

BEFORE THE ENVIRONMENTAL APPEALS BOARD

U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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ORAL ARGUMENT

	:
IN THE MATTER OF:	:
	:
CITY OF KEENE	: NPDES Appeal No.
	: 21-03
	:
NPDES Permit No. NH-0100790	:

Thursday,
April 7, 2022

Video Teleconference

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

BEFORE:

THE HONORABLE AARON P. AVILA
Environmental Appeals Judge

THE HONORABLE WENDY L. BLAKE
Environmental Appeals Judge

THE HONORABLE MARY KAY LYNCH
Environmental Appeals Judge

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APPEARANCES:On Behalf of the City of Keene:

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ALSO PRESENT:

Emilio Cortes, Clerk of the Board
Catherine Malinin Dunn, Senior Counsel, EAB
Kristen S. DeWire, Senior Counsel, EAB

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

2 (1:30 p.m.)

3 MR. CORTES: May I have your attention,
4 please. No recording of these proceedings is
5 allowed. A transcript will be prepared by the
6 court reporter and will be posted on the docket
7 for this matter on the Environmental Appeals Board
8 website.

9 The Environmental Appeals Board of the
10 United States Environmental Protection Agency is
11 now in session.

12 Today we will hear oral argument in the
13 matter of City of Keene, NPDES Permit Number
14 NH-0100790, NPDES Appeal Number 21-03.

15 The Honorable Judges Mary Kay Lynch,
16 Aaron P. Avila, and Wendy L. Blake now presiding.

17 JUDGE LYNCH: Thank you, and good
18 afternoon everyone. This is Judge Lynch.

19 The Environmental Appeals Board is
20 hearing argument today on a petition for review of
21 the Clean Water Act National Pollutant Discharge
22 Elimination System Permit, or NPDES Permit, issued

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1 by EPA Region 1 to the City of Keene, New
2 Hampshire.

3 The case involves challenges filed by
4 the City of Keene to the permit that authorizes
5 discharges from the Keene Wastewater Treatment
6 Plant, a publicly owned treatment works, to the
7 Ashuelot River. The challenges involve pH,
8 aluminum, and copper.

9 The argument will follow the Board's
10 February 10th, 2022, order. The Board has
11 allocated 60 minutes for oral argument, and we
12 will proceed as follows. First, we will hear from
13 Petitioner, the City of Keene. The City has been
14 allocated a total of 30 minutes, and they may
15 reserve up to 10 minutes of their allocated time
16 for rebuttal.

17 Next, we will hear from EPA Region 1,
18 who have been allocated a total of 30 minutes.

19 And, finally, if Petitioner opts to
20 reserve time for rebuttal out of their total of 30
21 minutes total, we will hear that rebuttal. And
22 the Clerk of the Board will keep track of the

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1 time.

2 And before we begin, I want to ask for
3 everyone's cooperation as we conduct this argument
4 in a virtual environment. It is critically
5 important that the court reporter capture the
6 argument, so we will ask those presenting to speak
7 directly into your microphone and try to avoid
8 speaking over others. I can tell you that it is
9 inevitable that we will step on each other's
10 words, and if this happens, and if there are any
11 technical difficulties affecting audio, please let
12 us know immediately, so we can repeat things or
13 fix any issues.

14 And I would particularly ask the court
15 reporter to alert us if you cannot hear what
16 people are saying.

17 And, also, if there are any other
18 technical issues, please let us know right away.

19 We are also very pleased that so many
20 people have been able to join us remotely to
21 observe the oral argument and help make these
22 proceedings transparent. And as the Clerk of the

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1 Board has noted, while we do not allow recordings
2 of any kind, a transcript of the argument will be
3 posted to the docket for this matter on our
4 website at a later date.

5 Let me also say that this is an
6 important case, and the Board very much
7 appreciates the time and effort that each of the
8 parties has expended in preparation for this
9 argument. You should assume that we have read all
10 the briefs and all your submissions, and,
11 therefore, we will ask questions that will assist
12 us in our deliberations.

13 We ask that you think of today as an
14 opportunity to have a dialogue with us about the
15 issues in the case.

16 You should not assume that the Judges
17 have made any decisions concerning any of the
18 issues in the case. And simply because we may ask
19 a difficult question does not mean that we have
20 made up our minds on any issue for one party or
21 another.

22 But, rather, we are going to use this

1 opportunity to listen, to probe the contours of
2 your legal positions, and to be sure we understand
3 your position and the legal and record support on
4 which the permit decision in your case is based.
5 We find this dialogue most helpful to our
6 deliberations.

7 I'd like now to call on the attorney
8 for each party to introduce themselves for the
9 record and who they represent. And when you're
10 speaking, please turn on your microphone and your
11 camera. And when you are finished speaking,
12 please turn off your camera and your microphone.

13 I would ask that we begin with the City
14 of Keene, followed by EPA Region 1. So let's
15 start with counsel for the City of Keene. And
16 please indicate whether you are reserving time for
17 rebuttal.

18 MS. TOURANGEAU: Good afternoon, Your
19 Honors. My name is Joanna Tourangeau. I am
20 representing the City of Keene in these
21 proceedings as Petitioner. And I respectfully
22 request to reserve 10 minutes for rebuttal.

1 JUDGE LYNCH: That's fine. Thank you
2 very much.

3 Counsel for EPA Region 1?

4 MS. SCHERB: Good afternoon, Your
5 Honors. My name is Kristen Scherb, and I'm from
6 EPA Region 1. I will also note that my colleague,
7 Samir Bukhari, is here with me in the room, but he
8 won't be presenting argument today.

9 JUDGE LYNCH: Thank you very much.

10 Well, with that, let's begin. So,
11 Counsel Tourangeau.

12 MS. TOURANGEAU: The City of Keene, as
13 you have mentioned, has appeared to appeal three
14 effluent limits in the EPA NPDES permit. First,
15 on pH, the administrative record is devoid of any
16 EPA analysis supporting imposition of an effluent
17 limit for pH for the floor of 6.5. Second --

18 JUDGE LYNCH: Counsel, I have a couple
19 of preliminary questions about your challenge to
20 pH that I'd like to ask at this point. The first
21 is based on the fact that your prior permit, the
22 2007 permit, had the same pH limit and you did not

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1 challenge that. I have read in your filings about
2 the operational and facility improvements you have
3 made, but my question is, is there any particular
4 factual change that has occurred that is causing
5 you to challenge the pH limit in this permit?

6 MS. TOURANGEAU: I think that the facts
7 that are different now from the facts in place at
8 that time are, number one, the continued -- you
9 know, over a decade of information and data
10 supporting the pH for the river, the receiving
11 water, being low, and the kind of ongoing expense
12 and upgrades necessary in order to achieve an
13 artificially low -- I'm sorry, high pH in the
14 discharge. That those -- that work and facility
15 upgrades and costs are significant for the City of
16 Keene.

17 JUDGE LYNCH: Thank you. And then my
18 second initial question is, as we begin, can you
19 clarify exactly what you are challenging and the
20 relief you are seeking? And one of the reasons I
21 ask this is because when I look at your comments
22 on pH, comment 3-1, you request language in the

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1 permit that would allow modification of the pH
2 limit based on two conditions after a site-
3 specific study.

4 But when I look at the permit, pages 17
5 and 22, I see a special condition that allows for
6 a demonstration project and modification of the pH
7 limit. So what's the basis for your challenge?

8 MS. TOURANGEAU: Yes. I think that
9 your question actually goes to the heart of all
10 three of the City's challenges to the permit and
11 its conditions, or lack thereof, which is that
12 while we would agree that EPA has in some cases,
13 such as for pH as you point out, specified that
14 site-specific data can be collected.

15 The mechanism whereby the new limit
16 would be implemented is not clear and does not --
17 is not automatic in the case of pH, but is not
18 such that it could account for the existence of
19 low pH. It is reliant on kind of changes to the
20 facility's pH.

