IN RE GOVERNMENT OF THE DISTRICT OF COLUMBIA MUNICIPAL SEPARATE STORM SEWER SYSTEM

NPDES Appeal Nos. 00-14 & 01-09

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided February 20, 2002

Syllabus

In April 2000, U.S. EPA Region III (the "Region") issued a National Pollution Discharge Elimination System ("NPDES") permit, number DC 0000221 (the "Permit"), to the Government of the District of Columbia (the "District"). The Permit authorizes storm water discharges from the District's municipal separate storm sewer system ("MS4"). The Permit requires the District to use various best management practices ("BMPs") to control pollutant discharges in furtherance of attaining the District's water quality standards. The required BMPs are set forth in the District's storm water management plan ("SWMP"), which is incorporated into the Permit by reference. On August 11, 2000, Friends of the Earth and Defenders of Wildlife ("Petitioners") timely filed a petition requesting that the Environmental Appeals Board review the Permit (the "Petition") (the Petitioners also filed a second petition after the Region withdrew and reissued a portion of the Permit).

HELD: The Permit is remanded to the Region for further analysis and explanation in a number of areas. Petitioners and the Region have grouped their arguments in the nine categories described below, and the Board's holding on each is summarized as follows:

1. Compliance with Water Quality Standards. Petitioners object to the Permit's conditions that specify BMPs, rather than numeric limits, to control pollutant discharges and meet the District's water quality standards. The Petitioners' general argument that the Region violated an affirmative duty to set numeric limits is rejected, in keeping with the Board's decision on similar issues in *In re Ariz. Mun. Storm Water NPDES Permits*, 7 E.A.D. 646 (1998). The Petitioners' more specific argument that numeric limits could have been set equal to the numeric water quality standards of the receiving waters is also rejected on the grounds that Petitioners failed to demonstrate that they raised this argument and the cited authority during the public comment period. The Petitioners' argument that the Region should have included narrative provisions requiring compliance with water quality standards is also rejected on the grounds that there is no statutory or regulatory provision that requires use of narrative limits.

There is merit, however, to Petitioners' argument that the Region failed to show that the selected BMPs will be adequate to ensure compliance with water quality standards. First, it is not clear that the Region's determination that the specified BMPs are "reasonably capable" of achieving water quality standards fully comports with 40 C.F.R. § 122.4(d),

which prohibits issuing a permit "when imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected states." (emphasis added). Second, even accepting the Region's suggestion that ensuring compliance was what the permit writer has in mind, there is nothing in the record, apart from the District's section 401 certification, that supports the conclusion that the Permit would, in fact, achieve water quality standards. Without such record support the Board cannot conclude that the approach selected by the Region is rational in light of all the information in the record. The Region does not dispute that the Region cannot rely exclusively on the District's section 401 certification, at least in a circumstance like this one in which there is a body of information drawing the certification into question. Accordingly, additional record support for the Region's determination is required, and the Permit is remanded for further analysis in this regard.

2. Hickey Run. Petitioners argue that the Permit is deficient in that (a) it contains an aggregate numeric effluent limit for four outfalls into Hickey Run instead of a limit for each outfall and (b) it contains monitoring requirements that the Petitioners allege are inadequate. The regulation cited by Petitioners contains the disjunctive phrase "outfall or other discharge point" and therefore must be read as contemplating some flexibility in appropriate circumstances to frame effluent limits at a discharge point other than the outfall. There is no clear error in the Region's conclusion that, in the unique circumstances of this case, an aggregate limit fixed at a point proximate to four closely connected outfalls was appropriate. However, the proposed delayed development of the Hickey Run monitoring requirements is problematic in two respects. First, both 40 C.F.R. § 122.48(b) and 40 C.F.R. § 122.44(i) require that certain monitoring conditions be included in all permits. The Region has not explained how its issuance of this Permit, which does not at its inception contain monitoring requirements for Hickey Run, comports with the regulatory directive that all permits include these conditions. Second, while the monitoring requirements are expected to be added at the time of the District's first annual report and thus should be in place before the Hickey Run effluent limit becomes effective, the Board finds it troubling that this would be accomplished through minor permit modification without notice and opportunity for public comment. Given that the regulations appear to contemplate that monitoring requirements ordinarily be included as up-front permit conditions — conditions which would thus ordinarily be subjected to public notice and comment — and there does not appear to be anything in the regulations allowing for minor permit modifications that authorizes use of a minor permit modification in this setting, the Board concludes that this Permit does not meet minimum regulatory requirements and that remand of these parts of the Permit is necessary.

3. Reductions to the "Maximum Extent Practicable". Petitioners' argument that the Region erred in determinating that the Permit will reduce storm water pollutant discharges to the maximum extent practicable ("MEP") as required by CWA § 402(p) is rejected. The record demonstrates that the Region duly considered the issue raised by Petitioners in their comments, and the record does not lead to the conclusion that any additional BMPs beyond those identified in the Permit are practicable in this case.

4. Deferral of Complete Program. Petitioners' arguments that the Permit's provision for upgrading the SWMP indicates that the Permit is inadequate at its inception is rejected. The evaluation and upgrade requirement incorporates into the Permit a process for adjusting the Permit's terms and conditions to take into account new knowledge and changed circumstances affecting practicality of BMPs. This adjustment process does not imply that the Region has failed to properly assess MEP at the time of the Permit's issuance; it simply recognizes that what is practicable will change over time and that the Permit should be adaptable to such changes.

5. Failure to Require Compliance Within 3 Years. Petitioners' argument that the Permit fails to require compliance within the three-year time period set forth in CWA § 402(p)(4) is rejected. The Permit does not authorize a deferred implementation of the BMPs that were determined to be MEP at the time of issuance of the Permit; instead, the Permit simply recognizes that what is practicable will change during the Permit's term and that upgrades of the Permit's requirements should not be delayed until the Permit is renewed.

6 & 7. Storm Water Implementation Plan and Funding. Petitioners' argument that the "cost benefit and affordability" analysis required by Part III.E of the Permit violates the CWA is rejected. Information concerning a "cost benefit analysis" of the various BMPs is relevant to the upgrading of the SWMP and BMPs. Cost benefit information, however, is not relevant for purposes of determining compliance with the Permit's requirement that the District implement the BMPs in its current SWMP. The Permit recognizes this distinction and states that "[a]ffordability cannot be used as a defense for noncompliance."

8. Modifications. The Board addresses Petitioners' various arguments regarding deficiencies in the Permit's modification provisions as follows. The Board adopts the Region's interpretation that the reference in the Permit to 40 C.F.R. § 122.63 serves to limit the allowable extensions of interim compliance dates undertaken as minor modifications to "not more than 120 days after the date specified in the existing permit and [provided that it] does not interfere with attainment of the final compliance date requirement." 40 C.F.R. § 122.63(c).

The Region did not err in characterizing the deadlines set forth in Part III.A and Part III.B.10 of the Permit as "interim compliance date[s] in a schedule of compliance" that may be modified by minor modification as set forth in 40 C.F.R. § 122.63(c). On the other hand, Permit Parts IV.A.1, VIII.A, IX.A.5 & IX.C, which together authorize changes in monitoring location by minor modification, cannot be squared with 40 C.F.R. § 122.63(c). That section only authorizes the addition of new monitoring requirements by minor modification; it does not authorize a change in monitoring location by minor modification. Accordingly, any such changes must be made through the formal "notice and comment" procedures of section 122.62. Therefore, Permit Parts IV.A.1, VIII.A, IX.A.5 & IX.C are remanded for revision.

Petitioners object to the Permit's conditions that allow the Region to "approve" schedules for developing and implementing an enforcement plan (Petition, Part III.B.11), to approve certain additional SWMP program activities (Petition, Part III.B.12), and to approve, disapprove, or revise the District's Annual Reports and Annual Implementation Plans (Petition, Part III.E). It is unclear whether these provisions are simply intended to reference EPA actions in administering the Permit that do not themselves result in changes to the Permit (or the SWMPs subsumed within the Permit) and thus should not be subjected to formal notice and comment procedures, or whether these provisions, referenced as they are in the minor modification section of the permit, are intended to serve as a basis for substantive changes to permit conditions. The Region is directed on remand to clarify the extent to which these provisions in the Permit allow for changes in permit conditions by minor modification.

9. Waivers and Exemptions. The Petitioners argue that the District's storm water regulations, incorporated into the Permit by reference, require the granting of various waivers or exemptions that are in conflict with the CWA and EPA rules. Because the Region's Second Response to Comments does not challenge the validity of Petitioners' Comments, but rather tends to treat them as meritorious, and because the Region failed to make changes to the Permit or to otherwise address Petitioners' concerns regarding these waivers

and exemptions, this portion of the Permit is remanded to the Region to either make appropriate changes to the Permit or to explain why the Petitioners' comments do not merit such changes.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

In April 2000, U.S. EPA Region III (the "Region") issued a National Pollution Discharge Elimination System ("NPDES")[1] permit, number DC 0000221 (the "Permit"), to the Government of the District of Columbia. The Permit authorizes storm water discharges from the District of Columbia's municipal separate storm sewer system ("MS4").[2] On August 11, 2000, Friends of the Earth and Defenders of Wildlife ("Petitioners") timely filed a petition requesting that the Environmental Appeals Board review the Permit (the "Petition").[3] The Petition argues that the Region clearly erred or abused its discretion in setting the Permit's conditions. The Region has filed a response to the Petition, and both parties have filed supplemental reply briefs.

As discussed below, we have, based on our consideration of the issues presented, determined that a number of issues warrant further consideration by the Region. Thus, we remand the Permit, in part, for further proceedings consistent with this decision.

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[1] Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources (discrete conveyances, such as pipes) into waters of the United States must have a permit in order for the discharge to be lawful. CWA § 301, 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System is the principal permitting program under the CWA. CWA § 402, 33 U.S.C. § 1342.

[2] Under CWA § 402(p) and 40 C.F.R. § 122.26, an NPDES permit is required for MS4s serving populations of 250,000 or more (large systems), and those serving populations of more than 100,000 but less than 250,000 (medium systems). It is undisputed that the District's MS4 is a large system.

[3] The Petitioners originally filed a timely request for an evidentiary hearing with the Regional Hearing Clerk. However, on May 15, 2000, EPA published a final rule modifying, among other things, the appeal process for NPDES permits set forth in 40 C.F.R. part 124. *See* Amendments to Streamline the NPDES Program Regulations: Round II, 65 Fed. Reg. 30,866 (May 15, 2000). This rule eliminated the previously existing requirement that a party seek an evidentiary hearing before filing a petition for review with this Board. The new rule granted certain petitioners, including the Petitioners in this case, until August 13, 2000, to file a petition for review with this Board.

I. *BACKGROUND*

A. *Factual and Procedural Background*

The MS4 that is owned and operated by the Government of the District of Columbia (the "District") discharges storm water into the Potomac and Anacostia Rivers and their tributaries. Pursuant to the requirements for system-wide MS4 permitting set forth in CWA § 402(p)(4) and the implementing regulations at 40 C.F.R. § 122.26(d), the District was required to file a two-part application for an NPDES permit covering discharges from the District's MS4.[4] The District submitted Part 1 of the required NPDES permit application in July 1991 and the Part 2 application in 1994. *See* Certified Index to the Administrative Record ("Index") pts. I.1.n & I.3.a. On July 31, 1998, the District submitted revisions and updated materials for the Part 1 application, and, on November 4, 1998, the District submitted revisions and updated materials for the Part 2 application. *Id*. pts. I.5 -.6. The revised Part 2 application also included the District's current Storm Water Management Plan ("SWMP").

