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

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| In the Matter of: | ) | |
| Town of Concord<br>Department of Public Works | ) | NPDES Appeal No. 13-08 |
| NPDES Permit No. MA0100668 | ) | |

**RESPONDENT REGION 1'S SUR-REPLY**

Respectfully submitted,

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Dated: November 29, 2013

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## I. INTRODUCTION

"[A]llowing a petitioner to raise for the first time on appeal concerns that could have been brought to the attention of the permitting authority, would leave the [] permit system open-ended, frustrating the objective of repose and introducing intolerable delay." *In re Sumas Energy 2 Generation Facility,* PSD Appeal Nos. 02-10 & 02-11, at 10 (EAB March 25, 2003) (Order Remanding in Part and Denying Review in Part). In its Reply, just as in its Petition, Petitioner consistently ignores this procedural prerequisite. As the Region demonstrates below, the Reply is replete with issues and arguments that have been made too late, are procedurally barred and cannot serve as a basis for review.

## II. ARGUMENT

### A. Petitioner Has Failed to Demonstrate That the Flow Limit Issue Was Preserved and Impermissibly Attempts to Introduce New Argument

In its Petition for Review, the Town claimed to have made a "direct request to [sic] an increased [sic] of flow capacity" in it comments on the draft permit and to have thus preserved the flow increase issue for review by this Board, as it is required to do by 40 C.F.R. §§ 124.13 and 124.19(a)(4). *Pet.* at 13. As the Region has pointed out, the Town's representation is flatly contradicted by comments received on the draft permit, which make clear the Town was *not* requesting a flow increase at this time. *Res. to Pet.* at 9-10, 14-15. In an attempt to demonstrate that the flow issue was preserved, the Town relies on assumptions, inferences, and contextualization to support its assertion that it made a "direct request" for a flow increase. In step one of its argument, the Town states "There can be no dispute that the Region understood the permit's flow limit of 1.2 MGD

placed a constraint on Concord's ability to address existing and identified demand for development…along with economical wastewater disposal options for affordable housing." *Reply* at 1. *But see*, AR B.1 (RTC) at 4 (indicating that "EPA does not necessarily agree with the claim that development cannot move forward without additional wastewater capacity."). Petitioner in step two contends that, upon intuiting the true intention of the Town, the Region should have acted upon this *sotto voce* request for a flow increase of unspecified magnitude. In the final step, the Town asserts that the Region should have ignored the Town's unambiguous statement that a flow increase request was not on the table in this permit reissuance—*e.g.*, the Town's statement that "a formal request for a flow increase will require a future modification" (RTC at 4)—by 'placing it into context,' through reference to statements made *before* the public comment period. *Reply* at 3 n. 1. That the Town should have to resort to such convolutions to maneuver around an inconvenient record and manufacture a comment that simply does not exist is itself compelling evidence that the flow argument is waived under this Board's exacting requirements governing issue preservation, where issues must be raised with "a reasonable degree of specificity and clarity." *In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002).

The Town's attempt to shoehorn the flow issue into this proceeding fails on additional procedural grounds. First, Petitioner neglected to satisfy the requirement of 40 C.F.R. § 124.19(a)(4)(ii) in its Petition, where it "must demonstrate, by providing specific citation to the administrative record, including the document name and page number, that each issue being raised in the petition was raised during the public comment period (including any public hearing) to the extent required by § 124.13." *See In re*

*ConocoPhillips Co.*, 13 E.A.D. 768, 801 (EAB 2008) (noting that the Board is not required to scour the entire administrative record to determine whether an issue was raised in comments below). Only in its Reply did the Petitioner attempt to show that the issue was raised below. It endeavors to do this by first stringing together various quotations from different parties made before and during the public comment period. It then offers its holistic interpretation of this pastiche to suggest what it believes the Region must have known, *i.e.*, that a flow increase request had actually been made notwithstanding the Town's categorical comment that it had not been made. Not only is this tardy demonstration in breach of 40 C.F.R. § 124.19(a)(4)(ii), it is also late-filed argument and impermissible under the Board's rules. The Board has consistently held that new arguments "raised for the first time at the reply stage of the[] proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness." *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999).