21 JUDGE LYNCH: So are you challenging
22 the special condition that's in the permit on

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1 pages 17 and 22? Or are you challenging the limit?

2 MS. TOURANGEAU: The challenge is that
3 the limit itself is not based on a clear and
4 cogent rationale in the administrative record.

5 JUDGE LYNCH: I don't see a challenge
6 to the limit in your comments. Can you show me
7 where that is?

8 MS. TOURANGEAU: Are you looking at our
9 draft --

10 JUDGE LYNCH: 3-1 --

11 MS. TOURANGEAU: -- our comments on the
12 draft?

13 JUDGE LYNCH: -- your comments, right.

14 MS. TOURANGEAU: So our --

15 JUDGE LYNCH: As I read your comments,
16 they are asking for the ability to do a study or
17 demonstration project.

18 MS. TOURANGEAU: I think that these
19 comments are pointing out both pieces, both that
20 the -- both using the demonstration to New
21 Hampshire DES, and how that would be implemented
22 by EPA, and not just by DES. But, secondarily, in

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1 the --

2 JUDGE LYNCH: Well, while you're
3 looking at that, maybe not at the same time, but
4 I -- let me direct you now to page 27 of your
5 petition, and what you asked for in your petition
6 is that the EAB, the Board, impose a limit of 6.0
7 to 8.0 standard units of pH.

8 So do you still want us -- are you
9 asking -- what about the study or the
10 demonstration project? It seems you're asking the
11 Board to unilaterally impose a limit in the
12 permit.

13 MS. TOURANGEAU: I think that what our
14 request in our petition was, was to remand to the
15 -- to Region 1 for review of the administrative
16 record documentation of the naturally occurring
17 low pH and the associated water quality
18 consequences, and to have a mechanism in the
19 permit --

20 JUDGE LYNCH: No. It said -- let's
21 read it. It says an imposition of 6.0 to 8.0.

22 MS. TOURANGEAU: Yes.

1 JUDGE LYNCH: Not a mechanism. It says
2 an imposition. So --

3 MS. TOURANGEAU: Yes.

4 JUDGE LYNCH: So can you just clarify,
5 what is it you're asking for?

6 MS. TOURANGEAU: Yes. I think we're
7 asking for both. I think we're asking for the
8 Board to either remand with those instructions or
9 to, at the very least, have the mechanism clearly
10 take into account site-specific data regarding the
11 pH of the -- the existing pH of the Ashuelot and
12 implement that into the permit limit.

13 JUDGE BLAKE: Counsel, so in your
14 response to comments, did you specifically ask for
15 the 6.0? That's the piece I am still missing --
16 that request. And if you don't have it right now,
17 that's fine. But I just wanted to follow up and
18 -- just to ensure that -- if you had a cite handy,
19 that would be great.

20 MS. TOURANGEAU: Yes. And I don't
21 right off the top of my head, but I -- and it's
22 hard to kind of answer questions and do that at

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1 the same time, but I will endeavor to save a
2 minute to address that in my rebuttal, and I will
3 take a look at that while EPA is presenting their
4 argument.

5 JUDGE LYNCH: Thank you. Proceed.

6 MS. TOURANGEAU: Yes. So kind of
7 starting off with pH, I think the parties are in
8 agreement that the pH of the receiving water is
9 low due at least in part to natural causes. And
10 EPA failed to clearly articulate --

11 JUDGE LYNCH: Counsel?

12 MS. TOURANGEAU: Yes?

13 JUDGE LYNCH: If I could ask you, you
14 said "at least in part." It seems to me
15 throughout your pleadings and now, you acknowledge
16 that there is at least some anthropogenic
17 contribution to the low pH?

18 MS. TOURANGEAU: I think that, yes, the
19 record reflects that there is some anthropogenic
20 deposition --

21 JUDGE LYNCH: Okay.

22 MS. TOURANGEAU: -- from air emissions.

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1 Yes.

2 JUDGE LYNCH: Thank you.

3 MS. TOURANGEAU: Yes. But the amount
4 is not clear, nor is there any direct link in the
5 record between the 6.5 floor in the water quality
6 standard and in the effluent limit to the need to
7 address the anthropogenic sources of low pH.

8 EPA concedes that it did not respond to
9 Keene's comments regarding negative water quality
10 impacts of a pH limit that is higher than the
11 receiving water and justifies that -- they justify
12 that lack of response by arguing that Keene's
13 comments were irrelevant and inappropriate because
14 the Region did not make the technical conclusion
15 that the low pH was due to natural causes.

16 But the fact that there is a concession
17 that there could -- there was no response to the
18 negative water quality impacts from that low pH
19 means that the record is silent regarding the
20 connection between the effluent limit in the
21 permit and the need to comply with water quality
22 standards.

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1 JUDGE LYNCH: And, Counsel, where in
2 the record, in your comments, do you show that
3 there is a negative impact?

4 MS. TOURANGEAU: In our comments on
5 page -- I believe it was in the first paragraph of
6 -- on page 3.1. The implications of the varying
7 pH levels may be causing an adverse effect by
8 producing a pH curtain wall in the vicinity of
9 Outfall Serial Number 00 --

10 JUDGE LYNCH: Right. But I didn't see
11 any studies or support for that. Was I missing
12 anything there?

13 MS. TOURANGEAU: I think that that
14 comment was not responded to at all, and I think
15 that there is --

16 JUDGE LYNCH: But it was a general
17 assertion, a comment. My question is, is there a
18 study in the record that I just missed, or in your
19 comments, more specifically?

20 MS. TOURANGEAU: I believe that the
21 study was cited in the briefing.

22 JUDGE BLAKE: Counsel, I looked in the

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1 petition, and the petition states, "Scientific
2 studies document that aquatic life is vulnerable
3 to adverse impacts from abrupt changes or
4 fluctuations in pH." This is the petition at 10.

5 But, again, I didn't see any study
6 cited there either. I was just curious what your
7 support was for that.

8 MS. TOURANGEAU: Yeah. I think that in
9 the reply -- I think that that is addressed in the
10 briefing. In the reply brief, I think we provided
11 that citation.

12 JUDGE BLAKE: Can we go back for a
13 moment to -- in your reply brief, at page 5, you
14 argue that EPA has failed to apply the New
15 Hampshire Water Quality Standards for pH as
16 written. I just want to explore that issue just
17 a little bit. Can you explain to me how the
18 Region has failed to apply the water quality
19 standards as written?

20 MS. TOURANGEAU: The New Hampshire
21 water quality standard for pH specifies that the
22 pH for Class B waters, which is what this

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1 receiving water is, shall be 6.5 to 8.0, except
2 when due to natural causes. There is -- as we
3 discussed in that brief, there is no kind of
4 specification in that water quality standard that
5 the only or sole source of a pH outside that water
6 quality standard must be natural.

7 The only kind of analysis that EPA
8 points to in support of its imposition of that
9 number and its kind of discarding of the impacts
10 to pH that are natural, aside from the water
11 quality impacts, is the impairment listing and two
12 emails from EPA and DES saying essentially, you
13 know, you have -- this waterway is impaired, and
14 so you cannot change the pH standard.

15 And so the concern is that there is an
16 exemption from that water quality standard for pH
17 that is naturally occurring, and it is agreed upon
18 by all of the parties that at least a portion, if
19 not the majority, based on, you know, decades of
20 VRAP reports of the pH issues are naturally
21 occurring.

22 And so that --

1 JUDGE LYNCH: Counsel, this is Judge
2 Lynch, if I could interrupt you. The water
3 quality standard itself also defines naturally
4 occurring condition. It says, "Naturally
5 occurring conditions means conditions that exist
6 in the absence of human influences."

