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

In Re: Springfield Water and Sewer Commission, Springfield Regional Wastewater Treatment Facility Reissuance of NPDES Permit No. MA0101613	)	NPDES Permit Appeal No. 20-07

SPRINGFIELD WATER AND SEWER COMMISSION'S
REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

EPA admits that it made changes to critical provisions of the Springfield Water and Sewer Commission's (the "Commission") permit for the Springfield Regional Wastewater Treatment Facility ("SRWTF") between the Revised Draft Permit (A.R. B.1) and the Final Permit (A.R. A.1). These changes were outside of EPA's legal authority under the Clean Water Act ("CWA"). Moreover, EPA's actions in issuing the Final Permit deprived the Commission of notice and meaningful opportunity to comment on the changes, in violation of the Administrative Procedure Act (the "APA") and principles of due process.

Throughout this permitting process, EPA has a demonstrated history of testing out various approaches and interpretations in the Commission's permits, only to arbitrarily change them later. First, EPA would announce a particular approach in the Draft Permits (A.R. B.1, B.5) for comment. After carefully considering EPA's approach, the Commission would submit comprehensive comments outlining its concerns with the approach. Then, rather than responding and addressing the Commission's concerns, EPA would abandon its initial approach and adopt an entirely different approach or announce a new interpretation, leaving the Commission with no ability to comment on the significant changes. EPA's tactic of announcing one approach or interpretation and then changing course in the subsequent or Final Permit—with the outcome, if not intention, of depriving the Commission of its right to meaningfully participate in the permitting process—is disingenuous, unlawful, and not absolved by the fact that the Commission had an opportunity to raise issues in this appeal.

EPA implemented this tactic numerous times, including on two significant issues of critical importance to the Commission, which merit further attention in this Reply.[1] First, EPA announced

[1] The Commission focuses on these issues in the Reply due to their critical importance, but does not waive any other objections raised in its Petition.

a new approach to assigning nitrogen concentrations, based ostensibly on discharge volume, for the first time in the Final Permit. The new approach is not consistent with the CWA, or with EPA's own regulations implementing the CWA. Second, EPA's decision to re-classify Outfall 042 as a CSO, after years of recognizing it as a plant bypass, is not only clearly erroneous but represents a new interpretation of what CSOs and bypasses are. EPA created a new concept for defining CSOs and applied it in the Commission's permit without sufficient legal justification or explanation, after years of recognizing the Outfall as a bypass. This change in interpretation and application violated APA procedures—and reflects a legal position that is not consistent with the CWA or EPA's own regulations and guidance.

In addition to announcing new approaches and interpretations in the Final Permit without providing an opportunity to comment, EPA also committed legal error in its reliance on the Connecticut Department of Environmental Protection ("CT DEEP") comments in the Final Permit. EPA's own data contradicts CT DEEP's comments, which do not provide sufficient legal basis to justify the final nitrogen limits.

Finally, it is important to note that despite EPA's allegations, the Commission has not waived any arguments with respect to either the nitrogen limits or Outfall 042. The Commission has repeatedly objected to EPA's approach to nitrogen and Outfall 042 issues, both generally and on specific issues. Principles of administrative procedure and due process require that the Commission be allowed to raise new arguments relating to provisions and rationales that appeared for the first time in the Final Permit documents. It is completely legitimate for the Commission to raise these issues now, and the Board should, after considering these concerns, grant the Commission's petition, and remand the Final Permit to EPA for reconsideration and revision.

II. ARGUMENT

A. EPA's approach to establishing nitrogen limits in the Final Permit violates the APA and constitutes clear error.

EPA states that in issuing the new nitrogen limits in the Final Permit, it simply "affirmed the imposition of a mass-based [total nitrogen] limit," *see* EPA Resp. at 15, but this characterization is misleading. The Final Permit did not affirm the mass-based limits announced in the Revised Draft Permit; it imposed mass-based limits calculated using an entirely new approach that the Commission had no prior notice of or opportunity to comment on. The APA requires that EPA afford notice and comment to ensure that "interested parties reasonably could have anticipated the final rulemaking from the draft permit." *NRDC v. U.S. EPA.*, 279 F.3d 1180, 1187 (9th Cir. 2002) (quoting *NRDC v. U.S. E.P.A.*, 863 F.2d 1420, 1429 (9th Cir. 1988)) (internal quotation marks and citations omitted). Even where Draft Permits reference a particular subject or condition, notice to interested parties is "inadequate" where EPA proposes changes in the conception of the condition. *See id.* at 1188.