Thereafter, the Region prepared a draft permit and, on February 20, 1999, the Region provided public notice and requested public comments on its first draft permit for the District's MS4 discharges. Index pts. I.7 -.8. As part of the first public comment period, the Region conducted a public hearing on March 29, 1999. *Id.* pt. I.10. Subsequently, the Region revised the terms of the proposed permit in response to comments received from the public, and it issued a second draft permit on October 1, 1999 (the "Second Draft Permit") and requested further public comments. *Id.* pts. I.11 — .12. At that time, the Region also issued its response to comments regarding the February 1999 draft permit ("Region's First Response to Comments"). *Id.* pt. I.17.

On January 6, 2000, the District of Columbia Department of Health ("DCDH") issued its certification[5] that the conditions set forth in the second draft permit would comply with the District's water quality standards, approved water quality management plans and District monitoring requirements. *Id.* pt. I.15.a. On April 19, 2000, the Region issued the final Permit and fact sheet. *Id.* pt. I.20. The Region also issued its summary of the comments on the second draft permit and

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[4] The permitting process is described below in Part I.B of this decision. *See also In re City of Irving, Tex., Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 111, 119-21 (EAB 2001).

[5] All NPDES permit applicants must obtain a certification from the appropriate state agency validating the permit's compliance with the pertinent federal and state water pollution control standards. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). The regulatory provisions pertaining to state certification provide that EPA may not issue a permit until a certification is granted or waived by the state in which the discharge originates. 40 C.F.R. § 124.53(a). The regulations further add that "when certification is required * * * no final permit shall be issued * * * [u]nless the final permit incorporates the requirements specified in the certification." 40 C.F.R. § 124.55(a).

the Region's responses to those comments ("Region's Second Response to Comments"). *Id.* pt. I.18.

On May 25, 2000, the Petitioners filed a request for an evidentiary hearing pursuant to the regulations governing the NPDES program at that time. On July 14, 2000, the Region returned Petitioner's Request for Evidentiary Hearing and notified Petitioners of their right to file an appeal with the Board under changes made to the NPDES permit appeals process that became effective on June 14, 2000.[6] Thereafter, Petitioners timely filed the Petition with the Board on August 11, 2000. The Petition incorporates the May 25, 2000 request for an evidentiary hearing as stating the basis of the Petitioners' objections to the Permit. The Petitioners have grouped their arguments in nine categories. (Throughout this decision, we will generally follow the Petitioners' lead and consider the arguments grouped in categories identified by the issue number used in the Petition — we will summarize these categories below in Part I.C.)

The Region filed a response to the Petition. *See* Region III's Response to Petition for Review (Sept. 28, 2000) ("Region's Response"). The Region's Response generally argues that the Petitioners have not shown that their Petition should be granted. In one respect, however, the Region states that it withdraws a portion of the Permit in response to Petitioners' issue number eight (this issue, as described more fully below, relates to whether the Permit improperly allows amendments or changes without requiring the formal procedures contemplated by the regulations).

Subsequently, on January 12, 2001, the Region reissued the withdrawn portion of the Permit with several amendments. Thereafter, the Petitioners filed a petition requesting review of the amendments to the Permit and they requested that this second petition be consolidated with their original Petition. *See* Petition for Review and Motion to Consolidate (Feb. 2, 2001).[7] The Petitioners also filed supplemental briefing concerning issue number eight from their original Petition. *See* Supplemental Reply Based on Intervening Permit Modification (Feb. 2, 2001). The Region has responded to the Petitioners' second petition. More recently, on December 18, 2001, the Board held oral argument on several of the issues raised in this case.

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[6] *See supra* note 3.

[7] The Petitioners' original petition was assigned EAB docket number NPDES 00-14 and their second petition was assigned EAB docket number NPDES 01-09. The Petitioners' motion to consolidate their second petition for review with their original Petition is hereby granted.

B. *Statutory and Regulatory Background*

The CWA, which was enacted by Congress in 1972, prohibits the discharge of any pollutant to waters of the United States from a point source unless the discharge is authorized by an NPDES permit. Section 402(a)(1) of the CWA authorizes the Administrator to issue permits for the discharge of pollutants into navigable waters of the United States. 33 U.S.C. § 1342(a)(1).

Section 402(a)(2) of the CWA states that the "Administrator shall prescribe conditions for such permits to assure compliance with the requirements of" section 402(a)(1). A requirement of section 402(a)(1) is that the permitted discharges must comply with section 301 of the CWA, 33 U.S.C. § 1311. Section 301 requires, among other things, achievement of "any more stringent limitation, including those necessary to meet water quality standards * * * established pursuant to any State law or regulation * * *." 33 U.S.C. § 1311(b)(1)(C).

The statutory requirement of CWA § 301(b)(1)(C) to protect water quality standards has been implemented through a variety of regulatory provisions. For example, long-standing Agency regulations prohibit the issuance of a permit "when imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected states." 40 C.F.R. § 122.4(d) (emphasis added). In addition, section 122.44(d) provides that the permit must contain effluent limits as necessary to protect water quality standards. *Id.* § 122.44(d)(1). Long-standing Agency regulations have also authorized the use of "best management practices" ("BMPs") to control or abate the discharge of pollutants in a variety of circumstances including when "[n]umeric effluent limitations are infeasible." *Id.* § 122.44(k).

Although EPA initially attempted to exempt municipal storm sewer systems from the requirement to obtain an NPDES permit for discharge of pollutants into navigable waters of the United States,[8] in the Water Quality Act of 1987 ("WQA"), Congress amended the CWA to specifically cover storm water discharges from conveyances such as MS4s. Among other amendments, the WQA added section 402(p) governing permitting for MS4s and certain other storm water systems. In particular, Congress required EPA to establish no later than February 4, 1989, regulations governing the permit application requirements for storm water discharges from MS4s serving a population of more than 250,000, and Congress required applications for such permits to be filed no later than February 4, 1990. CWA § 402(p)(4)(A), 33 U.S.C. § 1342(p)(4)(A). Congress also stated in section 402(p)(3) that permits from MS4s "shall require controls to re-

[8] That exemption was rejected by the U.S. Court of Appeals for the District of Columbia. *See NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977). This history is described more fully in *In re City of Irving, Tex. Mun. Separate Storm Sewer System*, 10 E.A.D. 111, 117 (EAB 2001).

duce the discharge of pollutants to the maximum extent practicable, including management practices * * * and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants." CWA § 402(p)(3), 33 U.S.C. § 1342(p)(3).

EPA initially promulgated regulations implementing section 402(p) of the CWA in 1990. These regulations, commonly referred to as "Phase I" regulations, established the NPDES permit application requirements for storm water discharges associated with industrial activity and discharges from large and medium MS4s. *See* National Pollution Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990 (Nov. 16, 1990) (codified at 40 C.F.R. pt. 122). In the preamble to the Phase I regulations, the Agency explained that the MS4 permitting program requires a substantial amount of flexibility but not "to such an extent that all municipalities do not face essentially the same responsibilities and commitments for achieving the goals of the CWA." 55 Fed. Reg. at 48,038. To achieve these ends, the Phase I regulations made a number of changes to the existing NPDES regulations to allow MS4s to focus less on end-of-pipe technology-based controls and to focus more on the development of site-specific SWMPs.

In the Phase I rulemaking, the Agency established a two-part permit application process for the development of MS4 permits that would assist permittees in developing SWMPs capable of meeting the statutory and regulatory goals. *Id.* The two parts of the permit application cover six general elements necessary for an MS4 permit: adequate legal authority, source identification, discharge characterization, proposed SWMP, assessment of controls, and fiscal analysis. *See* Office of Water, U.S. EPA, EPA 833-B-92-002, *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Application for Discharges from Municipal Separate Storm Sewer Systems* at 2-1 to 2-4 (1992) (hereinafter "Part 2 Guidance Manual"); *see also In re City of Irving, Tex.*, 10 E.A.D. 111 (EAB 2001) (describing in greater detail the elements addressing adequate legal authority, proposed SWMP, and assessment of controls).

As part of a subsequent rulemaking, commonly referred to as the "Phase II" regulations, section 122.44(k) was amended to authorize use of BMPs not only when "[n]umeric effluent limitations are infeasible" as was previously authorized, but also when "[a]uthorized under section 402(p) of the CWA for the control of storm water discharges." *See* National Pollutant Discharge Elimination System — Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,847 (Dec. 8, 1999) (codified at 40 C.F.R. § 122.44(k)(2)-(3)).

C. *Summary of Issues Raised in the Petitions*

As noted, Petitioners identify their bases for requesting review of the Permit in nine categories, which were separately numbered in their original Petition as issues one through nine. We will follow this numbering system in our discussion since the parties have used it to identify their arguments. The following is a brief summary of these nine issues, or categories of arguments, raised by Petitioners:

1. Compliance with Water Quality Standards. Under this heading, the Petitioners raise several arguments pertaining to whether the Permit is adequately protective of the District's water quality standards. In essence, Petitioners argue that the Permit does not have effluent limitations that assure compliance with the District's water quality standards. Petition at 3. The Region, in contrast, argues that the Permit does protect water quality standards. Region's Response at 10; *see also* Transcript of Oral Argument at 29, 32-33 (Dec. 18, 2001) (hereinafter "Tr. at __").[9]

2. Hickey Run. Petitioners argue that the Permit is deficient in that (a) it contains an aggregate numeric effluent limit for four outfalls into Hickey Run (which is a tributary of the Anacostia River) and (b) it contains monitoring requirements that the Petitioners allege are inadequate.

3. Reductions to the "Maximum Extent Practicable". Under this heading, Petitioners argue that the Region's determination that the Permit will reduce storm water pollutant discharges to the maximum extent practicable ("MEP") as required by CWA § 402(p) was clearly erroneous.

4. Deferral of Complete Program. Under this heading, the Petitioners raise arguments concerning the Permit's deferral of the time for the District to submit implementation and enforcement plans for its SWMP and concerning the Permit's deferral of an "upgraded" SWMP.

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[9] The Region also quotes an argument it made in its response to comments where the Region stated that the Permit is not necessarily required to assure compliance with state water quality standards but need only "control the discharge of pollutants to meet such provisions EPA or the State determines appropriate." Region's Second Response to Comments at 10, quoted in Region's Response at 9. In support of this argument the Region explained that the Ninth Circuit Court of Appeals has held that "EPA * * * has authority to require less than strict compliance with state water quality standards." Region's Response at 9 (quoting *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1166 (9th Cir. 1999)); *see also* Region's Reply at 7 n.4. However, at oral argument, the Region stated that, in issuing this Permit, it is not relying on the Ninth Circuit's conclusion that EPA has authority to require less than strict compliance with state water quality standards. Tr. at 31. Specifically, the Region stated that it intends this Permit to satisfy water quality standards. *Id.* at 32-33.

5. Failure to Require Compliance Within Three Years. Petitioners argue that the Permit fails to require compliance within the three-year time period set forth in CWA § 402(p)(4).

