

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

_____)
In the Matter of:)
)
Springfield Water and Sewer Commission)
)
NPDES Permit No. MA0101613)
_____)

NPDES Appeal No. 20-07

EPA REGION 1'S RESPONSE TO THE PETITION FOR REVIEW

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In re Chem-Security Systems, Inc., 1989 WL 253224 (EAB 1989) 39
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B	G.3	TMDL Approval Letter from the Long Island Sound Office of the U.S. EPA to the States of New York and Connecticut, with enclosure entitled: <i>EPA New England and EPA Region 2 TMDL Review for TMDL in Long Island Sound, Connecticut and New York, Final Status, Impairment/Pollutant is Hypoxia (Low Dissolved Oxygen) Due to Nitrogen.</i> April 3, 2001. https://ofmpub.epa.gov/waters10/attains_impaired_waters.show_tmdl_document?p_tmdl_doc_blobs_id=68400
C	B.6	Fact Sheet. Springfield Regional Waste Treatment Facility (“SRWTF”), Permit No. MA0101613. https://www3.epa.gov/region1/npdes/permits/2020/finalma0101613permit.pdf
D	A.1	Final Permit. SRWTF, Permit No. MA0101613. September 30, 2020. https://www3.epa.gov/region1/npdes/permits/2020/finalma0101613permit.pdf
E	H.9	Federal Register Notice. “Combined Sewer Overflow (CSO) Control Policy,” 59 Fed. Reg. 18688 (April 19, 1994). https://www.epa.gov/sites/production/files/2015-10/documents/owm0111.pdf
F	B.24	Prior SRWTF Permit. Permit No. MA0101613. December 8, 2000.
G	B.19	Prior Springfield Water and Sewer Commission CSO Permit, Permit No. MA0103331. September 30, 2009. https://www3.epa.gov/region1/npdes/permits/2009/finalma0103331permit.pdf
H	G.1	<i>Massachusetts Year 2014 Integrated List of Waters.</i> Massachusetts Division of Watershed Management, Watershed Planning Program. MassDEP. 2014. https://www.mass.gov/files/documents/2016/08/sa/14list2_0.pdf
I	J.12	<i>Nutrient Criteria Technical Guidance Manual: Estuarine and Coastal Marine Waters.</i> U.S. Environmental Protection Agency, Office of Water, EPA-822-B-01-003. October 2001. https://www.epa.gov/sites/production/files/2018-10/documents/nutrient-criteria-manual-estuarine-coastal.pdf

J	G.2	<p><i>Integrated Water Quality Report</i>. CTDEEP. 2018.</p> <p>https://portal.ct.gov/-/media/DEEP/water/water_quality_management/305b/2018CTIntgratedWaterQualityReportpdf.pdf</p>
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N	G.5	<p><i>Long Island Sound Nitrogen Reduction Strategy</i>. EPA Region 1 and Region 2. December 2015.</p> <p>https://longislandsoundstudy.net/wp-content/uploads/2016/02/LIS-Nitrogen-Strategy-Cover-Letter-final-12-23-15.pdf</p> <p>https://longislandsoundstudy.net/wp-content/uploads/2016/02/LIS-Nitrogen-Strategy-Enclosures-12-23-15-1.pdf</p>
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P	G.7	<p><i>Watershed Synthesis Section: A Preliminary and Qualitative Evaluation of the Adequacy of Current Stormwater and Nonpoint Source Nitrogen Control Efforts in Achieving the 2000 Long Island Sound Total Maximum Daily Load for</i></p>

		<i>Dissolved Oxygen</i> . New England Interstate Water Pollution Control Commission. August 2014. http://neiwpc.org/wp-content/uploads/2020/08/LIS-TMDL_Watershed-Synthesis-Section.pdf
Q	G.11	Long Island Sound TMDL Fact Sheet. EPA. 2017. https://longislandsoundstudy.net/wp-content/uploads/2017/10/EPA-TMDL-fact-sheet-long-version-P1007N7M.pdf
R	B.5	Draft Permit. SRWTF, Permit No. MA0101613. November 15, 2017. https://www3.epa.gov/region1/npdes/permits/2020/finalma0101613permit.pdf
S	A.2	Response to Comments. SRWTF, Permit No. MA0101613, September 30, 2020. https://www3.epa.gov/region1/npdes/permits/2020/finalma0101613permit.pdf
T	B.1	Revised Draft Permit. SRWTF, Permit No. MA0101613, August 17, 2018. https://www.epa.gov/sites/production/files/2018-08/documents/draftma0101613permitrevised.pdf
U	B.3	Public Notice for Revised Draft Permit. SRWTF, Permit No. MA0101613, August 17, 2018. https://www3.epa.gov/region1/npdes/permits/2020/finalma0101613permit.pdf
V	B.2	Fact Sheet Supplement. SRWTF, Permit No. MA0101613, August 17, 2018. https://www.epa.gov/sites/production/files/2018-08/documents/draftma0101613permitrevised.pdf
W	G.6	<i>Enhanced Implementation Plan for the Long Island Sound Total Maximum Daily Load</i> . Long Island Sound Study Steering Committee, NY, CT, MA, NH, VT. 2012. http://neiwpc.org/wp-content/uploads/2020/08/LIS-TMDL-Enhanced-Implementation-Plan.pdf
X	D.1	Section 401 Certification from Lealdon Langley, Director, Massachusetts Department of Environmental Protection. MassDEP. August 31, 2020.
Y	G.33	Springfield Comments on Athol, Templeton and Gardner NPDES Permits.
Z	H.10	CSO Guidance for NMC. 1995. https://www.epa.gov/sites/production/files/2015-10/documents/owm0030_2.pdf
AA	H.11	CSO Permit Writer's Guidance. 1995. https://www.epa.gov/sites/production/files/2015-10/documents/csopermitwriters_full.pdf
BB	H.3	Springfield High Flow SOP. 2016.

CC	H.4	Springfield Integrated Wastewater Plan. 2014.
DD	L.4	Springfield WWTF 2017 Inspection Report.
EE	G.27	Nitrogen Requirements for NPDES Permits in the Long Island Sound Watershed. June 7, 2019.

I. STATEMENT OF THE CASE

The Connecticut River is the longest river in New England, rising at the U.S. border with Quebec, Canada, and flowing roughly southward through Vermont, New Hampshire, Massachusetts and Connecticut, for approximately 400 miles, where it empties into Long Island Sound (“LIS”). Congress designated LIS an Estuary of National Significance in 1987. *See* Clean Water Act (“CWA” or “Act”) § 320(a)(2)(B).

For decades, both waters have suffered severe water quality impairments from discharges of total nitrogen (“TN”) and Combined Sewer Overflows (“CSO”) from, among other sources, Massachusetts Publicly Owned Treatment Works (“POTWs”). These adverse impacts, including prolonged stretches of extremely low dissolved oxygen (“DO”) and fish kills, led Connecticut and New York to develop, “A Total Maximum Daily Load [“TMDL”] Analysis to Achieve Water Quality Standards for [DO] in Long Island Sound,” *Exhibit (“Ex.”)A*, which was approved by EPA in 2001. *Ex.B*.

The TMDL specified significant TN reductions from “in-basin” POTWs—*i.e.*, those in Connecticut and New York—and assumed a 25% reduction from 96 “out-of-basin” POTWs in Vermont, New Hampshire and Massachusetts to be secured through subsequent NPDES permitting. *Ex.B.13*. Over the intervening years, in-basin POTWs have invested almost two billion dollars in treatment plant upgrades and have achieved their assigned WLAs. On the other hand, the out-of-basin dischargers, together contributing approximately 6 million pounds of TN per year into waters tributary to LIS, have been operating without any TN limits in their National Pollutant Discharge Elimination System (“NPDES”) permits, the TMDL assumption notwithstanding.

The Springfield Regional Wastewater Treatment Facility (“SRWTF”) is, by far, the

largest of these out-of-basin facilities. The SRWTF sits on the mainstem of the Connecticut River, about five miles from the Connecticut border and only 55 miles from LIS. A major regionally integrated POTW serving several surrounding satellite communities, it has a design flow capacity of 67 million gallon per day (“MGD”). *Ex.C.10*. Its previous permit had been administratively continued since its expiration in 2005. *Ex.F*.

This petition arises from EPA Region 1’s (“EPA’s”) issuance of an NPDES permit (“Permit”) to the Springfield Water and Sewer Commission (“Permittee” or “Petitioner”). The Permit authorizes discharges from the SRWTF to the Connecticut River and from 24 Combined Sewer Overflow (“CSO”) outfalls to the Connecticut, Chicopee and Mill Rivers. After two rounds of public comments, EPA included a water quality-based effluent limitation (“WQBEL”) for TN and enhanced existing CSO requirements to address ongoing nutrient- and CSO-driven impairments in the receiving waters. These provisions were prompted by persuasive comments on the initial draft permit from the downstream affected State of Connecticut, arguing that the draft lacked enforceable requirements necessary to ensure compliance with their state water quality standards (“WQS”), including for nutrients and DO. *In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 622-633 (EAB 2010), *aff’d*. 690 F.3d 9, 15 (1st Cir. 2012), *cert. denied*, 569 U.S. 972 (2013) (describing role of downstream states under the Act).

In almost all instances, Petitioner’s myriad challenges to the Permit’s TN limits, CSO requirements, and monitoring provisions fail to cross the Environmental Appeals Board’s (“Board’s”) threshold procedural requirements. Petitioner consistently decline to substantively confront—or even acknowledge—EPA’s explanations, which is fatal to a request for review. *In re City of Pittsfield*, NPDES Appeal No. 08-19, slip op. at 7 (EAB

Mar. 4, 2009) (Order Denying Review), *aff'd*, 614 F.3d 7 (1st Cir. 2010) (“... a long...line of Board authority has required that petitioners do more than ...reiterate comments...submitted on the draft permit. They must instead *explain why* the Region’s response...is clearly erroneous or otherwise warrants review.”).

In the few instances where Petitioner does grapple with EPA’s responses, it selectively addresses only portions of them. Insofar as these issues pertain to technical matters, Petitioner expressed disagreement but declines to provide the Board with any studies, reports, or other technical information that were not adequately considered by EPA, as it is obligated to do under Board precedent. *In re Env’tl. Disposal Sys., Inc.*, 12 E.A.D. 254, 291 (EAB 2005). Instead, Petitioner merely asserts differences of opinion without providing a technical basis of support—an approach the Board and courts have categorically deemed insufficient to obtain review. *E.g. In re City of Taunton*, 17 E.A.D. 105, 132 (EAB 2016) *aff'd*, 895 F.3d 120 (1st Cir. 2018), *cert. denied*, 139 S. Ct. 1240 (2019).

Petitioner’s challenges to the Permit’s monitoring requirements are equally unavailing, as they fail to show why the information should not be required. “[F]or a petitioner to raise a material issue of fact as to whether an information gathering requirement in a permit is unreasonable and therefore exceeds [EPA’s] authority under Section 308(a), a petitioner must cite evidence sufficient to support a finding that there is no basis in fact for [EPA] to require information in the first place.” *In re Town of Concord*, 15 E.A.D. 514, 542 (EAB 2014) (internal citation omitted). Petitioner does not even *attempt* such a showing.

EPA requests the Board deny review.

A. Statutory and Regulatory Background

1. CWA

“Congress has vested in [EPA] broad discretion to establish conditions for NPDES permits” to achieve the statutory mandates of section 301, 401 and 402 of the Act. *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992).

