

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

In re:)
)
)
City of Nezperce, Idaho)
)
)
NPDES Permit No. ID0020397)
)

PETITION FOR REVIEW

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INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the City of Nezperce, Idaho petitions for review of the conditions contained in National Pollutant Discharge Elimination System (“NPDES”) Permit No. ID0020397 (the “2019 Permit”), which was issued on June 25, 2019 by the U.S. Environmental Protection Agency (“EPA”) Region 10 to the City of Nezperce Wastewater Treatment Plant. The 2019 Permit is attached as Exhibit A. It authorizes Nezperce to discharge treated wastewater from Outfall 001 of the wastewater treatment plant to Long Hollow Creek, subject to the effluent limitations and other terms and conditions contained in the 2019 Permit, which is effective August 1, 2019 and expires July 31, 2024. The 2019 Permit includes effluent limitations for total ammonia (as nitrogen) of 0.5 mg/L and 0.4 lbs/day as a monthly average and 1.1 mg/L and 0.8 lbs/day as a daily maximum.¹ Nezperce had not been subject to ammonia limitations before issuance of the 2019 Permit.

Nezperce contends that certain permit conditions are based on clearly erroneous findings of fact and conclusions of law by EPA Region 10. Specifically, Nezperce challenges EPA’s failure to provide a schedule of compliance to allow Nezperce time to achieve new water quality-based effluent limitations for ammonia. In addition, EPA failed to properly respond to comments submitted by Nezperce requesting a schedule of compliance for ammonia and setting forth the reasons such a schedule is needed.

Nezperce requests that the 2019 Permit be remanded to EPA Region 10 for inclusion of a schedule of compliance to allow time to achieve the new ammonia limitations. In the alternative, Nezperce requests that the 2019 Permit be remanded for EPA to fully consider and respond to the Nezperce comments requesting a schedule of compliance for ammonia.

¹ 2019 Permit (Exhibit A), Part I.B, Table 1. Effluent Limitations and Monitoring Requirements, p. 4 of 27.

FACTUAL AND STATUTORY BACKGROUND

A. Factual background.

Nezperce owns and operates a wastewater treatment plant located in Nezperce, Idaho, providing secondary treatment for municipal sewage, with a residential population of approximately 475. There are no major industries discharging to the treatment plant. On February 5, 2004, EPA Region 10 issued a final NPDES permit authorizing Nezperce to discharge from its treatment plant Outfall 001 to Long Hollow Creek.² This receiving water is located within the boundaries of the Nez Perce Reservation. The 2004 Permit did not include effluent limitations for ammonia, but required weekly monitoring of total ammonia (as nitrogen).³ The 2004 Permit is now expired, but has been administratively extended and remains effective until August 1, 2019, the effective date of the 2019 Permit.

On November 28, 2017, Nezperce entered into a Compliance Order on Consent with EPA Region 10 to address ongoing violations of long-term total suspended solids (“TSS”) and 5-day biological oxygen demand (“BOD₅”) effluent limitations contained in the 2004 Permit.⁴ The 2017 Compliance Order requires that Nezperce complete a Phase I study of infiltration and inflow reduction projects and secondary treatment performance by May 31, 2020, and implement the recommendations of that study by December 31, 2021. If additional improvements are necessary, Nezperce must conduct Phase II planning and complete needed facility upgrades by December 31, 2028.⁵

² City of Nezperce NPDES Permit No. ID0020397 (EPA Region 10, Feb. 5, 2004) (the “2004 Permit”), attached as Exhibit B.

³ 2004 Permit (Exhibit B) at Part I.A.1, Table 1: Effluent Limitations and Monitoring Requirements, p. 5 of 22.

⁴ Compliance Order on Consent, *In the Matter of: City of Nezperce Wastewater Treatment Plant, Nezperce, Idaho*, Docket No. CWA-10-2018-0003 (EPA Region 10, Nov. 28, 2017) (the “2017 Compliance Order”), attached as Exhibit C.

