

BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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ORAL ARGUMENT

IN THE MATTER OF:	:
	:
TOWN OF CONCORD,	:
	: NPDES Appeal No.
	: 13-08
NPDES Permit No.	:
MA0100668	:
	:

Thursday,
May 22, 2014

Administrative Courtroom
Room 1152
EPA East Building
1201 Constitution Avenue, NW
Washington, DC

The above-entitled matter came on for hearing, pursuant to notice, at 1:30 p.m.

BEFORE:

THE HONORABLE RANDOLPH L. HILL
Environmental Appeals Judge

THE HONORABLE CATHERINE R. MCCABE
Environmental Appeals Judge

THE HONORABLE LESLYE M. FRASER
Environmental Appeals Judge

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ALSO PRESENT:

Eurika Durr, Clerk of the Board

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P-R-O-C-E-E-D-I-N-G-S

1:32 p.m.

MS. DURR: The Environmental Appeals Board of the United States Environmental Protection Agency is now in session for oral argument. In re: Town of Concord, Department of Public Works, Permit No. MA0100668, NPDES Appeal No. 13-08.

The Honorable Judges Leslye Fraser, Randolph Hill, Catherine McCabe presiding. Please turn off all cell phones and no recording devices allowed. Please be seated.

JUDGE HILL: Good afternoon. My name is Randy Hill. To my left, or your right, is Judge Catherine McCabe. To my right, your left, is Judge Leslye Fraser.

I think most of you came down from the Boston area and we sincerely appreciate your making the effort to be here in person. Also good afternoon to -- I understand we're being watched on video by EPA Region 1, and

1 representatives of the town are also present
2 at that.

3 Let me go ahead and explain how we
4 would like to proceed today. We have
5 allocated 45 minutes for each side. We'll
6 hear first from the Petitioner, Town of
7 Concord. Then from EPA Region 1.

8 Concord, you may reserve up to
9 five minutes of your time for rebuttal if you
10 wish.

11 As we explained in our order
12 scheduling oral argument, we are most
13 interested in discussing today the issues of
14 the aluminum limit, the pH limit, and the flow
15 limit.

16 We would like to ask that each of
17 you address them in that order if possible;
18 aluminum and then flow and then -- I'm sorry.
19 Let me start again. Aluminum and then pH and
20 then flow.

21 If there is time after that, you
22 may certainly address either or both of the

1 other issues that Concord has raised. We do,
2 of course, always reserve the right to ask you
3 questions about those issues or anything else
4 we can think of.

5 With that understanding, before we
6 begin, let me ask each of you to introduce
7 yourself and for whom you are appearing
8 starting with the Petitioners, please.

9 MR. COX: My name is Robert Cox.
10 I'm counsel for the Town of Concord,
11 Department of Public Works, the Petitioner in
12 this matter. With me is my co-counsel Ned
13 Bartlett.

14 JUDGE HILL: Good afternoon, Mr.
15 Cox, Mr. Bartlett.

16 Here for the EPA?

17 MR. CURLEY: Your Honors, my name
18 is Michael Curley. I'm an attorney with EPA.

19 MR. BUKHARI: Samir Bukhari,
20 Office of Regional Counsel, Region 1.

21 JUDGE HILL: Thanks, everyone. So
22 we'll go ahead and proceed then with the Town

1 of Concord.

2 Mr. Cox.

3 MR. COX: Thank you very much. I
4 would like to reserve five minutes of time at
5 the end for rebuttal.

6 Turning to the first issue which
7 you've raise, which is aluminum. I want to
8 give you a little bit of background in
9 connection with that just to frame the issues.

10 In 2006 the region issued a permit
11 with no limits on aluminum. It was report
12 only. The draft permit that issued here set
13 forth a limit of 306 milligrams per liter.

14 After the draft issued and the
15 final permit issued, that limit was dropped to
16 255 milligrams per liter. So the town saw the
17 new limit of 255 for the first time when the
18 permit issued.

19 EPA, the region claimed, made this
20 correction because of a new calculation with
21 respect to the 7Q10 that was needed. It said
22 it made this change as a result of a comment

1 that the 7Q10 set forth in the factsheet was
2 not clear and there was a request for
3 clarification.

4 But instead of clarifying what the
5 region did here and instead of explaining how
6 they arrived at that 7Q10 calculation, what
7 the region did was simply recalculate the 7Q
8 river flow number and it used a different set
9 of data in order to do so and it did not
10 explain why it used this different set of
11 data.

12 What it did was it used
13 selectively data from 1993 to 2012 for the
14 final permit, whereas in the draft permit it
15 was relying upon data from 1971 to 2000.

16 Effectively the region tossed out
17 21 years of data, didn't use 21 years of data
18 from 1971 to 1992 and instead used its final
19 19 years and gave no reason why it made this
20 a distinction between the data instead of
21 using a full set of 40 years.

22 That resulted in a river flow

1 calculation that was less. It changed from 43
2 CFS to 26.1 CFS and resulted in the limitation
3 going from 306 milligrams per liter to 255
4 milligrams per liter. We contend that this
5 was an error of law and, in fact, an abuse of
6 discretion. But not only that --

7 JUDGE McCABE: Tell us what
8 practical difference it makes to the town.

9 MR. COX: Well, it makes a
10 practical difference in the level they need to
11 comply with. There is a big difference
12 between 255 and 306.

13 JUDGE McCABE: And what do you
14 need to do to comply with the lower limit?

15 MR. COX: There needs to be more
16 resources put into the facility in order to
17 achieve that level.

18 JUDGE McCABE: Resources of what
19 nature and size?

20 MR. COX: Chemicals that are
21 needed by the treatment facility that they
22 have here. They have a state-of-the-art COMAG

1 system that uses both aluminum -- uses
2 aluminum in order to deal with the phosphorous
3 limit. It has a very low phosphorous limit so
4 it results in increased cost for the town in
5 order to get to that limit.

6 JUDGE McCABE: Do you know what
7 the increased costs are?

8 MR. COX: I do not. I do not know
9 what that cost is.

10 But more importantly what the
11 region did here is apply the nationally
12 recommended water quality criteria when the
13 region knows full well that this criteria is
14 not applicable to -- shouldn't be applicable
15 to Massachusetts water.

16 JUDGE HILL: Before we move on to
17 the recommended criteria, I want to go back to
18 the calculation issue. You characterized it
19 as violation of law, I think. Are you
20 alleging that there is a procedural or a
21 substantive error that the region committed?

22 MR. COX: Both. We did not have

1 an opportunity to see this change until the
2 final permit issued. It's something that was
3 so large that we should have had an
4 opportunity to do so. Also that was error, an
5 abusive discretion to not use this full data
6 set to do this calculation.

7 JUDGE HILL: Mr. Cox, I assume you
8 are familiar with 40 CFR 124.14(b) which
9 basically says that if there are significant
10 new issues raised, that the region has the
11 discretion to reopen the comment period.

12 There is Board case law that
13 basically says that in essence as long as a
14 party has the opportunity to fashion arguments
15 on appeal before the Board that the region has
16 a lot of discretion not to reopen the comment
17 period. Is there really a procedural problem
18 here or is it just mostly substantive that
19 you're complaining about?

20 MR. COX: As I said, there is
21 both. In light of that regulation the region
22 could have re-issued so there would be an

1 opportunity to see the data and full
2 opportunity to comment. Mind you, on the
3 petition level we have 30 days to review this
4 data and respond. There is a limited window
5 in order to address these issues so that --

6 JUDGE HILL: If you had had the
7 opportunity to comment on the revised
8 calculation, what more would you have said?
9 You've raised several points in your brief.

10 MR. COX: Right.

11 JUDGE HILL: Cumulatively most of
12 those comments don't go to the recalculation.
13 There are comments that you complain about,
14 for instance, you know, that they use the
15 recommended level. There's no TMDL, etc.
16 None of those changed between proposal and
17 final so what would you have commented
18 differently if you had seen the revised
19 calculation?

20 MR. COX: We would have been able
21 to narrow in on this change and this data and
22 focus our comments specifically on that data

1 change as opposed to the permit or the
2 petition.

3 You saw the petition. We are
4 raising numerous issues in connection with
5 aluminum. It would have allowed us an
6 opportunity to narrow in on exactly what the
7 region did in order to change this data set.
8 And we expected --

9 JUDGE HILL: Do you think that the
10 change in the data set -- other than it was a
11 change, what was wrong with it?

12 MR. COX: Well, that data set, as
13 I said, if they used a full time period, that
14 would have been 40 years of flow. At least
15 from my understanding of flow, it does not
16 change that dramatically if you use a less
17 period of time. You have a fuller picture
18 when you use that full year -- that full 40-
19 year period.

20 JUDGE McCABE: Did you recalculate
21 to see what that would do to your limit?

22 MR. COX: We have not done that

1 calculation. But if we had this information
2 up front, we could have done so. We could
3 have provided comments on a revised draft
4 permit and have the full opportunity to do so
5 and get the region's response to that and
6 their Response to Comments.

7 JUDGE McCABE: Why is this appeal
8 not sufficient for you to be able to raise
9 that issue?

10 MR. COX: Well, we're here. We're
11 raising that issue. We hope it's sufficient.
12 But the question was is it a procedural issue?
13 Is it a substantive issue? It's both. I was
14 addressing the procedural side.

15 JUDGE HILL: Did you suggest -- I
16 mean, did you suggest in your comments that
17 they should -- I mean, one of your claims is
18 that actually they didn't use the newest data
19 with respect to the aluminum level discharge
20 by the plant. Did you make that comment to
21 the region?

22 MR. COX: I believe we did with

1 respect to raising issues of using the
2 national standard and the signs underlining
3 that. But your point about using more recent
4 data there, that was a flow discharge as
5 opposed to the flow of the river here where
6 there is a fuller body of information that
7 could have been used by the region and we say
8 that should have been looked at.

9 JUDGE HILL: Let me ask you about
10 that. One of your claims is that they didn't
11 -- I mean, not the flow but the level of
12 discharge from Concord. You say in your
13 petition that level is going down and the
14 region didn't use the newest data for that.
15 Do I understand your argument correctly?

16 MR. COX: That's correct. That's
17 right.

18 JUDGE HILL: You have that data.
19 Is the level going down?

20 MR. COX: The level is going down.

21 JUDGE HILL: What is it today?

22 MR. COX: I don't know. I don't

1 have that data with me. If you'd like it --
2 if you'd like it, I can get it and provide it
3 following the hearing.

4 JUDGE HILL: I'm just -- I mean,
5 part of what we're wrestling with on this
6 issue is even if we agreed there was some
7 procedural error here, what would change? I
8 mean, if you're still discharging way above
9 306, much less 255, then it may not make much
10 difference, in the real world at least, what
11 happened, what the region did here.

12 MR. COX: Right.

13 JUDGE HILL: That's what I'm
14 probing.

15 MR. COX: I know I have some of
16 the data here, not a complete data set here.
17 If you like, I can offer that up later to the
18 Board.

19 JUDGE HILL: We'll consider that.

20 MR. COX: Okay. Thank you.

21 JUDGE HILL: Continue.

22 MR. COX: The other issue that we

1 raise in connection with the aluminum limits
2 relates to the application of the National
3 Recommended Water Quality Criteria. The
4 region, as I began to say before, knows, or
5 should know, that it should not be applied to
6 Massachusetts rivers.

7 The background information here
8 with respect to the upstream data shows eschew
9 of the chronic aquatic life criteria. The
10 average here was 141. The region is well
11 aware that aluminum levels in Massachusetts
12 rivers are above the criteria.

13 It is aware that Massachusetts
14 itself is looking at the standard and is doing
15 an ongoing review with certain municipalities
16 of setting up site-specific information with
17 respect to that criteria.

18 Where the prior permit, the 2006
19 permit, had simply the report where EPA knew
20 that the state is working on this issue and
21 looking at site-specific information, we think
22 it would be appropriate -- this is where it's

1 an abuse of discretion -- to defer from
2 issuing the limit until that information, that
3 study, can be completed. We view that as an
4 error --

5 JUDGE HILL: Mr. Cox, I need you
6 to, if you would, talk about the Board's
7 decision in the Attleboro, Massachusetts case.
8 Haven't we kind of already ruled on this?

9 In that case we basically said
10 that placing an aluminum limit on the
11 recommended criteria is appropriate in
12 Massachusetts unless and until the state
13 adopts a site-specific criteria. Doesn't that
14 kind of control here?

