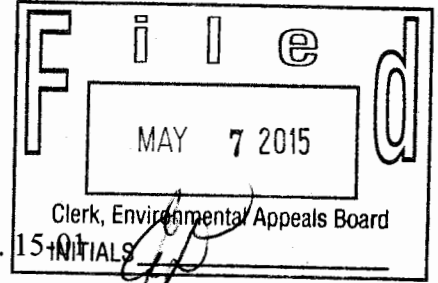


**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**



_____)
In re:)
))
CertainTeed Corporation)
))
Permit No. MA0003531)
_____)

NPDES Appeal No. 15-INITIALS

ORDER DENYING REVIEW

I. STATEMENT OF THE CASE

CertainTeed Corporation (“CertainTeed”) petitions the Environmental Appeals Board (“Board”) to review certain conditions of a National Pollutant Discharge Elimination System (“NPDES”) permit (“Permit”) that authorizes discharges from a facility that manufactures and distributes fiberglass/asphalt roofing materials (“Facility”) in Norwood, Massachusetts, operated by Bird Incorporated d/b/a CertainTeed Corporation. The Facility discharges into the Neponset River. The Neponset River is part of the Boston Harbor watershed and flows into Dorchester Bay. The U.S. Environmental Protection Agency (“EPA”) Region 1 (“Region”) issued the permit on January 13, 2015, pursuant to Clean Water Act (“CWA”) section 402, 33 U.S.C. § 1342.

CertainTeed challenges grab sampling requirements at all four outfalls authorized by the Permit, whole effluent toxicity testing requirements at two outfalls, and the effluent limits for total suspended solids at three outfalls. For the reasons discussed below, the Board denies the petition for review.

II. STATUTORY AND REGULATORY BACKGROUND

CWA section 301(a), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants to waters of the United States unless authorized by, among other things, an NPDES permit. EPA implements the federal NPDES program at CWA section 402, 33 U.S.C. § 1342, by issuing permits that allow for the discharge of pollutants subject to limitations and requirements imposed pursuant to CWA sections 301, 304, 306, 401, and 403, 33 U.S.C. §§ 1311, 1314, 1316, 1341, and 1343. States, Territories, or Tribes may also apply for EPA approval to implement all or parts of the NPDES program in lieu of EPA. CWA § 402(b), 33 U.S.C. § 1342(b). Here, EPA has not authorized the Commonwealth of Massachusetts to issue NPDES permits; therefore, EPA — specifically, the Region — is the relevant permitting authority.¹

Effluent limitations in NPDES permits may be either “technology-based” or “water quality-based.” *See* CWA §§ 301, 303, 304(b), 402, 33 U.S.C. §§ 1311, 1313, 1314(b), 1342; 40 C.F.R. pts. 122, 125, 131. Technology-based limitations, generally developed on an industry-by-industry basis, reflect a specified level of pollutant-reducing technology available and economically achievable for the type of facility being permitted. CWA § 301(b), 33 U.S.C. § 1311(b). Technology-based effluent limitation requirements “represent the minimum level of control that must be imposed in a permit,” 40 C.F.R. § 125.3(a), and may be developed for a particular facility in one of two ways. If EPA has developed industrial category-wide (or

¹ The Commonwealth maintains separate, independent permitting authority over surface waters pursuant to the Massachusetts Clean Water Act, *see* Mass. Gen. Laws Ann. ch. 21 § 43, and the Region and the Massachusetts Department of Environmental Protection (“MassDEP”) typically coordinate their respective permitting efforts and simultaneously issue two permits using a single document. *See generally In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 497 n.5 (EAB 2006). MassDEP issued a State permit with limitations identical to those in the Permit challenged in this proceeding. Response at 4 n.1.

subcategory-wide) effluent limitations — referred to as “effluent limitation guidelines” (“ELGs”) — such limits must be included in that facility’s permit. 40 C.F.R. § 125.3(c)(1); *see generally* *E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977). Where EPA has not developed an ELG for a particular industry, or has not addressed a particular pollutant discharged by an industry, the Clean Water Act authorizes EPA to use its best professional judgment (“BPJ”) to develop permit limits based on a case-by-case, site-specific application of the relevant technology-based level of control. *See* CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1); 40 C.F.R. § 125.3(c)(2); *Natural Res. Def. Council v. EPA*, 859 F.2d 156, 199 (D.C. Cir. 1988) (“BPJ limits constitute case-specific determinations of the appropriate technology-based limitations for a particular point source.”).

Water quality-based effluent limits, on the other hand, are designed to ensure that State water quality standards² — the water quality goal for a water body developed by a State and approved by EPA — are met when technology-based limitations alone are not sufficient for this purpose. In particular, CWA section 301 requires that permits include any effluent limitations “necessary to meet water quality standards.” CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); *see also* 40 C.F.R. § 122.44(d)(1)(i) (requiring effluent limits to control “all pollutants or pollutant parameters” that are or may be discharged at a level that causes or has the “reasonable potential to cause or contribute to an excursion above any State water quality standard”).

