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

In re:	)
City of Manchester, New Hampshire Division of Public Works	)
NPDES Permit No. NH0100447	)

PETITION FOR REVIEW OF CITY OF MANCHESTER WASTEWATER TREATMENT FACILITY AND 15 COMBINED SEWER OVERFLOW (CSO) OUTFALLS NPDES PERMIT ISSUED BY REGION 1

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I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the City of Manchester, New Hampshire (the "City" or "Manchester"), through its attorneys, McLane Middleton, P.A., respectfully submits this Petition for Review ("Petition") of the National Pollutant Discharge Elimination System ("NPDES") Permit No. NH0100447 (the "Permit") dated November 3, 2025, issued by the Environmental Protection Agency ("EPA"), Region 1 ("Region"). *See* Attachment A, Final 2025 Permit; Attachment B McLane Middleton, o/b/o the City, June 10, 2024, comments; Attachment C McLane Middleton, o/b/o February 3, 2025, comments; Attachment D Wright-Pierce Comments, June 10, 2024; Attachment E Osprey Owl Comments, February 3, 2025; Attachment F the Region's responses to comments; Attachment G Consent Decree in Civil Action No. 20-cv-00762-SM (Sept. 28, 2020).

The Permit contains several conditions and effluent limitations that are contrary to a judicially approved consent decree and run afoul of the careful negotiations that the City, EPA and New Hampshire Department of Environmental Services ("NHDES") engaged in for several years, which resulted in precise terms that would achieve compliance with the Clean Water Act ("CWA"). Many Permit conditions are based on findings of fact or conclusions of law that are unsupported by the administrative record and clearly erroneous. The Permit fails to consider important EPA policies, and the Permit contains erroneous, arbitrary and capricious conditions based on EPA's unlawful abuse of discretion. The Permit contains unreasonable and unlawful conditions that are overly restrictive and burdensome, not required by the CWA or other applicable laws, and exceed the Region's authority. EPA has also provided no technical basis justifying the additional expenditure that would be required to comply with many of the proposed conditions and limits.

In addition, the Region's responses in the record frequently fail to directly acknowledge the significant concerns raised by the City or to meaningfully explain how it arrived at its Permit conclusions, contrary to the requirements of 40 C.F.R. § 124.17(a)(2). *In re San Jacinto River Authority,* 14 E.A.D. 688 at *17 (EAB 2010); *In re Wash. Aqueduct Water Supply Sys.,* 11 E.A.D. 565, at *3 (EAB 2004). The Region also failed to provide the City with adequate notice of its new compliance obligations in certain material respects. *In re D.C. Water and Sewer Auth.*, 13 E.A.D 714, *34-35.

The City respectfully requests the Environmental Appeals Board ("EAB") grant review of this Petition and remand to EPA to impose only those conditions that are based on reasonable findings of fact in the administrative record and are in accordance with the law and the judicially approved Consent Decree.

II. THRESHOLD PROCEDURAL REQUIREMENTS

The City satisfies the threshold requirements for filing a petition for review under 40 C.F.R. part 124 as follows:

A. The City has standing to petition for review because it submitted comments on both the initial and revised draft permits. *See* 40 C.F.R. § 124.13; *id.* at § 124.19(a). *See also* Attachments B–E.[1]

B. All of the issues raised in this Petition were raised during the public comment period, and therefore, are preserved for review. EPA has also imposed new or altered conditions that could not have been assessed or commented on prior to the issuance of the final Permit.

C. The Petition is timely filed. 40 C.F.R. §§ 124.19(a)(3) and 124.20. The Permit and letter notice of the issuance of the final NPDES Permit are dated November 3, 2025. This

[1] The City references specific permit conditions, the City's comments on those permit conditions, and EPA's response to comments in footnotes throughout this Petition.

Petition is filed on or before November 3, 2025, within thirty (30) days after the Region provided notice of the final Permit to the City.

D. The Petition for Review complies with the Board's Practice Manual.

III. FACTUAL AND STATUTORY BACKGROUND

The City owns and operates a wastewater treatment facility (the Facility) which discharges treated effluent to the Merrimack River, Piscataquog River, and three smaller brooks.[2] Currently, the Facility operates under a permit that was issued on February 11, 2015, with an effective date of May 1, 2015, and expiration date of April 30, 2020. Manchester filed an application seeking a NPDES permit reissuance from EPA on October 30, 2019, as required by 40 Code of Federal Regulations (C.F.R.) § 122.6. Since the permit application was deemed timely and complete by EPA on March 3, 2020, the Facility's 2015 Permit has been administratively continued pursuant to 40 C.F.R. § 122.6 and § 122.21(d).

Manchester owns and operates a wastewater collection system that is comprised of 55 percent sanitary sewers (domestic, commercial, and industrial wastewater) and 45 percent combined sewers (domestic, commercial, and industrial wastewater plus stormwater runoff). The Facility serves the majority of Manchester, along with portions of Bedford, Goffstown and Londonderry, New Hampshire. There are 15 combined sewer overflow (CSO) outfalls remaining in the Manchester wastewater collection system and interceptor network. Of the 15 remaining CSO outfalls, two discharge to the Piscataquog River (adjacent to Bass Island and immediately upstream of the river's confluence with the Merrimack River), two discharge to the Merrimack River from the west side of the city, and 11 discharge to the Merrimack River from the east side of the city (including Tannery Brook and Ray Brook). During certain wet weather events,

[2] There are three receiving brooks including Baker Brook, Rays Brook, and an unnamed brook.

discharges of untreated sanitary wastewater and stormwater occur from the City's 15 CSOs into the Piscataquog and Merrimack Rivers. CSOs are point sources regulated under the NPDES program and must comply with both technology-based and water-quality-based requirements.

