IN THE MATTER OF CITY & COUNTY OF SAN FRANCISCO (OCEANSIDE WASTEWATER TREATMENT FACILITY & SOUTHWEST OCEAN OUTFALL)

NPDES Appeal No. 91–18

Permit No. CA 0037681

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided March 24, 1993

Syllabus

Coastal Advocates and Sierra Club petition for review of Region IX's denial of their request for an evidentiary hearing concerning a National Pollutant Discharge Elimination System ("NPDES") permit issued to the City and County of San Francisco. The NPDES permit regulates discharges from a publicly owned treatment work ("POTW") and combined sewer overflow ("CSO") collection point known as the Westside Transport ("Transport"). Both the POTW and the Transport discharge through a 4.5 mile outfall, known as the Southwest Ocean Outfall or "SWOO," to federal waters in the Pacific Ocean. The petition challenges the technology-based requirements for discharges from the Transport, the mass limitations for pollutants discharged from the POTW, and the permit's compliance with the anti-backsliding provision of the Clean Water Act.

With respect to the technology-based requirements for discharges from the Transport, Petitioners maintain that the Transport is a POTW and, therefore, the Transport should be required to meet secondary treatment before discharging through the SWOO. Alternatively, they maintain that the Region failed to apply technology-based "treatment" or "limitations" as required by the "best available technology economically achievable" ("BAT") and the "best conventional pollutant control technology" ("BCT"). They maintain that the Region failed to consider and to analyze adequately the relevant factors for determining the level of treatment required by BAT and BCT. They also maintain that the permit fails to comply with the requirement of the National Combined Sewer Overflow Control Strategy of EPA that all permits for CSO discharges should require specific minimum BCT/BAT technology-based limitations.

With respect to mass limitations for discharges from the POTW, Petitioners maintain that the equation for converting to mass limitations from concentration limitations fails to establish enforceable mass limitations. With respect to the permit's compliance with the anti-backsliding provision of the Clean Water Act, Petitioners maintain that the subject permit contains less stringent toxic effluent limitations for discharges from both the POTW and the Transport than a prior permit which

was issued by the Region for that discharge and a companion State Order. (The prior permit was never put into effect.)

Held: First, the Regional Administrator correctly concluded that the portion of the Transport that discharges directly through the SWOO to the Pacific Ocean is not a POTW and that the applicable technology-based controls for this discharge are BAT and BCT to be determined on the basis of "best professional judgment" ("BPJ"). Second, those issues concerning the Region's determination of the appropriate BAT and BCT technology-based controls applicable to the discharges from the Transport directly through the SWOO to the Pacific Ocean are not ripe for review since the Region has withdrawn, and is in the process of reproposing, that portion of the permit that concerns those issues. Third, the restrictions on backsliding do not apply to the subject permit since there was no prior NPDES permit in effect for the subject discharges.

Finally, the permit fails to establish enforceable mass limitations during a specific three-month period of the year. This portion of the permit is remanded to the Region to establish appropriate mass limitations as required by EPA regulations.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Firestone:

Petitioners, Coastal Advocates and Sierra Club (Loma Prieta Chapter), seek review of Region IX's denial of their request for an evidentiary hearing on issues concerning a National Pollutant Discharge Elimination System ("NPDES") permit issued to the City and County of San Francisco pursuant to the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* ("Clean Water Act"). The Environmental Appeals Board has jurisdiction to grant or deny this petition for review under 40 CFR §§ 124.72 & 124.91. *See* 57 Fed. Reg. 5320, 5335–5337 (February 13, 1992).

I. *BACKGROUND*

A. *The Permit*

On July 25, 1990, Region IX issued the subject NPDES Permit No. CA0037681 to the City and County of San Francisco ("the City").[1]

[1] While California has been delegated NPDES permitting authority for discharges into "navigable waters" within its jurisdiction, the subject outfall extends into ocean waters beyond that three-mile jurisdiction; consequently, EPA is the NPDES permitting authority for discharges from the subject outfall; *Pacific Legal Foundation* v. *Costle,* 586 F.2d 650, 655 (9th Cir. 1978), *rev'd on other grounds,* 445 U.S. 198 (1980) (only EPA had authority to grant permits to regulate discharges beyond the "territorial seas" defined as "the belt of the seas * * * extending seaward a distance of three miles"; *see* Sections 402(b) and 502(7) & (8) of the Clean Water Act, 33 U.S.C. §§ 1342(b) & 1362(7) & (8) (state authority to administer the NPDES permit program

The permit was co-signed by the California Regional Water Quality Control Board for the San Francisco Bay Region ("State Regional Board") and designated State Order No. 90–093.[2] The subject NPDES permit regulates the discharge of pollutants from a wastewater collection, treatment, and disposal system serving the City's Richmond-Sunset Sewerage Zone. The discharge from that system occurs through a 4.5 mile outfall known as the Southwest Ocean Outfall ("SWOO"). This system serves the western third of the City which is primarily a residential area. This system presently includes the Richmond-Sunset Treatment Plant and a two-chambered tunnel known as the Westside Transport ("Transport") which is part of the City's combined sewer system. The Richmond-Sunset Plant is scheduled to be replaced by the end of 1993 with the new Oceanside Treatment Plant. The subject permit governs both the present discharge by the Richmond-Sunset Plant and the future discharge by the Oceanside Plant, together with the discharge from the Transport.

By virtue of the City's combined sewer system, the underground pipes used to carry stormwater runoff during "wet weather" conditions are the same pipes used to carry raw sewage. Ordinarily, flows during "dry-weather" conditions consist of sanitary and industrial wastes which are continuous with little variation in the rate of flow. Flows during "wet-weather" conditions, in contrast, consist of both sanitary and industrial wastewater and stormwater runoff and are susceptible to large, sudden increased flow rates depending on the actual rainfall conditions.

During "dry weather" conditions, the wastewater generated by this western portion of the City averages 22 million gallons per day ("mgd"). The Richmond-Sunset Plant can treat up to 45 mgd of combined sewage and stormwater. The new Oceanside Plant will be able to treat up to 65 mgd of the combined flow, including a maximum of 45 mgd at the secondary treatment level. During peak "wet weather" conditions, the permit contemplates that when the capacity of the treatment plant then in operation is exceeded, the resulting com-

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is limited to discharges into "navigable waters" within its jurisdiction; "navigable waters" means the waters of the United States, including the territorial seas); *Natural Resources Defense Council, Inc.* v. *U.S. Environmental Protection Agency,* 863 F.2d 1420, 1435–1436 (9th Cir. 1988) (NPDES permit issued by EPA that regulates discharges from facilities located in waters seaward from the three-mile belt of the "territorial seas" does not require state certification).

[2] According to the permit, the State adopted this order with "waste discharge limits" for the Southwest Ocean Outfall ("SWOO") in order to indicate state concurrence with EPA's action and to assure that the discharge does not cause state water quality standards to be violated in state waters." Permit, at 3–4.

bined sewer overflow ("CSO") will be diverted to the Transport in order to prevent damage to the plant.

The Transport is a 2.5 mile long concrete tunnel with a two-chambered design.[3] When incoming combined flow exceeds the treatment plant's capacity, the excess is first diverted to the Transport's east chamber, known as the "storage box," for storage until the treatment plant is capable of receiving it for treatment.[4] If the combined flow exceeds the east chamber's storage capacity, the excess passes under a baffle and over a weir to the west chamber, known as the "decant box." From the decant box the excess combined flow is pumped to the SWOO where it blends with the effluent from the treatment plant and then is discharged into the Pacific Ocean. This process removes "some settleable solids" and floatable materials from the "decant." In a year of average rainfall, the permit provides that "decant" may flow from the west chamber directly to the SWOO and then out to the Pacific Ocean twenty-six times. During certain peak wet weather events, the combined flow may exceed even the west chamber's capacity and flow through another set of weirs into state waters at Ocean Beach. A state permit issued by the State Regional Board in September 1987, NPDES Permit No. CA0038415, also known as State Order No. 87–120, restricts those discharges to a long-term average of eight times yearly.