² Water quality standards consist of three mandatory components: beneficial designated uses for a water body or water body segment, numeric and/or narrative water quality criteria sufficient to protect the assigned designated uses, and anti-degradation requirements to ensure that once a use is attained, it will not be degraded. 40 C.F.R. §§ 131.6, .10-12; *see* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A). States may also “include in their State standards[] policies generally affecting their application and implementation.” 40 C.F.R. § 131.13

Therefore, if the permitting authority determines that the technology-based limitations alone are insufficient to ensure that State water quality standards are met, it must develop water quality-based effluent limits in the permit.

CWA section 303(d) requires States to identify water body segments that fail to meet State water quality standards despite implementation of all requisite effluent limitations on discharges in the affected waters. CWA § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A); *see* 40 C.F.R. §§ 130.2(j), .7(d). For such “water-quality limited” or “impaired” waters, States must develop a total maximum daily load (“TMDL”) for each relevant pollutant.³ CWA § 303(d)(1)(C), (d)(2), 33 U.S.C. § 1313(d)(1)(C), (d)(2). Where a TMDL for a particular pollutant exists for a receiving water body, the permitting authority must determine whether a wasteload allocation has been assigned to a point source seeking an NPDES permit. 40 C.F.R. §§ 130.2(h), .7(a). If a wasteload allocation has been so assigned, the permit issuer must calculate a water quality-based effluent limit for the pollutant that is “consistent with the assumptions and requirements” of the wasteload allocation. *Id.* § 122.44(d)(1)(vii)(B).

When determining the final effluent limitations for reissued permits, the permitting authority must consider whether any of the limitations are less stringent than limitations on the same pollutant in the previous NPDES permit. In general, a permitting authority may not renew,

³ TMDLs establish specific wasteload allocations for point sources that discharge to the water body in question, as well as load allocations for nonpoint sources in the watershed. 40 C.F.R. § 130.2(i). TMDLs also include natural background concentrations of the pollutants in question and incorporate margins of safety to account for scientific uncertainties. *Id.* §§ 130.2(g)-(i), .7(c)(1).

A “point source” is “any discernable, confined and discrete conveyance * * * from which pollutants are or may be discharged.” CWA § 502(14), 33 U.S.C. § 1362(14). A “nonpoint source” is any source of water pollution that is not a “point source.”

reissue, or modify a permit with less stringent limitations or conditions than those contained in the previous permit unless doing so complies with the Clean Water Act's "anti-backsliding" requirements. CWA § 402(o), 33 U.S.C. § 1342(o); 40 C.F.R. § 122.44(l). The anti-backsliding provisions prohibit the relaxation of permit limits, standards, and conditions except under certain circumstances. CWA § 402(o)(2), 33 U.S.C. § 1342(o)(2).

Finally, before issuing an NPDES permit, EPA must obtain (or a State may waive) State certification that the permit contains all conditions necessary to assure compliance with the Clean Water Act and attain the State's water quality standards. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1); 40 C.F.R. §§ 124.53(a), .55(a)(2).

III. PROCEDURAL AND FACTUAL HISTORY

CertainTeed manufactures fiberglass/asphalt roofing materials at the Facility. U.S. EPA Region 1, *Fact Sheet, Draft National Pollutant Discharge Elimination System (NPDES) Permit to Discharge to Waters of the United States Pursuant to the Clean Water Act (CWA), NPDES Permit No. MA0003531*, at 5 (May 27, 2014) (Administrative Record ("A.R.") 7) ("Fact Sheet"). The Permit, which is a renewal of a 2005 permit, authorizes discharge of process water, contact and noncontact cooling water, and stormwater runoff from four outfalls into the Neponset River. *Id.* at 6. For the segment of the Neponset River into which the Facility discharges, the Commonwealth of Massachusetts has developed a Total Maximum Daily Load pursuant to CWA § 303(d) for several pollutants, including sedimentation/siltation, total suspended solids ("TSS"), and turbidity. *Id.* at 6-7. There are no quantitative water quality criteria for TSS in the

Massachusetts water quality standards, *id.* at 14-15; however, the applicable narrative criterion provides:

These waters shall be free from floating, suspended and settleable solids in concentrations and combinations that would impair any use assigned to this [class of waters] that would cause aesthetically objectionable conditions or that would impair the benthic biota or degrade the chemical composition of the bottom.

314 Code. Mass. Regs. 4.05(3)(b)(5) (providing solids criterion for waters “designated as a habitat for fish, other aquatic life, and wildlife * * * and for primary and secondary contact recreation.”).