The City first submitted a Long-Term Control Plan ("LTCP") in 1995 and, following completion of a 10-year Phase I CSO abatement program established under a 1999 Compliance Order, submitted a revised LTCP in 2010 to address remaining CSO discharges. On July 13, 2020, EPA and the City entered into a Consent Decree establishing a binding schedule to implement the CSO control measures identified in the 2010 LTCP estimated to cost $271 million (the "Consent Decree"). Since entry of the Consent Decree,[3] the City has undertaken substantial system-wide improvements, including major wastewater treatment plant upgrades, ongoing compliance reporting, real-time control optimization studies, closure evaluations for inactive CSOs, and significant stormwater separation projects in the Cemetery Brook and Christian Brook drainage areas. These projects, together with a formal CSO discharge and public notification program, are intended to reduce and ultimately eliminate CSO discharges consistent with the Consent Decree's requirements.

In issuing the proposed permit, EPA has imposed conditions that exceed the scope of the CSO control obligations negotiated and memorialized in the Consent Decree. Because these new requirements go beyond what the parties agreed was necessary to achieve compliance under the 2010 LTCP and the 2020 Consent Decree, the Permit contains arbitrary and capricious terms and conditions.

[3] *See* Attachment G (Consent Decree).

IV. STANDARD OF REVIEW

Pursuant to 40 C.F.R. § 124.19(a)(4)(i), the Board should grant review of the Region's decision on an NPDES Permit here because the Permit conditions: 1) are based findings of fact or conclusions of law that are clearly erroneous, or 2) involve an exercise of discretion on important policy considerations that the Board should determine warrant review. *See also* 5 U.S.C. § 706 (establishing scope of review before a court). When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised "considered judgment." *In re Steel Dynamics, Inc.*, 8 E.A.D. 165, 191, 224-225 (EAB 2000).

To the extent that the disputed permit conditions are water quality-based requirements, the Region must satisfy the requirement that the discharge from the WWTF "will cause, have the reasonable potential to cause, or contribute to an excursion above any state water quality standard." 40 C.F.R. § 124.44(d)(i).

V. ARGUMENT

A. Additional Conditions in the Final Permit Run Afoul of the Executed Consent Decree[4]

1. *EPA is bound by the terms of the judicially approved Consent Decree.*

EPA cannot impose conditions that exceed those established in the existing, court-approved consent decree. The United States Supreme Court has directly addressed the effect of a judicially-approved consent decrees. In *U.S. v. Armour & Co.*, 402 U.S. 673, 681–82, the Court stated:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a

[4] Att. B, McLane Middleton June 10, 2024, at p. 7; Att. F, EPA Response to Comments at 7-8.

> compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation.

Relying on *Armour*, other courts have addressed the identical legal issue as presented in this Petition. For example, in *Indiana Dept. of Envtl. Mgmt., v Condrad*, 614 N.E.2d 916 (Ind. 1993), the court found that the Indiana Department of Environmental Management ("IDEM") was bound by a consent decree that set a maximum limit on PCBs in soil for a remediation project at 1 part per billion (ppb) and that IDEM could not, as a matter of law, set more stringent limits in a subsequent permit. The court held that: "[t]he State of Indiana and IDEM became bound by the terms of the consent decree when their representatives signed it" including the Attorney General, Deputy Attorney General, and the Environmental Management Board. The court noted that the consent decree at issue provided "[t]his Consent Decree shall bind . . . all parties hereto and their respective successors and assigns, whether elected or appointed." *Id*. at 920. *See also Delaware Valley Citizens' Council for Clean Air v. Pennsylvania,* 678 F.2d 470 (3d Cir. 1982) (holding that Pennsylvania was bound by consent decree which by its terms applies to State and was signed by state attorney general and counsel for Departments of Transportation and Environmental Resources), *cert. denied,* 459 U.S. 969 (1982).

In citing to *Armour*, the court held:

> In signing the Consent Decree, the parties to the decree agreed to impose upon Westinghouse the duty of constructing a water treatment facility which would

> reduce the concentration of PCBs in the water to a maximum of 1 ppb. As consent judgments are contractual in nature and to be construed as written contracts, *cf. United States v. Armour & Co.,* 402 U.S. 673, 681–82 (1971), we look only to the terms of the decree, which unambiguously establish Westinghouse's duties concerning its treatment facility. Because Westinghouse waived its right to litigate the issues implicated in the Monroe County clean-up project, the conditions upon which it gave that waiver must be respected.

Id.

Here, as noted in Attachment B, McLane Middleton Comments from June 10, 2024 at p. 7:

> The decree, lodged with the U.S. District Court for the District of New Hampshire, is "binding upon the United States and the State, and upon the City and any successors, assigns, or other entities or persons otherwise bound by law." 2020 Consent Decree ¶ 3. Thus, the agreement is not only binding upon the City, but upon EPA as well. Further, the "Consent Decree resolve[d] the civil claims of the United States and the State for violations alleged in the Complaints filed in this action through the date of lodging." 2020 Consent Decree ¶ 62. To the extent the Draft Permit contradicts the Consent Decree, the Draft Permit cannot be sustained.

The City, EPA, and NHDES carefully negotiated the terms of the Consent Decree. The City waived its Due Process right litigate based on EPA's and NHDES' express concurrence with the conditions of the Consent Decree, and therefore, "must be respected." *Armour & Co.*, 402 U.S. at 682.

2. *Any modification of the Consent Decree must be approved by the federal District Court of New Hampshire.*

Based on the foregoing, any modification to the decree should be presented to the district court for approval and should be granted only when EPA demonstrates a significant change in law or facts that justifies the alteration, and that the proposed change is narrowly tailored to those new circumstances. *See* Consent Decree ¶ 72–74 (describing consent decree modification requirements).