EPA mischaracterizes its "new approach" as a "logical outgrowth" of its calculation of nitrogen limits in the Draft Permits. *See* EPA Resp. at 25–26. However, the "logical outgrowth" doctrine does not apply here. "The logical outgrowth doctrine does not extend to a final rule. . . where interested parties would have had to divine the agency's unspoken thoughts, because the final rule was surprisingly distant from the [a]gency's proposal." *Mid Continent Nail Corp. v. United States*, 846 F.3d 1364, 1374 (Fed. Cir. 2017) (citing *Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005)) (internal quotation marks and citations omitted). Specifically, the 5 mg/L concentration from which EPA derived the nitrogen limit was not a "logical outgrowth" of the initial benchmark option in the Draft Permit (A.R. B.5), or of the annual average performance-based limit with an optimization target of 8 mg/L in the Revised Draft Permit. EPA has not demonstrated how calculation of the nitrogen limit using a 5 mg/L concentration is a

"logical outgrowth" of either of those proposals, and EPA has provided no valid legal or technical basis for the significant change.[2]

EPA incorrectly asserts in a footnote that the Commission received adequate legal notice of its final allocation plan and total nitrogen limit, through information that EPA presented at a public meeting about NPDES permit for other facilities in the state. *See* EPA Resp. at 27 n.5. This claim is wrong both factually and legally. As an initial matter, that public meeting did not concern the Commission's permit, and the information presented there was not referred to by EPA at any point in the permitting process as applicable to the Commission's facility. *See* A.R. G.28 (notifying "LIS Stakeholders" generally of a public meeting regarding nitrogen requirements for all NPDES permits in the LIS watershed). At that meeting, EPA circulated a table that specifically showed that the only facility in the Commission's size category—the SRWTF—would NOT receive a 5 mg/L limit. *See* A.R. G.29. The Agency does not deny that, but instead points to a slide showing that larger facilities (including several that are smaller than the SRWTF) would receive limits of 5 mg/L. A.R. G.27; *see also* EPA Resp. at 27 n.5. Having presented this array of confusing information at a public meeting about non-Commission permits, but specifically excluding the SRWTF from application of the approach discussed, EPA now tries to argue that these actions should preclude the Commission from contesting the new limits in its Final Permit, which reflected an entirely new approach than that contained in the two previous Draft Permits. There is no basis for such a claim.

[2] EPA's assertion that the revisions to the Final Permit are not "substantial" because the nitrogen limit in the Final Permit was 260 lb/day less stringent than the 2,534 lb/day limit in the Revised Draft Permit is erroneous. EPA's "new approach" to nitrogen, first announced in the Final Permit is a "substantial" change, and the fact that the resulting limit is slightly higher than the limit proposed in the Revised Draft Permit does not cure EPA's violations of the APA in developing the Final Permit. Further, EPA's elimination of the allowance to increase nitrogen discharges when additional CSO flows are brought into the plant reduces the nitrogen loading apparently allowed by the Final Permit.

1. EPA's justifications for the final nitrogen limits lack legal support.

EPA's failure to explain how its approach to nitrogen limits is consistent with the existing LIS TMDL or is otherwise "necessary" to meet water quality standards is clear error. To justify its "new approach" to calculating the nitrogen limit using a 5 mg/L concentration, EPA cites the decisions in *City of Taunton v. EPA* and *In re Upper Blackstone Water Pollution Abatement Dist.* *See* EPA Resp. at 33–34 (citing 895 F.3d 120 (1st Cir. 2018); 14 E.A.D. 577, 622-633 (EAB 2010), *aff'd.* 690 F.3d 9, 15 (1st Cir. 2012), *cert. denied*, 569 U.S. 972 (2013)). These cases are distinguishable and do not support the Agency's rationale in this matter.