In accordance with Section 301(b)(1)(B) of the Clean Water Act, 33 U.S.C. § 1311(b)(1)(B), which governs publicly owned treatment works ("POTWs"), and 40 CFR § 133.102, the subject permit requires that the treatment plant meet secondary treatment before discharging through the SWOO.[5] The Region has determined that the portion of the Transport, the west chamber, which pumps CSOs directly to the SWOO is not a POTW. Rather, the Region has determined that this portion of the Transport must meet the "best available technology economically achievable" ("BAT") and the "best conventional pollutant control technology" ("BCT") as required by Section

[3] According to state NPDES Permit No. CA0038415, the "Westside Project," which includes the Westside Transport, Westside Pump Station, SWOO and effluent line from the Richmond-Sunset Plant, was completed in February 1987.

[4] The Region has represented that the combined flows stored in the east chamber will receive secondary treatment at the Oceanside Plant. Region's Memorandum Opposing Petition for Review, at 11 (Hereinafter referred to as "Region's Response to Revised Petition").

[5] The Regional Administrator has reproposed, pursuant to 40 CFR § 124.60(b), the issue of whether the Oceanside Plant will be exempt, under certain wet weather conditions, from a certain secondary treatment requirement for biochemical oxygen demand ("BOD") and total suspended solids ("TSS").

301(b)(2) of the Clean Water Act, 33 U.S.C. § 1311(b)(2).[6] BAT and BCT limitations for point sources other than POTWs are often based on uniform, national effluent limitation guidelines established for different classes and categories of point sources.[7] Since no such guidelines have been established for CSOs, applicable BAT and BCT limitations are determined according to "best professional judgment" ("BPJ") on a case-by-case basis.[8]

The subject permit contains no numerical or pollutant-specific "effluent limitations" based on BPJ for pollutants discharged from the west chamber of the Transport directly to the SWOO.[9] In the Fact Sheet for the subject permit, the Region has concluded that "appropriate treatment means 'no treatment' for virtually all pollutants," [10] but that "baffling represents the BAT for floatables." The permit does include some restrictions on the discharge of pollutants from the Transport directly through the SWOO. The permit incorporates "the prohibitions and provisions of [state] NPDES Permit No. CA0038415" which regulates CSOs discharged from the Transport to state waters.[11] That state NPDES permit, in turn, requires baffling

[6] Section 301(b)(2) of the Clean Water Act also required compliance with the "best practicable control technology" ("BPT"). Section 301(b)(2), as amended, required compliance with BPT on or before July 1, 1977, and compliance with BCT and BAT on or before March 31, 1989.

[7] *See* Section 304(b) of the Clean Water Act, 33 U.S.C. § 1314(b); 40 CFR § 124.401 *et. seq.* (regulatory guidelines that set forth the degree of effluent reduction attainable through the application of BAT and BCT for specific classes and categories of point sources other than POTWs).

[8] *See* 40 CFR § 125.3(d) (regulations that set forth factors and other matters to be considered in setting technology-based treatment requirements on a case-by-case basis); 54 Fed. Reg. 37,370, 37,372 (Sept. 8, 1989) (National Combined Sewer Overflow Control Strategy which provides that all permits for CSO discharges should require specific minimum BCT/BAT technology-based limitations, established on a BPJ basis, and that such "BPJ" permits" must consider the factors set forth at 40 CFR § 125.3(d)).

[9] The permit states that:

> (CSOs) such as the decant from the Westside Transport are not normally subject to effluent limits, consistent with both EPA's and the State's CSO Control Strategy.* * * [E]ffluent limits for decant are not appropriate * * *.

Permit, at 2–3.

[10] The "no treatment" determination for BCT technology-based effluent limitations applied to suspended solids, BOD, grease and oil, pH, and coliform bacteria. Fact Sheet, at 9–12. The determination for BAT technology-based effluent limitations applied to ammonia, chlorine residual, and "metals and organic pollutants." *Id.*

[11] The subject permit prohibits "bypass", which is an intentional diversion of waste streams from any portion of a treatment facility, but allows" overflows" in accordance with "the prohibitions and provisions of NPDES Permit No, CA0038415." Permit, at 4; *see* 40 CFR § 122.41 (m) (definition of "bypass").

in the Transport to reduce "floatables."[12] The permit also requires specified best management practices ("BMPs") for toxic source reduction in the "decant."[13]

In addition to the foregoing standards for discharges from the Transport, the permit also establishes standards for discharges from "the sewage treatment plant" (or publicly owned treatment plant ("POTW")) through the SWOO.[14] More specifically, the permit establishes secondary treatment standards for certain conventional pollutants and establishes concentration effluent limitations for certain toxic pollutants discharged from the treatment plant through the SWOO. The permit also includes an equation for converting the permit's concentration effluent limitations to mass effluent limitations.[15] Under the terms of the permit, mass limitations are set based upon "actual" flow during a three-month "dry weather" period each year. There are no mass limitations set in the permit for "wet weather" flows.

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[12] State NPDES Permit No. CA0038415 require that:

> **The discharger shall prepare a facilities operation plan which is consistent with the following objectives:**
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> * * * * * * *
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> **b. Assure that all discharges from the diversion structures are first baffled to reduce floatables volume.**

As incorporated into the federal NPDES permit, the term "diversion structures" would include the Transport.

[13] The BMPs include educational control measures, regulatory control measures, and public agency control measures (recycling and alternative disposal programs). Permit, at 14–17.

[14] While the subject permit is entitled "NPDES Requirements * * * for Oceanside Treatment Facility and Southwest Ocean Outfall City and County of San Francisco," the terms of the permit apply to the discharge of wastewater to federal waters from the SWOO and require sampling of effluent from "the sewage treatment plant." *See* Permit, at 4. The Region has represented that the subject permit governs both the present discharge from the Richmond-Sunset Plant and the future discharge from the Oceanside Plant. Region's Response to the Revised Petition, at 3.

[15] Concentration limitations and mass limitations have distinct and separate regulatory and environmental functions. *See Natural Resources Defense Council, Inv. v. Texaco Refining and Marketing, Inc,* 800 F.Supp. 1, 20 (D.Del. 1992) *("Texaco"); Hercules, Inc. v. Evironmental Protection Agency,* 598 F.2d 91, 103 (D.C. Cir. 1978) ("Hercules"). Concertration limitations not only limit, in general, the concentration of pollutants in effluent discharged into the receiving waters, but they also provide an important limit on the discharge of pollutants during volumes of low flow when high concentration levels would not otherwise be limited by mass limitations. *See Hercules, supra; Texaco, supra.* Mass limitations, on the other hand, limit the total mass of pollutants that are discharged into the receiving waters, and, importantly, discourage permittees from diluting effluent to meet concentration limitations. *Hercules, supra; Texaco, supra.*

B. *Procedural Background*

The NPDES permitting history of the SWOO is somewhat unique. The City began discharging through the SWOO in September 1986 pursuant to a state NPDES permit designated "No. CA0037681" which is the same permit number as the subject permit. Since the discharge from the SWOO is into federal waters, beyond the three-mile territorial sea, in December 1986, EPA determined that the City needed a federal NPDES permit. Pending issuance of a federal permit, EPA issued an administrative order that established effluent limitations and monitoring requirements for all discharges through the SWOO.[16] Thereafter, in July 1988, the Region issued a federal NPDES permit waiving secondary treatment under Section 301(h) of the Clean Water Act, 33 U.S.C. § 1331(h).[17] This permit was co-signed by the State and designated State Order No. 88–106.[18] The Section 301(h) permit contains other requirements which Petitioners argue are more stringent than the subject permit.[19]

Several evidentiary hearing requests regarding this Section 301(h) permit were submitted in August 1988 to the Region; those requests have never been granted or denied. Rather, in February of 1990, approximately one-and-one-half years after the Section 301(h) permit was issued and the evidentiary hearing requests were submitted, the City submitted written notification to the Region of its "intent to withdraw" its application for the Section 301(h) waiver. This decision led to issuance of the subject permit. In a letter from William H. Pierce, Chief, Permits and Compliance Branch of Region IX to Robert Todd Cockburn of the Department of Public Works of the City, dated July 26, 1990, the Region agreed to accept withdrawal

[16] EPA Administrative Order No. IX–FY87–7 was issued on December 15, 1986, pursuant to Sections 308 and 309 of the Clean Water Act, 33 U.S.C. §§ 1318 & 1319. This order "expires immediately upon the effective date of a NPDES permit issued by EPA." Administrative Order IX–FY87–7, at 20.