The Supreme Court applies a two-part standard for modifying a consent decree: first, the moving party must show that a significant change in facts or law warrants modification; and second, the proposed revision must be suitably tailored to address that change. *United States v. City of Cincinnati*, No. 1:80-CV-369, 2021 WL 4193211, at *3 (S.D. Ohio Sept. 15, 2021). Significant changes include shifts in statutory or decisional law that render lawful what the decree was intended to prevent, or that make a decree's obligations impermissible under federal law. Consent decrees are interpreted like contracts, and courts enforce their unambiguous terms as written. When terms are ambiguous, courts may consider extrinsic evidence, but any remaining ambiguity must be construed against the party seeking enforcement. *United States v. Brace*, No. CV 90-229E, 2021 WL 4391289, at *11 (W.D. Pa. Sept. 24, 2021), aff'd, 2023 WL 118466 (3d Cir. Jan. 6, 2023). Although contractual in nature, amendments to a consent decree should require court approval, including in the present circumstances (see ¶ 73 of the decree); EPA cannot unilaterally alter its terms. *Brace*, 2021 WL 4391289, at *12.

Here, there has been no change in the City's operations, no change to the receiving water, and no change in the law that could support a modification of the Consent Decree. Accordingly, EPA's clearly erroneous "back-door" attempt to impose more stringent conditions cannot be sustained.

3. *The imposition of new and more stringent permit conditions constitutes a breach of contract.*

The Consent Decree's "express purpose" is "to require the City to undertake measures necessary to *achieve and maintain compliance* with the CWA, the New Hampshire Act, the Permit, and any applicable and State federal regulations." Att. G at ¶ 7. While EPA states that the Consent Decree only resolves past violations,[5] the objective of the Consent Decree recognizes

[5] Att. F, EPA Response to Comment 5.

that the goal is to "achieve and maintain compliance" well into the future with all applicable laws regarding water quality. There has been no change in circumstances warranting additional effluent limitations or monitoring to comply with existing water quality standards; the City is in full compliance with the terms of the Consent Decree.

A breach of contract occurs when a party fails to perform a duty imposed by a valid and enforceable agreement, resulting in harm to the non-breaching party. Imposing conditions that exceed the terms expressly agreed upon in the Consent Decree constitutes a breach of contract because the Consent Decree is a binding contract enforceable according to its plain language. *United States v. Alcoa, Inc*., 533 F.3d 278, 286 (5th Cir. 2008); *United States v. Brace*, No. CV 90-229E, 2021 WL 4391289, at *11 (W.D. Pa. Sept. 24, 2021), *aff'd*, No. 21-2966, 2023 WL 118466 (3d Cir. Jan. 6, 2023).

The Consent Decree was negotiated and consented to with specific obligations that were approved by the Court as the full scope of each parties' duties. When one party unilaterally imposes stricter conditions not contained in the decree, it alters the agreed-upon terms and undermines the bargain for exchange, thereby violating the contractual nature of the decree. Federal courts consistently treat such departures from the written agreement as impermissible modifications absent mutual consent or a legal obligation. *United States v. Alcoa, Inc*., 533 F.3d at 286. The imposition of additional obligations, as EPA has done in the Permit, is a clear breach of contractual commitments embodied in the decree.

4. *The new conditions constitute a breach of good faith and fair dealing.*

The imposition of Permit conditions stricter than those initially agreed upon in the Consent Decree also constitutes a breach of the covenant of good faith and fair dealing, which is implied in every contract, including consent decrees. This covenant requires each party to act in a manner that honors the terms of the agreement and preserves the other party's reasonable

expectations. *Speakman v. Allmerica Fin. Life Ins.*, 367 F. Supp. 2d 122, 132 (D. Mass. 2005). By unilaterally adding obligations not agreed to in the Consent Decree—or that otherwise directly contradict the Consent Decree—EPA frustrates the purpose of the bargain. EPA's effort to impose additional and more onerous conditions violates the implied covenant and independently supports the finding of breach of good faith and fair dealing.

5. *The more stringent permit conditions are barred by collateral estoppel and res judicata.*

i. Collateral Estoppel

Estoppel is comprised of the following four elements are met: (1) a representation or concealment of material facts made with knowledge of those facts; (2) the party to whom the representation was made must have been ignorant of the truth of the matter; (3) the representation must have been made with the intention of inducing the other party to rely upon it; and (4) the other party must have been induced to rely on the representation or his or her injury.[6] To apply estoppel to the federal government, there must also be some affirmative misconduct.[7]

Here, all elements for estoppel are satisfied. EPA made a clear and definite promise by mutually agreeing to the terms of the Consent Decree, including the specific Permit conditions that would govern the City's obligations, without alerting the City to the conditions contained in the Permit. The City reasonably relied on that promise and its assent to, and execution of, the Consent Decree was based on the understanding that EPA would honor the agreed-upon terms. The City's reliance was to its own detriment, as it bound itself to the decree and undertook compliance efforts in accordance with EPA's stated commitments and conditions. Having

[6] *See City of Concord v. Tompkins*, 124 N.H. 463, 467-68; see also *Turco v. Town of Barnstead*, 136 N.H. 256 (1992) (Supreme Court holding that town was estopped from failing to maintain road); see also *Aranosian Oil Co. v. City of Portsmouth*, 136 N.H. 57 (1992) (Supreme Court finding that elements of estoppel were met where city reversed decision to grant building permit).
[7] *Dantran, Inc. V. U.S. Dept. Of Labor*, 171 F.3d 58, 67 (1st Cir. 1999).

induced that reliance, EPA cannot now impose new or additional permit conditions inconsistent with the agreement it voluntarily entered. Moreover, as discussed above, EPA has breached a contract and notions of good faith and fair dealing.

ii. Res Judicata

The doctrine of res judicata bars a later suit when an earlier suit resulted in a final judgment on the merits, was based on proper jurisdiction, and involved the same cause of action and the same parties or privies as the later suit. *E.g., U.S. Envtl. Protection Agency v. City of Green Forest,* 921 F.2d 1394, 1403 (8th Cir.1990), *cert. denied,* 112 S.Ct. 414, 116 L.Ed.2d 435 (1991).