⁵ 2017 Compliance Order (Exhibit C) at pp. 4-5.

On January 31, 2018, EPA provided public notice of its intent to reissue the 2004 Permit, including proposed permit language and a supporting fact sheet.⁶ The 2018 Fact Sheet indicated that EPA had found no reasonable potential to exceed applicable water quality criteria for ammonia, so did not propose to include effluent limitations for ammonia.⁷ On March 1, 2018, Nezperce timely submitted comments on both the 2018 Draft Permit and the 2018 Fact Sheet.⁸

On March 15, 2019, EPA provided public notice of its intent to substantially revise the 2018 Draft Permit, including revised permit language and a supporting statement of basis.⁹ The 2019 Revised Draft Permit included proposed effluent limitations for ammonia, due to correction of errors in EPA's previous evaluation of the reasonable potential to exceed applicable water quality criteria for ammonia.¹⁰ On April 11, 2019, Nezperce timely submitted comments on the 2019 Revised Draft Permit, including a request for a schedule of compliance consistent with the activities required by the 2017 Compliance Order, which Nezperce believed would be necessary to achieve compliance with the proposed new water quality-based effluent limitations for ammonia.¹¹ On June 25, 2019, EPA issued the final 2019 Permit, including its response to comments received on both the 2018 Draft Permit and the 2019 Revised Draft Permit.¹² EPA did not substantively respond to the Nezperce request for a schedule of compliance for ammonia,

⁶ City of Nezperce Proposed Draft NPDES Permit No. ID0020397 (EPA Region 10, Jan. 31, 2018) (the "2018 Draft Permit"), attached as Exhibit D; Fact Sheet to City of Nezperce Proposed Draft NPDES Permit No. ID0020397 (EPA Region 10, Jan. 31, 2018) (the "2018 Fact Sheet"), attached as Exhibit E.

⁷ 2018 Fact Sheet (Exhibit E) at p. 14.

⁸ *Comments to draft NPDES Permit for the City of Nezperce Wastewater Treatment Facility (Permit No. ID 0020397)* (Nezperce, Mar. 1, 2018) (the "Nezperce 2018 Comments"), attached as Exhibit F.

⁹ City of Nezperce Revised Draft NPDES Permit No. ID0020397 (EPA Region 10, Mar. 15, 2019) (the "2019 Revised Draft Permit"), attached as Exhibit G; Statement of Basis to City of Nezperce Revised Draft NPDES Permit No. ID0020397 (EPA Region 10, Mar. 15, 2019) (the "2019 Statement of Basis"), attached as Exhibit H.

¹⁰ 2019 Statement of Basis (Exhibit H) at p. 5.

¹¹ *Comments to draft NPDES Permit for the City of Nezperce Wastewater Treatment Facility (Permit No. ID 0020397)* (Nezperce, Apr. 11, 2019) (the "Nezperce 2019 Comments"), attached as Exhibit I.

¹² Response to Comments (EPA Region 10, Jun. 25, 2019), attached as Exhibit J.

instead suggesting that Nezperce seek an amendment to the 2017 Compliance Order, if necessary.¹³

B. Statutory and regulatory background.

The federal Clean Water Act (“CWA”) authorizes EPA to issue NPDES permits for the discharge of pollutants to jurisdictional waters. CWA section 402, 33 U.S.C. § 1342. It also requires the development of effluent limitations in NPDES permits necessary to meet water quality standards. CWA section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). Federal regulations require that the conditions contained in NPDES permits comply with the applicable water quality standards of all affected States. 40 C.F.R. § 122.4(d).

Although Nezperce discharges to Long Hollow Creek, which is located within the Nez Perce Reservation, EPA Region 10 remains the permitting authority. EPA has indicated that because the Nez Perce Tribe has not applied for the status of Treatment as a State and has not adopted its own water quality standards, the 2019 Permit is based on application of Idaho water quality standards.¹⁴ Federal regulations governing EPA Region 10 as the permitting authority, as well as Idaho water quality standards, authorize the inclusion of schedules of compliance within NPDES permits. *See* 40 C.F.R § 122.47 and Idaho Administrative Procedures Act (“IDAPA”) 58.01.02 (400.03) (June 30, 2019).

