

**IN RE CITY OF MOSCOW, IDAHO**

NPDES Appeal No. 00-10

***ORDER DENYING REVIEW***

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Decided July 27, 2001

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## Syllabus

Petitioner, City of Moscow, (“Petitioner” or “Moscow”) operates a publicly owned treatment works (“POTW”) in Moscow, Idaho, adjacent to Paradise Creek near the Washington border. Moscow filed a Petition for Review (“Petition”) seeking revision of several permit conditions in a final Clean Water Act (“CWA”) National Pollutant Discharge Elimination System (“NPDES”) permit decision issued by U.S. Environmental Protection Agency, Region X (“Region”), for the discharge of treated waters into Paradise Creek.

In general, Petitioner asserts that the challenged permit conditions are based on clearly erroneous findings of fact and requests that the allegedly unlawful conditions be set aside or modified as appropriate. Petitioner contends that (1) the Region applied an incorrect design flow in its calculation of permit mass load limits for six effluent parameters; (2) the Region incorporated incorrect and insufficient compliance schedules for meeting four of the effluent limits, and it failed to conform to state certification requirements in this regard; (3) the Region relied on unsubstantiated seasonal data as a basis for establishing phosphorus limits rather than incorporating a phased approach with additional study; (4) the Region violated the Clean Water Act (“CWA”) by misapplying Washington State’s water quality standards for temperature and dissolved oxygen (“DO<sub>2</sub>”); (5) the Region’s interpretation of temperature and phosphorus limitations are contrary to public policy; and (6) the Region erroneously required a Quality Assurance Project Plan (“QAPP”) as a permit condition.

Held: The Board denies review of the Petition in its entirety based on the following findings:

(1) The Region did not err in applying the facility’s current design flow to calculate mass load limits instead of using, as requested by Petitioner, an assumption that relates to future plant modifications. Section 122.45(b)(1) of 40 C.F.R. refers to verifiable design flow at the time of permit issuance. In view of the lack of clarity in the record regarding a potential upgrade of the facility to a higher design flow, the Region did not err in declining to write the permit in a way that anticipated and allowed for such an upgrade. In addition, while 40 C.F.R. § 122.44(d)(1)(vii)(B) requires *consistency* with the requirements of any available waste load allocation (“WLA”), it did not, under the circumstances of this case, require Moscow’s permit limits to be *identical* to the WLAs relevant to this matter;

(2) The Region did not err in establishing compliance schedules that are more stringent than the ones included in the State of Idaho’s certification and that require compliance

within the term of the permit. The Region can provide compliance schedules only to the extent such schedules are authorized under state law. Given the problems inherent in the interpretation of State law reflected in the State's certification, the Region did not clearly err in requiring compliance within the term of the permit;

(3) The Region did not err in establishing the contested seasonal constraint for phosphorous as a permit limitation. The seasonal constraint is consistent with the applicable Total Maximum Daily Load ("TMDL") and is intended to apply for the present, until site-specific data become available. Furthermore, to the extent that Petitioner's claim entails a challenge to the underlying TMDL, the challenge is not one the Board will entertain. The Board has often emphasized that it will not review predicate regulatory decisions in the context of Board cases unless the circumstances are exceptional, and nothing in the record justifies deviation from the Board's general practice in this regard;

(4) The Region did not misapply Washington State's water quality standards ("WQSS") for temperature and DO<sub>2</sub>. The fact that there is some indication that Washington State has in practice applied its own WQSS in a less stringent manner than that contemplated by the applicable standard does not provide a basis for the Region to deviate from the standard in establishing a permit limit;

(5) Petitioner's argument that the permit conditions are so stringent that they could require Petitioner to cease discharging, and that the cessation of Moscow's discharge would harm the receiving water body, are appropriately viewed as a challenge to the TMDL and the Region's decision to incorporate TMDL-based limitations, and as a claim of technological and/or economical infeasibility. Absent exceptional circumstances, the Board will not entertain a challenge to predicate regulatory decisions. In addition, under the CWA, technological and economical infeasibility do not excuse compliance with state WQSS;

(6) The Region did not abuse its discretion in requiring a QAPP as a permit condition. The CWA confers broad authority on the Region to impose monitoring requirements in NPDES permits. Because consistent and accurate monitoring are pivotal to the integrity of NPDES permits, a permit limitation that requires an organized approach to data monitoring, such as the QAPP requirement here, is not unreasonable.

***Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich.***

***Opinion of the Board by Judge Fulton:***

**I. INTRODUCTION**

In a petition dated August 10, 2000, which was timely filed on August 11, 2000, the City of Moscow ("Petitioner" or "Moscow"), seeks review of several limitations and conditions in the final National Pollutant Discharge Elimination

System (“NPDES”) permit<sup>1</sup> (“permit”) issued by U.S. EPA Region X (“Region X”) on March 12, 1999, which regulates discharges from Moscow’s publicly owned treatment works (“POTW”) into Paradise Creek. In general, Petitioner alleges that a number of conditions incorporated into the permit are based on clearly erroneous findings of fact and conclusions of law and requests that review be granted and that the allegedly unlawful conditions be set aside or modified as appropriate. Petition for Review (“Petition”) at 1.

Moscow’s principal arguments can be summarized as follows: (1) the Region applied an incorrect design flow in its calculation of permit mass load limits for six of the effluent parameters;<sup>2</sup> (2) the Region incorporated incorrect and insufficient compliance schedules for meeting four of the effluent limits, and it failed to conform to state certification requirements in this regard;<sup>3</sup> (3) the Region relied on unsubstantiated seasonal data as a basis for establishing phosphorus limits rather than incorporating a phased approach with additional study;<sup>4</sup> (4) the Region violated the CWA by misapplying Washington State’s water quality standards for temperature and dissolved oxygen;<sup>5</sup> (5) the Region’s interpretation of temperature and phosphorus limitations are contrary to public policy;<sup>6</sup> and (6) the Region erroneously required a Quality Assurance Project Plan (“QAPP”) as a permit condition.<sup>7</sup>

In its response, Region X requests that this Board dismiss the petition, arguing, in essence, that: (1) the Region used the POTW’s current design flow to calculate the permit’s mass load limits and therefore did not err in applying 3.6 million gallons per day (“mgd”) to calculate the permit effluent limits;<sup>8</sup> (2) schedules are neither incorrect nor insufficient, and the Region is not required to follow the state certification to the extent that the certification provides less stringent requirements than the requirements in the permit;<sup>9</sup> (3) the permit’s phosphorus limit is dictated by the available Paradise Creek Total Maximum Daily Load

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<sup>1</sup> Under the Clean Water Act (“CWA”), persons who discharge pollutants from point sources into waters of the United States must have a permit in order for the discharge to be lawful. *See* CWA § 301, 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. *See* CWA § 402, 33 U.S.C. § 1342.

<sup>2</sup> *See* Petition at 3-5.

<sup>3</sup> *Id.* at 5-9.

<sup>4</sup> *Id.* at 10-11.

<sup>5</sup> *Id.* at 12-16.

<sup>6</sup> *Id.* at 16-18.

<sup>7</sup> *See id.* at 19-20.

<sup>8</sup> *See* Response to Petition (“Response”) at 6-9.

<sup>9</sup> *Id.* at 10-16

("TMDL"), and an administrative appeal is not the proper forum for challenging a TMDL;<sup>10</sup> (4) the Region did not misapply Washington State's water quality standards for temperature and dissolved oxygen;<sup>11</sup> (5) the permit's effluent limits on phosphorus and temperature cannot be avoided by arguments that they contravene public policy;<sup>12</sup> and (6) the permit's provision for a QAPP does not constitute error.<sup>13</sup>

## II. FACTUAL BACKGROUND

Petitioner operates a POTW in Moscow, Idaho, adjacent to Paradise Creek near the Washington border. In 1997, Moscow submitted an application for the renewal of its existing NPDES permit to discharge from its POTW to Paradise Creek. Petition Exhibit ("Pet. Ex.") 3 (Permit Renewal Application). In August of 1998, Region X issued a draft permit and sought public comments on the draft permit. By letter dated September 22, 1998, Petitioner submitted its comments on the draft permit. *See* Pet. Ex. 5 (Comments). A public hearing on the draft permit was conducted on November 17, 1998, in which Petitioner participated. *See* Pet. Ex. 9 (Public Hearing).

After reviewing comments made in response to the draft permit and at the public hearing, the Region proceeded with the preparation of the final permit, and on March 11, 1999, issued the final NPDES permit to become effective 30 days after issuance. *See* Pet. Ex. 1 (Final Permit). On April 8, 1999, Petitioner filed a timely request for Evidentiary Hearing with the Regional Administrator contesting several conditions and limitations of the final NPDES permit. Pet. Ex. 6 (Request for Evidentiary Hearing). Pursuant to the applicable NPDES regulations,<sup>14</sup> Moscow thereafter filed a timely appeal with this Board.

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<sup>10</sup> *Id.* at 18.

<sup>11</sup> *Id.* at 19-22.

<sup>12</sup> *Id.* at 22-23.

<sup>13</sup> *Id.* 23.

<sup>14</sup> On May 15, 2000, the U.S. Environmental Protection Agency published "Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two." *See* 65 Fed. Reg. 30,886 (May 15, 2000). The rules, effective July 14, 2000, revised the procedures for decisionmaking with respect to NPDES permits. 40 C.F.R. pt. 124. Section 124.21(c)(3), as amended by 65 Fed. Reg. 30,886, 30,911, provides that for "any NPDES permit decision for which a request for evidentiary hearing was filed on or prior to June 13, 2000 but was neither granted nor denied prior to that date, the Regional Administrator shall no later than July 14, 2000 notify the requester that the request for evidentiary hearing is being returned without prejudice. \* \* \* The requester may file an appeal with the Board, \* \* \* no later than August 13, 2000." 40 C.F.R. § 124.21(c)(3) (2000). On July 7, 2000, Region X returned Moscow's request for an evidentiary hearing as required by the amendments, leading to Moscow's filing an appeal with the Board.

For the reasons stated below, Petitioner's request for review is denied.

### III. STATUTORY BACKGROUND

The CWA provides for two different kinds of permit effluent limits: those based on the technology available to treat a pollutant and those necessary to protect the designated uses of the receiving water body. More specifically, the first variety — technology-based limits — reflects a specified level of pollutant-reducing technology required by the CWA for a given type of facility. *See* CWA § 301(b)(1)(A)-(B), 33 U.S.C. § 1311(b)(1)(A)-(B). An example relevant to the case at hand is the requirement in section 301 of the CWA that, as a class, POTWs meet performance-based requirements based on available wastewater treatment technology. *See* CWA § 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B). The performance level for POTWs is referred to as “secondary treatment.” Secondary treatment is comprised of technology-based requirements expressed in terms of five day biochemical oxygen demand (“BOD<sub>5</sub>”), total suspended solids (“TSS”), and pH. *See* 40 C.F.R. pt 133.

Technology-based effluent treatment requirements “represent the minimum level of control that must be imposed in a permit.” 40 C.F.R. § 125.3(a). When technology-based effluent limitations (“TBELs”) are not sufficient to meet the applicable State water quality standards,<sup>15</sup> more stringent effluent limits are called for. Water quality-based effluent limits (“WQBELs”) are designed to ensure that the applicable state water quality standards are met. *See* CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). Thus, ordinarily NPDES permits will incorporate TBELs unless more stringent controls are required to protect the designated uses of the receiving water body, in which case, the permit will incorporate more stringent WQBELs.

Under section 303(d) of the Clean Water Act, 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.” *See* 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 (“TMDLs”). CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R.