Under federal law, which governs the res judicata effect of a federal judgment, consent decrees generally are treated as final judgments on the merits and accorded res judicata effect. *E.g., I.A.M. Nat'l Pension Fund v. Industrial Gear Mfg.,* 723 F.2d 944, 947 (D.C.Cir.1983). Such treatment promotes judicial economy, preserves certainty and respect for court judgments, and protects parties relying on prior litigation from vexatious relitigation. *Id.*

Here, the City and EPA voluntarily negotiated and entered into the Consent Decree with the understanding that the agreement would conclusively determine their rights and obligations regarding the newly issued final permit conditions. Because the decree operates with the preclusive effect of a court-issued judgment, EPA is precluded from asserting new or revised permit conditions that contradict or further narrow the scope of conditions that was already determined. Allowing EPA to do so would undermine the finality of the decree and violate the doctrine of res judicata.

6. *The final Permit conditions that are contrary to the Consent Decree cannot be sustained.*

Several permit conditions fail to consider that the City, EPA, and NHDES collaborated over several years to reach an agreement on a Consent Decree for the City's effluent discharge to waters of the United States. Deviating from terms of CD undermines substantial investment by the City of money, time, resources, and goodwill. The Permit's imposition of additional and more onerous permit conditions, some of which conflict with the requirements of the Consent Decrees, are arbitrary and capricious, as described herein.

B. <u>The EPA failed to weigh the costs and benefits of multiple new permit limits and conditions.</u>

Considering the costs and benefits of agency actions has been a guiding principle in pursuit of informed and prudential agency decision-making.[8] EPA has overlooked existing statutory and regulatory requirements for assessing compliance with the CWA. The CWA specifies that effluent limitations for industrial wastewater must be technology-based and include consideration of the cost of applying the technology in relation to the effluent reduction benefits to be achieved.[9] *See e.g.*, 33 U.S.C. § 1314(b)(1)(B) (1976) (describing factors to be taken into account when determining control measures applicable to point sources required to meet effluent limitations); 51 Fed. Reg. 24974-01 (July 9, 1986) (establishing a POTW and Industry Cost-Effectiveness Test for establishing effluent limitations).

EPA has conducted cost-benefit analyses when setting effluent limitations even in the absence of a clear legislative directive. In *Entergy Corp. v. Riverkeeper Inc.*, for example, the

[8] Att. B, McLane Middleton June 10, 2024; Att. C, February 3, 2025, at p. 3; Att. F, EPA Response to Comment 4.
[9] There are four categories of effluent limitations or performance standards under the Clean Water Act for which guidelines have been established for consideration of cost: Best Practicable Control Technology (BPT), Best Available Technology (BAT), Best Available Demonstrated Control Technology (BDT) and Best Conventional Pollutant Control Technology (BCT). *See* 33 U.S.C. §§ 1314(b), 1316(b). While the tests applicable to each provision differ, each require analysis of costs of implementation.

United States Supreme Court upheld EPA's application of a cost-benefit analysis, finding that despite the statute's silence with respect to the consideration of costs and benefits, "it was well within the bounds of reasonable interpretation for the EPA" to perform a cost-benefit analysis in setting effluent standards under the Clean Water Act. *Entergy Corp. v. Riverkeeper Inc.*, 556 U.S. 208, 223 (2009); *see also id*. at 218 (agreeing with EPA's interpretation that the setting of effluent limits permits consideration of the technology's costs and the relationship between those costs and the environmental benefits produced). Consistent with EPA's approach of considering costs and benefits when setting technology-based effluent limits under the Clean Water Act, EPA should conduct an analysis of the significant costs that these new conditions and limits will have on a publicly operated wastewater treatment facility and what, if any benefit, these new conditions and limitations will have.

EPA has provided no technical basis justifying the additional expenditure that would be required to comply with many of the proposed conditions and limits. Simply put, a consideration of the costs to the City for several Permit conditions against any compliance benefits under the CWA, weighs heavily in the City's favor.[10]

C. <u>The newly established effluent limitation for ammonia and the compliance schedule are clearly erroneous</u>.[11]

1. *Ammonia Limit is unnecessary, overburdensome, and does not meet the "reasonable potential" analysis.*[12]

The proposed ammonia limit is unsupported by the administrative record and imposes more stringent conditions than many other wastewater treatment facilities that discharge to the

[10] As discussed herein, the City's position regarding terms contrary to the Consent Decree and costs applies to sections V.C–H herein.
[11] We incorporate by reference Sections V.A–B in Section C. The ammonia limit is contrary to the Consent Decree and fails to consider the costs and benefits associated with the limit.
[12] 2024 Fact Sheet at 23; Att. A, Permit at 3; Att. D, Wright-Pierce June 10, 2024, at pgs. 11-21; Att. F, EPA Response to Comment 14-15.

Merrimack Watershed. EPA has failed to follow its own practice by not providing the City with at least one permit cycle before adding a new effluent limitation. The City has been investing in major capital improvements and is operating under the existing Consent Decree that requires many such improvements. By failing to provide the City with adequate notice that an ammonia limit would be set in this permit, the City has not had any time to prepare for and plan for such a new limit. To the extent this was such a high priority for EPA, why was ammonia not raised during the lengthy Consent Decree settlement discussions?

