standards. And you may not be arguing this, but
5 when I was listening to that the question is why
6 can't the Petitioner challenge the findings the
7 permit writer made is clearly erroneous even if
8 the basis for EPA's conclusions are the same
9 facts that supports its approval of the 2016
10 TMDL?

11 MS. PARIKH: I think that the permit
12 writer ultimately has an obligation when you're
13 talking about the anti-backsliding provision to
14 not allow backsliding where -- unless the permit
15 writer shows that the revised limit will assure
16 attainment with standards.

17 I think the question is what degree of
18 analysis is required. And I would suggest that
19 where there is -- where it is an old TMDL, where
20 there is new information the permit writer would
21 certainly need to consider all of that new
22 information in determining whether or not the

1 limits assured its attainment with standards.

2 I think what you're asking, Judge
3 Lynch, is what if there's no new information,
4 it's just the permit writer disagrees with the
5 TMDL, that the TMDL limits would get to
6 standards. I think in that situation you've
7 essentially got sort of two parts of the Agency.
8 You've got the TMDL approver saying, well, this
9 does -- this will assure attainment of standards
10 and then you've got a permit writer who disagrees
11 with that.

12 I think in that situation I would
13 expect that the issue would need to get elevated
14 and there would have to be some sort of consensus
15 within the Agency as to whether these limits
16 would achieve standards, but that's not the
17 situation you have here. You don't have a
18 situation where the permit writer is disagreeing
19 with what is in the record for the TMDL. These
20 are all issues that were raised in the TMDL that
21 EPA considered in approving the TMDL and in this
22 case the permit writer reasonably relied on that

1 decision.

2 JUDGE WARD: Let me just follow up on
3 -- in your brief; it's page 13 in footnote 10,
4 you seem to be suggesting that it really doesn't
5 matter whether the prior permit limits were based
6 on a TMDL or not, or that that's at least one
7 reading of the statute. Are you making that
8 argument in defense of this permit or are you
9 just making that as an observation?

10 MS. PARIKH: We were just making that
11 as an observation, as another plausible reading
12 of the statute, but the Board does not need to
13 rely on that reading of the statute in order to
14 find that the requirements of 303(d)(4)(a) were
15 met, because as I've explained, the limits were
16 in fact based on the TMDL and certainly were
17 based on another Wasteload Allocation.

18 JUDGE WARD: And I guess just to -- at
19 least as I read the record, again, whatever you
20 may argue elsewhere going forward, the record
21 here seems to defend the limits as in compliance
22 with the anti-backsliding requirements because

1 they were based -- the prior limits were based on
2 a TMDL. That's what your record decision is here
3 and that that's what you're defending.

4 MS. PARIKH: That is correct. That is
5 the interpretation that we have articulated in
6 for example that chart that Mr. Sugarman had put
7 up from the Permit Writer's Manual that the prior
8 limit must be based -- that the limit that is
9 being revised must be based on a TMDL, and we
10 believe that that requirement is met here.

11 JUDGE WARD: And your -- just if you
12 could say again what your best argument is that
13 the 2012 permit limits were based on the 2006
14 TMDL, the best argument you had is --

15 MS. PARIKH: The best argument we have
16 is that it's almost identical to the 2006 TMDL
17 and our regulations require that limits be
18 consistent with the assumptions and requirements
19 of a TMDL.

20 JUDGE LYNCH: I just had a few
21 questions about comparing effluent limits.
22 First, in terms of the mass limits, do you just

1 look at the two final numbers or do we have to
2 consider how those numbers were arrived at, so
3 how they were calculated flow, other things, or
4 do you just look at the two final numbers?

5 MS. PARIKH: For purposes of assessing
6 whether backsliding has occurred?

7 JUDGE LYNCH: Yes, to comparing it
8 says -- yes.

9 MS. PARIKH: I mean I suppose there is
10 an argument that the two limits are the same
11 because they essentially get to the same water
12 quality standard, but I think in this situation
13 we looked at the total pounds per day allowed
14 under the prior -- the 2012 permit and the 2017
15 permit.

16 JUDGE LYNCH: And on the concentration
17 limits since the concentration limits were
18 removed, what's the comparison? I mean, how do
19 you assess that comparison?