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<sup>15</sup> Water quality standards are “provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses.” 40 C.F.R. § 131.3(i). Water quality criteria are, in turn, “elements of State water quality standards, expressed as constituent concentrations, levels or narrative statements” aimed to attain and maintain each designated use. 40 C.F.R. § 131.3(b).

§ 130.7. A TMDL is the sum of waste load allocations (“WLAs”)<sup>16</sup> for point sources discharging into the impaired segment, and load allocations (“LA”)<sup>17</sup> 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* 40 C.F.R. § 130.2(i). The concept behind the development of TMDLs is to provide a rational basis for developing water quality-based controls for discharges into already impaired waters.<sup>18</sup>

WQBELs are to be derived from WLAs, when WLAs are available for a given discharge. Section 122.44(d) requires each NPDES permit to include “any requirements *in addition to or more stringent* than promulgated effluent limitations guidelines \* \* \*.” 40 C.F.R. § 122.44(d) (emphasis added).<sup>19</sup> The same regulatory provision further requires that “[e]ffluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, [be] consistent with the assumptions and requirements of any available wasteload allocation.” 40 C.F.R. § 122.44(d)(1)(vii)(B).

#### IV. DISCUSSION

Ordinarily, in appeals under 40 C.F.R. § 124.19(a), the Board will not grant review unless it appears from the petition that the permit condition in question is based on a clearly erroneous finding of fact or conclusion of law or involves an important policy consideration which the Board, in its discretion, should review.<sup>20</sup>

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<sup>16</sup> The term waste load allocation is defined as “[t]he portion of a receiving water’s loading capacity that is allocated to one of its existing or future point sources of pollution. WLAs constitute a type of water quality-based effluent limitation.” 40 C.F.R. § 130.2(h).

<sup>17</sup> A load allocation is “the portion of a receiving water’s loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources.” 40 C.F.R. § 130.2(g).

<sup>18</sup> *See* U.S. EPA Office of Water, NPDES Permit Writers’ Manual § 6.4.1 at 105 (1996).

<sup>19</sup> Effluent limitation guidelines are regulations promulgated by EPA under Section 304 of the CWA that establish national technology-based effluent requirements for specific industrial categories. *See* CWA § 304(b), 33 U.S.C. § 1314(b).

<sup>20</sup> Prior to the amendments to streamline the NPDES regulations, 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. 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 Florida Pulp & Paper*  
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40 C.F.R. § 124.19(a) (2000). 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); *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 Contaminación 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. On appeal to the Board, the petitioner bears the burden of demonstrating that review is warranted. *AES P.R.*, 8 E.A.D. at 328; *In re Hawaii Elec. Light Co.*, 8 E.A.D. 66, 71 (EAB 1998); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997).<sup>21</sup>

Persons seeking review must demonstrate to the Board, *inter alia*, “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). Participation during the comment period must conform with the requirements of section 124.13 which requires that all reasonably ascertainable issues and all reasonably available arguments supporting a petitioner’s position be raised by the close of the public comment period. 40 C.F.R. § 124.13 (2000); *see, e.g., In re New England Plating*, 9 E.A.D. 726, 732 (EAB 2001); *In re City of Phoenix*, 9 E.A.D. 515, 525 (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

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*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. *See In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 n.11 (EAB 2001). The standard of review under 40 C.F.R. § 124.91 was similar to that under 40 C.F.R. § 124.19. For instance, under section 124.91 a petition for review was not granted unless the Regional Administrator’s denial or Administrative Law Judge’s decision was clearly erroneous or involved an exercise of discretion or important policy that merited review by the Board. This same principle applies under section 124.19. *See* 40 C.F.R. § 124.19(a)(1)-(2) (2000). Likewise, other principles such as exercising the power of review only sparingly, the burden of demonstrating that the petition warrants review, and that most permits should be adjudicated at the Regional level, are still applicable to petitions for review of NPDES permitting decisions under section 124.19. *Compare* 44 Fed. Reg. 32,854, 32,887 (June 7, 1979) (preamble to § 124.101, former § 124.91) *with* 45 Fed. Reg. 33,290, 33,412 (May 19, 1980) (preamble to § 124.19).

<sup>21</sup> Standing to appeal a final permit determination is limited under section 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); *see In re City of Phoenix, Ariz. Squaw Peak & Deer Valley Water Treatment Plants*, 9 E.A.D. 515, 525 (EAB 2000). As noted previously, Moscow submitted general and specific comments on the draft permit and also participated in the public hearings.

any public hearing) to the extent required by these regulations \* \* \*.’”), *appeal filed*, No. 01-70263 (9th Cir. docketed Feb. 17, 2001).

The Board traditionally assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature. *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). 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 position. *Id.*

With these considerations as background, we will now proceed to the analysis of Moscow’s claims.

#### A. *Design Flow*

Moscow first maintains that the Region made an incorrect assumption regarding design flow in its calculation of mass load limits for BOD<sub>5</sub>, TSS, total residual chlorine (“RC”), total ammonia (“TA”), and total phosphorous (“TP”). Petition at 3-5. Petitioner raises two arguments in support of its position. Moscow’s first argument is that the design flow of the POTW is 4.0 mgd and that Region X erroneously used a design flow of 3.6 mgd to calculate the mass load limits. Petition at 4. Petitioner’s second argument is that because the TMDL provides WLAs for Moscow’s POTW, the Region was required to use 4.0 mgd — the effluent flow rate used in the TMDL — instead of 3.6 mgd, to be consistent with the applicable allocations. *See* Petition at 4-5. Based on these arguments, Petitioner requests that the permit mass load limits for BOD<sub>5</sub>, TSS, RC, TA, and TP be recalculated using a design flow of 4.0 mgd. We consider Petitioner’s arguments in turn.<sup>22</sup>

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<sup>22</sup> We note that the TMDL applicable here establishes WLAs only for TSS, TA and TP, which means that Moscow’s allegation about consistency with the TMDL applies only to TSS, TA and TP, and not also to BOD<sub>5</sub> and RC as Petitioner claims.

1. *What Constitutes “Design Flow” Within The Meaning of EPA’s Regulations?*

As stated, the Regional permit writer used a design flow figure of 3.6 mgd, based on the current design flow of the facility,<sup>23</sup> instead of 4.0 mgd as proposed by Moscow. The Region’s position is that it used the correct design flow figure to calculate the permit’s mass load limits because 4.0 mgd only represents a proposed facility upgrade and not the facility’s design flow at the time of permit issuance. *See* Response at 6-9.

Section 122.45(b)(1) of 40 C.F.R. establishes general guidelines applicable to the calculation of effluent limitations for POTWs. With respect to design flow, Section 122.45(b)(1) provides, “permit effluent limitations \* \* \* shall be calculated based on design flow.” 40 C.F.R. § 122.45(b)(1). The term “design flow” is not defined in the regulations; we are thus left to its plain and ordinary meaning, as used in the context of section 122.45(b)(1), in addressing the issue at hand. *See In re Odessa Union Warehouse Co-op, Inc.*, 4 E.A.D. 550, 556 (EAB 1993) (need to consult the ordinary meaning of words absent any statutory or regulatory definition); *see also Rucker v. Wabash R.R. Co.*, 418 F.2d 146, 149 (7th Cir. 1969) (same rules of construction apply to administrative regulations as apply to statutes); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”).

The issue, in essence, concerns the temporal meaning of the phrasing in section 122.45(b)(1), the question being whether it was intended to refer to the design flow of a facility at the time of permit issuance, or rather requires consideration of the design flow implications of potential facility upgrades. In this regard, we find nothing in either the term “design flow” itself or in its usage in section 122.45(b)(1) that connotes anything other than the design flow at the time of permit issuance. Presumably, if planned but unrealized upgrades were to be considered in the analysis the text of the regulation would have made reference to such a consideration. Absent some language indicating a prospective focus, we will in-

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<sup>23</sup> The 3.6 mgd figure is based on information provided by Moscow in its permit renewal application. The Region acknowledges that Moscow’s permit renewal application was actually predicated on a design flow of 3.5 mgd and that the Region’s use of 3.6 mgd in writing the permit was erroneous. The Region also indicates, however, that this slightly higher flow assumption benefits Moscow and that the error is thus harmless. *See* Response at 7 n.7. We agree.

Notably, a permittee is not necessarily bound by representations made in its permit application. *See In re City of Yankton*, 5 E.A.D. 376, 387 (EAB 1994). Thus, we proceed to analyze the merits of Petitioner’s claims that 4.0 mgd is the correct design flow.

terpret the language as referring to the known and verifiable design flow.<sup>24</sup>

The record before us does not provide any evidence that 4.0 mgd was the design flow of the facility at the time the permit was issued. The record is rather supportive of the Region's position that the 4.0 mgd figure relates to a proposed but unrealized plant upgrade.<sup>25</sup>

Because we read section 122.45(b)(1) to contemplate that POTWs' effluent limitations be calculated based on design flow at the time of permit issuance and not on changes in design flow anticipated in the future, and because the Petitioner did not provide any evidence showing that the facility's design flow at the time of permit issuance was 4.0 mgd, we conclude the Region did not err in applying the 3.6 mgd figure.<sup>26 27</sup>

One additional related argument by Moscow bears mention. Moscow claims that condition I.F in the final permit concedes that the POTW's design

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<sup>24</sup> This is not to say that the Region could not have written the permit in a way that anticipated and allowed for an upgrade of the facility to 4.0 mgd in the event that the planned upgrade had become sufficiently certain to warrant such provision. In this regard, we note that the record is at best unclear in terms of the likelihood and timing of an upgrade of Moscow's facility. In view of the lack of clarity regarding any planned upgrade and the fact that Moscow can in any event and at an appropriate time seek a permit modification calibrated to a 4.0 mgd facility, we do not find the Region's decision to construct the current permit around a 3.6 mgd flow assumption to be clearly erroneous.

<sup>25</sup> See, e.g., Pet. Ex. 5 at 6 (Specific Comments) ("[T]he design criteria in the draft permit was based on the '94 Wastewater Facility Plan. The *proposed flow* in the updated Wastewater Facilities *will be based on* a population of 28,479 versus 25,429 in the 1994 Plan. Accordingly, the flow, and loading *will be increased* by 12%. The average flow needs to be changed to 4.0 mgd.") (emphasis added); see also Region's Exhibits ("Reg. Exs.") 8 & 9 (Region X contacted Moscow's contractor to determine the current design flow of the facility; the contractor indicated that the Facility Design Plan recommends that the design flow be increased to 4.0 mgd, but if the City decides to upgrade to 4.0 mgd it will not be effective until late 2001).

<sup>26</sup> In *Town of Ashland*, 9 E.A.D. at 670, we denied review on one of the issues raised on appeal because of petitioner's failure to do more than reiterate previous comments it made on the draft permit without addressing the Region's previous response to those same comments. In the instant case, the Region noted in its Response to Comments that the administrative record did not have any information indicating that actual steps had been taken by Moscow to increase the facility's design capacity, and Moscow has failed to rebut the Region's Response to Comments with evidence to the contrary. See Pet. Ex. 8 at 1 (Response to Comments). Petitioner thus does little more in its Petition than echo the same concerns that the Region addressed in the Response to Comments. Accordingly, we deny review on this ground as well.

<sup>27</sup> As the Region has observed, if the design flow is increased in the future, Moscow can request a permit modification under 40 C.F.R. § 122.62. See Response at 8. Section 122.62(1) provides for the modification of permits when "material and substantial alterations or additions to the permitted facility \* \* \* [that] occurred after permit issuance \* \* \* justify the application of permit conditions that are different or absent in the existing permit". 40 C.F.R. § 122.62.

flow is 4.0 mgd.<sup>28</sup> See Petition at 4 n.1. The Region responded to this claim by asserting that Moscow has misapprehended the meaning and purpose of permit condition I.F. Response at 8. According to the Region, provision I.F only specifies requirements that will apply if and when Moscow increases its design flow to 4.0 mgd.