The imposition of an ammonia limit does not align with several other permits for wastewater treatment facilities that discharge to the Merrimack Watershed, which do not have an ammonia limit.[13] The federal and State Constitutions provide for equal protection under the law. *See* Fifth Amendment of the United States Constitution and Part 1 Article 14 of New Hampshire's Constitution. The United States Supreme Court has held, "[t]o withstand scrutiny under the equal protection component of the Fifth Amendment's Due Process Clause, 'classifications . . . must serve important governmental objectives and must be substantially related to achievement of those objectives." *Davis v. Passman*, 442 U.S. 228, 234–35 (1979). Failing to treat municipalities that discharge to the Merrimack River equally, impermissibly

[13] *See e.g.,* U.S. EPA, NPDES Permit No. NH0100170, City of Nashua, New Hampshire (issued November 3, 2025); U.S. EPA, NPDES Permit No. NH0001621, Manchester Water Works, City of Manchester (issued October 2, 2023); U.S. EPA, NPDES Permit No. NH0101390, Town of Allenstown, New Hampshire (issued November 29, 2021); U.S. EPA, NPDES Permit No. NH 0100005, Town of Ashland, New Hampshire (issued November 9, 2021); U.S. EPA, NPDES Permit No. NH0100331, The City of Concord, New Hampshire (issued August 31, 2020); U.S. EPA, NPDES Permit No. MA0100633, City of Lowell, Massachusetts (issued September 25, 2019); U.S. EPA, NPDES Permit No. MAG590000, General Permit for Medium Wastewater Treatment Facilities in Massachusetts (issued September 28, 2022); U.S. EPA, NPDES Authorization No. NHG580020, Town of Woodstock, New Hampshire (issued September 1, 2023); U.S. EPA, NPDES Authorization No. NHG580018, Town of Henniker, New Hampshire (issued September 1, 2023).

treats the City differently. The City should not be subject to an ammonia limit when several upstream *and* downstream dischargers do not have an ammonia limit.[14]

Moreover, the imposition of an ammonia limit is unwarranted and conflicts with the carefully negotiated agreement implemented in the Consent Decree. The City's Enhanced Biological Phosphorus Removal (EBPR) system became operational in late 2023 pursuant to the Consent Decree to reduce total phosphorus at cost of approximately $47.5 million.[15] Nitrification for ammonia removal reduces alkalinity, lowers pH, and may destabilize EBPR performance thereby affecting the City's ability to reduce total phosphorous. EPA has not provided any guidance on future total nitrogen limits, leaving the City without any standard or basis upon which to responsibly design treatment processes. EPA acknowledged in its Response to Comment 14 that total nitrogen limits are unknown, preventing informed long-term planning, and that imposing an ammonia limit will be "more challenging."[16] If only ammonia removal is required, nitrification may suffice but will require significant additional alkalinity. On the other hand, if total nitrogen removal is required in the future, denitrification would be necessary—a fundamentally different process. In other words, not knowing whether a nitrogen limit will be imposed in the near future prohibits the City from effectively treating for ammonia.

[14] The United States Supreme Court has held "[i]n numerous decisions…that the Due Process Clause of the Fifth Amendment forbids the Federal Government to deny equal protection of the laws." *Davis v. Passman*, 442 U.S. 228, 234 (1979). See also N.H. Const. pt. 1, art. 14.

[15] This cost includes upgrades for aeration and solids train.

[16] EPA Response to Comment 14 states that: "EPA notes that the total nitrogen analysis is distinct from most other pollutants of concern because the impacts of total nitrogen are not seen until reaching the marine portion of the Merrimack River. Therefore, the total nitrogen load from the entire watershed must be evaluated and impacts far downstream must be considered. This is different than pollutants such as aluminum or ammonia which are evaluated for toxic impacts in the immediate vicinity downstream of the discharge. More work needs to be done before total nitrogen limits (if any are required) can be allocated to the various POTWs and other sources in the watershed. EPA acknowledges that this makes the decision regarding treatment process changes to achieve the ammonia limit more challenging but is not able to provide any guidance at this time. . . ."

For example, to comply with an ammonia limit, Manchester might choose to nitrify without any meaningful denitrification and thus need significant alkalinity addition both to avoid pH violations and to maintain the pH in the ideal range for EBPR. Conversely, if a future total nitrogen limit is also anticipated, it may be more cost effective to move forward with denitrifying process modifications to reduce or eliminate the need for alkalinity addition. In the latter case, it also would be critical to have guidance on the anticipated effluent limits for total nitrogen. Both alternatives will still require consideration of additional provisions for the current EBPR process and the implications of elevated nitrate levels. Also, nitrification, and total nitrogen removal, can significantly impact secondary system capacity. EPA failed to take these facts into account which leads to an arbitrary and capricious decision.

Instead of taking a "wait and see" approach,[17] EPA cannot simply impose arbitrary standards and require the City to expend significant time, money and effort on something that might be entirely changed in the next permit cycle. Better planning for more cost-effective facilities can be conducted once EPA is able to provide better guidance. The City should not be punished for EPA's failure to conduct sufficient analyses.

The EPA also incorrectly conducted its "reasonable potential analysis." Following issuance of the Permit, the City recalculated the warm season in 95th percentile effluent ammonia concentration using data contained in the Fact Sheet namely, 18.25 mg/L, and not 21.8 mg/L as used by EPA.[18] The correct downstream concentration is ~1.48 mg/L, which significantly alters the reasonable potential analysis and severely undermines justification for imposing ammonia limits, especially in shoulder seasons.

[17] *See* EPA Response to Comment 14 (conceding that "more work needs to be done before total nitrogen limits . . . can be allocated to the various POTWs").
[18]Permit, 2024 Fact Sheet at Appendix B-3.

EPA also failed to adhere to State water quality standards when setting an ammonia limit. EPA did not properly follow N.H. Code Admin. R. Env-Wq 1703.25 to .32 to assess for the Facility's potential to discharge ammonia that would have an impact on the receiving water.

Additionally, EPA failed to obtain sufficient ambient water temperature and pH information to set an effluent limit. Without additional data, EPA's conclusions are not based in fact and are clearly erroneous. The City seeks removal of any ammonia limit and instead require the City to monitor once per month for the next permit cycle.[19]

2. *The Proposed Ammonia Limit Cannot Pass the "Common Sense Test."*

In line with a cost benefit analysis, many of the new conditions and limits do not meet the "common sense test."[20] This "common sense test" requires at a minimum, that the POTW assess whether the proposed limit is technologically achievable.[21] In considering whether a proposed limit is technologically achievable, EPA should assess whether the POTW is likely to meet the new limits with currently available forms of pollution prevention. *Id*.