6. Storm Water Implementation Plan. Petitioners argue that the Permit in Part III.E uses language allowing for a "cost benefit and affordability" analysis that the Petitioners argue is contrary to the CWA.

7. Funding. Petitioners raise several additional arguments concerning the "cost benefit and affordability analysis" under Part III.E of the Permit as it pertains to funding of the implementation plan.

8. Modifications. The Petitioners argued in their original Petition that the Permit "illegally authorizes numerous substantive changes in permit requirements without a formal permit revision." Petition at 9. In its response, the Region stated that it withdraws the provisions of the Permit that are affected by Petitioners' arguments in this category, and the Region proposed amendments to address this issue. Response at 25. After the Region issued its amendments on January 12, 2001, the Petitioners filed both a petition for review of the amendments and a supplemental brief, both of which argue that the modifications of the Permit fail to address most of the concerns raised by Petitioners in their original Petition.

9. Waivers and Exemptions. The Petitioners argue that the District's storm water regulations that are incorporated into the Permit by reference require the granting of various waivers or exemptions that the Petitioners argue are in conflict with the CWA and EPA rules.

Each of these arguments will be separately considered in the discussion that follows. We begin, however, with a brief discussion of the standards we use in evaluating petitions filed under 40 C.F.R. part 124 for review of NPDES permits.

II. *DISCUSSION*

A. *Standard of Review*

The Board generally will not grant review of petitions filed under 40 C.F.R. § 124.19(a), unless it appears from the petition that the permit condition that is at issue is based on a clearly erroneous finding of fact or conclusion of law or involves an important policy consideration which the Board, in its discre-

tion, should review.[10] 40 C.F.R. § 124.19(a) (2001); *see also City of Moscow, Idaho*, 10 E.A.D. 135, 140 (hereinafter "*Moscow*"); *In re City of Irving*, 10 E.A.D. 111, 122 (hereinafter "*Irving MS4*"). While the Board has broad power to review decisions under section 124.19, the Agency intended this power to be exercised "only sparingly." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also Moscow*, 10 E.A.D. 135, 141; *In re Rohm & Haas Co.*, 9 E.A.D. 499, 504 (EAB 2000); *In re AES P.R. L.P.*, 8 E.A.D. 324, 328 (EAB 1999), *aff'd sub nom. Sur Contra La Contaminacíon v. EPA*, 202 F.3d 443 (1st Cir. 2000).

Agency policy favors final adjudication of most permits at the regional level. 45 Fed. Reg. at 33,412; *see also Moscow*, 10 E.A.D. at 141; *Irving MS4*, 10 E.A.D. at 122; *In re New England Plating Co.*, 9 E.A.D. 726, 730 (EAB 2001); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *In re Town of Hopedale, Bd. of Water & Sewer Comm'rs*, NPDES Appeal No. 00-4, at 8-9 n.13 (EAB, Feb. 13, 2001). On appeal to the Board, the petitioner bears the burden of demonstrating that review is warranted. *Moscow*, 10 E.A.D. at 141; *see also AES P.R.L.P.*, 8 E.A.D. 324, 328 (EAB 1999); *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 71 (EAB 1998); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997).[11]

Persons seeking review must demonstrate to the Board, among other things, "that any issues being raised were raised during the public comment period to the extent required by these regulations * * *." 40 C.F.R. § 124.19(a) (2001). Participation during the comment period must conform with the requirements of section 124.13, which requires that all reasonably ascertainable issues and all reasonably

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[10] Prior to the amendments to streamline the NPDES regulations (*see supra* note 3), the rules governing petitions for review of NPDES permitting decisions were set out in 40 C.F.R. § 124.91. These rules did not provide for an appeal directly to the Board. Instead, a person seeking review of an NPDES permitting decision was required to first request an evidentiary hearing before the Regional Administrator. *In re City of Moscow, Idaho*, 10 E.A.D. 135, 140-41 n.20 (EAB 2001). The outcome of the request for an evidentiary hearing or the outcome of an evidentiary hearing — if the request was granted — was then appealable to the Board. However, under those rules there was no review as a matter of right from the Regional Administrator's decision or the denial of an evidentiary hearing. *See In re City of Port St. Joe*, 7 E.A.D. 275, 282 (EAB 1997); *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 51 (EAB 1995); *In re J & L Specialty Prods. Corp.*, 5 E.A.D. 31, 41 (EAB 1994). Petitions for review of NPDES permits are now regulated by 40 C.F.R. § 124.19, as amended by 65 Fed. Reg. 30,886, 30,911 (May 15, 2000). Even though the regulations governing NPDES appeals changed in the sense that the evidentiary hearing provisions were eliminated, the standard of review has not changed. *Moscow*, 10 E.A.D. 135, 140-41 n.20 (citing *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 n.11 (EAB 2001)).

[11] Standing to appeal a final permit determination is limited under 40 C.F.R. § 124.19 to those persons "who filed comments on [the] draft permit or participated in the public hearing." Any person who failed to comment or participate in the public hearing on the draft permit can appeal "only to the extent of the changes from the draft to the final permit decision." 40 C.F.R. § 124.19(a) (2001); *see In re City of Phoenix*, 9 E.A.D. 515, 524 (EAB 2000).

available arguments supporting a petitioner's position be raised by the close of the public comment period. 40 C.F.R. § 124.13 (2001); *see also, Moscow*, 10 E.A.D. at 141; *In re New England Plating*, 9 E.A.D. 726, 730 (EAB 2001); *In re City of Phoenix, Ariz.*, 9 E.A.D. 515, 524 (EAB 2000) ("Those persons seeking to appeal based on their status as commenters or public hearing participants must also demonstrate to the Board, *inter alia*, 'that any issues being raised were raised *during* the public comment period (including any public hearing) to the extent required by these regulations * * *.'").

The Board traditionally assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature. *Moscow*, 10 E.A.D. at 142; *see also In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998), *petition for review denied sub nom. Penn Fuel Gas, Inc. v. EPA*, 185 F.3d 862 (3rd Cir. 1999). When the Board is presented with technical issues we look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record. *NE Hub*, 7 E.A.D. at 568. If we are satisfied that the Region gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, we typically will defer to the Region's determination. *Id.*

For the following reasons, we conclude that Petitioners have shown that, in several respects, the Region's decision to issue the Permit was deficient under these standards. Accordingly, we remand the Permit for further proceedings consistent with this decision.

B. *Petitioners' Issue One: Water Quality Standards*

The Permit contains one numeric effluent limitation for discharges from four outfalls into Hickey Run. Other than this one numeric discharge limit, the Permit designates a variety of best management practices, or BMPs, to control the discharge of pollutants from the District's MS4. The Petitioners raise three arguments objecting to the Region's approval of the Permit conditions establishing BMPs to control pollutant discharges and ensure compliance with the District's water quality standards. First, the Petitioners argue that the Region should have established numeric limits for most of the system's outfalls, rather than relying on BMPs to control pollutant discharges. Petition at 2-3. Specifically, the Petitioners argue that the Region made no showing that numeric limits are infeasible and that the Region should set the numeric limits equal to the numeric water quality standards applicable to the receiving waters. *Id.* at 4; Petitioners' Reply Brief at 3. Second, Petitioners argue that the Region should, at a minimum, have established narrative limits. Petition at 4. Finally, Petitioners argue that the Region failed to make the requisite determination that the chosen BMPs will ensure protection of the District's water quality standards. *Id.* at 5; Petitioners' Reply at 4.

Before turning to these arguments, we must first address a number of issues by way of background, some of which were treated by the parties' briefs as being in dispute, but which the parties conceded during oral argument. As noted above, section 301 of the CWA requires, among other things, that NPDES permits contain "any more stringent limitation, including those necessary to meet water quality standards * * * established pursuant to any State law or regulation * * *." 33 U.S.C. § 1311(b)(1)(C). This statutory requirement has been implemented, in part, through long-standing regulations that prohibit the issuance of an NPDES permit "when imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected states." 40 C.F.R. § 122.4(d) (2001) (emphasis added). In addition, section 122.44(d) provides that "the permit must contain effluent limits" for a particular pollutant "when the permitting authority determines * * * that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a state numeric criteria within a State water quality standard for an individual pollutant." *Id.* § 122.44(d)(1)(iii).

In their filings with the Board, Petitioners maintain that, based on evidence in the record, the Permit is required by 40 C.F.R. § 122.44(d) to contain effluent limitations that protect water quality standards. Petition at 3 (citing 1998 Water Quality Report at 48, app. D at 3-75). Specifically, Petitioners argue that information submitted by the District with its application for the Permit shows that discharges from the District's MS4 causes, has the reasonable potential to cause, or contributes to in-stream excursions above the allowable ambient concentrations of the District's numeric water quality standards, thereby triggering the requirements of section 122.44(d)(1). They explain as follows:

> The monitoring data submitted with D.C.'s MS4 application confirms that storm sewer discharges present major threats to surface water quality in the District. The data shows that such discharges repeatedly exceed the District's water quality standards for fecal coliform bacteria, which are 200/100 mL max. 30-day mean for Class A waters, and 1,000/100 mL for Class B waters. 21 DCMR 1104.6. In almost all of the storm water sampling reported in the Part 2 application, fecal coliform counts exceeded one or both of these standards, often by wide margins. Part 2 application, Tables 4.3.4-3 to -14; 21 DCMR 1104.6. At least one discharge also exceeded arsenic criteria for fisheries. *Id.*, Part 2 application, table 4.3.4-10. * * *
>
> Under these circumstances, the Act and EPA rules require that the permit include effluent limitations to assure compliance with water quality standards. * * *[T]he Dis-

> trict's 1998 Water Quality Report specifically identifies storm water discharges as known or suspected contributors to violations of water quality standards for specific pollutants in waters throughout the District. Water Quality Report at 48, Appendix D at 3-75. For a number of waters, the report lists urban runoff/storm sewers as the only source of impairment. *Id.*

Id. at 3.

The Region does not argue that this evidence cited by Petitioners is insufficient to trigger the requirements of section 122.44(d)(1), which as noted requires "effluent limits" if discharges cause or contribute to violations of water quality standards. Instead, the Region maintains that section 122.44(d)(1) does not require that "effluent limits" be expressed as numeric limits. The Region argues that BMPs are a type of effluent limit and that it properly explained the basis for its decision to use BMPs instead of numeric effluent limits. Specifically, the Region explained in the Fact Sheet that "In accordance with 40 CFR § 122.44(k), the [Region] has required a series of [BMPs], in the form of a comprehensive SWMP, in lieu of numeric limitations." Fact Sheet at 7. The Region explained further in the Region's First Response to Comments that "[d]erivation of water quality-based limits by application of the methods contained in the Technical Support Document for Water Quality-Based Toxics Control is *not feasible* at this time because insufficient information is known about the magnitude, variation, and frequency of the flow rate of both the river and storm discharges." Region's First Response to Comments at 7 (emphasis added); *see also* Region's Response at 9.