15 MR. COX: You have ruled so. That
16 was five years ago, I think.

17 JUDGE HILL: Are there changed
18 circumstances?

19 MR. COX: I didn't say that. That
20 decision was five years ago. Here we are
21 raising that there is more knowledge that the
22 region has of data with respect to the rivers

1 and know that it has been a problem in
2 Massachusetts, which brought the Attleboro
3 case before you.

4 Certainly you ruled on it and you
5 ruled on it in Upper Blackstone as well. We
6 know you've done that. That is appropriate
7 for the region to defer here and it's an abuse
8 of discretion not to hold back when they know
9 that the state is working on the standard.

10 JUDGE HILL: The region's other
11 argument is that -- first, they essentially
12 argued they didn't have any discretion to do
13 that because Massachusetts law says use the
14 recommended level unless and until we adopt a
15 site-specific. Are you suggesting the region
16 should simply not put in a limit?

17 MR. COX: The region has done a
18 couple cycles of this permit where the
19 national standard has been out there since
20 1989 and has not imposed that limit. It could
21 defer to the 2006 permit. It could defer for
22 this permit as well.

1 JUDGE HILL: If they had done that
2 and there was, say, an NGO before us saying
3 they needed to put that limit in the permit,
4 how would we respond to that?

5 MR. COX: Well, we would put it
6 out for comments and put the comments in and
7 we --

8 JUDGE HILL: I mean, what would be
9 the legal argument to exclude it?

10 MR. COX: The legal argument would
11 be the same presentation that I'm providing to
12 you here, that it's appropriate to defer where
13 the state is working on this matter.

14 JUDGE FRASER: How is this not
15 within the region's technical judgment such
16 that the Board generally defers to a technical
17 question on what the limit should be? You're
18 saying they have the discretion which suggest
19 that we're in the realm of technical
20 discretion.

21 MR. COX: Right. Understood. We
22 are claiming that this is an abuse of

1 discretion given the circumstances where the
2 region is aware and knows that the state is
3 working on it, knows that questions have been
4 raised with the science, knows that
5 Massachusetts rivers, and this river, the
6 national standard is not suitable for these
7 rivers.

8 JUDGE HILL: Before we move on,
9 one of the arguments that you made in your
10 brief is that the region failed to follow the
11 technical support document by setting the
12 effluent limit equivalent to the wasteload
13 allocation. Is that correct?

14 MR. COX: That's correct.

15 JUDGE HILL: I'm curious why
16 you're arguing that. The region says in
17 response to that, well, yeah, that document
18 says that it's discouraged because it
19 generally results in limits that aren't
20 stringent enough rather than too stringent and
21 that a permit writer needs to take into
22 account the effluent at that facility to write

1 a more stringent limit. If we agreed with you
2 that they should not follow the TSD there,
3 would that -- what did you get from that?

4 MR. COX: Well, first, they should
5 be following the guidance on what should be
6 done. Second, I believe our technical folks,
7 and we put it in the petition, said the
8 opposite of what the region concluded.

9 JUDGE McCABE: Before we leave the
10 aluminum issue, Mr. Cox, I would just like to
11 get some clarity on what relief you're asking
12 us for. In the petition we're asked to remand
13 the permit to the region to revise the
14 aluminum effluent limit. What are you
15 seeking, a limit of zero? Of 306? What are
16 you asking for?

17 MR. COX: We are seeking to have a
18 deferral of the permit so that would be report
19 only.

20 JUDGE McCABE: So no limit.

21 MR. COX: So no limit.

22 JUDGE McCABE: Revise the effluent

1 limit to zero.

2 MR. COX: To zero.

3 JUDGE McCABE: Okay. Now, if we
4 are not willing to do that let's say
5 hypothetically --

6 MR. COX: The alternative?
7 Alternatively to the limit that was set forth
8 in the draft. Also, what is left out of the
9 permits is any consideration with respect to
10 greater dilution that comes during winter
11 time.

12 It would be appropriate for this
13 facility to have a seasonable limit. A
14 seasonal limit was imposed with respect to
15 phosphorous, again, because this is the first
16 time we are seeing a limit here. And the data
17 does show that the facility is going to have
18 a difficult time complying immediately with
19 this new standard during summer months.

20 JUDGE HILL: I didn't see that
21 anywhere in your comments on the proposed
22 permit.

1 MR. COX: It is encompassed, I
2 would argue, in connection with the issues
3 that were raised as to the science of going to
4 the national standard.

5 JUDGE HILL: Is it sufficient to
6 encompass a request for a seasonal limit in
7 the criticism of the science of
8 calculating --

9 MR. COX: No. There was a comment
10 raised on seasonal limits, yes.

11 JUDGE HILL: I'll go back and look
12 at that.

13 JUDGE McCABE: Now, Mr. Cox, you
14 pointed out to us that you were raising
15 procedural objections as well as substantive.
16 When I asked you about relief, you've talked
17 so far about the substantive limit that would
18 be set in the permit if we were to grant the
19 Town of Concord relief.

20 The procedural concerns that you
21 raised, are you asking us to try -- if we were
22 just focusing on those are you asking us to

1 try to cure them by remanding to the region to
2 think it over again?

3 MR. COX: Yes, yes.

4 JUDGE McCABE: And what about
5 reopening public comments?

6 MR. COX: Think it over again.
7 Open it to public comments so that we can look
8 at these calculations with respect to 7Q10.

9 JUDGE McCABE: Which is it? Are
10 you asking us to remand both those things?

11 MR. COX: Three alternatives in
12 there, yes.

13 JUDGE McCABE: Okay.

14 MR. COX: Zero, 255, remand for --

15 JUDGE McCABE: Not 255. You
16 wanted 306.

17 MR. COX: 306. I'm sorry.

18 JUDGE McCABE: Zero, 306, seasonal
19 limit. If you don't get those, remand to
20 region to reopen public comment?

21 MR. COX: Correct. Yes.

22 JUDGE McCABE: If they were to do

1 that --

2 MR. COX: Is that more than I
3 should be asking for?

4 JUDGE McCABE: It's a lot but it's
5 important to be clear on what you're asking
6 for. If they were to reopen for public
7 comment, would you be putting additional data
8 or information into the record, or would we
9 just be renewing -- would you just be renewing
10 arguments?

11 MR. COX: No. I would be
12 anticipating having additional data that we
13 could put into the record. And that gets back
14 to the question raised before about data that
15 I don't have handy for here.

16 JUDGE McCABE: So you couldn't
17 tell us what the data would be, but you would
18 be hoping that you could find additional data
19 to put in?

20 MR. COX: I know there's data
21 there. I don't have it here and I would
22 suggest we provide it.

1 JUDGE HILL: Is there anything
2 else you wanted to say about aluminum?

3 MR. COX: I would like to use my
4 time to talk about pH.

5 JUDGE HILL: Let's go on then.

6 MR. COX: Especially on flow.

7 JUDGE HILL: Okay.

8 MR. COX: Moving to pH? That's
9 what you want to hear?

10 JUDGE HILL: Yes.

11 MR. COX: Okay. With respect to
12 pH we have the same issue in the sense that
13 there was a draft permit that -- the draft
14 permit changed when you got to the final
15 permit. The draft pH limit was from 6.0 to
16 8.3 SU. The final permit was pH from 6.5 to
17 8.3 SU so changing the minimum pH from 6.0 to
18 6.5.

19 Now, significantly in the
20 factsheet, and I'm going to quote what the
21 region says here. The region said that,
22 "Because the receiving water has not shown any

1 adverse effects due to the occasional low pH
2 in the discharge, the pH range requirement in
3 the draft permit is maintained as 6.0 to 8.3."

4 Now, the region said despite that
5 statement they have received some comments
6 questioning whether it's appropriate to be
7 outside the 6.5 to the 8.3 and, therefore, re-
8 examine and set the new limit in the final
9 permit a pH of 6.0.

10 The process that the region used
11 to reach this permit decision was flawed. It
12 was an error of law and fact implicating
13 important public matters, and also an abuse of
14 discretion. The change from the draft to the
15 final was not a logical outgrowth.

16 JUDGE FRASER: Can I stop you
17 right there? Again, you are raising
18 procedural and substantive questions.

19 MR. COX: Correct.

20 JUDGE FRASER: And just like my
21 colleague asked you on aluminum, if we tease
22 apart the procedural first, have you not had

1 an opportunity to present your arguments here
2 on appeal such that, in essence, is there a
3 remaining procedural issue?

4 MR. COX: The remaining procedural
5 issue are the procedural requirements are
6 there for a reason and that's why we're
7 raising them here. We are, of course, having
8 the opportunity to make arguments on
9 substantive matters, but this is not
10 sufficient, especially the way the region did
11 it here, by making a change that we did not
12 have an opportunity to comment upon. When we
13 get to the substance, I think that will become
14 clear.

15 JUDGE FRASER: But if you're
16 challenging it here, which the regs envision
17 as well, if it were raised and you have an
18 opportunity to challenge the procedural issues
19 here and also reach the substantive issues,
20 what would be the relief on the procedural
21 part getting to the substance afterwards?

22 MR. COX: The relief would be to

1 remand it to the region to re-issue a draft
2 permit with information supporting the 6.0
3 limit. Does that make sense? Okay.

4 The Board has ruled earlier about
5 these changes with respect to a draft, to a
6 final, that if you do it without any
7 indication so that you're giving us a surprise
8 to the regulated entity, that's inappropriate.
9 That should --

10 JUDGE FRASER: How is there a
11 surprise here when we have commenters who say
12 every other POTW has a higher limit that
13 matches the water quality standards?

14 MR. COX: It was a surprise to us.
15 I mean, we didn't see those comments until the
16 permit issued so when we provided our
17 comments, we said, "Great. What you want to
18 do, that makes a lot of sense."

19 As the region said in its
20 factsheet, because the waters have not shown
21 any adverse effects to occasional low pH,
22 there is reason to believe they meant what

1 they said. There is no indication in the
2 factsheet indicating, "Well, we're a little
3 uncertain about this," or any sign that they
4 might change it so we didn't --

5 JUDGE FRASER: Were you aware of
6 the exceedance? The region does rely on a
7 water quality exceedance, the pH exceedance.
8 Were you aware of that beforehand?

9 MR. COX: I don't know. I know
10 that was in the data that came with the
11 comments and I can't answer that. But that,
12 as you know, is what the region is relying
13 upon. They have 11 data points and they are
14 all above 6.5 and there is only one that's at
15 6.3 and they use that as a basis.

16 JUDGE FRASER: How many should
17 there have to be before the region can rely on
18 an exceedance as a basis of making the
19 decision --

20 MR. COX: Well --

21 JUDGE FRASER: -- if it's not one?

22 MR. COX: There's not going to be

1 any set number but it should be based upon all
2 the data that is available. As you saw in our
3 petition, we provided information from other
4 years showing, I think, 60 data points showing
5 that the condition of this river has been
6 pretty much the same over the years, and that
7 the discharge from the facility has not had
8 any impact upon water quality.

9 JUDGE FRASER: Is that a reference
10 to Exhibit K attached to your petition?

11 MR. COX: Yes.

12 JUDGE FRASER: Is that -- was that
13 information in the record before you attached
14 it to your petition?

15 MR. COX: No, it was not. That
16 gets to the procedural issue of where we are
17 now of coming up now saying, "Well, look. If
18 this wasn't a comment, we could have provided
19 that information so the region could have
20 reviewed it and we could have addressed it
21 then."

22 JUDGE HILL: Would that be your

1 best argument as to why? Putting aside
2 whether there was some procedural problem, is
3 your best argument for why it doesn't need to
4 be 6.5 now essentially the data that's in
5 Exhibit K?

6 MR. COX: The data in Exhibit K
7 and that the region hasn't shown that the
8 existing limit has not been protective of
9 water quality. They can't impose a more
10 stringent limit where it's been protective and
11 this river has not been impaired for pH. In
12 addition, there is the question --

13 JUDGE HILL: Why can't the region
14 say, "Look, we got one exceedance." I mean,
15 it's not a permit exceedance. It's actually
16 the water quality. You meet the water quality
17 standard.

18 MR. COX: Right.

19 JUDGE HILL: So, you know, if the
20 test is "reasonable potential," then there's
21 obviously reasonable potential if the water
22 isn't actually meeting it and so we have to

1 set a limit that will meet the water quality
2 standard.

3 MR. COX: That's one of the
4 questions we raised here is whether the region
5 did perform a reasonable potential analysis.

6 JUDGE FRASER: What else would you
7 have them say beyond showing the data point?
8 What else do you think they should have
9 included?

