

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

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In re: )  
)

TOWN OF CONCORD, DEPARTMENT )  
OF PUBLIC WORKS )

NPDES Permit No. MA0100668 )  
\_\_\_\_\_)

NPDES APPEAL NO. 13-08

**CONCORD'S REPLY TO REGION 1'S RESPONSE TO PETITION FOR REVIEW**

Robert D. Cox, Jr., Esquire  
Norman E. Bartlett, II, Esquire  
BOWDITCH & DEWEY, LLP  
311 Main Street  
P.O. Box 15156  
Worcester, MA 01615-0156  
Tel: (508) 926-3409  
Fax: (508) 929-3012  
[rcox@bowditch.com](mailto:rcox@bowditch.com)  
[nbartlett@bowditch.com](mailto:nbartlett@bowditch.com)

Counsel for the Petitioner, Town of Concord

Dated: November 15, 2013

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## **I. INTRODUCTION**

Pursuant to 40 CFR § 124.19(c)(2) the Petitioner, Town of Concord, Department of Public Works (“Petitioner” or “Town” or “Concord”) submits this Reply to Region 1’s Response to the Town’s Petition for Review. The Region fails to squarely meet the objections the Town has raised in its Petition for Review of a NPDES permit with respect permit limitations on flow and conditions imposed by the Region on pH, aluminum, as well as mandate for collection system mapping, preparation of a collection system operation and maintenance plan, and submission of the annual reports, monitoring of Di-(2-ethylhexyl phthalate) (“DEHP”), and reporting requirements relating to chemical dosing.

## **II. THE TOWN’S REPLY TO REGION 1’S RESPONSE**

### **A. Concord properly preserved its arguments regarding flow limits and the Region fails to explain its error.**

The Region seeks to create a process and procedure under which a permittee must “formally request” an increase in flow, and then argues that because the Town failed to “formerly submit” or make a “formal request” for an increase of flow, it failed to preserve for review the flow issues the Town presents in its Petition for Review. Response, pp. 9, 10 and 17. The Region, however, cites to no such process. There is none, other than what the Town and the Region discussed before the draft permit issued and by way of the Town’s comments on the draft permit.

There can be no dispute that the Region understood the permit’s flow limit of 1.2 MGD placed a constraint on Concord’s ability to address existing and identified demand for development and redevelopment of residential and commercial properties along with economical wastewater disposal options for affordable housing. Before the draft permit issued, the Town

and the Region's permit writing staff met on June 7, 2012 to discuss the Town's need for additional wastewater capacity at the Town's WWTF. During the meeting, the Town explained to the Region its extensive wastewater planning activities, including examination of alternatives to increase flow, and desire for an integrated approach to address water and wastewater demands (see Petition, pp. 3-8), which is memorialized in a letter to the Region dated June 20, 2012. (Petition, Exh. B ). The letter references the various studies the Town has completed, its integrated planning efforts, and states: "it has become increasingly evident that additional capacity at the Concord municipal WWTF is needed," and "it is clear that an increase effluent discharge capacity under WWTF surface water discharge permit may be the most viable alternative available." (Petition, Exh. B).

While in its Response the Region fails to mention this meeting, the Region does note it in the Fact Sheet, as well as "the Town's requested flow increase." (Fact Sheet, p. 4 of 24). The Town's comments outline its extensive technical review of options "to increase its ability to treat wastewater," and repeats: "it has become increasingly evident that additional capacity at the Concord municipal WWTF is needed." (Petition, Exh. A).

There can be no doubt what the Town was seeking from the Region: an increase in flow. The Town asked for it. (Petition, Exh. A). As did the Concord Business Partnership. ("The permitted treatment capacity allowance has not been increased since the mid-1980s" and "[a]t this time, we believe it imperative that you consider the merits of allowing the Town to expand the amount of wastewater which could be treated at the existing waste water treatment facility.") (RTC B1, p. 22). The National Park Services understood that the Town sought an increase in flow ("We support the decision not to grant a flow increase to the Town of Concord at this

time”), and the Region acknowledged “that now is not the right time to grant Concord WWTF a flow increase.” (RTC D1, pp. 37 – 38).