The notion that effluent limits may be expressed as either numeric limits or as some other restriction that limits the discharge of pollutants, such as BMPs, has been stated in EPA guidance and has been endorsed by this Board. In essence, because the term "effluent limitation" is defined to mean any restriction on quantities, rates, and concentrations of pollutants,[12] effluent limits required by section 122.44(d)(1) therefore may be expressed as either numeric limits or as BMPs, both of which serve to limit quantities, rates or concentrations of pollutants. *In re Ariz. Mun. Storm Water NPDES Permits*, 7 E.A.D. 646, 658-59 (EAB 1988) (hereinafter "*Arizona Municipal*")[13] (citing Questions and Answers Regarding Im-

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[12] The term "effluent limitation" is defined by the regulations to mean "any restriction * * * on quantities, discharge rates, and concentrations of 'pollutants' which are 'discharged' from 'point sources' into 'waters of the United States,' the waters of a 'contiguous zone,' or the ocean." 40 C.F.R. § 122.2 (2001).

[13] Our holding in *Arizona Municipal* was affirmed by the Ninth Circuit Court of Appeals. *See Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999), *aff'g on other grounds In re Ariz. Mun. Storm Water NPDES Permits*, 7 E.A.D. 646 (EAB 1988).

plementation of an Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 57,425, 57,426 (Nov. 6. 1996)). Initially, the Petitioners argued that the Region's failure to use numeric limits violated section 301 of the CWA and 40 C.F.R. §§ 122.4(d) & 122.44(d). Petition at 2-3. At oral argument, Petitioners also stated that where the water quality standards are numeric standards, the "only certain method to assure compliance with standards is with numeric effluent limits." Tr. at 6. The Petitioners, however, also acknowledged during oral argument that BMPs are a form of effluent limitation, Tr. at 7, and that BMPs may be used to satisfy water quality-based requirements. Tr. at 9.[14] Given this concession, we do not need to revisit our prior determination in *Arizona Municipal* that, as a general proposition, BMPs are a form of effluent limit that may in appropriate circumstances be used to satisfy the requirements of section 122.44(d) of the regulations in order to resolve the dispute at hand.

With respect to whether deployment of BMPs was inappropriate under the circumstances of this case, we note that the regulations specifically authorize the use of BMPs in two potentially applicable circumstances. First, section 122.44(k)(2), as added in 1999, authorizes BMPs when "[a]uthorized under section 402(p) of the CWA for the control of storm water discharges." 40 C.F.R. § 122.44(k)(2) (2001). Second, section 122.44(k)(3) authorizes BMPs when "[n]umeric effluent limitations are infeasible." *Id.* § 122.44(k)(3); *see also Arizona Municipal*, 7 E.A.D. at 656 ("Under the regulations, best management practices * * * may be incorporated into storm water permits where numeric limitations are infeasible."). In the present case, the Region stated at oral argument that it did not base its decision to approve BMPs on the new 40 C.F.R. § 122.44(k)(2), which was added in the 1999 amendments[15] and which allows BMPs when authorized by CWA § 402(p). Tr. at 48. Instead, the Region determined that numeric limits were not feasible, which is the criterion for use of BMPs under 40 C.F.R. § 122.44(k)(3). Specifically, as noted above, the Region explained that "[d]erivation of water quality-based limits by application of the methods contained in the Technical Support Document for Water Quality-Based Toxics Control is *not feasible* at this time because insufficient information is known about the magnitude, variation, and frequency of the flow rate of both the river and storm discharges." Region's First Response to Comments at 7 (emphasis added).

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[14] However, the Petitioners consistently argued that if the Region chooses BMPs to meet water quality-based standards, the Region "would still have to show that they [the BMPs] are going to do the job." Tr. at 10. This issue is discussed further below.

[15] *See* National Pollutant Discharge Elimination System — Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,847 (Dec. 8, 1999).

This brings us to the issues that remain in dispute. The Petitioners argue first that "the Region has made no showing that numeric limitations are infeasible * * * . The Region did not even attempt development of numeric effluent limits for discharges to waters of the District other than Hickey Run." Petition at 4. On this point, the Petitioners elaborate further in their Reply Brief that, where mixing zones[16] have not been established (as is the case here for all outfalls other those into Hickey Run), "under long-established EPA guidance and practice, effluent limits must be set to assure compliance with water quality standards at the point of discharge." Petitioners' Reply Brief at 3. In other words, Petitioners argue that the Agency can easily set a numeric limit for each outfall that is equal to the numeric water quality standard for the receiving water. Presumably, Petitioners reason that the discharges will not cause or contribute to an in-stream excursion above an allowable standard if the discharges, themselves, must be below the applicable standard. Petitioners argue further that "[t]his is not an exercise requiring any information beyond the water quality criteria set in D.C.'s published water quality standards." *Id.* These arguments, however, do not persuade us that review of the Permit should be granted on this ground.

In *Arizona Municipal*, we considered a challenge to the permit issuer's determination pursuant to what is now section 122.44(k)(3)[17] that setting numeric effluent limits was not feasible for an MS4 system's discharges. *Arizona Municipal*, 7 E.A.D. at 656. In that case, the permit issuer made its determination of infeasibility because, due to "the unique nature of storm water discharges in the arid Arizona environment and the uncertainties associated with the environmental effects of short-term, periodic discharges, 'it would be premature to include in the final permit any specific toxicity-related effluent limitations * * *.'" *Id.* at 657. In considering arguments that this determination was insufficient, we noted that the permit issuer's reasons were consistent with Agency policy documents that "recogniz[e] that permitting agencies frequently lack adequate information to establish appropriate numeric water quality-based effluent limitations, and provid[e]

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[16] Briefly stated, a mixing zone is "an allocated impact zone in the receiving water which may include a small area or volume where acute criteria can be exceeded provided there is no lethality (zone of initial dilution), and a larger area or volume where chronic water quality criteria can be exceeded if the designated use of the water segment as a whole is not impaired as a result of the mixing zone." *Guidance on Application of State Mixing Zone Policies in EPA-Issued NPDES Permits*, (Aug. 1996).

[17] The current section 122.44(k)(3) was section 122.44(k)(2) prior to the amendment of section 122.44(k) in 1999. As previously discussed, the 1999 amendments added a new section 122.44(k)(2), allowing use of BMPs when authorized under section 402(p) of the Act. The old section 122.44(k)(2) shifted at that time to become the new and current section 122.44(k)(3). *See* National Pollutant Discharge Elimination System — Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,847 (Dec. 8, 1999). Accordingly, at the time of the *Arizona Municipal* decision, the regulatory provision authorizing use of BMPs when numeric limits are infeasible was set forth in section 122.44(k)(2), which is the regulation cited in the *Arizona Municipal* decision. *See Arizona Municipal*, 7 E.A.D. at 656.

for the inclusion of BMPs until such information becomes available." *Id.* at 658. The petitioners challenged the permit issuer's decision by arguing that the permit issuer had an affirmative duty to set numeric limits. We rejected this argument, stating that "the petitioners have failed to convince us that this determination was in any way unlawful or inappropriate." *Id.* at 659.

In the present case, the Petitioners have made many of the same generalized challenges to the Region's permitting decision as those we considered and rejected in *Arizona Municipal*, asserting that the Region has an affirmative duty to set numeric limits. In keeping with *Arizona Municipal*, we find these general arguments to be without merit. The Petitioners in this case, however, also rely on a more specific argument that numeric limits could have been derived under methods that the Petitioners describe as "long-established EPA guidance and practice." Petitioners' Reply Brief at 3. As discussed below, this more specific argument must also be rejected in this case because Petitioners failed to raise it and the cited authority during the public comment period.

The regulations governing the NPDES permitting program and review by this Board require that persons seeking review must demonstrate to the Board "that any issues being raised were raised during the public comment period to the extent required by these regulations * * *." 40 C.F.R. § 124.19(a) (2001); *Moscow*, 10 E.A.D. at 141. The regulations provide further that all reasonably ascertainable issues and all reasonably available arguments supporting a petitioner's position must be raised by the close of the public comment period. 40 C.F.R. § 124.13 (2001); *see, e.g.*, *Moscow*, 10 E.A.D. at 141; *In re New England Plating*, 9 E.A.D. 726, 730 (EAB 2001); *In re City of Phoenix, Ariz.*, 9 E.A.D. 515, 524 (EAB 2000). "Accordingly, only those issues and arguments raised during the comment period can form the basis for an appeal before the Board (except to the extent that issues or arguments were not reasonably ascertainable)." *New England Plating*, 9 E.A.D. at 731 (citing *In re Jett Black, Inc.*, 8 E.A.D. 353, 358 & nn.18, 23 (EAB 1999) (finding that reasonably ascertainable arguments not raised during the public comment period were not preserved for appeal)).

As we have previously 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." *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999). "In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary." *In re Essex County (N.J.) Resource Recovery Facility*, 5 E.A.D. 218, 224 (EAB 1994). In particular, the petitioner must have raised during the public comment period the specific argument that the petitioner seeks to raise on appeal; it is not sufficient for the petitioner to have raised a more general or related argument during the public comment period. *See, e.g., In re RockGen Energy Ctr.*, 8 E.A.D. 536, 547-48 (EAB

1999) (petition denied because petitioner raised during the public comment period three issues regarding one type of emissions control technology, but had not raised the specific issue comparing that technology to the technology that was selected, which petitioner sought to raise on appeal). "At a minimum, commenters must present issues with sufficient specificity to apprise the permit issuing authority of the issue raised. Absent such specificity, the permit issuer cannot meaningfully respond to comments." *Id.* at 17 (citing *In re Spokane Reg'l Waste-to-Energy*, 2 E.A.D. 809, 816 (Adm'r 1989) ("Just as 'the opportunity to comment is meaningless unless the agency responds to significant points raised by the public,' so too is the agency's opportunity to respond to those comments meaningless unless the interested party clearly states its position.") (quoting *Northside Sanitary Landfill, Inc. v. Thomas*, 849 F.2d 1516, 1520 (D.C. Cir. 1988)) (internal citations omitted)).

In the present case, Petitioners raised their general objection to the absence of numeric effluent limits during both the public comment period on the first draft permit and during the public comment period on the second draft permit. *See* Letter from David S. Baron to William Colley, EPA Region III, at 2-3 (Apr. 21, 1999); Letter from David S. Baron to William Colley, EPA Region III, at 1-2 (Oct. 29, 1999). The Petitioners, however, have not shown that they raised their argument concerning the alleged "long-established EPA guidance and practice" regarding point-of-discharge limits at any time during the first or second public comment periods, and the Petitioners have not explained why this argument and the cited authorities were not reasonably ascertainable at that time. In this regard, it is significant that the Region discussed the implications of "the Technical Support Document for Water Quality-Based Toxics Control" in the Region's response to comments on the first draft permit. *See* Region's First Response to Comments at 8.[18] Presumably, Petitioners would recognize this document cited by the Region to be among the body of "long-established EPA guidance and practice" to which they now refer. Thus, the Region's basis for its decision was fully available to Petitioners during the second public comment period, and their failure to make their more specific response and citation to the allegedly countervailing authority at that time is fatal to their attempt to make their case at this juncture. Accordingly, Petitioners have failed to preserve this argument for appeal.