[17] If certain requirements are met, Section 301(h) authorizes EPA, with state concurrence, to issue an NPDES permit which modifies the secondary treatment requirements for a POTW that discharges into ocean waters.

[18] According to the subject permit, the State co-signed the Section 301(h) permit for the purpose of "revising waste discharge requirement[s]" for the discharge from the SWOO. Permit, at 2. This action "represented final state concurrence on EPA's waiver of secondary treatment requirements." *Id.*

[19] *See infra* notes 50 and 51.

of the City's Section 301(h) application at the time the subject permit becomes effective.[20]

As noted, the subject permit was issued on July 25, 1990. On August 28, 1990, Petitioners filed a Request for an Evidentiary Hearing ("Hearing Request").[21] Almost one year later, on July 11, 1991, prior to issuance of any decision by the Regional Administrator to grant or deny the Hearing Request, Petitioners filed a Petition for Review on the theory that the Regional Administrator had "constructively denied" their Hearing Request on the subject permit. On December 2, 1991, the appeal was stayed until January 31, 1992, to allow additional time for the Region to grant or deny the Hearing Request. On January 31, 1992, the Regional Administrator issued notice of his intent to repropose certain portions of the NPDES permit under 40 CFR § 124.60(b) and denied the Petitioners' Hearing Request.[22] On February 4, 1992, the Region filed a Motion to Dismiss the Petition for Review. On March 2, 1992, Petitioners filed an opposition to the Region's Motion to Dismiss and a Revised Notice of Appeal and Petition for Review ("Revised Petition").

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[20] *See also* Letter from Rudolf Nothenberg, Chief Administrative Officer of the City, to Daniel W. McGovern, Regional Administrator for Region IX, dated May 30, 1990.

[21] The Sierra Club Legal Defense Fund filed the Hearing Request on behalf of the Central Coast Conservation Center ("Central Coast"), predecessor to Coastal Advocates, the Surfrider Foundation and the Sierra Club.

[22] The Regional Administrator identified the portions of the permit that were to be withdrawn and reproposed as those portions of the permit which concern the following issues:

1. Whether BAT or BCT requires effluent limitations that reflect the additional amount of pollutant removal achievable through expansion of the Transport's existing capacity to store combined flows for later treatment at the new Oceanside Plant, thus reducing the amount of decant discharged to the SWOO.
2. Whether the new Oceanside Plant should be exempted in whole or in part under 40 CFR § 133.103(a) from complying with the monthly 85% removal rate for BOD and TSS when its hydraulic capacity is exceeded for more than three days during wet weather.
3. Whether a wet weather flow limit for the effluent from the Oceanside Plant is appropriate and, if so, what the appropriate limit should be.

Notice of Intent to Repropose, at 6–7. As of the date of this order, Region IX has not issued a draft permit reproposing the relevant portions of the permit.

In the Revised Petition, Petitioners again raise most of the issues asserted in the initial Petition.[23] These issues fall into three categories: challenges to the technology-based requirements for discharges from the Transport; challenges to the mass limitations for pollutants discharged from the treatment plant; and challenges to the subject permit's compliance with the anti-backsliding provision of Section 402(o) of the Clean Water Act, 33 U.S.C. § 1342(o). We will discuss each in turn.

II. *DISCUSSION*

Under the rules governing an NPDES permit proceeding, there is no appeal as of right from the Regional Administrator's decision. *In re Sequoyah Fuels Corporation,* NPDES Appeal No. 91–12, at 3–4 (EAB, Aug. 31, 1992); *In re Miners Advocacy Council,* NPDES Appeal No. 91–23, at 3 (EAB, May 29, 1992). Ordinarily, a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important, and should therefore be reviewed by the Environmental Appeals Board. *Sequoyah Fuels, supra*; 44 Fed. Reg. 32,887 (June 7, 1979) (Preamble to 40 CFR Part 124). The petitioner has the burden of demonstrating that review should be granted. *Miners Advocacy Council, supra,* at 3; *see* 40 CFR § 124.91(a).

A. *The Technology-Based Requirements for Pollutants Discharged from the Transport*

We turn first to Petitioners' challenge to the technology-based requirements, or lack thereof, for pollutants discharged from the Transport through the SWOO to the Pacific Ocean. Petitioners argue that the Region erred by concluding that the Transport is not a POTW and that secondary treatment is not necessary for the combined flows discharged from the Transport. Alternatively, they argue that if technology-based controls are required in accordance with BAT and BCT, the Region erred by (1) failing to require "treatment" or "effluent limitations" for pollutants discharged from the Transport, (2) failing to consider and to analyze adequately the relevant factors for determining the level of "treatment" required by BAT and BCT, and (3) failing to require certain minimum technology-based limita-

[23] Because the Region denied Petitioners' Request subsequent to the filing of the original Petition and because Petitioners assert that the Revised Petition is "the [original] petition for review in its entirety, as amended," we grant the Region's Motion to Dismiss the original Petition on the ground it is superseded by the Revised Petition. To the extent there is any difference between the original Petition and the Revised Petition, this appeal is limited to only those concerns set forth in the Revised Petition.

tions set forth in the National Combined Sewer Overflow Control Strategy ("EPA's CSO Strategy"), 54 Fed. Reg. 37,370 (Sept. 8, 1989). For the reasons stated below, we conclude that the west chamber of the Transport is not a POTW and that the remaining issues asserted by Petitioners are not now reviewable in that the Region has not yet issued a final permit decision regarding the appropriate BAT and BCT requirements for direct discharges from the west chamber of the Transport through the SWOO to the Pacific Ocean.

1. *Whether the Region Erred by Determining that the Transport is not a POTW*

Initially, we address the question of whether discharges from the Transport through the SWOO are discharges from a POTW thereby requiring the Transport to provide secondary treatment in accordance with Section 301(b)(1)(B). This question raises a purely legal issue.[24]

In support of their position that the Transport is a POTW, Petitioners make two arguments.[25] First, they argue that the Transport falls within the definition of "POTW" set forth at 40 CFR § 122.2. Second, they argue that the Transport falls within the definition of "treatment works" set forth at Section 212(2) of Title II of the Clean Water Act, 33 U.S.C. § 1292(2), and that such definition applies to Section 301 of Title III of the Clean Water Act, 33 U.S.C. § 1311.

EPA defines the term "POTW" at 40 CFR § 122.2 for purposes of implementing the NPDES permitting program required by Section 402 of the Clean Water Act, 33 U.S.C. § 1342.[26] Section 122.2 defines a "POTW" as follows:

[24] The Regional Administrator denied a hearing on this issue because it presented a "purely legal" issue and raised no material issue of fact as required under 40 CFR § 124.75(a). When only legal issues are raised, the Regional Administrator is required to deny an evidentiary hearing request; however, on review of the denial the Board is authorized by § 124.91(a)(1) to review policy or legal conclusions of the Regional Administrator. *See* 40 CFR § 124.74 (note).