Instead of meeting the Town’s challenge, the Region’s Response seeks to re-cast the Town as failing to “formerly submit” a request for a flow increase. The Region, however, cites to no such process by which the Town must make such a form of submission. Instead, the Region turns a blind eye on the Town’s well-documented and well-expressed need for an increase in flow capacity. The flow issue was preserved for review as required by 40 CFR §§ 124.13 and 124.19(a).<sup>1</sup> It is because of the Region’s errors in fact and law concerning the Town’s flow needs that the Town petitions the Board for review.

In its response to comments, the Region states that it “will not process a NPDES permit authorizing an increased discharge from a POTW until the Commonwealth has approved a comprehensive wastewater management plan [CWMP] that justifies the flow increase.” RTC A1. In its Response, the Region says it identified the Commonwealth of Massachusetts’ CWMP planning process “as relevant only to the timing of any future flow increase request.” The Region, however, misstated the role of the CWMP process in relation to the flow limit it imposes in the NPDES permit. In 2004, Concord completed a CWMP which was approved by the Commonwealth’s Secretary of Environmental Affairs. (Petition, Exh. C). But for the flow limit imposed by the permit, Concord could increase the flow of its WWTP without the need for any

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<sup>1</sup> The Region cites to the Town’s statements and its comments that the Town “understands that a formal request for a flow increase will require a future modification to the permit and will be initiated via a notice of project change to be via Massachusetts EOEEA-MEPA office.” These statements, however, must be placed in context. In meeting with the Region’s permit writers on June 7, 2012, the Region indicated that it intended to move forward with the permit and informed the Town that once the permit issued, the only way to increase flow would be through a future permit modification. The Town asked the Region to delay issuing the permit, which it denied, and proceeded to issue the draft permit. Nonetheless, the issue before the Region and the reason for the June 7, 2012 meeting was to request an increase in flow and to tie that increase into other planning efforts reflected in the studies and reports the Town had completed and made available to the Region through a link in the Town’s comment letter. (Petition, Exh. A, p. 3).

further approval from the Secretary.<sup>2</sup> The Region has set a limitation on flow based on its error in application or interpretation of the role of the Commonwealth's CWMP planning process, which notably is not a regulatory process, but a planning process controlled by a state issued guidance document. The CWMP completed by Concord and approved by state allows a flow rate greater than that set in the permit.

The Region also says in its Response that it “nowhere suggested that it was attempting to regulate flow of water *per se*.” Response, p. 15. But that is exactly what the Permit does at Part I. A.1.: “Effluent Characteristic: Flow; Effluent Limits: (Average Monthly) 1.2 MGD.” The permit regulates “flow.” Flow is not a pollutant. Flow is only incorporated in the permit via the effluent load limitations. Nowhere in its Response does the Region respond to the Town’s challenge to EPA’s legal authority to set a flow limit. Because the legal issues of authority are so closely related to challenges on flow, and by commenters other than the Town, and that the Region had an opportunity to address, these too were preserved for review. In re Ecoeléctrica, LP, 7 E.A.D. 56, 63-64 n. 9 (1997).

The Region says that a flow limit is a component of water quality based effluent limitations and a flow limit gives “assurance that assumptions underlying the permit remain secure for the near term.” Response, p. 16. The water quality based effluent limitations, however, give no authority to set a “flow” limit. In calculating effluent limitations for POTWs, 40 CFR § 122.45(b)(1) provides “permit effluent limitations . . . shall be calculated based on

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<sup>2</sup> Under MEPA regulations, an ENF, and other MEPA review if the Secretary so requires, is only required for “expansion of an existing wastewater treatment facility and/or disposal facility of greater than 100,000 gpd or 10% of existing capacity.” 301 CMR 11.03(5)(b)2. Based on the permitted flow capacity of 1.2 mgd, Concord’s WWTF could discharge 119,000 gpd greater than the permit limit without any “Commonwealth [approval of] a comprehensive wastewater management plan that justifies the flow increase.” Because the MEPA regulations define design “Capacity” as the maximum capacity at which a facility can operate regardless of regulatory restrictions and because the WWTF’s design Capacity is 1.36 mgd average daily flow (“ADF”) (Petition, p. 7), the Town could discharge up to 135,000 additional gallons per day without the Commonwealth’s approval. The Region incorrectly informed the Town during the June 7, 2012 meeting and states incorrectly in its response to comments that the Town needed state approval before any increase in flow in the permit, when it did not.