During the week of May 27, 2014, the Region and the Massachusetts Department of Environmental Protection (“MassDEP”) issued a Draft Permit and Fact Sheet, and solicited public comment on the Draft Permit. In addition to describing the Facility, its location, the discharge, and the receiving water, the Fact Sheet identified the statutory and regulatory authority for the Draft Permit and explained how the Region derived the effluent limits pursuant to those legal authorities. *See generally* Fact Sheet. CertainTeed submitted the only comments to the Draft Permit, to which the Region and MassDEP responded. *See* U.S. EPA Region 1 & MassDEP, *Response to Public Comments NPDES Permit #MA0003531* (Jan. 13, 2015) (A.R. B.1) (“RTC”).

On January 13, 2015, the Region issued the Permit to CertainTeed. *See* U.S. EPA Region 1 & MassDEP, *Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. MA0003531* (Jan. 13, 2015) (A.R. A.1) (“Permit”). CertainTeed petitioned the Board to review Permit conditions pertaining to sampling

requirements, whole effluent toxicity testing requirements at two outfalls, and the TSS effluent limits at three outfalls.

IV. ANALYSIS

Section 124.19 of title 40 of the Code of Federal Regulations governs Board review of NPDES permits. In any appeal from a permit decision issued under part 124, the petitioner bears the burden of demonstrating that review is warranted. *See* 40 C.F.R. § 124.19(a)(4). Under 40 C.F.R. § 124.19, the Board has discretion to grant or deny review of a permit decision.

Ordinarily, the Board will deny review of a permit decision and thus not remand it unless the permit decision either is based on a clearly erroneous finding of fact or conclusion of law, or involves a matter of policy or exercise of discretion that warrants review. 40 C.F.R.

§ 124.19(a)(4)(i)(A)-(B); *accord, e.g., In re Prairie State Generating Co.*, 13 E.A.D. 1, 10

(EAB 2006), *aff'd sub nom. Sierra Club v. EPA*, 499 F.3d 653 (7th Cir. 2007); *see also*

Revisions to Procedural Rules Applicable in Permit Appeals, 78 Fed. Reg. 5,281, 5,282 (Jan. 25,

2013). In considering whether to grant or deny review of a permit decision, the Board is guided

by the preamble to the regulations authorizing appeal under part 124, in which the Agency stated

that the Board's power to grant review "should be only sparingly exercised" and that "most

permit conditions should be finally determined at the [permit issuer's] level." Consolidated

Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also* 78 Fed. Reg. at 5,282.

In considering a petition filed under 40 C.F.R. § 124.19(a), the Board first evaluates whether the petitioner has met threshold procedural requirements, including issue preservation.

See 40 C.F.R. § 124.19; *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006). A

petitioner must demonstrate that any issues and arguments it raises on appeal have been preserved for Board review (i.e., were raised during the public comment period or public hearing on the draft permit), unless the issues or arguments were not reasonably ascertainable at the time. 40 C.F.R. §§ 124.13, .19(a)(4)(ii); *see, e.g., In re City of Attleboro*, 14 E.A.D. 398, 441-42 (EAB 2009); *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 724 (EAB 2006); *In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 120-22 (EAB 2005); *In re City of Moscow*, 10 E.A.D. 135, 141, 149-50 (EAB 2001). If a petitioner fails to meet a threshold requirement, the Board typically denies or dismisses the petition for review. *See, e.g., Arecibo*, 12 E.A.D. at 122 (declining to review issues not raised during the public comment period); *In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-12 & 10-13, at 4-7 (EAB June 9, 2010) (Order Dismissing Two Petitions for Review as Untimely).

A. Sampling Requirements

The tables at Part I.A.1 through I.A.4 of the Permit set forth monitoring requirements for all four outfalls. These monitoring requirements specify the sample type, and footnote 3 provides details about when the samples must be taken. Specifically, footnote 3 states:

Grab samples shall be taken during the first 15 minutes of the initiation of the discharge where practicable, but in no case later than within the first hour of discharge. If collection of sample(s) during the first 15 minutes of discharge is impracticable, the Permittee shall submit a description of why the collection of the sample(s) during the first 15 minutes was impracticable.

Permit at 10 n.3. In its Petition, CertainTeed challenges when these grab samples must be taken.

Contrasting the current Permit with the permit issued in 2005, the Petition states:

Footnote 3 for Parts I.A.1 through 4 [of the 2005 permit] requires that storm water

samples be collected within the first 30 minutes of a storm event with a maximum collection time of three hours. In the Permit[,] the requirement has been changed to collecting a sample in the first 15 minutes with a maximum collection time of one hour.

Petition at 2; *see also id.* at 5.⁴ CertainTeed further argues that “[c]ollecting a sample within 15 minutes of discharge would be virtually impossible, especially given the winter weather in [Massachusetts].” *Id.* at 2, 5.