Substantively, the Town's claim of issue preservation rests in significant part on a pre-public comment period meeting with the Region regarding flow issues, where the Town contends that it made the Region aware of its flow constraints and wastewater needs. *Reply* at 1-2. The meeting, which is memorialized in a June 20, 2012, letter, and attached as Exhibit B to the Petition, does nothing to help the Town. Most fundamentally, these comments were not made during the public comment period. In construing the requirement that comments be raised *during* the public comment period, the Board has denied review of issues presented prior to, but not during, the public comment period. *In re City of Phoenix*, 9 E.A.D. 515, 530 (EAB 2000). Accordingly, "a permit issuer is under no obligation to address an issue, *sua sponte*, simply because the

issue had been raised at some earlier stage in the permitting process." *See Sumas*, at 9 n.12; *In re Carlota Copper Co.*, 11 E.A.D. 692, 725-27 (EAB 2004) (rejecting argument that to demonstrate that an issue was preserved, one only needs to show that the permit issuer was "aware" of an issue at some time prior to the final permit decision).

Tellingly, Petitioner consigns the dispositive statement on issue preservation—the Town's own representation to the Region, made during the public comment period, that it "may" make a flow increase request in the future—to a footnote. There, Petitioner labors to revise its meaning by providing 'context,' again by reference to the June 7, 2012 meeting and subsequent letter, asserting that "the reason for the June 7, 2012 meeting was to request an increase in flow." This is contradicted by the text of the letter, which states that the Town "may" seek an increase,[1] and furthermore is irrelevant in light of the comments actually filed on the draft permit.[2]

Even as the Town attempts to demonstrate that the flow increase issue was preserved, it attempts to shift accountability for its ultimate failure to do so onto the Region. First, it alleges that the Region demanded that the Town "formally request" a flow increase according to some unknown process, and in support of this contention cites to three uses of the word "formal" in the Region's Response to Petition. *Reply* at 1. The

[1] The June 2012 letter also undermines Petitioner's attempt to equate the mere identification of "capacity constraints" to a request for a flow increase. Again, in a portion of the letter that Petitioner itself quotes, *Reply* at 2, the Town stated that "additional capacity at the Concord municipal WWTF is needed," but based on that fact went on to inform the Region that an increased flow limit "may"—not will—be needed.
[2] *See In re New England Plating Co.*, 9 E.A.D. 726, 734 n.18 (EAB 2001) ("[T]he public comment period is a contained process, and …the permitting authority is not obligated to consider and address the full panoply of issues that may have been raised at one point in a… permitting process and that may or may not still be in dispute at the time of the public comment period.").

Town here attempts to make something out of nothing. The Region's formulation mirrors the Town's (stating in its comments that it "understands that a formal request for a flow increase will require a future modification to the permit…") and, like the Town, was intended to refer to a clearly delineated request for a specific increase.

Second, the Town appears to be claiming that it detrimentally relied on statements by EPA regarding the CWMP process. *Reply* at 3-4 n.2. But in failing to lodge any concerns with the Region's statements on the CWMP process during the public comment period, it failed to preserve the issue. The Town, in addition, appears to concede that its requested flow increase from 1.2 MGD to 1.67 MGD—brought to the Region's attention for the first time in the Petition—would in fact trigger MEPA requirements. *Id.* at 4, n.2. To mitigate this fact, the Town *again* shifts position, and implies that it was not really asking the Region for an additional 0.47 MGD but rather for 0.135 MGD, which it asserts would avoid MEPA requirements. This only exemplifies the need for a party to follow the rules governing the NPDES permitting process. The Region is neither capable of divining the Town's mutable intentions on the issue of flow, nor under applicable regulations and Board precedent is it required to. "While it is appropriate to hold permitting authorities accountable for a full and meaningful response to concerns fairly raised in public comments," such as the Town's comment that it may seek a future flow increase, "authorities are not expected to be prescient..." *In re Sutter Power Plant*, 8 E.A.D. 680, 694 (EAB 1999).[3]