10 MR. COX: Where is the reasoning?
11 Where is the reasonable potential analysis?
12 We don't see that. I don't think the region
13 can just say, "Oh, we have one data point.
14 Therefore, that's enough." We haven't seen a
15 reasonable potential analysis.

16 JUDGE HILL: That's what I'm
17 asking you. Let's assume that instead of what
18 the region did, the region put a big header in
19 20 point type, "Reasonable potential
20 analysis."

21 MR. COX: And here it is.

22 JUDGE HILL: And here it is. And

1 all they showed was the one data point.
2 That's our reasonable potential analysis.
3 Would that be enough?

4 MR. COX: No. There needs --

5 JUDGE HILL: Let me rephrase my
6 question. Why wouldn't it be enough?

7 MR. COX: There needs to be some
8 explanation why that one point is sufficient
9 and why they are not considering other data
10 that we provided that was available in
11 connection with river flow.

12 The other issue I want to raise,
13 and this may go back to the procedural side is
14 that the region's explanation -- as you know,
15 the region is required to explain why they
16 make a change like this and their explanation
17 is they looked at the data and they said, or
18 concluded, that it's not clear whether the
19 river would have sufficient buffering to
20 assimilate low pH discharges without violation
21 of water quality.

22 Not clear. Is that a sufficient

1 explanation? We don't think so at all. We
2 think that this Board should be demanding of
3 the permit writers to take the steps to be
4 sure that they provide clear, unambiguous
5 declarative words when they are describing
6 what actions they are taking. This wasn't
7 done here. What the permit writer did fails
8 to meet the standard that this Board has set
9 forth.

10 JUDGE McCABE: So would it be
11 sufficient on a remand if the region were to
12 write you something that says that?

13 MR. COX: Well, I would like to
14 see what they'd write because we don't have
15 that yet. We really need to see what their
16 thinking was behind that.

17 I see I have 10 minutes.

18 JUDGE HILL: You actually have 15
19 because I think the timer only gave you 35 at
20 the start and you had 40 at the start so
21 you've got 15 minutes. Shall we move onto
22 flow?

1 MR. COX: I would be delighted to
2 move on to flow.

3 JUDGE McCABE: Before you go to
4 flow, just one more question on the procedural
5 relief.

6 MR. COX: Yes.

7 JUDGE McCABE: Are you asking to
8 have the comment period reopened or only to
9 have the region provide that reasonable
10 potential?

11 MR. COX: No. We are asking for
12 remand to direct that they re-issue to allow
13 for a comment period so that we can provide
14 comments on this change that caught us by
15 surprise.

16 JUDGE HILL: And your additional
17 data.

18 MR. COX: Yes.

19 Flow. The issue represented here
20 is whether the region has authority to
21 regulate flow in the town's discharge. We
22 say, as we lay out in our petition, the answer

1 is no. The region has no authority. EPA has
2 no authority to regulate flow. It can
3 regulate pollutants in the flow of water but
4 not flow itself.

5 JUDGE HILL: So here's my --
6 you're talking a lot about procedure today.
7 Did you say that clearly? I think the answer
8 is no.

9 MR. COX: I think the answer is
10 no. However --

11 JUDGE HILL: Are you required to?

12 MR. COX: I don't think we are
13 required to.

14 JUDGE HILL: Why not?

15 MR. COX: We're not required to
16 because this is an issue where the agency is
17 acting beyond its authority, has no authority
18 to do this. For that reason we should be able
19 to raise this legal issue before you.

20 JUDGE HILL: You don't have to
21 raise purely legal issues before the region.
22 You can raise them first before the Board.

1 MR. COX: I didn't quite say that.
2 Or, if I did, I didn't mean to. It is where
3 the agency is acting beyond its authority we
4 should, and I hope you agree, be able to raise
5 that issue with you where the agency has done
6 something that is completely beyond it's
7 statutory and regulatory powers.

8 JUDGE HILL: The region contends
9 that you didn't say anything about flow other
10 than "We're going to deal with it later." I
11 mean, they are arguing you didn't preserve any
12 of this, legal or otherwise. How do you
13 respond to that?

14 MR. COX: I respond that is
15 incorrect. It is clear if you look at the
16 record in a comprehensive fashion and a
17 complete fashion that the region was informed
18 that the flow limit of the town imposed an
19 impediment to current and long-term planning
20 for the town. That the region was aware that
21 additional capacity was needed. The region
22 acknowledged it in its Response to Comments.

1 A comment that was made by the
2 National Park Service, and I'm going to quote
3 from it, "Now is not the right time to grant
4 Concord wastewater treatment facility a flow
5 increase." The flow issue was clearly before
6 the region. It was aware of it and has raised
7 these issues in order to --

8 JUDGE HILL: So asking Judge
9 McCabe's favorite question, what are you
10 seeking now? Do you want -- I mean, do you
11 want 1.335? Do you want 1.67? Do you want no
12 flow limit?

13 MR. COX: We want no flow limit.
14 If I may hand up a copy of the permit. May I?

15 JUDGE HILL: Sure.

16 JUDGE McCABE: We also do have
17 copies.

18 JUDGE HILL: We have it here if
19 you want to just tell us the page.

20 MR. COX: What I would like to
21 direct your attention to is on part 1, A.1,
22 where at the top we see the effluent limits.

1 JUDGE HILL: Right.

2 MR. COX: On the left you see the
3 parameters. The parameters you see BOD, TSS,
4 pH, ammonia, nitrogen, aluminum, things that
5 are clearly pollutants. But you also see
6 flow. If you go across the line you see the
7 limit there, the limit on flow of 1.2 million
8 gallons per day. It's that limit that we seek
9 to have stricken.

10 If you were to look at other
11 permits that have been issued by the region,
12 specifically New Hampshire, or permits that
13 are issued in other states that are not where
14 the region -- excuse me, where the agency
15 still has authority, you would not see a
16 limitation on flow there.

17 JUDGE FRASER: How do you respond
18 to the region's comment that they included
19 flow because that was the basis upon which
20 they made the rest of the calculations so that
21 the limits in the table only make sense with
22 respect to the flow that was used in the

1 equations?

2 MR. COX: I respond to that by
3 saying yes, of course, the region is to use
4 the design flow in order to do the calculation
5 for effluent limitations. But that doesn't
6 mean that they have authority to regulate, to
7 limit flow itself. The authority is there to
8 regulate pollutants and not the flow itself.

9 JUDGE HILL: Can they regulate the
10 operation and maintenance of a POTW?

11 MR. COX: Yes. Of course, but --

12 JUDGE HILL: "To operate this POTW
13 do not go above your design capacity because
14 if you do, it won't work right and you won't
15 be able to meet your effluent limits." Would
16 that be an okay condition?

17 MR. COX: It depends upon how they
18 are wording this. If they're trying to
19 regulate flow as a pollutant, that would be
20 improper.

21 JUDGE HILL: But what I'm
22 suggesting is they wouldn't be regulating flow

1 as a pollutant. They would be saying,
2 "operate the POTW not above 1.2 MGD because,
3 otherwise, it won't work right?"

4 MR. COX: No, because that would
5 still get you to the same point, that it's
6 regulating flow as a pollutant. Look, we have
7 just Massachusetts permits where Region 1 is
8 issuing this limitation. Why wouldn't it be
9 sufficient in order to have just a report only
10 at this location?

11 JUDGE HILL: That might be within
12 the region's discretion. Maybe it's more of
13 an issue with respect to water quality on the
14 Concord River. I don't know but I can see
15 that argument.

16 MR. COX: It might be within the
17 discretion if they had authority to do so.
18 But as we've laid out the statutory provisions
19 as set forth in NPDES' program regulates
20 discharge of pollutants from a point source.

21 A point source, as you know, is
22 defined and here on this permit it's 001, from

1 which pollutants are maybe discharged.

2 Pollutants are broadly defined but they are
3 not defined to include flow. The region is
4 charged with setting effluent.

5 JUDGE McCABE: But isn't this
6 point source defined as the wastewater
7 treatment plant with a 1.2 million gallon per
8 day flow capacity?

9 MR. COX: Yes. That's what it
10 says but that still doesn't give the region
11 authority to put a limitation on that flow.

12 JUDGE McCABE: It doesn't give you
13 authority to exceed it either, does it? Even
14 if they hadn't written it in there, if it had
15 been the premise of the permit -- let's say
16 you were a coal-fired power plant instead of
17 a wastewater treatment plant and your capacity
18 permitted at 500 megawatts, could you suddenly
19 be operating a 1,000 megawatt capacity boiler
20 and saying that was permitted too?

21 MR. COX: There are other issues
22 that would come into play in order to reach

1 that level. The issues I'm raising here is
2 what authority EPA Region 1 has with respect
3 to regulating flow of water. They can only
4 regulate pollutants, not flow.

5 JUDGE McCABE: It's not just
6 water. This is polluted water.

7 MR. COX: Well, what is in the
8 water? Pollutants. What does the statute say
9 that EPA can regulate? Pollutants in water.

10 JUDGE HILL: Let's get back to the
11 procedural issue. I mean, your comments say
12 basically say, "Look, we can't operate at this
13 level." You argue that was essentially a
14 statement made to increase the flow level.

15 If you thought it was illegal for
16 them to impose any flow limit, I'm trying to
17 understand why you wouldn't raise that in your
18 comments. And why would you ask for a higher
19 flow limit if you don't think that one can be
20 imposed at all? Why doesn't the region get
21 the first chance to answer that?

22 MR. COX: Well, if you look at the

1 comments and how the comments came about,
2 there was first a meeting which the region had
3 with the town where the town came in and said,
4 "Look, we've been doing planning for many,
5 many years. We're reaching our capacity. We
6 want to plan long-term here. We need
7 capacity.

8 JUDGE FRASER: That's before the
9 comment period, though.

10 MR. COX: Correct. That's before
11 the comment period. But in the factsheet,
12 remember, the region acknowledged this
13 meeting.

14 JUDGE FRASER: Right.

15 MR. COX: So I'm putting this in
16 context that there's this meeting where we
17 said, "We have this flow issue. We have this
18 integrated planning thing that we've been
19 doing before EPA even considered it. Help us
20 work with it."

21 The response was, "Well, we are
22 about to issue the permit. It's going to have

1 a limit. Do whatever you want. Knock
2 yourself out on integrated planning."

3 JUDGE HILL: Did you say at that
4 meeting, "You should stop doing this. You
5 don't have the authority to impose it at all?"

6 MR. COX: No, we did not.

7 JUDGE HILL: Okay. Why not?

8 MR. COX: Well, look, they are
9 coming to work with the region on how best to
10 manage an issue that we as public entities
11 must deal with together. How to deal with a
12 problem in a town that has been growing that
13 has had the same limit since the 1980s and has
14 done everything it can in order to deal with
15 the flow through II programs, through
16 regulations.

17 It's done studies and it's on the
18 cusp of making a decision of whether to spend
19 significant monies for a groundwater treatment
20 system, which really doesn't make much sense
21 because it's not going to get them there, or
22 try to do something on the flow.

1 That is the context in which the town
2 came to --

3 JUDGE McCABE: Well, if you want
4 the agency to be responsive, I'm looking at
5 your comment and what they said in response.
6 You're saying at the end of your comment on
7 the flow issue -- this is your public comments
8 on the draft permit -- "The town understands
9 that a formal --

10 JUDGE HILL: Let me interrupt you
11 for just a second.

12 Eurika, can you add five minutes
13 to the clock?

14 MR. COX: It's like being at a
15 football game.

16 JUDGE McCABE: Where's the ball?
17 Okay. We're back to the comments on the flow.

18 MR. COX: Yes.

19 JUDGE McCABE: The town says, "The
20 town understands that a formal request for a
21 flow increase will require a future
22 modification to the permit and will be

1 initiated via a notice of project change via
2 the Massachusetts EOEEA and EPA office."

3 So the town recognizes it would
4 need a permit modification and the response
5 from the region is the commenter is correct
6 that a flow increase will require a
7 modification to the permit and the notice
8 through NEPA.

9 They've given you the mechanism.
10 You've acknowledged that this is the
11 mechanism. Have you asked for a permit
12 modification to increase your flow?

13 MR. COX: Not yet.

14 JUDGE McCABE: Why not?

15 MR. COX: We are in these
16 proceedings because we contend that the region
17 erred in telling us that they could not give
18 us an increase because of the state side of
19 it, the CWMP.