Permit condition I.F was apparently not in the draft permit; rather, it surfaced for the first time in the final permit. The provision includes a table that references 4.0 mgd as one of the “Design Criteria Requirements.” The reference is not otherwise explained or qualified. If anything, the remainder of the text in condition I.F tends to suggest that the conditions described in the table are the *current* plant conditions. Pet. Ex. 1 at 11 (Final Permit) (“If the facility performs plant upgrades that affect *design criteria listed in the table \* \* \**.”) (emphasis added). We find nothing in the permit itself, or the record upon which the permit is based, that corroborates the argument the Region is making on appeal that the table describes a future contingency.

While we find the unqualified reference to 4.0 mgd in condition I.F awkward and somewhat odd, we stop short of concluding that the Region should be estopped by condition I.F from arguing that the facility’s current design flow is anything other than 4.0 mgd. The reason is fairly plain: the record clearly reflects that there simply has never been any question that the Region was basing the permit’s effluent limitations on a design flow of 3.6 mgd. The Region held to this premise from the draft permit through the response to comments. The fact that Petitioner has likewise challenged this premise at each stage of the permit pro-

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<sup>28</sup> Condition I.F reads as follows:

F. Design Criteria Requirements. The design criteria for the permitted facility is as follows:

Criteria	Value	Units
Average Flow	4.0	mgd
Influent Five-day Biochemical Oxygen Demand Loading	7035	lbs/day
Influent Total Suspended Solids Loading	4379	lbs/day

Each month, the Permittee shall compute an annual average value for flow, and BOD<sub>5</sub> and TSS loading entering the facility based on the previous twelve months data or all data available, whichever is less. If the facility performs plant upgrades that affect design criteria listed in the table, only data collected after the upgrade should be use in determining the annual average value.

Pet. Ex. 1 at 11-12 (Final Permit).

ceedings belies any suggestion that with the advent of condition I.F Petitioner is now genuinely confused as to the design flow assumptions behind the permit's effluent limitations. Against this backdrop, we conclude that the unqualified reference to 4.0 mgd in condition I.F, inartful though it may be, is, at worst, harmless error.<sup>29</sup>

## 2. *Whether Need for Consistency With the Available TMDL and WLAs Required Use of Different Design Flow Assumption*

Petitioner's argument here is that Paradise Creek TMDL applies a 4.0 mgd flow rate and that, therefore, the mass-based limits in the NPDES permit must be based on a 4.0 mgd flow rate to produce consistency with the assumptions and requirements of the WLAs. Petition at 5. In essence, Petitioner is arguing that the Region was required to adopt in the final permit the same mass load allocations provided by the TMDL.

The controlling regulation here is section 122.44(d)(1)(vii)(B) of 40 C.F.R., which requires consistency with the requirements of any WLA developed and approved for a particular discharge. More specifically, it provides that the permitting authority, "[w]hen developing water quality based effluent limits \* \* \* shall ensure that \* \* \* [e]ffluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation \* \* \*." 40 C.F.R. § 122.44(d)(1)(vii)(B).

In the case at hand, the Paradise Creek TMDL includes concentration-based and mass-based allocations for a number of the pollutants of concern. The concentration-based and mass-based allocations in the TMDL are based on a "proposed permit discharge limit" of 4.0 mgd.<sup>30</sup> As we have discussed, the contested permit limitations are based on a different assumption. The Region did not, in our view, clearly err in applying the 3.6 figure in its calculation of mass-based WQBELs, rather than incorporating the mass-based allocations provided in the TMDL.

As we have observed, WLAs are fractions of a TMDL that are allocated to existing or future point sources of pollution to a receiving water body. Significantly, WLAs are not permit limits *per se*; rather they still require translation into

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<sup>29</sup> See, e.g., *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 749 (EAB 2001); *In re Chem. Waste Mgmt. of Ind., Inc.*, 6 E.A.D. 144, 163 n.18 (EAB 1995); *In re J & L Specialty Prods. Corp.*, 5 E.A.D. 31, 79-80 (EAB 1994).

<sup>30</sup> The TMDL constantly refers to 4.0 mgd as the "proposed permit discharge limit." See Pet. Ex. 4 at 34-36, 43, 50, 52 (TMDL).

permit limits (i.e., WQBELs).<sup>31</sup> Of note here is that while section 122.44(d)(1)(vii) prescribes minimum requirements for developing WQBELs, it does not prescribe detailed procedures for their development.<sup>32</sup> The lack of a detailed procedure for establishing permit limits from available WLAs was intended to give “the permitting authority the flexibility to determine the appropriate procedures for developing water quality-based effluent limits.” 54 Fed. Reg. 23,868, 23,879 (June 2, 1989).

Section 122.45, which pertains to the calculation of NPDES permit conditions, requires in general that limitations for POTWs be expressed as average weekly and monthly limits, and also that they be expressed in terms of mass. 40 C.F.R. § 122.45(d)(2), (f). The applicable regulations do not, however, specify the effluent flow rate to be applied in the derivation of mass-based limits when translating WLAs into permit limits.<sup>33</sup> Indeed, there are no specific regulatory guidelines in this regard, other than the general direction that “[i]n the case of POTWs, permit effluent limitations \* \* \* shall be calculated based on design flow.”<sup>34</sup> As we have already discussed, we read this provision to contemplate the design flow of a facility at the time of permit issuance, in this case 3.6 mgd.

In the instant case, the permit writer adopted the concentration-based allocations from the TMDL as permit limits for Moscow. When converting from concentration-based limits to mass-based limits, however, the permit writer used the facility’s design flow rate instead of the “proposed permit discharge limit” used in the TMDL to develop the mass-based limits. The fact sheet submitted with the draft permit and made available for public comment specifies that the loadings for TSS, TA and TP were recalculated because federal regulations require the limits

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<sup>31</sup> EPA’s Technical Support Document For Water Quality-Based Toxic Controls (“TSD”) refers to the process of calculating permit limits from WLAs as the final step in the “standards to permit” process. U.S. EPA Office of Water, TSD § 5.1 (March 1991).

<sup>32</sup> See 54 Fed. Reg. 23,868, 23,879 (June 2, 1989) (“Subparagraph (vii) does not prescribe detailed procedures for developing water quality-based effluents limits. Rather, the regulation prescribes minimum requirements for developing water quality-based effluent limits and, at the same time, gives the permitting authority the flexibility to determine the appropriate procedures for developing water quality-based effluent limits.”).

<sup>33</sup> This contrasts with the regulatory scheme developed specifically for the Great Lakes, which establishes a procedure to calculate mass-based effluent limits from available WLAs. See 40 C.F.R. pt. 132, App. F, Procedure 7. Under that procedure, mass loading rates are calculated using effluent flow rates consistent with those used in establishing the concentration-based limitations. *Id.*; see also Proposed Water Quality Guidance for the Great Lakes System, 58 Fed. Reg. 20,802, 20,976 (Apr. 16, 1993).

<sup>34</sup> See *In re City of Port St. Joe*, 7 E.A.D. 275, 293-93 (EAB 1997) (“The NPDES regulations do not provide guidance to the Region on how to establish appropriate mass limits for a POTW, except for the general direction that “[i]n the case of POTWs, permit effluent limitations, standards, or prohibitions shall be based on design flow.”(quoting 40 C.F.R. § 122.45(b)(1))).

be calculated based on the design flow of the facility and the information provided by the facility stated that the facility's design capacity is 3.6 mgd. Pet. Ex. 2 at 9 (Fact Sheet). While there may be some question whether the regulations *per se* precluded use of the TMDL's flow assumptions, we find that resort to the facility's actual design flow in calculating mass-based limits was within the discretion accorded the Region by the regulations and that the exercise of that discretion in the circumstances of this case was not clearly erroneous.

Moreover, although the record is not altogether clear on the point, there is some indication that the reference in the TMDL to a proposed discharge limit of 4.0 mgd was made in anticipation of a possible future upgrade of the facility to a design flow of 4.0 mgd. *See* Pet. Ex. 4 at 34-36, 43, 50, 52 (TMDL). In view of our discussion in section IV. A. 1. *supra*, this would not be surprising. As we have already stated, there is nothing in the record that indicates that the facility's current design flow is more than the 3.6 mgd figure relied upon by the Region. Thus, while the Region opted to be conservative and apply the current design flow of the facility to derive the contested permit limits, this was well within the discretion accorded the Region under the applicable regulatory scheme.

We do not regard the choice to use the facility's current, known design flow in developing WQBELs rather than the higher number reference in the TMDL as being in conflict with the requirement that WQBELs be consistent with available WLAs. While the governing regulations require *consistency*, they do not require that the permit limitations that will finally be adopted in a final NPDES permit be *identical* to any of the WLAs that may be provided in a TMDL.<sup>35</sup> TMDLs are by definition maximum limits; permit-specific limits like those at hand, which are more conservative than the TMDL maxima, are not inconsistent with those maxima, or the WLA upon which they are based.

Accordingly, here again we do not find that the Region's decision to use a design flow of 3.6 mgd to be clearly erroneous, and neither do we find that the issue presented involves an important matter of policy or exercise of discretion that warrants Board review.<sup>36</sup>

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<sup>35</sup> The intent of section 122.44(d)(1)(vii), as stated in its preamble, is to ensure that "when WLAs are available, they [are] used to translate water quality standards into NPDES permit limits." 54 Fed. Reg. 23,868, 23,879 (June 2, 1989). The preamble, however, does not mention that NPDES permit limits are to be identical to the allocations available in TMDLs. See for instance the interpretation given by EPA to 40 C.F.R. § 122.44(d)(1)(vii)(B) in the preamble of the Final Reissuance of NPDES Storm Water Multi-Sector General Permit for Industrial Activities ("Effluent limitations must be consistent with (*but not identical to*) wasteload allocations in TMDLs."). 65 Fed. Reg. 64,746-01, 64,792 (Oct. 30, 2000) (*emphasis added*).

<sup>36</sup> One of the factors that plays an important role in the development of permit limits is the available dilution of the receiving water body. *See* U.S. EPA Office of Water, TSD § 5.1.1 (Mar. Continued

B. *Compliance Schedules for Total Ammonia, Total Phosphorus, Dissolved Oxygen and Temperature*

Moscow's second contention is that the Region incorporated incorrect and insufficient schedules of compliance for meeting the effluent limitations on TA, TP, dissolved oxygen ("DO<sub>2</sub>") and temperature. Petition at 5-9. In support of its position, Moscow raises two arguments. Moscow first argues that the compliance schedules set by the Region fail to conform to state certification requirements. Petition at 5. Moscow's second argument is that the compliance schedules are unattainable and therefore inconsistent with the compliance expectations set forth in the federal regulations, which, according to Moscow, require compliance *as soon as possible*, but *not sooner than possible*. Petition at 5, 8-9. Moscow thus requests that the compliance schedules be revised to allow compliance in a time frame consistent with the state certification because that schedule provides for compliance as soon as possible. Petition at 7, 9.