design flow.” The term “effluent limitation,” however, is defined to mean restrictions on “pollutants.” 40 CFR § 122.2. As set forth in Concord’s Petition, the flow of water or any other non-pollutant is beyond the Region’s regulatory authority to control. The Region has no legal authority to set a flow limit on non-pollutants.<sup>3</sup>

Finally, the Region contends that reasons cited in its Response to Comments refusing to address the Town’s request for increase of flow were mere “technical recommendations.” Response, p. 18. The Region’s comments, however, when plainly read are clearly designed to reflect reasons why the Region would not increase flow. As set forth above and in the Town’s Petition, the Region’s comments relating to CWMP and discussion of potential alternatives to an increase in discharge are in error. In short, because the Region has failed to show no error of fact or law in response to the Town’s claims with respect to flow, the Board should remand this issue to the Region.

Likewise, Region has failed to address the Town's claims with respect to including a stepped permit limit. In similar circumstances, the Region has included a “stepped effluent flow limit” where design capacity was available, even without need to ask for it. See, Part I. F. “Special Conditions, Annual Average Flow Increase,” page 15 of Billerica Draft Permit issued on August 6, 2013

<http://www.epa.gov/region1/npdes/permits/draft/2013/draftma0101711permit.pdf>

**B. The pH limit set by the Region is not a difference of opinion on a technical issue, but rather the result of clear error.**

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<sup>3</sup> While the Region claims in its Response that it is necessary to set a flow limit to “provide certainty that the assumptions underlying permit determinations remain accurate and protective”, Response, p. 16, in other permits issued by the Region no such flow limit is imposed. See, e.g., Part I.A.1 in permits issued to Concord, NH - <http://www.epa.gov/region1/npdes/permits/2011/finalnh0100901permit.pdf>; Exeter, NH - <http://www.epa.gov/region1/npdes/permits/2012/finalnh0100871permit.pdf>; Hooksett, NH - <http://www.epa.gov/region1/npdes/permits/2013/finalnh0100129permit.pdf>; and in a draft permit issued to Nashua, NH - <http://www.epa.gov/region1/npdes/permits/draft/2013/draftnh0100170permit.pdf>. The Region does not explain why, for some permits, “certainty” is gained through a flow limit, but for others it is not needed.



The Town was afforded no opportunity to comment on the new pH effluent limits until the final permit was issued. Consequently, the Region, in its Response, sets forth for the first time its position in response to the Town's objection to the new pH limits. In re Dominion Energy Brayton Point, LLC, 13 E.A.D. 407, 416 (2006) (Board recognizing that appeal was first opportunity petitioner had to comment on the region's rationale). The Region says that it "concluded that a limit of 6.0 may not adequately ensure attainment of water quality criterion for minimum pH and, consequently, could result in a violation of Massachusetts standards." (Emphasis supplied), Response, p. 23. The Region's Response, however, misses the mark. The Region fails to show that the Town's prior permit's effluent limitations of 6.0 – 8.3 for pH will cause or have a reasonable potential to cause a violation of the receiving water quality criteria for pH. Consequently, the revised pH effluent limitations in the final permit were adopted without sufficient technical justification.

In its Response, the Region says that it "was required to revise the pH limit to one that would ensure compliance with WQS," citing to 40 CFR 122.44(d). (emphasis supplied). Response, p. 22. 40 CFR 122.44(d) requires, at subparagraph (d)(1)(i), that "[l]imitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." Factors to be taken into account in the "reasonable potential" analysis are described more specifically by subparagraph (d)(1)(ii). If a pollutant discharge is found to cause, have the reasonable potential to cause, or contribute to exceedances of numeric or narrative state water quality criteria, then, the permit writer must establish the limit as provided in subparagraphs (iii) through (vii). 40 C.F.R.