[3] Citing to *In re Ecoeléctrica, LP*, 7 E.A.D. 56, 63-64 n. 9 (EAB 1997), the Town asserts unconvincingly that its arguments regarding the legal authority to impose flow limits were preserved by relying on a narrow exception under the Board's doctrine of issue preservation. In limited circumstances, the Board will exercise its discretion to reach the merits of an issue not specifically raised in comments below where the specific issue

Finally, the Town attempts to counter the Region's argument that the stepped permit issue was not raised below by conceding that fact, noting that the Region has included such a limit "even without need to ask for it." *Reply* at 5. This falls well short of satisfying the Town's obligation to raise issues during the comment period in order to preserve the right to challenge a condition on appeal.

The Board need not reach the merits of the flow issue. For the foregoing reasons, and as set forth in the Region's Response, the Board must deny review of the flow limit issue on the grounds that it was not preserved for review.

### B. Petitioner Has Failed to Demonstrate that the Region Committed Clear Error in Setting the Minimum pH Limit and Impermissibly Attempts to Introduce New Argument.

Next, Petitioner takes issue with the Region's statement that it "was required to revise the pH limit to one that would ensure compliance with WQS, not to one that was merely 'reasonably capable' of achieving compliance." *Res. to Pet.* at 22 (quoting *In re D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002) ("*DCMS4*")). Initially, inasmuch as Petitioner attempts to suggest that the Region relied solely on 40 C.F.R. § 122.44(d) for this "long-standing principle," *In re D.C. Water & Sewer Auth.*, 13 E.A.D. 714, 765 (EAB 2008), it should be noted that this particular regulatory provision

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raised in the petition is very closely related to challenges raised during the comment period, and the permit issuer had the opportunity to address the concerns in its response to comments. *Id.* The Town asserts that the Region, in addressing issues related to flow, implicitly addressed the legal authority to impose flow limits in an NPDES permit. Under Petitioner's conception, this "rarely applied," *New England Plating*, 9 E.A.D. at 733, exception to issue preservation would become the rule. *Ecoeléctrica* is clearly inapposite, as the Region here did not 'actually address' in the RTC or anywhere below the specific legal concerns pertaining to flow that Petitioner belatedly raises. *In re Teck Cominco Alaska, Inc.*, 11 E.A.D. 457, 482 n.21 (EAB 2004); *New England Plating*, 9 E.A.D. at 732-33 (citing cases).

was provided as one of three authorities cited by the Region. *See Res. to Pet.* at 22 (citing *D.C. Water*, 13 E.A.D. at 765; 40 C.F.R. §§ 122.4(d), 122.44(d)). Petitioner, using solely this one citation as license to explore the many subsections of § 122.44(d), next attempts to substantiate its claims with a new argument: the Region did not perform a reasonable potential analysis and, thus, committed clear error in deriving the pH limit. *Reply* at 7. Petitioner, however, offers no reason why it could not have included this argument in its Petition for Review. There is none, and Petitioner's attempt to amend its Petition now comes too late and must be rejected. *Cf. In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 438 (EAB 2007) (noting that to allow a new argument "effectively permit[s a] petitioner to amend an otherwise inadequate petition"). Nevertheless, even if Petitioner had timely raised the argument, it is incorrect, as the Region did perform a reasonable potential analysis for the pH limit. *See* RTC at 17, 32.[4]

Next, Petitioner should not be allowed to substantiate its claim that the Region provided insufficient justification for changing the pH limit in the final permit with a new argument, raised for the first time in the Reply, invoking the calculated dilution factors. Moreover, the argument is flawed, because the Region's statements in the draft permit regarding the pH limit were never based on the calculated dilution factor, *see* AR A.7 (FS) at 9, and the pH and alkalinity data on which the Region actually relied, RTC at 17, 32, are unrelated to the calculated dilution factor. The record data revealed that the river