THRESHOLD PROCEDURAL REQUIREMENTS

Nezperce satisfies the threshold requirements for filing a petition for review under 40 C.F.R. part 124, to wit:

1. Nezperce has standing to petition for review of the permit decision because it is the permittee, and participated in the public comment period on the permit. *See* 40 C.F.R.

¹³ Response to Comments (Exhibit J) at p. 9.

¹⁴ 2018 Fact Sheet (Exhibit E) at p. 7.

§ 124.19(a). Nezperce submitted timely comments on both the 2018 Draft Permit and the 2019 Revised Draft Permit.¹⁵

2. The issues raised by Nezperce in its petition were raised during the public comment period and therefore were preserved for review. Nezperce requested a schedule of compliance to allow time for it to achieve the new water quality-based effluent limitations for ammonia, including the reasons why such a schedule was necessary, in its comments on the 2019 Revised Draft Permit.¹⁶

ARGUMENT

Nezperce contends that EPA Region 10 erroneously failed to provide a schedule of compliance to allow Nezperce time to achieve new water quality-based effluent limitations for ammonia. In addition, EPA failed to properly respond to comments submitted by Nezperce requesting a schedule of compliance for ammonia.

I. EPA Region 10 erroneously failed to provide a schedule of compliance for ammonia.

A. Both federal and Idaho laws authorize the inclusion of schedules of compliance within NPDES permits.

EPA Region 10 was authorized by federal regulations to grant the Nezperce request for a schedule of compliance for ammonia: “The permit may, when appropriate, specify a schedule of compliance leading to compliance with CWA and regulations.” 40 C.F.R. § 122.47(a).

In addition, applicable state water quality standards specifically allow compliance schedules:

Compliance Schedules for Water Quality-Based Effluent Limitations. Discharge permits for point sources may incorporate compliance schedules which allow a discharger to phase in, over time, compliance with water quality-based effluent limitations

¹⁵ See Nezperce 2018 Comments (Exhibit F) and Nezperce 2019 Comments (Exhibit I).

¹⁶ Nezperce 2019 Comments (Exhibit I) at pp. 1-3.

when new limitations are in the permit for the first time. IDAPA 58.01.02 (400.03).

B. Nezperce satisfied all conditions necessary to qualify for a schedule of compliance for ammonia.

Under Idaho regulations, quoted above, compliance schedules are available where, as here, the permit includes a new water quality-based effluent limitation. The 2004 Permit did not include limitations for ammonia, and EPA proposed such limitations for the first time in the 2019 Revised Draft Permit.¹⁷ As a result, Nezperce satisfied state law requirements necessary to receive a schedule of compliance for ammonia.

Under federal regulations, a compliance schedule may be appropriate if the discharger cannot immediately comply with a water quality-based effluent limitation (“WQBEL”) upon the effective date of the permit, based on a number of factors:

Factors relevant to whether a compliance schedule in a specific permit is “appropriate” under 40 C.F.R. § 122.47(a) include: how much time the discharger has already had to meet the WQBEL(s) under prior permits; the extent to which the discharger has made good faith efforts to comply with the WQBELs and other requirements in its prior permit(s); whether there is any need for modifications to treatment facilities, operations or measures to meet the WQBELs and if so, how long would it take to implement the modifications to treatment, operations or other measures; or whether the discharger would be expected to use the same treatment facilities, operations or other measures to meet the WQBEL as it would have used to meet the WQBEL in its prior permit.¹⁸

EPA guidance, provided in its NPDES Permit Writers’ Manual, outlines similar considerations:

Permit writers should consider the principles outlined in this [Hanlon] memo when assessing whether a compliance schedule for achieving a WQBEL is consistent with the CWA and its

¹⁷ 2019 Statement of Basis (Exhibit H) at p. 5.