[25] We note that while the Sierra Club commented, in general, on the permit's lack of technology-based controls applicable to the "decant," it failed to object to the Region's determination that the Transport was not a POTW. Indeed, the Sierra Club's comments may be read as conceding that BAT and BCT are the required technologies for discharges from the west chamber of the Transport. However, Central Coast did comment that full secondary treatment standards should apply to the combined flows discharged from the Transport through the SWOO.

[26] Section 122.2 of Title 40 of the Code of Federal Regulations provides that the definitions set forth in that section "apply to parts 122, 123, and 124." These

> any device or system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a 'state' or 'municipality.' This definition includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

Petitioners argue that the Transport is a POTW because it "partially stores and treats sewage and conveys it to a POTW." By so characterizing the discharges from the Transport, Petitioners ignore the fact that the two-chambered design of the Transport separates the flow of CSOs into two chambers and then directs the flow from each chamber in two different directions for discharge into the SWOO from two separate locations.

The combined flows stored in the east chamber of the Transport will be conveyed to the Oceanside Plant for treatment. As a result, that portion of the Transport, the east chamber, falls squarely within the definition of a POTW as defined by § 122.2 and the effluent so conveyed must receive secondary treatment. Petitioners have acknowledged that the Oceanside Plant will be subject to secondary treatment requirements.[27] The Region has also represented that "those wastes conveyed by the Transport to the POTW will receive secondary treatment as Petitioners demand." Region's Response to Revised Petition, at 11. Consequently, to the extent Petitioners' concern is with the discharge from the east chamber, there should be no doubt that these wastes will receive secondary treatment.

To the extent Petitioners are concerned with the combined flows which exceed the capacity of the east chamber of the Transport and flow into the west chamber, the Region properly concluded that the west chamber is not a POTW. First, the west chamber of the Transport does not and will not "convey wastewater" to a POTW. The wastewater in the west chamber is pumped directly to the SWOO.

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three parts implement the NPDES permitting program required by Section 402 of the Clean Water Act.

[27] As noted earlier, the Region has withdrawn and reproposed a portion of the permit concerning certain secondary treatment requirements. Nonetheless, the critical point to be made is that the wastewater conveyed by the east chamber of the Transport to the treatment plant will be treated with the same secondary treatment requirements applicable to that POTW. We note that the permit establishes certain secondary treatment requirements for discharges from the treatment plant to the SWOO; it does not draw a distinction between the treatment required by the existing Sunset-Richmond Plant and that required by the future Oceanside Plant.

Second, the flows through the west chamber are not being "treated" as contemplated by the definition of POTW in § 122.2. The diversion of CSOs[28] to the west chamber of the Transport is not intended for the purpose of effecting "treatment" of sewage before discharge. Rather, the diversion is intended for the purpose of preventing damage to the treatment plant and of discharging those flows that cannot otherwise be inhibited for later "treatment." While the excess wastewater from the east chamber flows under a baffle and over a weir into the west chamber before it is pumped to the SWOO, the resulting control over settleable solids and floatable materials does not mean that the flow is being "treated" within the meaning intended by § 122.2. Rather, this reflects the application of BAT and BCT technology-based controls to discharges of CSOs as contemplated by the Clean Water Act. *See generally Montgomery Environmental Coalition* v. *Costle*, 646 F.2d 568, 589–591 (D.C. Cir 1980).

The Region's position that the discharge from the west chamber is subject to BAT and BCT technology controls is consistent with EPA's CSO Strategy. EPA's CSO Strategy provides that:

> CSOs are point sources subject to NPDES permit requirements including both technology-based and water quality-based requirements of the CWA. CSOs are not subject to secondary treatment regulations applicable to publicly owned treatment works (*Montgomery Environmental Coalition v[]. Costle*, 646 F.2d 568 (D.C. Cir. 1980).[29]

[28] The discharges from the west chamber of the Transport fall within the definition of CSOs set forth in EPA's CSO Strategy. EPA's CSO Strategy defines CSOs as "flows from a combined sewer in excess of the interceptor or regulator capacity that are discharged into a receiving water without going to a [POTW]" and that "occur prior to reaching the headworks of a treatment facility." 54 Fed. Reg. at 37,371. The discharges from the west chamber of the Transport are wet weather flows from a combined sewer system that exceed the treatment plant's capacity. Such flows occur prior to reaching the headworks of the treatment plant and are diverted to the transport prior to reaching the treatment plant. They are diverted directly to the SWOO without going first to the treatment plant for treatment.

[29] In *Montgomery*, the D.C. Circuit held that CSOs are subject to the technology-based requirements of the Clean Waster Act for "private discharges rather than the secondary treatment required for POTWs." *Montgomery*, 646 F.2d at 592. In that case, the D.C. Circuit determined a "combined sewer overflow point," which discharged sewage during extreme storm conditions, was a not a POTW under EPA's former definition of "treatment works." That former definition of "treatment work at former 40 CFR § 124.1(hh), 38 Fed. Reg. 13,528, 13,530 (May 22, 1973), provided that:

> the term 'treatment works' means any facility, method or system for the storage, treatment, recycling or reclamation of municipal sewage or industrial wastes of a liquid nature, in-

> Technology-based permit limits should be established for best practicable control technology currently available (BPT), best conventional pollutant control technology (BCT), and best available technology economically achievable (BAT) based on best professional judgment (BPJ) when permitting CSOs.

Id.

Without question, EPA's conclusion that CSOs are not POTWs but are point sources subject to BAT and BCT controls is a correct one. Accordingly, there is no basis for reversing the Region's conclusion. Indeed, as noted, these interpretations were previously upheld by the D.C. Circuit in *Montgomery, supra*.[30]

Petitioners next argue that the Transport is a POTW because it falls within the definition of "treatment works" found at Section 212(2) of the Clean Water Act and that such definition applies to Section 301 of the Clean Water Act. They argue that the D.C. Circuit erred in holding to the contrary in *Montgomery*.[31]

We need not address this issue because a review of Petitioners' comments confirms that Petitioners failed to raise it during the comment period.[32] EPA regulations provide that on appeal "no issues shall be raised by any party that were not submitted to the administrative record * * * as part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them." *See* 40 CFR § 124.76; *In re Puerto Rico Sun Oil Company, Inc.*, NPDES Appeal No. 92–20, at 17 (EAB, Oct. 23, 1992). Petitioners have not met this requirement and have not otherwise alleged or argued any basis for applying the good cause exception to their failure to raise the issue as required by 40 CFR § 124.76. *See In*

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cluding waste in combined storm water and sanitary sewer systems.

[30] *See supra* note 29.

[31] While we decide this issue on procedural grounds, we note that the D.C. Circuit held in *Montgomery* that "neither the language of the [Clean Water] Act nor its history supports the conclusion that the definition of 'treatment works' in section 212 should be viewed as supplying the meaning of that term in section 301." *Montgomery*, 646 F.2d at 591. This holding in *Montgomery* has not been overruled or disagreed with by any other federal court. Nor has it been superseded by any statutory law.

[32] The three comment letters submitted in 1990 in connection with the subject permit include: a comment letter submitted by the Sierra Club dated June 18, 1990; a comment letter submitted by Anthony Michalak dated June 6, 1990; and a comment letter submitted by Central Coast dated June 4, 1990.

re NPC Services, Inc., NPDES Appeal No. 91–4, at 2–3 (CJO, May 30, 1991).

In sum, we conclude that the Region correctly determined that the west chamber of the Transport is not a POTW and that, therefore, the discharges from that chamber do not require secondary treatment.