20 JUDGE HILL: If we agreed with you
21 and the flow disappeared from the permit
22 tomorrow --

1 MR. COX: Yes.

2 JUDGE HILL: -- could Concord
3 operate at above 1.2 or would they still need
4 this approval from the Massachusetts planning
5 whatever it is?

6 MR. COX: They could operate above
7 the 1.2.

8 JUDGE HILL: Yes.

9 MR. COX: The CWMP and NEPA,
10 that's the state process, allows for up to a
11 10 percent increase of the discharge.

12 JUDGE HILL: So they could operate
13 at 1., what is it, 335.

14 MR. COX: Yes.

15 JUDGE HILL: But not above that.

16 MR. COX: Not above that absent
17 doing some other things. Be mindful as we've
18 set forth in the record, the town has done a
19 study on this facility of what it's capable of
20 doing and it's capable of doing much more with
21 some modifications in the scheme of things.

22 JUDGE HILL: You criticized the

1 region for relying on the Massachusetts, I
2 think you said, NEPA, but you're telling me
3 that even if there was no flow limit, you
4 couldn't operate more than 10 percent above.
5 So wasn't the region's conclusion that process
6 has to finish out? Wasn't that at least
7 correct on its face?

8 MR. COX: No, it was not because
9 the town could go that 10 percent. Look,
10 we're right at the level. That 10 percent
11 means something.

12 We're talking long term here about
13 a town that has been doing planning for years
14 and is looking out 20 years trying to address
15 issues of economic growth and have growth
16 occur, dense along shorelines, trying to
17 accommodate affordable housing.

18 It's trying to look long term so
19 that 10 percent, or less than 10 percent, is
20 a lot.

21 Especially where the option that
22 the town is looking at based upon its studies

1 is to spend monies to do a groundwater
2 discharge permit which would put the water in
3 the ground and then it would go out to the
4 river. But that would get it 155,000 gallons.

5 JUDGE HILL: You didn't raise the
6 10 percent point in your comments either. Am
7 I correct about that?

8 MR. COX: That's correct. Again,
9 putting it in context, it didn't quite respond
10 to your question -- I guess I did earlier --
11 is that the town was coming to the region to
12 talk to an issue.

13 The region said we're not going to
14 go to this so what did the town do? It
15 mirrored back. It mirrored back, "Okay, we
16 have to do the modification. We'll do that."

17 They haven't yet but they were
18 given wrong information from the EPA with
19 respect to the impact that the CWMP or the
20 state has. The state law does not impose an
21 impediment which the region says it does in
22 order to have an increase in flow.

1 JUDGE McCABE: Obviously the
2 region has a different view of what they said
3 in their response to comment here and I don't
4 actually see anything in their Response to
5 Comments that indicates they told you no, they
6 wouldn't allow you to raise your flow limit if
7 you were to ask for that.

8 So I really am having a hard time
9 understanding why you don't simply ask for
10 that because if there is any question about
11 whether that issue is alive in this
12 proceeding, and if it's an important issue to
13 your town and you need to have the answer to
14 it, I cannot understand why you wouldn't
15 simply put in something that is called a
16 request for a permit modification to increase
17 that limit.

18 Then there would be no question
19 that the issue was properly before the agency
20 and they would have to address it in which
21 case your question about whether the
22 Massachusetts plan comes first or not would be

1 fairly posed. Here it's only a hypothetical
2 question because you haven't asked and they
3 haven't said no.

4 MR. COX: But there is a very real
5 question before this Board and that is whether
6 the region had authority to put a flow limit
7 in this permit. It does not have legal
8 authority to do so. It's acting
9 inconsistently for New Hampshire permits.

10 A New Hampshire permit which feeds
11 the same body of water from Nashua that's in
12 a draft form right now but it does not have a
13 flow limitation that you see right here.
14 There is says "report only" instead of the 1.2
15 million in the Nashua permit.

16 That is what we think that this
17 Board should direct the region to do, to
18 remand it to strike the permit -- the flow
19 limitation that is set forth.

20 JUDGE McCABE: I'm not sure that
21 would help you.

22 MR. COX: We believe that it will

1 because it will help in the planning process.
2 Again, the town is at the cusp of making a
3 decision of where to invest its resources so
4 if it knows that it's not going to be a
5 limitation by this permit, it can do other
6 steps which may include a modification to move
7 forward with that aspect of planning as
8 opposed to putting all its monies in a
9 groundwater disposal system.

10 JUDGE McCABE: If we were to
11 strike that number, the flow limit, from this
12 table so it wasn't presented as any other
13 effluent limit, you would still have a point
14 source that is permitted at a design of 1.2.

15 If you start discharging at 1.5,
16 or whatever it is you plan to go up to, and
17 enforcement person might very well say to you,
18 "Well, now you are discharging without a
19 permit," and that is even more serious.

20 MR. COX: They might but the real
21 issue is whether the town is complying with
22 the effluent limitations that are set forth in

1 this permit because you need to be mindful, as
2 I know you are, that flow varies daily, varies
3 weekly, varies monthly so it is up and down.
4 The permit writer has put in here
5 concentration levels in the permit that
6 control pollutants. Flow is not a pollutant.

7 JUDGE McCABE: Mr. Cox, I
8 understand your point but this issue is
9 important to the town for planning purposes so
10 I would, again, comment that I think it makes
11 sense to make sure you've got all procedural
12 vehicles that would pose that and get you to
13 the point of decision making on that.

14 MR. COX: Appreciate that very
15 much.

16 JUDGE HILL: Do you have anything
17 further on this?

18 MR. COX: I do not. I'll save
19 some time for rebuttal.

20 JUDGE HILL: Thank you very much,
21 Mr. Cox.

22 Mr. Curley.

1 MR. CURLEY: Your Honor, my name
2 is Michael Curley, EPA attorney, Region 1.
3 I'll be addressing the aluminum and pH --

4 JUDGE HILL: Move your mic up just
5 a bit.

6 MR. CURLEY: The aluminum and pH
7 issues and my colleague, Mr. Bukhari, will be
8 addressing flow and the remaining issues.

9 First, I will get into the town's
10 comment about the fact that EPA's national
11 recommended criteria for aluminum should not
12 apply here. Second, I'll touch briefly on
13 some of the other aluminum related issues that
14 we believe --

15 JUDGE FRASER: Excuse me a second.
16 Can the volume go up a little?

17 JUDGE McCABE: He just needs to
18 get closer to the mic.

19 MR. CURLEY: I need to lean into
20 it.

21 JUDGE FRASER: Thank you.

22 MR. CURLEY: And then I'll get

1 into the argument that the town -- rather that
2 the region used a faulty method to calculate
3 the 7Q10. Then finally I'll get into the pH
4 limit issues.

5 We've already heard here that the
6 town has discussed that the region has used --
7 rather should not be using EPA national
8 recommended criteria for aluminum. As Your
9 Honors have noted, the Board has spoken about
10 this issue in the City of Attleboro case.

11 In that case, as we know, the
12 Board has said that unless and until the state
13 adopts site-specific criteria for aluminum or
14 determines that aluminum in the river is
15 naturally occurring, the region is bound to
16 apply the Massachusetts water quality
17 standards which here are the recommended EPA
18 national criteria of 87 micrograms per liter.

19 We believe that issue is really
20 that simple. This is what we said in our
21 Response to Comments during the public comment
22 period. It's what we've said in our response

1 to the petition.

2 There's been some indication that
3 the Massachusetts DEP is looking into
4 developing a site-specific criteria. We've
5 actually learned, although this is outside the
6 record, but we've actually today -- not today
7 but earlier this week that the department has
8 no plans to develop a site-specific criteria
9 or a differing aluminum criteria. But we've
10 also --

11 JUDGE HILL: What could Concord
12 do? Can they ask the state to look at it?

13 MR. CURLEY: I presume they could
14 ask the state to develop a site-specific
15 criteria. It's the Massachusetts water
16 quality standards, the Massachusetts
17 regulations here that apply.

18 JUDGE HILL: So the last permit
19 was report only and now you've got an effluent
20 limit. One of Mr. Cox's arguments is that why
21 don't you simply continue to report only until
22 Massachusetts revises because the national

1 criterion doesn't make sense for this water
2 body. Why did you go from reporting only
3 effluent limit in this permit cycle?

4 MR. CURLEY: I think we indicated
5 in our response to the petition that one of
6 the changes that we've seen in the last
7 several years is the lowering of phosphorous
8 limits and that many of these facilities use
9 alum in their process to achieve those lower
10 phosphorous limitations.

11 Thereby, that increases the amount
12 of aluminum that is ending up in the receiving
13 waters. And the record shows that there is
14 somewhere on the order of 75 micrograms per
15 liter of an ambient level of aluminum.
16 Therefore, we are obliged to do the reasonable
17 potential analysis to determine what effect
18 the discharge may have.

19 JUDGE HILL: Can you -- I agree
20 that is probably a simple issue. I think the
21 7Q10 is not so simple. So the region got a
22 comment, "We don't understand how you

1 calculated 7Q10. Please explain it to us."

2 The response to that comment was,
3 "Okay. We'll completely recalculate it. Oh,
4 and by the way, we're not going to provide
5 much more explanation." How does that
6 constitute a logical outgrowth? How could
7 Concord have had any idea that was what was
8 coming?

9 MR. CURLEY: I don't know that I
10 would say it was completely recalculated so
11 much as there were a couple of different
12 changes that occurred during the calculation.
13 One, as has been noted, the period of record
14 changed from '73 or '71 in 2000 to 1993 to
15 2012.

16 The other change, I believe, was
17 that we accounted for some of the other
18 facilities along the river, one of those being
19 the Billerica water. Not the water treatment
20 plant, but rather their drinking water intake.
21 I think there were only a couple of changes
22 that occurred in that calculation.

1 JUDGE HILL: Again, if the test
2 for logical outgrowth is whether it was
3 reasonably foreseeable, was it reasonably
4 foreseeable to Concord that you would lower
5 the permit limit by 20 percent based on not
6 only substituting your data, but making these
7 other changes that you just mentioned?

8 MR. CURLEY: I think, as you said,
9 they had the opportunity now to get into these
10 issues and to raise this issue. One thing
11 they have not raised is if there are really
12 any errors in the data that we have issued, or
13 that it was technically an error to use newer
14 data, which is what we've done here.

15 JUDGE FRASER: So are you saying
16 harmless error? Even if you didn't give them
17 notice that it's harmless error?

18 MR. CURLEY: Yeah, it's not a
19 significant change to the calculation and,
20 thereby, not a significant change to the
21 permit.

22 JUDGE FRASER: No limit to a

1 limit?

2 MR. CURLEY: I think if we had --
3 there was a limit in the draft permit. There
4 was not a limit being proposed so there was a
5 difference there.

6 JUDGE HILL: But it did go down
7 fairly significantly.

8 MR. CURLEY: It did go down from
9 306 to 255. That's correct. But, again,
10 there has been no complaint that the actual
11 USGS data that we relied on is in anyway in
12 error. They have also --

13 JUDGE HILL: What about their
14 argument that there is even newer data in the
15 issuance of their discharge? I mean,
16 reasonable potential is both what is happening
17 in the stream and what they are discharging.
18 Their argument is it's continuing to go down
19 and they might not need a limit at all just
20 like they used to not have.

21 MR. CURLEY: Right. I think what
22 you're referring to is the concentration,

1 aluminum concentration data that was used in
2 the reasonable potential calculation.

3 JUDGE HILL: Yes.

4 MR. CURLEY: The data that the
5 region used in that original calculation was
6 from January 2009 to January 2011 so it's not
7 terribly old data. Again, it has not been
8 pointed out that their effluent -- rather,
9 their concentration of aluminum in the
10 effluent has decreased significantly in that
11 time. We had no reason to believe -- we had
12 not been shown that was the case. There were
13 two separate calculations when that was done.

14 JUDGE HILL: Your brief says that
15 the change between the proposed limit and the
16 final limit in the new calculation is "logical
17 and rational." That is about all you say.
18 Where in the record did the region explain why
19 they made this change?

20 MR. CURLEY: The change to the use
21 of the period of record?

22 JUDGE HILL: The change to the

1 7Q10. All of the changes to the 7Q10.

2 MR. CURLEY: The explanation is
3 that we got the comments that were calling for
4 greater clarity and what happened from the
5 previous --

6 JUDGE HILL: But that's what I'm
7 struck by.

8 MR. CURLEY: Right.

9 JUDGE HILL: We want greater
10 clarity so you give greater clarity by
11 explaining what you did. Instead you
12 responded with, "Okay. You want greater
13 clarity? We'll change it."