Under section 402, EPA may issue an NPDES permit “for the discharge of any pollutant” if the permit conditions “assure” that the discharge complies with applicable requirements, “including those necessary to meet [WQS]” under section 301(b)(1)(C). CWA § 402(a)(1)-(2). EPA must also impose conditions “necessary to insure compliance with applicable water quality requirements” of States affected by the discharge. *Id.* at § 401(a)(2).

EPA has implemented these statutory requirements through regulations. Most trenchantly, 40 C.F.R. § 122.4(d) *prohibits* issuance of an NPDES permit, “[w]hen the imposition of conditions cannot *ensure* compliance with the applicable water quality requirements of all affected States.” (emphasis added). *See also id.* § 122.44(d)(1)(vii)(A) (requiring the permitting authority to ensure that “[t]he level of water quality to be achieved by limits on point sources established under this paragraph...complies with all applicable [WQS]”) and § 122.44(d)(4) (requiring inclusion of conditions necessary to conform to water quality requirements of all affected states).

2. WQS

States must develop WQS that identify “designated uses” (recreation, aquatic habitat, *etc.*) for each water body within their boundaries and specify, in

numerical or narrative form, the quantities of pollutants that may be present in the water without impairing those uses – *i.e.*, “water quality criteria.” CWA § 303(c).

States must also prohibit discharges that would degrade water quality below that necessary to maintain the “existing uses” (distinct from “designated uses”) of a water body, *i.e.*, antidegradation. CWA § 303(d)(4)(B); 40 C.F.R. § 131.12 (state antidegradation policies “...shall assure water quality adequate to protect existing uses fully.”); *PUD No. 1 of Jefferson Cty. v. Washington Dep't of Ecology*, 511 U.S. 700, 705 (1994) (“... [Section] 303 [of the Act] ‘contains an ‘antidegradation policy’—that is, a policy requiring that [WQS]... be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation.”). Thus, no activity that would “partially or completely eliminate any existing use” is permitted, even if it would leave the majority of a given body of water undisturbed. *See id.* at 718–19.

3. NPDES Permits and TMDLs

States must identify water body segments “for which the [required] effluent limitations... are not stringent enough to implement [WQS].” CWA § 303(d)(1)(A). For these “impaired” waters, states must develop a TMDL for each relevant pollutant. CWA § 303(d)(1)(C); 40 C.F.R. §§ 130.2(j), 130.7. The TMDL is then allocated among facilities discharging to the impaired waterbody, including wasteload allocations (“WLAs”) for point sources. 40 C.F.R. § 130.2(h). A WQBEL for a discharge must ensure compliance with WQS and be “consistent with the assumptions and requirements” of an available WLA. *Id.* at 122.44(d)(1)(vii)(B).

4. NPDES Permits and CSOs

Pursuant to CWA Section 402(q), permits “shall conform” to EPA’s 1994 Combined Sewer Overflow Control Policy (“Policy”), 59 Fed. Reg. 18,688 (April 19, 1994) (*Ex.E*). The Policy “establish[ed] a consistent national approach for controlling discharges from CSOs to the Nation’s waters through the [NPDES] program.”

Ex.E.18,688. A CSO is “the discharge from a [Combined Sewer System] at a point prior to the POTW Treatment Plant.” *Ex.E*.18,689. CSOs comprise mixtures of domestic sewage, industrial wastewater, and stormwater, and often contain high levels of pollutants, including suspended solids and oxygen-demanding organic compounds. *Id.* “CSOs are point sources subject to NPDES permit requirements including both technology-based and water quality-based requirements of the [Act].” *Ex.E*.18,695.

II. FACTS AND PERMIT PROCEEDINGS

A. The Facility

The SRWTF is a major POTW situated on the main stem of the Connecticut River in Agawam, Massachusetts. *Ex.C.Attachment A*. Springfield’s wastewater collection system comprises both sanitary sewers and combined sewers. *Ex.C.10*.

Under normal flow conditions, wastewater is directed to the SRWTF through interceptor sewers. *Id.* Treated effluent is then discharged through outfall 001 to the Connecticut River. *Id.* When the combined flow exceeds the hydraulic capacity of the interceptor sewer and/or the wastewater treatment plant during wet weather, the CSOs discharge untreated combined sanitary wastewater and stormwater to the Connecticut, Mill and Chicopee Rivers. *Id.*

EPA administratively continued Springfield’s 2009 CSO and 2000 WWTF permits

until issuing the Permit. *See* 40 C.F.R. § 122.6; *Exhibit.F-G*.¹ The Permit imposes, for the first time, a mass-based TN limit of 2,794 lb/day and several new and existing CSO requirements, which together are the focus of the Petition.

B. The Receiving Waters

1. Affected Rivers

The SRWTF discharges treated effluent and CSOs into segments of the Connecticut, Mill and Chicopee Rivers, fresh-water tributaries of LIS, that are Class B under Massachusetts WQS. 314 CMR 4.06. Massachusetts Class B waters are designated as, *inter alia*, habitats for aquatic life and for primary and secondary contact recreation. *Id.* at 4.05(3)(b). The three rivers are “identified as impacted by the discharge of [CSOs][.]” *Id.* at 4.06.

The Connecticut River segment into which outfall 001 and CSO outfalls discharge is listed as impaired for, *inter alia*, *E. coli* and total suspended solids. *Ex.H*. The Mill River segment into which some CSOs discharge is listed for impairments caused by *E. coli*. *Id.* The Chicopee River segment into which other CSOs discharge is listed for impairments caused by fecal coliform. *Id.*

2. LIS

LIS covers about 1,300 square miles and borders Connecticut and New York. It drains a densely populated watershed area of over 16,000 square miles, including portions of Maine, Vermont, New Hampshire and Massachusetts. *Ex.A.4*. About 613 square miles of LIS fall within Connecticut. *Id.* at 7. Connecticut classifies LIS as Class SA and Class SB and designates these waters as, *inter alia*, suitable for recreation and aquatic life

¹ The Permit consolidates the WWTF permit that expired in 2005 and the CSO permit that expired in 2014.

habitat. R.C.S.A. § 22a-426-4(f), (j).

Connecticut regulations establish DO, biological condition, and nutrient loading requirements for each water class. For Class SA and SB waters, DO must not be less than 3 mg/L and may be less than 4.8 mg/L for only limited periods of time. R.C.S.A. § 22a-426-9(a)(1). Regarding biologic condition, “Surface waters... shall be free from...constituents...which...can reasonably be expected to...impair the biological integrity of aquatic or marine ecosystems...” *Id.* at § 22a-426-4(a)(5). “The loading of...nitrogen...to any surface water body shall not exceed that which supports maintenance or attainment of designated uses.” *Id.* at § 22a-426-9; *see also* § 22a-426-4(a)(11) (authorizing “imposition of discharge limitations or other reasonable controls... for point...sources of ...nitrogen...which have the potential to contribute to the impairment of any surface water, to ensure maintenance and attainment of existing and designated uses, restore impaired waters, and prevent excessive anthropogenic inputs of nutrients or impairment of downstream waters.”)

Connecticut regulations mandate protection of “existing” and “designated” uses.

R.C.S.A. § 22a-426-8(a)(1). “Tier 1” antidegradation review provides:

The Commissioner shall determine whether the discharge... is consistent with the ...protection of existing ...uses assigned to the ... water body.... Connecticut [WQS] ... form the basis for [this] evaluation considering the discharge...independently and in the context of other discharges...in the affected water body and *considering any impairment listed pursuant to 33 USC 1313(d) or any Total Maximum Daily Load (TMDL) established for the water body..*

R.C.S.A. § 22a-426-8(f) (emphasis added).

3. Water Quality Impairments

i. Cultural Eutrophication Generally

Cultural eutrophication is the “process by which a water body suffocates from

receiving more nutrients... than it can assimilate.” *City of Marlborough*, 12 E.A.D. 235, 237 (EAB 2005). Elevated nitrogen levels can cause excessive algal and/or plant growth in marine systems. *Ex.I.1-5, 1-7*. The respiration and decomposition of these aquatic organisms can reduce in-stream DO concentrations to hypoxic levels (*i.e.*, below 3.0 mg/L), which can kill, impair or displace animals. *Ex.A.1-2; Ex.I.7*. Most of the Nation’s “estuarine and coastal waters are moderately to severely polluted by excessive nutrients,” including nitrogen. *Ex.I.xvii*.

ii. Cultural Eutrophication in LIS

For years, New York and Connecticut listed LIS as impaired under Section 303(d) for nutrients and DO. *Ex.A.9; Ex.K-L*. Between 1987-2000, *i.e.*, before the development of the LIS TMDL, the average maximum summertime extent of hypoxia was 208 square miles. *Ex.J.13*. In 1989, a particularly severe year, more than 500 square miles, or 40 percent, of LIS’s bottom waters had DO levels below 3 mg/L. *Ex.A.9*.

The implementation of the WLAs in the LIS TMDL, approved by EPA in 2001 and described below, has reduced but not eliminated hypoxia. *Ex.K-L*. The 2015-2019 five-year average for maximum hypoxia area is still **89 square miles**, with an average duration of over **50 days**. *Ex.K.13*.²

4. LIS TMDL

In 2000, CTDEEP completed a TMDL to address nitrogen-driven eutrophication impacts in LIS. The TMDL included WLAs for point sources and Load Allocations for non-point sources. The WLAs for in-basin sources (Connecticut and New York) were allocated facility-by facility to achieve an aggregate 60% reduction in point source loading

² See also *Exs.M-Q*.

from those two states. *Ex.A.26, 40, 43*. The TMDL did not assign a WLA for out-of-basin sources (Massachusetts/New Hampshire/Vermont POTWs). *Id.* at 33-34. However, the WLAs for in-basin sources were established on an assumption that the out-of-basin POTWs would reduce loadings by an *aggregate 25%* from the baseline through the issuance of NPDES permits. *Id.* The baseline was largely based on estimates, not actual measurements, of TN from out-of-basin sources. *Ex.S.136*. The baseline-in-fact was thus marked by uncertainty. *Id.*

EPA's approval of the 2001 LIS TMDL was similarly predicated upon the assumed, or reasonably assured, 25% out-of-basin load reduction. *Ex.B.10*. EPA committed "to use its authorities when issuing NPDES permits...to translate the nitrogen reductions into facility specific requirements in order to achieve the overall 25% reduction level." *Id.* at 13.

C. Permit Development

1. Draft Permit: Holding the Aggregate Out-of-Basin Load Based on Optimization and Benchmarks

In November 2017, EPA released a draft NPDES permit for the SRWTF and 24 CSO outfalls ("Draft Permit"). *Ex.R*. To determine consistency with the assumptions and requirements of the available WLA, EPA analyzed whether there had been a 25% reduction from the TMDL baseline using available 2004-2005 discharge data. The total estimated loading from the Connecticut River during that period was 13,836 lbs/day, below the out-of-basin TMDL target of 16,254 lbs/day. *Ex.C.18.Table_3*.