[4] Petitioner makes much of the fact that there is no reference to the words "reasonable potential" in the Fact Sheet or RTC relative to the pH limit. Petitioner has cited no authority requiring a reasonable potential analysis to take a particular form, nor do the regulations dictate one. *See* 40 C.F.R. § 122.44(d)(1)(ii); *see also* 54 Fed. Reg. 23,868, 23,873 (June 2, 1989) ("[A] permitting authority has a significant amount of flexibility in determining whether a particular discharge has a reasonable potential to cause an excursion above a water quality criterion, taking the factors in subparagraph (ii) into account").

does not always meet WQS for pH. For this reason, the Region determined that dilution, no matter the calculation, could not be taken into account at all. RTC at 17, 32. Furthermore, Petitioner makes absolutely no attempt to address the Region's explanation for the change in the pH limit that the river often has low acid buffering capacity, meaning that it "has little ability [to] maintain a neutral pH in response to an acidic discharge." *Id.*; *Res. to Pet.* at 21.

Lastly, Petitioner misinterprets Board precedent regarding the level of confidence the permitting authority must have in its assessment that permit limits can ensure compliance with WQS. *Reply* at 8. If it is unclear that an effluent limit can ensure compliance with WQS, then the requirement of 40 C.F.R. § 122.4(d) has not been met. *See In re City of Marlborough*, 12 E.A.D. 235, 250-52 (EAB 2005) (finding that "a mere possibility of compliance does not 'ensure' compliance"); *see also In re Upper Blackstone Water Pollution Abatement Dist.*, NPDES Appeal Nos. 08-11 to 08-18 & 09-06, slip op. at 61 (EAB May 28, 2010) (noting that "the permit issuer should have a high degree of confidence in the determination" whether permit conditions will ensure compliance with WQS). The Town turns this principle on its head and asserts that unless the Region is confident that there would be a violation of WQS in the absence of a limit, it cannot impose the limit.

For the foregoing reasons, as well as those provided in the Region's Response to the Petition, review on issues regarding the pH limit should be denied.

### C. Petitioner Has Failed to Demonstrate That its Arguments Pertaining to the Aluminum Limit were Preserved and Impermissibly Attempts to Introduce New Argument.

Next, Petitioner asserts that it preserved certain issues regarding the Region's use of Massachusetts' current criteria for aluminum to calculate effluent limits in the permit. *Reply* at 9.[5] The Region disagrees and notes that, in any event, Petitioner has never provided any legal authority to support an argument that the existing Massachusetts' WQS should not be applied where no site specific criteria have been proposed and indeed no indication has been provided as to when such a re-evaluation might occur or when new criteria, if any, might result. In fact, it is undisputed that MassDEP has not established site specific criteria for aluminum. Additionally, Petitioner still has never squarely addressed the Region's explanation, *see* RTC at 11; *see also Res. to Pet.* at 26, that unless and until MassDEP does so – and EPA approves such a revision of Massachusetts' WQS – the Region is obligated to base the aluminum effluent limit on EPA's recommended criterion. *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 80-82 (EAB Sept. 15, 2009).

Petitioner also asserts that it preserved the argument that the aluminum limit in the permit places a disproportionate and, thus, unfair burden on Petitioner in comparison to upstream WWTFs and that, consequently, it was error to develop it without the use of site specific criteria, water-effect ratios, or a TMDL. *Reply* at 10; *Pet.* at 23. As the Region noted, *see Res. to Pet.* at 27, this argument – premised on the issue of fundamental fairness – was not preserved. Although Petitioner now appears to suggest that its brief comment regarding the "discussion of TMDLs" in the Fact Sheet preserved

[5] Petitioner also asserts that the permit limit for aluminum is improper because the Region has not explained "the need to now, for the first time, impose default criteria that has [sic] been in effect since 1989." *Reply* at 9-10. This argument was, of course, never raised during the public comment period (though it was readily ascertainable) and, as such, is unpreserved. 40 C.F.R. §§ 124.13, 124.19(a)(4)(ii).