20 MS. PARIKH: I think you would look to
21 see whether the permit limit has been made less
22 stringent. So if you look at the 2012 limit that

1 had a concentration limit and the 2017 permit
2 that does not have a concentration-based limit,
3 there is at least the argument to be made that
4 the 2017 permit is less stringent and we would --
5 we focused on -- our arguments on why the anti-
6 backsliding exception applies as opposed to
7 whether or not the permit -- whether the permit
8 had been made less stringent.

9 JUDGE LYNCH: All right. Thank you.

10 Mr. Kendrick?

11 MR. KENDRICK: Good afternoon. May it
12 please the Board, again I'm Ned Kendrick
13 appearing on behalf of the Village of Ruidoso and
14 the City of Ruidoso Downs. With me, if there
15 were room at the counsel table would be my
16 colleagues, Retired Judge Alvin Jones in the
17 audience, and Village Counselor John Cornelius.

18 We're here today primarily to support
19 EPA in its opposition to the petition and also to
20 let you know about Ruidoso, Ruidoso's concerns.
21 We're the ones out there in the field
22 experiencing this permit. And this is a very

1 important issue for Ruidoso. They wouldn't have
2 sent three of us here if it wasn't important.
3 And there's a long history that the Petitioner
4 has summarized.

5 I want to hit three topics quickly.
6 One, that these limitations have gotten stricter
7 and stricter, and I'm going to do -- show a
8 dreaded overhead here. That's the first point.

9 Secondly, there's been some
10 discussion in the Petitioner's brief about
11 whether Ruidoso is able to meet this new
12 stringent limit. I'd like to talk about that a
13 little bit.

14 And then thirdly, I'd like to talk a
15 little bit about what we believe is really the
16 most important step that Ruidoso is doing. We
17 have a very stringent permit limit and I think
18 ultimately water quality will be improved with
19 non-point source control.

20 So the EPA attorney has discussed this
21 briefly, and this is also in my notice of
22 appearance. I don't know if we can turn this

1 overhead on.

2 This -- again, you've seen this
3 before. It's in my notice of appearance. What
4 Ruidoso wants to do is counter this story, this
5 appearance that's --

6 JUDGE LYNCH: Excuse me. Just for the
7 record can you identify the source of this
8 document?

9 MR. KENDRICK: Certainly.

10 JUDGE LYNCH: This was in your brief?

11 MR. KENDRICK: This is in my brief,
12 Ruidoso's notice of appearance, and it's at page
13 2.

14 JUDGE LYNCH: Okay. Thank you.

15 MR. KENDRICK: So it's in the record.
16 There's this perception -- or when I read
17 Petitioner's brief, I get the sense that
18 Petitioner is saying that Ruidoso kind of has a
19 license to put in a lot more nutrients into the
20 river than it has in the past, that there's a
21 doubling of discharge of nutrients.

22 So what we want to do is show that the

1 opposite is true. There's been a tightening of
2 nutrient limits over the years since the new
3 plant was built and went online in 2011. And the
4 numbers are all here for the first permit, the
5 2007 permit.

6 The limits were up at 195 pounds per
7 day and 130 pounds per day. Mass loading, nine
8 milligrams per liter, six milligrams per liter
9 concentration. And that depends on influent
10 temperature. And with the 2012 permit the limits
11 got tighter. The pounds per day were 135 and 90,
12 depending on influent temperature. Six
13 milligrams per liter, four milligrams per liter.
14 And then today the limit is 37.8 pounds per day.
15 So there's a significant progression, a
16 significant tightening.

17 Now what everyone is talking about is
18 the 18.9 pounds per day. At the very end of the
19 last permit there was one month in which there
20 was a mass loading of 18.9 pounds per day. And I
21 think it's interesting just as kind of a --
22 almost an anecdote or a happenstance that that

1 limit only became effective because the 2017
2 permit was -- I'm sorry, the 2012 permit was
3 administratively continued. EPA I understand was
4 really trying to get the new permit out before
5 the last day of the previous permit. And if that
6 had happened, like we didn't have the July 31st,
7 2017 final limitation effectiveness, there would
8 be no conversation today about backsliding.

9 So admittedly it doesn't remove the
10 existence of that one month of the 18.9 pounds
11 per day, but I think it's interesting that it's
12 kind of a happenstance that that occurred.