Given that "excessive nitrogen loadings are causing significant water quality problems in LIS, including low [DO][,]" *Ex.C.19*, EPA explained that "to ensure that the aggregate nitrogen loading from out-of-basin point sources does not exceed the TMDL

target of a 25 percent reduction over baseline loadings,” it was introducing optimization measures at each of the out-of-basin facilities consistent with holding the aggregate load below the TMDL target. *Id.* at 25. EPA examined recent monitoring data from the SRWTF to determine the magnitude of their TN discharges, and found that from 2012-2016, the annual average TN load discharged ranged from 1,650 lbs/day to 2,534 lbs/day and averaged 2,279 lbs/day. *Id.*

EPA invited comment on three alternative nitrogen optimization conditions: (1) a loading benchmark of 2,279 lbs/day, based on the average calendar year TN load from 2012 to 2016; (2) a loading benchmark of 2,534 lbs/day combined with a concentration-based benchmark of 8 mg/L per permit day, based on the maximum calendar year TN load from 2012 to 2016; and (3) a concentration-based benchmark of 8 mg/l, to encourage a consistent level of treatment at the facility. *Ex. C.19 Table 4.20-22*. The common justifications underlying all three variations were “to ensure that the aggregate nitrogen loading from out-of-basin point sources does not exceed the TMDL target of a 25[%] reduction over baseline loadings,” *and* that the out-of-basin WWTP “nitrogen loads do not increase.” *Id.* at 19, 20-22.

On Permittee’s request, EPA extended the initial 30-day public comment period until February 12, 2018. Following requests for a public hearing, EPA again reopened the public comment period and held a public hearing. EPA received comments on the Draft Permit from the Permittee, CTDEEP, the Connecticut Nature Conservancy (“CRC”) and Save the Sound.

Although Permittee requested Alternative 2, many commenters, including CTDEEP, objected to the inclusion of a “benchmark” rather than an enforceable numeric

WQBEL. CTDEEP cited recent scientific studies concluding that “nitrogen discharges from [POTWs], as well as nitrogen from CSOs, continue to contribute to water quality violations in LIS,” and that “approximately 50% of the nitrogen load to LIS comes from areas north of Connecticut.” *Ex.S.163*. CTDEEP also observed that, “[v]ery little to no attenuation occurs in the Connecticut River...so this entire total nitrogen load from upper basin states is essentially transported directly to LIS.” *Id.* CTDEEP encouraged “EPA and MADEP to adopt a comprehensive nitrogen control plan for all the wastewater treatment facilities that discharge nitrogen to LIS via the Connecticut River, as it has been done in Connecticut and New York State.” *Id.* CTDEEP reminded EPA that the TMDL assumed “the enforceable mechanism to ensure reductions are attained will be state and federal permitting programs.” *Id.* at 164; *Ex.A.40*.

CTDEEP also questioned whether SRWTF itself was continuing to achieve a 25% reduction from the baseline. *Ex.S.164*. Citing the Fact Sheet at 19, CTDEEP noted that EPA had determined that “[t]he current annual average TN [total nitrogen] load is 631 lbs/day greater than the 2004-2005 estimated load from this facility.” *Id.* Likewise, CTDEEP pointed out that “[r]ecent data from the past five years show that the [SRWTF] is no longer meeting [its] reduction goal (on an individual plant basis).” *Ex.S.164*. That the SRWTF was *increasing* its TN loading heightened CTDEEP’s concern over the absence of an enforceable WQBEL. *Id.*

Finally, beyond the TMDL, CTDEEP directed EPA to more recent analyses indicating that, despite extraordinary efforts made by New York and Connecticut to achieve the TMDL, LIS was continuing to suffer from nitrogen-driven impairments, including hypoxia, and *ispo facto* exceeding its assimilative capacity for nitrogen.

Ex.S.163.

Citing the same analyses, Save the Sound observed that “[d]ischarges from Springfield add to the nitrogen load in [LIS] and contribute to water quality violations in the Sound.” *Ex.S.188-189* (“...[N]itrogen discharges...are...contributing to water quality violations in [LIS] and will continue to do so, even if and when all of the remaining actions to implement the 2000 TMDL are taken.”). Save the Sound called for enforceable WQBELs under sections 301 and 122.44(d), specifically citing *Upper Blackstone*, 690 F. 3d 9 (translating narrative nutrient water quality criterion into a numeric limit under section 122.44(d)(1)(vi)(A)). *Ex.S.187.*

Finally, CRC commented that the permit must be written to protect existing uses under Connecticut’s antidegradation policy and identified those uses. *Ex.S.175-176.*

2. Revised Draft Permit: Holding the Aggregate Out-of-Basin TN Load Based on Numeric WQBEL and Optimization

These comments caused EPA to question whether its proposed optimization approach would inadvertently authorize an increase of nitrogen to LIS. EPA also questioned whether its approach would ensure compliance with WQS under CWA section 301(b)(1)(C) and 40 CFR §§ 122.44(d)(1)(vii). *See Section.I.A.1, supra.*

“After consideration of all of the comments and supporting material,” EPA published the Revised Draft Permit on August 17, 2018, *Ex.T*, stating that “EPA and MassDEP have determined that nitrogen and CSO notification requirements that differ from those which were proposed in the Draft Permit are necessary to protect water quality in the Connecticut River and [LIS] and to protect recreational uses in the Connecticut River.” *Ex.U.2.*

In the Fact Sheet Supplement, EPA agreed that “optimization benchmarks cannot

provide assurance that the cumulative nitrogen load to the LIS will not exceed the out-of-basin...point source wasteload allocation established by the TMDL.” *Ex. V.3*. Moreover, EPA noted that “TN loads discharged from the facility over the past ten years have not decreased and may be increasing[.]” *Id.* This was a concern as the “Springfield facility is the largest out-of-basin contributor of TN loading in the Connecticut River watershed and is also the closest out-of-basin major point source contributor to Connecticut’s portion of the Connecticut River.” *Id.* To avoid increased TN loading into LIS from the Springfield and other out-of-basin facilities into nitrogen-impaired waters, EPA concluded that an enforceable WQBEL “would need to be imposed in order to protect water quality in the Connecticut River and [LIS] and to protect recreational uses in the Connecticut River.” *Id.*

For these reasons, the Revised Draft Permit included a mass-based effluent limit of 2,534 lb/day (as a 12-month rolling monthly average); the optimization requirement from the Draft Permit (without the benchmark); permission to request incremental increases in the TN effluent limit upon the completion of four planned CSO projects, according to increments defined in the permit; and new CSO notification requirements.

At Permittee’s request, EPA extended the public comment period. EPA received comments from the Permittee and CTDEEP, among others.

Permittee, like EPA, recognized that “the TMDL combined wasteload allocation for the out-of-basin dischargers in the Connecticut River basin must be allocated among individual dischargers.” *Ex.S.86*. Permittee similarly conceded that “[w]hile EPA certainly has some latitude in allocating the allowable TMDL wasteload among individual dischargers, the fairest and most straightforward way to do this is based on design flows.” *Id.*

3. Final Permit: Holding the Aggregate Out-of-Basin TN Load Based on Numeric WQBEL and Optimization

i. Derivation of TN Limit

Using the best reasonably available information, the Permit affirmed the imposition of a mass-based TN limit to ensure consistency with the assumptions of the available LIS WLA and compliance with WQS, including antidegradation, pursuant to Section 301, 401(a)(2) and 402 of the Act, and implementing regulations.

ii. Decision to Impose a TN Limit

EPA's decision to impose an enforceable, numeric WQBEL rather than a narrative optimization requirement (with a non-enforceable benchmark) was informed by several factors.

First, EPA was convinced by CTDEEP that voluntary efforts to reduce nitrogen loading by Springfield did not satisfy the Act's mandate to include limits that meet WQS. *See CWA §§ 301, 401(a)(2) and 402. See also Marlborough*, 12 E.A.D. at 250 (“[M]ere possibility of compliance does not ‘ensure’ compliance” as required by the statute and regulations.). Thus, “the effluent limit [in the Final Permit] is based on both the need to assure that the out-of-basin target will continue to be met through the imposition of enforceable permit limits rather than voluntary reductions that could be abandoned at any point and the need to prevent further degradation of a water body in a downstream state.” *Ex.S.134*.

Second, EPA gave weight to the undisputed fact that excessive nitrogen loadings cause significant water quality problems, including low DO, in LIS. This was of acute concern to EPA because of the magnitude of out-of-basin loading: as much as six million lbs/yr, based on the sum of the maximum annual discharge from each out-of-basin

discharger from 2013 to 2017. *Ex.S.9-10, 25.*

Third, EPA was concerned that loads from the SRWTF might not have decreased over the past ten years, but might have increased, further suggesting the need for an enforceable WQBEL that caps the TN load. *Ex.V.3; Ex.S.133, 164, 174-175, 188.* Because TN increases may be driven by population increases (the estimated wastewater TN loading is 10 lbs/person/year), EPA also determined that TN limits were necessary to assure that aggregate out-of-basin loading is not exceeded due to future out-of-basin population growth. *Ex.S.23.*

Fourth, EPA considered scientific papers published after the completion of the TMDL and cited by the commenters that cast doubt on the 1998 estimates that were used to establish the TMDL baseline. *Ex.S.25.* These estimates were not derived using a comprehensive effluent TN data set but on presumed concentrations, and therefore may have been set significantly higher than actual loadings. *Id.* This called into question whether the 25% reduction in out-of-basin TN loadings from the baseline-in-fact has occurred, as Permittee repeatedly contended in its comments. *Id. at 136.* Because actual data from 1998 do not exist, this technical dispute cannot be resolved. *Id.* But given the requirement to ensure consistency with the assumptions of the TMDL, this uncertainty cut toward an enforceable limit to prevent TN loads from increasing over time. *Id.*

Fifth, EPA found it reasonable to take a precautionary approach where analyzing available record materials to determine the need for a nutrient WQBEL because the cycle of eutrophication is difficult to reverse once begun. *Ex.S.26.* Here, the existence of ongoing cultural eutrophication, questions over the accuracy of the TMDL baseline-in-fact, and concerns over possible increased loads together counseled in favor a WQBEL.

Sixth, EPA considered the Enhanced Implementation Plan (“EIP”) cited by CTDEEP. *Ex.W*. Although the CWA anticipates conflicts over pollution discharges between upstream and downstream states, *see Milwaukee v. Illinois*, 451 U.S. 304, 325–26 (1981) (“In the 1972 amendments Congress provided ample opportunity for a State affected by decisions of a neighboring State’s permit-granting agency to seek redress”), the EIP represents *agreement* among the five in- and out-of-basin states to cap out-of-basin loads. Though the EIP is not legally binding, EPA gave it weight because it continues to reflect the *consensus* of all five states that discharge to and contribute to impairments in LIS, as evidenced by Connecticut’s comments and Massachusetts’ certification, *Ex.X*, of EPA’s permit and the issuance of an identical state permit. *Ex.S.13-14; 135-136; 158-159; 164*.

For these six reasons, EPA concluded that capping the aggregate out-of-basin load through enforceable TN WQBELS was necessary to ensure compliance with sections 301, 401 and 402 of the Act and EPA’s implementing regulations.

iii. Allocation of Aggregate TN Load

EPA next turned to various comment proposals to allocate that load. Prompted by CTDEEP’s call for a comprehensive allocative plan to guide NPDES permitting of out-of-basin facilities, *Ex.S.164*, combined with Permittee’s recommendation to use design flow as a basis for allocating the out-of-basin loads, *Ex.S.86*, EPA set about to articulate water quality-based principals grounded in the Act to guide the assignment of WQBELS that would ensure compliance with applicable WQS and consistency with the available WLA in the LIS TMDL.

When confronting the difficult environmental regulatory problem of controlling

nearly 100 discharges into a complex system like LIS, EPA was presented with a variety of potential permitting approaches. Rather than resolve this complex permitting task on an *ad hoc* basis, EPA fashioned an approach to comprehensively regulate nitrogen loading from out-of-basin nitrogen sources on a gross, basin-level scale. *Ex.S.10*. As the out-of-basin POTWs have not been assigned WLAs under the TMDL, allocating nitrogen loads among these facilities to ensure compliance with WQS was committed to EPA's reasonable discretion, as Permittee acknowledged. *Id.* at 9, 86.