7 And if you look at the dictionary
8 definition of "absence," it means non-existence.

9 MS. TOURANGEAU: Yes. And the --

10 JUDGE LYNCH: So doesn't that mean --

11 MS. TOURANGEAU: I think that the vast
12 majority of the data from VRAP and from DES
13 indicates that the -- you know, the pH is
14 naturally occurring. I think there is not --

15 JUDGE LYNCH: But, Counsel, you know,
16 you quote the VRAP data, right, for example, the
17 2007 report. And you quote page 18. You quote a
18 sentence that says, "pH measurements are likely
19 the result of natural conditions." But you leave
20 out the very next sentence which talks about
21 human-caused acid rain and acid deposition. Why
22 did you leave that next sentence out?

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1 MS. TOURANGEAU: I think there has been
2 -- I think that the -- whether there is, you know,
3 a contribution that is a portion that is the
4 result of anthropogenic sources, I think that it
5 is -- the burden is on EPA in establishing a
6 cogent basis for application of -- or of refusal
7 to apply that standard to show why the 6.5 is
8 necessary in order to address both pieces of the
9 pH analysis, meaning the natural causes and the
10 anthropogenic.

11 JUDGE LYNCH: Well, didn't the State --
12 go ahead, Judge Avila.

13 JUDGE AVILA: Can I just ask one
14 question about -- and I know our time is short,
15 but I take the Region's point in their argument to
16 be basically the water quality standard says the
17 pH of this class of water bodies shall be 6.5 to
18 8.0 unless due to natural causes. And the State
19 has listed those as impaired on its 303(d) list.

20 So, kind of ipso facto, hasn't the
21 State already said that this water is not at a pH
22 due to natural causes, given that it was listed on

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1 the 303(d) list, and that's kind of the end of the
2 matter?

3 MS. TOURANGEAU: The 303(d) list does
4 not go to -- does not speak to that correlation
5 that I'm trying to get at between the impacts to
6 pH from natural versus anthropogenic sources. And
7 the other point that we made in the brief is that
8 simply deferring, as EPA did in its entirety, on
9 that listing as impaired as the basis for saying
10 that 6.5 to 8 is the mandatory standard, is not
11 based on EPA's own reasoned analysis as required.
12 It is just deferring to EPA -- to DES statements.

13 And, in fact, if you dig -- I'm sorry.

14 JUDGE AVILA: I'm sorry. On that, I
15 will say, you put in a lot of data from the VRAP
16 studies and your own data that don't -- that -- on
17 pH upstream. But in -- and I think you called it
18 "reams of data," and the Region's response is
19 that, yes, you put in reams of data, but it
20 doesn't really show what the source of that pH is.

21

22 And so what is your response to that?

1 It doesn't indicate why the pH sample -- your data
2 doesn't indicate or give any demonstration as to
3 why the pH samples are low.

4 MS. TOURANGEAU: I think, again, on
5 kind of both of those issues, the City's position
6 is that EPA's obligation is to have its own cogent
7 explanation for imposition of the pH effluent
8 limit. And if you look at the documents that they
9 relied on, those are only the impairment listing
10 that DES did, which includes no analysis and two
11 emails from DES saying that the waterway is
12 impaired, period, and not responding to EPA
13 questions.

14 JUDGE LYNCH: Counsel, we've only dealt
15 with the pH. We did not get to the aluminum or
16 copper issues. We can give you five minutes'
17 additional time, and we'll provide the same
18 additional time to the Region.

19 MS. TOURANGEAU: Okay. Should I do
20 that right now?

21 JUDGE LYNCH: Yeah. Why don't we move
22 to aluminum and then copper.

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1 MS. TOURANGEAU: Okay.

2 JUDGE LYNCH: And just -- we have read
3 all of the briefs. We're familiar with the
4 record. So I would just suggest that you make any
5 particular points that -- that would further the
6 dialogue.

7 MS. TOURANGEAU: Yeah. I appreciate
8 the additional time, and thank you.

9 On both aluminum and copper, as on the
10 pH side, what the City is asking for is a clear
11 mechanism to obtain site-specific data, have it
12 reviewed in consultation with DES and EPA, and
13 then have a mechanism whereby, if acceptable to
14 DES and to EPA, the permit limit is adjusted
15 without there having been an already effective
16 permit limit that would be subject to permit
17 modification and/or anti-backsliding analysis.

18 For both of these criteria, that
19 results in issues on the aluminum side of the
20 house. The issue would be that you run the risk,
21 without such a clear mechanism, of having a
22 standard based on outdated science that doesn't

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1 apply to waters with a pH that is low, such as the
2 Ashuelot --

3 JUDGE LYNCH: But, Counsel, I didn't
4 see where you responded to the Region's position
5 that they are required to issue a permit in
6 compliance with existing law and regulations,
7 which includes the existing water quality
8 standard.

9 MS. TOURANGEAU: Yes. I think what we
10 are -- and there may be some confusion on that and
11 on copper, in that what we are asking for is not
12 that the permit limit be written, relying on new
13 science that there be a number, but that the City
14 have the opportunity to collect data, to apply
15 that standard in consultation with DES and EPA,
16 and then to have that be --

17 JUDGE LYNCH: Counsel, why can't you do
18 that now?

19 MS. TOURANGEAU: Because right now what
20 the permit has for aluminum, for example, is a
21 three-year implementation period, and for copper
22 there is no implementation schedule.

1 JUDGE LYNCH: What was preventing you
2 from doing the study or collecting the data?

3 MS. TOURANGEAU: We can do the study,
4 which is a significant expense. But without the
5 assurance that there would be any value in doing
6 that study, it is very difficult to kind of invest
7 municipal resources with a complete lack of
8 certainty or buy-in from the regulator that there
9 would be any agreement on what the outcome of
10 doing that work would be.

11 You know, as EPA says with regard to
12 aluminum, you can go do that study, but we're not
13 going to tell you whether the outcome of it is
14 going to be reviewed by us or not.

15 JUDGE LYNCH: Well, how do you respond
16 to the Region's position that, on the other hand,
17 you want the result hardwired into the permit
18 before they have a chance to comply with their
19 legal obligations?

20 MS. TOURANGEAU: As we briefed, I do
21 believe that was a misunderstanding. The City is
22 not requesting, on aluminum or on copper, that

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1 there be any hardwiring. We are only asking that
2 the EPA lay out the mechanism, not the outcome.

3 JUDGE LYNCH: Well, there are
4 mechanisms, and they refer to the regulatory
5 provisions in --

6 MS. TOURANGEAU: The mechanisms are not
7 clear in terms of whether EPA would consider the
8 outcome or not.

9 JUDGE BLAKE: So, Counsel, but, for
10 example, for copper, EPA Region 1 -- Region 1 laid
11 out very clearly the process. And so it's just
12 not clear to me, if it's laid out in response to
13 comments what the process is, and the permit
14 modification regulations are clear as to how you
15 go and seek a permit modification, what is the
16 issue?

17 How is the City harmed? Can you
18 explain that?

19 MS. TOURANGEAU: So the -- because
20 there is -- should I answer?

21 JUDGE LYNCH: Just briefly answer.

22 MS. TOURANGEAU: Okay. Because there

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1 is not a specific mechanism that says if you use
2 WER or BLM for copper to figure out what this new
3 limit would be, we would consider that as
4 complying with New Hampshire standard.

5 We could satisfy -- the City could
6 satisfy DES, but it would not be part of our
7 permit until we went through the permit
8 modification process, at which point if there is
9 already a copper limit compliance standard, we are
10 subject to anti-backsliding.

11 JUDGE LYNCH: Thank you.

12 JUDGE AVILA: Can I just ask one follow
13 up on that?

14 JUDGE LYNCH: All right. The Clerk of
15 the Board keeps track of the extra minutes,
16 though.

17 JUDGE AVILA: And it's just one quick
18 question. As I understood the regulations,
19 though, on copper, the study you would do under
20 New Hampshire law changed the numeric criterion in
21 the water standard, but then it still has to be
22 translated into an effluent standard.