§ 122.44(d)(1)(iii)-(vii). While the Region says it was required to set a water quality based effluent limit for pH, it did not perform a “reasonable potential” analysis. The Fact Sheet makes no reference to one. According to EPA’s own guidance, the Region’s permit writer should have done so. See [http://water.epa.gov/learn/training/standardsacademy/permit\\_page17.cfm](http://water.epa.gov/learn/training/standardsacademy/permit_page17.cfm) (“In the “fact sheet” that accompanies most permits, the permit writer should document the need for any WQBELs by presenting relevant data and assumptions”). No mention of any “reasonable potential” analysis is provided in the Region’s RTC. This is clear error for which remand is required.

The Region cannot impose a more stringent effluent limitation when an existing effluent limitation has been protective of water quality. The Region references only one observed criteria violation out of dozens of measurements. The State did not find cause to list the River as impaired for pH. As a result, the existing limitation – 6.0 – 8.3 SU – must be in compliance with the criteria.

Moreover, the fact that the stream criterion specifies that pH in the River should not be below 6.5 is not a sufficient basis for requiring that effluent limitations for discharges to the River must be identical to the stream criterion. Setting effluent limitations equal to stream criterion is only needed when there is no dilution of the effluent in the receiving water, or the receiving water is in violation of the applicable criterion.

In the draft permit, the Region’s position was that there was adequate dilution of the Concord WWTP effluent in the Concord River to protect against excursions of the Class B pH criteria. The Region’s defined dilution factor for this discharge did not change so greatly between the time of the draft permit (19:1) and the time of the final permit (15:1). The Region does not say that such a change would cause or have a reasonable potential to cause pH criteria

violations. Therefore, there was no new information to support the conclusion by the Region that, upon reevaluation with the final permit, there was suddenly inadequate dilution. The Region provides no calculations or other proofs that show a dilution factor of 19:1 is protective, but a dilution factor of 15:1 is not.

The Region's support for the revised pH effluent limitation rests upon the occurrence of only one pH value (out of 11 cited by the Region and approximately 60 provided by the Town) in the River less than 6.5. This is not a sufficient ground to conclude that the River is in violation of the pH criterion. In fact, if the River was impaired for pH (i.e., stream quality did not adhere to the criterion) then the River should have been listed as impaired in the State's 303d list. It is not.

It is not sufficient for the Region to state "it is not clear that the Concord River has sufficient buffering capacity" or that "a limit of 6.0 may not adequately ensure attainment of the water quality criterion." (Emphasis supplied). The Region's uncertainty and speculation does not serve as an adequate basis for changing a permit limit. "A permit issuer must articulate with reasonable clarity the reasons for its conclusions and must adequately document its decision making." City of Marlborough, 12 E.A.D 235, 245 (2005) (remanding where Region said a result "may be possible;" "a mere possibility of compliance does not 'ensure' compliance.")

The Region mischaracterized or fails to recognize the value of the data provided with the Town's Petition. Response, p. 23. Exhibit J consists of measurements in 1990. While the Region seeks to dismiss this information as "questionable" representativeness of "current conditions in the river," the purpose of the presentation of this data from over 20 years ago was to demonstrate that conditions in the River have not changed over a substantial period of time. The Region similarly dismisses the value of Petitioner's Exhibit K, as not representative of

conditions in the receiving waters. However, contrary to the Region's statements, the Billerica WWTP WET tests, which include ambient water chemistry taken approximately 4-5 miles downstream from the Concord WWTP effluent, provide a good representation of the ambient conditions in the Concord River in the vicinity of the Concord effluent. Nothing in the record indicates that pH might show dramatic swings in a few miles travel time, and there is no reason to reject this data.

This issue should be remanded to the Region.

### **C. The Aluminum Limit**

The Region's position that the Town failed to preserve issues relating to an aluminum limit based on Massachusetts standards is misplaced. The Town commented that MassDEP and others were currently evaluating criteria for Massachusetts and that the project will likely lead to result in new, less restrictive criteria. The Region acknowledged that it was aware MassDEP is considering developing site-specific criteria. RTC A.6. The Town's comment that new, less restrictive criteria would be appropriate encompasses what Region now says the Town did not say – that 87ug/l limit is overly protective. Consequently, the issue was preserved for review.