In developing its approach, EPA considered, but rejected, several possible alternatives, on one of two principal grounds: (1) they were not sufficiently protective to assure compliance with applicable CWA requirements (*i.e.*, they lacked enforceable TN effluent limitations to *ensure* as a matter of law that nitrogen loads would be maintained at protective levels), or (2) they would entail unwarranted uncertainty and delay (*i.e.*, they called for the development of new TMDLs to pinpoint necessary loads, even though the permit at issue has expired and impairments persist). *Ex.S.9-15*.

Based on comments, EPA opted to roughly divide the aggregate out-of-basin load in Massachusetts by establishing mass-based effluent limits based on facility design flow. *Ex.S.11-13*. EPA defined the following five tiers: (1) POTWs above 10 MGD were allocated mass-based loads derived using 5 mg/l TN; (2) POTWs between 5-10 MGD were allocated loads based on 8 mg/l; (3) POTWs between 1 and 5 MGD on 10 mg/l; (4) POTWs between 0.1 and 1 MGD were required to optimize their plants to remove TN, and (5) POTWs below 0.1 MGD were required to monitor TN. *Id.* Most facilities can meet their respective 5, 8 and 10 mg/l TN concentrations when (and if) they reach design flow by means of optimization, but the four largest facilities that

comprise tier 1, including SRWTF, will be able to do so through installation of readily available treatment technologies. *Id.*

That tier 1 facilities were allocated TN loads derived from 5 mg/l made sense to EPA given their size and location. This marginal burden for the four largest facilities is *both* equitable because they currently generate approximately 51-58% of the Massachusetts out-of-basin load *and* reasonable because three of these facilities are on the main stems of LIS tributaries, so there is little or no attenuation of nitrogen. *Ex.S.12.*

Tier 2 facilities were allocated loads partly on the assumption that POTWs greater than that size are likely to already possess the technical capability and operator sophistication needed to achieve relatively stringent effluent limitations via optimization. *Ex.S.12.*

Tier 3 facilities, somewhat smaller, received slightly less stringent allocations. *Ex.S.12.*

Tier 4 facilities were only required to optimize because the many (41) facilities smaller than 1 MGD collectively account for a relatively small amount (about 20%) of the total load. *Ex.S.12-13.*

Finally, Tier 5 facilities were required to monitor and report data that may be used in future permitting cycles. *Ex.S.13.*

In sum, in arriving at its tiering determination, EPA considered a series of technical, regulatory and policy factors within its expertise, and accounted for the equities.

iv. Assessment of the TN limit's protectiveness

In responding to comments calling for effluent limits that would comply with Connecticut's antidegradation policy and that would implement Connecticut narrative

nutrient WQS, EPA concluded that the chosen load was neither overly stringent, nor overly lax, as explained below.

v. Compliance with Connecticut's Antidegradation Policy

EPA concluded that Connecticut's narrative criteria would not call for a limit less stringent than the TN limit. Uncontested on the record is that several million pounds of TN are discharged each year from out-of-basin facilities to LIS, which is experiencing severe ongoing cultural eutrophication. The magnitude of this discharge is obviously beyond, "some theoretical impact on a downstream State," *Arkansas v. Oklahoma*, 503 U.S. at 111 (1992). As explained in Section.II.B.2, Connecticut's Tier 1 antidegradation review requires the permitting authority to "consider[] any impairment listed pursuant to [303(d)] or any [TMDL] established for the water body." R.C.S.A. § 22a-426-8(f). In EPA's technical and scientific judgment, shared by all five in- and -out-of-basin states and supported by water quality data and information in the record, the current quantity of nitrogen in LIS exceeds the nutrient-related criteria applicable to LIS, and existing uses are not being protected. *Ex.S.26-30*; Section.II.B.3.

vi. Translation of Connecticut's Narrative Nutrient Criteria

EPA also concluded that Connecticut's narrative criteria would not call for a limit more stringent than the TN limit under 40 C.F.R. § 122.44(d)(1)(vi)(A), which authorizes EPA to establish QBELs for a pollutant "using a calculated numeric water quality criterion" that EPA demonstrates will attain and maintain WQS. Out-of-basin loads, whose magnitude is described above, necessarily contribute or have the potential to contribute, to ongoing WQS violations in LIS. *Ex.S.22-26*.; *see also* 40 C.F.R. § 122.44(d)(1)(i)-(iii). EPA utilized the EPA-approved TMDL target as the load-based

“calculated criterion.” *Id.* It is reasonable, in EPA’s technical judgment, to issue permits to out-of-basin dischargers with conditions that hold loads constant and in so doing curtail the potential for the *large-scale*, out-of-basin loadings to contribute to further impairment and degradation of a water that is still beyond its assimilative capacity for nitrogen. *Id.*

Although LIS is not yet achieving WQS, EPA recognized that Connecticut and New York have substantially reduced their nitrogen loadings into LIS and water quality conditions have improved. *Ex.S.11-12.* EPA also acknowledged that additional work, including to meet the LA, is underway in those states to further reduce nitrogen loadings into LIS. EPA determined that it will take time for the impact of these reductions to be fully realized and for designated uses to be fully restored. *Id.* at 12. EPA’s out-of-basin permitting approach balanced the need to hold overall TN loadings constant to avoid exacerbating ongoing nitrogen-driven environmental despoilation against the inherent scientific and technical uncertainty associated with receiving water response in a water body as complex as LIS. *Id.* In the absence of refined models, EPA concluded that the record provides a reasoned basis to support the imposition of enforceable effluent limitations on out-of-basin dischargers that are designed to hold aggregate loadings constant. *Ex.S.22-26, 28-29, 32-33*, citing *Miami–Dade County v. EPA*, 529 F.3d 1049, 1065 (11th Cir.2008) (holding that the “EPA is compelled to exercise its judgment in the face of scientific uncertainty unless that uncertainty is so profound that it precludes any reasoned judgment.”). EPA accordingly concluded that more stringent limitations on the out-of-basin dischargers are therefore not needed at this time. *Id.*

D. CSOs

1. Bypass of Secondary Treatment

Subject to certain exceptions, EPA regulations prohibit “bypass,” the intentional diversion of waste streams from any portion of the treatment facility. 40 C.F.R.

§ 122.41(m). The CSO Policy reiterates this prohibition but also contemplates certain permits approving peak-flow bypass prospectively, rather than on an ongoing, case-by-case basis. *Ex.E.18693*. To use this prospective approach, permittees must demonstrate, among other things: a long-term control plan (“LTCP”) that justifies the cut-off point for the bypass of treatment; a cost-benefit analysis comparing bypass to CSO-abatement projects; and a no feasible alternatives analysis. *Id.* The Policy states that, “[t]here must be sufficient data in the administrative record...supporting all the requirements in 40 C.F.R.

§ 122.41(m)(4) for approval of an anticipated bypass.” *Id.* “[T]he permittee bears the burden of showing that there is no feasible alternative to bypass of treatment.” *In re City of Lowell*, 18 E.A.D. 115, 173 n.36 (E.A.B. 2020) (*citing Ex.E.18693*). EPA determined that Permittee did not satisfy the requirements for prospective bypass approval. *Ex.S.46-47*.

2. Classification of Outfall 042

EPA permitted Outfall 042 as a CSO. A CSO is as “a discharge from a [CSS] at a point prior to the POTW Treatment Plant.” *Ex.E.18688*. A “POTW Treatment Plant” is “that portion of the POTW which is designed to provide treatment...of municipal sewage...” 40 C.F.R. § 403.3(r). A CSO-related bypass is a discharge that occurs after receiving *at least* primary treatment. *Ex.E.18693*.

Outfall 042 is located at the Inlet Structure. *Ex.DD.Attachment A*. As described by the Permittee, “combined flows from...Springfield and customer communities enter the

POTW Plant Inlet Structure, where preliminary mixing occurs prior to” discharge from Outfall 042. *Ex.S.50*. The Inlet Structure is upstream and across a parking lot from the “bar screens,” which is the first process point for the WWTF. *Ex.C.Attachment_B* (noting “raw wastewater” entering the “bar screens”). Discharges from Outfall 042 do not receive control of solids and floatables (*i.e.*, primary treatment). *Ex.S.57*. Because 042 is located upstream of the WWTF and discharges from the outfall do not receive at least primary treatment, EPA determined it was classified as a CSO. *Id.*

III. STANDARD OF REVIEW THRESHOLD AND PROCEDURAL REQUIREMENTS

To obtain review, Petitioner must demonstrate that the permit decision “is based on a finding of fact or conclusion of law that is clearly erroneous.” 40 C.F.R.

§ 124.19(a)(4)(i).

A. Petitioner’s Burden on Appeal

[T]he burden of demonstrating that review is warranted rests ‘squarely’ with Petitioner.” *Pittsfield*, slip op. at 6; 40 C.F.R. § 124.19(a)(4)(i-ii).

1. Petitioner must raise all reasonably ascertainable issues and available arguments

Only issues or arguments raised during a public comment period are preserved for review, unless the issues or arguments were not reasonably ascertainable before the close of the public comment period. 40 C.F.R. §§ 124.13, .19(a)(4)(ii).

2. Petitioner may not reiterate comments and must substantively confront EPA’s responses

Petitioner must state “with specificity” its objections to the permit and explain “why [EPA’s] prior response to those objections is clearly erroneous or otherwise

warrants review.” *In re Westborough*, 10 E.A.D. 297, 305 (EAB 2002); 40 C.F.R.

§ 124.19(a)(4)(ii). Petitioner may not merely reiterate comments previously submitted on the draft permit. A “petitioner's failure to address the permit issuer’s [RTC] is fatal to its request for review.” *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 170 (EAB 2006).

Additionally, “mere allegations of error” or “vague or unsubstantiated claims” are insufficient to warrant review. *City of Attleboro*, 14 E.A.D. 398, 443 (EAB 2009). For these reasons, the claims in paragraphs A(6), B, C(1), C(2), C(3), D(3), E(2), E(3), E(4), I, J, K, L, M, and N of Section IV of the Petition do not, on their face, warrant review.

3. To demonstrate error on a technical issue, petitioner must demonstrate compelling error, not merely a preference for an alternative technical theory

The Board gives substantial deference to the permit issuer’s technical judgment.

Town of Ashland Wastewater Treatment Facility, 9 E.A.D. 661, 667 (EAB 2001).

“Establishment of a nitrogen effluent limit in a permit is inherently a technical issue.” *In re D.C. Water & Sewer Auth.*, 13 E.A.D. 714, 742 (EAB 2008). “[C]lear error or a reviewable exercise of discretion is not established simply because [a] petitioner presents a difference of opinion or alternative theory regarding a technical matter.” *Id* (citation omitted).

Therefore, in a challenge to scientific or technical issues, a petitioner must present the Board “with references to studies...that provide...detailed...facts and data about...matters...not adequately considered by [EPA].” *Envtl. Disposal Sys., Inc.*, 12 E.A.D. at 291 (EAB 2005). For these reasons, Petitioner’s claims in paragraphs A(2)(a), A(2)(b) and G fail to establish reviewable error.