EPA should also assess whether the limits are sensible in light of actual conditions at the POTW, the receiving water, and past compliance experience.[22] *Id*. Since the POTW is not currently violating its NPDES permit conditions, and receiving waters are in compliance with State water quality criteria, the proposed conditions and limits are not supported by the administrative record.

[19] The City also maintains that sampling twice per week is unreasonable and unnecessary.
[20] *See e.g.,* EPA's *Local Limit Development Guidance*, EPA 833-R-04-00-2A (July 2004).
[21] *Id*. at 6–13.
[22] *Id*.

3. *Notwithstanding the fatal flaws with the ammonia limit, EPA's proposed compliance schedule is unworkable*.[23]

EPA's compliance scheduled for ammonia is fundamentally unreasonable. The Permit at § I.A.G. imposes an inadequate a 24-month compliance schedule to "evaluate and implement optimization measures to reduce the concentration of ammonia nitrogen in the discharge to achieve compliance with the ammonia limit." If the ammonia limit remains, which it should not, the City seeks a 138-month compliance schedule, as follows:

- 60-month period to conduct river temperature and pH monitoring to determine the appropriate values to use for analysis . . . . It is presumed that after 48 months of monitoring, the City would report on the findings for the applicable river temperature and pH, and an updated analysis of the reasonable potential to exceed on a monthly basis . . . .

- Concurrent 60-month period to optimize the existing treatment process for phosphorus removal and conduct operational monitoring and trials related to nitrification for ammonia removal. This optimization period will allow the City to understand the performance of their EBPR system with the improvements that were just brought online in December of 2023. Of critical importance are the early spring months . . . to better define the extent of the existing system's ability to remove ammonia while maintaining EBPR. This period will also be used to trial process modifications (with advanced notice and concurrence of EPA and NHDES) to promote nitrification and better understand overall impacts. The City may also choose to pilot test new systems/technology to make better decisions on the longer-term capital improvements required for ammonia compliance. This optimization period will allow the City to understand the implications of meeting the ammonia limit in relation to the total phosphorus limit, and provide a subsequent report on the optimization efforts.

- 12-month period to prepare planning level report for ammonia removal. The planning level report would summarize the findings of process optimization efforts to determine the capability of the existing treatment process and evaluate alternatives for the needed upgrades to the secondary treatment process to achieve concurrent EBPR and ammonia removal with the possibility of utilizing a nitrogen removal configuration that would incorporate both nitrification and denitrification. Previous upgrades focused on EBPR, which, as constructed, will require changes to allow both EBPR and nitrification simultaneously to ensure permit compliance for both.

[23] Att. A, Permit I.G.2; Att. D., Wright-Pierce Comments June 10, 2024 at 19-45; Att. F, EPA Response to Comment 19.

- 24-month period to design upgrades needed to meet ammonia limit.
- 30-month period to construct upgrades needed to meet ammonia limit.
- 12-month period to start-up, troubleshoot, and optimize [the] new process to attain compliance.[24]

EPA responds that this proposed compliance schedule is "not as soon as possible." However, EPA cannot simply say "assume," as it does, that "compliance may be achieved through optimization without the need for a major facility upgrade." Such a conclusion is unsupported by the administrative record; EPA points to no factual basis or rationale for the unsubstantiated opinion that a major facility upgrade will not be needed. The City cannot be forced to take a "wait and see" approach as suggested by EPA. Any shorter compliance schedule included in the Permit at the outset is arbitrary and capricious.

Such conclusion is further supported by EPA's handling of the City of Rochester, New Hampshire's NPDES permit and its appeal thereof. In that matter, EPA reached an agreement with Rochester to allow for a nine-year compliance schedule to comply with a total phosphorous limit in its NPDES permit.[25] Indeed, in that Order, EPA concluded that the nine-year compliance schedule was "reasonable."[26] Treating the City of Rochester differently from the City defies notions of equal protection under State and federal law. *See supra* § V.A.

[24] Att. D, Wright-Pierce June 10, 2024, at p. 9; Comment 19; Att. F, EPA Response to Comment 19.
[25] *See In the Matter of City of Rochester, New Hampshire,* NPDES Permit No. NH0100668, Docket No. CWA-AO-R01-FY24-12, Administrative Order on Consent (March 27, 2024).
[26] *Id*. at § I.

D. EPA exceeds its legal authority and creates undue burdens on the City by including requirements in the Permit that the City monitor for PFAS analytes in influent, effluent, and sludge.[27, 28]

The Permit incorporates erroneous requirements that the City use EPA method 1633 to monitor for per- and polyfluoroalkyl substances ("PFAS"), and adsorbable organic fluorine ("AOF"), respectively, in its influent, effluent, and sludge.[29] The Permit and EPA's Response to Comments arbitrarily conclude that EPA has authority to require the City to sample for PFAS. While the City acknowledges that EPA has authority to require sampling, such monitoring requirements cannot be arbitrarily imposed. Here, EPA lacks clear legislative authority to require PFAS monitoring for discharges to surface water. *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 371 (2024) (explaining that it is the court's responsibility to ensure that the agency has "engaged in 'reasoned decision-making'" within the boundaries of their delegated authority).