the issue, *see Reply* at 10 (citing comment A17), there is no reference to fairness, disproportionate burdens, or upstream WWTFs in this comment. *See* RTC at 18. Nor does the comment contain a specific request that aluminum limits be based on a water-effect ratio, site specific criteria, or a TMDL. Again, a petitioner must have raised "the specific argument that [it] seeks to raise on appeal"; a "more general or related argument" is insufficient. *DCMS4*, 10 E.A.D. at 339-340. Furthermore, Petitioner's citation to comment A17 comes too late; the Town provided no citation in the Petition, *see Pet.* at 23, to demonstrate that the issue was raised during the public comment period, *see* 40 C.F.R. § 124.19(a)(4)(ii); *In re Zion Energy, LLC*, 9 E.A.D. 701, 707 (EAB 2001) (rejecting as untimely a petitioner's attempt to "amend a facially inadequate Petition."). Finally, as the Region has already noted, it is not error to base an aluminum limit on the state's numeric criterion in the absence of site specific criteria or a TMDL and Petitioner has provided no citation to any legal authority holding otherwise. *See Pet.* at 23.

Petitioner next repeats various complaints about the data used in the 7Q10 calculation. *Reply* at 10-11. As previously explained, however, Petitioner's argument regarding the use of flow data for certain months was readily ascertainable, but was not preserved. *Res. to Pet.* at 29. Additionally, Petitioner bears the burden of demonstrating clear error and must provide legal and factual support for its contentions, 40 C.F.R. § 124.19(a)(4); *In re Guam Waterworks Auth.*, NPDES Appeal Nos. 09-15 & 09-16, slip op. at 10 (EAB Nov. 16, 2011), which it has failed to do. *See Res. to Pet.* at 29.

Next, Petitioner asserts that, because the TSD "discourages" the use of a particular approach to calculating effluent limits, the Region was required to provide more "information . . . to justify [its] position." *Reply* at 11. Notably, Petitioner does not dispute the Region's observation that no public comments were received regarding this

aspect of the aluminum limit calculation and, thus, that the issues raised in Section B.4 of the Petition should be dismissed as unpreserved. *See Res. to Pet.* at 30. Furthermore, any new argument that the use of this method requires further explanation by the Region must be rejected because it is being raised for the first time in Petitioner's Reply. *In re Arecibo & Aguadilla Reg'l Wastewater Treatment Plants*, 12 E.A.D. 97, 123 n.52 (EAB 2005) (A petitioner may not "attempt to use [its] Reply Brief to substantiate [its] claim with new arguments . . . . Petitioners should have raised all their claims and supporting arguments in their petitions."); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999). Finally, Petitioner does not even attempt to refute the Region's observation that the TSD discourages the use of the complained-of method not because the resultant effluent limits may be too stringent, but because they may not be stringent enough. *Res. to Pet.* at 30 n.20 (citing AR I.3 (TSD) at 104).

Petitioner next re-asserts the argument that it was error for the Region not to use more recent, unspecified effluent data in the reasonable potential analysis for aluminum. *Reply* at 11. As the Region has explained, Petitioner has failed to carry its burden on this count. *Res. to Pet.* at 31. Additionally, to the extent Petitioner attempts to use its Reply to substantiate its claim with a new argument – that the Region improperly failed to explain why the data set it used was appropriate, *Reply* at 11 – it must be rejected as tardy. *Arecibo,* 12 E.A.D. at 123 n.52.

Petitioner's final argument regarding aluminum, *see Reply* at 11, must also fail, because, as previously noted, *Res. to Pet.* at 32, it was not specifically preserved.

For the foregoing reasons, as well as those provided in the Region's Response to the Petition, review on issues regarding the aluminum limit should be denied.