4. Comparisons to other permits are legally irrelevant

“[A] disparity in requirements imposed on [publicly owned treatment works]” is

legally irrelevant to a permit challenge “because permits are issued on an individual basis, taking into account individual differences where appropriate.” *City of Port St. Joe*, 7 E.A.D. at 304 n.44 (EAB 1997). Petitioner’s arguments comparing SRWTF to other dischargers in New Hampshire, New Jersey and the Great Lakes Basin are thus infirm. *Pet.11*, 31.

IV. ARGUMENT

Petitioner’s challenges to the Permit fall into four categories, none of which constitutes reviewable error: (A) Total Nitrogen (B) CSOs; (C) Co-permittees, and (D) miscellaneous monitoring/technical issues.

A. Nitrogen

1. EPA provided adequate notice and opportunity to comment on the TN Limit

Petitioner contends EPA erred by not re-noticing the permit before imposing a TN limit of 2,794 lbs/day in the Final Permit. *Pet.7-10*. Petitioner’s claim that EPA leapt without explanation from a mass-based TN limitation allegedly derived from 8 mg/l in the Draft Permit to a limit based on 5 mg/l in the Permit does not square with the record. As explained below, Petitioner neither addresses EPA’s explanation for the TN limit (for one, EPA did not use 8 mg/l to derive either of the draft permit limits), nor describes how any changes between the Revised Draft and Permit has hampered its ability to fairly develop its appeal. Review should therefore be denied.

Reopening the public comment period is committed to EPA discretion and “is only appropriate where information received during the comment period raises ‘substantial new questions’ regarding the permit.” *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 431 (EAB 1997) (citing 40 C.F.R. § 124.14(b)). Additional notice and comment is not needed for a final NPDES permit that differs from, but is a logical outgrowth of, the draft permit. *City of*

Taunton, MA v. EPA, 895 F.3d 120, 130 n.10 (1st Cir. 2018). EPA considers multiple factors in deciding whether to reopen a comment period, including:

whether permit conditions have changed, whether new information or new permit conditions were developed in response to comments received during prior proceedings for the permit, whether the record adequately explains the agency's reasoning so that a dissatisfied party can develop a permit appeal, and the significance of adding delay to the particular permit proceedings.

In re City of Palmdale, 15 E.A.D. 700, 715 (2012) (citations omitted).

EPA's decision to issue the Permit without additional notice is reasonable. EPA included a mass-based TN limit in the Revised Draft Permit, at 4, so that was not a "new question." Growing logically from that same draft was the TN limit of 2,794 lbs/day, which was based on Petitioner's comment to allocate the aggregate load using design flow. *Am. Med. Ass'n v. United States*, 887 F.2d 760, 768 (7th Cir.1989) (stating that "the relevant inquiry is whether or not potential commentators would have known that an issue in which they were interested was 'on the table'...".) Nor can revisions to the limit be characterized as "substantial," most certainly not from the standpoint of Petitioner—the Permit TN limit was 260 lbs/day *less* stringent than the 2,534 lbs/day in the Revised Draft Permit.³

That the TN limit was revised *upward* from the one proposed does not, obviously, trigger any obligation on EPA to republish the draft for a third time. The revision grew logically from comments on the Revised Draft Permit, including Connecticut's and Permittee's. Petitioner's invitation to EPA to reconsider its allocative plan could only take EPA so far. As EPA observed, Petitioner's proposed allocation—a concentration-based TN

³ Petitioner erroneously contends that the Revised Draft TN limit was based on 8 mg/l. It was, instead, based on, "the maximum annual average TN load discharged from the facility from 2012-2016 (See Attachment H of the 2017 Fact Sheet)." *Ex.V.3*. If EPA had *actually* based the TN limit on an effluent concentration of 8 mg/l in the Draft and Revised Draft Permit, as Petitioner repeatedly contends, this outcome would be mathematically impossible.

limit of 8 mg/l based on design flow—would have resulted doubling the TN load to the nitrogen-impaired waters of LIS. *Ex.S.9-15*. Given Connecticut’s sensible comment for EPA to comprehensively allocate the aggregated out-of-basin load, EPA established a reasonable plan that would meet the requirements of section 301(b)(1)(C), and exhaustively outlined the factors and underlying rationales for the Permit’s TN load. Section.II.C.3 (explaining the decision to utilize 5 mg/l, 8 mg/l and 10 mg/l to derive load-based limits).

Petitioner largely ignores EPA’s explanation, claiming that the TN limit was based on what EPA believed the SRWTF could achieve through optimization alone (as EPA believed the smaller facilities could), even though EPA explained that the 5 mg/l was chosen in part because it could be achieved through “readily available treatment technology.”⁴ *Ex.S.12*.

Petitioner provides no support for its repeated allegation that it was impeded from lodging objections to EPA’s decision on appeal, a fact that affirms EPA’s decision to move forward with permit issuance. If there is an argument that Petitioner would have aspired to develop but for the lack of an additional comment period, they have yet to identify it.⁵

Finally, EPA’s decision was informed by its concern over nutrient discharges: “[W]hen permitting for nutrients, time is of the essence, because [] nutrients [tend] to

⁴ The TN limit is above the annual load that the SRWTF was discharging *without any* optimization requirements or limits in its previous permit. *Ex.S.47 and Appendix A*. Annual average loads for the last 5 years from Springfield with no effluent limit were: 2018 1,837 lb/day; 2017 1,953 lb/day; 2016 1,643 lb/day; 2015 2,377 lb/day; and 2014 2,303 lb/day.

⁵ Petitioner received adequate legal notice of the TN limit; it also received notice in fact on multiple occasions of the allocative plan that EPA had devised in response to comments. Although Petitioner expresses surprise at the derivation of its limit, it filed comments on other NPDES permits for other out-of-basin dischargers containing the same methodological approach. *Ex.Y*. Petitioner cites a one-page summary of TN limits, *Pet.Ex.8*, but fails to reference a companion PowerPoint presentation indicating POTWs above 10 MGD would receive limits derived from 5 mg/l TN. *Ex.EE.11*.

recycle in the ecosystem and exacerbate existing impairments[.]” *Ex.S.26*. It bears repeating that Springfield’s prior permit, which did not have any nitrogen limit, is **15-years expired**.

For all these reasons, EPA’s exercised reasonable discretion to issue the Permit without reopening the public comment period.

2. EPA allocation of TN loads to out-of-basin facilities based upon their design flows was rational in light of the record

Petitioner claims that EPA does not provide any basis for how it selected the target concentrations of 5, 8 and 10 mg/l, how it selected the facility design flows that would determine which target concentrations would apply, or why those concentrations or the resulting limits are necessary to achieve applicable WQS or the WLA established in the LIS TMDL. *Pet.11*.

Petitioner’s assertion is contradicted by the record, in which EPA detailed its technical determinations. *Ex.S.9-33* (basis for selecting 5, 8 and 10 mg/l; basis for assigning those targets based on design flow; basis for determining that the limits were “necessary” under section 301 and 122.44(d); determination that that resulting limits are necessary to achieve WQS; determination that the limits are consistent with the assumptions of the assumptions and requirements of the LIS TMDL WLA). By failing to confront EPA’s position, Petitioner leaves EPA’s analysis unrebutted and, logically, leaves the Board “with a record that supports the Region’s approach.” *In re Westborough*, 10 E.A.D. at 311.

Petitioner points to a draft NPDES permit issued to another facility—Keene, NH’s POTW to support its claim that EPA arbitrarily assigned TN limits based on design flow. This does not demonstrate grounds for review. *Section.III.A.4*. Unlike Keene’s discharge, which originates in another state hundreds of miles from the LIS, Petitioner’s facility is on the main stem of the Connecticut River, close to its mouth.

Petitioner has manifestly failed to carry the particularly “heavy burden” assigned to it in instances where EPA has exercised its considered judgment on an “inherently” technical or scientific issue, in this case the decision to impose a nitrogen limit. *D.C. Water & Sewer Auth.*, 13 E.A.D. at 742. *Section.III.A.3.*

3. EPA’s determination of the TN limit was not predicated on the SRWTF’s ability to achieve it, but on the magnitude of its discharge and proximity to LIS

Petitioner objects to its TN limit because “a statistical calculation of historical flow and recent process optimization efforts...demonstrates that the SRWTF’s is likely to violate the [TN limit]” without substantial investment. *Pet.12.*

Once more, Petitioner mischaracterizes the explicit basis of the limit. As explained in *Section.II.C.3.i*, the TN limit assigned to Springfield and the three other largest facilities was derived because of the relative magnitude of the TN load from these facilities. They were not based on “on the SRWTF’s ability to meet that limit” through optimization, *Pet.12*, but through “readily available treatment technology.” *Ex.S.12.* Petitioner is now meeting the mass-based TN limit. *Ex.S.47 and Appendix A.* EPA did *not* “assume” that the SWRTF could continue to meet the TN limit using its existing technology when and if SRWTF approaches design flow (which would necessitate effluent concentrations of 5 mg/l). Rather EPA recognized that Petitioner may need to invest in its wastewater infrastructure at some point in the future to comply with their legal obligations under the Act.

Petitioner separately objects to the TN limit on the grounds that the SRWTF currently lacks treatment technology to meet the TN limit and is thus at risk of non-compliance. *Pet.12-14.* This claim fails, because section 301(b)(1)(C) requires limits to

meet WQS, without exception for cost or technological feasibility. *Blackstone*, 690 F.3d at 33. The statistical analyses provided in *Pet.Exs.10-11* are unconvincing. Petitioner provides figures without attendant data or any explanation of assumptions (*e.g.*, averaging period, date range, *etc.*). While it will always be possible to project hypothetical violations using statistical analysis depending on the assumptions used, Petitioner does not grapple with EPA's analysis of plant's historical performance showing consistent compliance with the limit.

Factually, Petitioner's objections turn on a presumption that it will immediately be required to meet a concentration-based 5 mg/l. This, as previously explained, ignores the fact that Petitioner does not need to achieve effluent concentrations of 5 mg/l for the foreseeable future because they have been assigned a mass-based effluent limitation calculated on design flow, which they are far below and likely may *never* need to meet. *Ex.S.144-145*. Without refuting EPA's responses, Petitioner merely reprises its flawed analysis, which is insufficient to obtain review on this technical issue.

Next, Petitioner queries whether "additional risk will arise with anticipated increases of influent flow to the SRWTF after completion of CSO LTCP projects. *Pet.12-14*. Although this is conceivable, "[l]ess speculation and more empirical evidence is needed by petitioner to justify review of the permit." *In re Texas Indus., Inc.*, 2 E.A.D. 277, 279 (Adm'r 1986). Because Petitioner does not establish when these potential increases will occur or whether they might be mitigated by other measures, such as activities by Co-permittees to reduce infiltration and inflow into the system through good operation and maintenance practices, as required under the Permit, Petitioner's argument does not demonstrate error.

4. EPA’s decision to remove allowances for four CSO diversion projects was rational, because the TN limit was increased in the Permit to a level sufficient to accommodate any incremental increases

Petitioner argues that EPA erred by removing a Draft Permit provision that would have allowed for incremental increases in TN discharges to facilitate tie-ins from other POTWs; to maximize flow to the SRWTF to reduce the volume and frequency of CSOs; and to accommodate future growth. *Pet.14-16*.

Petitioner’s concerns are misplaced. Because the TN limit was based on design flow—far above the SRWTF’s current flows—it accounted for all of the potential increases outlined by Permittee. *Ex.S.15, 145*. Thus, EPA’s allocative plan logically obviated the need for the incremental increase provision.