EPA cited *Taunton* and *Upper Blackstone* to support the concept that the Agency has the authority under the CWA to impose any limits it chooses in NPDES permits regardless of whether those limits bear any rational relation to an established TMDL. *Id.* *Taunton* and *Upper Blackstone* do not support this concept. No TMDL existed in either of these cases. For example, in *Taunton*, the First Circuit upheld EPA's use of a reference-based approach to establish an effluent limit to translate narrative criteria, where no TMDL had been developed. *See* 895 F.3d at 137–38. Nothing in that case supports EPA's actions here. In addition, in the absence of a TMDL, EPA had calculated an allowable load for the receiving water and wasteload allocations ("WLAs") for point sources, and "identified the datasets and studies it relied upon in making these calculations, and provided a clear account of its reasoning and underlying assumptions." *Id.* at 130. No such clear account supports EPA's imposition of the Commission's final nitrogen limit.

Further, the First Circuit in *Upper Blackstone* acknowledged that "water quality standards will continue to be enforced during th[e TMDL development] process," but no enforceable TMDL existed at the time from which effluent limits could be derived. *Upper Blackstone*, 690 F.3d 9, 14, n.8 (1st Cir. 2012). As the court in *Upper Blackstone* explained, a "TMDL is a calculation of the maximum quantity of a pollutant that may be added to a water body from all sources without

exceeding applicable water quality standards including 'a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.'" *Id.* (citing 33 U.S.C. § 1313(d)(1)(C)). Here, EPA has already promulgated a TMDL. EPA's refusal to follow the directives of the CWA, by establishing permit limits that bear no rational relation to the existing TMDL, render the TMDL provisions of the Act superfluous and meaningless—a result that Congress could not have intended.

Finally, EPA erroneously relies on the Board's opinion in *In re City of Moscow*, 10 E.A.D. 135 (EAB 2001), as support for effluent limits more stringent than required by an applicable TMDL. *See* EPA Resp. at 32–33. In that case, a TMDL had been developed with a wasteload allocation based on a future expansion of the City of Moscow wastewater treatment plant that would increase its capacity to 4 million gallons per day (MGD). *Moscow*, 10 E.A.D. at 148. Because the permit in question was issued before that expansion could occur, the permit writer calculated the limit using the existing plant capacity of 3.6 MGD. *Id.* at 146-47. The Board upheld the permit because it adopted the concentration-based allocations from the TMDL, and appropriately adjusted for design flow of the facility at the time of permit issuance. *Id.* at 148. Here, EPA is ignoring the allocations contained in the TMDL—which already have been met—relying instead on a "new approach" to calculate a nitrogen loading limit using a concentration of 5 mg/L. The Board's opinion in *Moscow* does not authorize such an approach.

2. EPA's assertion that the final nitrogen limit is "necessary" is erroneous.

EPA's assertion that the final nitrogen limit is necessary to protect water quality standards is erroneous. Even if the CWA authorized EPA to impose permit limits that bear no rational relation to an established TMDL, EPA fails to explain how the 5, 8, and 10 mg/L concentrations used in its new approach are necessary or protective of water quality standards. EPA's justification for the assignment of concentrations based on plant size does not actually demonstrate how the

allocations achieve water quality standards. Although EPA may believe that effluent limits in permits are "necessary" to address impairments in the LIS, it has not shown how its arbitrary assignment of limits to the various plants based on their size will achieve the desired pollutant reductions. *See* A.R. A.2 at 22–29.

Further, EPA's assertion of necessity is contradicted by its approach to permitting for smaller plants. For example, smaller facilities serving higher-income, suburban populations represent substantially greater out-of-basin loadings than the SRWTF, but are required to meet less stringent nitrogen limits based on 8 or 10 mg/L or, in some cases, no limits at all. *See* A.R. G.29. Indeed, EPA never explained why the Commission, which discharged 1,837 lb/day in 2018 received the most stringent limit, while dischargers collectively responsible for over 1,200 lb/day need no limit at all. EPA Resp. at 27 n.4; A.R. A.2, App. A. The Commission, however, which serves economically challenged inner-city populations and represents a smaller share of out-of-basin loadings, is faced with meeting the most stringent limit under EPA's new approach. The disparate treatment among facilities, given total overall loadings, is not consistent with the applicable TMDL, and cannot be demonstrated to be necessary to meet water quality standards.