13 JUDGE WARD: Mr. Kendrick, is that --

14 MR. KENDRICK: Yes?

15 JUDGE WARD: So are you making a legal
16 argument based on this progression of the
17 lowering of the limits save this one month or are
18 you making -- I'm trying to understand the point
19 you're making --

20 MR. KENDRICK: Okay.

21 JUDGE WARD: -- in terms of the
22 relevance to the legal issue before the Board.

1 MR. KENDRICK: Well, I'm -- it's
2 really -- I'm really trying to tell the Ruidoso's
3 story. So I would say it's not a legal argument
4 and I apologize if I'm taking the Board's time
5 with this background, but I'd like to let you
6 know how hard Ruidoso has been working.

7 By the way, Ruidoso, the village has
8 about 8,000 people; the little city is about
9 3,000 people. So you have these two small towns
10 that are struggling with this and they've
11 developed a state-of-the-art nutrient removal
12 facility. And it's -- and the limits of
13 technology are considered to be 3.0 milligrams
14 per liter. The NMED has made that made point in
15 the TMDL. So that's in the record.

16 So here we are as we've demonstrated
17 in this overhead. The equivalent that we're at
18 right now, it's not a standard, not an effluent
19 limit, but we're down at about 2.37, rounded to
20 2.4 milligrams per liter. This permit, just so
21 you all know, is incredibly stringent. It is
22 beyond the limits of technology. So that's my

1 point there, that Ruidoso is working very hard.

2 There was some issue raised in the
3 Petitioner's brief about, well, gee, not only is
4 this a terrible permit, but it's -- Ruidoso can't
5 meet it. And it's true, we're very worried about
6 meeting this permit because it is below the
7 commonly recognized limits of technology.

8 But through hard work of the plant
9 director we have had a pretty good string of
10 success for the first 13 months of the permit.
11 We've only exceeded the nutrient limit once in
12 August of 2018, just two months ago. And that
13 was due to summer monsoon rains that -- where the
14 water infiltrated into the ground and then soaked
15 the ground and then entered the collection pipes,
16 the wastewater collection pipes through cracks.
17 And it brought too influent to the plant and it
18 reduced the ability of the plant to treat nitrate
19 -- nutrients: phosphorous and nitrogen.

20 So, and the plant is working very hard
21 on fixes for that and they hope it doesn't happen
22 again. There's some carbon that can be added to

1 the plant wastewater basins to kind of feed the
2 bugs that eat the nutrients. So we're working
3 very hard on that.

4 And then really the problem is that
5 this plant is at over 6,000 feet of elevation.
6 The weather gets very cold. So we can't
7 absolutely promise we can meet the limit every
8 single month, because if you get very cold
9 weather at this elevation; it's a biological
10 treatment plant, it can harm the nice bacteria
11 that chew on the nutrients. So --

12 JUDGE LYNCH: And so, Mr. Kendrick --

13 MR. KENDRICK: Yes?

14 JUDGE LYNCH: -- how is EPA Region 6
15 supposed to factor in those statements you just
16 made when they're making a determination about
17 ensuring water quality standards?

18 MR. KENDRICK: Well, I think they need
19 to know how hard we're trying and our success to
20 date with the new permit, 12 out of 13 months.
21 So I think we have a good track record and we're
22 very optimistic about the future. And I am

1 trying to let you all know how difficult it is,
2 but Ruidoso is doing I think well enough that
3 this permit -- I think EPA can assume that these
4 limits will be met, albeit there will be a few --
5 occasional excursions for instance in very cold
6 weather, but -- a few outliers, but --

7 JUDGE LYNCH: and I also wanted to ask
8 you if you have any information based on the
9 record as to whether or not the 2012 permit
10 limits were based on the 2006 TMDL.

11 MR. KENDRICK: I believe they were.
12 It seemed like the final limits were -- reflected
13 the 2006 TMDL, so the final numbers for -- the
14 numbers in the final as opposed to interim
15 limits.

16 I will just digress and say that the 2007
17 and 2012 permits contained schedules of
18 compliance that allowed for interim limits.

19 JUDGE LYNCH: You can have an
20 additional two minutes.

21 MR. KENDRICK: I have a little more
22 time?

1 JUDGE LYNCH: Yes.

2 MR. KENDRICK: Okay. Thank you. So
3 I think that the answer to your question is yes,
4 the 2012 permit was based on the 2006 TMDL. Yes.