14 And then I search in vain in the
15 record for an explanation of how the new
16 method works. If I'd been OARS and had a
17 chance, I might have submitted the same
18 comment. I still don't understand what you're
19 doing.

20 MR. CURLEY: Right. I think what
21 happened was in the 2006 permit there was a
22 7Q10 calculation that was merely carried over

1 into the new draft permit. It was the same
2 method that had been used, in other words, in
3 2006. We didn't redo the calculation.

4 There were no comments in 2006
5 regarding it that I know of. Therefore, it
6 was carried over. When we got the comments
7 requesting greater clarity, that's when we
8 decided to expand on the calculation and the
9 newer period of record was used.

10 JUDGE McCABE: Is that explained
11 in Response to Comments the reasons that you
12 changed that?

13 MR. CURLEY: There's no
14 explanation for the newer period of record,
15 no, but we believe it's self-evident that
16 newer data would be more representative of the
17 conditions in the river as they are today
18 rather than in 2000.

19 JUDGE McCABE: And this --

20 JUDGE HILL: We have to find that
21 the change was self-evident.

22 MR. CURLEY: Well --

1 JUDGE McCABE: Did the draft
2 permit say that it was any place in the
3 factsheet or anything else indicate that the
4 original calculation was based on the prior
5 permit?

6 MR. CURLEY: The factsheet? No,
7 it does not mention that, but if you look at
8 the two they are exactly the same.

9 JUDGE FRASER: How do you think
10 you provided greater clarity in response to
11 the comment by the process the region used?

12 MR. CURLEY: Well, I think what
13 the region tried to do was expand or include
14 maybe the intermediate steps that were not
15 readily apparent in the particular calculation
16 as it appeared in the draft.

17 JUDGE FRASER: But if I'm the
18 reader, or I'm the submitter of the comment,
19 and I'm looking at the draft permit and the
20 factsheet and I say, "I don't understand what
21 you've done. Please provide greater clarity,"
22 the region turns around and does a different

1 -- an analysis with a different data set and
2 doesn't connect the dots.

3 I'm still the reader looking at
4 now something that doesn't even match what I
5 asked you about in the first place. I think
6 what my colleagues and I are trying to ask is
7 how is the region provided greater clarity as
8 opposed -- I recognize you're saying we use
9 newer data but that seems like the question
10 was driving at where is the clarity on what
11 you did and why.

12 MR. CURLEY: I guess the clarity
13 derives from the methodology has not changed
14 so the clarity -- our attempt to improve the
15 clarity was to introduce those intermediate
16 steps that were done but not recorded in the
17 draft, the version that appears in the draft
18 permit. I don't know if I've answered your
19 question or not.

20 JUDGE FRASER: Yes.

21 MR. CURLEY: I guess I'll stay on
22 the 7Q10 for a minute. There's a couple of

1 other issues that the town takes issue with
2 and that is the fact that -- the town argues
3 that we should not have used June through
4 September data for the facilities in the 7Q10.
5 We've never heard an explanation from the town
6 why the use of June through September data is
7 not appropriate in the 7Q10.

8
9 In fact, it's really only logical
10 to use those traditional low-flow months when
11 you're calculating the 7Q10, the low flow, for
12 the river. Plus in the draft permit that
13 particular aspect of the 7Q10 calculation
14 appeared and there was no comment from any of
15 the public that was an issue.

16 The town also argues that we
17 shouldn't have used 2010 to 2012 data
18 representing the flow from the facilities in
19 the 7Q10. Again, that was -- I think you're
20 suggesting that a longer period should have
21 been used to represent the flows in the data.
22 Again, they are only assuming that a shorter

1 period overestimates the contribution of those
2 facilities.

3 JUDGE HILL: In all of these
4 issues are you arguing that they failed to
5 preserve or just that they are substantively
6 incorrect?

7 MR. CURLEY: Both. I mean --

8 JUDGE HILL: Why is it a failure
9 to preserve given that you changed the
10 analysis?

11 MR. CURLEY: Well, the
12 methodology, again, did not change greatly.
13 Particularly those aspects of 7Q10 calculation
14 did not change. June through September data
15 was used in draft and in the final. Then a
16 two-year period representing the facility's
17 effluent flow was used in the draft and in the
18 final. It's the same methodology carried
19 through there.

20 I can return to some of the
21 aluminum issues or move on to pH.

22 JUDGE HILL: Go ahead.

1 MR. CURLEY: There's a few other
2 issues with respect to aluminum that we noted
3 in our briefs have not been preserved. One is
4 the town's argument that it's bearing a
5 disproportionate burden of aluminum control
6 because it's located downstream from several
7 other aluminum dischargers.

8 Not only is it undeserved but we
9 would also like to point out that it's untrue
10 because of the five other upstream dischargers
11 that use alum in their process. Only one of
12 them does not have currently an aluminum limit
13 and that facility is operating under a 2005
14 permit and it's very likely to get aluminum
15 limit in its next reissuance.

16 Three of those facilities actually
17 have limits well below Concord. Two of those
18 facilities have limits of 87 micrograms per
19 liter. That's the, you know, water quality
20 criterion end of the pipe. Another one has a
21 limit of 218. Concord's limit in the final
22 permit is 255. The other facility has a limit

1 of 278, so fairly close to Concord's.

2 You touched on the issue of us
3 using, or the claim that we used the method in
4 calculating the aluminum limit that the TSD
5 discourages. As we've noted in the briefs, we
6 don't think that was preserved.

7 JUDGE HILL: Why don't we move on
8 to pH.

9 MR. CURLEY: Okay. So the town
10 asserts it was clear error and the use of
11 discretion for the region to set the minimum
12 pH limit at 6.5 standard units in the final
13 where we had set it at 6.0 in the draft
14 permit.

15 We reasonably concluded based on
16 the available data and we explained that the
17 limit below 6.5 could not ensure compliance
18 with state water quality standards. We think
19 this is a technical issue that warrants
20 deference.

21 JUDGE FRASER: Before we get to
22 the technical issue, I wrote down your quote

1 a little bit ago. In terms of discussing
2 aluminum, you said, "The region was obliged to
3 do the reasonable potential analysis to see
4 what effect aluminum will have." Is the
5 region not also required to do the same
6 reasonable potential analysis for pH and, if
7 so, where is it?

8 MR. CURLEY: We believe we did
9 reasonable potential analysis for pH in the
10 Response to Comments. I believe in the
11 Response to Comments it's on page 7 -- I'm
12 sorry. I think it's on page 42 or 44. I want
13 to say it's comment A17 or A18.

14 JUDGE FRASER: With the same
15 detail? Was the data set that you used -- I'm
16 looking at a response C6. The data set that
17 you used was that in the record beforehand or
18 is that something that was added in Response
19 to Comments?

20 MR. CURLEY: I believe that most
21 of the data points that are there were
22 actually in the record beforehand, but the

1 difference being that the factsheet was
2 developed in January of 2011, particularly
3 with respect to pH.

4 These data after that point would
5 show the violation at 6.3 and then the other
6 one at 6.5 which is at the water quality
7 criterion. Those occurred after the factsheet
8 was developed with respect to pH but before
9 the draft permit was issued.

10 JUDGE FRASER: I'm sorry. So
11 going back to -- you say there is a reasonable
12 potential analysis. I see in the Response to
13 Comments for the other pollutants there's a
14 nice box set off and it's labeled "reasonable
15 potential analysis."

16 There's a little more data and a
17 narrative in Response to Comments, but where
18 specifically are you pointing to the
19 reasonable potential analysis you say the
20 region has done?

21 MR. CURLEY: It says, as you said,
22 in response C6 on page 32.

1 JUDGE HILL: Okay. So if you look
2 at that, it doesn't take that long to read.
3 It's not that long. "After further
4 examination of -- I'm paraphrasing or cutting
5 out words. "After further examination of the
6 upstream data, it appears the Concord River
7 upstream of the Concord POTW does not always
8 meet the 6.5 minimum. Also, the alkalinity of
9 the receiving water is low at times."

10 Then there is a table showing
11 those results and then it says, "Because it is
12 not clear that the Concord River has
13 sufficient buffering capacity to assimilate
14 low pH discharges without a violation of water
15 quality standards, EPA has decided to change
16 the minimum pH limit."

17 So are we suppose to interpret the words
18 "not clear" to mean reasonable potential?

19 MR. CURLEY: Well, I think the
20 entire analysis there is the reasonable
21 potential analysis where we've noted that
22 there's been a violation that it's

1 instantaneous criteria, in-stream criteria and
2 effluent limit as you noted. Therefore -- and
3 also we pointed to the alkalinity data so,
4 therefore, there is reasonable potential for
5 the effluent which is routinely below 6.5.

6 JUDGE FRASER: I'd like to come
7 back to dilution in a minute, but if I'm
8 looking at the regulations in terms of
9 conducting a reasonable potential analysis,
10 among things sensitivity of the species, but
11 the dilution of the effluent and the receiving
12 water because you are really changing what the
13 effluent is to match what the receiving water
14 is after years of allowing the effluent to be
15 lower than a lower pH.

16 So, one, where is the explanation
17 that there needs to be a change and, two, I
18 didn't see any explanation and perhaps you can
19 point me to it, of the dilution impact. I
20 know you changed the ratio but where is the
21 explanation for the change in the ratio that
22 was used and why there was a change?

1 MR. CURLEY: The dilution fact
2 here, as we were saying, is not really
3 applicable because we already have violation
4 of water or violation of water quality
5 standards. So we are looking at the dilution
6 available in the river. At least in one of
7 our readings here it's not available at all so
8 dilution doesn't come into account I guess
9 because there's been a violation.

10 JUDGE McCABE: One exceedance?

11 MR. CURLEY: Well, we have -- you
12 know, it is a limited data set. It's 11 data
13 points, but we have a violation. It's a
14 recent violation. Yes, we took that
15 information. Not just the one point but also
16 the alkalinity information which is five of
17 the 12 -- five of the 11 readings show that we
18 have a water body that has a limited capacity
19 to --

20 JUDGE FRASER: Even on those areas
21 where you had the low alkalinity the pH was
22 pretty close to neutral and so I'm -- it's not

1 -- it seems it was still within the range of
2 6.5 to 8.3.

3 MR. CURLEY: That's correct.
4 Right.

5 JUDGE FRASER: So was there
6 evidence from before under the current permit
7 where they had the 6.0 limit at the minimum?
8 Was there evidence that the alkalinity had
9 changed or that the pH in the receiving bodies
10 was different?

11 MR. CURLEY: I'm not sure that was
12 looked closely at, the alkalinity data in the
13 previous permit if that's what you're asking.

14 JUDGE FRASER: I'm asking -- you
15 say it's not a logical outgrowth so up until
16 this point the town has had a different pH
17 level for the effluent that is lower than the
18 receiving bodies. They have been allowed to
19 rely on dilution.

20 They had one exceedance and you
21 now have changed it to say, "Well, we think
22 the alkalinity may not be able to absorb the

1 change and we have one exceedance."

2 I'm asking was there a comparison
3 or a look-back to see was that any different
4 than what had happened before and there didn't
5 seem to be a problem for the current permit
6 terms.

7 MR. CURLEY: I'm not aware that
8 was done.

9 JUDGE FRASER: So do you think
10 from the comment that was submitted that
11 everyone else on the water body is at 6.5 to
12 8.3, which is the same as the -- the effluent
13 is the same as the water quality for the
14 receiving body, do you think that was
15 sufficient to put Concord on notice that you
16 were going to be changing them and not relying
17 on dilution and concluding that dilution was
18 no longer going to be a reasonable way of
19 meeting the standard at the end of the pipe?

20 MR. CURLEY: I think that probably
21 factored into it, yes, that the water quality
22 criterion is 6.5 and that the other facilities

1 have a limit of 6.5, yes.

2 JUDGE FRASER: They should have
3 had enough notice that you would remove the
4 dilution ability to comply?

5 MR. CURLEY: Well, I mean, the
6 opportunity to raise the issue is here and to
7 present other data that would show that our
8 technical conclusion was flawed in some way.
9 I would say that the data that they have
10 offered is not necessarily, we think, the most
11 representative data.

12 We have two data sets, one that is
13 20-odd-years old and another that was taken
14 from 10 miles downstream. We believe the
15 conclusion that we could not ensure compliance
16 with water quality standards by including a
17 limit of 6.0 is supported by the data that we
18 do have from the facility.