The Petitioners argue second that "[e]ven if numeric limits were infeasible, [the Region] has not shown why it could not include narrative provisions in the permit requiring protection of water quality standards." Petition at 4. This argu-

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[18] The Region explained in its First Response to Comments as follows: "Derivation of water quality-based limits by application of the methods contained in the 'Technical Support Document for Water Quality-Based Toxics Control' (TSD) is not feasible at this time because insufficient information is known about the magnitude, variation, and frequency of the flow rate of both the river and storm water discharges." First Response to Comments at 8.

ment also must fail. There is no statutory or regulatory provision that requires use of narrative limits. Moreover, the regulations specifically authorize the use of BMPs where numeric limits are infeasible. 40 C.F.R. § 122.44(k)(3) (2001). Accordingly, we conclude that the Region was authorized to use BMPs and was not required to include narrative provisions in the Permit of the kind suggested by Petitioners. However, as discussed below, we are remanding this Permit on other grounds, and our conclusion here that use of narrative limits is not required should not be viewed as discouraging the use of narrative limits in any reissued permit if the Region determines that narrative limits would be appropriate in addressing the concerns giving rise to the remand.

Finally, Petitioners argue that "[i]f EPA intends to rely on BMPs, it still must demonstrate that those management practices will be adequate to assure compliance with water quality standards in the receiving waters" and that "[t]he Agency has failed to do so here." Petition at 5. Petitioners elaborate further on this last argument in their Reply Brief by noting that the record contains "absolutely no facts or technical analysis" to support the Region's statement in its response to comments that the Permit's BMPs are "reasonably capable of achieving water quality standards," and by noting that "the legal test is not whether the BMPs are 'reasonably capable' of achieving water quality standards. Rather, the permit must 'ensure' compliance with water quality standards." Petitioners' Reply Brief at 4 (citing 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.4(d)). In its Response, the Region reiterated that it "issued the Permit based on its determination (and certification of the Permit by [D.C. Department of Health] * * *) that the BMPs set forth in the District's SWMP are 'reasonably capable of achieving water quality standards.'" Region's Response at 10; *see also* Region's Reply at 6.[19]

At oral argument, the Region stated that, in using the "reasonably capable" language, it was not seeking to establish a new, less restrictive, standard for MS4 permits, and that this Permit was intended to protect water quality standards. In particular, the Region stated that "[i]n the response to comments, we were not trying to set up a different standard." Tr. at 39. Instead, the Region stated that it intended the "reasonably capable" language as "merely a paraphrase of the requirement that [the Region] found that no more stringent limits were necessary to achieve water quality standards. That is set forth in [section] 301(b)(1)(c) [of the Act]." Tr. at 39.

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[19] As noted *supra* note 9, the Petitioners also presented a number of arguments addressing the Ninth Circuit's statement in *Defenders of Wildlife v. Browner,* 191 F.3d 1159, 1166 (9th Cir. 1999), that "EPA * * * has authority to require less than strict compliance with state water quality standards." *See* Petitioners Reply at 4-6. We do not reach these arguments, however, because the Region has stated that it is not relying on this discretion identified in the Ninth Circuit's analysis. Tr. at 31.

We have two concerns regarding the manner in which the Region has addressed the question of the Permit's meeting water quality standards. First, it is not clear that the Region's determination that the BMPs required under the Permit are "reasonably capable" of achieving water quality standards fully comports with the regulatory prohibition on issuing a permit "when imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected states." 40 C.F.R. § 122.44(d) (2001) (emphasis added). Simply stated, the "reasonably capable" formulation, accepting as it is of the potential that the Permit will not, in fact, attain water quality standards, does not appear to be entirely comparable to the concept of *ensuring* compliance.[20]

Second, and more importantly, even accepting the Region's suggestion that ensuring compliance was what the permit writer had in mind, we find nothing in the record, apart from District's section 401 certification,[21] that supports the conclusion that the Permit would, in fact, achieve water quality standards.[22] Indeed, the Region acknowledged that "[u]nfortunately, the permit writer didn't commit a lot of his analysis to writing * * *." Tr. at 46. Although we traditionally assign a heavy burden to petitioners seeking review of issues that are essentially technical in nature, *see e.g.*, *Moscow*, 10 E.A.D. at 142, we nevertheless, do look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all information in the record. *Id.* (citing *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998)). Without an articulation by the

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[20] The "reasonably capable" formulation does not appear to be common usage in EPA permits. At oral argument, counsel for the Region indicated that he was unaware of any other permit that relied upon such a formulation or any Agency guidance that recommended this formulation or treated it as comparable to a determination that a permit *ensures* compliance with water quality standards. Tr. at 41-42.

[21] As described more fully *supra* note 5, section 401 of the CWA requires that any applicant for a federal permit (including NPDES permits issued by EPA) must provide the permitting agency a certification from the state in which the discharge originates that the discharge will comply with the state's water quality standards. CWA § 401, 33 U.S.C. § 1341. In the present case, the District of Columbia Department of Health issued its certification on January 6, 2000, that the conditions set forth in the second draft permit would comply with the District's water quality standards, approved water quality management plans and District monitoring requirements. Index pt. I.15.a.

[22] It bears noting that, in the context of an MS4 permit, compliance with water quality standards need not be immediate, but must occur within "3 years after the date of issuance of such permit." CWA § 402(p)(4)(A), 33 U.S.C. § 1342(p)(4)(A); *see also* Memorandum by E. Donald Elliot, EPA Assistant Administrator and General Counsel, to Nancy J. Marvel, Regional Counsel Region IX, at 4-5 (Jan. 9, 1991) ("In light of the express language, we believe the Agency may reasonably interpret the three-year compliance provisions in Section 402(p)(4) to apply to all permit conditions, including those imposed under [section] 301(b)(1)(C) [water quality standards]."). Accordingly, the determination relative to water quality standards that the permit issuer is required to make at the time of issuance is that the permit will achieve compliance within three years. As explained below, however, even taking this flexibility into account the record is deficient here.

permit writer of his analysis, we cannot properly perform any review whatsoever of that analysis and, therefore, cannot conclude that it meets the requirement of rationality. Moreover, Petitioners argue, and the Region does not dispute, that the Region cannot rely exclusively on District's section 401 certification, at least in a circumstance like this one in which there is a body of information drawing the certification into question. *See* Tr. at 43. Accordingly, additional record support for the Region's determination is needed, and, finding such support altogether absent from the record, we are remanding the Permit to the Region to provide and/or develop support for its conclusion that the permit *will* "ensure" compliance with the District's water quality standards and to make whatever adjustments in the Permit, if any, might be necessary in light of its analysis.[23]

C. *Petitioners' Issue Two: Hickey Run Numeric Effluent Limits*

The second category of issues raised by the Petitioners concerns the Permit's effluent limits and monitoring requirements for four outfalls into Hickey Run. The Petitioners object that the prescribed numeric limit is set forth as an aggregate limit covering all four outfalls, and the Petitioners object that the prescribed requirements for monitoring compliance with the numeric limit lack the specificity required by the regulations. Petitioners object to the aggregate limit on the grounds that, according to Petitioners, the regulations "require that effluent limits be outfall specific unless infeasible" and "EPA has not shown that outfall specific limits are infeasible." Petition at 5. Petitioners elaborate on this point in their Reply Brief, stating that "EPA rules *explicitly* require outfall specific effluent limits." Petitioners' Reply at 6. Petitioners also argue in their Petition that "the monitoring provisions relevant to the Hickey Run effluent limit are inadequate because the Permit fails to "specify the type and interval of required monitoring as well as the frequency," and because the Permit fails to specify "the precise monitoring locations." Petition at 6.

The Region argues in its response that the Hickey Run numeric effluent limit is the first numeric limitation used in any MS4 permit based on a total maximum daily load ("TMDL")[24] and that the effluent limit is consistent with was-

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[23] As we observed above, our determination that the Region is not required to include narrative permit conditions requiring compliance with water quality standards does not preclude the Region from employing such provisions in any reissued permit upon remand. We note in this regard that inclusion of enforceable narrative permit conditions requiring compliance with applicable water quality standards within three years may be particularly useful in the event that the Region has difficulty stating that, without such a condition, compliance with water quality standards is assured.

[24] Under section 303(d) of the CWA, states are required to identify those water segments where technology-based controls are insufficient to implement the applicable water quality standards, and which are therefore "water quality limited." 33 U.S.C. § 1313(d)(1)(A). Once a segment is identified as water quality limited, the state is further required to establish total maximum daily loads, or

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teload allocation set forth in the Hickey Run TMDL as required by 40 C.F.R. § 122.44(d)(1)(vii)(B). The Region states that it approved the aggregate limit for four outfalls because those outfalls "combine to make up the Hickey Run headwaters," and "[a]bove these outfalls, Hickey Run does not exist outside the storm sewer pipes," and further that "the outfalls [are] located close together and one entity (the MS4) [is] responsible for all four outfalls and could best oversee the implementation." Region's Response at 14. The Region also states that the Hickey Run TMDL was not able to more precisely allocate the load between the outfalls and that the Petitioners did not provide any additional data or basis from which individual outfall limitations might be derived. *Id.* at 15. Thus, the Region states that it "had no additional legal or factual basis on which to make the Hickey Run limit outfall specific, and therefore concluded that such individual limits are infeasible." *Id.* at 15.

With respect to monitoring requirements, the Region argues that the Permit requires monitoring of Hickey Run no less than three times per year using the test analytic method specified in Part 136, and the Region notes that the Permit requires the District to develop a sampling plan with the First Annual Report. *Id.* at 16. The Region also argues that "[t]he Permit requires that all samples and measurements be representative of the volume and nature of the monitored discharges consistent with 40 C.F.R. § 122.41(j)(1)". Region's Reply at 11. Finally, the Region states that "[t]he monitoring requirements, therefore, are representative of the monitored activity and otherwise consistent with federal regulations." *Id.* at 11-12**.**

We conclude that the Petitioners have failed to demonstrate in their Petition that the Region's decision to specify an aggregate numeric limit for the four outfalls forming the headwaters of Hickey Run was clear error or a policy choice that otherwise warrants review of this Permit. In particular, we cannot endorse Petitioners' argument that "EPA rules *explicitly* require outfall specific effluent limits." Petitioners' Reply at 6. The regulation cited by Petitioners reads as follows: "All permit effluent limitations, standards and prohibitions shall be established for each outfall *or discharge point* of the permitted facility * * *." 40 C.F.R. § 122.45(a) (2001) (emphasis added). Notably, this regulation identifies the location to which the limitation is applied (i.e., "outfall or discharge point") in the disjunctive. Thus, if we are to give meaning to the disjunctive phrase "or discharge point," we must read the regulation as contemplating some flexibility in appropriate circumstances to frame effluent limits at a point other than the outfall.

(continued)
TMDLs, for the water segment. 40 C.F.R. § 130.7 (2001). A TMDL is the sum of waste load allocations for point sources discharging into the impaired segment and load allocations for nonpoint sources and natural background. A TMDL is a measure of the total amount of a pollutant from point sources, nonpoint sources and natural background that a water quality limited segment can tolerate without violating the applicable water quality standards. *See Id.* § 130.2(i) (2001).

Therefore, we cannot conclude that the Petitioners' proffered interpretation is required nor that the regulation precludes per se the establishment of a limit at a point other than an outfall.