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1 So it's not even a question -- or
2 correct me if I'm wrong -- it's not even a
3 question of EPA accepting the results of your
4 study after New Hampshire has. It's -- I think
5 what the Region was saying in its response to
6 comments and in its brief is that even if New
7 Hampshire accepts it and the numeric criterion
8 changes, you still have to translate that into an
9 effluent limitation in the permit.

10 MS. TOURANGEAU: Yes.

11 JUDGE AVILA: Is that -- okay. We are
12 on common -- common understanding on that.

13 MS. TOURANGEAU: Yes.

14 JUDGE AVILA: Okay. Thank you.

15 JUDGE LYNCH: Thank you, Counsel.

16 We'll now hear from Region 1, but can
17 the Clerk of the Board indicate how many minutes
18 we're adding to Region 1's time?

19 MR. CORTES: Yes, Your Honor. In
20 addition to the five minutes that you initially
21 identified, I've added an additional two minutes.
22 Thank you.

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1 JUDGE LYNCH: Thank you. So, Counsel
2 Scherb?

3 MS. SCHERB: Good afternoon, Your
4 Honors. My name is Kristen Scherb, and I
5 represent EPA Region 1 in this appeal.

6 I collaborated with my colleague, Samir
7 Bukhari, also of EPA Region 1, and Pooja Parikh of
8 the Office of General Counsel on the written
9 briefs for this case, as well as my preparation
10 for oral argument, although neither of them will
11 be presenting oral argument today.

12 I will also note again, as I did
13 previously, that Mr. Bukhari is here with me in
14 the room, but, again, he will not be presenting
15 oral argument.

16 I'd like to begin, Your Honors, by
17 giving just a one- to two-sentence summary of the
18 Region's position on each issue on appeal today
19 before diving into each in greater detail.

20 On the issue of pH, the Region properly
21 applied the water quality standards' pH range of
22 6.5 to 8.0 for a standard after determining that

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1 the one exception to that range in the water
2 quality standards did not apply. This conclusion
3 mirrors the State's interpretation of its own
4 water quality standards.

5 On the issue of the aluminum limit, the
6 Region properly applied the currently effective
7 water quality standards for aluminum to derive
8 that limit. And on the issue of the special
9 conditions related to both copper and aluminum,
10 the Region's position is that the Region did not
11 abuse its discretion by deciding not to include
12 the requested special conditions, either as they
13 were presented in the comments on the draft
14 permit, or as Petitioner has attempted to explain
15 them on the reply.

16 So beginning with pH, Your Honors --

17 JUDGE AVILA: Can I ask a question on
18 pH just at the outset? I want to understand to
19 what extent you relied on the 303(d) listing. Is
20 that just evidence of the State's interpretation
21 of the term "natural causes," or you made your --
22 and the Region made its own determination as to

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1 what natural causes means? Or -- I'm just trying
2 to understand how much work the 303(d) listing is
3 doing in your argument. I got a little confused
4 on that.

5 MS. SCHERB: Sure. So based on the
6 record before the Region when it was drafting the
7 permit, the 303(d) list was the most persuasive
8 and strongest piece of evidence that the natural
9 cause exception did not apply.

10 There was also the statement from NHDES
11 in the record, which I can also discuss, that
12 confirmed the State's interpretation aligned with
13 the Region's interpretation.

14 And then, in addition to that, there is
15 also --

16 JUDGE LYNCH: What was your second
17 point? I didn't hear that.

18 MS. SCHERB: I apologize. Are you
19 having trouble hearing me? I can move closer.

20 JUDGE LYNCH: No, I -- that's good.

21 MS. SCHERB: So my response to the
22 question, Your Honor, was that based on the record

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1 before the Region, the 303(d) list was the
2 strongest piece of evidence. There was also the
3 statement from NHDES --

4 JUDGE LYNCH: Okay.

5 MS. SCHERB: -- which I'll discuss as
6 well. And then my third point is that there was,
7 additionally, a lack of information in the record
8 that the natural cause exception did apply. So
9 considering that all together, the 303(d) list was
10 the strongest piece of evidence, and in that sense
11 it was dispositive, Your Honor.

12 JUDGE AVILA: Well, I guess let me just
13 follow up. Could EPA have come to a different
14 conclusion as to the meaning of "natural causes,"
15 given that it's on the 303(d) list and the EPA
16 approved the 303(d) list?

17 MS. SCHERB: Sure. So this reminds me
18 of a point that Petitioner brought up in their
19 reply, which is essentially arguing that if there
20 is a mix of natural and anthropogenic causes, that
21 can still qualify under the natural cause
22 exception, which I believe your question is

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1 getting at as well.

2 EPA does not need the water quality
3 standard to come to that conclusion. You know,
4 based on the language of the statute, there is
5 just this one exception, due to natural causes,
6 and it's also clear that the State interprets it
7 to be that if there are any anthropogenic causes
8 it does not apply.

9 And we know this, for example, looking
10 at this NHDES statement, which has been cited in
11 the briefs, it's Item F4 in the administrative
12 record, and it was also attached in the response
13 to the petition. This email from NHDES is
14 explaining their position, essentially that the
15 water is impaired because it's on the 303(d) list,
16 and that means that the low pH is not naturally
17 occurring.

18 Also, in that email from NHDES, it says
19 -- and this is a quote here -- "Simply put,
20 upstream is not a natural condition." So they are
21 describing both the natural and anthropogenic
22 contributions to the low pH and indicating that

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1 they interpret that mix of causes the same way
2 that the Region does, which is that if there is a
3 mix, then the natural cause exception does not
4 apply.

5 JUDGE BLAKE: Counsel, I have two
6 questions for you. One is sort of a hypothetical
7 derived from Keene's reply brief, and then I have
8 a second question.

9 So the first one, so let's just assume
10 you have a waterway with a low pH due to natural
11 causes. But there is -- and there is one
12 anthropogenic source on the waterway, and let's
13 just say that anthropogenic source only
14 contributes one percent of the pH to the water
15 body. And that just further reduces the pH level
16 in the water body making it more acidic.

17 So is it your position that in this
18 particular instance the water body would not
19 qualify for the exception for natural causes?

20 MS. SCHERB: Sure, Your Honor. So I'll
21 begin by noting that situation is quite different
22 from the one here, of course. You know, here it

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1 doesn't appear to be that drastic of a division
2 between the natural and anthropogenic.

3 But to answer your hypothetical, Your
4 Honor, it would be the Region's position that if
5 it's not entirely due to natural causes, then that
6 natural cause exception would not apply. And I'll
7 note that that also aligns with the State's
8 conclusion. If we look at -- this is in the
9 administrative record as well -- Items G2 and G3,
10 these are the CALM guidance documents that explain
11 how items end up on the 303(d) list.

12 It clearly answers this question that
13 if there is a mix of natural and anthropogenic
14 causes, that exception does not apply, and it
15 would be listed as impaired. And, you know, as we
16 have noted in our briefs, it's appropriate to, you
17 know, rely or defer to the State's interpretation
18 of its own water quality standards. So here that
19 is appropriate.

20 And, additionally, the EPA's conclusion
21 aligns with the State's interpretation.

22 JUDGE AVILA: Well, I don't want --

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1 mean to belabor this, but you said I think "defer
2 or rely." Which did you do, defer or rely to make
3 your own independent judgment?

4 MS. SCHERB: Sure. So, Your Honor, we
5 looked at the information in the record, which
6 included the 303(d) list, and we made the
7 determination that because the water was included
8 on the 303(d) list, the natural cause exception
9 does not apply. That 303(d) list is a document,
10 of course, that goes through approval by both the
11 State and by EPA prior to this permit proceeding.

12 So the EPA reached the conclusion based
13 on that document. That conclusion was further
14 supported by the statement from the State, this
15 NHDES email that we keep referencing, indicating
16 that their conclusion aligns with ours.