¹⁸ *Compliance Schedules for Water Quality-Based Effluent Limitations in NPDES Permits* (EPA Memo, J. Hanlon to A. Strauss, May 10, 2007) at pp. 2-3.

implementing regulations and when documenting the basis for a compliance schedule in a permit. Considerations outlined in the memo include the following:

- Demonstrate that the permittee cannot immediately comply with the new effluent limitation on the effective date of the permit.
- Include an enforceable *final* limitation and a date for achievement in the permit.
- Justify and document the *appropriateness* of the compliance schedule; factors relevant to a determination that a compliance schedule is appropriate include how much time the discharger had to meet the WQBEL under prior permit(s), whether there is any need for modifications to treatment facilities, operations, or other measures and, if so, how long it would take to implement such modifications.
- Justify and demonstrate that compliance with the final WQBEL is required *as soon as possible*; factors relevant to a determination that a compliance is required as soon as possible include the steps needed to modify or install treatment facilities, operations, or other measures and the time those steps would take.
- Include an enforceable sequence of events leading to compliance with interim milestones for schedules longer than one year.¹⁹

Nezperce provided all the information necessary for EPA to determine that a compliance schedule for ammonia was appropriate for the 2019 Permit, including Nezperce's current inability to meet the proposed limitations, the measures necessary to achieve compliance, and the time needed to implement those measures, among other things:

The City is aggressively completing a Facilities Plan to address compliance issues identified in the 2018 Compliance Order on Consent to address effluent discharge limits of the 2004 permit predominately associated with BOD and TSS that the City cannot reliably achieve. Within the Compliance Order, the EPA agreed that an extended timeframe for compliance is justified and ordered

¹⁹ NPDES Permit Writers' Manual (EPA, Sep. 2010) at p. 9-9 (emphasis in original).

full compliance with the 2004 permit limits be achieved over a 10 year period terminating December 31, 2028.

The potential nutrient and proposed effluent ammonia limits require a significant “change-of-course” in the way the City treats and disposes of wastewater.

Given the existing lagoon treatment process, the City is unable to meet an effluent ammonia limit of <0.5 mg/l by the time the proposed permit is expected to become effective. Therefore, the City requests that an extended compliance schedule be incorporated into the permit.

Further, during the Phase I planning process identified in the existing Compliance Order, the City would continue to collect effluent ammonia, temperature, and pH data more consistent with current operations (as EPA acknowledged within the Statement of Basis) for continued use by EPA for performance analysis. In conjunction, the City will collect stream flow rate information in addition to the surface water monitoring required under Table 2 of the permit. This will allow the EPA to work with the City and better quantify creek flows, establishing timeframes for seasonal discharge to optimize the City’s ability to comply with ammonia, phosphorus, and temperature limits. The data collection period would begin upon issuance of the permit and terminate no later than May 31, 2024 in conjunction with the Compliance Order assessment period. The new data would be utilized to develop dynamic ammonia limits including consideration of a seasonal permit to discharge under more moderate flow conditions. A compliance date beginning July 2029 would be implemented for the final limits.

In summary, the City proposes the following timeline of Extended Compliance Activities to facilitate development of dynamic ammonia limits in parallel with compliance efforts the City is striving to achieve under the existing Compliance Order on Consent.

| Timeframe | Existing Compliance Order Activities | Extended Compliance Activities |
|-----------------------------|--|--|
| July, 2019 | | Anticipated effective date of NPDES permit |
| July, 2019 – May, 2020 | Facilities Plan Analysis | Additional Data Collection for development of dynamic ammonia limit |
| June, 2020 – December, 2021 | Phase I Design & Construction | <ul style="list-style-type: none"> • Effluent Discharge Data (Ammonia, temperature, pH) |
| January, 2022 – May, 2024 | Phase I Assessment Period | <ul style="list-style-type: none"> • Streamflow Data (Flow, Ammonia, temperature, pH) |
| June, 2024 – May, 2026 | Phase II Planning | Development of dynamic ammonia limit based on data collection period and seasonal discharge |
| June, 2026 – December, 2028 | Phase II Design & Construction for full compliance | |

Nezperce 2019 Comments (Exhibit I) at pp. 1-3.