Moreover, we find no clear error in the Region's conclusion that, in the unique circumstances of this case, an aggregate limit fixed at a discharge point proximate to four closely connected outfalls was appropriate. In this regard, we note that, here: (1) the aggregate limit is consistent with the aggregate waste load allocation set forth in the Hickey Run TMDL; (2) the four outfalls are located close together; (3) a single entity is responsible for all four outfalls; (4) the four outfalls, together, form the entire headwaters of Hickey Run; (5) the Region determined that it was infeasible to allocate the load by outfall or otherwise establish an appropriate limit specific to the individual outfalls; and (6) the Petitioners did not provide any additional data or basis for the Region to derive individual outfall limitations. *See* Region's Response at 13-15.[25]

With respect to monitoring requirements, Petitioners' point regarding the generality of the Permit's monitoring provisions is well taken. At its inception, the Permit would not specify the precise location or the sample collection method of monitoring tests to be performed on Hickey Run, although the Permit does contemplate that greater precision will be brought to the Hickey Run outfall monitoring plan as part of the District's First Annual Report. Agency guidance states that the permit's monitoring and reporting conditions should specify: (1) the sampling location; (2) the sample collection method; (3) monitoring frequencies; (4) analytic methods; and (5) reporting and recordkeeping requirements. U.S. EPA NPDES Permit Writers' Manual, EPA-833-B-96-003, at 115 (Dec. 1996). This guidance states further that the permit writer is responsible for determining the appropriate monitoring location and for "explicitly specifying" this in the permit. *Id.* at 117. It further states that "[s]pecifying the appropriate monitoring location in a NPDES permit is critical to producing valid compliance data." *Id.* In addition, by "sample collection method," the guidance means the type of sampling, such as "grab" or "composite" samples, which is distinguished from the "analytic methods" referenced in 40 C.F.R. part 136. *Id.* at 122. The regulations require that all permits specify the required monitoring "type, interval, and frequency." 40 C.F.R. § 122.48(b) (2001).

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[25] We note that, since the Region has determined that setting limits for the individual outfalls into Hickey Run is not feasible, the Region might have, consistent with the regulations, established a system-wide BMP requirement in lieu of any effluent limitation. *See* 40 C.F.R. § 122.44(a), (k)(2001) (allowing the establishment of BMPs instead of effluent limits where effluent limitations are infeasible). Thus, if sustained, the Petitioners' objection might very well produce a result that is contrary to what Petitioners request: rather than resulting in individual limits for each outfall, the one numeric effluent limit in this Permit might be deleted in favor of reliance on system-wide BMP requirements. We are not suggesting that the Region alter the Permit in this regard. Rather, we simply point out that this course of action may well have complied with the regulation.

In the present case, the Region has not explained why it departed from Agency guidance by not specifying the precise location for monitoring the Hickey Run discharges, nor has the Region adequately explained how the Permit conditions satisfy the regulatory requirement to specify the "type, interval, and frequency" of monitoring. Although the Region argues that the Permit satisfies the regulations by specifying that monitoring must be conducted three times per year, *see* Region's Response at 16, this Permit condition does not appear to specify both the "interval and frequency" of monitoring as required by 40 C.F.R. § 122.48(b). Further, the Permit's reference to the *monitoring* method specified in 40 C.F.R. part 136 does not appear to satisfy the requirement that *sampling* methods be specified in the Permit. However, the Region argues that these defects do not require remand because they will be cured before the Hickey Run numeric effluent limit becomes effective — the Permit requires the District to develop a sampling plan with the First Annual Report. Region's Response at 16.

We find the proposed delayed development of the Hickey Run monitoring requirements to be problematic in two respects. First, both section 122.48(b) and section 122.44(i) would appear to require that certain monitoring conditions be included in all permits. Section 122.48(b) states that "[a]ll permits shall specify" the monitoring type, intervals, and frequency. 40 C.F.R. § 122.48(b) (2001). Section 122.44(i) states that "each NPDES permit shall include" monitoring conditions in addition to those set forth in section 122.48 in order to assure compliance with permit limitations. *Id.* § 122.44(i). The Region has not explained how its issuance of this Permit, which does not at its inception contain monitoring requirements for Hickey Run, comports with the regulatory directive that all permits include these conditions. Second, while we recognize that the monitoring requirements are expected to be added at the time of the District's First Annual Report and thus should be in place before the Hickey Run effluent limit becomes effective, we are troubled that this would be accomplished through a minor permit modification without notice and opportunity for public comment. *See* Permit pts. III.E & IX.A.5 (as amended). Given that the regulations appear to contemplate that monitoring requirements ordinarily be included as up-front permit conditions — conditions which would thus ordinarily be subjected to public notice and comment — and the fact that we find nothing in the regulations allowing for minor permit modifications that authorizes use of a minor permit modification in this setting,[26] we conclude that this Permit does not meet minimum regulatory requirements and that remand of these parts of the Permit is necessary. We can foresee two possible paths available to the Region for addressing the Permit's imprecision in the Hickey Run monitoring requirements on remand. The path most easily

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[26] 40 C.F.R. § 122.63 (2001). While this provision allows for the permit issuer to impose by minor modification "more frequent monitoring or reporting," there is no suggestion in the text of the regulation that the establishment of monitoring locations can be accomplished by minor modification. *See infra* Part II.E for further discussion of 40 C.F.R. § 122.63.

reconciled with the regulatory requirements would be to add the missing precision to the revised permit at its inception. An alternative path may be to add the precision later in the context of formal, notice and comment permit modification. However, if the Region pursues the latter option, it must articulate its rationale for the consistency of such an approach with the regulations discussed above.[27] Accordingly, we remand the Permit's conditions for monitoring discharges into Hickey Run to afford the Region an opportunity to address these issues or to provide a more detailed explanation of its analysis.

D. *Issues Three Through Seven: MEP Standard*

In issues three through seven of the Petition, the Petitioners argue that the Region failed to properly apply the requirement in section 402(p)(3)(B)(iii) of the CWA to reduce the discharge of pollutants to the "maximum extent practicable." Petitioners raise the following sub-issues: In issue number three, Petitioners argue that the BMPs required by the Permit will produce no reductions in the discharges of a variety of pollutants and that the Permit does not contain a number of controls listed in the Agency guidance manual for MS4 permits. Petition at 6-7. In issue number four, the Petitioners argue that the Permit's requirement for evaluation and upgrade of the BMPs over time constitutes an admission that the current BMPs are not MEP and that therefore the permit contains an illegal deferral of compliance. *Id.* at 7. In issue number five, Petitioners argue that this deferral of compliance through upgrades over time does not comply with the requirement of section 402(p) to achieve implementation within 3 years. *Id.* at 7-9. Finally, in issues number six and seven, Petitioners argue that a "cost benefit and affordability analysis" required by Part III.E of the Permit is not authorized by the regulations and illegally introduces cost and affordability as grounds for not implementing BMPs that are required to meet MEP. *Id.* at 8-9.

1. *Issue Three: Permit Fails MEP Due to No Reductions in Certain Pollutants*

The Petitioners argue that the Permit fails to satisfy the requirement of section 402(p)(3)(iii) of the CWA that the Permit reduce pollutant discharges to the "maximum extent practicable." Petition at 6. Petitioners argue that the BMPs required by the Permit will produce no reductions in cadmium (Potomac, Anacostia and Rock Creek), dissolved phosphorous (Potomac and Rock Creek) and copper and lead (Rock Creek). *Id.* They also argue that the reductions of total suspended solids, BOD, COD, total nitrogen and total phosphorus are so small as to constitute no meaningful reduction. *Id.* The Petitioners also argue that the Permit fails to

[27] Further, it would appear that, in any case, the Permit must be constructed in such a manner that ensures monitoring requirements are in place before the Hickey Run numeric effluent limit becomes effective.

comply with the EPA guidance manual for the Part 2 application, which according to Petitioners "sets out in great detail the specific control measures that must be included in any SWMP, and requires that those measures be incorporated into the MS4 permit." *Id.* at 7 (citing U.S. EPA Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems at 1-9, 6-1 to -25 (1992)).

The Region argues that, in the absence of promulgated technology-based standards defining MEP, the permitting authority must necessarily approach the question of what constitutes MEP on a case-by-case basis, taking into account the totality of the circumstances. Here, the Region concluded that "a relatively large number of new activities to be performed" under the Permit's BMPs satisfies the MEP criterion. Region's Response at 17 (quoting Region's First Response to Comments at 9-10). The Region notes that "the Current SWMP identifies over 220 structural BMPs that have been installed and over 600 that have been approved for installation and/or construction." *Id.* at 18 (citing Revised SWMP at 6-2 & tbl. 6.2-1). The Region notes further that "the SWMP also details storm water capital projects over the next several years starting with FY 1998 expenditures of over $1.3 million, FY 1999 projects costing more than $3.1 million and projected costs from FY2000-FY2007 of $39 million." *Id.* at 18-19. In addition, the Region argues that "the Permit requires the District to implement its current SWMP, and then to focus on specific revisions to develop an upgraded SWMP that (following EPA approval) will assure pollutants will be reduced to the maximum extent practicable." *Id.* at 19 (citing Permit pt. III).

We conclude that the Petitioners have failed to show any clear error of fact or law in the Region's analysis or any policy choice that warrants review. As we noted at the outset of our discussion, we traditionally assign a heavy burden to petitioners seeking review of issues that are essentially technical in nature. *Moscow*, 10 E.A.D. 142; *see also In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998). This is grounded on the Agency policy that favors final adjudication of most permits at the regional level. 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *see also Moscow*, 10 E.A.D. 141; *Irving MS4*, 10 E.A.D. at 122; *In re New England Plating Co.*, 9 E.A.D. 726, 730 (EAB 2001); *Town of Ashland*, 9 E.A.D. at 667; *In re Town of Hopedale, Bd. of Water & Sewer Comm'rs*, NPDES Appeal No. 00-4, at 8-9 n.13 (EAB, Feb. 13, 2001).

When the Board is presented with technical issues, we look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record. *Moscow*, 10 E.A.D. at 142 (citing *NE Hub*, 7 E.A.D. at 568). If we are satisfied that the Region gave due consideration to comments received and adopted an approach in the final permit

decision that is rational and supportable, we typically will defer to the Region's position. *Id*.

In the present case, we note at the outset that Petitioners' emphasis on the *amount* of reduction achieved for the various pollutants is misplaced. The key question under section 402(p)(3)(B) of the statute is what is practicable.[28] Here, taking into account the full range of considerations before it,[29] the Region concluded that the BMPs required by the Permit collectively represent the maximum practicable effort to reduce pollution from the District's MS4. We are loath to second guess the Region's technical judgment in this regard. The record demonstrates that the Region duly considered the issue raised by Petitioners in their comments, and the record does not lead to the clear conclusion that any additional BMPs beyond those identified in the Permit are practicable taking into account all of the relevant circumstances in the District.[30] Accordingly, we conclude that the position adopted by the Region is rational in light of the information in the record and consequently we deny review of this issue.

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[28] As noted previously, the Region stated at oral argument that it intends this Permit to also satisfy water quality standards under section 301 of the Act. Tr. at 32-33. Although we determine in this part that the Petitioners have not shown any clear error in the Region's determination that the BMPs specified in this Permit were MEP at the time of issuance of the Permit, the Region must also determine, as discussed above in Part II.B, whether the conditions of this Permit ensure attainment of water quality standards as required by 40 C.F.R. § 122.4(d).