19 JUDGE HILL: How do you respond to
20 Concord's argument that putting in this
21 condition that says, "But you can prove
22 otherwise and then we'll change it," that that

1 is essentially shifting the burden of making
2 a reasonable potential analysis to them and it
3 belongs with you.

4 MR. CURLEY: Well, I think we have
5 a lot of sort of discretion when it comes to
6 determining reasonable potential. We have, on
7 the one hand, to ensure that water quality
8 standards are not violated, but they are
9 rather high-hurdled to ensure.

10 As the Board has said in Upper
11 Blackstone that the regulations require a
12 precautionary approach when determining
13 whether the permit must contain a water
14 quality-based effluent limit for a particular
15 pollutant.

16 We believe it's that precautionary
17 approach to ensure -- that we must ensure
18 water quality standards that have shown up
19 here in our decision.

20 JUDGE HILL: But --

21 JUDGE FRASER: But the Board case
22 law also says that we really need to see to

1 give you that deference to your technical
2 expertise and recent judgment we need that
3 adequate explanation on the record.

4 Part of what that provision seems
5 to suggest is that all of the analyses you
6 should have done in the reasonable potential
7 analysis that you did for the other pollutants
8 you've shifted with respect to pH to the town
9 to do.

10 MR. CURLEY: I think -- my
11 understanding of the reasonable potential
12 analysis when it comes to pH is that it
13 differs markedly than for aluminum, let's say.
14 There we have a mass-balance equation that is
15 relatively straightforward to show.

16 When we are doing a pH reasonable
17 potential analysis, the pH is the result of
18 complex interactions among various chemicals
19 and so forth. Therefore, it will not be laid
20 out necessarily in the same matter as the
21 aluminum. It does look a bit different but we
22 believe that it's in here. It's in that kind

1 of response to that comment

2 JUDGE McCABE: The last sentence
3 of the Response to Comments tells the town
4 that if they want to try to make the
5 demonstration, that this limit is not -- or
6 that they could keep their 6.0 limit, their
7 demonstration would need to include several
8 samples and examine water quality impacts year
9 around. Why doesn't EPA have to do that to do
10 its reasonable potential analysis?

11 MR. CURLEY: We had the data
12 before us of this limited data set. Again, we
13 had to ensure that there would be no violation
14 of water quality standards. We believed from
15 looking at these data that we could not make
16 that assurance.

17 JUDGE McCABE: You're telling us
18 this is all the data that is available?

19 MR. CURLEY: It's the data that
20 was in the record that was before us at the
21 time of our decision. That's correct.

22 JUDGE HILL: What about the data

1 in Exhibit K?

2 MR. CURLEY: I'm sorry?

3 JUDGE HILL: What about the data
4 in Exhibit K to Concord's brief?

5 MR. CURLEY: Right. Well, we've
6 raised a couple issues about that. One is
7 that one data set in Exhibit K is 10 miles
8 downstream from Concord.

9 JUDGE FRASER: About four-and-a-
10 half or five?

11 MR. CURLEY: I believe it's 10
12 miles. I believe it was taken from the
13 Billerica Wastewater Treatment Facility which
14 if you look at the map on the back of the
15 permit, there is a scale at the bottom and it
16 scales out to a lot closer to 10 so we're not
17 sure of the representativeness of that data.

18 JUDGE FRASER: Did they introduce
19 it to show that over the time between 1990 and
20 current, 2012 or so, that the pH had not
21 really changed in the water, notwithstanding
22 their long-term limits? You're just saying

1 that data is too far away to be used?

2 MR. CURLEY: Right. Perhaps the
3 data -- perhaps the pH in Billerica hasn't
4 changed in the time period because I think
5 they are both from that same location.

6 JUDGE HILL: Did the permit that
7 the region submitted in Massachusetts for 401
8 certification have 6 or 6.5 in it as the pH
9 limit?

10 MR. CURLEY: The permit has been
11 certified with 6.5.

12 JUDGE HILL: So they didn't review
13 a permit -- they didn't review a permit with
14 6?

15 MR. CURLEY: Well, they review
16 draft permits, yes.

17 JUDGE HILL: That's what I
18 thought.

19 MR. CURLEY: But we've seen the
20 permit at 6, yes.

21 JUDGE HILL: And they certified
22 that permit?

1 MR. CURLEY: I believe they
2 certified the final permit but I could be
3 wrong about that.

4 JUDGE HILL: Okay.

5 MR. CURLEY: Should we turn to
6 flow?

7 JUDGE FRASER: You know in the
8 Response to Comment, and you concede
9 basically, that there is an inherently limited
10 data set that you used to make these
11 decisions. Is the region essentially saying
12 that a data set that has one exceedance is
13 sufficient to lower the limit to be protected?
14 Is that the essence of your argument?

15 MR. CURLEY: In this case but not
16 always. We are also looking at the alkalinity
17 data along with pH data.

18 JUDGE FRASER: And what is it that
19 says about the alkalinity data, again, where
20 the pH, if you look at the table that you
21 provided, and you have alkalinity against the
22 pH and in all instances the pH, I think, was

1 between 6.5 and 7.

2 So what is it specifically, if you
3 can help me understand, that you think the
4 alkalinity can absorb 6.0 to 6.3 which is
5 where the town says they typically discharge?

6 MR. CURLEY: Right. I don't know
7 that I'm qualified to get into a typical
8 explanation of that. I'm relying on what the
9 permit writers have told me, that when the
10 alkalinity is below 20 just indicates a water
11 body that has a limited capacity to absorb the
12 lower pH.

13 JUDGE HILL: We're certainly not
14 technical experts either, but I guess what
15 concerns me is that in the context of this
16 case, you had 6 for cycle after cycle and you
17 say 6 is good enough, dilution is good enough.

18 That's what you say in the
19 factsheet for the proposal. Then you shift
20 and you throw in all of this information about
21 alkalinity and pH levels. Those arguments may
22 be entirely valid but Concord never got the

1 chance to address any of those because it was
2 a shift.

3 In essence isn't there somewhat of
4 a greater obligation to explain what you're
5 doing if you make such a significant change
6 between proposed and final permit?

7 MR. CURLEY: Well, I mean, I don't
8 know that it's such a significant change but
9 when you go from a draft permit the point of
10 a draft permit is to take public comment and
11 presumably to change the permit in some way so
12 we end up with changes that will occur between
13 a draft and a final permit.

14 JUDGE McCABE: You mentioned that
15 you spoke to the permit writer to get an
16 explanation. Why did you need to do that?

17 MR. CURLEY: About the alkalinity?

18 JUDGE McCABE: Yes.

19 MR. CURLEY: Well, it's in here as
20 well. I mean --

21 JUDGE McCABE: On page 32?

22 MR. CURLEY: On page 32. There's

1 a sort of corresponding response on page --

2 JUDGE HILL: 22 I believe.

3 MR. CURLEY: 18.

4 JUDGE HILL: 18?

5 MR. CURLEY: Sorry, 17.

6 JUDGE McCABE: I think if it's
7 necessary for you to have a conversation with
8 the permit writer, how do you expect the town
9 to understand it?

10 MR. CURLEY: Well, point taken.

11 JUDGE FRASER: Another question.
12 Just on that mixing zone and the dilution,
13 when you propose the 6.0 in the permit for the
14 minimum at the pH, you were relying on a
15 mixing zone? Are you relying on the
16 Massachusetts mixing zone rule? What was the
17 basis of that 6.0?

18 MR. CURLEY: I think what happened
19 was that we were relying on the previous
20 permit. The previous permit had a 6.0 limit.

21 JUDGE FRASER: But even rolling it
22 back, the 6.0 came from some place else if the

1 Massachusetts Class B standard is 6.5. All
2 along it's been 6.0. It had to assume
3 something for a mixing zone which came from
4 where?

5 MR. CURLEY: I'm not aware. I'm
6 not really sure of that. I know we relied on
7 the previous permit and carried over the
8 number. I'm not really sure about --

9 JUDGE FRASER: On the basis of the
10 previous number being different than the
11 receiving body is that presumably there's a
12 mixing zone that by the time you finished the
13 mixing zone with dilution you'll be able to
14 meet the 6.5 to 8.3 standard. You basically
15 now have decided even if I give you the one
16 exceedance as being sufficient, you have
17 decided that essentially the mixing zone can't
18 accommodate that change.

19 Isn't there an explanation
20 warranted as to the basis, the underlying
21 basis for changing is that you are now
22 discounting dilution in a mixing zone? Where

1 is the explanation in the record for that?

2 MR. CURLEY: Well, I think the
3 explanations that are in the record are in
4 Response to Comments on the two pages that
5 I've mentioned.

6 JUDGE FRASER: Right. But I
7 didn't see any discussion per the statute that
8 says talk about the impact of dilution other
9 than we don't think or we're not assured or
10 we're not comfortable. Those aren't your
11 exact words but that the alkalinity and the
12 exceedance we're not comforted that there is
13 going to be adequate dilution.

14 MR. CURLEY: Right. That's the
15 conclusion.

16 JUDGE FRASER: Over what space?
17 Over what part of the river? Over a small
18 part of the river? Over four miles down from
19 the plant? At what point are we discussing?

20 MR. CURLEY: Right. I mean, the
21 conclusion is that dilution at the point of
22 discharge is not adequate. I don't believe

1 that mixing zones are allowed for pH limits
2 here.

3 JUDGE FRASER: They would have
4 been if you had 6 all along I would think.

5 JUDGE HILL: Or else the 6.0 was
6 never valid.

7 MR. CURLEY: Well, all right. I'm
8 sorry. I must be wrong about that.

9 JUDGE HILL: You've got about 14
10 minutes left. Do you want to move to flow?

11 Mr. Bukhari.

12 MR. BUKHARI: Good afternoon. My
13 name is Samir Bukhari. I'm an attorney in the
14 Office of Regional Counsel, Region 1. Today
15 I will address the issue of effluent flow,
16 collection system OM and mapping and DEHP
17 monitoring. I'll take each one in turn.

18 Effluent flow. The town makes
19 three principle arguments relative to the
20 permit's limit on effluent flow.

21 No. 1, that the EPA lacks legal
22 authority to impose such a limit.

1 No. 2, that the agency erred in
2 misinterpreting or ignoring a so-called direct
3 request for an increased effluent flow limit.

4 No. 3, EPA erred by stating that
5 it would wait for an updated CWMP plan prior
6 to acting on an effluent flow increase.

7 None of these issues were raised
8 below or were otherwise preserved for review.

9 JUDGE HILL: Yeah, but the Concord
10 Business partnership did say that the flow
11 limit was too low.

12 MR. BUKHARI: I would note that
13 the Concord Business Partnership raised a
14 generic request for EPA to assess the merit of
15 the flow increase. The town didn't even point
16 to that comment in their petition for review
17 in identifying the issue as preserved.

18 In reply, the town stated that it
19 was the town that raised the issue and
20 preserved the issue and Concord understood
21 them to mean that. Even Concord -- even the
22 town of Concord concedes that the Concord

1 Business Partnership's comment wasn't specific
2 enough, wasn't clear enough, wasn't precise
3 enough to preserve the issue.

4 Part of the reason for that is
5 that any flow increase that is granted to the
6 facility by necessity under Massachusetts
7 water quality standards, anti-degradation
8 provisions B14 CMR 4.04, and Subsection 5 and
9 2, necessarily requires an anti-degradation
10 demonstration.

11 The town, or the Applicant, needs
12 to demonstrate that there will be no
13 significant lowering of water quality or no
14 potential to impair uses or, in the
15 alternative, undertake a very specific four-
16 pronged demonstration addressing issues like
17 social and economic development and mitigation
18 of impacts.

19 JUDGE HILL: I don't recall this
20 argument in your brief. Did I miss something?

21 MR. BUKHARI: Your Honor, the
22 reason the argument wasn't addressed in the

1 brief is that the issue of flow was nowhere --
2 the issue of whether a specific flow increase
3 request was made was nowhere on the record
4 below.

5 JUDGE McCABE: What about the
6 question of legal authority? It was certainly
7 raised in the petition.

8 MR. BUKHARI: It was raised in the
9 petition. It was not raised in the comments.
10 As this town -- as this Board --

11 JUDGE McCABE: Is that waivable?

12 MR. BUKHARI: I'm sorry?

13 JUDGE McCABE: Is that waivable or
14 is it more like a jurisdictional argument?

15 MR. BUKHARI: No, that's waived
16 under this Board's precedent, most recently in
17 the town of New Market. The Board has been
18 very clear that, under 124.13 and 19(a), a
19 town a commenter has the obligation to raise
20 available legal theories and arguments in the
21 public comment period. The town failed to do
22 so, although it was certainly something that

1 was --

2 JUDGE HILL: Let's imagine a
3 hypothetical where Region 12 puts out a permit
4 and puts in a condition that every single
5 person in this room would agree the agency
6 lacks authority to do. But for some reason
7 that is unexplainable nobody raised it in
8 their comments.