Despite the clear request by Nezperce for a schedule of compliance for ammonia to be included in the permit, with appropriate support, EPA failed to consider any of the factors prescribed by federal regulations or EPA guidance to determine whether a compliance schedule was appropriate and, if so, what its terms should be.²⁰

C. EPA has provided a schedule of compliance for ammonia for another discharger under similar circumstances.

EPA is clearly aware of the availability of schedules of compliance in Idaho NPDES permits for new water quality-based effluent limitations. In fact, EPA has previously granted a schedule of compliance for ammonia to another discharger within the Nez Perce Reservation. The City of CULDESAC received new seasonal ammonia limitations in its most recent NPDES

²⁰ See Response to Comments (Exhibit J) at p. 9.

permit.²¹ Unlike the Nezperce 2019 Permit at issue here, however, the Culdesac Permit also included a schedule of compliance that allowed Culdesac time to achieve the new ammonia limitations.²² EPA explained its rationale as follows:

Compliance schedules are authorized by federal NPDES regulations at 400 [sic] CFR 122.47 and Idaho WQS at IDAPA 58.01.02.400.03. Compliance schedules allow a discharger to phase in, over time, compliance with water quality-based effluent limitations when limitations are in the permit for the first time. Additionally, the federal regulations at 40 CFR 122.47 require that the compliance schedules require compliance with effluent limitations as soon as possible and that, when the compliance schedule is longer than 1 year, the schedule shall set forth interim requirements and the dates for their achievement. The time between the interim dates shall generally not exceed 1 year, and when the time necessary to complete any interim requirement is more than one year, the schedule shall require reports on progress toward completion of these interim requirements. In order to grant a compliance schedule the permitting authority must make a reasonable finding that the discharger cannot immediately comply with the water quality-based effluent limit upon the effective date of the permit and that a compliance schedule is appropriate (see 40 CFR 122.47(a)). The EPA has found that a compliance schedule is appropriate for total ammonia.

A reasonable potential calculation showed that the Culdesac discharge would have the reasonable potential to cause or contribute to a violation of the water quality criteria for ammonia. Therefore, the draft permit contains water quality-based effluent limits for ammonia.

A review of the data shows that the permittee will not be able to meet the limits upon the effective date of the permit. Therefore, a compliance schedule is appropriate. See Appendices D and E for the reasonable potential and effluent limit calculations for ammonia.

The permit requires the facility to meet final effluent limits in four years and eleven months. The time is required to obtain funding,

²¹ City of Culdesac NPDES Permit No. ID0024490 (EPA Region 10, Aug. 18, 2016) (the “Culdesac Permit”), attached as Exhibit K, at Part I.B. Table 1. Effluent Limitations and Monitoring Requirements, pp. 5-6 of 30.

²² Culdesac Permit (Exhibit K) at Part I.D. Total Ammonia Schedule of Compliance, pp. 9-10 of 30.

allow proper evaluation of alternatives in the facilities planning process. Pursuant to 40 CFR 122.47(a)(3), a permit with a compliance schedule must have interim requirements and dates for achievement. EPA has included interim requirements, dates for their achievement and reports of progress.²³

For Nezperce, EPA also conducted a reasonable potential calculation, which showed that the Nezperce discharge would have the reasonable potential to cause or contribute to a violation of the water quality criteria for ammonia:

In developing the draft permit, EPA incorrectly applied the reported ammonia effluent concentrations to be in units of ug/L. Instead, the data were in mg/L. This means the effluent levels of ammonia were much higher in comparison to the criteria. The updated reasonable potential calculation using the correct units shows that the discharge has reasonable potential to cause or contribute to a violation of the water quality criteria for ammonia. Therefore, the revised draft permit contains water quality-based effluent limits for ammonia. Appendix A shows the reasonable potential analysis and effluent limitation calculations.²⁴

Based on the referenced ammonia data, EPA should have similarly concluded that a schedule of compliance for ammonia was appropriate for Nezperce.