The Region does not dispute that the 2005 permit allowed samples to be collected within the first 30 minutes of discharge. Instead, it contends that CertainTeed failed to present its argument in the proceedings for the current Permit, even though CertainTeed had the opportunity to make such an argument. Response at 26. Specifically, the Region argues that footnote 3 “is identical to the sample type footnote included in the Draft Permit, except that any requirement pertaining to a composite sample was removed as a result of a request by [CertainTeed] made during the public comment period to change composite samples to grab samples at Outfalls 002, 003 and 004.” *Id.* at 26-27. In the Draft Permit, footnote 3 addressed both grab samples and composite samples. The Draft Permit provided:

Grab samples shall be taken during the first 15 minutes of the initiation of the discharge where practicable, but in no case later than within the first hour of discharge. If collection of sample(s) during the first 15 minutes of discharge is impracticable, the Permittee shall submit a description of why the collection of the sample(s) during the first 15 minutes was impracticable. *The composite samples for TSS shall consist of at least 8 grab samples collected on a time-weighted basis during a normal working day and during the time at which the discharge is entering the receiving water unless otherwise specified. The timing of grab samples shall correspond with the timing of composite sampling for the other parameters.*

⁴ Because the pages of CertainTeed’s Petition are not numbered, the Board has numbered the pages in order, beginning with the first page following the table of contents.

See U.S. EPA Region 1 & MassDEP, *Authorization to Discharge Under the National Pollutant Discharge Elimination System, NPDES Permit No. MA0003531*, at 8 n.3 (draft May 30, 2014) (A.R. A.6) (emphasis added). CertainTeed's comments objected to taking composite samples for TSS and total phosphorus,⁵ see Letter from Patrick Widman, Plant Manager, CertainTeed RPG, to Shauna Little, U.S. EPA Region 1, at 2 (July 9, 2014) (A.R. B.2) ("Comments"), and as a result, the Region deleted the italicized portion of the quoted text above that referenced composite samples. Notably, the grab sample requirement that CertainTeed now challenges remains unaltered from the Draft Permit. Thus, CertainTeed had an opportunity during the public comment period to object to the provisions concerning when a grab sample must be taken, but failed to do so.

⁵ CertainTeed's comments provide in relevant part:

Part I.A.2, Table 2 includes a requirement to collect a composite sample for Total Suspended Solids. Due to the limited discharge duration at this outfall we request that this sample requirement be changed to a grab sample and only when a discharge occurs.

* * * *

Part I.A.3, Table 3 requires composite samples for Total Suspended Solids and Phosphorous. We request that all sampling requirements for this outfall be changed to grab samples "when a discharge occurs." [Outfall 3] is a manually initiated discharge.

* * * *

Part I.A.4, Table 4 requires composite samples for Total Suspended solids and Phosphorous. We request that all sampling requirements for this outfall be changed to grab samples "when a discharge occurs." [Outfall 4] is a manually initiated discharge.

Comments at 2.

As we noted earlier, the Board typically declines to review arguments or issues that have not been raised as required by 40 C.F.R. § 124.13. Important reasons underlie this procedural requirement. “Adhering to the requirements in 40 C.F.R. § 124.13 ensures that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final, thereby promoting EPA’s longstanding policy that most permit issues should be resolved at the regional level, and providing predictability and finality to the permitting process.” *Arecibo*, 12 E.A.D. at 116-17. Rarely, the Board will consider an issue not specifically commented upon where the specific issue raised in the petition is “very closely related to challenges raised during the comment period” and the Region had the opportunity to respond to those comments. *E.g.*, *In re New Eng. Plating Co.*, 9 E.A.D. 726, 732-33 (EAB 2001); *see also Scituate*, 12 E.A.D. at 723 n.7 (discussing *New Eng. Plating*); *In re ExxonMobil Chem. Co.*, PSD Appeal No. 13-11, slip op. at 20 n.9 (EAB May 14, 2014), 16 E.A.D. ____ (determining the Region was sufficiently on notice of petitioner’s objections and had an opportunity to respond).

The narrow exception to the requirement to first raise objections during the public comment period does not apply to this case. CertainTeed’s comments do not address the time at which a grab sample must be taken, nor are any other comments very closely related to this issue. Nothing in the comments put the Region on notice of CertainTeed’s concerns regarding the requirement to obtain grab samples “during the first 15 minutes of the initiation of the discharge where practicable,” and the Region’s first opportunity to address those concerns was in its response to the Petition. Accordingly, CertainTeed has waived this issue, and the Board declines review of the 15-minute time frame for grab sample requirements in footnote 3 of the Permit.