3. EPA's reasonable potential analysis constitutes clear error as contrary to EPA's own regulations.

EPA relies, in part, on 40 C.F.R. § 122.44(d) as a basis to impose effluent limits for nitrogen, asserting that SRWTF's discharges have the reasonable potential to cause or contribute to water quality standards violations. *See* EPA Resp. at 20–21, 28, 33. On this issue of reasonable potential, however, EPA stated in its Response to Comments that "[w]here a TMDL has been established, the permit writer is required to ensure that the effluent limits are 'consistent with the assumptions and requirements of any available wasteload allocation' applicable to the discharger." A.R. A.2 at 93 (citing 40 CFR §122.44 (d)(1)(vii)(B)). EPA has not done so. The Commission pointed out that the effluent limits for nitrogen in the Final Permit bear no rational relation to the WLA for out-

of-basin dischargers, and EPA simply responded that it need not follow its own guidance. *See* EPA Resp. at 34. EPA's reliance on *Taunton* for the proposition that it can ignore its own regulations and an approved TMDL in imposing a nitrogen limit is misleading and misplaced. *Id.* As discussed above, no applicable TMDL or WLA existed for the contested limits in *Taunton*, but a TMDL does exist here, and applicable regulations requires that narrative and numeric water quality criterion be consistent with any available WLA for the discharge. *See* 40 C.F.R. § 122.44(d)(1)(vii)(B). The concentrations assigned based on design flow, and effluent limits resulting therefrom, bear no rational relation to the applicable WLA for out-of-basin dischargers in the LIS, in violation of 40 C.F.R. § 122.44(d)(1)(vii)(B), which is clear error.

Furthermore, the CWA does not require effluent limits for every parameter, even where water quality standards are applicable, and EPA has not demonstrated why effluent limits are necessary here or how the selected limits will achieve water quality standards. *See* 33 U.S.C. § 1311(b)(1)(C) (requiring permits to include effluent limitations *necessary* to meet water quality standards). Notably, many permits do not include limits for every parameter present in a discharge. Rather, in order to establish effluent limits based on "reasonable potential to cause, or contribute to an excursion above any State water quality standard," federal rules require that EPA actually analyze and demonstrate the reasonable potential for such an excursion. *See* 40 C.F.R. § 122.44(d)(1)(ii). EPA has not done so here. In fact, EPA specifically acknowledged a downward trend in nitrogen loadings from the SRWTF, despite the absence of a nitrogen limit in prior permits. *See* EPA Resp. at 27 n.4 ("Annual average loads for the last 5 years from Springfield with no effluent limit were: 2018 1,837 lb/day; 2017 1,953 lb/day; 2016 1,643 lb/day; 2015 2,377 lb/day; 2014 2,303 lb/day."). These data directly contradict EPA's and CT DEEP's baseless speculation that nitrogen loadings from the SRWTF are increasing and that effluent limits at the SRWTF are therefore "necessary" under 33 U.S.C. § 1311 and 40 C.F.R. § 122.44(d). Invoking 40 C.F.R. § 122.44(d) as a basis for imposing

effluent limits without first establishing that a "reasonable potential" exists contradicts the CWA and applicable regulations, and therefore constitutes clear error.

4. EPA's statements regarding a compliance schedule for nitrogen are erroneous and contradictory.

EPA asserts that limits are necessary because discharges from SRWTF are increasing, while at the same time stating that it is "not convinced" that the Commission is unable to meet the new effluent limit announced in the Final Permit based on a trend of decreasing discharges. *See* EPA Resp. at 12, 14, 27, 35. These are contrary positions. EPA either believes that 1) nitrogen loads from SRWTF have increased such that an effluent limit based on a 5 mg/L concentration is "necessary" to achieve water quality standards or 2) nitrogen loadings from SRWTF have not increased and, therefore, the permittee can continue to meet the new nitrogen limit with existing technology. If EPA believes that nitrogen loadings from SRWTF have increased, such that imposition of an effluent limit in the Final Permit is warranted to maintain compliance with the LIS TMDL, then EPA should have carefully considered the evidence submitted by the Commission, which showed that a sufficient basis exists to issue a compliance schedule, in order to allow the Commission time to perform the necessary upgrades to meet the new effluent limit. *See* 40 C.F.R § 122.47(a). The fact that EPA "was not convinced" of the Commission's inability to meet the new effluent limit is not a sufficient basis to deny the compliance schedule. EPA's unsupported and conclusory determination regarding the Commission's request for a compliance schedule constitutes clear error and should be remanded.