D. EPA violated federal and state law, and its own guidance, by failing to grant Nezperce a schedule of compliance for ammonia.

This Board grants review of a permitting decision when the Petitioner has shown that it is based on clearly erroneous findings of fact or conclusions of law, or when the decision involves an exercise of discretion or an important policy matter that warrants EAB review. 40 C.F.R. § 124.19(a)(4). When evaluating a challenged permit decision for clear error, the Board considers the administrative record, and determines whether the record as a whole demonstrates that the “permit issuer ‘duly considered the issues raised in the comments’ and ultimately

²³ Fact Sheet to City of Culdesac NPDES Permit No. ID0024490 (EPA Region 10, Aug. 18, 2016), attached as Exhibit K, at pp. 15-16.

²⁴ 2019 Statement of Basis (Exhibit H) at p. 5 and Appendix A.

adopted an approach that ‘is rational in light of all information in the record.’” *In re Town of Concord Dept. of Public Works*, 16 E.A.D. 514, 517 (EAB 2014); *see also In re Gov’t of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002).

In reviewing an exercise of discretion by the permit issuer, the Board will uphold the permit issuer’s decision if it is cogently explained and supported in the record. *In re Town of Concord*, 16 E.A.D. at 517. In this case, however, EPA has no reasonable basis for its failure to grant Nezperce a schedule of compliance for ammonia. The agency was provided clear information that Nezperce could not immediately comply with the new ammonia limitations, such that a schedule of compliance was appropriate. Indeed, the agency conducted its own calculations demonstrating that Nezperce could not meet the new limits. Despite the fact that another discharger on the Nez Perce Reservation had been granted a schedule of compliance for the same parameter under similar circumstances, EPA gave no indication in its 2019 Statement of Basis or Response to Comments that it actually considered the Nezperce request and supporting data and information. EPA violated federal and state regulations allowing schedules of compliance, particularly for new water quality-based effluent limitations, and disregarded its own guidance concerning the factors to consider in determining whether to grant a schedule of compliance.

In the face of evidence that a community could not meet a new effluent limitation, this Board has previously remanded similar NPDES permitting decisions:

Since the issue of whether the City is entitled to a compliance schedule directly affects the permit’s terms, factual issues having to do with the City’s ability to comply immediately are clearly material (*i.e.*, could affect the outcome of the proceeding). Thus we are remanding this issue to the Regional Administrator. On remand, the Regional Administrator is directed to reconsider the

issue of whether the City is entitled to a compliance schedule. . . .”²⁵

Nezperce has demonstrated that it is entitled to a compliance schedule under federal and state law, and therefore requests that this Board remand the 2019 Permit to EPA Region 10 for inclusion of a schedule of compliance to allow time to achieve the new ammonia limitations.

II. EPA failed to properly respond to Nezperce comments requesting a schedule of compliance for ammonia.

A. EPA was required to duly consider and meaningfully respond to the Nezperce request for a schedule of compliance for ammonia.

Federal permitting rules require that permit issuers must “[b]riefly describe and respond to all significant comments on [a] draft permit.” 40 C.F.R. § 124.17(a)(2). The Board has held that it is incumbent on the permit issuers to “duly consider” issues raised in comments, and to respond in a “meaningful fashion.” *In re West Bay Expl. Co.*, 17 E.A.D. 204, 222 (EAB 2016) (quoting *In re Gov’t of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 342 (EAB 2002) and *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 585 (EAB 2004)). Although comment responses may be succinct, they must be “clear and thorough enough to adequately encompass the issues raised by the commenter.” *Id.* Comment responses must be sufficient to enable the Board to determine that the issuer has adopted an approach that is “rational in light of all information in the record.” *In re Muskegon Development Co.*, 17 E.A.D. 740, 742 (EAB 2019).