B. *Whole Effluent Toxicity Testing Requirements*

The Permit also includes whole effluent toxicity (“WET”) testing requirements at Outfalls 001 and 002 and provides sampling and reporting requirements in tables at Part I.A.1 and I.A.2, and in footnotes 12 through 16. Permit at 2-3 (Outfall 001), 5-6 (Outfall 002), 11-12 nn.12-16. CertainTeed seeks clarification as to a perceived “discrepancy with the sampling requirements in [one of] the footnote[s] and [the] table[s]. Footnote 16 [of the Permit] lists sampling requirements that include both total solids, dissolved solids and total chlorine. The table[s] do[] not include these requirements.” Petition at 5; *see also id.* at 2. Thus, according to CertainTeed, the requirements in the tables conflict with the requirements described in footnote 16 of the Permit.

In responding to the Petition, the Region provided its interpretation of the tables and footnote 16.⁶ Both tables contain two sections that concern WET. One section, labeled “Whole Effluent Toxicity,” “requires *effluent* (*i.e.*, 100 percent effluent) to be analyzed for certain parameters, including total residual chlorine, total solids and total dissolved solids.” Response at 30; *see* Permit at 2-3 (Outfall 001), 5-6 (Outfall 002). Another section, labeled “Whole Effluent Toxicity Test, Receiving Water Chemical Analysis,” “requires the *receiving water* (*i.e.*, zero percent effluent) to be analyzed for hardness, alkalinity, pH, specific conductance, ammonia, total organic carbon, cadmium, copper, lead, nickel, zinc, aluminum, antimony, iron, manganese, chromium, calcium, magnesium, [and] phosphorus.” Response at 30; *see* Permit at 3 (Outfall 001), 6 (Outfall 002).

⁶ The Region provided this response in its Response brief, rather than earlier, because it contends that CertainTeed did not raise this issue below. While there is merit to the Region’s claim, the clarification it provides will nonetheless be helpful guidance for future compliance.

The Region further explains that “[t]otal residual chlorine, total solids and total dissolved solids are not listed in the [t]able as being subject to *receiving water* toxicity testing requirements because the Permit does *not* require them to be so tested.” Response at 30 (quoting Permit at 12 n.16) (first emphasis added). Indeed, the Board confirms that the sections of the tables that are labeled “Whole Effluent Toxicity Test, Receiving Water Chemical Analysis” do not list total residual chlorine, total solids, and total dissolved solids as being subject to the prescribed requirements. Permit at 2-3, 5-6. Moreover, footnote 16, which summarizes the WET test requirements, provides:

In conjunction with each WET test, the Permittee shall report the concentrations of hardness, alkalinity, pH, specific conductance, ammonia, total organic carbon, total recoverable cadmium, total recoverable copper, total recoverable lead, total recoverable nickel, total recoverable zinc, and total recoverable aluminum found in the 100% effluent and receiving water control (0% effluent) samples in [discharge monitoring reports] * * *, noted above as Whole Effluent Toxicity and Whole Effluent Toxicity Test, Receiving Water Chemical Analysis. * * * *Total residue chlorine, total solids, and total dissolved solids must also be reported for 100% effluent.*

Id. at 12 n.16 (emphasis added). Nothing in the footnote states that chlorine, total solids, and total dissolved solids must be subject to receiving waters toxicity testing requirements.

Here, the Region has reasonably construed the tables in Part I.A.1 and I.A.2 and footnote 16 as being consistent with each other and not subjecting “[t]otal residual chlorine, total solids and total dissolved solids * * * to receiving water toxicity testing.” Response at 30. The Board adopts the Region’s harmonious interpretation of the provisions as “an authoritative reading of the permit that is binding on the Agency.” *In re Austin Powder Co.*, 6 E.A.D. 713, 717 (EAB 1997); *accord In re Charles River Pollution Control Dist.*, NPDES 14-01, slip. op. at 23 (EAB Feb. 4, 2015), 16 E.A.D. ___; *In re Amoco Oil Co.*, 4 E.A.D. 954, 981 (EAB 1993);

see also In re Great Lakes Chem. Corp., 5 E.A.D. 395, 397 (EAB 1994) (construing Agency's agreement with permit applicant's construction of permit terms as binding on Agency).

Accordingly, the Board rejects CertainTeed's claim that the tables pertaining to WET requirements in Part I.A.1 and I.A.2 and footnote 16 are unclear or contradictory.