At the outset, we note that the state certification only provides compliance schedules for temperature, TP, and TA; thus, Moscow's request to conform the permit compliance schedules to Idaho's certification does not apply to DO<sub>2</sub>. Moreover, there is no mention in the comments on the draft permit or public hearing's transcript of the need for an extended compliance schedule for DO<sub>2</sub>.<sup>37</sup> As already stated, 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 at that time). *See* 40 C.F.R. § 124.13; *In re New England Plating*, 9 E.A.D. 726, 732 (EAB 2001).<sup>38</sup> Because

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1991). In its analysis of WQBELs, the permit writer observed that Paradise Creek (the receiving water body) does not provide sufficient dilution for Moscow's effluent. *See* Pet. Ex. 2 at 8 (Fact Sheet) ("The flow volume in Paradise Creek is so small in relation to [Moscow's] effluent volume that it cannot provide dilution of the effluent \* \* \*"). It bears noting that utilizing the inflated design flow number advocated by Petitioner would have yielded effluent limits artificially high for the volume of wastewater entering Paradise Creek, further taxing the creek's assimilative capacity and imperiling water quality standards. *See, e.g.*, U.S. EPA Office of Water, NPDES Permit Writers' Manual § 6.5.1 (1996) ("The objective in the development of permit limits is to establish limits that promote compliance with WLA under normal operating conditions.").

<sup>37</sup> Petitioner raised other comments regarding DO<sub>2</sub> in its general and specific comments on the draft permit but none of them relates to the issue raised on appeal. *See, e.g.*, Pet. Ex. 5 (General Comments at 9-10) & (Specific Comments at 3).

<sup>38</sup> Moscow submitted general and specific comments on the draft permit during the comment period. *See* Pet. Ex. 5. In its comments it raised the general issue of the need for a phased approach for temperature and TP. *Id.* The issue of conformance with state certification, which is now raised on appeal, was not specifically raised by Petitioner in its written comments. The State certification was issued after the deadline for submission of written comments on the draft permit, which ended September 16, 1998. Idaho's certification letter was issued on October 16, 1998. However, a public hearing

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Moscow did not earlier raise the issue of an extended compliance schedule for DO<sub>2</sub> and does not now argue that the issue was inascertainable, we will not consider the merits of this argument as it pertains to DO<sub>2</sub>.<sup>39</sup>

For a similar reason, we decline to consider the permit's compliance schedule for TA. In its comments on the draft permit Petitioner raised the issue of the need for a phased approach for TA to allow time to the States of Washington and Idaho to adopt EPA's new ammonia criteria.<sup>40</sup> The ammonia issue raised on appeal, however, is distinct from the one raised in comments. Indeed, the issue of an extended compliance schedule for TA as raised on appeal was not specifically raised in comments below.<sup>41</sup> Moreover, Petitioner did not mention the need for conformance with Idaho's certification in conjunction with TA during the public hearing as it did with temperature and TP. Because the issue of an extended compliance schedule for TA was reasonably ascertainable and Moscow earlier failed to raise this particular issue, we decline to entertain it at this juncture.

Consequently, the only permit conditions for which the issue of insufficient compliance schedules was preserved are those relating to TP and temperature. Because Petitioner's request is to conform the compliance schedules to the State's certification, we will first determine whether the Region clearly erred in concluding that it was not bound by the compliance schedules contained in the Idaho certification. Because we conclude that the Region did not err in this regard, we then turn to the question whether the Region nonetheless abused its discretion in not providing longer compliance schedules.

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ing on the draft permit was held on November 17, 1998, in which Moscow participated. In its appearance at the public hearing Petitioner's representative read excerpts from the State certification and raised Moscow's concerns about compliance with temperature and TP as scheduled in the permit. Pet. Ex. 9 at 12-13.

<sup>39</sup> For instance, in its comments on the draft permit Petitioner specifically requested a compliance schedule for the full term of the permit to comply with the condition on temperature in the event EPA rejected its request to eliminate the permit limitation. *See* Pet. Ex. 5 at 4 (Specific Comments). We do not see why if Petitioner wished to preserve for review the issue of an extended compliance schedule for DO<sub>2</sub> it failed to address the issue in the same way it did with temperature.

<sup>40</sup> In its general comments Petitioner raised some concerns about TA in terms of conforming the TA limitations to new criteria developed by EPA. However, we do not view the comments raised below as sufficiently related to the issue on appeal to warrant further consideration. *See* Pet. Ex. 5 at 1 (Specific Comments).

<sup>41</sup> *See, e.g., New England*, 9 E.A.D. at 735 (denying review of an issue not specifically raised during the comment period and that was distinct from the only issue raised in comments below).

### 1. *Conformance With State Certification*

Section 401(a)(1) of the CWA requires all NPDES permit applicants to obtain a certificate from the appropriate state agency validating the permit's compliance with the pertinent federal and state water pollution control standards. *See* 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).

In our decisions, we have often emphasized that the Region's duty under section 401 of the CWA to defer to considerations of state law is intended to prevent EPA from *relaxing* any requirements, limitations or conditions imposed by state law. *See, e.g., In re City of Jacksonville, Dist. II Wastewater Treatment Plant*, 4 E.A.D. 150, 157 (EAB 1992); *see also In re Ina Rd. Water Pollution Control Facility*, 2 E.A.D. 99, 100 (CJO 1985). When the Region reasonably believes that a state water quality standard requires a more stringent permit limitation than that specified by the state, the Region has an independent duty under section 301(b)(1)(C) of the CWA to include more stringent permit limitations. *See City of Jacksonville*, 4 E.A.D. at 158; *see also* 40 C.F.R. § 122.44 (d)(1), (5).

Based on the foregoing, it is plain that the certification process does not mandate a less stringent permit condition than the one EPA proposes to include, simply because State law may be less stringent in some respects. Certification does, however, call upon a state to identify "the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards." 40 C.F.R. §§ 124.55(c), 124.53(e); *In re American Cyanamid Co.*, 4 E.A.D. 790, 801 n.11 (EAB 1993).

In the instant case, Idaho's Department of Environmental Quality ("IDEQ") issued a state certification which validated Moscow's permit, but which "conditioned" certification on the establishment of compliance schedules less stringent than those ultimately adopted by the Region<sup>42</sup> for several permit limitations, including the limits for TP and temperature.<sup>43</sup> The stated basis for the longer compliance schedules was that Idaho's water quality standards allow for compliance

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<sup>42</sup> The compliance schedules adopted by the Region require compliance with the TP and temperature limitations by no later than March 12, 2004. Pet. Ex. 1 at 6 (Final Permit).

<sup>43</sup> The Idaho certification states the conditions as follows:

Therefore, issuance of the state water quality certification of [sic] for NPDES Permit No. ID-002149-1 is conditioned upon the following:

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schedules that go beyond the life of a permit, and IDEQ was concerned about Moscow’s ability to achieve compliance within the time frames prescribed by Region X. *See* Pet. Ex. 10 (State Certification).

We note at the outset that, while it is true that the compliance schedules set forth in the State’s certification are identified as “conditions,” we do not interpret this to mean that the State’s certification had vitality only if the Region incorporated verbatim the State’s proposed compliance schedules. Rather, since, as we have discussed, the State’s certification authority cannot limit the inclusion by the Region of any more stringent condition required by section 301(b)(1)(C) of the CWA, we read these conditions as describing the least stringent compliance schedules that the State would consider acceptable under State law.<sup>44</sup> Viewed in this light, an approach to compliance schedules that, while more stringent, is within the outer bounds of what the State deems acceptable, would not be *inconsistent* with the State’s certification. Thus, we reject Petitioner’s argument that, to be consistent with the State certification, the Region had to incorporate the specific time frames contemplated by the certification.

This, however, does not resolve the question whether, even if not required to do so, the Region nonetheless *should have* incorporated the State’s compliance schedules, in view of the practicability concerns voiced by both Petitioner and the State.<sup>45</sup> The Region makes two arguments in defense of its rejection of the time

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1. Effluent limitations for total phosphorus are as follows:

a) The permittee shall achieve compliance with the following interim total phosphorus effluent concentrations on or before February 2002:

\* \* \* \* \*

b) The permittee shall achieve compliance with following final phosphorus effluent concentrations *on or before December 2009*.

\* \* \* \* \*

2. Effluent limitations for flow are as follows:

a) The permittee shall achieve compliance with permit No. ID-002149-1 Table 1.A.1. listed effluent flow limitations *on or before December 2005*.

Pet. Ex. 10 at 2 (State Certification) (emphasis added).

<sup>44</sup> We note in this regard that the certification calls for compliance “on or before” the referenced compliance deadline. Pet. Ex. 10 at 2 (State Certification).

<sup>45</sup> Petitioner maintains that the Region’s compliance schedules do not provide adequate time “for planning, designing, financing, and construction of the necessary major upgrades to Moscow’s  
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frames proposed by the State. First, the Region argues that the schedules proposed by the State exceeded the authority accorded the State by its own water quality standards. *See* Response at 9. Second, the Region argues that 40 C.F.R. § 122.47(a)(1) requires compliance “as soon as possible” and Petitioner has in any case failed to show that it is not possible to comply consistent with the time frames set forth in the Region’s permit. *Id.* We approach these issues in turn.

a. *Extending Compliance Schedules Beyond the Term of the Permit*

We have recognized in the past that a Region’s authority to provide for compliance schedules in EPA-issued permits is limited to those circumstances in which the State’s water quality standards or its implementing regulations “can be fairly construed as authorizing a schedule of compliance.” *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175 (Adm’r 1990), *modification denied*, 4 E.A.D. 33, 34 (EAB 1992); *In re City of Ames, Iowa* 6 E.A.D. 374, 380 (EAB 1996).<sup>46</sup> Absent such flexibility under state law, compliance is required immediately upon issuance of the permit. *See In re J & L Specialty Prods. Corp.*, 5 E.A.D. 333, 344 (EAB 1994). Accordingly, in this case, the Region’s capacity to provide compliance schedules is circumscribed by what Idaho’s water quality standards allow.

Upon examination, Idaho’s water quality regulations allow for the incorporation of compliance schedules into NPDES permits. This authorization is not unqualified, however. Rather, compliance schedules are allowed, under Idaho’s regulations, when WQBELs are included in a permit for the first time, in which case the schedules are limited to five years or the life of the permit.<sup>47</sup> In the instant case, as previously indicated, TP and temperature are new WQBELs for which Region X established compliance schedules allowing Moscow until March 12, 2004, nearly the entire term of the permit, to come into compliance.<sup>48</sup>

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facility that are needed to achieve compliance with the [effluent] limitations \* \* \* .” Petition at 8. These appear to be the same considerations that factored into the State’s view of an appropriate compliance schedule, as articulated in its certification.

<sup>46</sup> If the applicable state’s water quality standards were promulgated after July 1, 1977, and if the state regulations allow for compliance schedules, EPA, when acting as the permitting authority, may grant compliance schedules in accordance with the requirements of 40 C.F.R. § 122.47.

<sup>47</sup> “Discharge permits for point sources may incorporate compliance schedules which allow a discharger to phase in, over time, compliance with water quality-based effluent limitations when new limitations are in the permit for the first time. Compliance schedules for NPDES permits are limited to five years or the life of the permit.” Idaho State Water Quality Standards and Water Treatment Requirements (“IDAPA”) 58.01.02.400 (Apr. 5, 2000).

<sup>48</sup> The permit is to expire on April 14, 2004, five years after issuance.

The controversy here is that in its certification for Moscow's permit IDEQ proposed compliance schedules that extend well beyond the expiration date of the permit,<sup>49</sup> and the Region did not modify the final permit to incorporate the State's proposed schedules. Rather, the Region opted to adopt more stringent compliance schedules.

The applicable state water quality regulation provides that "[c]ompliance schedules for NPDES permits are limited to five years or the life of the permit." Under the interpretation of this regulatory text reflected in the certification, the term "life of the permit" encompasses any administrative extensions; therefore, compliance schedules can go beyond the initial expiration date of an NPDES permit. Moscow's position is that the permit's compliance schedules are clearly erroneous because the Region not only failed to incorporate the compliance schedules certified by IDEQ, but also summarily dismissed Idaho's interpretation of its own rule. Petition at 7.