### D. Petitioner Has Failed to Demonstrate That its Arguments Pertaining to Collection System Requirements were Preserved

The Town's claim that it raised its objections to the permit's monitoring and reporting requirements with specificity is incorrect, as the Town effectively acknowledges. *Reply* at 12 (stating that "the Town's level of specifically [sic] matches the limited explanation and justification the Region provided"). The Town concedes that its comments were generalized objections but argues that its undifferentiated allegations were somehow excused because they mirrored the purported generality of the Region's Fact Sheet justification. *Id.* The Town badly misconstrues governing regulations and Board precedent regarding issue preservation—indeed, turns that body of law on its head. While it is true that where an "issue is raised only generically during the public comment period, the permit issuer is not required to provide more than a generic justification for its decision," *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 251 n. 12 (EAB 1999), this well-worn principal of administrative law relates to the obligation to *respond* to comments. Petitioner cites to no authority for its novel proposition that a commenter need only reflect the level of detail in a permit issuer's rationale, even where that rationale is (in Petitioner's own assessment) "most general, vague and generic." *Reply* at 12. Regardless of how specific the permit authority's justification is, parties submitting comments on draft permits must "present their concerns with sufficient precision and specificity" to apprise the permitting authorities of the significant issues so that the "permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made," can explain why none are necessary in its response to comments. *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708,722 (EAB 2006)

(quotation marks and citations omitted). As the Board has explained, "[t]he effective, efficient and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with draft permits before they become final," an aim that is not advanced by matching allegedly generic justifications with generic objections. *Encogen*, 8 E.A.D. at 250.

Moreover, the assertion that the Region "said only that these new requirements are 'reasonable' and 'necessary to ensure proper maintenance of the collection systems,'" is facially incorrect, as even a cursory examination of the record reveals. *See* FS at 20 (explaining the relationship between collection system maintenance, I/I and SSOs); RTC at 14. Petitioner is obviously free to disagree with the Region's explanations, but it may not ignore material portions of the Region's response and still hope to garner review. *In re Peabody W. Coal Co*., 12 E.A.D. 22, 33 (EAB 2005) (holding that a petitioner must "substantively confront" a permit issuer's explanation in order to warrant review).

Finally, the Town contends that the collection and maintenance systems requirements were not tied to achievement of state WQS. *Reply* at 12. This, again, is belied by the permit record, where the Region linked collection system operation and maintenance to the prevention of SSOs, as well as to minimizing or preventing "any discharge in violation of the permit which has the reasonable likelihood of adversely affecting human health or the environment." *See* FS at 20. The Town complains that it is "difficult to fathom under what circumstances detailed mapping or plan writing and reporting on the same to the Region would help achieve WQS." *Reply* at 12. In the Region's judgment, knowledge of a collection system's configuration and attributes will assist the Town in minimizing or preventing blockages, excessive I/I and SSOs. It is

clear that the Town disagrees, but it is also "axiomatic that a challenge to the fundamental technical expertise of a permit issuer requires a petitioner to overcome a particularly heavy burden, and that a successful challenge to a permit issuer's technical expertise must consist of more than just a difference of opinion." *In re Shell Offshore Inc.*, OCS Appeal Nos. 11-05 to 11-07, slip op. at 82 (EAB Mar. 30, 2012).

### E. Petitioner Fails to Demonstrate Error Regarding the DEHP Monitoring Requirement and Impermissibly Attempts to Introduce New Argument

Petitioner mistakenly claims that the Region failed to address its argument that, with the new dilution factor, DEHP would not result in a receiving water concentration exceeding the human health criteria. *Reply* at 13-14. Petitioner is mistaken. The Region indeed addressed this point, by noting that it did not even require a "reasonable potential" to exceed the criteria prior to imposing such a requirement, much less an exceedance of the criteria. *Res. to Pet.* at 41-42.