5. EPA's claimed reliance on CT DEEP's comments to justify the final nitrogen limits is factually and legally flawed.

In its Response to the Commission's Petition, EPA puts great reliance on the comments submitted by CT DEEP, claiming that these comments justify imposition of the final nitrogen limit. *See* EPA Resp. at 15. That is simply not the case. The brief CT DEEP comments simply argue

for imposition of a limit instead of a benchmark. A.R. A.2 at 163. (As noted above, EPA has itself acted inconsistently on this issue, insisting that the Commission's facility needs a limit in order to stay below the TMDL allocations, while other facilities, for some reason, do not need a limit for that purpose, or are granted a less stringent limit.) But the CT DEEP comments provide absolutely no basis for the specific limit that EPA issued in the Final Permit, or for the "new approach" with which that limit is calculated. CT DEEP makes vague statements about possible violations of water quality standards, without tying those claims directly to the Commission, and refers to its general antidegradation policy, which contains no numeric limits at all. A.R. A.2 at 158–59, 161–66, 170–71. CT DEEP commented that it believed a limit should be required, and indicated what it believed the limit should be. A.R. A.2 at 171. CT DEEP did not request a limit based on 5 mg/L, and at no time indicated that such a limit was necessary to achieve applicable state water quality standards. As a result, EPA's reliance on CT DEEP's comments to justify its new approach is misplaced.

Moreover, if EPA did rely primarily on CT DEEP's comments in issuing the Final Permit, then the Agency committed a major procedural error. Those comments were not used to justify the nitrogen requirements in either Draft Permit. To then shift to a new approach based on those comments would absolutely, under the APA, require EPA to provide another opportunity for the Commission and other stakeholders to comment. At a minimum, EPA should have demonstrated the link between CT DEEP's comments and the final nitrogen limit, and allowed the Commission to comment on EPA's methodology. Failure to do so violated the APA.

Finally, the fact that the Commission did not object to this new use of the CT DEEP comments in the Final Permit cannot constitute a waiver of the Commission's right to raise this objection now. The objection is valid, and should result in remand of the permit.

6. The optimization requirement is vague and violates fair notice principles.

EPA's "principal water quality justification for the optimization requirement," which "requir[es] dischargers to take reasonable steps to minimize loading to LIS," highlights the Commission's primary concern. EPA Resp. at 37. Requiring a permittee "to take reasonable steps to minimize loading to LIS" is impermissibly vague. EPA has stated that it imposed the effluent limit to do just that: minimize nitrogen loadings to the LIS and provide legal assurance that the SRWTP will optimize its nitrogen removal efforts. *Id.* at 36–37. If numeric limits for nitrogen are upheld in the Commission's permit, the permit must state that compliance with such limits satisfy the optimization requirement. The Commission has no way of fully complying with the optimization requirement absent clearer directives, and the effluent limit itself obviates the need for optimization.

EPA lists certain requirements or deliverables mandated by the optimization condition, such as "not increas[ing] nitrogen discharge loadings" and submitting and adhering to nitrogen optimization techniques. *Id.* at 36. But, these individual facets of the optimization requirement are also impermissibly vague and do not necessarily represent an exhaustive list of "optimization requirements." The vague requirement not only fails to inform the permittee of what is legally required, it also leaves the permittee open to ongoing enforcement, by EPA or citizen groups, for failure to comply a requirement that has no express objectives. EPA's inclusion of the impermissibly vague optimization requirement constitutes clear error and should be remanded.

B. EPA's approach to reclassifying Outfall 042 violates the APA and constitutes clear error.

From the initial comment period, the Commission has objected to EPA's erroneous reclassification of Outfall 042 as a CSO. *See* A.R. C.1 at 9-12. In the fact sheet for the Draft Permit, EPA asserted that Outfall 042 was "inadvertently omitted" and reclassified as a CSO for "completeness." A.R. B.6 at 27. In the Final Permit, EPA asserted for the first time that "the inlet

structure was not designed to nor does it provide any treatment, and it occurs before the headworks of the WWTP. . . ." A.R. A.2 at 52. Because of EPA's brevity and lack of an adequate and defensible regulatory basis for the reclassification of Outfall 042 in the Draft Permit, the Commission was deprived of notice and a meaningful opportunity to provide comments. Because the treatment and location issues were not reasonably ascertainable during the public comment periods, as they first arose in the Final Permit and supporting documents, the Commission has a duty to present new information to demonstrate clear error. *See* 40 C.F.R. § 124.13; 40 C.F.R. § 124.19(a)(4)(ii); *see also In re: Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip.op. at 6 (EAB April 4, 2001). With the new information provided by the Commission, Outfall 042 meets the definition of a bypass, even under EPA's own rationale.