EPA lacks authority to require PFAS monitoring absent clearly established water quality criteria. While EPA has the authority to regulate pollutants under the Clean Water Act, including the establishment of monitoring requirements, the lack of specific PFAS surface water quality criteria leave EPA devoid of any clear benchmark against which to assess the necessity of monitoring. EPA's recently established drinking water quality standards cannot serve this purpose. Drinking water quality standards and ambient groundwater quality criteria are separate from surface water quality standards and have no legal or practical bearing on permitted discharges to the Merrimack River. EPA has not provided the City with evidence of adverse environmental impacts to the river, biota or fauna, nor has it provided a factual basis that humans

[27] Att. A, Permit Part I.A. and note 13; Att. B, McLane Middleton June 10, 2024, at pgs. 2-3; Att. C, McLane Middleton February 3, 2025, at pgs. 2-3; Att. F, EPA Response to Comments 1-3, 35.
[28] We incorporate by reference Sections V.A–B, *supra*.
[29] Att. B, McLane Middleton June 10, 2025, at pgs. 2-3; Att. C, February 3, 2025, at pgs. 2-3; Att. F, EPA Response to Comments 1, 2; Att. A, Permit at page 10, #13.

are adversely affected due to PFAS compounds in surface waters. Therefore, EPA's demand for monitoring is without basis.

Moreover, EPA's directive that the City utilize methods 1633 to monitor for PFAS analytes and AOF is outside of the scope of the EPA's authority. EPA notes in the Fact Sheet that there is no "final 40 C.F.R. § 136 method for measuring PFAS in wastewater and sludge."[30] Nonetheless, EPA seeks to require monitoring via Method 1633 which it states was "finalized" in January of this year. Respectfully, no analytical method is "final" for the purpose of NPDES permit monitoring, until promulgated via the notice and comment rulemaking process. Method 1633 has not been properly promulgated by EPA. EPA's reliance on non-promulgated analytical methods contravenes the procedural requirements of the Administrative Procedures Act. *See* 5 U.S.C. § 553.

EPA also erroneously relies CWA § 402(a) for its authorization to "prescribe permit conditions on data and information collection." However, CWA § 308(a)(A)(iv) provides that in carrying out CWA § 402, EPA is authorized to require an owner or operator of any point source to "sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall *prescribe*)." (emphasis added). The plain language of "prescribe" means to "lay down a *rule*."[31] Monitoring standards for PFAS have not yet been fully vetted or approved. Without such a rigorous testing and peer review program, and adoption of a monitoring standard by *rule*—after receipt and consideration of public comments—the imposition of any unapproved method is arbitrary and capricious.

[30] Att. A, Permit at Fact Sheet, p. 34.
[31] Merriam-Webster Dictionary Online, *available at*, https://www.merriam-webster.com/dictionary/prescribe (last visited Nov. 28, 2025).

EPA cites to *In re: Avon Custom Mixing Services, Inc*,[32] to support the proposition that it has the authority to impose effluent monitoring in the develop in "any" effluent standard. However, that case stood for the proposition that "where the monitoring relates to maintaining State water quality standards . . . nothing in the CWA or the implementing regulations constrain the Region's authority to include monitoring provisions." (emphasis added) *See In re: Avon Custom Mixing Services, Inc* at *7. Here, as EPA explicitly acknowledges, there are no enforceable State water quality standards implicated for PFAS.[33] Therefore, monitoring for PFAS is unnecessary to comply with an existing standard.

EPA suggests that the City's next NPDES permit may include PFAS effluent limitations, and it relies, in part, on CWA Section 308(a)(A)(v) for the proposition that EPA may require a discharger to "provide such other information as [it] may *reasonably* require." *See* EPA Response to Comment 1 (emphasis added). However, the agency's position is mere speculation and there is no reasonable basis for EPA to require the City to sample for PFAS. Indeed, there is no evidence in the record that shows that WWTF effluent exceeds recommended human health criteria and drinking water standards.[34] The City does not use, generate, or treat PFAS. The Permit has reasonable requirements for indirect dischargers, which should be the focus since the City does not manufacture, generate, or use PFAS.

Accordingly, in line with *Loper*, the EAB should not defer to the agency; placing any regulatory burden on the City is based on clearly erroneous findings of fact and conclusions of law.

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[32] Att. F, EPA Response to Comment 1.
[33] EPA Response to Comments 1 at 8, 53 at 80. *See also In re: Avon Custom Mixing Services, Inc*, 10 E.A.D. 700 (2002) at *7 (recognizing that the Region's authority to require monitoring in NPDES permits extends specifically, and only, to the monitoring needed to maintain state water quality standards).
[34] *See In re: Town of Concord Dept. Public Works*, 16 EAD 514, at *24 (allowing Petitioner to present sufficient evidence to show that the agency had no factual reasoning or justification for seeking certain specific information).

Furthermore, any requirement that the City monitor for PFAS analytes will pose an undue financial burden on the City, without proper justification or legal basis, and without conducting a cost and benefit analysis.[35] The City anticipates that sampling via these methods will cost $1,245 per site and per sample, at a total of 50 sampling sites. The sampling will therefore impose an additional $62,250.00 per year in costs annually. These costs simply cannot be justified for PFAS sampling, as the EPA lacks any legal or factual basis to justify the necessity of the sampling itself.

E. The reporting timeframe for CSO discharges cannot be met.[36]

EPA erroneously reduces the "initial notification" requirement to provide public notice of a CSO event to two (2) hours. However, the Consent Decree addressed this issue head on by requiring the City to provide public notice "as soon as practicable but no later than four (4) hours after the City has become aware, by monitoring, modeling, or other means, that a CSO discharge has occurred." ¶ 19(a).

There has been no change in circumstances that would support a reduction in reporting time. Indeed, the City's monitoring systems have remained the same and the availability of staff, especially on weekends and nights, remains the same. Accordingly, EPA's introduction of this condition into the Permit is arbitrary and capricious.

[35] *See supra* § V.B.
[36] Att. A, Permit Part I.A.H(g)(2); Att. B, McLane Middleton June 10, 2025, at p. 8; Att. F, EPA Response to Comment 7.