[29] The circumstances that existed when the Region issued this Permit were unusual as explained by the Region at oral argument: "When the District finished their application in 1998 and when we issued the permit, the District was still under the control of the Financial Oversight and Management Authority and there was some difficulty in the District in determining which of the many parts of its government would be accomplishing which task in what time frame. Nevertheless, the [Region] found that it would be remiss in not issuing the permit with the requirements as specific as we could set them at that time, but to also require the District to further identify who would do what when, where the funding would come from, and to reevaluate the controls they had in place." Tr. at 50. The Region stated further that, since the issuance of the Permit, the District's Water and Sewer Authority has been authorized to lead the administration of the storm water management program and that "[t]he District has also been proceeding forward with the implementation of many new structural and other structural BMPs and other programs to reduce pollutants." *Id.* at 51. We assume that these improvements will be incorporated in current or revised form into the Permit as SWMP upgrades pursuant to the process outlined in the Permit for such upgrades. Permit pts. III.A & III.F.

[30] To the extent that the Petitioners seek to rely on Agency guidance that lists specific kinds of control measures to be included in the permit application and permit (EPA, Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems at 1-9, 6-1 to -25 (1992)) as somehow showing that the Region failed to include in this Permit required permit elements, the Petitioners have failed to show how the Region's response to comments on this issue did not adequately respond to their comments. More particularly, the Petitioners have not even identified what conditions they believe should be included in the Permit under the guidance. Accordingly, we deny review on this ground.

2. *Issue Four: Upgrade of the SWMP over Time*

The BMPs specified in the Permit as the applicable effluent limits are the BMPs set forth in the District's SWMP. The Permit requires that the District's SWMP, and the BMPs set forth in the SWMP, be evaluated and upgraded over time. The Petitioners argue that the Permit's requirement for the BMPs to be evaluated and upgraded over time constitutes an admission that the current BMPs do not meet the MEP criterion and that therefore the permit contains an illegal deferral of compliance with the permitting requirements of the CWA. Petition at 7. This argument, however, must fail. The Region correctly responds that the current BMPs are what the Region has determined to be MEP and that the evaluation and upgrade requirement is a "normal process of adjustment that the Region believes is necessary and appropriate to protect water quality and meet the MEP criterion." Region's Response at 19. The evaluation and upgrade requirement of the Permit, and Agency policy for MS4s, recognizes that knowledge concerning effective methods for controlling pollutant discharges and barriers restricting the ability to control pollutant discharges will necessarily change over time. The evaluation and upgrade requirement incorporates into the Permit a process for adjusting the Permit's terms and conditions to take into account new knowledge and changed circumstances affecting practicality of BMPs. This adjustment process does not imply that the Region has failed to properly assess MEP at the time of the Permit's issuance; it simply recognizes that what is practicable will change over time and that the Permit should be adaptable to such changes. In short, the Petitioners have not shown clear error in the Region's determination of what is "practicable" at the time of Permit issuance.

3. *Issue Five: Compliance within Three Years*

The Petitioners argue that the evaluation and upgrade process discussed above does not comply with the requirement of section 402(p)(4)(A) of the CWA to achieve actual implementation within three years. Petition at 7-8. This argument also must fail. The Region correctly notes that the Permit requires the District to *immediately* implement the BMPs that have been determined to be MEP at the time of Permit issuance and, in addition, the Permit requires the District to begin a process of continual upgrade and improvement of those BMPs. Region's Response at 21. Thus, the Permit does not authorize a deferred implementation of the BMPs that were determined to be MEP at the time of issuance of the Permit; instead, the Permit simply recognizes that what is practicable will change during the Permit's term and that upgrades of the Permit's requirements should not be delayed until the Permit is renewed. Accordingly, here again we deny review.

4. *Issues Six and Seven: The Implementation Plan and Cost Benefit Analysis*

The Petitioners note that the Permit requires the District to submit each year a SWMP implementation plan covering the work to be done in the next three years and to analyze that work "based on a cost benefit and affordability analysis." Petition at 8 (quoting Permit pt. III.E). The Petitioners argue that this "cost benefit and affordability analysis" is not found anywhere in the Agency's regulations or guidance documents. *Id.* at 8-9. Petitioners also argue that the "cost benefit and affordability" analysis would allow the District to avoid BMP effluent limitations by claiming that it has inadequate resources to meet the implementation schedule. *Id.* at 9 (issue number seven). Specifically, they state that "compliance cannot be contingent on the willingness of the Mayor, the Control Board, or Congress to appropriate funds." *Id*. The Region argues that the Petitioners' concerns are unfounded. The Region argues that the "cost benefit and affordability analysis" is authorized by the CWA because it is meant to implement the "practicability" part of the MEP test in determining BMP requirements. Region's Response at 23. The Region also argues that the Permit specifically states that affordability is not a defense for compliance with the Permit's terms. *Id.* (citing Permit, pt. III.E).

We conclude that the Petitioners have not shown any clear error of fact or law or shown that a policy choice made by the Region with respect to the "cost benefit analysis" in part III.E of the Permit warrants review. We base this holding, in part, on our recognition that this Permit contains provisions establishing BMPs set forth in the current SWMP that were determined to be MEP at the time of the Permit's issuance, and it also contains provisions requiring upgrade of the current SWMP within three years of the Permit's issuance. In this context, the required Annual Report and SWMP Implementation Plan serve two functions: they provide reporting on compliance with the Permit's requirement to implement the current SWMP, and they provide information, analysis and preliminary proposals for terms to be included in the upgraded SWMP when the Permit is amended.[31] Information concerning a "cost benefit analysis" of the various BMPs is relevant for the process of amending the Permit with an upgraded SWMP and upgraded BMPs. As stated by the Region, "[i]n terms of establishing the permit requirements to reduce pollutants to the *maximum extent practicable,* the Region finds cost and affordability information useful in determining the degree of *practicability*." Region's Response at 24.

This cost benefit information, however, is not relevant for determining compliance with the Permit's requirement that the District implement the BMPs in its

[31] As discussed below in Part II.E of this decision, we are remanding those portions of Part III.E of the Permit that purport to allow the Region to change the terms of the Permit by minor modification procedures.

current SWMP. By incorporating the District's current SWMP into the Permit, the Region has determined that the BMPs set forth in that SWMP are MEP. The Region, thus, has already determined that those BMPs are "practicable" and consideration of costs or benefits is not appropriate when considering whether the District has complied with the requirement to implement those BMPs. This distinction between the compliance-reporting and future planning functions of the Annual Report and Annual Implementation Plan is recognized and mandated by the Permit's condition that states that "[a]ffordability cannot be used as a defense for noncompliance." Permit pt. III.E. Accordingly, we see no clear error in the Region's decision to require that the District's Annual Implementation Plan provide information regarding the costs and benefits of the various BMPs covered by the plan, and we deny review of this condition of the Permit.

E. *Issue Eight: Modifications of the Permit*

Petitioners argue that the Permit "illegally authorizes substantive changes in permit requirements without a formal permit revision." Petition at 9. In its Response, the Region "notifies the Board of the Region's proposal to amend the permit to address this issue and that such amendment would remove the issue from this appeal in accordance with 40 C.F.R. § 124.19(d)." Region's Response at 25. Subsequently, on January 12, 2001, the Region re-issued the withdrawn portion of the Permit with several amendments. Thereafter, the Petitioners filed a petition for review of the amendments to the Permit. *See* Petition for Review and Motion to Consolidate (Feb. 2, 2001). The Petitioners also filed a supplemental brief supporting their original Petition on this issue. *See* Supplemental Reply Based on Intervening Permit Modification. As noted above in Part I.B, we have consolidated the February 2001 petition with the original Petition, and will consider all related issues in this part of our analysis.

In their second petition, Petitioners recall that they had argued in the first Petition that the Permit would improperly allow eight types of permit modifications to be made under the regulations governing *minor* modifications. Second Petition at 5. The Petitioners listed these allegedly improper modifications in eight categories. Petitioners argue that all of the types of modifications identified in its original list are major modifications that must comply with the more stringent requirements for formal permit revisions, including public notice and comment. *Id.* at 7-9. Petitioners state that the Region's amendment to the Permit addressed only a portion of one of those eight types of modifications. *Id.* The types of modifications originally identified by Petitioners as improper minor modifications are as follows:

> a. Changes in deadlines for submission of Annual Review, Annual Report, Annual Implementation Plan, and Upgraded SWMP (Permit pt. III.A).

> b. Changes in deadlines for implementing outfall monitoring and implementing upgraded SWMP (Permit pt. III.A).
>
> c. Extension of time for implementing illicit discharge program (Permit pt. III.B.10, at 22).
>
> d. EPA approval of schedule for developing and implementing an enforcement plan and approval of the plan itself (Permit pt. III.B.11, at 22-23).
>
> e. EPA determination of minimum levels of effort required for additional SWMP program activities needed to meet requirements of EPA rules (Permit pt. III.B.12, at 25).
>
> f. EPA approval, disapproval or revision of Annual Report and Annual Implementation Plan, and upgraded SWMP (Permit pt. III.E, at 29).
>
> g. Other program modifications (Permit pt. III.H, at 30).
>
> h. Changes in monitoring locations from those specified in the Permit (Permit pt. IV.A.1, at 34; pt. VIII.A, at 45; pt. IX.C, at 49).

Second Petition at 4; Petition at 9-10. Petitioners recognize that the Region's amendment to the Permit requires that EPA approval of the upgraded SWMP (a part of item (f) in the list) be subject to major modification procedures of 40 C.F.R. § 122.62. Second Petition at 5. The Petitioners continue to argue that all of the remaining modifications contemplated by these eight categories, including the remnant of category (f) not changed by the Region's amendment, are also major modifications that cannot be made under the minor modification procedures. Petitioners also specifically argue that any changes in interim compliance dates cannot extend the date of compliance more than 120 days if implemented under the minor modification provisions of 40 C.F.R. § 122.63 and that any longer extensions can only be accomplished by modification under the procedures of section 122.62.

The Region, in contrast, argues that all of the modifications at issue fall within the ambit of permissible minor modifications under 40 C.F.R. § 122.63. *See* Region III's Response to Petition for Review at 7-8 (Mar. 28, 2001) ("Region's Second Response"). With respect to the issue of extensions of interim compliance dates, the Region argues that "[w]hile the Permit does not explicitly limit such extensions to the 120 days allowed by the regulations, the Permit requires that such revisions be 'in accordance with 40 C.F.R. § 122.63,' which sets forth

such a requirement for interim compliance dates." *Id.* at 8. The Region goes on to argue that the modifications challenged by Petitioner in its categories (a), (b), (c) and (d) are interim compliance date changes falling within the scope of section 122.63. *Id.* at 10-12. The Region maintains that the modifications challenged by Petitioner in its categories (e) and (f) are merely the proper exercise of "review and approval" of various reports and implementation plans and that such oversight is properly part of the Region's duties in administering this Permit. *Id.* at 12-13.[32] The Region argues that the modification addressed in Petitioners' category (g) "only lays out the procedures by which the SWMP modifications will be implemented by the District in context with the compliance schedule discussed above. By itself this provision has no substantive effect." *Id.* at 13. With respect to Petitioners' final category concerning changes in monitoring locations (Petitioners' category (h)), the Region argues that "there is nothing in 40 C.F.R. § 122.63 that would prohibit EPA from authorizing change in monitoring locations for MS4 compliance purposes." *Id.* The Region also argues that allowing the District to select other equally representative outfalls for monitoring is a reasonable exercise of its authority to monitor a complex and dynamic permit. *Id.* at 14.