C. *Effluent Limits for Total Suspended Solids*

Finally, CertainTeed challenges the total suspended solids ("TSS") effluent limits for Outfalls 002, 003, and 004, arguing that these limits should be identical to the concentration-based TSS effluent limits the Region developed for Outfall 001. Petition at 1, 5-6. Outfalls 002, 003, and 004 are subject only to concentration-based effluent limits for TSS, whereas Outfall 001 is subject to both concentration-based and mass-based effluent limits for TSS.⁷ For all outfalls, the Permit retains the concentration-based TSS effluent limitations that were in the 2005 permit. *See* Fact Sheet at 14, 15, 22-23, 25. Each outfall is subject to two concentration-based limits for TSS: a maximum daily limit and a monthly average limit. For Outfall 001, the maximum daily limit is 70 mg/L and the monthly average limit is 40 mg/L; for Outfall 002, the maximum daily limit is 30 mg/L and the monthly average limit is 20 mg/L; and for Outfalls 003 and 004, the maximum daily limits are 15 mg/L and the monthly average limits are 10 mg/L. Permit at 2, 5, 8-9. Thus, CertainTeed contends that the TSS effluent limits for Outfalls 002, 003, and 004

⁷ The mass-based TSS effluent limits are not in controversy in this appeal. The Region concluded that the discharge at Outfall 001, unlike the discharge at Outfalls 002, 003, and 004, was composed of effluent from industrial categories subject to the effluent limitation guidelines. Therefore, the Region determined that the effluent limitation guidelines that formed the basis for the new mass-based TSS effluent limits at Outfall 001 did not apply to the remaining outfalls. Response at 14 (citing Fact Sheet at 11-12; RTC at 5-7, 8-9, 10); *see also id.* at 12-13 (describing development of effluent limits for Outfall 001).

should be the same as those at Outfall 1: a maximum daily limit of 70 mg/L and a monthly average limit of 40 mg/L.

To arrive at the TSS concentration-based effluent limitations for Outfalls 002, 003, and 004, the Region explained that the limitations originated from a permit issued in 1997 and are “technology-based limits based on BPJ.” Fact Sheet at 22-23, 25; *see also* RTC at 7. The Region further explained that it considered several factors when deciding to retain the TSS effluent limits from the 1997 and 2005 permits for Outfalls 002, 003, and 004. First, the Region considered “the impairment to the Neoponset River and the concentrations of TSS measured in effluent from the Facility.”⁸ *Id.* at 23; *see also id.* at 25. Then, the Region determined that the technology-based limits were more restrictive than the water-quality-based limits. *Id.* at 23, 25. The Region also considered the “low frequency of discharge from Outfall 002.” *Id.* at 23. Finally, the Region determined that for Outfalls 002, 003, and 004, the technology-based TSS effluent limits did not violate the anti-backsliding prohibition on relaxed permit limits, and discharge at those limits also would not violate the Massachusetts water quality standards. *Id.* at 23, 25.

During the public comment period, CertainTeed challenged the effluent limits for TSS at Outfalls 002, 003, and 004. Comments at 1-3. With respect to Outfall 002, CertainTeed stated that “there has not been a discharge from Outfall 002 since 2012. CertainTeed has performed maintenance in the area that leads to Outfall 002 further reducing the likelihood of any

⁸ The Region considered the measured TSS concentrations from samples taken at Outfalls 002, 003, and 004 from January 1, 2009, through December 31, 2013. Fact Sheet at 22-23, 25.

discharges.” *Id.* at 2. The heart of CertainTeed’s objection to the limits at Outfall 002, which it repeated verbatim in comments for Outfalls 003 and 004, was that:

We find no design data or historical data that supports these lower limits. We believe the original limits to have been established in error. Further, the derived [best professional judgment and best achievable technology limits] for Outfall 001 support a higher TSS limit. We request the TSS limit for Outfall 002 be changed to equal Outfall 001.

Id.; see also *id.* at 2 (Outfall 3), 4 (Outfall 4).

The Region provided a nearly two-and-a-half page response to CertainTeed’s comments regarding the TSS effluent limitations for Outfall 002.⁹ RTC at 5-7. In the response, the Region refuted CertainTeed’s allegation that the design data and historical record did not support the effluent limitations and also explained that the limited discharge from the outfall and the maintenance performed on the treatment system did not require less stringent limits. *Id.* at 5-6. The Region also explained how it developed the TSS effluent limitations for Outfall 002, which are technology-based, by using BPJ and why it did not relax the limits set in the prior permit. *Id.* at 6-7. In particular, the Region explained that because of existing impairment in the receiving water for conditions attributed to TSS, the effluent limitations existing in the prior permit would satisfy anti-degradation requirements and, consequently, State certification requirements. *Id.* at 6. The Region also noted that it found no exception to the anti-backsliding requirements that would allow relaxation of the permit limits. *Id.*

⁹ The discharge from Outfall 002 consists of “treated contact process water (i.e., cleaning and dust control water), non-contact cooling water, boiler condensate, boiler blowdown, and stormwater from the granule plant which drains into the Facility’s stormwater system.” Fact Sheet at 6.