2. *Whether the Board Should Consider Challenges to Issues Concerning the Technology-based Requirements for discharges from the Transport to the SWOO*

Petitioners' argue that to the extent the discharge from the west chamber of the Transport through the SWOO is subject to the technology-based requirements of BAT and BCT in accordance with Section 301(b)(2) of the Clean Water Act, the Region's failure to require technology-based controls, other than baffling, violates the Clean Water Act, EPA regulations, and EPA's CSO Strategy. Petitioners raise numerous objections which fall into three general categories. They argue that the Region erred by (1) failing to require "treatment" or "effluent limitations" for most pollutants, (2) failing to consider and to analyze adequately the relevant factors for determining the level of treatment required by BAT and BCT, and (3) failing to require certain minimum technology-based limitations set forth in EPA's CSO Strategy.

In addition to dismissing Petitioners' contentions on the merits, the Regional Administrator denied the Hearing Request for the first two issues set forth above on procedural grounds.[33] The Region argues on appeal that by virtue of its decision to reopen the permit to determine the appropriate BAT and BCT limitations for the Transport, "strong policy considerations militate[] against granting review." We agree and conclude, for the following reasons, that all three of the issues set forth above are not ripe for review.

[33] Specifically, the Regional Administrator denied review of Petitioners' challenges to the Region's failure to consider certain factors and the adequacy of the Region's BAT/BCT determination on the grounds that (1) such issues had not been raised during the comment period as required by 40 CFR § 124.76 and (2) some issues failed to state "the legal or factual question alleged to be at issue" and to designate "the specific factual areas to be adjudicated" as required by 40 CFR § 124.74(b)(1). The Regional Administrator denied review of Petitioners' challenge that the permit failed to require "treatment" or "effluent limitations" on the grounds that (1) Petitioners had failed to raise a factual issue as required by 40 CFR § 124.25(a) and (2) the supporting arguments for their position had not been raised during the comment period as required by 40 CFR § 124.76.

As noted above, when the Regional Administrator denied the Petitioners' Hearing Request on the issues identified, the Regional Administrator also withdrew certain portions of the permit in accordance with 40 CFR § 124.60(b). In particular, the Regional Administrator agreed to repropose the portions of the permit that establish the BAT and BCT limitations for the Transport to determine:

> Whether BAT or BCT requires effluent limitations that reflect the additional amount of pollutant removal achievable through expansion of the Transport's existing capacity to store combined flows for later treatment at the new Oceanside Plant, thus reducing the amount of decant discharged to the SWOO.

Consequently, there is no final permit decision regarding the appropriate technology-based controls required for the discharge of pollutants from the west chamber of the Transport through the SWOO. As such, there is nothing for the Board to review.

Under 40 CFR § 124.60(b), the new draft permit must proceed through the same process of public comment and opportunity for a public hearing as would apply to any other draft permit subject to Part 124. As long as an issue is sufficiently related to that portion of the permit which has been withdrawn and reproposed under § 124.60(b), Petitioners will not be precluded from raising in that proceeding all ascertainable issues and submitting all reasonably available arguments pertaining to that draft permit. *See* 40 CFR § 124.13; cf. *In re Hadson Power 14—Buena Vista,* PSD Appeal Nos. 92–3, 92–4 & 92–5, at 45 (EAB, Oct. 5, 1992)(when an issue is remanded, comments submitted during a reopened public comment period may support a renewed challenge in any further appeal after completion of that remanded proceeding).

In recognition of this principle, the Region, in its Response to the Revised Petition, has represented that with respect to those issues concerning the appropriate technology controls required by BAT and BCT:

> Petitioners will be able to raise issues and arguments relevant to the new draft decision—whether or not hearing on such issues and arguments were denied in this proceeding,—and to pursue appeal if they so desire. . . . [T]o the extent the Hearing Request was

> deficient, Petitioners will have another chance to perfect their arguments in the new proceeding.

Region's Response to the Revised Petition, at 41.

In these circumstances, until such time as the Region makes a decision on the reproposed permit, it is not possible to determine whether the Region has failed to require appropriate "treatment" or "effluent limitations" for pollutants discharged from the Transport or whether the Region has failed to consider and to analyze adequately the relevant factors for determining the level of treatment required by BAT and BCT. Consequently, we agree with the Region and conclude that these two issues, and the many subissues raised thereunder and arguments asserted in support thereof, are not yet ripe for review.

While the Region has addressed the merits of Petitioners' third issue regarding the permit's compliance with EPA's CSO policy, we conclude that this issue is also not ripe for review. In particular, the third issue concerns whether the permit complies with three minimum BAT/BCT technology-based limitations set forth in EPA's CSO Strategy. EPA's CSO Strategy provides, in pertinent part, that:

> All permits for CSO discharges should require the following technology-based limitations as a minimum BCT/BAT, established on a BPJ basis: * * * (2) maximum use of the collection system for storage; * * * (4) maximization of flow to the POTW for treatment; * * * and (6) control of solid and floatable materials in CSO discharges.

54 Fed. Reg. at 37,372. Again, until the Region issues a final decision on the reproposed portion of the permit regarding the appropriate technology-based controls required by BAT and BCT for discharges from the west chamber of the Transport through the SWOO, it is not possible to determine whether the permit complies with these three minimum technology-based limitations.

Accordingly, all of Petitioners' objections regarding the Region's assessment of the BAT and BCT requirements and the lack of technology-based controls for discharges of pollutants from the west chamber of the Transport through the SWOO are not ripe for review. To the extent these or any other issues relating to the appropriate BAT and BCT technology-based controls applicable to those discharges are properly preserved for review in accordance with 40 CFR

Part 124, the Petitioners may reassert them in an appeal from the final decision on those reproposed portions of the permit.

B. *The Mass Limitations for Pollutants Discharged from the Oceanside Plant*

Petitioners also assert that the permit does not establish enforceable mass limitations, as required by EPA regulations, for discharges from the treatment plant through the SWOO.[34] In brief, Petitioners maintain that the flow limits required to establish mass limitations are either lacking or inadequate.

Both Petitioners and the Region refer to mass limitations as limitations applying to discharges during either "dry weather" or "wet weather." In the context of this discussion on mass limitations, "dry weather discharges" is a reference to those discharges from the treatment plant occurring during a specific three consecutive month period each year.[35] The calendar months for this three-month period are not defined by the permit.

With regard to mass limitations during the period of "wet weather discharges," the Region concedes that the permit does not contain any flow limit during that period of time. Indeed, the Region is seeking comment on the new draft permit on the issue of whether the permit should establish "wet weather" flow limits.[36] Since this issue of the appropriate flow limit goes to the heart of Petitioners' objection that the permit lacks enforceable mass limitations for dis-

[34] The issues raised by Petitioners are purely legal. *See supra* note 24.

[35] The Region and Petitioners each distinguish between the mass limitations established for pollutants discharged during "dry weather" and those established for pollutants discharged during "wet weather." This distinction is apparently grounded in section A.3 of the permit. That section of the permit establishes an "average dry weather flow" limit of 24 mgd for "three consecutive dry weather months each year." The permit establishes no limit whatsoever for "wet weather flow" or the remaining nine months of the year. As discussed below, the mass limitations in the subject permit must be based on flow limits; therefore, the mass limitations for "dry weather discharges" are those based on "dry weather" flow limits. In the subject permit, the "dry weather" flow limit is a "three-month" limit.

[36] The issue withdrawn and reproposed for reconsideration by the Regional Administrator is stated as follows:

> Whether a wet weather flow limit for the effluent from the Oceanside Plant is appropriate and, if so, what the appropriate limit should be.

Notice of Intent to Repropose, at 7.

charges during the period of "wet weather," the issue pending before the Board is not ripe for review.

With respect to the mass limitations that apply to pollutants discharged during the period of "three consecutive dry weather months each year," we agree with Petitioners that the permit fails to establish enforceable mass limitations as required by 40 CFR § 122.45(f) and, for the reasons set forth below, remand the permit to the Region so that appropriate mass limitations may be established.