Regarding compliance with the TN limit, EPA indicated that this was a long-term planning question, acknowledging that “if...flow and/or...TN loading increases substantially in the future...it may be necessary to enhance the treatment...to achieve lower TN concentrations to continue to meet the total load limit of 2,794 lb/day.” *Ex.S.146*.

Finally, EPA identified another reasonable regulatory mechanism to account for any TN loads that are redirected to the Facility: permit modification or, given the longer-term timing of these potential load increases, permit renewal. *Ex.S.148*. “This...will allow EPA to make record-based permit adjustments [for] flow diversions that have actually materialized.” *Ex.S.147*. In sum, EPA concluded “[t]his will leave the Permittee in the same position as under their proposed structure[.]” *Id*.

Petitioner fails to address EPA’s response. Instead, Petitioner complains that potentially increased flows “likely would contribute to additional violations of the Final Permit.” *Pet.14*. But the fact that the TN limit could be violated in the future does not speak

to the reasoned, record-based rationale for EPA's decision. Petitioner's implication that its only recourse is to violate the permit requirements is misguided; at some point in the future, it could make upgrades to the SRWTF or seek a necessary compliance schedule. But, "[a] permit appeal is not a forum to entertain speculations about future permit violations and enforcement." *In re City of Caldwell*, NPDES Appeal No. 09-11, at 14-15 (EAB Feb. 1, 2011) (Order Denying Review).

Petitioner expresses a distaste for the possibly resource-intensive permit modification process to implement load increases, concluding that this will create a disincentive for smaller facilities to consolidate. *Pet.16-17*. This objection amounts to a preference over the regulatory vehicle for implementing any flow increases, not a demonstration of reviewable error. But even the rationale underlying this preference does not add up: facilities that might hypothetically contribute flow to the SRWTF need not secure a permit modification to do so.

5. EPA derived the TN limit in a manner fully consistent with 40 C.F.R. § 124.44(d)

Petitioner contends that EPA failed to follow NPDES regulations, the NPDES Permit Writer's Manual, and other guidance to determine the need for a TN WQBEL in the Permit. *Pet.16-21*.

First, Petitioner alleges that the TN Limit assigned to the SRWTF was inconsistent with the LIS TMDL, because in Petitioner's view the assumed out-of-basin reductions (25% from baseline) have already occurred. *Pet.17-19*. On that assumption, Petitioner concludes that the existence of WLAs for CT/NY POTWs forecloses EPA's ability to impose any more stringent WQBEL on the SRWTF under section 301 of the Act. *Id.* at 19.

Petitioner's position is meritless and flouts Board precedent. "TMDLs are by

definition maximum limits; permit-specific limits...which are more conservative than the TMDL maxima, are not inconsistent with those maxima, or the WLA upon which they are based.” *In re City of Moscow*, 10 E.A.D. 135, 148 (EAB 2001) (upholding permit issuer’s discretion to deviate from a WLA based on new information). This interpretation is consistent with other provisions of EPA regulations, including 40 C.F.R. § 122.44(d)(4) (requiring NPDES permits to include “any requirements in addition to or more stringent than...standards under sections 301...of the CWA necessary to...[c]onform to applicable water quality requirements under section 401(a)(2) of CWA when the discharge affects a State other than the certifying State”). *See also City of Taunton*, 895 F.3d at 139-40 (upholding EPA’s decision to establish necessary permit limits to comply with WQS based on available information, *citing Upper Blackstone*, 690 F.3d at 26).

Petitioner ***explicitly*** concedes that the assumptions of the LIS WLA apply to its discharge. *Pet.19*. Its complaint that the 25% out-of-basin TN reduction has been met ignores EPA’s rationale for imposing an enforceable WQBEL to ensure that the SRWTF and other out-of-basin POTWs will continue treatment to ensure that result, in accordance with section 301(b)(1)(C) and 401(a)(2). *Section.I.A.1-3*.

Petitioner, furthermore, overlooks EPA’s additional justification for maintaining the TN limit—Connecticut’s antidegradation policy—rendering any perceived error with the justification under § 122.44(d)(1)(vii)(B) harmless, as it would not change the permit result. *See In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 749 (EAB 2001) (declining to review errors that have no bearing on the ultimate conclusion by the permit issuer); *In re Old*

Dominion Elec. Coop., 3 E.A.D. 779, 780-82 (Adm'r 1992) (same).⁶

Instead, Petitioner fixates on EPA's reasonable potential analysis. Petitioner's dismissal of the analysis as "unsupported" contradicts the administrative record and does not satisfy Petitioner's burden to demonstrate clear EPA error. *Pet. 17; Ex. C. 18-21; Ex. V. 3-4; Attachment A; Ex. S. passim*. EPA established the TN limit based on data indicating that SRWTF is contributing significant nitrogen loading to LIS, which is already exceeding its assimilative capacity for nitrogen and suffering the continuing effects of cultural eutrophication. EPA's rationale is sufficient, as the "reasonable potential" analysis "requires" only "some degree of certainty greater than a mere possibility, but it leaves to the permit writer's scientific and technical judgment how much certainty is necessary." *Upper Blackstone*, 14 E.A.D. at 599 n.29. Petitioner's contention that EPA's reasonable potential analysis was clearly erroneous because it differed from one proposed reasonable potential methodology in EPA guidance is plainly incorrect. *Pet. 16*. Guidance is just that: while "valuable tools in aiding the Agency's deliberative processes where regulations may lack details about their implementation, they do not confer any rights nor are they binding." *Attleboro*, 14 E.A.D. at 438 n.71 (EAB 2009). And NPDES regulations do not require EPA to use any particular methodology or modeling to determine whether the "reasonable potential" standard is met, and EPA is not required to demonstrate that nitrogen is causing impairment before setting a nitrogen limit. *See City of Taunton*, 895 F.3d at 133 (citing *Upper Blackstone*); *see also City and County of San Francisco*, NPDES Appeal 20-01, slip op. at 22-23 (EAB, December 1, 2020) (rejecting Petitioner's argument that the

⁶ Having waived any arguments relating to antidegradation by failing to raise them in its Petition, Petitioner is of course *foreclosed* from pursuing the matter in their reply brief. 40 C.F.R. § 124.19(c)(2).

WQBEL was improper because it failed to follow the standards-to-permits process specified in the Permit Writer's Manual). Even assuming that EPA relied on guidance here, EPA was not directed to project instream concentrations based on the TN in SRWTF's effluent, as Petitioner claims. *Pet.17*. The portion of the Manual cited by Petitioner does not include such a requirement, but underscores flexibility afforded a permit writer, even providing for *qualitative* approaches.⁷

6. EPA properly determined that the SRWTF can meet the TN Limit and that a compliance schedule would not be appropriate under 40 C.F.R. § 122.47

Petitioner contends that EPA erred by failing to provide the SRWTF with a compliance schedule to achieve the TN Limit, claiming that their current Biological Nutrient Reduction process is not intended to achieve concentrations below 8 mg/l and that violations at 5 mg/l are “even more likely[.]” *Pet.21*.

There is no right to a compliance schedule; one “may” be provided “when appropriate.” 40 C.F.R. § 122.47(a).

As described *supra* footnote 4, EPA was not convinced by the Permittee's claims about the SRWTF's inability to meet the new effluent limit using its existing capabilities. *Ex.S.144-145*. Petitioner restates those arguments here, which is insufficient to obtain review. *Section.III.A.2*.

Finally, although the Petitioner complains that an “administrative order is inadequate and unnecessarily burdensome[.]” and that an order “could subject the Commission to third-party challenges for failure to comply,” *Pet.21*, conjecture on

⁷ Petitioner makes a cursory reference to purported deficiencies into the Fact Sheet, citing 40 C.F.R. § 124.8, but ignores EPA's response to this issue. *RTC.133-134*.

enforcement actions does not constitute grounds for review. *In re Salt River Project Agricultural Improvement Dist.*, 17 E.A.D. 312, 320 n.10 (EAB 2016).

7. EPA’s nitrogen optimization requirement was sufficiently clear to give SRWTF notice of its obligations and necessary to ensure compliance with WQS

Petitioner objects to a narrative WQBEL requiring it to “continue to optimize the treatment facility operations relative to total nitrogen removal through continued ammonia removal, maximization of solids retention time while maintaining compliance with BOD and TSS limits, and/or other operational changes designed to enhance the removal of nitrogen.” *Pet.22*. Petitioner contends that limit is “unduly vague” and “unnecessary.” *Id.* at 23.

Petitioner’s challenge to the optimization language on fair notice grounds ignores most of EPA’s response. Among other justifications, EPA indicated in response to Permittee’s objections that the provision provided a “clear endpoint” —to “enhance the removal of nitrogen” — and outlined the “objective factors” to consider when doing so: continued ammonia removal, maximization of solids retention time while maintaining compliance with BOD and TSS limits, and/or other operational changes. *Ex.S.92*. EPA also established a floor for compliance: “at a minimum, the facilities must not increase their nitrogen discharge loadings.” *Ex.S.32*. The Permit requires Petitioner to evaluate nitrogen optimization techniques over the first year, submit its findings to EPA, and then adhere to the plan for the duration of the permit term. Put otherwise, Petitioner need not comply with an amorphous standard residing in the mind of a hypothetical EPA inspector, but rather with an operational plan of its own making. *San Francisco*, slip op. at 29 (rejecting Petitioner’s claim that the narrative WQBELs failed to provide fair notice).

Petitioner ignores EPA's explanation, focusing instead on the dictionary definition of optimize provided by EPA. Petitioner, however, never explains why the express language of the provision, delimited by the ordinary meaning of a word in common usage, is insufficient to guide compliance. Its citation to *Gen. Elec. Co. v. U.S., Env'tl. Prot. Agency*, 53 F.3d. 1324, 1328-29 (D.C. Cir. 1995), for the generic proposition that a rule must clear enough to "warn a party about what is expected of it," does not advance Petitioner's argument. To the contrary, that case stands as a coda for what EPA has done here.

The Petitioner's contention that the optimization provision is "unnecessary" in light of the "new total nitrogen limit based on a reduced concentration target of 5 mg/l," is misinformed. *Pet.23*. Petitioner's TN Limit is mass based. It will only need to achieve a concentration of 5 mg/l *if and when* it reaches design flow, which it is well below. Until its flows approach the design flow, Petitioner can discharge at levels well above 5 mg/l and still achieve the TN Limit. Petitioner leaves unaddressed the principal water quality justification for the optimization requirement. EPA explained that "this narrative condition also requires dischargers to take reasonable steps to minimize loading to LIS, which is important given that cultural eutrophication is ongoing in that water body." *Ex.S.92*; *see also* 24 (explaining EPA's precautionary approach to nutrient permitting). Given this, EPA's decision to retain this the protective optimization provision and guard against the potential for long-term and sustained increases in TN loading from the SRWTF into the nitrogen-impaired waters of LIS is entirely in keeping with section 301's command to ensure compliance with WQS, including antidegradation requirements.

B. CSO Issues

1. EPA properly included regulatory language prohibiting bypass of secondary treatment.

Petitioner objects to EPA's language addressing the bypass of secondary treatment by taking out of context a mistaken statement in the Fact Sheet: "At this time, [] no feasible alternatives to this bypass have been identified without the discharge of additional untreated sewage in system's CSOs." *Pet.24, Ex.C.8*. Petitioner fails to substantively address EPA's explanation in the RTC for why the record, despite that statement, did not demonstrate no feasible alternatives to the extent required by the CSO Policy in order to justify a prospective allowance of a bypass. *Ex.S.46-47*. Although not an exhaustive list, EPA noted three specific technical issues as specified in the Policy for which it would require further information before it could affirmatively approve CSO-related bypass: a cost-benefit analysis comparing elimination of bypass to other CSO abatement projects; clarification under which specific wet weather conditions a CSO-related bypass should be allowed; and information to ensure that bypass will not cause exceedances of WQS. *Ex.S.46-47; Ex.E.18693-94*. Rather than rebutting EPA's response, Petitioner simply asserts that EPA is bound by a mistaken statement, subsequently corrected. *Pet.25*.