17 JUDGE AVILA: And I think I interrupted
18 Judge Blake's second question, so --

19 JUDGE BLAKE: No worries. Yes. With
20 respect to -- so, again, Keene indicates that they
21 provided substantial data to you in the comments,
22 and your response is that you had no obligation or

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1 reason to comment on the data provided.

2 And just -- I wanted you to, one,
3 clarify the basis for your position; and, number
4 two, I also wanted to know whether you addressed
5 at all the possible curtain wall impact and
6 potential impacts on fish that were raised by
7 Keene on page 3-1 of their comments.

8 MS. SCHERB: Yes, Your Honor. So I'll
9 address those two points separately. First, the
10 data. So, and I'll also begin by noting that, as
11 Your Honors have identified and indicated today,
12 it is unclear exactly what Petitioner was looking
13 for, either in their comments on the draft permit
14 or in the petition, and perhaps they are looking
15 for different things.

16 The Region interpreted the comments as
17 a challenge to the limit, and in doing so
18 considered the data that they had submitted. In
19 terms of the basis for why the Region didn't
20 specifically comment on that data, that would be
21 40 CFR 124.17(a)(2), which says that the Region
22 should comment on significant comments.

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1 And here that wouldn't rise to the
2 level of significant because, as I believe one of
3 Your Honors identified earlier, the data that was
4 submitted simply indicates that the pH is low,
5 which is a conclusion that the Region already
6 agrees with, the State agrees with. The fact that
7 it's on the 303(d) list confirms this. This was
8 not new information.

9 So, in that regard, you know, the
10 Region didn't expressly confirm the data, but we
11 did state in response to comments that the water
12 is impaired, which is essentially confirmation of
13 that point. And, importantly, we also described
14 earlier our rationale for imposing the permit
15 limit, so we really also addressed the essence of
16 what we understood to be their critique of the
17 limit.

18 Your second --

19 JUDGE BLAKE: Do you think that the
20 City -- did you find anywhere in the City -- in
21 the comments that the City submitted where they
22 were seeking a 6.0 limit?

1 MS. SCHERB: I did not find such
2 specific request, Your Honor.

3 And to answer your previous question
4 about the curtain wall and whether the Region
5 considered that, I'll address that question now.
6 So although the term "curtain wall" was mentioned
7 in comments, that, again, didn't rise to the level
8 of significance under 40 CFR 124.17(a)(2).

9 As Your Honors noted, there weren't any
10 studies or further explanation to support that
11 point. It was really just one or two sentences,
12 you know, a really cursory treatment of the issue,
13 certainly not rising to the level of significance
14 that would require response.

15 And, additionally, I will note that in
16 the petition that is the point where Petitioner
17 elaborates on that point and makes, as we pointed
18 out in the response to the petition, several new
19 arguments. And because they're new and did not
20 appear in the comments themselves, they are of
21 course not procedurally proper for the Board
22 today.

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1 JUDGE LYNCH: Counsel, I had a question
2 about your determination that the natural cause
3 exception doesn't apply. You do acknowledge -- in
4 your pleadings anyway -- that there is a certain
5 lack of clarity about whether the contributions --
6 at least the relative contributions of naturally
7 occurring conditions and anthropogenic, and you
8 say, well, rather than being a fatal flaw, as
9 Petitioners view it, that in fact it was a key
10 consideration -- that's the language you use -- in
11 the Region's permitting decision.

12 Can you explain how the lack of clarity
13 actually factored into your consideration?

14 MS. SCHERB: Absolutely, Your Honor.
15 So here there was not clear evidence -- or really
16 evidence at all -- that the natural cause
17 exception applied. And because we couldn't find
18 evidence that the natural cause exception applied,
19 we took the most protective reading of the water
20 quality standard, which also aligns with the
21 State's interpretation of the water quality
22 standard, to impose that 6.5 to 8.0 limit.

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1 This is an instance where if you read
2 the water quality standard, it's really presumed
3 that the 6.5 to 8.0 range applies, unless due to
4 natural causes. There is this one exception, and,
5 you know, under the protective principles
6 underlying the Clean Water Act, it's better to be
7 -- to interpret that in a way that construes the
8 exception narrowly and yet conclusively conclude
9 that the exception applies.

10 And the Region is entirely justified in
11 applying the default range, which is what we did
12 here, especially because not only was there a lack
13 of information that that exception applied. There
14 was also very clear indication that it did not,
15 which is the 303(d) list and the statement that I
16 have referenced by NHDES.

17 I would also like to respond --

18 JUDGE BLAKE: Go ahead. I have -- I
19 wanted to move to aluminum. Do you have an item
20 on pH you wanted to close with?

21 MS. SCHERB: Sure. I'll just respond
22 directly to a point that the Petitioner makes, the

1 one with the natural limit. Essentially, their
2 point is that there is a mix of natural and
3 anthropogenic causes that is permitted by the
4 water quality standards.

5 But if that's true, then this water,
6 which does have a mix of natural and anthropogenic
7 causes for its low pH, wouldn't be on the 303(d)
8 list, which is the list of waters that are not
9 compliant with water quality standards. So simply
10 put, the inclusion of the water on that 303(d)
11 list conclusively answers that question and
12 supports the Region's imposition of the 6.5 to 8.0
13 limit.

14 And unless there's further questions,
15 I can move on to aluminum as Your Honor wished.

16 So on -- on the topic of aluminum --
17 and I'll discuss here the limit before moving on
18 to the challenge to the lack of special
19 conditions, the Region properly applied the
20 currently applicable water quality standards, and,
21 therefore, the Board should affirm that limit.

22 As we have noted in the briefs, Clean

1 Water Act Section 301(d)(1)(c), and the regulation
2 40 CFR 124 -- 122.44(d)(1), require the permit
3 writer to impose limits that ensure compliance
4 with State water quality standards and other
5 applicable sources of law, not EPA guidance, as
6 Petitioner urges.

7 JUDGE BLAKE: But how do you respond to
8 the City's argument that the 1988 criteria for
9 aluminum doesn't apply to waters where the pH that
10 the City alleges is noted in their data is below
11 6.5, how do you -- how do you respond to that?

12 MS. SCHERB: Sure. So this is -- this
13 really reflects another example of the City
14 conflating the 1988 guidance, which was issued by
15 EPA under its 304(a) authority, with the currently
16 effective water quality standards. Although it
17 may be the case that those water quality standards
18 were based perhaps in large part on that guidance,
19 they are not in fact the same thing.

20 And Petitioner points to the 1988
21 guidance and says that it doesn't apply to
22 receiving waters with pH below that number, but

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1 they don't point to anything in the actual water
2 quality standards themselves that say that the
3 aluminum criteria only applies to a certain pH
4 range. And that's because that's not what the
5 water quality standards say.

6 In fact, if you look at the water
7 quality standards, which I believe is Env-Wq
8 1703.22(s), you'll see that there is no caveat for
9 which pH of receiving waters this applies to. So
10 their assertion that this -- that the water
11 quality standards don't apply to this water is
12 simply factually inaccurate, Your Honor.

13 JUDGE LYNCH: Well, counsel, from a
14 technical or scientific point of view, what would
15 be the purpose or impact of applying that standard
16 which was only analyzed for toxicity for waters
17 6.5, I think it is, to 9, I mean, why would you do
18 that? Or what impact is it having?

19 MS. SCHERB: I'm not sure I understand
20 your question, Your Honor. Do you mind
21 rephrasing?

22 JUDGE LYNCH: Let me try. You are

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1 saying, well, the water quality standards don't
2 limit that guidance, right, to waters at a
3 particular level. But it is the case that that
4 guidance only did a -- only analyzed the toxicity
5 for a particular range.

6 From a scientific or technical
7 standpoint, why would it make sense to impose that
8 limit on waters that have a different range? I
9 don't know if that was any clearer.