The Region explained that its responses to CertainTeed's comments regarding TSS limits for Outfalls 003 and 004 are "substantially identical" to each other.¹⁰ RTC at 10. The Region reiterated that it first established the TSS effluent limitations for Outfalls 003 and 004 in the 1997 permit. *Id.* at 8. These limitations were technology-based and developed using best professional judgment. *Id.* As in its response to comments concerning TSS effluent limitations for Outfall 002, the Region expressed concern with relaxing the limitations at Outfalls 003 and 004 due to anti-degradation and anti-backsliding requirements: "[W]ere EPA to increase the allowable TSS load to the [receiving water], the existing impairments related to TSS would be expected to degrade. Further, * * * the limits have been maintained based on anti-backsliding requirements." *Id.* at 9. The Region also noted that discharge from Outfalls 003 and 004 using the existing technology has generally met the existing permit limits. *Id.* (stating that discharge from Outfall 003 "has exceeded the daily maximum limit on only one occasion and has not exceeded the monthly average limit"); *id.* at 10 (stating that discharge from Outfall 004 "has exceeded the daily maximum limit only on two occasions and the monthly average limit on one occasion").

On appeal, CertainTeed's argument regarding the TSS effluent limitations for Outfalls 002, 003, and 004 does not add much, if anything, to what it stated in its comments. The Petition on this point provides almost in its entirety:

EPA determined that one or more of the limits in a prior permit for Outfall 001 was a mistake. EPA chose to correct the alleged mistake but then did not recognize the other historic errors which resulted in differing TSS limits. The outfall with the highest and most consistent discharge, Outfall 001[,] has the

¹⁰ The discharge from Outfalls 003 and 004 consist of treated stormwater discharge from the tank farm and the still yard, respectively. Fact Sheet at 11.

highest TSS limit. Any historic limits for the other three Outfalls were in error and are not supported by the activity at the site. There was simply a mistake that was not corrected, but now EPA is attempting to correct one of the errors, but not all of them. To substantiate the error, it is clear that the derived Best Practicable Control Technology Currently Available (BPT) and Best Available Technology Economically Achievable (BAT) for Outfall 001 support the use of the TSS limit for Outfall 001 for the other Outfalls at the CertainTeed [F]acility * * * .

Petition at 3-4.

When a petitioner challenges an issue the permit issuer addressed in its response to comments, the petitioner must provide a record citation to the comment and response and also must *explain why* the permit issuer's previous response to those comments was clearly erroneous or otherwise warrants review. 40 C.F.R. § 124.19(a)(4)(ii); *accord In re Penn. Gen. Energy Co.*, UIC Appeal Nos. 14-63 through 14-65, slip op. at 6-7 (EAB Aug. 21, 2014), 16 E.A.D. ___; *In re Seneca Res. Corp.*, UIC Appeal Nos. 14-01 through 14-03, slip op. at 7 & n.4 (EAB May 29, 2014), 16 E.A.D. ___; *see also In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 494-95 (EAB 2004); *In re Westborough*, 10 E.A.D. 297, 305, 311-12 (EAB 2002); *In re City of Irving*, 10 E.A.D. 111, 129-30 (EAB 2001), *review denied sub nom. City of Abilene v. EPA*, 325 F.3d 657 (5th Cir. 2003). The Board consistently has denied review of petitions that merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit. *E.g.*, *In re City of Pittsfield*, NPDES Appeal No. 08-19, at 7, 10-11 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd*, 614 F.3d 7, 11-13 (1st Cir. 2010); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) ("Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority's response to those objections warrants review."); *In re Hadson Power 14*, 4 E.A.D. 258, 294-95 (EAB 1992)

(denying review where petitioners merely reiterated comments on draft permit and attached a copy of their comments without addressing permit issuer's responses to comments).

The U.S. Courts of Appeals for the First, Sixth, and Ninth Circuits have upheld this Board requirement that a petitioner must substantively confront the permit issuer's response to the petitioner's previous objections. *Native Vill. of Kivalina IRA Council v. EPA*, 687 F.3d 1216, 1219-22 (9th Cir. 2012), *aff'g In re Teck Alaska Inc.*, NPDES Appeal No. 10-04 at 7-11 (EAB Nov. 18, 2010) (Order Denying Review); *City of Pittsfield v. EPA*, 614 F.3d 7, 11-13 (1st Cir. 2010), *aff'g In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review); *Mich. Dep't of Envtl. Quality v. EPA*, 318 F.3d 705, 708 (6th Cir. 2003) (“[Petitioner] simply repackag[ing] its comments and the EPA’s response as unmediated appendices to its Petition to the Board * * * does not satisfy the burden of showing entitlement to review.”), *aff'g In re Wastewater Treatment Fac. of Union Twp.*, NPDES Appeal Nos. 00-26 & 00-28 (EAB Jan. 23, 2001) (Order Denying Petitions for Review); *LeBlanc v. EPA*, 310 F. App'x 770, 775 (6th Cir. 2009) (concluding that the Board correctly found petitioners to have procedurally defaulted where petitioners merely restated “grievances” without offering reasons why the permit issuer's responses were clearly erroneous or otherwise warranted review), *aff'g In re Core Energy, LLC*, UIC Appeal No. 07-02 (EAB Dec. 19, 2007) (Order Denying Review). Moreover, “‘mere allegations of error’ are insufficient to support review.” *Westborough*, 10 E.A.D. at 311 (citing *In re City of Moscow*, 10 E.A.D. 135, 172 (EAB 2001) and *New Eng. Plating*, 9 E.A.D. at 730).