Unaccompanied by technical analysis or mention of the factors in regulation and policy, the statement was inaccurate and not intended to constitute a determination under 40 C.F.R. § 122.41(m)(4)(ii) and Section.II.7 of the Policy. *Ex.C.8*. Although the Draft Permit stated that "bypass of secondary treatment is allowed when wet weather influent flow exceeds the wet weather capacity of the secondary treatment," it also prohibited bypass, which conflicts with a determination that there are no feasible alternatives to bypass. That the Draft Permit retained the bypass prohibition, alongside other incongruent language,

demonstrates EPA was not intending to make a formal no feasible alternatives analysis determination. The Draft Permit also contained none of the permit provisions required by the Policy for prospective bypass authorization (*e.g.*, definition of specific conditions where it is allowed). *Ex.E.18693*. Moreover, EPA recognized this statement was mistaken, explained the proper analysis, and appropriately remedied it in the Final Permit. *See In re Chem-Security Systems, Inc.*, 1989 WL 253224, at *2 n.11 (EAB 1989) (“It is entirely appropriate for a public comment period to result in changes to the Region's decisional basis, the record, or the draft permit itself.”)

2. EPA reasonably required measurements of bypass flow volumes

Petitioner objects to the requirement to measure bypass flows using a meter, citing the claimed rarity of such events, the level of effort it would require, and the perceived lack of regulatory authority to require it. *Pet.25-26*. Petitioner reiterates comments made on the Draft Permit without substantively engaging with EPA’s response, which directly addressed each of Petitioner’s complaints. *Ex.S.48, 108*. A key rationale for this requirement—concerns for increased flows—was not speculation; Petitioner noted in its own comments that “[f]uture increase in flow to the plant, which will be realized through planned capital projects and potential expansion of regionalization, will also contribute to an increase in annual loading.” *Ex.S.108*. Moreover, Petitioner’s claim regarding the rarity of bypass is incorrect; the record demonstrates an average of 20 bypass events per year over a five-year period. *Ex.C_AttachmentD.2*. The provision here falls within EPA’s broad monitoring authority, *see Port St. Joe*, 7 E.A.D. at 306, and review should be denied.

3. EPA did not abuse its discretion in declining a compliance schedule for measurement of comingled flow

Petitioner objects to EPA’s decision not to include a compliance schedule for the

permit requirement that effluent samples be taken at “a representative point,” including after comingling of flows that bypass secondary treatment. *Pet.26*. Petitioner has failed to address, let alone rebut, EPA’s rationale for denying its compliance schedule request—the permit requirement is not new and permittee was required by its prior permit to have already been sampling at such a point. *Ex.S.48-49*. Because compliance with this term should have already been achieved, a schedule would not ensure compliance “as soon as possible,” as required by 40 C.F.R. § 122.47(a)(1). Review should be denied.

4. EPA properly classified Outfall 042 as a CSO

Petitioner objects, on two bases, to the classification of Outfall 042 as a CSO, as opposed to a bypass: that 042 is not a CSO within the meaning of the Policy and that EPA is foreclosed from permitting 042 as a CSO because previous permits did not do so. *Pet.26-30*. These claims are factually and legally flawed.

As to whether Outfall 042 is properly considered a CSO, Petitioner fails to rebut EPA’s reasonable application of the Policy. According to Petitioner, 042 should be considered a bypass because it discharges wastewater directly to a receiving water due to the “plant’s hydraulic capacity limitation.” *Pet.28*. Petitioner asserts that this is different than a CSO, “which occur[s] when combined storm water and wastewater is discharged directly to the receiving water because precipitation-induced flows cannot be directed to the wastewater treatment facility and must be discharged directly to the receiving stream.” *Pet. 28*. The reason such CSOs cannot be directed to the WWTF is the “plant’s hydraulic capacity limitation,” *i.e.*, the exact reason for bypass in Petitioner’s definition. Failing to provide any other meaningful distinction between 042 and a CSO, Petitioner is left with the tautology that it should be considered a bypass simply because Petitioner labels it a bypass,

*e.g., Pet.Ex.13.*⁸ *Pet.27.*

Under the Policy, the key distinction between a CSO and a CSO-related bypass is that the former occurs before the WWTF and the latter occurs after receiving at least “primary clarification, solids and floatables removal and disposal, disinfection (where necessary), and any other treatment that can reasonably be provided.” *Ex.E.18693.*

Petitioner is unable to rebut that Outfall 042 discharges raw sewage⁹ as a result of high-flows and limited WWTF capacity, prior to the “headworks” or preliminary point of treatment at the WWTF—bar screens and solids removal.

Ex.C.Attachment_B_Process_Flow_Diagram (noting “raw wastewater” entering “bar screens”).

Instead, Petitioner, for the first time, asserts that EPA has misunderstood the issue because 042 is “not a CSO bypass” but rather a “plant emergency bypass.” *Pet.29.*

However, EPA’s regulations do not distinguish between types of bypasses. *See* 40 C.F.R. § 122.41(m)(4)(i). Moreover, where the reason for the discharge at Outfall 042 is

undisputedly the “plant’s hydraulic capacity limitation,” *Pet.28*, the distinction Petitioner is attempting to draw has no meaning. A CSO-bypass, like a CSO-discharge, occurs where the flows in the collection system exceed the “plant’s hydraulic capacity limitation,”

necessitating a discharge of flows above that limitation lest the WWTF be washed out.

Application of the Policy to Outfall 042 is appropriate as the discharge undisputedly occurs

⁸ Petitioner failed to utilize the O&M Manual for argument during the comment period and is procedurally barred from doing so now. *Section.III.A.1.*

⁹ Petitioner newly asserts in its Petition that “[c]hlorine treatment is being added at the Influent Structure for odor control.” *Pet.27.* This issue is waived. EPA clearly labelled 042 as a CSO that receives no treatment and that the omission of 042 as a CSO in the previous permit was inadvertent. *FS.7-8;27.* Nevertheless, the addition of chlorine to the discharge at 042 does not alter the fact that it occurs before the “headworks” of the WWTF and fails to satisfy the minimum treatment for a CSO-related bypass.

due to high flows caused by precipitation events. And the correct application of the Policy leads to the conclusion that Outfall 042 is a CSO.

Finally, Petitioner's argument that EPA is foreclosed from permitting Outfall 042 as a CSO because previous permits took a different approach is unpersuasive. An agency may change its position so long as it "provide[s] reasoned explanation for its action" and "display[s] awareness that it *is* changing position." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). EPA expressly acknowledged it was changing its approach in the Fact Sheet (at 27) and provided a detailed history of the permitting approach to Outfall 042 in its RTC. *Ex.S.52-53; Ex.G.2009_CS0_Permit_and_RTC*). It thus demonstrated its awareness that it was changing its position. *Fox Television*, 556 U.S. at 515. EPA also provided a detailed analysis, rooted in the Policy and regulations, that supports its position as both a legal and technical matter, *i.e.*, a "reasoned explanation for its action." *Id.*

Regarding the compliance schedule for Outfall 042, Petitioner once again fails to substantively engage with EPA's response to its comment. *Ex.S.58*. EPA stated that, based on its technical expertise and experience, one year is a reasonable amount of time to install basic controls such as baffles, screens, and racks. *Id.*

5. The CSO public notification requirements are reasonable and consistent with the Policy.

Petitioner objects to several elements of the Permit pertaining to public notification of CSO events. *Pet.35*. Petitioner asserts that all these provisions are clear error because they purportedly exceed the Policy's NMCs. *Pet.30-31*. Petitioner misunderstands the role of the NMCs, which are, by definition, "minimum" levels and therefore a floor, not a ceiling. Moreover, the NMCs establish broad controls that require "implementation of actual control measures [] based on site-specific considerations." *Ex.E.1869I*. EPA

Guidance specifically emphasizes that “[t]he most appropriate mechanism for public notification will probably vary with local circumstances.” *Ex.Z.9-1*. Accordingly, EPA’s decision to include notification requirements that implement the NMCs with more specificity due to local circumstances was entirely appropriate and, as demonstrated below, supported by the record.

6. The compliance schedule for public notification is reasonable.

Petitioner objects that EPA failed to provide adequate time to implement the public notification plan requirements. *Pet.31*. In the RTC, EPA explained that it had extended the time for Petitioner to develop and implement a public notification plan from 12 month to 24 months. *Ex.S.119*. Nevertheless, Petitioner asserts it was clear error for EPA not to provide a total of 36 months for implementation. *Pet.31*. Petitioner’s claim that 36 months are necessary to comply with requirements unique to Massachusetts is undercut by the fact that other Massachusetts CSO communities have complied with a requirement to develop and implement a plan in 12 months. *Ex.S.119*. Petitioner’s representation, *Pet.31*, that all CSO permittees in New Jersey are provided with 36 months is similarly unavailing.

Section.III.A.4.

7. The requirement for initial notification of CSO events within two hours appropriately implements Connecticut’s notification law.

Petitioner objects to the requirement to provide notice of CSO activations within two hours of becoming aware of such an event. *Pet.32-33*. In the Draft Permit, EPA proposed requiring initial notification within 24 hours. Several commenters questioned the adequacy of that requirement, including Connecticut (*Ex.S.169*), so EPA re-proposed the permit in 2018 with a two-hour initial notification requirement. This approach was necessary to account for the downstream state’s “real-time” notification law (requiring

POTW operators to report sewage spill to CTDEEP within two hours) and use of the waters. *Ex.S.120; Ex.V.5.*

Petitioner's objection does not engage with this rationale other than to say it "should not dictate" the requirement. *Pet.33.* Rather, Petitioner unpersuasively relies on contrasting the Permit with the initial notification requirement for CSO dischargers to the Great Lakes Basin, but unlike dischargers to the Great Lakes Basin, the SRWTF is located immediately upstream from Connecticut. *Pet.32-33. Section.IV.A.4.*

8. The requirement to provide supplemental notification within 24 hours serves an important public health purpose.

Petitioner objects to the requirement to provide supplemental notification within 24 hours, claiming that EPA failed to identify a public health benefit. *Pet.33-34.* EPA, however, included two paragraphs on that very issue. *Ex.S.120-21.* Petitioner claims EPA provided "no response" to its comments regarding the inherent unreliability of flow volume within 24 hours, *Pet.33.* Not only did EPA respond to this comment, it *removed* the requirement to report flow volume in this notification from the permit. *Ex.S.121.* In addition to these significant procedural flaws, EPA's rationale for this requirement is sound. Supplemental notification provides valuable information to the public, particularly as to the cessation of the CSO event. *Ex.S.120-21.*

9. The requirement to identify the location of each discharge is reasonable.

Petitioner objects to the requirement to identify the location of each CSO discharge in the supplemental notification on the basis that it provides "no added benefit or useful information." *Pet.35.* As EPA explained, Petitioner's CSO outfalls are located within a relatively small geographic area. *Ex.S.120.* Therefore, providing the precise location of

CSO discharges provides beneficial information for the public that would not be possible from generic descriptions. *Id.* Petitioner does not address this analysis and thus fails to establish grounds for review.