10 MS. SCHERB: Yes, I believe so, Your
11 Honor. So, you know, although I can't answer with
12 absolute clarity, I would hypothesize that at the
13 time when the State was considering its water
14 quality standards and what it wanted to implement
15 in terms of water quality standards, you know, it
16 seems that the State had this guidance in front of
17 it when it was doing so.

18 And I would imagine that they likely
19 considered this question at the time when they
20 were drafting those water quality standards. And,
21 likewise, I would imagine -- you know, again, I'm
22 just hypothesizing -- that EPA likely considered

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1 that as well in its approval of those water
2 quality standards.

3 You know, if we look at 40 CFR 131.5,
4 that indicates that when EPA is approving water
5 quality standards, it must do so based on a sound
6 scientific rationale. So the fact that these
7 water quality standards are in effect and they
8 have been approved by EPA, you know, certainly
9 very strongly suggests that EPA can, you know,
10 consider this in the approval and determine that
11 it was based on scientific rationale. And it is
12 likely that the State also considered this, you
13 know, when it was approving those water quality
14 standards.

15 And, you know, here the permit writer
16 is really just applying those standards as
17 written, because it has already gone through such
18 a rigorous approval process, both by the State and
19 by the EPA.

20 So it's really, you know, as we've
21 mentioned in our briefs, it's not appropriate in
22 a permit proceeding to challenge -- for the

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1 Petitioner to challenge those underlying water
2 quality standards. It's really the permit
3 writer's job to apply those existing water quality
4 standards and then for them to challenge the
5 application of those standards.

6 JUDGE LYNCH: Thank you. I had a
7 question about the State's water quality standards
8 and the 2018 aluminum guidance. If their -- and
9 it's about their process. If they were to adopt
10 the 2018 guidance, is that a public process
11 subject to public comment?

12 MS. SCHERB: Yes. So when states
13 update their water quality standards, either to
14 reflect this 2018 guidance or otherwise, there is
15 opportunity for public participation. It has to
16 go through approval, and I believe some form of
17 public comment at the State level, and the State
18 has to first approve the water quality standards
19 and then submit those to EPA.

20 I believe there may also be opportunity
21 for public comment at that point, and --

22 JUDGE LYNCH: So the State's adoption

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1 of the 2018 aluminum criteria, sitting here today
2 or, of course, on the day that the permit was
3 issued, that's not a fait accompli. Is that
4 right?

5 MS. SCHERB: That's correct, Your
6 Honor. And, in fact, I'll draw your attention to
7 40 CFR 131.11(b)(1), and that regulation lays out
8 three options for states when they are adopting
9 their water quality criteria. One of them is that
10 they consider this -- they can consider this
11 304(a) guidance, which is, for example, this 1988
12 and this 2018 guidance. Another option is that
13 they consider that guidance with site-specific and
14 functional findings. And a third option is that
15 they consider it -- other scientific, successful
16 methods.

17 So it's -- just because EPA has issued
18 this guidance, this non-binding guidance under
19 304(a), is not a guarantee that the State, you
20 know, must necessarily implement it in their water
21 quality standards. They also have these other
22 options, as long as it's scientifically sound.

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1 And even if they do ultimately decide
2 that that is what they will adopt, there are --
3 there are many layers of process, both in terms of
4 the State adopting that criteria and also EPA
5 ultimately approving it, Your Honor.

6 JUDGE LYNCH: Thank you.

7 JUDGE AVILA: I should know this, but
8 when was the current aluminum standard originally
9 approved by EPA?

10 MS. SCHERB: I don't have an exact
11 answer to that, Your Honor, but I would imagine it
12 was quite some time ago as it was based, I
13 believe, on the 1988 guidance.

14 JUDGE AVILA: That's my sense, too. So
15 what recourse does the City, or any entity for
16 that matter, if there is a sea change in the
17 science from 1988 to today, or in 2000, it turns
18 out, you know, that the 1988 criteria is just way
19 off the mark, or the 1988 guidance I guess I
20 should say is way off the mark, what recourse does
21 anyone have to -- you know, are they just stuck
22 with the current water quality standard?

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1 MS. SCHERB: Sure. So that's the same
2 answer, Your Honor, as the process I was alluding
3 to previously. The states are required -- it's
4 called the triennial review process of reviewing
5 the water quality standards and updating them.

6 And, at that point, you know, there's
7 opportunity for public comment. Again, it has to
8 go through both State and EPA approval, and that
9 would certainly be an appropriate time to express
10 any concerns about, you know, proposed limits or
11 current limits. That would be an appropriate time
12 to express that, not here during an NPDES permit
13 proceeding.

14 JUDGE AVILA: But if it's triennial, so
15 every three years, right?

16 MS. SCHERB: I believe so, Your Honor,
17 yes.

18 JUDGE AVILA: So the aluminum criteria
19 -- the aluminum water quality standard was
20 approved by EPA within the last three years, the
21 current one?

22 MS. SCHERB: I don't believe that's the

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1 case, Your Honor. I'm not familiar with the
2 details of, you know, when it was submitted and,
3 you know, how recently it has been considered.
4 But it is an iterative process, and there, you
5 know, were opportunities in the past most likely,
6 and there will be future opportunities to make
7 these sort of critiques, Your Honor.

8 JUDGE AVILA: And so, just so I'm
9 clear, to what extent does the Region -- does a
10 permit issuer -- have any independent duty to
11 determine whether a state's approved water quality
12 standards are scientifically defensible at the
13 permitting stage? Is there any role for that?

14 MS. SCHERB: Sure. So if there were --
15 so if I understand your question, it's -- you
16 know, if there is evidence submitted during public
17 comment, for example, indicating that the current
18 standard wasn't appropriate, is that essentially
19 your question, Your Honor?

20 JUDGE AVILA: Yes. Exactly. During
21 the permit proceeding, if someone said this water
22 quality standard is no longer protective of the

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1 designated use for this water body, is there any
2 way for the permit writer to take that into
3 account, or is it just that's what the water
4 quality standard says until it's revised?

5 MS. SCHERB: I believe that, in
6 general, the permit writer applies the water
7 quality standards as written, and that is not the
8 appropriate opportunity to challenge that.

9 But I believe, you know, kind of
10 separate from that, in the Act there is -- it
11 contemplates in certain instances, if the
12 Administrator determines that water quality
13 standards are not consistent with the Act, there
14 is -- it contemplates initiating a process in that
15 instance.

16 So, you know, if there was some
17 evidence, perhaps that would be an appropriate
18 route. But in this permit proceeding, especially
19 this permit proceeding where that has not
20 happened, it's appropriate simply to apply the
21 currently effective water quality standards.

22 JUDGE AVILA: As I recall, the

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1 Administrator has the authority to make a
2 necessity determination that a federal standard is
3 required in certain circumstances, right?

4 MS. SCHERB: That certainly could be
5 the case, Your Honor. I'm not sure of the
6 specific answer to that question.

7 JUDGE BLAKE: So, Counsel, just to --
8 just to close the loop on this, so when issuing a
9 permit, it's the Region's position that the Region
10 does not have an independent obligation to examine
11 the validity of the science underlying any
12 component of the approved water quality standards?
13 I think here Keene is suggesting that the Region
14 has that obligation for aluminum.

15 MS. SCHERB: So it's entirely
16 appropriate for the permit writer to presume that
17 the water quality standards represent good
18 science, you know, for the reason -- the process
19 that I describe, and especially 40 CFR 131.5,
20 which says specifically that EPA, you know, will
21 approve water quality standards if they are based
22 on sound scientific rationale.

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1 And because of that, it's, you know,
2 entirely appropriate for the permit writer to
3 apply the currently effective water quality
4 standard, and also, additionally, because of the
5 obligation to do so under Clean Water Act Section
6 301(d)(1)(c) and 40 CFR 122.44(d)(1), which
7 indicate that the permit limits have to ensure
8 compliance with currently effective water quality
9 standards and other applicable sources of law.