Petitioner maintains that the Region's approach was inappropriate, especially when measured against the Board's past pronouncements on this subject. Petition at 6. In particular, Petitioner cites a footnote from *American Cyanamid* that states: "[W]hen a State certification specifically prescribes a permit condition or limitation that interprets one of the State's water quality standards less strictly than the Region might prefer, \* \* \*, the Region would have to provide a compelling reason for rejecting the State's interpretation of the standard." *In re American Cyanamid Co.*, 4 E.A.D. 790, 801 n.12 (1993). Petitioner, thus argues that the Region is required to provide compelling reasons why it rejected Idaho's interpretation, and this it failed to do. Petition at 6.

Based on our review of the record, we cannot agree. Rather, it appears to us that the Region has, in fact, articulated a compelling reason for not utilizing the State's proposed compliance schedules. At bottom, the Region questions whether the State's certification can be taken as a clear and appropriate interpretation of State law. Based on our review, we conclude that the Region was not clearly erroneous in this conclusion.

As we have stated, the Region's authority to provide compliance schedules is dependent on the relevant state's first having recognized a role for compliance schedules in its articulation of its own water quality standards. Thus, the key question is what is authorized under *state* law. The Region maintains that the certification at issue premises its expansive approach to compliance schedules not on State law, but rather by reference to *federal* law. As noted above, the State regulations themselves limit compliance schedules to five years or *the life of the*

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<sup>49</sup> In its certification, IDEQ proposed extending the compliance dates for TP and temperature to December 2009 and December 2005, respectively.

*permit*. In concluding that compliance schedules that extend well beyond the *term* of a permit may nonetheless fall within the *life* of the permit, the certification observes:

A compliance schedule under the Idaho water quality standards can be extended beyond 5 years if the life of the permit is administratively extended *by EPA*. In addition, a new compliance schedule may be included in a reissued permit that would allow the continued phase-in of activities to comply with water quality standards.

The use of a compliance schedule as described above has been authorized *by EPA*. In EPA's Water Quality Guidance for the Great Lakes, 40 C.F.R. 132, Appendix F, Procedure 9, EPA provides that compliance schedules may be established that go beyond the expiration date of the NPDES permit. Under these circumstances, EPA is to establish an interim limit, and include in the administrative record the final limit and compliance date. EPA further provides that NPDES permits may provide for additional studies to determine whether criteria may be modified. The additional studies may result in the need for additional time for compliance, which may extend beyond the term of the permit.

Pet. Ex. 10 at 1 (State Certification) (emphasis added).

The only mechanism referenced in the certification as possible support for the State's conclusion that a compliance schedule can be extended beyond five years is an "Administrative extension" of a permit by EPA. As an initial matter, it is unclear from the certification and, for that matter, from the briefs, what the administrative extension mechanism is to which the State refers. We presume that the State is referring to 40 C.F.R. § 122.6, which allows a federal permit to continue in effect after its expiration date in circumstances in which an application for permit renewal has been filed and is pending Agency review. We note in this regard that neither the State in the certification nor the Petitioner here has pointed to case law or any other federal authority that suggests that 40 C.F.R. § 122.6 can serve as a predicate for fashioning federal permits with compliance schedules that extend more than five years.

Moreover, there is no indication in the State's certification that the State has its own authority comparable to the authority that the State finds in the federal

regulations.<sup>50</sup> Thus, the interpretation advanced in the certification would have the questionable effect of permitting the Region to issue a schedule extending well beyond five years, relying on federal authority, while the State could not issue a permit with such an extended schedule in its own right because of the unavailability of such authority under State law. In the face of this somewhat illogical result, we cannot conclude that it was clearly erroneous for the Region to disregard the interpretation advanced in the certification in favor of a course that more clearly complied with the letter of Idaho's regulations.

Additionally, as the Region observed in its Response to Comments, there is more than a little awkwardness in relying on the possibility of a future event like an "administrative extension"<sup>51</sup> as a basis for a compliance schedule extending well beyond the term of the permit: "[T]here is no guarantee, at the time of permit issuance, that a permit will be administratively extended in the future" and therefore "there is no basis for EPA to conclude, at this point that a compliance schedule greater than five years would still be within the life of the permit as required by State Law." Pet. Ex. 8 at 7 (Response to Comments).

Simply put, IDEQ's interpretation is based on the occurrence of a future event which may or may not occur. As the Region argued in its brief, this:

[P]uts the permittee in an impossible position because the permit's full compliance schedule is contingent upon a *possible future event*. If the permit were written allowing until 2009 to achieve compliance, but then was not administratively extended, the compliance schedule could not be carried forward into a new, reissued permit, because that would be beyond the life of the permit. Therefore, the new permit would require immediate compliance, but Moscow would still be several years away from complying and therefore would be subject to enforcement action.

Response at 14.

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<sup>50</sup> The only regulation cited by the State is IDAPA 16.01.02.400.03, the provision requiring compliance with five years or the life of the permit. Relying on the federal authorities discussed above, the State concludes, "IDAPA 16.01.02.400.03 allows a compliance schedule of more than 5 years if the life of the permit is administratively extended." Pet. Ex. 10 at 2 (State Certification). There is no indication in the State certification that the State has its own administrative extension mechanism.

<sup>51</sup> The same awkwardness would appear to be inherent in betting on a reissued or modified permit at some point in the future.

In sum, given the difficulties inherent in the State's analysis, and the attendant uncertainty regarding whether there was authority under State law to provide a compliance schedule that extended beyond the expiration date of the permit, it was certainly not clear error for the Region to decide not to adopt the State's compliance schedule proposal and to instead require compliance within the term of the permit. The question remains, albeit now in less stark form, whether the compliance schedules set forth in the permit are consistent with the "as soon as possible" test from 40 C.F.R. § 122.47(a)(1).

b. *The "As Soon as Possible" Test*

Petitioner maintains that the Region misapplied the "as soon as possible" test in this case, arguing that the compliance schedules do not provide adequate time "for planning, designing, financing, and construction of the necessary major upgrades to Moscow's facility that are needed to achieve compliance with the [effluent] limitations \* \* \*." Petition at 8. Indeed, these seem to be the same considerations that factored into the State's view of an appropriate compliance schedule, as articulated in its certification.

In its brief in opposition to the Petition, the Region argues that Petitioner has failed to demonstrate why instead of the time-consuming upgrades referenced in its Petition, Petitioner could not achieve compliance by "removing users from the system; requiring pretreatment by users; or, in the case of phosphorus, imposing a local ban on phosphate use." Response at 12. Of note here is the fact that we find no reference or meaningful discussion of these considerations, or, for that matter, of the "as soon as possible" requirement of 40 C.F.R. § 122.47(a)(1), in the Region's Response to Comments. Without some discussion in the Response to Comments of this issue, it is difficult to ascertain whether the permit decision was fully informed.

Nevertheless, we decline to remand the case for further development of this issue. In light of our conclusion that the Region acted reasonably in staying within the term of the permit in constructing the compliance schedules at issue, and, given that the schedules are only one month short of the permit's expiration date, we view this oversight in the Response to Comments as harmless error.<sup>52</sup>

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<sup>52</sup> See, e.g., *In re Chem. Waste Mgmt. of Ind., Inc.*, 6 E.A.D. 144, 163 n.18 (EAB 1995) (Region's failure to include in administrative record conversations with state officials which were the basis for including challenged permit condition regarded as harmless error); *In re J & L Specialty Prods. Corp.*, 5 E.A.D. 31, 79-80 (EAB 1994) (alleged technical violations to notification procedures under 40 C.F.R. § 124.10(c) and Region's failure to respond to permittee's request for a copy of the administrative record as regarded harmless error absent demonstration of harm to permittee); *In re Spokane Reg'l Waste-to-Energy*, 2 E.A.D. 809, 815 (Adm'r 1989) (failure of permit issuer to consider certain technology in its best available control technology ("BACT") analysis deemed harmless error

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Remanding the permit to the Region so that it could either defend its current schedules or extend them for one month would not appear to serve any of the interests before us in any meaningful way.

### C. Seasonal Constraints on Phosphorus Limits

Petitioner argues that Region X erred in its establishment of a limitation for phosphorus. Petition at 10. The permit's restriction on phosphorus is applicable only during the growing season for nuisance algae,<sup>53</sup> identified as the period from May 15 through October 15. See Pet. Ex. 1 at 4 (Final Permit). In Petitioner's view, the seasonal constraint adopted in the permit does not accurately represent the actual duration of algal growth in Paradise Creek. Petition at 10.

The permit's seasonal constraint was taken from the TMDL, which defines the normal growing season as the months of May to October. The TMDL relied on data from the Spokane River/Long Lake system, which recommended May 15 to October 15 as the initial period for limiting discharge of phosphorus to Paradise Creek and suggested that "further study to determine site specific algal characteristics \* \* \* be performed and corresponding adjustments to the growing season discharge period [be] implemented *as more site specific information becomes available.*" Pet. Ex. 4 at 42 (TMDL) (emphasis added).<sup>54</sup>

According to Petitioner, the Region erred in relying "solely on comments in the TMDL" rather than site-specific information, and, in the absence of "relevant or reliable scientific information, the length of the seasonal limitation established by Region X is arbitrary and capricious as well as unduly burdensome". Petition at

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because it would not have had any effect on the outcome of the permit determination); see also *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 749 (EAB 2001).

<sup>53</sup> The limitation on phosphorus is designed to address nuisance algal growth and for that reason it only applies during "normal growing season months" and not during the entire year. See Pet. Ex. 4 at 42 (TMDL).

<sup>54</sup> In this regard the TMDL states:

A review of existing literature and documents prepared over the past 25 years by agencies in Washington and Idaho on phosphorus in the Spokane River/Long Lake system resulted in a recommendation of May 15 to October 15 as the initial period for limiting discharge of phosphorus to Paradise Creek from the Moscow Wastewater Treatment Plant \* \* \*. As many differences as similarities can be identified between the Spokane/Long Lake system and the Idaho portion of Paradise Creek, so further study to determine site specific algal characteristics should be performed and corresponding adjustments to the growing season discharge period implemented as more site specific information becomes available.

Pet. Ex. 4 at 42 (TMDL).

10-11. Petitioner's request is that the permit be modified to allow Moscow time to study and model the Creek's algal growing season before the limitation in the permit takes effect. Petition at 11.

We do not agree with Petitioner that the Region's decision to incorporate the contested seasonal constraint for phosphorus is arbitrary and capricious. The Region in its Response to Comments explained that the seasonal constraint would remain in the final permit to ensure the permit's consistency with the available WLA for Moscow's POTW. *See* Pet. Ex. 8 at 3 (Response to Comments). As discussed previously, section 122.44(d)(1)(vii)(B) requires consistency with the *assumptions and requirements* of any available WLA.

Petitioner relies on the reference in the TMDL to the development of site-specific data to insinuate that the May 15 to October 15 constraint was not intended as a TMDL requirement, and that, therefore, the Region should not have used it as a permit limitation. We disagree here as well. The TMDL states clearly that the May 15 to October 15 period is appropriate "as the initial period for limiting discharge phosphorus to Paradise Creek," and, even though it recommends further site specific studies, it seems plain that the initial limitation is intended to apply in the present while "*more site specific information becomes available.*" Pet. Ex. 4 at 42 ("TMDL") (emphasis added). Therefore, we do not find clear error in the Region's decision to include the May 15 to October 15 constraint in the permit for Moscow's discharges into Paradise Creek, at least for now, until site-specific data become available.<sup>55</sup>

As to Petitioner's claim that the initial algal growing period incorporated from the TMDL into the permit is erroneous, we find that this is not the appropriate forum for raising this issue. We agree with the Region that Petitioner's allegations are in essence challenges to the underlying determinations of the TMDL (*i.e.*, the initial algal growth assumption) and to the Region's decision to approve the Paradise Creek TMDL. As explained below, Petitioner's challenge should have earlier been brought either as a challenge to the TMDL itself in state court or in federal court as a challenge to EPA's approval of the TMDL under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 et seq.