In this case, CertainTeed's petition does not address the Region's extensive response to comments and consequently, CertainTeed has not demonstrated why those responses were clearly erroneous or otherwise warrant review. CertainTeed provides no additional support or

explanation for the contentions in its Petition. In particular, CertainTeed does not substantiate its contentions that the “historic limits for the other three Outfalls were in error” and that the “derived Best Practicable Control Technology Currently Available (BPT) and Best Available Technology Economically Achievable (BAT) for Outfall 001 support the use of the TSS limit for Outfall 001 for the other Outfalls at the CertainTeed [F]acility.” Notably, these arguments reiterate CertainTeed’s comments, *compare* Petition at 3-4, *with* Comments at 2-3, to which the Region thoroughly responded in its Response to Comments document. *See* RTC at 5-7 (discussing Outfall 002), 8-9 (discussing Outfall 003), 10 (discussing Outfall 004). Nor does CertainTeed provide any response to the Region’s statements in its Response to Comments document that it cannot relax these limits because to do so would violate anti-backsliding and anti-degradation requirements of the Clean Water Act.

CertainTeed does challenge a portion of the administrative record: “EPA went to great lengths to discuss the TSS limit for Outfall 001 [but] it did not substantiate the TSS limits for Outfalls 002, 003, and 004.” Petition at 5. This argument, however, follows a lengthy quotation from the Fact Sheet¹¹ describing the change to the TSS limitations for Outfall 001. *Id.* at 4 (“The Permit contains detailed information supporting the TSS limit for Outfall 001, but contains NO information for the TSS limits for Outfalls 002, 003, and 004.”) (misidentifying Fact Sheet as Permit). The Board therefore does not construe this argument about Outfall 001 as a rebuttal to the Region’s *response to comments* for Outfalls 002, 003, and 004, which was issued after the Fact Sheet and after consideration of public comments. *See id.* at 4-5. Most significantly, the

¹¹ CertainTeed’s Petition includes over a page of quoted text that CertainTeed identifies as originating in the Permit; however, the Board has determined that the quoted text is from section 7.1.2 of the Fact Sheet, on pages 13 through 15, which discusses the TSS effluent limit for Outfall 001.

Region's response to comments *does* in fact address the TSS effluent limitations for Outfalls 002, 003, and 004. RTC at 5-7, 8, 10.

The arguments in the Petition fail to confront the Region's responses to CertainTeed's earlier objections and also are unsupported, conclusory, and lacking in the specificity required by 40 C.F.R. § 124.19(a)(4)(ii). Additionally, CertainTeed's failure to rebut the Region's response to comments leaves the Board with a record that supports the Region's approach. Without more, the Board is unable to determine what aspects of the Region's responses CertainTeed believes were clearly erroneous or warrant review. CertainTeed has not met its burden of showing that Board review of the effluent limits for TSS at Outfalls 002, 003, and 004 is warranted.

V. CONCLUSION AND ORDER

For the reasons stated above, the Board denies CertainTeed's petition for review of Permit No. MA0003531.

So ordered.

ENVIRONMENTAL APPEALS BOARD¹²

Dated: May 7, 2015

By: Kathie A. Stein

Kathie A. Stein
Environmental Appeals Judge

¹² The two-member panel deciding this matter consists of Environmental Appeals Judges Leslye M. Fraser and Kathie A. Stein. 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Petition for Review in the matter of *In re CertainTeed Corporation*, NPDES Appeal No. 15-01, were sent to the following persons in the manner indicated:

By U.S. First Class Certified Mail, Return Receipt Requested:

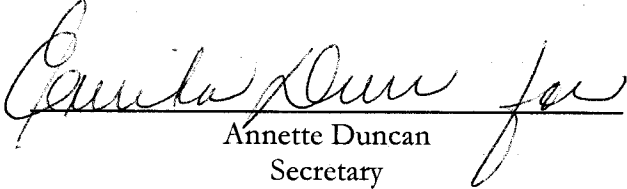
Lauren P. Alterman
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Samir Bukhari
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Date:

May 7, 2015


Annette Duncan
Secretary