10 JUDGE AVILA: And can I just ask,
11 what's the -- you didn't put in the special
12 condition that the -- on the studies that --
13 authorizing the City to conduct the studies on
14 aluminum. What would be the harm in including
15 that in the permit?

16 MS. SCHERB: Sure. So I can certainly
17 address that, the issue of the special conditions.
18 There would -- although the Region might have
19 included a special condition describing the
20 process of how the permittee might obtain a permit
21 modification, we couldn't -- the permit writer
22 could not include what the permit -- the permittee

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1 was requesting in public comments, which is a
2 commitment to the particular outcome, because that
3 would prevent -- that could prevent the permit
4 writer from meeting its obligations under
5 301(b)(1)(c), you know, ensuring that the permit
6 limits ensure compliance with water quality
7 standards.

8 You know, as we have described in the
9 response to the petition, even if there is a new
10 site-specific criteria, the permit writer still
11 has to do the reasonable potential analysis, the
12 anti-backsliding analysis, anti-degradation.
13 There is also opportunity for public comment, if
14 there is a permit modification.

15 And including the special conditions as
16 requested by the permittee in their public
17 comments would or could very likely prevent the
18 permit writer from going through all of these
19 processes because it would be committing to a
20 particular result.

21 And, you know, if we look at it instead
22 as having sort of reframed the request for the

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1 special conditions as not seeking commitment to a
2 particular outcome, but, rather, to the process,
3 the Region's position is that it did not abuse its
4 discretion by not including that. And,
5 importantly, the permittee is not harmed by the
6 Region not including that in the permit.

7 There is no -- no reason that not
8 including those special conditions prevents the
9 permittee from applying for a modification, if
10 appropriate, in the future. You know, the whole
11 reason for not including the special conditions is
12 that the Region wanted to maintain an open mind.

13 And consistent with that, if the
14 permittee submits a permit modification request,
15 it's my -- the Region's mind is certainly open and
16 would consider such a request. And, if it was
17 appropriate, may ultimately grant a permit
18 modification.

19 So essentially there is no harm in not
20 including this requested special condition. The
21 relief is still available.

22 JUDGE AVILA: I just want to be clear

1 that we have a common understanding of what they
2 ask for and a common -- especially as to aluminum.

3 Looking at 4-2 of their comments and it
4 says -- it talks about the study that they want to
5 pursue, and then it says, "If Keene pursues this
6 type of study, additional language is requested to
7 be in the final permit that results in the study
8 that would be accepted and that a permit
9 modification may be made to reflect site-specific
10 limits."

11 "May" sounds to me to be permissive.
12 So were they really asking for you to
13 automatically change the permit?

14 MS. SCHERB: So it's unclear, Your
15 Honor, especially the first sentence which you
16 just read. It's -- I forget the exact phrasing of
17 it, but it's seeking confirmation that the results
18 will be accepted, and that's where the confusion
19 came from.

20 But your point really stands that we
21 could not -- the permit writer could not include
22 a special condition that commits to an outcome.

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1 And then if we instead read that request to
2 request simply the memorialization of the process,
3 not including a step-by-step explanation of the
4 process in the permit itself, especially when
5 that's otherwise available, you know, combining
6 the Region's response to comments describing how
7 the permittee needs to be approved by the State,
8 and then also the regulations describing when a
9 modification is appropriate, the permittee is
10 already aware of how that process is implemented,
11 and, again, not including -- that special
12 condition does not preclude the permittee from
13 applying or potentially even receiving a permit
14 modification in the future, if it is appropriate.

15 JUDGE AVILA: Can I just ask, does New
16 Hampshire's water quality standard, at least as to
17 aluminum, even contemplate the study or modified
18 process? I get it for copper. I saw where the
19 regs contemplate the ability to get a new numeric
20 water quality criteria if you follow whatever --
21 I forget the names of the studies and the factors.

22 But as to aluminum, does the water

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1 quality standard contemplate this kind of, you
2 know, independent study and modification process?
3 I just don't see it, but I may have missed it.

4 MS. SCHERB: Sure. So I don't have it
5 in front of me either, Your Honor, so I don't want
6 to answer definitively, but I know that whether
7 it's in the regulation or just a policy they would
8 be permitted in certain instances to conduct a
9 site-specific --

10 JUDGE AVILA: Okay.

11 MS. SCHERB: -- study of the criteria.

12 JUDGE AVILA: I got it. Thank you.

13 MS. SCHERB: So unless there are
14 further questions, Your Honor, I'll conclude my
15 argument here.

16 JUDGE LYNCH: I don't have any further
17 questions. Do either of the Judges at this point?

18 JUDGE BLAKE: Just one final question.
19 You know, I think the City -- I just want to get
20 clarity with regard to, is the agency -- is the
21 Region's position that the process as laid out in
22 the response to comments, and the permit

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1 modification provisions of our regulations, and
2 adding it as a special condition of the permit,
3 would not have changed anything or would not have
4 provided a benefit to -- I'm trying to understand
5 sort of, from the Region's perspective, why it
6 wasn't necessary? I mean, is there any benefit to
7 have you put in a special condition? What would
8 that have provided Keene, if anything?

9 MS. SCHERB: So the position, Your
10 Honor, is that it wouldn't have changed any of
11 their legal rights, really. As you've mentioned,
12 the response to comments, together with the
13 regulations regarding modifications, describe and
14 set forth how they might apply for a permit
15 modification and when it might be appropriate.

16 So, you know, I guess a potential
17 benefit would be it's -- like if it's reproduced
18 in another place, maybe it's easier to read that.
19 But it doesn't change anything in terms of their
20 legal rights or their potential ability to obtain
21 a modification.

22 And I think it's quite clear from the

1 response to comments and the regulations already
2 how to do that, and it simply is not necessary and
3 doesn't really add anything to include a
4 description of the process as a special condition
5 in the permit.

6 JUDGE AVILA: I'm sorry. I had one
7 other question on aluminum. If tomorrow -- I
8 mean, if -- probably more realistic, in a month,
9 if the State changed the aluminum water quality
10 standard and EPA approved it, what does that mean
11 for this permit, if anything?

12 MS. SCHERB: Sure, Your Honor. So
13 there is -- there is a three-year compliance
14 schedule in this permit. And I don't have it in
15 front of me, but I believe it contemplates this
16 possibility where if there are changes to the
17 water quality standards, then perhaps they would
18 be able to, you know, receive a modification in
19 before the permit limit took effect.

20 JUDGE LYNCH: I'm looking at it right
21 now, and I -- I just want to be clear. The permit
22 has a special condition for aluminum, and it sets

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1 out the permit modification regulation, correct?

2 MS. SCHERB: I don't have it in front
3 of you -- in front of me, but that -- that may be
4 the case, Your Honor.

5 JUDGE LYNCH: I actually do have it in
6 front of me, and it does and it does talk about --
7 it addresses what happens during the three-year
8 period. It even specifically addresses the anti-
9 backsliding requirements and when those kick in,
10 and when you don't have to actually go through
11 that. So thank you.

12 MS. SCHERB: So unless there are further
13 questions, Your Honors, I will conclude my
14 argument.

15 JUDGE LYNCH: Okay. Why don't you
16 proceed, please.

17 MS. SCHERB: For the reasons described
18 today, the Board should affirm the permit. Thank
19 you.

20 JUDGE LYNCH: All right. Thank you
21 very much.

22 So now we'll go back to counsel for the

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1 City of Keene for the rebuttal. You have
2 10 minutes.

3 MS. TOURANGEAU: My rebuttal will be
4 brief. I want to respond just to two points on
5 aluminum and copper. First, Judge Avila asked
6 about the potential benefit to the City of the
7 special conditions on aluminum and on copper, and
8 those benefits are twofold.