Even when the permit issuer offers a rationale for ignoring certain comments, the Board may remand a permit approval if the Board cannot determine that the issuer has “duly considered” all significant issues. For example, in the *In re Muskegon Development Co.* appeal, the Board remanded a permit in part because the issuer failed to address several comments

²⁵ *In re City of Ames, Iowa*, 6 E.A.D. 498, 504 (EAB 1996).

directly, or to provide any cross-reference or other indication that the issues raised by the omitted comments had been addressed elsewhere in its response. 17 E.A.D. at 751. The Board found that it was “stymied in its ability to determine whether the Region considered and responded to comments . . . and otherwise exercised its considered judgment in issuing the Permit” because of the inadequate information and reasoning in the issuer’s response, and remanded the permit. *Id.* at 749.

The Board also has remanded permits because the issuer failed to respond to comments regarding questionable factual findings. In *In re Washington Aqueduct*, the Board remanded an NPDES permit for reconsideration solely because the permit issuer ignored comments questioning the validity of the data it used to analyze the potential for certain pollutants to exceed water quality standards. 11 E.A.D. at 586, 589-90. Similarly, the Board remanded a decision for failure to address comments regarding the implications of underground geological formations for injection wells in *In re West Bay*, 17 E.A.D. 204, 221 (EAB 2016). The Board held that it was “particularly important” for the permit issuer to address technical issues, and avoid asking the Board to serve as the “first-line decisionmaker.” *Id.* at 222. The decision emphasized that the Region, not the Board, has applicable technical expertise:

The Board’s role is not to make initial scientific findings, but to review the Region’s decisions to determine if the Region has based its conclusions on clearly erroneous conclusions of fact or law. *Id.* at 222-23.

B. EPA failed to duly consider and meaningfully address Nezperce Comment 14 requesting a schedule of compliance for ammonia.

The selection from the Nezperce 2019 Comment letter presented as Comment 14 in the Response to Comments included at least three substantial issues, none of which EPA addressed in its response. First, Nezperce explained that compliance with the ammonia limit set forth in the permit is impossible with the existing treatment process; second, Nezperce requested an

extended compliance schedule be incorporated into the permit, and proposed a schedule in a detailed timeline of “Extended Compliance Activities,” presented as a table with specific dates and milestones; and third, Nezperce proposed specific measures to “allow the EPA to work with the City and better quantify creek flows, establishing timeframes for seasonal discharge to optimize the City's ability to comply with ammonia, phosphorus, and temperature limits.”²⁶ Significantly, Nezperce expressly stated that a compliance schedule was needed “to facilitate development and implementation of dynamic ammonia limits **in parallel with** compliance efforts . . . under the existing Compliance Order on Consent,” emphasizing that addressing the issues raised in the comment were specific to the permit conditions themselves, rather than any issues with the Compliance Order.²⁷

EPA failed to address—or even acknowledge—the issues raised in Nezperce Comment

14. EPA provided only the following terse response:

The City should contact the Enforcement & Compliance Assurance Division to discuss the potential for an amendment to their existing compliance order, if necessary.²⁸

This response is clearly inadequate, even under the most generous reading of the requirements of 40 C.F.R. § 124.17(a)(2). EPA did not address the issue of ammonia limitations; it did not even acknowledge that Nezperce had proposed a compliance schedule, let alone address the question of its feasibility; and it completely ignored the measures Nezperce proposed

²⁶ Nezperce 2019 Comments (Exhibit I) at pp. 1-3.

²⁷ Nezperce 2019 Comments (Exhibit I) at p. 2 (emphasis added).