As previously explained, section 303(d) of the CWA requires each state to develop TMDLs for its impaired waters. *See* CWA § 303(d), 33 U.S.C. § 1313(d). Federal regulations also require states to provide for public participation in the process of developing TMDLs, consistent with the state's continuing

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<sup>55</sup> Petitioner can request a permit modification under 40 C.F.R. § 122.62 to the extent that site specific data become available that points to a different growing season. With this mechanism available, there is no reason to disregard the initial TMDL-based limitation while Petitioner performs new studies and gathers data to model Paradise Creek's growing season.

planning process. *See* 40 C.F.R. §§ 25, 130.7(c)(1)(ii). The Idaho regulations accordingly provide requirements for public participation in water quality decisions. *See* IDAPA 16.01.02.052. The record before us shows that Paradise Creek's TMDL was made available for public review and comment for a period of 30 days starting on November 5, 1997.<sup>56</sup> *See* Pet. Ex. 8 at 8 (Response to Comments). In addition, Idaho's Administrative Procedure Act provides that any aggrieved party may seek judicial review of agency actions in accordance with section 67-5270 of the Act. Idaho Code § 67-5270 *et seq.*<sup>57</sup>

Once a TMDL is developed and has gone through the process of public review, the State submits the TMDL to the EPA for approval. *See* CWA § 303(d)(2), 33 U.S.C. § 1313(d)(2). It is well settled that a party dissatisfied with EPA's approval may seek review of EPA's approval decision in United States district court under the APA. *See, e.g., Scott v. City of Hammond*, 741 F.2d 992, 997 (7th Cir. 1984) ("The only recognized avenue for challenges to the substance of EPA's actions taken with respect to state submissions [of TMDLs] is a suit for judicial review under the [APA]."); *United States Steel Corp. v. Train*, 556 F.2d 822, 836-37 (7th Cir. 1977) (EPA "had no authority to consider challenges to the validity of state water quality standards" in the context of a permit proceeding. The "[a]uthority to approve or disapprove a state's identification of polluted waters and calculation of total maximum daily loads is conferred on the Administrator by § 303(d)(2). These determinations are reviewable in an action in the district court under the judicial review provisions of the APA."); *Hayes v. Browner*, 117 F. Supp. 2d 1182, 1197 (N.D. Okla. 2000) ("Although Plaintiff's wording of the argument may have some appeal, determining whether or not the submitted and approved 'TMDLs' really are 'TMDLs' requires the Court to review something that the EPA has actually approved. Such an evaluation is appropriately left to an APA action.").

In contrast to Idaho's Administrative Procedure Act and the APA, the rules governing permit appeals before the Board do not in the ordinary course contemplate review of Agency decisions of this kind. Section 124.19 of 40 C.F.R., which addresses Board review of permit decisions, authorizes the Board to review "contested permit conditions." 40 C.F.R. § 124.19(a). As we have held in a number of different contexts, this does not ordinarily extend to considerations of the

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<sup>56</sup> The record shows that Petitioner recognized that, because it did not challenge the TMDL in the proper forum, a permit appeal challenging the content of the TMDL was likely to be dismissed. Pet. Ex. 5 (Attachment F) (letter addressed to IDEQ regarding Moscow's considerations to appeal Paradise Creek's WLAs and TMDL); Reg. Ex. 14 at 2 ("The city may appeal all or portions of the permit to the EPA Administrative Appeals Board in Washington D.C. Since the permit is based on the TMDL we most likely will be turned down. The City can then further appeal through the court system.").

<sup>57</sup> For a discussion of Idaho's administrative procedure, see Idaho Division of Environmental Quality, Guidance for Development of Total Maximum Daily Loads 14 (1999).

validity of prior, predicate regulatory decisions that are reviewable in other fora. *See, e.g., In re City of Irving, Tex.*, 10 E.A.D. 111, 124 (EAB 2001) (NPDES permit); *In re Woodkilt, Inc.*, 7 E.A.D. 254, 269-70 (EAB 1997) (Clean Air Act Certificate of Compliance); *In re Suckla Farms, Inc.*, 4 E.A.D. 686, 699 (EAB 1993) (Underground Injection permit); *In re Ford Motor Co.*, 3 E.A.D. 677, 682 n.2 (Adm'r 1991) (RCRA permit).

This Board has thus denied in the context of NPDES permit appeals review of challenges to EPA's approval of state water quality standards. *See, e.g., In re City of Hollywood, Fla.*, 5 E.A.D. 157, 175-76 (EAB 1994). In essence, TMDLs are components of state water quality standards, required to be developed and implemented by section 303(d) of the CWA. As such, the principles that the Board applied in *Hollywood* apply with equal force in this setting. *See also, e.g., In re American Cyanamid Co.*, 4 E.A.D. 790, 796 (EAB 1993) ("[T]he permit reliance on toxicity testing was not subject to challenges in a federal permit proceeding, because such testing is an integral component of the [state] effluent toxicity standard \* \* \*"). The Board will review the vitality of a predicate and earlier reviewable regulatory decision only in "an exceptional case," such as where a challenged regulatory decision has been effectively invalidated by a court but has yet to be formally repealed by the Agency. *In re Echevarria*, 5 E.A.D. 626, 635 n.13 (EAB 1997); *see also In re B.J. Carney Indus.*, 7 E.A.D. 171, 194 (EAB 1997) (holding that the Board will entertain a challenge to an Agency regulation only in "the most compelling circumstances"). Nothing in Moscow's brief or in the administrative record persuades us that this case presents any compelling circumstances warranting a departure from our general practice of not reviewing predicate regulatory decisions in the context of Board cases. Therefore, to the extent that Moscow's reference to the inaccuracy of the seasonal constraint on phosphorus represents a challenge to the underlying TMDL, the challenge is not one that this Board will entertain.

Because we do not find clear error of fact or law in the Region's decision to follow the applicable TMDL in the incorporation of a seasonal constraint for phosphorus, we decline to grant review on this basis.

#### D. Application of Washington State's Water Quality Standards

Petitioner's fourth contention is that the Region violated the CWA by misapplying Washington State's water quality standards for temperature and DO<sub>2</sub>.<sup>58</sup>

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<sup>58</sup> The CWA and its implementing regulations require each NPDES permit to include conditions necessary to conform to the applicable water quality standards when the permitted discharge affects a state other than the certifying state. CWA § 401(a)(2), 33 U.S.C. § 1341(a)(2); 40 C.F.R. § c; 122.44(d)(4). Moscow's POTW is located one half mile upstream from the Washington State border. The Region determined that the POTW's discharges may affect the water quality of Paradise  
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Petition at 12-16. In support of its argument about EPA's misapplication of Washington State's water quality standard for temperature, Petitioner alleges that Washington State's temperature standard is a variable standard and that the Region erred in interpreting it as an absolute standard by applying 18°C as a default, and in disregarding the need for an evaluation of the natural conditions of the receiving water body. Petition at 14. In addition, Petitioner contends that the State of Idaho erroneously incorporated the 18°C into the TMDL.

In regard to DO<sub>2</sub>, Petitioner maintains that, even though, as written, Washington State's regulations establish that DO<sub>2</sub> at Paradise Creek shall exceed 8.0 milligrams per liter ("mg/L"), as applied by the State of Washington, DO<sub>2</sub> is subject to less stringent and more achievable target levels. On this basis, Petitioners asserts that the applicable DO<sub>2</sub> limit is 6.0 mg/L and not 8.0 mg/L. In support of its argument for an "as applied" DO<sub>2</sub> standard, Moscow makes reference to two documents: (1) the TMDL for the South Fork of the Palouse River; and (2) the Fact Sheet for the NPDES permit Washington State proposed to issue for the Town of Albion.<sup>59</sup> Petition at 15.

### 1. *Temperature Standard*

Washington State's water quality standards provide that "[t]emperature shall not exceed 18.0°C \* \* \* due to human activities. When natural conditions exceed 18.0°C \* \* \*, no temperature increases will be allowed which will raise the receiving water temperature by greater than 0.3°C." Wash. Admin. Code § 173-201A-030(2)(c)(I)(iv) (2001). Based on its interpretation of the standard, IDEQ determined in the TMDL that "[t]o meet the water quality target stream temperature within Paradise Creek must not exceed 18°C at any time," and that "in order to meet the target established at the state line, the temperature of water discharged to the stream must be at or below 18°C unless the ambient air temperature

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Creek in Washington State, and considered Washington's water quality standards in developing Moscow's permit.

<sup>59</sup> The Region alleges that these two documents are not in the Administrative Record, that Moscow did not raise the issue previously, and that, therefore, Petitioner is barred from raising this issue on appeal. Response at 22. Nonetheless, our review of the record reveals that the issue was adequately raised during the comment period and therefore preserved for review. *See* Pet. Ex. 5 at 10 (General Comments); Pet. Ex. 5 at 3 (Specific Comments); Petition at 16; Pet. Ex. 8 at 10 (Response to Comments). In terms of whether the specific documents on which Petitioner relies can be considered relative to this issue, the South Fork TMDL was submitted to the Board as an attachment to Petitioner's comments on the draft permit. Taken at face value, this suggests that the TMDL is appropriately considered part of the administrative record. The Fact Sheet for the Albion permit was not available during the public comment period. While not technically part of the record, we nonetheless consider it as relevant information that was inascertainable during the public comment period. *See* 40 C.F.R. § 124.13.

or the stream temperature is less than 18°C.”<sup>60</sup> Pet. Ex. 4 at 38 (TMDL).

Basically, the TMDL allows Petitioner to discharge into Paradise Creek if the effluent’s temperature is at 18°C or below. Only when Paradise Creek’s in-stream temperature is less than 18°C is Petitioner allowed, subject to restrictions, to discharge effluent above the 18°C limitation.

The TMDL prescribes the “allowable effluent flow” that Moscow is permitted to discharge without causing the stream to exceed the established in-stream temperature limit. Tables correlating Moscow’s effluent flow and temperature with Paradise Creek’s flow and temperature determine Moscow’s allowable effluent flow. See Pet. Ex. 4 at 38, Appendix B (TMDL).

Petitioner challenges permit condition I.1.6, which, as we read it, simply incorporates and restates the temperature allocations and allowable daily effluent flow for Moscow’s facility as prescribed in the TMDL. See Pet. Ex. 1 at 5 (Final Permit). In explaining its dissatisfaction with the permit, Petitioner argues that “IDEQ \* \* \* blindly accepted just a limited portion of the Washington State” water quality standard. Pet. Ex. 5 at 7-9 (General Comments). Petitioner claims that the TMDL and the permit are erroneous because consideration was only given to the first portion of the applicable standard, which prescribes that the stream temperature should not exceed 18.0°C *due to human activities*, and the second portion of the standard, which accounts for *natural conditions* and allows a 0.3°C increase over natural conditions, was disregarded. See Pet. Ex. 5 at 7-8 (General Comments) (“Neither the permit nor the TMDL have correctly understood Washington’s temperature standards nor did they correctly account for the normal water temperatures and flow rates and seasonal variations.”).<sup>61</sup>

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<sup>60</sup> In this regard the TMDL further explained that “point source temperature loading to a stream may increase the stream temperature near the outfall, then decrease as energy is dissipated to cooler ambient air or by mixing with cooler stream temperatures. However, such a decrease in temperature of effluent discharge to the stream can only occur when the ambient air or stream temperature is less than the effluent temperature.”Pet. Ex. 4 at 37 (TMDL).