9 First, having certainty and clarity
10 regarding the process allowed -- the concern is
11 not that DES would act -- and EPA would act
12 quickly. It's that they would act slowly. As I'm
13 sure you can imagine, given that we are currently
14 looking at standards from 1988, it is unlikely
15 that there will be fast agency action to change
16 the standards. And the concern is that the three-
17 year compliance schedule that is set out as a
18 special condition for aluminum is not sufficient
19 time to allow for that process to under -- to be
20 undertaken by the regulators.

21 And so what the City asked for is a
22 condition that would specify that that process

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1 could apply, even outside that timeline, so that
2 we are not bound by old, obsolete, inapplicable
3 criteria going forward because of anti-
4 backsliding. So --

5 JUDGE LYNCH: Counsel, do you
6 acknowledge that because of the public process
7 that it's possible that New Hampshire may not
8 adopt the 2018 recommendations, because of the
9 public process and otherwise?

10 MS. TOURANGEAU: I think that there is
11 a lot of uncertainty. I think, yes, that is not
12 clear, and the timeline is even less certain,

13 JUDGE LYNCH: Did the City comment on
14 either the recent water quality standards adoption
15 or the 303(d) list which both of those I --
16 they're in the administrative record, and I've
17 just checked and both of those processes happened
18 in the last few years, 2020 and 2021.

19 MS. TOURANGEAU: I'm sorry. I don't
20 know the answer to that question, Your Honor.

21 JUDGE LYNCH: Okay. Thank you.

22 MS. TOURANGEAU: So those were my

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1 rebuttal points.

2 JUDGE LYNCH: So could you -- so you
3 just specifically talked about aluminum. What was
4 your specific point on copper --

5 MS. TOURANGEAU: Similarly --

6 JUDGE LYNCH: -- in the special
7 condition?

8 MS. TOURANGEAU: I'm sorry.

9 JUDGE LYNCH: Yeah.

10 MS. TOURANGEAU: I'm sorry for talking
11 over you. Similarly, on copper, that condition
12 relies on current DES standards. As Judge Avila
13 pointed out, the concern is that there there is no
14 special condition, that there is no certainty
15 about a process that would allow the City to
16 undertake a study and incur the expenses
17 associated with a study, without any kind of
18 clarity about whether and how EPA would translate
19 that into a new effluent condition.

20 And there is no intent on the part of
21 Keene -- and I apologize if the draft comments
22 were not clear -- that we are asking for EPA to

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1 impose a specific number. We were only asking for
2 there to be a clear process that said if you go
3 through and use, you know, BLM or WER to
4 reestablish based on site-specific data, and
5 that's reviewed by EPA and DES, then that would be
6 considered by EPA in revising the effluent
7 standard that is in the NPDES permit.

8 We were not saying that they would just
9 kind of write that new standard into this permit,
10 but that the process would be acceptable to
11 support that conclusion the same way that an
12 administrative record has to be in issuing the
13 permit in the first instance.

14 JUDGE AVILA: If I could just follow up
15 on that, or -- you know, I get -- I appreciate the
16 concern of not wanting to expend resources on a
17 study that may or may not be useful in the future,
18 or whatever. But our standard of review is clear
19 error and abuse of discretion. So I'm kind of --
20 I'm looking for where -- what's the hook for
21 saying it's clearly erroneous or an abuse of
22 discretion to not I guess give you the special

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1 condition in the permit. I mean, kind of, what's
2 the hook for saying that it's clearly erroneous or
3 abuse of discretion?

4 MS. TOURANGEAU: So there I think the
5 issue would be that the basis for kind of not
6 relying on the water quality standard, which EPA
7 does throughout the balance of its permit, to say,
8 you know, somehow this translation piece is
9 different for copper than it was for pH, and for
10 aluminum, seems unreasonable and arbitrary.

11 And what I'm saying is, you know, our
12 argument on pH was all you did was look at the,
13 you know, three -- the impairment listing and say
14 that means that this is one and done, and we don't
15 have any discretion.

16 But when it comes to copper, there is
17 a whole different analysis that is completely the
18 opposite where they are saying, oh, no, no, no,
19 no, we have this, you know, intricate and
20 detailed, you know, basis that we have to go
21 through to do that translation where we have to
22 review all of it, and, you know, make our own

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1 reasoned judgment.

2 And so those two pieces just don't line
3 up in terms of their position. They are
4 inconsistent.

5 JUDGE AVILA: Thank you.

6 JUDGE BLAKE: If I could just go back
7 for a moment on pH. We talked a little bit ago
8 about the State's regulatory definition of
9 naturally occurring conditions. Judge Lynch went
10 through that. Counsel for the Region also
11 referenced the CALM document. Actually, section
12 3.1.8 in the CALM document has an entire section
13 on naturally occurring water quality exceedances.

14 So it does lay all of that out, and it
15 talks about the regulation and it talks about
16 EPA's guidance and how, you know, a water body
17 that is impaired solely by natural causes can be
18 listed on the 303(d) list, and the answer is yes,
19 unless there is an exception like we have here.

20 So I do think that there is -- I
21 noticed in your brief you mentioned there is no
22 evidence. I do think that there is a record with

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1 regard to the State's interpretation as set forth
2 in its regulations, as well as the CALM document.
3 But I just -- I want to just draw a little bit on
4 your reply brief.

5 Let's just assume for argument's sake
6 that the natural causes exception did apply when
7 there were both natural and, you know, human
8 sources. Where would we draw the line as to what
9 falls within the exception? I mean, would a water
10 body qualify for the exception if 51 percent of
11 its pH emissions stemmed from natural causes?

12 MS. TOURANGEAU: So I think here I
13 would point your attention to the record,
14 specifically to AR Index Number F6 and F7 where
15 EPA itself was asking DES those type of questions.
16 And here the question is a complicated one in that
17 you have natural and anthropogenic sources that
18 are causing the low pH, and the question is, what
19 are the associated water quality impacts --
20 impacts to fish and other critters that are living
21 in the river, and the other, you know, uses of
22 that river?

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1 And the question that is not answered
2 in the record is how the effluent standard that is
3 imposed in the license meets that water quality
4 standard and the kind of uses of that water body.

5 JUDGE AVILA: Can I just follow up on
6 that in one -- in one respect? I guess what I'm
7 struggling in part with is this pH range has been
8 in place since 2007, and you talked about the
9 curtain effect and various impacts to aquatic
10 wildlife. Is there any evidence in the record
11 that anything has happened, curtain wall-wise or
12 to these fish and critters, since 2007? I mean,
13 because presumably that curtain wall is going on
14 right now, right?

15 MS. TOURANGEAU: I think that that --
16 I don't think there is anything in the record in
17 terms of studies of those water quality impacts.
18 I think that the VRAP's kind of data collection
19 and pieces on how that pH has been changing over
20 time is pretty well documented in the record.

21 Did that answer your question?

22 JUDGE AVILA: Yes. Thank you very much.

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1 JUDGE LYNCH: Thank you very much. Any
2 other questions from the Judges?

3 JUDGE AVILA: I don't have any.

4 JUDGE LYNCH: Perfect timing. Judge
5 Blake?

6 JUDGE BLAKE: No. Thank you.

7 JUDGE LYNCH: All right. Well, thank
8 you, and I'd really like to thank everyone for
9 their arguments and the dialogue that we had
10 today. It's really enormously helpful to the
11 Board, and we will take this into account during
12 our deliberations.

13 And, with that, I would like to turn it
14 back over to the Clerk of the Board to conclude
15 today's proceedings.

16 MR. CORTES: Thank you, Your Honor.

17 May I have your attention, please.
18 These proceedings before the Environmental Appeals
19 Board are now adjourned. Thank you.

20 JUDGE LYNCH: Thank you.

21 (Whereupon, the above-entitled matter
22 went off the record at 2:49 p.m.)

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Date: 04-07-22

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