²⁸ Response to Comments (Exhibit J) at p. 9.

to ensure optimal compliance.²⁹ As discussed above, despite the clear request by Nezperce that a schedule of compliance for ammonia be included in the permit, with appropriate support, EPA here failed to consider any of the factors prescribed by federal regulations or EPA guidance to determine whether a compliance schedule was appropriate and, if so, what its terms should be. Just as in *In re Muskegon Development Co.*, EPA here failed to provide any indication that it had “duly considered” the issues raised sufficient to demonstrate that it had “considered and responded to [all] comments.” 17 E.A.D. at 749.

By ignoring the three substantial technical issues raised in Nezperce Comment 14, EPA is inappropriately asking the Board to “serve as a first-line decisionmaker” with regard to technical questions, just as in *In re West Bay*. See 17 E.A.D. at 222-23. For this reason alone, the decision to approve this permit should be remanded with instructions to duly consider and meaningfully address all significant comments.

CONCLUSION

For the foregoing reasons, Nezperce respectfully requests that this Board grant the following relief:

1. Remand the 2019 Permit to EPA Region 10 for inclusion of a schedule of compliance to allow time to achieve the new ammonia limitations;

²⁹ EPA addressed a separate Nezperce request for a schedule of compliance in Comment Response 6. Response to Comments (Exhibit J) at p. 5. Nezperce commented on the 2018 Draft Permit (which did not include ammonia limitations) by suggesting interim limits and a schedule of compliance consistent with the 2017 Compliance Order. Nezperce 2018 Comments (Exhibit F) at p. 3. EPA responded by stating, “Since the effluent limitations proposed in the draft permit and contained in the final permit are the same as those in the previous permit, there is no basis to include interim effluent limits in the permit. In addition, since the permit limits have not changed, there is no basis to include a compliance schedule in the permit.” Response to Comments (Exhibit J) at p. 5. Because neither the Nezperce comment nor the EPA response referred to the 2019 Revised Draft Permit (which included ammonia limitations), EPA cannot rely on Comment Response 6 to justify its failure to include a schedule of compliance for ammonia. Further, the limits in the 2019 Permit have changed in comparison to the 2004 Permit. Therefore, there is a clear basis to include a compliance schedule for ammonia in the 2019 Permit.

2. Alternatively, remand the Permit for EPA Region 10 to duly consider and meaningfully respond to the Nezperce comments concerning its request for a schedule of compliance; and

3. Any such other relief as may be appropriate under the circumstances.

In addition, Nezperce requests the opportunity to present an oral argument in this proceeding.

Respectfully submitted,

/s/ Fredric P. Andes

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LIST OF EXHIBITS

| <u>Exhibit Description</u> | <u>Exhibit Number</u> |
|---|------------------------------|
| 2019 Permit – NPDES ID0020397 | A |
| 2004 Permit – NPDES ID0020397 | B |
| 2017 Compliance Order | C |
| 2018 Draft Permit – NPDES ID0020397 | D |
| 2018 Fact Sheet | E |
| Nezperce 2018 Comments | F |
| 2019 Revised Draft Permit – NPDES ID0020397 | G |
| 2019 Statement of Basis | H |
| Nezperce 2019 Comments | I |
| Response to Comments | J |
| Culdesac Permit – NPDES ID0024490 | K |
| Culdesac Fact Sheet | L |

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this Petition for Review, including all relevant portions, contains fewer than 14,000 words.

/s/ Fredric P. Andes

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of July, 2019, a true and correct copy of the foregoing Petition for Review and all Exhibits was sent to the following persons, in the manner specified:

By EAB eFiling System and overnight delivery to:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
WJC East Building, Room 3334
Washington, D.C. 20004

By email and overnight delivery to:

Daniel D. Opalski, Director
Water Division
U.S. Environmental Protection Agency
Region 10
1200 Sixth Avenue, Suite 155
Seattle, WA 98101-3188
Email: opalski.dan@epa.gov

By First Class U.S. Mail to:

Nez Perce Tribe
Attn: Ken Clark
Water Resources Division
P.O. Box 365
Lapwai, ID 83540

/s/ Fredric P. Andes

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