5 And then I can move quickly here. My
6 final point has to do with the importance of non-
7 point source controls, which has been alluded to
8 by EPA's counsel.

9 The permit does contain a requirement,
10 the current permit that's under review contains a
11 requirement to replace 200 on-site treatment
12 systems. And 60 of these have already been
13 replaced. There were -- we have 140 to go, and
14 we're on track to do that. That's the village.
15 And the little city of Ruidoso has succeeded in
16 replacing 112 of these units since the plant has
17 been operating. And this is important because --
18 and I can refer you to the record on this, and it
19 is -- it's in the administrative record. It's
20 the Molzen Corbin study. Darn it. I can -- I
21 don't want to pause too long here, but I --

22 JUDGE LYNCH: That's fine. We'll --

1 MR. KENDRICK: It's there. It's the --

2 JUDGE LYNCH: -- find it.

3 MR. KENDRICK: -- April of May 2017
4 wastewater collection systems study. But there's
5 a really important fact in there that -- which I
6 think the EPA already may have alluded to that
7 for every 80 units that are on-site systems that
8 are taken out of service and replaced with
9 hookups to the treatment plant, that's a 5.1
10 pound per day reduction of total nitrogen to the
11 river.

12 So if you -- we get to our 200 during
13 the term of the permit, that's a reduction of
14 12.75 pounds per day. That's a pretty good
15 proportion of the 37.8, about a third. And
16 Ruidoso has committed to continuing with those
17 septic hookups.

18 So I think that's something that
19 probably has influenced EPA, that -- how much
20 more can you get out of this plant when we're
21 beyond the limits of technology? So the real
22 future of water quality improvement is the non-

1 point source control.

2 And the other big project is -- it's
3 a sewer system repair/rehabilitation project, and
4 out of the bad luck of a flood in June of 2008;
5 that flood caused a lot of the collection lines
6 to be damaged, I guess there was a silver lining
7 that the Federal Emergency Management Agency,
8 FEMA, is working with Ruidoso with grant money.
9 And the total project will be about \$36 million.
10 But a key piece of the project will be the repair
11 of cracks and leaks in the collection system.

12 And there are two important benefits
13 to that: One, when -- these collection systems
14 above the water table, it leaks nutrients into
15 the ground which gets to the river. So we'll --
16 that will be a very important prevention of
17 pollution to the river.

18 And also when these pipes are below
19 the water table, there will no longer be
20 infiltration of groundwater into the lines, which
21 caused the problem we had two months ago when you
22 have a dilute wastewater coming into the plant.

1 Not enough carbon for the bugs to get rid of the
2 nutrients.

3 So those are important things that the
4 communities are working on. We're very
5 optimistic that the river will be in compliance.
6 Combination of a very strict permit and our on-
7 site and sewer line rehabilitation projects.

8 JUDGE WARD: I just wanted to go back
9 to the question I raised, and I should have been
10 a little bit more specific. I was focused on the
11 -- your filing and I took the chart that you were
12 sharing with us perhaps to be arguing that in
13 this case there is no backsliding because in fact
14 save the one month the limits have gone down.
15 But you argued -- you said earlier you're not
16 making a legal argument based on these facts. Is
17 that right?

18 MR. KENDRICK: Correct. I think you
19 have to -- I mean, we're caught with that one
20 month. It just happened by -- just because the
21 permit -- the old permit was continued. So it
22 just -- I thought it was interesting background,

1 but doesn't -- but there it is. So I'm not
2 arguing -- I'm not --

3 JUDGE WARD: Okay.

4 MR. KENDRICK: -- making a legal
5 argument. I'm making a factual argument just to
6 -- yes.

7 JUDGE WARD: Okay. That's helpful.
8 Thank you.

9 JUDGE LYNCH: Thank you. Mr.
10 Sugarman, your five minutes?

11 MR. SUGARMAN: Judge Ward, I just want
12 to address that one issue briefly.

13 Mr. Kendrick's table would have been
14 perhaps more helpful and complete if it had
15 indicated that the limits in his far right column
16 were interim limits that were adopted pursuant to
17 compliance schedules that were incorporated into
18 those permits.