EPA regulations set forth specific requirements for establishing mass limitations in an NPDES permit. Section 122.45(f)(1) requires that "[a]ll pollutants limited in permits shall have limitations, standards or prohibitions expressed in terms of mass, except [under certain specified circumstances]."[37] 40 CFR § 122.45(f)(1). Section 122.45(d)(2) requires that for continuous discharges from a POTW, all limitations must be stated as "[a]verage weekly and average monthly discharge limitations" unless impracticable.[38] 40 CFR § 122.45(d)(2). "Continuous discharges" are those which occur "without interruption throughout the operating hours of the facility, except for infrequent shutdowns for maintenance, process changes, or other similar activities."[39] 40 CFR § 122.2.

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[37] The exceptions set forth in § 122.45(f)(1) are:

> (i) For pH, temperature, radiation, or other pollutants which cannot appropriately be expressed by mass;
>
> (ii) When applicable standards and limitations are expressed in terms of other units of measurement; or
>
> (iii) If in establishing permit limitations on a case-by-case basis under § 125.3, limitations expressed in terms of mass are infeasible because the mass of the pollutant discharged cannot be related to a measure of operation (for example, discharges of TSS from certain mining operations), and permit conditions ensure that dilution will not be used as a substitute for treatment.

The Region has not relied on any exemption.

[38] EPA regulations define "average weekly" and "average monthly" mass discharge limitations at 40 CFR § 122.2 ("average monthly discharge limitation"; "average weekly discharge limitation"; and "daily discharge"). An "average weekly" or "average monthly" discharge limitation means the highest allowable average of "daily discharges" over a calendar week or month, e.g., the highest allowable average number of pounds of a pollutant discharged per day over a calendar week or month. 40 CFR § 122.2. The "average weekly and monthly discharges" are calculated as the total number of pounds of a pollutant discharged each day during a calendar week or month and then divided by the number of days the pollutant was discharged during that week or month. *See id.*

[39] The constant daily flow of sewage to the treatment plant would fall within the definition of "continuous discharge" at § 122.2.

The subject permit does not set forth specific average weekly and average monthly mass limitations for each pollutant limited in the permit. Rather, it sets forth an equation which the Region contends allows the permittee and the public to convert concentration limitations, expressed in various terms,[40] into mass limitations.[41] Specifically, section E.6 of the permit provides:

> Where effluent concentration limitations in mg/l or ug/l are contained in this Permit, the following Mass Emission Limitations shall also apply:
>
> (Mass Emission Limit in lb/day) = (Concentration Limit in mg/l) x (8.34) x (Actual Flow in million gallons per day averaged over the time interval to which the limit applies).

Elsewhere, at section A.3, the permit provides that the "average dry weather flow" limit is 24 mgd.[42] The Region has construed the flow limit in section A.3 to be an "average three-month" flow limit.[43]

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[40] Section 122.45(f)(2) provides that "[p]ollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall require the permittee to comply with both limitations." 40 CFR § 122.45(f)(2). With respect to most of the pollutants limited by the subject permit, the permit contains numerical effluent limitations expressed in terms of "concentration limitations." For such pollutants, concentration limitations may be expressed as an absolute maximum and/or a maximum average number of grams of the pollutant allowed per liter of effluent (mg/l, ug/l, ng/l, or pg/l) over one or more specified time intervals. For some conventional pollutants, concentration limitations are expressed in terms of a "monthly average," "weekly average," and "maximum at any Time." For toxic pollutants that affect marine aquatic life, concentration limitations are expressed in terms of a "6-month median," "daily maximum," and "Instanteous Maximum." For other toxic pollutants that affect human health (carcinogens and non-carcinogens), concentration limitations are expressed only in terms of a "monthly average."

[41] *See supra* note 15.

[42] Section A.3 of the permit provides:

> The average dry weather flow shall not exceed 24 million gallons per day. Average dry weather flow shall be determined over three consecutive dry weather months each year.

It is not immediately clear whether the average flow limit of 24 mgd is an "average monthly" or "average three-month" limit. We note that this question was raised during the comment period and not addressed in the Region's Response to Comments. See Comments of Anthony Michalak, at 1 ("Does this mean it is a dry weather monthly average flow limitation?").

[43] That the flow limit in section A.3 was intended to be an average three-month flow limit is evident from the Regional Administrator's denial of the Hearing Request which stated:

Continued

Petitioners argue that the equation at section E.6 does not establish a lawful mass limitation because the equation allows the mass limitation to fluctuate with the "actual flow."[44] As a consequence, the Petitioners argue that the permit fails to establish a "ceiling" or limitation on the discharge of mass on an average weekly and monthly basis.[45] The Region responds that a flow limit in the equation is unnecessary since elsewhere in the permit it has established a three-month average flow limit. The Region argues that while the flow may fluctuate on a short-term basis, the permittee will minimize such fluctuations to meet the long-term three-month average flow rate and, therefore, the actual flow for purposes of calculating average weekly and monthly mass limitations is, in effect, "limited" by the average three-month flow limit of 24 mgd.[46]

Petitioners acknowledge that the permit establishes a three-month average flow limit but argue that because the three-month flow limit is not expressly incorporated into the equation for calculating mass limitations, a violation of that flow limit does not mean

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> section A.3 allows the actual flow to exceed 24 mgd for short periods as long as these exceedances are counterbalanced by flows less than 24 mgd at other times so that, *at the end of three dry months each year, the flow averages out to no more than 24 mgd.*

Decision on Hearing Request, at 37 (emphasis added).

[44] The Region concedes that the mass limitations will vary based on actual flow. In denying the Hearing Request, the Regional Administrator stated "since mass limits are calculated based on the *actual* flow, which is not known until after the discharge, they cannot be calculated in advance and included in the permit as suggested by Requesters." Decision on Hearing Request, at 36.

[45] Two points should be noted. First, since EPA regulations require only average weekly and monthly mass limitations, Petitioners' objections to the permit's failure to establish any other enforceable mass limitations is rejected. *See* 40 CFR § 122.45(d)(2).

Second, Petitioners seek a flow limit in the equation for calculating mass limitations expressed as: "the observed flow rate in MGD for the time interval to which the limit applies or 24 MGD, whichever is the lesser amount." Revised Petition, at 26. In other words, Petitioners seek a daily maximum flow limit or a lesser flow limit (and, as a result, a lower mass limitation) when the observed flow is less than the daily maximum flow. The Region responds to Petitioners' request for an absolute daily flow limit of 24 mgd by stating "an absolute flow limit of 24 mgd in the mass loading equation will distort the maximum *average* flow limit of section A.3." Decision on Hearing Request, at 37. We need not address whether the flow limits sought by Petitioner are appropriate since the numerical value of any absolute or average flow limit must be determined by the Region in the first instance on remand.

[46] *See supra* note 42; *see also* Response to Revised Petition, at 48 (the Region asserted that the permittee will "minimize any short-term excursions above the 24 mgd limit or risk exceeding the long-term average").

the permittee has also violated any mass limitations.[47] Petitioners argue further that assuming the three-month flow limit is impliedly incorporated into the equation, violations of mass limitations could only be known after the three-month period when it is determined that the permittee has violated the three-month flow limit. Even then, Petitioners complain it is not clear just what mass limitation would be violated.[48] Importantly, under the Region's interpretation of the permit, if the three-month average flow limit of 24 mgd is *not* violated, there can be no mass limitation violation (assuming concentration limitations are met) despite the fact that flows may vary significantly in any given week or month from that 24 mgd goal.