Petitioner quarrels with the Region's technical position on the Town's unsubstantiated claim that "DEHP will dissipate quickly," which in addition to being speculative was also unpreserved. *Reply* at 14; *Res. to Pet.* at 42-43. In the Reply, Petitioner does not dispute the Region's conclusion that the issue was waived because no commenter raised the issue. *Reply* at 14. While Petitioner may believe that "it logically follows that DEHP will dissipate quickly…long before" it reaches Billerica, this uncorroborated inference is insufficient to disturb the Region's technical judgments. *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 32 (EAB Sept. 15, 2009) ("[I]n a challenge to technical issues, we expect a petitioner to present us with references

to studies, reports or other materials that provide relevant, detailed, and specific facts and data about permitting matters that were not adequately considered by a permit issuer.").[6]

The Town and the Region continue to differ on whether the fact that DEHP is "ubiquitous" in the environment cuts for or against the imposition of a monitoring requirement. *Reply* at 14. The Town's position is that, if a pollutant is widespread, then "there can be no connection between its presence in the environment and the discharge itself." *Id.* This leap in logic is obviously unwarranted, but also entirely new, and as such, is late-filed. *Knauf*, 8 E.A.D. at 126 n.9

Finally, the Town reiterates its position that the Region failed to consider its request to include an opt-out provision if "monitoring provides no value." *Reply* at 15. In articulating the technical rationale for continuing monitoring and additional data collection to inform future regulatory actions, the Region adequately addressed, and rejected, the Town's vague and generic request to opt-out. The Region gave due consideration to the Town's comments, but concluded that "Given that there is a drinking water source downstream, there is ample justification for the monitoring requirement," and that, "more data on the discharge of this chemical will supply important information to the Town of Billerica and to the agencies that manage the Concord River." RTC at 17. Review of this technical issue should be denied.

[6] Petitioner also points to other post-comment period statements from the record that it believes are supportive of its position. *Reply* at 14 (noting that DEHP is "only slightly soluble in water"). Petitioner is procedurally barred from making such argument on two counts: first, the issue is waived, and second, even if it were not, there is no reason why this supplemental argument could not have been made in the first instance in the Petition. *Knauf*, 8 E.A.D. at 126 n.9 ("New issues raised…at the reply stage of the[] proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness.").

## F. REQUEST FOR ORAL ARGUMENT

The Region respectfully submits that oral argument will not assist the Board in its deliberations on the issues presented in this case. Upon consideration of Petitioner's Reply, it is evident that the vast majority of issues before this Board can be disposed of on straightforward procedural grounds.

Petitioner claims that important policy considerations relating to the flow issue—*i.e.*, the role of state wastewater planning processes and allegations of disparate treatment based on the Region's practices in several New Hampshire permits—constitute grounds for oral argument in this case. *Reply* at 17. As further grounds, the Town cites to a "question of national significance" concerning whether the flow of water is a pollutant under the Clean Water Act. However, neither the flow issue, nor the two corollaries identified by the Town, were specifically preserved for review below. *See Res. to Pet.* at 18-19. (The disparate treatment claim appears for the first time in this Reply, even though all of these permits were available at the time the Town filed its Petition.) In any event, further substantive exploration of these concerns would be academic and will not affect the outcome of this case, as the Town has not yet made a flow increase request.

Petitioner also claims, without any explanation, that the oral argument on issues concerning pH, aluminum and monitoring and reporting requirements are "likely to assist the Board." The Town does not identify any particular issues or aspects of these technical issues that would warrant argument. In addition to being waived in the vast majority of cases, the issues here are primarily technical in nature. The facts and data necessary to the dispose of these issues have been set forth in the administrative record and in multiple rounds of briefing in this case; to the extent that they are reached at all,

these issues are fully capable of being resolved—and will be more efficiently resolved, given their technical complexity—based on the parties' written detailed submissions to date. In light of this backdrop, and in consideration of the limited Agency resources, the Region respectfully requests that the Board proceed to decide the case based on the briefing provided by the parties.

## III. CONCLUSION

The Petition should be denied.

Respectfully submitted,

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Samir Bukhari
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Assistant Regional Counsel

## STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this response to the petition for review contains less than 7000 words consistent with 40 C.F.R. § 124.19(d)(3).

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Dated: November 29, 2013

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Samir Bukhari