19 The final effluent limitations were as
20 -- just as we've been talking about all day long,
21 and they -- and those effluent limitations,
22 despite the existence of the compliance

1 schedules, went into effect on the final day of
2 the permit. And it's the final effluent
3 limitations which the EPA needs to look at when
4 it is assessing whether or not there is
5 backsliding from a legal perspective. And I can
6 give you a regulatory citation for that, if you
7 would like one.

8 JUDGE LYNCH: Mr. Sugarman, I
9 understand that. If you want to regulatory
10 citation --

11 JUDGE WARD: Oh, I think that -- I
12 understand your point.

13 MR. SUGARMAN: Okay. Then I want to --

14 JUDGE LYNCH: But I had a question
15 about that.

16 MR. SUGARMAN: Yes.

17 JUDGE LYNCH: I understand the legal
18 point, but factually doesn't the fact that the
19 City of Ruidoso and the wastewater treatment
20 plant was operating under those interim limits
21 actually impact the state of the water in the
22 river?

1 MR. SUGARMAN: Well, to the extent
2 that they make an effort to achieve those limits
3 and that they're successful and that the
4 discharge of the pollutant is reduced, then of
5 course, yes, it does.

6 JUDGE LYNCH: But also that new limits
7 -- the final limit and the new limits that came
8 into effect in 2017 should be expected to impact
9 the water quality.

10 MR. SUGARMAN: If -- they will impact
11 the water quality. I have no doubt about that.
12 I don't think that it will be for the better. I
13 think that the -- a permitted discharge is -- of
14 the pollutant is now greater than it was before.

15 I want to directly address the source
16 of the concentration limits for Judge Ward, Judge
17 Stein and you, Judge Lynch as well.

18 We spent a lot of time talking about
19 that. I respectfully request that the Court --
20 the Board look at page 47 of the 2006 TMDL and
21 page 1 of what I believe to be the final 2016
22 TMDL which sets out tables for Wasteload

1 Allocations as they were calculated in the TMDLs.
2 The Board will find that there is no Wasteload
3 Allocation that is stated as a concentration
4 limit. There was not -- and I just state this to
5 follow up on my point earlier that the
6 concentration limits are exogenous to the TMDL.
7 They are not calculated in the TMDL. Look at the
8 tables. It's there or not there for your own
9 eyes.

10 Second, I'd like to say that the big
11 picture here, the really big picture that the
12 Board -- I can't stress how important this is for
13 the future administration of the Clean Water Act.
14 The Board really needs to consider carefully what
15 the relationship is between a TMDL and then
16 subsequent NPDES permits that are issued
17 consistent with that TMDL. The Board has perhaps
18 not plumbed that as much as it could have, but
19 what the Board has stated in the past is that
20 "consistency" means cannot exceed.

21 The Board has also -- a Wasteload
22 Allocation is a maximum. The Board has also held

1 in the In re Moscow case that was cited by Ms.
2 Parikh that an effluent limitation in a permit
3 that is lower than a Wasteload Allocation is in
4 fact permissible.

5 JUDGE LYNCH: Mr. Sugarman, does it
6 matter whether or not there's new information
7 between the time of the TMDL and the issued
8 permit?

9 MR. SUGARMAN: Not -- it doesn't make
10 any difference if that information does not find
11 its way into the considered judgment of the
12 permit writer.

13 JUDGE LYNCH: And what's the new
14 information in this case that you're relying on
15 between the TMDL and the permit?

16 MR. SUGARMAN: I am not relying on new
17 information. As I stated I believe in response
18 to a question by Judge Ward, I tried to direct
19 the permit writer's attention to the very
20 relevant facts as they are set out in the TMDL.
21 That's what I tried to do, not to direct -- not
22 to provide new information to the permit writer.

1 The permit writer in this case doesn't
2 -- in the response to comments the permit writer
3 says, oh, the Petitioner is unhappy because
4 there's no concentration limit. What the permit
5 writer doesn't do is he doesn't provide any
6 response to my comment. The permit writer
7 provides absolutely no explanation whatsoever as
8 to why the concentration limits were deleted from
9 the 2017 permit.

10 Ms. Parikh right has said, well, they
11 were thinking about this at NMED. But what you
12 will not find is a shred of evidence in the
13 record that the permit writer gave the matter any
14 consideration whatsoever.