We conclude that the Region's equation does not comport with EPA's regulations for mass limitations. Unless it is impracticable to establish average weekly or monthly mass limitations or a pollutant is exempt from a mass limitation, the regulations require average weekly and monthly mass limitations. *See* 40 CFR § 122.45(d)(2) & (f)(1). Under the equation, as presently drafted in the permit, the three-month average flow limit does not establish a limit on flow for the calendar weeks or months within the three-month period. As a consequence, there is no set limit on mass for each calendar week or month within the three-month period. Allowing mass limitation to fluctuate with actual flow throughout the three-month period renders the average weekly or monthly mass limitations requirement essentially meaningless.

In these circumstances, the Region's position must be rejected and the permit remanded with instructions for the Region to set appropriate mass limitations in accordance with the above-noted regulations.

C. *The Permit's Compliance with the Anti-backsliding Prohibition of the Clean Water Act*

Finally, Petitioners argue that the subject permit violates the anti-backsliding provision of the Clean Water Act, Section 402(o) of

[47] Petitioners make this point by stating that, under the terms of equation in the permit, "[w]hatever is discharged is, by definition, within that fluctuating limit, whether or not the maximum flow (as opposed to actual flow) set forth at section A.3 is being violated." Revised Petition, at 27.

[48] This point is made when Petitioners state:

> if the Region were correct in its assertion that the three-month flow average limit always applies to the equation (which, on its face, it does not), which of the two distinct concentration limits for. [sic] e.g., BOD, should apply, the 30 mg/l monthly average or the 45 mg/l weekly average?

Revised Petition, at 27–28.

the Clean Water Act, 33 U.S.C. § 1342(o), and 40 CFR § 122.44(l)(1).[49] Specifically, Petitioners maintain that the Section 301(h) NPDES permit issued by the Region in 1988 or State Order No. 88–106 issued by the State Regional Board established more stringent effluent limitations than those in the subject permit for seventeen toxic pollutants discharged from the treatment plant through the SWOO[50] and thirty-two toxic pollutants discharged from the west chamber of the Transport through the SWOO[51] to the Pacific Ocean.[52]

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[49] We note that Petitioners argue that the permit violates both Section 402(o) of the Clean Water Act and 40 CFR § 122.44(l). Section 402(o) was enacted by the Water Quality Act of 1987, Public Law 100–4, 101 Stat. 7 *et seq.* Prior to enactment of this statutory anti-backsliding provision, EPA had promulgated an anti-backsliding regulation at 40 CFR § 122.44(l)(1). 48 Fed. Reg. 14146, 14170 (April 11, 1983) (reorganizing Part 122); *see* 45 Fed. Reg. 33,290, 33,450 (May 19, 1980) (final rule establishing consolidated permit program requirements governing the NPDES program under the Clean Water Act). Subsequent to enactment of Section 402(o), EPA has revised § 122.44(l) to implement the statutory exceptions to the prohibition on backsliding from BPJ limits when less stringent effluent limitations guidelines are subsequently promulgated. 54 Fed. Reg. 246, 251–252, & 256 (Jan. 4, 1989). During this revision, EPA also implemented the statutory prohibition on the issuance of a permit less stringent than existing effluent guidelines or applicable state water quality standards, *Id.*

That revision of § 122.44(l), however, did not implement, and to date EPA has not implemented, the statutory prohibition against backsliding from water quality-based permits. *Id.* at 252. EPA Draft Interim Guidance on Implementation of Section 402(o) Anti-backsliding Rules for Water Quality-Based Permits, issued by the Office of Water Enforcement and Permits on September 29, 1989, provides that:

> The statutory anti-backsliding provisions found at § 402(o) take precedence over EPA's existing regulations governing backsliding, found at § 122.44(l)(1)[]. Therefore, the Regions and States must now apply the statute itself, instead of these regulations, when questions arise regarding backsliding from limitations based on State treatment or water quality standards.

Draft Interim Guidance, at 2. While draft guidance does not have the effect of binding EPA's position, it reflects EPA's latest thinking. *See In re Hadson Power 14—Buena Vista,* PSD Appeals Nos. 92–3 through 92–5, at 10. Consequently, we limit our discussion to Section 402(o) although the D.C. Circuit has held that EPA had authority to issue its anti-backsliding regulation prior to enactment of Section 402(o). *See Natural Resources Defense Council, Inc. v. U.S. Environmental Protection Agency,* 859 F.2d 156, 1977–203 (D.C. Cir. 1988) (challenge concerned BPJ portion of EPA anti-backsliding regulation). Thus, § 124.44(l)(1) does not apply.

[50] *See* Revised Petition, at 30–31.

[51] *See* Revised Petition, at 31–32.

[52] The pertinent numerical effluent limitations for toxic pollutants are water quality-based controls derived from the Water Quality Control Plan for Ocean Waters of California adopted by the State Water Resources Control Board in 1990. Consequently, Petitioners' concern that the subject permit fails to comply with the statu-

Section 402(o) of the Clean Water Act provides, generally, that the effluent limitations of a renewed, reissued, or modified permit must be at least as stringent as the effluent limitations in the "previous permit."[53] The Conference Report for the Water Quality Act of 1987, which enacted the statutory anti-backsliding provision, explains that Congress intended "to preserve pollution control levels *achieved* by dischargers by prohibiting the adoption of less stringent treatment or control limitations, standards, or conditions than those already contained in a permit." H.R. Conf. Rep. No. 1004, 99th Cong. 2d Sess. 1986, at 155 (emphasis added).

We conclude that the subject permit is not a "renewed, reissued, or modified" version of the Section 301(h) permit or any other "previous permit" and, therefore, the anti-backsliding provision of Section 402(o) does not apply to this permit. As noted at the outset, the City initially discharged pollutants from the Richmond-Sunset Plant through the SWOO pursuant to a 1986 state-issued NPDES Permit No. CA0037681.[54] Soon after the City began discharging under the state-issued NPDES permit, EPA issued an administrative order, No. IX–FY87–7, upon determining that the state did not have jurisdiction over the discharge. The order established "interim" effluent limitations and monitoring requirements pending issuance of a final federal permit for discharges from the SWOO. The EPA administrative order expressly states that it "is not and shall not be interpreted to be a[] NPDES permit under Section 402 of the Act" and "shall expire

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tory and regulatory anti-backsliding provisions concerning permits written on a case-by-case basis under Section 402(a)(1) using BPJ is unwarranted.

We note that the Regional Administrator denied an evidentiary hearing on this issue because Petitioners failed to raise any material issue of fact. The Regional Administrator determined that the "factual basis" for the challenge was invalid since the Section 301(h) modified NPDES permit was not "in full force and effect." Decision on Hearing Request, at 38. The question of whether the subject permit is a "renewed, reissued, or modified" version of the section 301(h) permit raises only legal issues.

[53] The relevant portion of Section 402(o) of the Clean Water Act provides that:

> In the case of effluent limitations established on the basis of [Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) or Section 303(d) or (e), 33 U.S.C. § 1313(d) or (e)], a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with [Section 303(d)(4), 33 U.S.C. § 1313(d)(4)].

This portion of Section 402(o) is generally referred to as the anti-backsliding provision for water quality-based effluent limitations.

[54] The Region has consistently assumed that by issuing an NPDES permit for the subject discharge, it was reissuing the state's 1986 NPDES permit. The Region has never suggested that the subject permit is in any way a reissued version of the Section 301(h) permit.

immediately upon the effective date of an NPDES permit issued by EPA." Administrative Order IX–FY87–7, at 20. In 1988, the Region issued the Section 301(h) permit but that NPDES permit never became effective because in August 1988 several hearing requests were submitted in that permit proceeding. *See* 40 CFR § 124.15(b).

The Region maintains that, as a result of the hearing requests filed in the Section 301(h) permit proceeding, the Section 301(h) permit was "stayed" and therefore "the 301(h) permit decision as a whole did not take effect and consequently never placed any enforceable obligations on the City." The Region reasons that an NPDES permit that never became effective and is unenforceable cannot be a "previous permit" for purposes of determining whether a subsequent permit violates the anti-backsliding provision.