F. The WET testing frequency is arbitrary and capricious. [37]

EPA failed to set a reasonable WET testing frequency. Such frequency should be done on a case-by-case basis. *See EPA NPDES WET Permit Writers' Manual*, at 4-11 (July 2024).[38] Here, there is no reasonable potential that the City will have violations of WET criteria as demonstrated by robust historical monitoring data. Accordingly, the City requests that the sampling for WET be reduced to once per year.

G. Requiring monthly DMR submittals is arbitrary and capricious.[39]

The City objects to monthly DMR submittals, as described in the comments and as contrary to the Consent Decree.[40] EPA has unreasonably and unlawfully imposed monthly DMR submittals when they should only be required annually. To the extent the monthly DMR submittal is required, providing the City with 15 days to obtain, analyze, compile, and report all data is insufficient. Accordingly, to the extent the DMR annual requirement remains, the City requests that such reports be filed on the 30th of each month, thereby providing the City with 30 days.

H. The City cannot comply with Attachment G to the Permit.

EPA references Attachment G for those pollutants listed to be assessed for a "Pollutant Scan." EPA, however, failed to include Attachment G in the Permit, and therefore, the City has

[37] Att. A, Permit Condition Part 1.A. Effluent Limitations and, Monitoring Requirements, WET Testing Requirements, at page 4; Att. D, Wright-Pierce June 10, 2024 Comments at pages 2-7; Att. F, EPA Response to Comment 11, 15

[38] *See also id*. At 4-12 "An NPDES permit writer also may establish a monitoring schedule that reduces or increases the monitoring frequency during a permit cycle. Monitoring schedules that reduce monitoring over time might be appropriate for NPDES discharges for which the initial monitoring shows compliance with NPDES permit effluent limits for WET, does not exceed WET triggers, or otherwise demonstrates the discharge does not cause an excursion of WET WQS."

[39] Att. A, Permit I.H.5; I.I.5; Att. G, Consent Decree ¶ 19(c); Att. B, McLane Middleton June 10, 2024, Comments at page 8; Att. F, EPA Response to Comment 6.

[40] Att. B, McLane Middleton June 10, 2024, Comments at page 8; EPA Response to comment 6 at 17–18.

no reasonable means of complying with any Permit condition or limitations relying on Attachment G. Accordingly, any reference to Attachment G should be struck.

VI. STAY OF CONTESTED CONDITIONS

Pursuant to 40 C.F.R. § 124.16, the filing of a petition for review under 40 C.F.R. § 124.19 automatically stays the effect of all contested NPDES permit conditions, which also remain outside the scope of judicial review until final agency action. Under § 124.16(a)(2)(i), any uncontested conditions that are not severable from the contested provisions are also stayed, and the Regional Administrator is required to identify which permit terms are affected.[41] Particularly for NPDES appeals, as provided in § 124.16(a)(ii), when an appeal is filed, the Regional Administrator must notify the discharger and all interested parties of the uncontested conditions of the final permit that become enforceable obligations.

The City is contesting major provisions of the Permit, all of which are inseverable. As such, Parts I.A., I.G., I.H., I.I., and I.J should be stayed.

In addition, **all** Permit conditions should be stayed because the water quality certificate issued by NHDES on May 13, 2025, has been appealed by the Conservation Law Foundation *See* 40 C.F.R. § 124.55 (requiring State water quality certification for EPA to issue an effective NPDES permit); Permit Part I.J.; *see also* NHDES Water Council, Docket No. 25-18 WC (pending appeal docket of the State-issued water quality certificate). Since there is no effective water quality certificate, all NPDES permit conditions should be stayed.

VII. ALTERNATIVE DISPUTE RESOLUTION

The City is willing to stay this appeal and participate in Alternative Dispute Resolution.

[41] All other uncontested and severable conditions of the permit become fully effective and enforceable 30 days after the Regional Administrator provides the required notification under § 124.16(a)(2)(ii). During this period, the permittee must continue complying with the corresponding conditions of its existing permit to the extent the new permit conditions are stayed.

VIII. CONCLUSIONS AND RELIEF SOUGHT

For the foregoing reasons, the City of Manchester, New Hampshire respectfully seeks review by the EAB of the terms and provisions of the final NPDES Permit challenged by the City as set forth herein. After such review, the City requests EAB to:

A. Set briefing schedule for this appeal to assist the EAB in resolving the issues in dispute;

B. Provide an opportunity for oral argument; and

C. Vacate and remand the contested permit condition to EPA Region I with an order to issue an amended NPDES Permit that conforms to the EAB's findings on the terms and provisions appealed by the City; and

D. Such other relief that may be appropriate under these circumstances.

Respectfully submitted,

CITY OF MANCHESTER, NEW HAMPSHIRE

By its Attorneys,

McLANE MIDDLETON,
PROFESSIONAL ASSOCIATION

Date: December 3, 2025

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STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this petition for review, including all relevant portions and exclusive of attachments, contains less than 14,000 words.

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Dated: December 3, 2025

LIST OF ATTACHMENTS

ATTACHMENT A – FINAL NPDES Permit No. NH0100447

ATTACHMENT B – McLane Middleton Public Comments from June 10, 2025

ATTACHMENT C – McLane Middleton Public Comments from February 3, 2025

ATTACHMENT D – Wright Pierce Public Comments from June 10, 2024

ATTACHMENT E – Osprey Owl Public Comments from February 3, 2025

ATTACHMENT F – Environmental Protection Agency Response to Comments

ATTACHMENT G – Consent Decree between Environmental Protection Agency and City of Manchester

CERTIFICATE OF SERVICE

I, Adam M. Dumville, hereby certify that on this 3rd day of December 2025, I served a copy of the foregoing Petition for Review, Statement of Compliance with Word Limitations on the parties identified below by the Environmental Appeals Board electronic filing system, U.S. first-class mail, postage pre-paid:

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Dated on the 3rd day of December 2025.

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