9 Would we as a Board be obligated
10 to essentially pass that issue through to the
11 Court of Appeals saying, "Look, it wasn't
12 raised below so it wasn't preserved so go
13 ahead with this clearly illegal permit
14 condition and we'll let the federal courts
15 correct it."

16 MR. BUKHARI: No. I don't think
17 so. I think that the Board under case law in
18 Christian County Generation and Marine Shale
19 Processors has identified certain significant
20 or important issues that they deem significant
21 or important issues that they can, indeed,
22 pass upon even if they were not properly

1 preserved on the record below as here.

2 In the event that the Board deems
3 it appropriate to reach those issues, we think
4 that the permit limit as we've identified --
5 for the reasons identified in our response to
6 the petition --

7 JUDGE HILL: Let me ask you about
8 the merits. At various points in your brief
9 you call it an effluent limit, you call it a
10 permit condition, you call it a component that
11 the water quality based effluent limits are
12 based on. Is it all of the above? I mean,
13 what is it?

14 Mr. Cox's full argument is that
15 this is an effluent limit and you can only set
16 effluent limits on pollutants. Is it an
17 effluent limit?

18 MR. BUKHARI: It is an effluent
19 limit and it is a pollutant. It is a
20 condition. And we would also argue that the
21 flow from the facility, the effluent flow for
22 the reasons averted to by Judge McCabe also --

1 JUDGE HILL: So it is all of the
2 above?

3 MR. BUKHARI: It is, and I would
4 be happy to walk through our thinking on the
5 merits, again, with the caveat that we had no
6 opportunity to address these issues below. I
7 think three points on the merits.

8 No. 1, the town's argument is
9 based on a demonstratively false premise that
10 the town is discharging pure water rather than
11 municipal wastewater effluent and that it,
12 therefore, falls outside the definition of
13 pollutants.

14 No. 2, the town focuses too
15 narrowly on the definition of effluent
16 limitation rather than the statutory and
17 regulatory authorities relied on by EPA for
18 limiting and conditioning a discharge: section
19 402(a)(2), Section 301(1)(c), 122.4(a) and (d)
20 and 122.44 as well as .43.

21 No. 3, it misinterprets the
22 language of the permit to conclude that EPA is

1 attempting to regulate the quantity rather
2 than the quality of the effluent. Perhaps
3 I'll just start with that last argument and --

4 JUDGE FRASER: Can I ask a
5 preliminary question?

6 MR. BUKHARI: Sure.

7 JUDGE FRASER: Mr. Cox made a
8 point of saying that one of the other
9 dischargers from New Hampshire that are also
10 discharging into this river have flow in their
11 permit. Is there something unique about the
12 town of Concord that flow is necessary to be
13 in their permit as opposed to others? If
14 that's a true statement, why is there a need
15 for flow here?

16 MR. BUKHARI: The flow limit --
17 first of all, I would say that the permits are
18 adjudicated on a case-by-case basis. The
19 facts and circumstances of New Hampshire
20 permits are not before this Board. The town
21 was fully capable of pointing to this fact in
22 the public comment period but failed to.

1 In this case -- in Massachusetts all POTW
2 permits, with the exception of one, have flow
3 limits.

4 JUDGE HILL: Why does that one
5 not? You say it's in draft. Is the factsheet
6 out for public comment?

7 MR. BUKHARI: I believe -- I
8 believe it is.

9 JUDGE HILL: What is the reason in
10 the factsheet for not having a flow limit in
11 it?

12 MR. BUKHARI: I -- I can't speak
13 to that directly, Your Honor. Again, it's not
14 before us. Generally in Massachusetts we
15 impose flow limits as a protective condition.

16 JUDGE McCABE: But not in New
17 Hampshire.

18 MR. BUKHARI: But not in New
19 Hampshire. I would say there are different
20 routes for getting to standards. There are
21 different ways of framing a permit.

22 JUDGE McCABE: But this is all

1 coming from the same region.

2 MR. BUKHARI: That's true but
3 there is --

4 JUDGE McCABE: I asked because you
5 said it was -- you said flow was also among
6 things an effluent limit so if it's an
7 important effluent limit like the rest of the
8 pollutants we said, I was just curious as to
9 why, particularly when you have discharges
10 into the same river and you're looking at what
11 are the same quality standards for the same
12 river, why would there be flow in some if it's
13 an effluent limit and not in others?

14 MR. BUKHARI: Well, I mean, there
15 are effluent limitations that have been
16 imposed on all the discharges into the
17 surrounding Sirasco River and all the
18 dischargers save one in Massachusetts.

19 The purpose of the effluent
20 limitation is to impose a restriction on the
21 quantity of pollutant or the rate of the
22 pollutant in order to comply with water

1 quality standards.

2 There are different routes for
3 complying with quality water standards. One
4 is the imposition of mass limitations. There
5 could be impositions as, Judge Hill, you
6 referred to earlier, conditioning the permit
7 to include some operational restrictions
8 related to design flow.

9 We could spin out many different
10 variations about how the permit could be
11 constructed to comply with water quality
12 standards and have that permit certified by
13 the state as they are in New Hampshire and
14 Massachusetts. But we need to be presented
15 with that -- with those scenarios rather than
16 deal with hypotheticals for the first time
17 before the Board --

18 JUDGE FRASER: We asked a legal
19 authority question which would have all-
20 encompassing for NPDES permits if we're
21 talking about flow as a legal authority
22 question which is the question the permittee

1 here has raised. I appreciate that none of
2 these other permits are before us but our
3 ruling could have implications for all the
4 other permits as well.

5 MR. BUKHARI: Right. So I think
6 it makes sense to turn to the question of
7 legal authority, the substance of merits. Let
8 me begin by just referring to the
9 interpretation of the permit. I think the
10 town has pointed to the face of the permit and
11 referred to the use of the word flow on the
12 face of the permit. I would note that word
13 appears in the column effluent characteristic.
14 This is --

15 JUDGE HILL: Actually it's listed
16 as a parameter and that's really what that --

17 MR. BUKHARI: A parameter related
18 to the effluent. This is a restriction on the
19 quantity of effluent flow from the facility
20 and the pollutants therein.

21 There is nothing in the permit
22 record to justify the reading of the permit

1 that we are attempting to regulate the flow of
2 water. There use of the word flow does not
3 denote necessarily the flow of water. The
4 more natural interpretation here given the
5 circumstances is the flow of sewage effluent
6 as this is a POTW.

7 JUDGE HILL: To give Mr. Cox full
8 credit to his argument, his argument would be,
9 okay, so your sewage has got a bunch of gunk
10 in it and it's all flowing in water so put
11 limits on every piece of the gunk, but you
12 can't put limits on the whole amount because
13 the whole amount contains something that is
14 not a pollutant. How do you respond to that?

15 MR. BUKHARI: Your Honor, we
16 disagree with the notion that the whole amount
17 of wastewater effluent issuing from the plant
18 is not a pollutant.

19 As to the first argument that I
20 refer to below, we need look no further than
21 the plain language of the Clean Water Act and
22 the definition of pollutant under Section

1 502(11) which refers to sewage, as well as
2 municipal waste discharged into water.

3 I think the town has conceded that
4 this is not bottled water coming out of the
5 sewage treatment plant. This is treated
6 effluent. Those terms -- the terms under the
7 definition of pollutant basically cover the
8 municipal wastewater discharge at issue here.

9 JUDGE HILL: Mr. Bukhari, before
10 we let you sit down, does the state need to
11 approve a comprehensive plan before you can
12 change the flow limit or not?

13 MR. BUKHARI: No, they don't but
14 EPA in the factsheet very clearly outlined the
15 need for the town to complete its CWMP plan.
16 That issue was before the town in the draft
17 permit and it was not commented on. That
18 issue is waived. But I would also say that
19 EPA's position is fully consistent with the
20 town on this point, or was at the time of the
21 permit.

22 JUDGE HILL: So if the town came

1 in tomorrow, and as Judge McCabe was kind of
2 suggesting, asking you for an increase to say
3 1.6 or 1.8 or whatever, would you approve it
4 or not? Or on what basis would you evaluate
5 it?

6 MR. BUKHARI: We would evaluate it
7 on the basis of whether it complied with the
8 Clean Water Act. We would not -- if there was
9 a simple -- if there was a simple request to
10 increase the discharge to 1.6, we would not be
11 able to approve it because anti-degradation
12 provision under Massachusetts water quality
13 standards would be triggered because that
14 would be a new or increased discharge beyond
15 the 1.2.

16 We made that point repeatedly in
17 our Response to Comments that there needed to
18 be an anti-degradation, an authorization
19 obtained from the state and a justification
20 that anti-degradation provisions would be met.

21 JUDGE HILL: So the parts of the
22 response comments document that talk about the

1 comprehensive plan are really irrelevant?

2 MR. BUKHARI: No. I think that
3 what we were doing was mirroring the position
4 of the town. The town indicated to us in its
5 June 20, 2012 letter that it planned to update
6 its CWMP, that's a quote, and to seek NEPA
7 approval of that quote in its comments on the
8 draft permit.

9 It said that it planned to
10 complete its planning and seek NEPA approval.
11 I noticed a project change which is a
12 reference to the CWMP process. We were
13 looking to the town. We were entitled to rely
14 on the representations regarding the current
15 status and future of planning.

16 JUDGE HILL: And would the NEPA
17 process result in this anti-degradation
18 finding or not?

19 MR. BUKHARI: No, that's a separate
20 finding under Section 4.04, Subsection 2. I
21 would note that under Subsection --

22 JUDGE HILL: Can you point me to

1 the response comments document where you refer
2 to that?

3 MR. BUKHARI: We refer to the
4 anti-degradation justification and the
5 necessity of that in response to the Concord
6 Business Partnership comment and I'll read it
7 here. "As explained --

8 JUDGE HILL: I'm sorry. Where are
9 you?

10 MR. BUKHARI: I'm sorry. This is
11 Response -- this is the Response to Comments,
12 page 22, Response B1. We state, "As explained
13 in Response A1 an increase in design flow at
14 the facility may be granted to the town only
15 after the facility's plan has been approved by
16 Mass DEP and it has been shown that the Class
17 B water quality standards including anti-
18 degradation can be achieved at the increased
19 flow.

20 The difficulty of getting such an
21 authorization for a river that is already
22 impaired and effluent dominated during low-

1 flow period should not be under-estimated."

2 I would note that demonstration
3 under 4.04.5, Subsection C, the burden of
4 making that justification falls on the
5 Applicant, not on the permit issuer. We would
6 review whether an issuing department in
7 releasing a draft permit whether the
8 justification was sound and was sufficient to
9 satisfy the act. The obligation to make that
10 determination in the first instance falls on
11 the Applicant. That simply is not in the
12 record.

13 JUDGE McCABE: The anti-degradation
14 requirement applies to the pollutant limits
15 themselves so that you couldn't put more BOD
16 into the river water? If they were to take
17 their famous bottled water and pour that into
18 their water treatment plant and increase the
19 quantity of their flow but not the
20 concentration or mass of the individual
21 pollutants, they would be okay. Right?

22 MR. BUKHARI: So long as they

1 limit -- so long as those were limited, the
2 mass of pollutants. The mass of pollutants
3 would be a function of the flow.

4 JUDGE McCABE: So we're not
5 worried about the total volume of waste water
6 coming out. We're worried about the total
7 mass of pollutants.

8 So when you say that they could
9 not -- I think this began with your answering
10 the question of if they came in and asked for
11 a permit modification to increase their flow
12 now, could they get it. You said, well, no
13 because of anti-degradation.

14 But you're assuming that they
15 haven't done anything to clean up their flow
16 so that if it's at 1.6 and it's just as
17 contaminated in every liter as it was when it
18 was at 1.2, then they could not get that
19 certification from the state or permission
20 from the state because it would fall afoul of
21 anti-degradation on one or more of the
22 contaminants. It might not be the ones we're

1 talking about. It might be BOD.

2 MR. BUKHARI: But that
3 demonstration would need to be made. That
4 specific demonstration that the pollutant
5 loads would be held constant and, therefore,
6 the loading would be insignificant or would
7 not have any potential to impair uses or would
8 otherwise meet the forefront analysis needs to
9 be made on the record.