Petitioners dispute these contentions. They assert that the pertinent numerical effluent limitations in the Section 301(h) permit were not "stayed" because (1) the hearing requests submitted in that permit proceeding did not contest those limitations or the point for monitoring those limitations and (2) stays of contested provisions can only occur after a hearing is granted, citing to 40 CFR § 124.16(a). Next, they assert that the effluent limitations would have been effective and enforceable had the Regional Administrator decided to grant or deny the hearing requests in accordance with the regulatory time requirement for doing so. Finally, they argue that the effluent limitations in the Section 301(h) permit are "in effect" by virtue of the companion State Order.[55] For the reasons set forth below, Petitioners' arguments must be rejected.

Agency regulations provide that after the close of the public comment period on a draft NPDES permit, "the Regional Administrator shall issue a final permit decision" and the "final permit decision * * * shall become effective 30 days after the service of notice of the decision *unless * * * an evidentiary hearing is requested under § 124.74.*" 40 CFR § 124.15(a) & (b) (emphasis added).

Section 124.16(a), which is set forth in Subpart A of Part 124 concerning "General Program Requirements" for RCRA, UIC, PSD and NPDES permits, provides, generally, that if a hearing request concerning an NPDES permit is *granted,* the effect of contested permit conditions and uncontested permit conditions that are not severable from the contested conditions shall be stayed while the uncontested permit conditions that are severable from the contested

[55] *See supra* note 18.

conditions "shall remain fully effective and enforceable." 40 CFR § 124.16(a). Section 124.16(a) expressly refers to § 124.60 which is set forth in Subpart D of Part 124 concerning "Specific Procedures Applicable to NPDES Permits." Section 124.60(c)(1), in turn, provides that if a hearing request regarding an NPDES permit is granted or if a petition for review of the denial of a hearing request is timely filed, "the force and effect of the contested conditions of the final permit shall be stayed." 40 CFR § 124.60(c)(1). Importantly, with regard to *uncontested* conditions, the regulations provide that the Regional Administrator must notify "the discharger and all parties of the *uncontested* conditions of the final permit that are enforceable obligations of the discharger." 40 CFR § 124.60(c)(5) (emphasis added). We note that the more general regulation, § 124.16(a), similarly requires that the Regional Administrator must clarify the conditions that are enforceable from the conditions that are not enforceable. *See* 40 CFR § 124.16(a) (if a request for review of an NPDES permit is granted, the Regional Administrator must identify those conditions that will be stayed and all other conditions shall be enforceable).

In these circumstances, Petitioners' reliance on § 124.16 is misplaced. Under the unique procedures involving NPDES permits, § 124.15(b)(2) provides that an NPDES permit is simply *not effective* pending a request for an evidentiary hearing. Once the Regional Administrator acts on the hearing request it is possible that certain *uncontested* conditions may go into effect. However, the regulations contemplate that before any uncontested conditions become enforceable, the Regional Administrator must clarify which conditions will become effective.

Since evidentiary hearing requests were submitted in the Section 301(h) permit proceeding and the Region never granted or denied those hearing requests, the Region correctly concluded, based upon § 124.15(b), that none of the conditions in the Section 301(h) permit became effective and enforceable. As a result, the City was never required to comply with any limitations contained in the Section 301(h) NPDES permit. Accordingly, the subject permit is not a "renewed, reissued, or modified" version of the Section 301(h) NPDES permit. The Section 301(h) NPDES permit is not a "previous permit" for purposes of the anti-backsliding provision of the Clean Water Act.

Notwithstanding the fact that Section 301(h) permit was not effective and enforceable, Petitioners argue that the toxic effluent limitations in the Section 301(h) permit which were uncontested by the hearing requests would have been established in a "previous

permit" had the Region complied with the directive of 40 CFR § 124.75(a)(1). That regulation directs that within thirty days following the time allowed for submitting requests for an evidentiary hearing, "the Regional Administrator shall decide the extent to which, if at all, the hearing request shall be granted, provided that the request conforms to the requirements of § 124.74, and sets forth material issues of fact relevant to the issuance of the permit." 40 CFR § 124.75(a)(1). The regulations do not prescribe a specific result in the event the Region fails to comply with the time requirement of § 124.75(a)(1). Nonetheless, Petitioners argue that since the Region did not act within the time prescribed, the Section 301(h) permit should be deemed to be "effective" and, thus, the uncontested provisions should be considered to be the "previous permit" for the purpose of applying the anti-backsliding provisions to the subject permit.

Petitioners' argument is, again, without merit. While we generally do not condone delays in acting on hearing requests, the Region's inaction did not render the uncontested provisions of the Section 301(h) permit effective and enforceable. Importantly, uncontested NPDES conditions do not automatically become enforceable when the Region grants or denies a hearing request. As noted above, uncontested conditions are not enforceable until thirty days after the date of the Region's notice "of the uncontested conditions of the permit that will be enforceable obligations of the discharger." *See* 40 CFR § 124.60(c)(1) & (2). Because such notice is required only after the Region takes action on the hearing request, the Region was never required to provide such notice in this case.

Here, the Region decided not to rule on the pertinent hearing requests because of the City's interest in withdrawing the 301(h) permit. EPA's Regional Offices must be given reasonable flexibility in administering Agency permitting programs. Accordingly, without clear statutory or regulatory authority supporting Petitioner's position, we will not take away Regional permitting discretion by holding that certain provisions become effective or ineffective when the Region fails to meet the time frame set in § 124.75(a)(1).[56]

[56] Court's have long recognized that agency discretion is not voided simply because regulatory timeframes are missed. *See United States v. Boccanfuso,* 882 F.2d 666, 671 (2d Cir. 1989) ("Federal agencies do not lose jurisdiction by their failure to comply with statutory time limits unless the statute demonstrates congressional intent that this result occur * * *, and the Court is reluctant to void subsequent agency action when an agency has failed to observe a procedural requirement but important public rights are at stake and less drastic remedies are available," citing *Brock v. Pierce County,* 476 U.S. 253, 266 (1986)).

Finally, we turn to the Petitioners' contention that the State's 1988 Order, contained in the same document as the Section 301(h) permit, is the current permit for discharges from the SWOO. As discussed above, the state had no authority to issue an NPDES permit for the discharges from the SWOO because the outfall for that discharge is not located in state waters. *See Pacific Legal Foundation, supra;* Sections 402(b) and 502(7) & (8) of the Clean Water Act; *NRDC v. EPA,* 863 F.2d 1420. Consequently, the State Order is not a "previous [NPDES] permit" for purposes of Section 402(o). The Region properly concluded that the State's 1988 Order was irrelevant to the analysis under Section 402(o).

Since there was no "previous [NPDES] permit" in effect prior to issuance of the subject permit, we conclude that the subject permit is not a "renewed, reissued, or modified" permit and, therefore, the anti-backsliding provisions do not apply.

III. *CONCLUSION*

For the reasons stated above, we deny review in part and remand in part. We conclude that the Region properly determined that the west chamber of the Transport is not a POTW and that the subject permit does not violate the prohibition on backsliding and, therefore, we deny review on these issues. We also deny review with respect to Petitioners' challenges to the appropriateness of the BAT and BCT controls for discharges of CSOs from the west chamber of the Transport through the SWOO. These challenges are not ripe for review. When a final permit decision is issued by the Region reflecting its determination of the appropriate BAT and BCT limitations for that discharge, Petitioners may reassert those challenges and any others properly preserved for review.

Finally, we are remanding the permit to the Region to establish appropriate mass limitations in accordance with the applicable regulations. Final agency action for all issues concerning the mass limitations in the subject permit shall occur only upon completion of the administrative appeals process to the Board from the remanded proceeding. 40 CFR § 124.91(f).

So ordered.