1. The procedure EPA followed in its reclassification of Outfall 042 as a CSO violates the APA.

The Outfall 042 section in the Final Permit impermissibly departed from the substance of the Draft Permit and deprived the Commission of proper notice and opportunity to comment.

EPA initially reclassified Outfall 042 as a CSO in the Draft Permit. In the fact sheet accompanying the Draft Permit, the regulatory basis given for reclassifying Outfall 042 was that "CSO 042, which is the CSO outfall located at the treatment plant, was inadvertently omitted from the list of outfalls from which discharges are authorized by the existing CSO permit. It is incorporated here for completeness." A.R. B.6 at 27. In response, the Commission, in its initial comment on the Draft Permit, noted that the explanation for reclassification was insufficient and briefly explained that Outfall 042 does not meet the definition of a CSO. A.R. C.1 at 10-11. EPA provided no further rationale in the Revised Draft Permit. Then, in the Response to Comments issued with the Final Permit, EPA created an entirely new and different rationale for its reclassification of Outfall 042 as a CSO. A.R. A.2 at 51–53.

EPA shifted away from its earlier explanation that Outfall 042 was reclassified because it was inadvertently omitted. Instead, EPA now stated that "[i]n developing the Draft Permit, EPA applied the definition of a CSO in determining the classification of outfall 042." A.R. A.2 7 at 51. CSOs are defined as "a discharge from a combined sewer system at a point prior to the POTW Treatment Plant." *See National CSO Control Policy,* 59 Fed. Reg. 18688 (1994). EPA then erroneously declared that because "the inlet structure was not designed to nor does it provide any treatment, and it occurs before the headworks of the WWTP, discharges from outfall 042 at the inlet structure are appropriately considered CSOs. . . [and thus the reclassification] remains unchanged in the Final Permit." *Id.* at 52. EPA's decision to reclassify Outfall 042 as a CSO based on an entirely new rationale in the Final Permit violates the APA.

Under the APA, "EPA must provide the public with notice and an opportunity to comment before it issues NPDES permits." *NRDC* v. *EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) (citing 5 U.S.C. § 533(b)-(c); 40 C.F.R. §§ 124.6(d), 124.10(a)(1)(ii), (b); *NRDC v.* EPA, 863 F.2d 1420, 1428-29 (9th Cir. 1988)). Like any agency, EPA is bound by 5 U.S.C. § 553 and "must provide notice sufficient to fairly apprise interested persons of the subject and issues before the Agency." *Id.* (citing *NRDC v. EPA*, 863 F.2d 1420, 1429 (9th Cir. 1988)). Additionally, the Draft Permit must be "accompanied by a fact sheet," 40 C.F.R. § 124.6, that "briefly set[s] forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit." 40 C.F.R. § 124.8. Here, EPA failed to meet both of these requirements.

Again, the fact sheet accompanying the Draft Permit provided no substantive information as to why, after years of permitting Outfall 042 as an emergency bypass, and not a CSO, EPA reclassified Outfall 042. EPA's failure to provide an adequate basis or any background detailing the reclassification of Outfall 042 at any time before the Final Permit was issued failed to provide

notice to the Commission of the regulatory basis for the reclassification and thus prevented the Commission from having the opportunity to provide a meaningful comment. Instead, the Commission was forced to provide a general explanation of why Outfall 042 should remain an emergency bypass and was unable to address any real regulatory basis for a reclassification.