<sup>61</sup> According to Petitioner:

In other larger rivers in eastern Washington the WDOE has made determinations that a higher temperature standard of 20°C complete with additional provisions identifying allowable increases of up to 0.3°C above the natural temperature from human activities when the natural temperature exceeds 20°C. Many of these determinations were found to be necessary and appropriate for river segments that entered the state from Idaho \* \* \*.

IDEQ and EPA need to recognize that Washington now has different temperature standards for rivers and streams in the same area, even though those rivers and streams are subject to the same climate and the  
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At the public hearing on the draft permit, Moscow's representative maintained that "Moscow's temperature limits should be adjusted to allow a point three increase over the natural conditions of approximately twenty-one to twenty-five degrees centigrade rather than the strict eighteen degrees centigrade." Pet. Ex. 9 at 18 (Public Hearing).

The Fact Sheet and the Region's Response to Comments explained that the temperature limitation of 18°C was adopted from the TMDL.<sup>62</sup> See Pet. Ex. 2 at 13 (Fact Sheet); Pet. Ex. 8 at 9 (Response to Comments). In its Response, the Region states that the permit limit on temperature does not attempt to interpret the underlying Washington State water quality standards beyond the interpretation and translation afforded by the TMDL. According to the Region, where a limit is provided by a TMDL, it cannot be error to incorporate the TMDL limit in a permit. See Response at 20.

We agree. As explained previously, the applicable regulations require consistency with the assumptions and requirements of any available WLA. 40 C.F.R. § 122.44(d)(1)(vii)(B). Here, the applicable TMDL provides a temperature WLA for Moscow. We do not find clear error in the Region's decision to include the TMDL's temperature allocations in the permit. Therefore, we deny review of this issue.<sup>63</sup>

Moreover, in regard to Petitioner's argument that the TMDL itself erroneously interprets Washington State's temperature standard, we find that this is a challenge to the determinations underlying the TMDL. As explained previously, this is not the appropriate forum in which to bring a challenge of this nature.

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same solar air exposures as Paradise Creek, and these are all considered to be "protective." Hence, implementation of the 18°C standard as a default, without even considering the natural temperatures, or allowable increases under Washington's standards, is not necessary "to assure protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife."

Pet. Ex. 5 at 9 (General Comments).

<sup>62</sup> The Fact Sheet further explained that "the instream temperature criterion can be met by either requiring the temperature of the effluent discharged to the stream to be at or below 18.0°C, or, if the ambient temperature of the stream is less than 18.0°C, by determining the effluent flow volume that can be discharged to the stream without causing an exceedance of the criterion". Pet. Ex. 2 at 13 (Fact Sheet).

<sup>63</sup> As already stated, when WLAs are available for a particular discharger the Region is not required to adopt the same WLAs as permit limits. Section 122.44(d)(1)(vii)(B) of 40 C.F.R. calls for *consistency* and not for *identical* limits. Nonetheless, the incorporation of identical TMDL limits can be a proper exercise of the Region's authority.

## 2. Dissolved Oxygen Standard

Washington State's water quality standard for DO<sub>2</sub> provides that "dissolved oxygen shall exceed 8.0 mg/L."<sup>64</sup> Under Idaho's water quality standards, DO<sub>2</sub> is to exceed 6.0 mg/L at all times.<sup>65</sup> In the Fact Sheet, the Region explained that "data collected upstream and downstream of Moscow's facility indicate that Paradise Creek is not meeting Washington's or Idaho's water quality criterion for dissolved oxygen." Pet. Ex. 2 at 10 (Fact Sheet). The Region found that the effluent's DO<sub>2</sub> ranged from 6.6 mg/L to 9.7 mg/L with a median value of 7.5 mg/L, and determined that an effluent limit of 8.0 mg/L was required. *Id.*

In its comments on the draft permit, Moscow indicated that even though Washington's water quality criteria for Paradise Creek contemplates that DO<sub>2</sub> should be no less than 8.0 mg/L, the DO<sub>2</sub> effluent limitation on Petitioner's discharge should be 6.0 mg/L. *See* Pet. Ex. 5 at 9-10 (General Comments); Pet. Ex. 5 at 3 (Specific Comments). Petitioner alleged that the Washington State Department of Ecology ("WDOE") recognized that the standard of 8.0 mg/L instantaneous minimum would not be attainable under critical conditions for most of the year, and has identified instead "targets for attainable [DO<sub>2</sub>] for Paradise Creek and the South Palouse River" that range from 4 mg/L to 6 mg/L on a seasonal basis.<sup>66</sup> Pet. Ex. 5 at 3 (Specific Comments); Pet. Ex. 5 at 40 (South Fork Palouse River TMDL). Petitioner basically asserts that the permit limitation should be calibrated to Washington State's as-applied standard reflected in the South Fork Palouse River TMDL, instead of relying on the 8.0 mg/L figure referenced in the Washington water quality criteria. Petition at 15-16.

The Region's Response to Comments addressed Petitioner's comments by explaining that EPA is required by 40 C.F.R. §§ 122.4(d) and 122.44(d) to apply the criteria currently in effect in the Idaho and Washington water quality standards. The Region further explained that "[i]f, in the future the State changes their water quality standards, the [p]ermittee may request a modification of the permit to reflect the new criteria." Pet. Ex. 8 at 10 (Response to Comments).

We agree with the Region. Federal permits are required to meet state water quality standards. CWA § 301(b)(1)(C); 33 U.S.C. § 1311(b)(1)(C); CWA § 401(a)(2), 33 U.S.C. § 1341(a)(2); 40 C.F.R. § 122.44(d)(4); *see also In re Mass. Corr. Inst.-Bridgewater*, NPDES Appeal No. 00-9, at 9 (Oct. 16, 2000)

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<sup>64</sup> Wash. Admin. Code § 173-201A-030(2)(c)(ii) (2001).

<sup>65</sup> IDAPA 58.01.02.250.02.a (2000).

<sup>66</sup> Neither the South Fork Palouse River nor the Paradise Creek "targets" referenced by Petitioner are directly applicable in this case; Petitioner cites them only for the purpose of showing how Washington has applied its WQS in practice. The applicable TMDL for Paradise Creek does not itself include a DO<sub>2</sub> limit; hence the need to consider Washington's WQS for DO<sub>2</sub>.

(Order Dismissing Petition for Review) (“In setting permit limits, EPA is required under CWA 301(b)(1)(C) to set permit limitations necessary to meet water quality standards \* \* \*.”); *In re City of Fayetteville, Ark.*, 2 E.A.D. 594, 600-601 (CJO 1988) (“The meaning of [section 301(b)(1)(C)] \* \* \* is plain and straightforward. It requires unequivocal compliance with applicable water quality standards, and does not make any exceptions for cost or technological feasibility.”), *aff’d sub nom. Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

In the case at hand, the Region reasonably determined that a limit of 8.0 mg/L was necessary to ensure that Washington’s water quality standards were met. *See* 40 C.F.R. § 122.4(d) (“No permit may be issued \* \* \* [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.”). The fact sheet shows that Region X concluded that the inclusion of a limit on DO<sub>2</sub> was required based on the results of uncontested effluent data that showed DO<sub>2</sub> in Moscow’s effluent below the minimum level established for the receiving water body, along with data showing that the receiving water body itself was not meeting the State criteria. The fact that there is some indication that WDOE has in practice applied DO<sub>2</sub> limits less stringent than that reflected in the applicable standard does not provide a basis for the Region to depart from the standard in establishing a permit limit. Rather, until such time that WDOE actually changes its water quality criteria for DO<sub>2</sub>, the Region has no choice but to apply it. *See, e.g., Mass. Corr. Inst.-Bridgewater*, at 9. Accordingly, we find no error in the Region’s decision to establish a DO<sub>2</sub> limit of 8.0 mg/L, and review of this issue is denied.

#### E. Arguments Regarding Public Policy

Petitioner’s fifth contention is that the Region’s incorporation of temperature and phosphorus limitations of such stringency is contrary to public policy because it degrades rather than maintains water quality. Petition at 16-18. Petitioner alleges that the permit conditions are such that to achieve compliance, Moscow will in all likelihood be forced to cease discharging to Paradise Creek. As a consequence, Petitioner maintains, Paradise Creek will lose substantial flow, and nuisance algae growth, high temperature, and low dissolved oxygen concentration would be exacerbated by the loss of flow to the creek. Petition at 18. Petitioner adds that this would result in a significant loss and impairment of aquatic habitat and degradation of creek aesthetics, and that these unfavorable environmental effects would come at a substantial financial cost to the public. Petition at 18. Petitioner’s request is that the EAB revise the temperature and phosphorus limitations in a manner that acknowledges the alleged benefits of Moscow’s effluent on flow, applies a phased approach to compliance, and avoids the extreme environmental and financial costs associated with such stringent standards. Petition at 18.

In articulating its fifth contention, Petitioner seems to raise two issues that, while intertwined, differ slightly. In one respect, Petitioner is basically arguing

that the Region erred in setting permit limitations for temperature and phosphorus *without considering* the potential harmful effects to water quality that could result from the elimination of Moscow's discharge to Paradise Creek. In another respect, Petitioner argues that the Region should not have established permit limitations so stringent that Moscow will be forced to cease discharging. This latter idea, while not expressly articulated as such, essentially argues that compliance with the permit is technologically and/or economically infeasible. Thus framed, we now proceed to analyze these issues.

### 1. *Consideration of the Potential Harmful Effects*

Petitioner's comments on the draft permit stressed the lack of consideration in the TMDL and permit of the potential harmful effects that could result from the elimination of Moscow's discharge, and how a zero discharge scenario was not evaluated against present discharge conditions. Pet. Ex. 5 at 1-3 (General Comments). Petitioner also provided examples where state authorities had specifically considered the alleged benefits of effluent on the receiving water body. *Id.* at 3. The Region's response to these arguments was that the limitations on phosphorus and temperature were included in the permit to be consistent with the available WLAs, and that "[i]t is beyond the scope of the permitting program to modify or adjust WLAs in a TMDL." Pet. Ex. 8 at 5 (Response to Comments).

While it is true that the Region's Response to Comments does not address the potential positive effects of Moscow's effluent, we see Petitioner's argument, at bottom, as another attempt to challenge the TMDL and the Region's decision to incorporate TMDL-based limitations as permit conditions, in that the permit's effluent limitations for temperature and phosphorus are basically the same as the WLAs prescribed in the TMDL. In this regard, we have already concluded that the Region did not err in including the temperature and phosphorus allocations in Moscow's permit, for section 122.44(d)(1)(vii)(B) of 40 C.F.R. requires the permitting authority to be consistent with the assumptions and requirements of any available WLA.<sup>67</sup> We have also explained that we will not entertain a challenge of the TMDL or WLA.<sup>68</sup>

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<sup>67</sup> We note on this regard that the TMDL does mention the impact of Moscow's effluent on the creek's total stream flow during low flow periods. *See* Pet. Ex. 4 at 25 (TMDL) ("During the low flow periods of the year, the effluent from the plant can comprise upward of 90 percent of the total stream flow downstream of the treatment plant."). Whether this particular element was actually factored into the calculations of WLAs for Moscow is beyond our scope of review.