10 But I would also note that --

11 JUDGE McCABE: I understand but
12 what I'm trying to get at here is that it
13 doesn't sound like you're saying that the
14 anti-degradation and the need to have the
15 state's permission is limiting the total
16 quantity of water, if you will, that can come
17 out of the plant. It is the pollutants in the
18 water, the mass of the pollutants that they
19 are limiting.

20 MR. BUKHARI: Correct. Yes.

21 JUDGE HILL: Do you have any other
22 questions?

1 JUDGE McCABE: No.

2 JUDGE HILL: Okay. Thank you very
3 much, Mr. Bukhari.

4 MR. BUKHARI: Thank you.

5 JUDGE HILL: Mr. Cox, we went way
6 over with him. I'm going to give you an extra
7 five minutes. You have 10 minutes.

8 MR. COX: Thank you. Give me a
9 moment. Couple of comments I would like to
10 make in rebuttal. First with respect to
11 aluminum. One of the questions raised is what
12 could the town do. What the town could do
13 here is to do a site-specific study.

14 We heard for the first time that
15 DEP is not going to do it. Well, the town
16 could do that site-specific study with respect
17 to this river. That is why we've asked for a
18 deferral on this permit. The town could do
19 that study.

20 JUDGE HILL: Change the study and
21 then the permit limit be changed later based
22 on that information.

1 MR. COX: Yes.

2 JUDGE HILL: Okay.

3 MR. COX: Well, as long as we
4 change it now but we do have anti-degradation
5 issues that come into play so we would like to
6 have it not go into effect so that the site-
7 specific study can be done. That would
8 provide the data upon which a permit
9 limitation could be based.

10 Second, the procedural issues that
11 you raised with respect to the 7Q10. As you
12 know, we agree that there was a change that
13 was made from draft to final that were not
14 reasonably foreseeable. We agree that no
15 explanation for that change was provided and
16 it needed to be provided here.

17 JUDGE HILL: The concern that I
18 have, though, is that, I mean, as Mr. Curley
19 pointed out, I mean, most of the methodology
20 didn't change. I mean, there was no data
21 substituted in. They backed out a couple of
22 POTWs they didn't back out from the original

1 calculation.

2 The overall gestalt, if you will,
3 of the analysis was the same. Yet, other than
4 the data set you don't really complain in your
5 petition here about methodological problems.
6 If we agree there is procedural error, what
7 would you say in the remand that would be
8 useful at this point?

9 MR. COX: If the remand results in
10 the issuance of the permits so we can comment,
11 then we can see the data that is used to set
12 that.

13 As I said before, they choose to
14 use a data set that they say is more recent
15 and would be appropriate, but there really is
16 no reason when you give a flow to have more
17 recent data to be used. We have 40 years of
18 data on flow in this river that could have
19 been used and we don't understand why that
20 full body of information --

21 JUDGE HILL: So your comment on
22 remand would be expand the data set?

1 MR. COX: Yes, yes. Our comment
2 on remand and the permit reissuance would be
3 to expand the data, yes. We want to see what
4 the region would do with that.

5 JUDGE HILL: Are there other
6 complaints that you have with the methodology
7 that they used?

8 MR. COX: On the flow data?

9 JUDGE HILL: Yes.

10 MR. COX: No.

11 JUDGE HILL: Okay.

12 MR. COX: Other than what we set
13 forth in our petition and I won't go back over
14 that again.

15 JUDGE McCABE: And I also notice
16 we keep talking about how they didn't explain
17 the calculation but there are two full pages
18 of this in the appendix to the Response to
19 Comments with an awful lot of numbers so they
20 did explain a lot of detail.

21 MR. COX: That's right, a lot of
22 number, but there's not an explanation for why

1 the numbers that they had before were not
2 encompassed in this set of data.

3 JUDGE McCABE: So that's the one
4 thing you want explained?

5 MR. COX: Yes. The other issue I
6 want to raise with respect to aluminum is this
7 issue with respect to disparate burden. As we
8 put this in our reply, it's taken a bit out of
9 context.

10 The issue we're raising there with
11 respect to the river and the other
12 contributors to the river is that the proper
13 way that this should be looked at is river
14 shed-wise so that all of the treatment plants
15 are considered what is appropriate so that
16 there is site-specific data that is available
17 in order to set the permit limit.

18 I'm going to turn to pH now. With
19 respect to the reasonable potential analysis
20 and the questions asked where it is, we're
21 still looking for it. We don't know where it
22 is. The best we see in the record, and I

1 think you noted this, is a reference at
2 comment A14 and comment C6 where. The region
3 sort of turns it -- not sort of.

4 It turns on its head the
5 reasonable potential analysis by having the
6 language that has the town come back and say,
7 "Okay, you want to do something different?
8 You do the reasonable potential analysis."
9 That's the only place that we see any
10 reference to a reasonable potential analysis
11 here.

12 JUDGE HILL: But the argument is
13 we got one below 6.5 so if you discharge below
14 6.5 that's going to hurt the water body. If
15 it happens on that day, it's instantaneous.
16 That's all we need to say.

17 JUDGE McCABE: Isn't that per se?

18 JUDGE HILL: Isn't that enough?

19 MR. COX: That's what they say and
20 we think that's not right. You asked if you
21 did a different type of analysis with aluminum
22 and --

1 JUDGE HILL: In other words,
2 again, if we agreed with you that what they
3 did here was insufficient, what more would you
4 say in your comments after remand that would
5 shed light on this?

6 MR. COX: We would have the remand.
7 We would have the permit reissued. We would
8 look at and ensure that a full set of data is
9 looked at. The region relied upon 11 points
10 and there's a lot more out there. We provided
11 some and they raised issues why it's not good
12 enough.

13 JUDGE HILL: I understand your
14 argument.

15 MR. COX: We disagree with that
16 and you saw the reasoning why. We -- this is
17 in response to the question you raised. We
18 would like to talk to the permit writer to
19 find out what he was thinking, why he said
20 that it was not clear as to the impact here.

21 JUDGE McCABE: Have you had no
22 opportunity to -- has the town had no

1 opportunity to talk to the permit writer?

2 MR. COX: I suppose we could call
3 him up and talk to him but not in the context
4 of --

5 JUDGE McCABE: Doesn't the town
6 have meetings with the region?

7 MR. COX: The town have meetings
8 with the region?

9 JUDGE McCABE: Yes.

10 MR. COX: Well, you saw in the
11 record the one meeting that occurred. That's
12 not the way the permitting happens here in the
13 region. The communications are not occurring.

14 I'm going to move on to the flow
15 issue. One issue that you raise, Judge, was
16 whether you should just pass this issue on to
17 the Court of Appeals to be considered on the
18 legal issue.

19 We would take that legal issue
20 there if we need to, but we do think this is
21 something that you can address. We've raised
22 an error of law as to whether there is

1 authority to regulate pollutants. We don't
2 think there is at all.

3 JUDGE HILL: Mr. Bukhari's argument
4 is that they are not regulating water, they
5 are regulating sewage. How do you respond to
6 that?

7 MR. COX: What is it in sewage
8 that can be regulated? It is the pollutants.

9 JUDGE HILL: But the term sewage
10 is a term in statute that is -- the statute
11 defines sewage as one pollutant.

12 MR. COX: We don't see here a
13 limitation on sewage. We see a limitation on
14 specific pollutants.

15 JUDGE HILL: So what if they
16 changed that word to sewage flow 1.2 million
17 gallons?

18 MR. COX: Then what does that
19 mean, sewage flow? What does it mean when
20 they do a reasonable potential analysis or any
21 type of analysis on the specific compounds
22 that are identified in the flow? They need to

1 look at this carefully. I think you need to
2 look at the authority here because we just
3 don't see that there's any authority for the
4 region to regulate flow.

5 The other issue I want to raise in
6 connection with flow -- give me a moment. I
7 want to get to my notes -- is on the question
8 you asked and the region responded that flow
9 is effluent limit.

10 Effluent limits are exactly that,
11 they are limits. They are restrictions on
12 pollutants. If you look at the definitions,
13 as I know you will, that's what it says; it's
14 a restriction on pollutants, not flow.

15 Now, the region itself says that
16 it used flow as a backstop or a backstop that
17 is flow assumption through a permit condition.
18 I do that as a conceding that they don't have
19 authority to regulate pollutants in flow
20 because they are -- that's what they are
21 saying in their response.

22 I should put this in context. We

1 raised this issue. "EPA, region, you don't
2 have authority to regulate a pollutant in
3 flow." The response in the reply, "use flow
4 as a backstop and the assumption that went
5 into it as a permit." This, we think, is
6 wrong.

7 The region is seeking, as it says,
8 to provide certainty that the assumptions
9 underlying the permit determinations remain
10 accurate and protective. But, again, that
11 doesn't explain the questions that you raised
12 and what we've raised in our petition.

13 JUDGE HILL: Again, I asked you
14 this question before and I'm still not sure I
15 got an answer that convinces me. So taking
16 the backstop idea, if they wrote a permit
17 condition that said, "Don't operate above your
18 design capacity," or wrote a permit condition
19 that said, "Don't operate above the level that
20 the Massachusetts NEPA law allows you to
21 operate at," would that be -- could they do
22 that as a way to ensure that the effluent

1 limits are met?

2 MR. COX: Is that different than
3 the limitation that we see here?

4 JUDGE HILL: I understand that's
5 not this permit but if they wrote that
6 instead, would you have any basis to challenge
7 it?

8 MR. COX: It would still be
9 regulating a pollutant in flow.

10 JUDGE HILL: So they have no -- so
11 EPA has no authority to limit the operational
12 conditions that result in the effluent limits?

13 MR. COX: They don't have that --
14 they don't have that wiggle room to do so
15 because they are setting the effluent
16 limitation based upon specific pollutants that
17 are there by that mechanism by which they can
18 control the specific pollutants that are in
19 the flow.

20 JUDGE FRASER: Can I ask a related
21 question? If I'm looking at the table you
22 handed us, these limits are, many of them, 300

1 pounds a day, 450 pounds a day on the average
2 weekly. Then there's average monthly but they
3 are written in total numbers, total mass
4 basically in terms of the day.

5 If the flow limit was removed from
6 this sheet, what would change about the
7 operation at the facility? You said you could
8 go up to 10 percent or more in terms of the
9 through-put, but would you still not be
10 limited to the pounds per day on the permit?
11 Are you looking at that would be more water
12 added? What is changing in terms of the
13 impact if flow comes out?

14 MR. COX: These other permit
15 conditions that would remain. There would
16 still be an obligation to comply with the
17 concentration levels, comply with the mass
18 levels that are set.

19 JUDGE FRASER: I understand that,
20 but I'm saying how you would operate the
21 facility. What is the impact of taking flow
22 out if you're left with these mass loadings at

1 the end of the day?

2 MR. COX: The facility needs to
3 work harder to assure that these mass levels
4 are kept out of the effluent that results.

5 JUDGE FRASER: So you can dilute
6 more? You can put more water through? You
7 are still limited at the end of the day.

8 MR. COX: Exactly.

9 JUDGE FRASER: It seems like if
10 you have more through-put coming, you've got
11 to have a lower concentration of whatever you
12 call it, the sludge.

13 MR. COX: Same concentration and
14 the mass level, too. The facility needs to
15 work harder in order to do that and work to
16 get there.

17 JUDGE HILL: Thank you --

18 JUDGE FRASER: Let me come back to
19 my earlier question. Would it really help the
20 town as a practical matter to take this flow
21 limit out of the permit?

22 MR. COX: Yes, it would. I think

1 I laid out before the planning process the
2 town is going through so that it would know
3 going forward that this limitation is not
4 going to be a barrier and that it can make a
5 decision on whether to go forward with a waste
6 water disposal -- subservice disposal system
7 or to get the need that it has in town for
8 increased capacity through the discharge plant
9 -- discharge facility.

10 JUDGE HILL: Thank you very much,
11 Mr. Cox.

12 MR. COX: Thank you.

13 JUDGE HILL: This has been very
14 illuminating. I appreciate everybody for
15 answering all of our difficult questions.
16 We'll take the case under advisement.
17 Everybody have a good holiday weekend and
18 thank you very much.

19 MR. COX: Thank you.

20 MS. DURR: All rise.

21 (Whereupon, at 3:23 p.m. the
22 hearing was adjourned.)

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This is to certify that the foregoing transcript


In the matter of: Town of Concord

Before: US EPA EAB

Date: 05-22-14

Place: Washington, DC

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