We begin with the regulatory text. Section 122.63, which governs minor modifications, provides as follows:

> Upon the consent of the permittee, the Director may modify a permit to make the corrections or allowances for changes in the permitted activity listed in this section, without following the procedures of part 124. *Any permit modification not processed as a minor modification under this section must be made for cause and with part 124 draft permit and public notice as required in § 122.62.* Minor modifications may *only*:
>
> (a) Correct typographical errors;
>
> (b) Require more frequent monitoring or reporting by the permittee;
>
> (c) Change an interim compliance date in a schedule of compliance, provided the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirement; or

[32] The Region raises a similar argument regarding category (d) to the extent that Petitioners object to interim "approvals" in that category. Region's Second Response at 11.

> (d) Allow for a change in ownership or operational control of a facility where the Director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director.
>
> (e) (1) Change the construction schedule for a discharger which is a new source. No such change shall affect a discharger's obligation to have all pollution control equipment installed and in operation prior to discharge under § 122.29.
>
> (2) Delete a point source outfall when the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except in accordance with permit limits.
>
> (f) [Reserved]
>
> (g) Incorporate conditions of a POTW pretreatment program * * * as enforceable conditions of the POTW's permits.

40 C.F.R. § 122.63(a) — (g) (2001) (emphasis added). Significantly, this regulation allows changes to the Permit without formal notice and comment procedures "only" when the changes fall within the listed categories, and it expressly requires all other modifications to be made pursuant to the formal procedures of section 122.62.

With respect to the narrow issue of whether the Permit authorizes extensions of interim compliance dates that are longer than 120 days, we conclude that the better interpretation of the Permit is one that reconciles the text of the Permit with the applicable rules. Thus, we adopt the Region's interpretation that the reference in the Permit to 40 C.F.R. § 122.63 serves to limit the allowable extensions of interim compliance dates undertaken as minor modifications to "not more than 120 days after the date specified in the existing permit and [provided that it] does not interfere with attainment of the final compliance date requirement." 40 C.F.R. § 122.63(c) (2001). In addition, we also adopt the Region's interpretation that Part III.H of the Permit (Petitioners' category (g)) "[b]y itself * * * has no substantive effect." Region's Second Response at 13. Thus, Part III.H may not

be relied upon as independent authority for modifying the Permit; rather authority for a proposed modification must be provided elsewhere in the Permit or in the applicable regulation. With respect to both of these issues, our interpretation of the Permit's terms will be binding on the Region in implementing the permit. *See Irving MS4*, 10 E.A.D. at 128-29 n.20 ("[B]ecause we serve as the final decision maker for the Agency in this matter, our interpretation[s] will be binding on the Region in its implementation of the permit").

Next, we consider whether the Region is correct that the modifications challenged by Petitioner in its categories (a), (b) and (c) are interim compliance date changes falling within the scope of section 122.63(c). *See* Region's Second Response at 10-13. That section authorizes the minor modification procedures to be used to change "an interim compliance date in a schedule of compliance." 40 C.F.R. § 122.63(c) (2001). Thus, in analyzing the issues raised by Petitioner and the Region's response, we first must determine whether the changes authorized by the Permit in Petitioners' categories (a), (b) and (c) are changes to interim compliance dates in a "schedule of compliance."

The term "schedule of compliance" is defined by the regulations to mean "a schedule of remedial measures included in a 'permit,' including an enforceable sequence of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations." 40 C.F.R. § 122.2 (2001). Schedules of compliance are required to be included as conditions of a permit "to provide for and assure compliance with all applicable requirements of CWA and regulations." *Id.* § 122.43(a). "Schedules of compliance" are governed by 40 C.F.R. § 122.47, which requires, among other things, that a schedule of compliance "shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA." *Id.* § 122.47(a)(1).

In the present case, Part III.A of the Permit is captioned "Compliance Schedule." In that part of the Permit, there are various substantive requirements leading to the implementation of an upgraded SWMP and a schedule of "deadlines" for steps in that process. In particular, deadlines are set for "First Annual Report," "Implement outfall monitoring," "First Annual Implementation Plan," submission of "Upgraded SWMP," and "Implement Upgraded SWMP." Permit pt. III.A, tbl. 1. Part III.A of the Permit also states that "the requirements in Table 2 in Part III.B of this permit are to be used in development of the upgraded SWMP" and that "[t]he District's November 4, 1998 SWMP (or revised/upgraded SWMP) is also incorporated by reference into this permit." Permit pt. III.A at 6. Both the substantive requirements set forth in Part III.A of the Permit and the requirements in Table 2 in Part III.B of the Permit appear to be "schedule[s] of remedial measures" fitting the regulatory definition of "schedule of compliance." 40 C.F.R. § 122.2 (2001). In addition, these deadlines appear to be "enforceable sequence[s] of interim requirements (for example, actions, operations, or milestone events) leading to compliance with the CWA and regulations." Thus, we conclude that the

Petitioners have failed to show any clear error of fact or law, or important policy decision, warranting review of the Region's decision to characterize the deadlines set forth in Part III.A as "interim compliance date[s] in a schedule of compliance" that may be modified as set forth in 40 C.F.R. § 122.63(c). Accordingly, as Petitioners' categories (a) and (b) list deadlines set forth in Part III.A, we decline to grant review of these portions of the Permit.

We also find credible the Region's argument that the deadlines identified by Petitioners in their category (c) are appropriately viewed as "interim compliance date[s] in a schedule of compliance" under 40 C.F.R. § 122.63(c). Category (c) refers to deadlines, and authorizations for extensions of such deadlines, that are set forth in Part III.B.10 of the Permit. These deadlines appear to be additional detailed sub-parts of the deadlines identified in the schedule of compliance set forth in Part III.A of the Permit. Accordingly, we decline review of Petitioners' category (c). We note, consistent with our holding above, that any extension of the deadlines set forth in Parts III.A and III.B.10 of the Permit may not be more than 120 days from the date in the existing Permit. *See* 40 C.F.R. § 122.63(c) (2001).

We conclude, however, that the Petitioners have shown that the Region erred in approving a Permit condition that authorizes changes listed in Petitioners' categories (h) as minor modifications under section 122.63, and we conclude that Petitioners have raised substantial questions regarding the scope of changes authorized by the Permit conditions identified in Petitioners' categories (d), (e) and (f) that require clarification.

In Petitioners' category (h), they object to the Permit's conditions that authorize changes to the monitoring locations that are required by the Permit (Permit pts. IV.A.1, VIII.A, IX.A.5 & IX.C). The Region correctly notes that section 122.63(b) authorizes minor modification to "require more frequent monitoring or reporting by the permittee." 40 C.F.R. § 122.63(b), *cited in* Region's Second Response at 13. The Region, however, is incorrect in its argument that "there is nothing in 40 C.F.R. § 122.63 that would prohibit EPA from authorizing change in monitoring locations for MS4 compliance purposes." Region's Response at 13.

As noted above, section 122.63 allows minor modifications "only" within categories listed in that section, and it expressly requires all other modifications to be made pursuant to the notice and comment procedures of section 122.62. Specifically, section 122.63 states:

> Upon the consent of the permittee, the Director may modify a permit to make the corrections or allowances for changes in the permitted activity listed in this section, without following the procedures of part 124. *Any permit modification not processed as a minor modification under*

> *this section must be made for cause and with part 124 draft permit and public notice as required in § 122.62.* Minor modifications may *only*: * * * [listing categories].

40 C.F.R. § 122.63 (2001). The only reference to monitoring found in section 122.63 is in subsection (b), which only authorizes modification to *add* additional monitoring requirements; it does not authorize a change in monitoring location. Accordingly, any such changes must be made through the formal "notice and comment" procedures of section 122.62, and therefore we grant review of the Permit, Parts IV.A.1, VIII.A, IX.A.5 & IX.C and remand the Permit for further proceedings consistent with this decision.

In Petitioners' categories (d), (e) and (f), Petitioners object to the Permit's conditions that allow the Region to "approve" schedules for developing and implementing an enforcement plan (Permit pt. III.B.11), to approve certain additional SWMP program activities (Permit pt. III.B.12), and to approve, disapprove or revise the District's Annual Reports and Annual Implementation Plans (Permit pt. III.E). Based on our review, it is unclear whether these provisions are simply intended to state that EPA decisions regarding various submissions required under the Permit related to the SWMPs do not themselves result in changes to the Permit (or the SWMPs subsumed within the Permit) and thus should not be subjected to formal notice and comment procedures, or whether these provisions, referenced as they are in the minor modification section of the permit, are intended to serve as a basis for substantive changes to permit conditions. Accordingly, as part of our remand of this Permit, we direct the Region to clarify the extent to which these provisions in the Permit contemplate changes to permit conditions. To the extent that permit changes are contemplated, the Region is further directed to explain how such changes can be approved by minor modification in the face of the Region's concession that upgrades to the Permit's SWMPs must be made through the formal procedures set forth in Section 122.62.

F. *Issue Nine: Waivers and Exemptions*

In their final category of issues, the Petitioners argue that the District's storm water regulations, which are incorporated into the permit by reference, require the District to grant waivers or exemptions from the District's regulations that the Petitioners argue are in conflict with the CWA and implementing regulations. Petition at 11. The Region argues that the identified exemptions or waivers are not as broad as suggested by the Petitioners and that Petitioners have not shown that any of the exemptions or waivers under the District's regulations violate federal law. Region's Response at 26-29. The Region's arguments here are in stark contrast to its Second Response to Comments where, in response to comments raising these same concerns, the Region merely stated that "[t]he permit addresses most of the EJLDF [Petitioners] recommended changes." Second Response to Comments at 9. In fact, it would appear that the changes made by the

Region to the second draft permit did not address any of the particular issues that Petitioners have now raised in this final category of issues on appeal.

Because the Region's Second Response to Comments does not challenge the validity of Petitioners' Comments, but rather tends to treat them as meritorious,[33] and because the Region failed to make changes to the Permit or to otherwise address Petitioners' concerns regarding these waivers and exemptions, we are remanding this portion of the Permit to the Region to either make appropriate changes to the Permit or to explain why the Petitioners' comments do not merit changes to the Permit.

III. *CONCLUSION*

For the foregoing reasons, this matter is remanded to the Region for further proceedings consistent with this decision.

So ordered.

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[33] Based on our review, there may be cause for treating these concerns as meritorious. Petitioners observe that 21 DCMR § 514.1 allows variances to requirements for land disturbing activities, erosion control requirements, and storm water control at construction sites, all of which are part of the storm water management activities incorporated as BMPs into the Permit. Petitioners' Reply at 12-13. In addition, Petitioners point out that the exemption provisions of 21 DCMR §§ 527.1, 528 also apply to storm water management requirements incorporated as BMPs into the Permit. *Id.* at 13. It is not clear how these BMPs can be enforceable obligations of the Permit when the District's regulations that are also incorporated into the Permit grant the District the right to grant waivers and exemptions from these BMP requirements under standards that apparently are not found in federal law and without notice to the Region or the public. The Region should address these issues on remand, either by changes to the Permit or by an explanation of the Region's rationale for why these concerns do not warrant modifications to the Permit.