Further, EPA's drastic shift in rationale for why Outfall 042 was reclassified deprived the Commission of notice and a meaningful opportunity to comment on the changes between the Draft Permit and the Final Permit as it relates to Outfall 042, in direct violation of the APA. A "final rule which departs from a proposed rule must be a logical outgrowth of the proposed rule. . . . The essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from the draft permit." *NRDC v. U.S. EPA.*, 279 F.3d 1180, 1187 (9th Cir. 2002) (quoting *NRDC v. U.S. E.P.A.*, 863 F.2d 1420, 1429 (9th Cir. 1988)) (internal quotation marks and citations omitted); *see also NRDC v. EPA*, 279 F.3d at 1186 (concluding that EPA's notice and comment procedure was inadequate because it did not afford interested parties the opportunity to comment on a substantive change between the draft and final permits).

The Commission had no way to anticipate the rationale EPA provided for the first time when it issued the Final Permit. In fact, EPA admitted, when it issued the Draft Permit, the exact point that it later contested in the Final Permit. In the fact sheet accompanying the Draft Permit, EPA stated that Outfall 042 is "located at the treatment plant." A.R. B.6 at 27. Then, in the Final permit, EPA asserted that Outfall 042 is located "before the headworks of the WWTP," A.R. A.2 at 52, because "[n]o treatment of the waste stream occurs at the inlet structure prior to flows discharging from outfall 042." *Id.* There is no possible way the Commission could have known from the Draft Permit and the rationale in the accompanying fact sheet that it needed to explain in

detail the exact function and location of Outfall 042 to show why EPA's rationale in the Final Permit was wrong.

Given the dramatic shift in EPA's rationale for reclassifying Outfall 042, the Commission is entitled to respond—as it did in its Petition—to EPA's new rationale. EPA's shift from "inadvertently omitted" to an entirely different rationale deprived the Commission of notice and a meaningful opportunity to comment on the changes between the Draft Permit and the Final Permit as it relates to Outfall 042 in violation of the APA.[3]

2. Outfall 042 meets the definition of a bypass under EPA's own rationale.

According to EPA's own logic, because the discharges from Outfall 042 are not from a point prior to the POTW Treatment Plant and are part of the Influent Structure where treatment is provided, Outfall 042 is appropriately considered an emergency bypass, and not a CSO.

EPA noted in its Response to Comments, that "[i]n developing the Draft Permit, EPA applied the definition of a CSO in determining the classification of outfall 042." A.R. A.2 at 51. CSOs are defined as "a discharge from a combined sewer system at a point prior to the POTW Treatment Plant." *See National CSO Control Policy,* 59 Fed. Reg. 18688 (1994). A CSO discharge typically occurs because of heavy rainfall or snowmelt. If enough rain or snowmelt occurs, the wastewater volume can rise above the SRWTF's capacity. When this happens, a CSO located in the collection system operates to discharge excess wastewater directly into nearby water bodies, before the wastewater enters the treatment plant, so as not to overflow the plant. Outfall 042, however, is not a CSO.

[3] Further, the Commission is entitled now to challenge the rationale first presented by EPA in its Response to Comments, contrary to EPA assertions. The Commission has consistently argued that Outfall 042 is a bypass rather than a CSO, and is allowed to present new information to demonstrate clear error by EPA. *See* 40 C.F.R. § 124.19(a)(4)(ii) ("if the petition raises an issue that the Regional Administrator addressed in the response to comments document issued pursuant to § 124.17, then petitioner must provide a citation to the relevant comment and response and explain why the Regional Administrator's response to the comment was clearly erroneous"). Here, the Commission has done just that.

First, EPA itself stated that Outfall 042 was located at the treatment plant and not at a point in the collection system prior to the treatment plant. In the fact sheet accompanying the Draft Permit, the regulatory basis given for reclassifying Outfall 042 is stated as follows: "CSO 042, which is the CSO outfall *located at the treatment plant*, was inadvertently omitted from the list of outfalls from which discharges are authorized by the existing CSO permit." EPA Resp. Ex. C at 27 (emphasis added).

Second, Outfall 042 does not meet the definition of a CSO. Outfall 042 is not located "at a point prior to the POTW Treatment Plant." Instead, it is located after the SRWTF Influent Structure, where flows coming into the plant can receive treatment, such as mixing for homogenization and chlorination for odor control. *See* Pet. Ex. 13. In fact, the Influent Structure and Outfall 042 are an integral part of the plant's headworks itself, and function together as a "plant protection line" during high flows, to prevent overloading and flooding of the treatment plant processes that would cause damage to equipment as well as to the health and safety of the plant operation staff. Stated differently, Outfall 042's purpose is not to control the flow of wastewater that may enter the treatment plant, it is for emergency control over the volume of wastewater that has already entered into the treatment plant. Outfall 042 therefore does not satisfy the definition of a CSO, but instead meets the definition of a bypass under EPA's regulations.