10. The prohibition of septage during wet weather events limits water quality impacts from CSOs.

Petitioner objects to a permit prohibition on discharges of “septage, holding tank wastes, or other material, which may cause a visible oil sheen or containing floatable material” to the sanitary sewer system “during wet weather when CSO discharges may be active,” except for discharges from domestic sources. *Pet.35*. Petitioner unconvincingly claims that this prohibition is unnecessary and infeasible.

EPA explained that the provision is necessary because it is undisputed that discharges either through CSOs or flow without secondary treatment contain higher concentrations of pollutants than fully treated flow. *Ex.S.68*. This provision is designed to minimize environmental and public health risks by limiting the addition of pollutant-laden flows that can reasonably be withheld from the sanitary sewer system when the risk of CSOs and secondary bypass is present.

This provision is feasible, especially since EPA recognized that the Permittee is limited in its ability to control the addition of pollutants to the sanitary sewer system from domestic sources. *Ex.S.68*. Accordingly, the Permit makes clear that these sources were not covered by the prohibition. *Id.* However, for non-domestic sources, the Policy clearly articulates as one of the NMCs the use of the POTW’s “pretreatment requirements to assure CSO impacts are minimized.” *Ex.E.18691. Cf. Ex.Z.4-1*. Petitioner exaggerates the scope of this provision as a “prohibit[ion] [of] industrial discharges during weather.” *Pet.36*. The actual provision is more limited, prohibiting only certain *types* of industrial discharges (*i.e.*,

those that may cause an oil sheen or contain floatable material) when CSO discharges may be active. This requirement is consistent with and should be achievable through the already-existent pretreatment requirements, *e.g.*, control of fats and grease. *Ex.D.Part.I.G.*

11. EPA reasonably required Petitioner to report duration and volume of CSO discharges.

Petitioner challenges the requirement to report the duration (in hours) and volume (in gallons) of each CSO discharge, arguing that this requirement exceeds the NMC. *Pet.36-37.* Again, Petitioner misunderstands the NMCs as a ceiling or maximum on CSO permit requirements, when they represent the *minimum* level of controls to be implemented by more specific permit terms. *Ex.E.18691.* Petitioner’s assertion that the NMCs do not require “the reporting of hours and volume of discharge” is mistaken. *Pet.37.* For permittees who are developing or have developed an LTCP, like Petitioner, the Policy states they “should develop a comprehensive, representative monitoring program that measures the frequency, *duration*, flow rate, *volume*, and pollutant concentration of CSO discharges”) (emphasis added). *Ex.E.18692.*

EPA explained that the measurement data of CSOs is critical for evaluating compliance with technology-based effluent limitations contained in the permit and the assumptions set forth in the Permittee’s LTCP. *Ex.S.123.* Based on EPA’s and MassDEP’s experience, direct measurement of this data is most accurate and therefore this is the required approach. *Ex.S.123.* Petitioner has not provided any evidence to rebut the fact that direct measurement is the most accurate approach to measurement, warranting denial of review. *Section.III.A.3.*

12. EPA’s “dry weather” definition is consistent with the CSO Policy.

Petitioner objects to the Permit’s definition of “dry weather.” *Pet.37.* The Permit

prohibits “dry weather overflows” from CSOs and requires certain performance measurements during dry weather. “Dry weather” is defined “as any calendar day on which there is less than 0.1 inch of rain and no snow melt.” The Policy applies “to all CSSs that overflow as a result of storm water flow, including snow melt runoff.” *Ex.E.18689*. It does not apply to “CSOs during dry weather,” defined as “the flow in a combined sewer that results from domestic sewage, groundwater infiltration, commercial and industrial wastewaters, and any other non-precipitation related flows (*e.g.*, tidal infiltration).” *Id.* Petitioner’s objections are based on its concerns that it may experience a CSO discharge “with 0.1 inches of rain” or “a significant amount of snow melt.” *Pet. at 37-38*. Neither concern identifies a clear error with EPA’s approach.

As for the possibility of a CSO discharge occurring on a day with less than 0.1 inch of rain, Petitioner provides neither any evidence of previous CSO events caused by less than 0.1 inches of rain nor other technical analysis, even though this definition was included in Petitioner’s previous permit (Part I.A.2.c.). EPA has also consistently used this definition in other CSO permits. Speculative and unsupported contentions are insufficient to obtain review.

Regarding snow melt, Petitioner concern that it would run afoul of the dry weather CSO prohibition if it experienced a CSO discharge on a day “with a significant amount of snow melt” is misplaced. *Pet.38*. Any day with snow melt is, by the Permit’s definition, not “dry weather.” *Ex.D.Part I.A.1.e*; I.B.3.d. EPA did not “fail[] to address discharges caused by snowmelt.” *Pet.38*. Rather, it explicitly defined such discharges to be non-dry weather CSO discharges.

C. Co-Permittee Issues

1. EPA's decision to include satellite communities as Co-permittees in the Permit was rationally based in the administrative record.

Petitioner's passing allegation that EPA erred by including satellite collection facilities that contribute wastewater effluent to the SRWTF is procedurally barred and meritless. *Pet. 24*. Petitioner does not dispute that municipal satellite collections systems comprise a portion of a POTW, nor that they operate point sources, nor that they discharge pollutants to navigable waters, but narrowly contends that EPA is obligated to issue a separate NPDES permit to each individual system. *Pet.24*.

The issue of whether municipal satellite collection systems are subject to the NPDES program and may be included with a regionally integrated plant has been conclusively settled in EPA's favor. *Charles River Pollution Control District*, 16 E.A.D. 623 (EAB 2015). Accordingly, EPA responded to—and rejected—Petitioner's theory that the Act requires separate NPDES permits for each constituent part of the regionally-integrated POTW. *Ex.S.40, 41*. In response, Petitioner restates its conclusion without substantively engaging with EPA's extensive legal rebuttal, *Pet.24* ("This rationale misses the point."), and thus fails to carry its burden. *Section.III.A.2*.

2. The operation and maintenance requirements applicable to Co-permittees are sufficiently clear to apprise these entities of their obligations

Petitioner objects to two aspects of the operation and maintenance requirements applicable to the Co-permittees. Petitioner contends EPA erred by declining to delineate the boundaries of each Co-permittee's respective municipal boundaries and by weakening the permit requirement to prevent unauthorized discharges caused by malfunctions of the sewer system infrastructure by adding the qualifying phrase "with the goal." *Pet.38-39*.

EPA recognized that, “[g]iven their knowledge of municipal infrastructure and boundaries, the [co-permittees] are in the best position to delineate the reach of their [respective] collection systems.” *Ex.S.70*. Regarding the commenter’s request to amend the preventative maintenance program intended to prevent unauthorized discharges (*i.e.*, overflows and bypasses) caused by malfunctions of the sewer system infrastructure, EPA concluded “it should remain a clear and enforceable condition of the permit and should not be weakened through...precatory terms.” *Id.* at 71.

Petitioner contends, without further explanation, that these two considered judgments are clearly erroneous, but without any further substantiation, this claim cannot demonstrate grounds for review. *Section.III.A.2*.

3. EPA provided sufficient time to Co-permittees to complete collection system mapping

Petitioner asserts that EPA erred by declining to extend the timeframe for submitting collection system mapping from 30 to 36 months. *Pet.39*.

In responding to comments, EPA articulated several rationales for its position, and noted that the “commenter has not identified any specific impediments to meeting this requirement within the [given] time frame” and through its Petition it still has not. *Ex.S.152*. EPA based its conclusion, in part, on information in the record regarding EPA’s experience with the time required to complete mapping requirements across New England; Petitioner dismisses this as “anecdotal,” but cannot provide any countervailing instance of a co-permittee that has failed to complete collection system mapping within the time frame prescribed by the Permit. *Section.III.A.2*.

D. Miscellaneous Issues

4. EPA provided sufficient time for Permittee to complete an operation and maintenance plan

Petitioner asserts that EPA failed to provide sufficient time to complete a collection system study and an operation and maintenance plan, claiming that compliance with those provisions require 18 and 36 months, respectively, rather than 6 and 24 months provided by the Permit, because of the Permittee's governmental and procurement processes. *Pet.40*.

EPA offered several explanations for retaining the two-year schedule. *Ex.S.74*. For example: "EPA has been including...CMOM requirements in municipal permits in Massachusetts for more than 10 years and permittees and co-permittees have been able to fulfill these requirements within this timeframe, utilizing available resources and expertise." *Ex.S.74*. Petitioner again dismisses EPA's response as "anecdotal," but if it possesses specific facts that would call EPA's decision into question, they appear nowhere in its Petition. Because Petitioner ignores the basis for EPA's conclusion, the Board should deny review. *Section.III.A.2*.

5. EPA provided sufficient time for Permittee to analyze pretreatment requirements

Petitioner objects to the 120-day time frame provided in Permit to comply with a pretreatment requirement, alleging that EPA failed to account for Permittee's procurement process. *Pet.41*.

In response, EPA explained that Permittee had misapprehended the scope and burden associated with the requirement—to determine the need to revise pretreatment requirements, not to revise the requirements themselves—and that 18 months to complete the information form attached to the Draft Permit would be excessive. *Ex.S.75*.

Petitioner complains that EPA clearly erred by relying on its compliance expertise and experience with other permittees to derive a reasonable timeframe for this requirement, but impermissibly fails to explain why this basis is erroneous. *Section.III.A.2.*

6. EPA provided sufficient time for Permittee to comply with the new *E. coli* limits

Petitioner asserts that EPA should have provided eighteen rather than twelve months to comply with the Final Permit's *E. coli* limits. *Pet.42.* Petitioner believes that EPA rejected the longer schedule based on an erroneous understanding that Permittee needed "18 months to review plant performance and adjust disinfection levels[,]" as opposed to plant upgrades. *Id.*

The only concrete rationale for extending the compliance schedule presented in comments on the Draft Permit was to account for seasonal variation, a factor for which EPA explicitly accounted. *Ex.S.75* (providing one year to allow Permittee to observe plant performance under a range of weather conditions). As Petitioner ignores EPA's rationale for the requirement and fails to offer any support for extending the schedule beyond twelve months, review should be denied. *Section.III.A.3.*

7. EPA was not required to re-notice the permit based on the total phosphorus ("TP") monitoring requirement

Petitioner claims EPA erred by failing to reopen the permit to allow for comment on a TP monitoring requirement. *Pet.43.* EPA included the monitoring requirement in response to a comment, because "[e]urasian water milfoil is present in the Connecticut portion of the Connecticut River[,]" and [u]nderstanding... phosphorus inputs in the...River is important to understanding the spread of weeds... [.]” *Ex.S.177.* EPA's decision to move forward with Permit issuance was within its discretion, given that nutrient issues were on the table and

the broad discretion to impose monitoring requirements. *Supra*, 39. EPA's reasonable justification for including a monitoring condition here is left entirely unaddressed by Petitioner, compelling denial of review. *Section.III.A.3*.

V. **CONCLUSION**

Review should be denied.

VI. STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this response to the petition for review contains less than 14,000 words in accordance with 40 C.F.R. § 124.19(d)(3).

Dated: Dec. 11, 2020

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VII. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to the Petition for Review and Statement of Compliance with Word Limitations, in connection with *In re Springfield Water and Sewer Commission*, NPDES Appeal No. 20-07, was sent to the following persons in the manner indicated:

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