<sup>68</sup> Petitioner further requests this Board to revise the compliance schedules for these two parameters. We already determined, however, that the Region's decision to stay within the term of the permit was reasonable. *See* Section IV.B *supra*.

## 2. Forcing Moscow to Cease Discharging

As discussed above, Moscow's petition can also be construed as claiming technological and/or economical infeasibility, in that it raises concerns about the cost of compliance and the need to undergo major modifications to achieve compliance,<sup>69</sup> and argues that, based on these considerations, the permit may become "another driver to get the effluent totally out of the creek."<sup>70</sup>

In this regard, we have often emphasized that the legal standard is that cost and technological considerations are not factors in setting water quality-based effluent limits. See *In re Town of Maynard, Mass. Maynard Water Pollution Control Facility*, NPDES Appeal No. 01-5, at 9, (EAB, May 18, 2001) (Order Denying Review); *In re Town of Hopedale*, NPDES Appeal No. 00-04, at 24 (EAB, Feb. 13, 2001) (Order Denying Review); *Mass. Corr. Inst.-Bridgewater*, at 10. See also, e.g., *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999) (EPA obligated to "require that level of effluent control which is needed to implement existing water quality standards without regard to the limits of practicability."); *United States Steel Corp. v. Train*, 556 F.2d 822, 838 (7th Cir. 1977) (holding that even if permittee's assertion about the impossibility of achieving compliance with the present technology was true, it does not follow that the contested effluent limitations were invalid); *In re J & L Specialty Prods. Corp.*, 5 E.A.D. 31, 48-49 (EAB 1994) (Region not authorized under CWA to grant variances from water quality-based limitations because of lack of technical feasibility). Rather, section 301(b)(1)(C) of the CWA requires unequivocal compliance with applicable water quality standards, and does not recognize an exception for cost or technological infeasibility. See *In re New England Plating Co.*, 9 E.A.D. 726, 738 (EAB 2001) ("In requiring compliance with applicable water quality standards, the CWA simply does not make any exceptions for cost or technological feasibility.") (quoting *Mass. Corr. Inst.-Bridgewater*, at 10).

In light of the foregoing, review on the basis of Petitioner's fifth contention is denied.

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<sup>69</sup> See, e.g., *In re Town of Maynard, Mass. Maynard Water Pollution Control Facility*, NPDES Appeal No. 01-5, at 6-7, (EAB, May 18, 2001) (Order Denying Review) (construing similar arguments as "technological feasibility" issues); see also *In re Town of Hopedale*, NPDES Appeal No. 00-04, at 23-24 (EAB, Feb. 13, 2001) (Order Denying Review).

<sup>70</sup> Pet. Ex. 5 at 11 (General Comments) ("The short time frame to achieve 98% removal of Total Phosphorus is unattainable and unnecessary and becomes just another driver to get the effluent totally out of the creek with the resultant harmful effects due to loss of flow."); see Pet. Ex. 5 at 6 (General Comments) ("In view of the high costs for engineering and construction and operation and maintenance, allowing the implementation over a period of greater than 5 years \* \* \* is also appropriate."); see also Pet. Ex. 9 at 35-42 (Public Hearing).

## F. *Quality Assurance Project Plan*

Petitioner's final allegation is that the Region erroneously required "submittal and agency review and approval of a quality assurance project plan ("QAPP") as a condition of permit issuance." Petition at 19. Petitioner claims that preparation of a QAPP is superfluous and unreasonably burdensome on the permittee, and that it is neither required by the CWA nor necessary to assure compliance with any regulatory requirement. Petition at 20.

The Region explained in the Fact Sheet accompanying the draft permit that the draft permit required development and submission of a QAPP in order to ensure consistency and accuracy in the monitoring data submitted by the permittee, and that the QAPP will "consist of standard operating procedures the permittee must follow for collecting, handling, storing and shipping samples, laboratory analysis and data reporting." Pet. Ex. 2 at 18 (Fact Sheet). In its comments on the draft permit, Petitioner expressed its concerns about the incorporation of a QAPP as a permit requirement and inquired about the legal basis for the requirement. Pet. Ex. 5 at 6 (Specific Comments). The Region explained in its Response to Comments that the basis for the QAPP is found at 40 C.F.R. § 122.41(e), which requires proper operation and maintenance of all facilities and systems of treatment and control installed and used to achieve compliance with permit conditions, and which defines proper operation and maintenance as including adequate laboratory controls and appropriate quality assurance procedures. Pet. Ex. 8 at 11 (Response to Comments).<sup>71</sup>

Petitioner alleges that section 122.41(e) merely provides that an NPDES permit must contain a generic condition requiring the permittee to properly operate and maintain all facilities and systems of treatment and control, and that because permit condition III.E "tracks verbatim the generic language" of section 122.41(e) the QAPP requirement should be eliminated. Petition at 19. Petitioner further maintains that because condition I.E.2 requires the use of EPA's guidance documents on quality assurance, quality control, and chain-of-custody, the preparation of a QAPP is unnecessary. Accordingly, Petitioner requests the elimination of permit condition I.E.1 requiring the development of a QAPP, condition I.E.3

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<sup>71</sup> Section 122.41(e) provides:

(e) *Proper operation and maintenance.*

The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures.

40 C.F.R. § 122.41(e).

requiring submission of the QAPP within 90 days of the effective date of the permit, and conditions I.E.4 and I.E.5 establishing elements of the QAPP.

Contrary to Petitioner's assertions, and as explained by Region X in its Response, the contested permit condition does not require approval by EPA of the QAPP as a condition of permit issuance, it only requires the development and submission of a QAPP containing the elements specified in permit condition I.E. Thus, while Petitioner would be subject to enforcement for failure to have a QAPP, Petitioner's concern about being subject "to enforcement for permit violations based solely on the terms of a yet to be approved plan" is misplaced.

In essence, Petitioner is questioning the Region's authority under the CWA and its implementing regulations to require the development and submission of a QAPP. It is self-evident that the purpose of the QAPP requirement is to ensure the accuracy of the monitoring data submitted by the permittee.<sup>72</sup> Monitoring data play a crucial role in fulfilling the objectives of the CWA and its implementing regulations. Such data are used, among other things, to evaluate a facility's discharge characteristics and compliance status over time.<sup>73</sup> As a consequence, the accuracy of monitoring data is essential.<sup>74</sup>

The CWA does not specifically require the development of QAPPs as a mean of ensuring monitoring data integrity. However, section 308 of the CWA bestows upon the Administrator broad authority to require owners and operators of point sources to establish monitoring, maintenance and recordkeeping methods,

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<sup>72</sup> See U.S. EPA Office of Water, Technical Support Document For Water Quality-Based Toxic Controls § 6.3 (March 1991) ("Since most of the routine information gathered in compliance monitoring results from permittee self-monitoring, quality assurance (QA) is as important as compliance with limits. It is essential that permittees develop and adhere to a QA plan consistent with the required monitoring and analysis. The permittee is responsible for maintaining data to demonstrate compliance with QA procedures established in the test methodology or as specified in the permit.").

<sup>73</sup> See, e.g., NPDES General Permits and Reporting Requirements for Storm Water Discharges Associated with Industrial Activity, 56 Fed. Reg. 40,948, 40,956-57 (Aug. 16, 1991) ("Monitoring data serves a number of functions under the NPDES program. [Among others,] [d]ischarge monitoring data can be used to assist in the evaluation of the risk of the discharge by indicating the types and the concentrations of pollutant parameters in the discharge[.] \* \* \* in evaluating the potential of the discharge to cause or contribute to water quality impacts and water quality standards violations[.] [and] \* \* \* to evaluate the effectiveness of controls on [sic] reducing pollutant discharges. \* \* \* Where numeric or toxicity effluent limits are incorporated into permits, discharge monitoring data plays a critical role by providing EPA and authorized NPDES States with data to evaluate compliance with effluent limits.").

<sup>74</sup> See, e.g., U.S. EPA Office of Water, NPDES Permit Writers' Manual at 115 (1996) ("Permit writers should be aware of and concerned with the potential problems that may occur in a self-monitoring program such as improper sample collection procedures, poor analytical techniques, and poor or improper report preparation and documentation. To prevent or minimize these problems, the permit writer should clearly detail monitoring and reporting requirements in the permit.").

and to “provide any such other information as [she] may reasonably require.” CWA § 308(a)(4)(A); 33 U.S.C. § 1318(a)(4)(A); *see also In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 671-72 (EAB 2001) (holding that the CWA confers broad authority on the Region to impose monitoring requirements in NPDES permits and that there is nothing in the Act or its implementing regulations that would limit monitoring requirements to just those that might be necessary to assess compliance with effluent limits established by the permit); *In re City of Port St. Joe*, 7 E.A.D. 275, 306 (EAB 1997) (holding that section 308(a) confers broad authority on the Region to impose monitoring requirements). In addition, section 402(a)(2) of the CWA authorizes the Administrator to prescribe permit conditions for data and information collection, reporting, and such other requirements as she deems appropriate to carry out the objectives of the Act. CWA § 402(a)(2); 33 U.S.C. § 1342(a)(2).

Section 123.41(e) of 40 C.F.R. specifically addresses quality assurance procedures and establishes their connection to a permittee’s duty to properly maintain and operate all the facilities and control systems deployed in the process of achieving compliance with permit conditions. 40 C.F.R. § 122.43(a). Additionally, section 123.43(a) authorizes the Regional Administrator to “establish conditions, as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of the CWA and regulations.” 40 C.F.R. § 122.43(a). Likewise, section 123.48(a) authorizes the incorporation of permit requirements concerning the proper use, maintenance, and installation of monitoring equipment or methods. 40 C.F.R. § 122.48(a). It seems plain that the CWA and its implementing regulations authorize the Region to include permit requirements like the QAPP here in conjunction with the ultimate goal of assuring compliance with the CWA. In this regard, we conclude that the Region did not abuse its discretion in requiring a QAPP as a permit condition.

Petitioner also raises the argument that the QAPP requirement is superfluous and unreasonably burdensome, the reason being that condition III.E already adequately serves the purposes of 40 C.F.R. § 122.41(e).<sup>75</sup> As explained by the

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<sup>75</sup> Condition III.E reads as follows:

Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the Permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also include adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back-up or auxiliary facilities or similar systems which are installed by a Permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

Region, however, conditions I.E and III.E serve different purposes. While condition III.E tracks verbatim the language of section 122.41(e), and thus reminds the permittee of its general duty to properly operate and maintain its facilities and equipment in a compliant manner, condition I.E gives section 122.41(e) particularized meaning by specifically requiring the development and submission of a QAPP and detailing the content and elements of the QAPP. Viewed in this light, condition I.E is not superfluous.

In regard to Petitioner's argument that the QAPP is unreasonably burdensome, Moscow has not substantiated its claim with evidence. This Board has often emphasized that "mere allegations of error" are not enough to warrant review, and has often denied granting review of arguments that are vague and unsubstantiated. *See, e.g., In re New England Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001); *In re Hadson Power 14 Buena Vista*, 4 E.A.D. 258, 294 n.54 (EAB 1992); *In re Terra Energy Ltd.*, 4 E.A.D. 159, 161 (EAB 1992).

Given the importance of consistent and accurate monitoring to the integrity of NPDES permits, it does not strike us as unreasonable that permittees be expected to have an organized approach — embodied in a QAPP — to monitoring activities. Because in permit appeals petitioners bear the burden of demonstrating that a permit condition is based on a clear error of fact or law, and in this case Petitioner has not made such a demonstration, review of this issue is denied.

## V. CONCLUSION

For the foregoing reasons, Moscow's petition for review is denied in all respects.

So ordered.