15 I have 48 seconds left. And those --
16 I want to say the point here -- or I'm over 56
17 seconds -- the point is -- and it's the point
18 that the 9th Circuit makes in the Friends of the
19 Pinto Creek decision, which I did not cite to the
20 Board in my brief, Judge Stein. The point is
21 that the 9th Circuit recognizes that there is a
22 different function between a TMDL and an NPDES

1 permit.

2 The EPA recognizes that fact in their
3 brief when they say the TMDL is a planning
4 document. It is not a regulatory document. If
5 everything goes as planned in the future and
6 these projects are implemented and Ruidoso does a
7 good job and non-point source reduction is
8 successful and the world operates as it should,
9 then yes, then the water quality standards will
10 be attained according to the TMDL. But that's
11 not where we are right now.

12 We're in a very different situation
13 where the loads that are being discharged into
14 the river are already 73 percent above the target
15 loads, where even the Permittee says that they
16 can't assure that they were going -- that they
17 will comply with their permit limitations. Well,
18 if they can't comply with their permit
19 limitations, then that sort of undercuts the very
20 basis of the TMDL, which according to the EPA is
21 the basis --

22 JUDGE LYNCH: is that an enforcement

1 issue for the region to address?

2 MR. SUGARMAN: I'm getting ready, but
3 -- and my last comment will be on the
4 concentration limit, Judge Ward and all of Your
5 Honors. If the EPA had stated a 2.41 milligram
6 per liter concentration limit in the permit, I
7 would not be here arguing today about the
8 deletion of the concentration limit in this
9 proceeding.

10 JUDGE WARD: Either the nitrogen or
11 the phosphorous?

12 MR. SUGARMAN: Total nitrogen.

13 JUDGE WARD: Right.

14 MR. SUGARMAN: Nitrogen. Did I say
15 phosphorous?

16 JUDGE WARD: I think --

17 (Simultaneous speaking.)

18 MR. SUGARMAN: The phosphorous is a
19 different matter. Phosphorous is the -- the
20 phosphorous, the calculated phosphorous limit
21 actually goes down under the 2017 permit limit.

22 JUDGE WARD: So you're not arguing

1 here that there should have been a concentration
2 limit for phosphorous in the final permit?

3 MR. SUGARMAN: No, I am arguing. I'm
4 just -- our main concern, my client's main
5 concern is with the doubling of the permitted
6 discharge of total nitrogen into the system.
7 That is in light of the NMED's technical
8 determination, which we agree with that all
9 increases in nitrogen loading from whatever
10 source should be avoided. Our focus is on the
11 nitrogen limit.

12 JUDGE WARD: And if there had been a
13 concentration limit for nitrogen in the permit,
14 you would not have brought this challenge?

15 MR. SUGARMAN: To the deletion of the
16 concentration limit.

17 JUDGE WARD: Okay.

18 MR. SUGARMAN: I'm sorry. If there
19 had been a 2.41 concentration limit, the
20 likelihood is that we would have not have
21 challenged the concentration limit.

22 JUDGE WARD: All right. Conclude --

1 MR. SUGARMAN: I would like to
2 withdraw that last statement that I just made. I
3 would -- that is something that I -- that was
4 something that I -- that was a statement that I
5 made off-the-cuff that was perhaps not advised.

6 JUDGE WARD: Okay. That's understood.
7 It's on the record.

8 JUDGE LYNCH: Thank you very much.

9 MR. SUGARMAN: Thank you.

10 JUDGE LYNCH: Thank you. And I'd like
11 to thank all the counsel for your arguments today
12 and Mr. Gillespie for his briefs. And this is
13 going to conclude today's proceedings. And the
14 Board will advise the parties if there are any
15 further steps on the documents and on the motion,
16 the pending motion, but we'll do that at a later
17 time. So thank you all very much.

18 MS. DURR: All rise. This session of
19 the Environmental Appeals Board now stands
20 adjourned.

21 (Whereupon, the above-entitled matter
22 went off the record at 2:46 p.m.)

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This is to certify that the foregoing transcript


In the matter of: City of Ruidoso Downs and
Village of Ruidoso WWTP

Before: EPA EAB

Date: 10-30-18

Place: Washington, DC

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