Bypasses are "intentional diversions of waste streams from any portion of a treatment facility." 40 C.F.R. § 122.41(m). A permittee "may allow any bypass to occur which does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to assure efficient operation." 40 C.F.R. § 122.41(m)(2). Because Outfall 042 functions as an integral part of the headworks—a portion of a treatment facility—and intentionally diverts wastewater to prevent overloading and flooding of the treatment plant in order to ensure efficient operation of the Treatment Plant, Outfall 042 is a bypass.

In its Response to Comments, EPA—in addition to raising the location issue argument—argued for the first time that Outfall 042 is not a "CSO-related bypass," so therefore must be a CSO. A.R. A.2 at 52. EPA expressed that a CSO-related bypass is "a discharge that occurs after receiving at least primary treatment." *Id.* EPA then declared that because EPA concluded that "the inlet structure was not designed to nor does it provide any treatment, and it occurs before the headworks of the WWTP, discharges from Outfall 042 at the inlet structure are appropriately considered CSOs." *Id.* This argument by EPA fails for two reasons. First, EPA has introduced another category of discharges that are irrelevant to the issue at hand: "CSO-related bypasses." The issue for Outfall 042 is whether the discharge from that outfall is a CSO, or is instead a discharge from the treatment plant. The "CSO-related bypass" category of discharges, which are from the Treatment Plant and receive primary (but not secondary) treatment, have nothing to do with this situation. The Commission has never considered or claimed the 042 discharge to be a "CSO-related bypass," and EPA has never considered it to be so either.

Second, when considering the logic employed by EPA in the Response to Comments, Outfall 042 meets EPA's definition of a bypass. As the Commission has previously explained and again reiterates here, the discharge from Outfall 042 is clearly a discharge from the treatment plant, rather than a CSO. Outfall 042 serves as a unit operation of the SRWTF, with the ability to provide chemical additions and control influent flow. *See* Pet. Ex. 13. Further, chlorine treatment is added at the Influent Structure for odor control. *Id.* The record plan and the Operation and Maintenance Manual ("O&M Manual") showcase these treatment functions. *Id.* Therefore, according to EPA's own logic, it follows that because the Influent Structure was designed to and does provide treatment, and is part of the headworks of the treatment plant, discharges from outfall 042 have always been and should continue to be considered an emergency plant bypass.

For decades, despite opportunities for reconsideration, EPA has recognized that Outfall 042 acted as a bypass and was not a CSO. EPA worked with the Commission to develop and approve a CSO Long-Term Control Plan, but never required Outfall 042 to be included as a CSO. *See* A.R. H.16 (stating that the Commission's analysis and resulting CSO controls are consistent with EPA's CSO Policy). EPA approved permits for decades recognizing Outfall 042 as a bypass, and specifically declined to include Outfall 042 in the Commission's 2009 CSO Permit. *See* A.R. B.19 at 6. Outfall 042 was not "inadvertently omitted" by EPA for decades. Outfall 042 does not meet the definition of a CSO and EPA's reclassification of Outfall 042 as such constitutes clear error.

III. CONCLUSION

For the foregoing reasons, the Region clearly erred in issuing the Final Permit over the Commission's detailed objections, and Petitioner respectfully requests that the Board remand NPDES Permit No. MA0101613.

Date: January 27, 2021

Respectfully submitted,

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STATEMENT OF COMPLIANCE WITH THE WORD/PAGE LIMITATION

In accordance with 40 C.F.R. § 124.19(d)(l)(iv) & (d)(3), I hereby certify that this Reply does not exceed 7,000 words. Not including the transmittal letter, caption, table of contents, table of authorities, figures, signature block, table of attachments, statement of compliance with the word limitation, and certification of service, this Petition contains 6,067 words.

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2021 the foregoing Reply in Support of Petition for Review was served on to the following persons, in the manner specified below.

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