Nowhere in its Response does the Region refute that it is aware that the National Water Quality Criteria for aluminum may be significantly overly protective and not applicable to Massachusetts rivers. Nor does the Region address the fact that streams in eastern Massachusetts are regularly observed to have aluminum at levels above the National criteria of 87ug/l. The Region nowhere denies that site specific criteria is needed in lieu of National criteria. Nor does the Region explain the need to now, for the first time, impose default criteria that has been in effect since 1989 – other than to suggest that use of alum, in the treatment process to control phosphorus, may result in elevated aluminum in discharges. Response, 27, n.18. The Region, however, cites to no information suggesting that the Town's use of alum was reason to impose

the aluminum limit now; that is, that the Concord's compliance with a stringent phosphorus effluent limit of 0.2 mg/l has in any way lead to an increase in the Towns discharge of aluminum requiring a limit based on default criteria, before site specific criteria is developed and used to set proper limits.

The Region mischaracterizes the Town's arguments that it is being unfairly burdened with aluminum criteria that is dependent upon and must await a TMDL. The Town is located in a watershed where there are at least eight WWTF discharging upstream from the Towns facility, all of which discharge aluminum. The Town notes only that the appropriate development of aluminum limits should be done not by individual point sources, but on a watershed basis. While this may entail a TMDL, the Town does not say the Region must await a TMDL before regulating aluminum. Instead, as noted above, site specific criteria and water effect ratios should serve as the sound basis for setting an aluminum limit, not default to a National recommendation that is clearly qualified to support the establishment of a site specific criterion. The Region's Response incorrectly states the Town "submitted comments to the contrary" on the need for TMDL. What the Town actually said was that no TMDL was needed because "MassDEP has not found aluminum to be a problem in the Concord River." RTC A17. The issue was as properly preserved.

The Region fails to meet the Town's charge that the Region's 7Q10 calculation was faulty. In response, the Region says only that its selection of data "is logical and rational" and that it may chose "which" data it uses to support a change 7Q10 calculation. Nowhere, however, does the Region explain why it uses flow data only for the months of June through September and only for the years 2010 through 2012. Instead, the Region says that the Town's general objection is not sufficient to demonstrate the Region's method was erroneous. The Region,

conveniently overlooks that it provided a new 7Q10 calculation in the final permit that the Town did not see previously and which, as the Town states in its Petition, the Region does not explain. Petition, p. 23. Even in its Response, the Region maintains that it has no obligation to explain why it used data that generated more stringent effluent limits.

Nor does the Region adequately explain why it used in its revised calculation a practice that “EPA discourages the use of.” Response, p. 30. The Region says that it is matter of discretion; of its “technical judgment.” The Region does not deny the TSD discourages the use of average monthly limit equal to the chronic WLA as it does not address effluent variability. Instead, the Region says the TSD “does not prohibit this approach.” Response, p. 30. Where the Region uses an approach EPA discourages to set a new limit, different from the draft permit, more information must be provided to justify the Region’s position. Without more information to support its position and use of a calculation practice that EPA discourages, Region has made an error of law and fact and abused its discretion.

The Region does not explain why it relied upon data from the period of January 2009 through January 2011. Response, p. 31. The Region make no effort to explain why this particular data set might fairly represent the Town’s aluminum concentration levels. Instead, the Region inappropriately seeks to turn the table to say that it is “entirely speculative” that other data may yield different results. We don’t know. The Region has not done its job.

Finally, the Region does not explain why it failed to give consideration to seasonally varying effluent limits. While the Region claims the issue was not preserved, the Region overlooks that the Town did note the wide differences in effluent levels during seasons, RTC A18, and that the Region saw fit to do so with phosphorus. The Region does not explain why it did not set seasonal limits for aluminum. The Board should remand this issue to the Region.

#### **D. Monitoring and Reporting Requirements**

The Region incorrectly contends that the Town's challenge to Collection System Mapping, and Operations and Maintenance Plan and annual reporting were not raised with specificity. Response, p. 34. They were, as the Town's level of specificity matches the limited explanation and justification the Region provided in the Fact Sheet for these new conditions, not present in any prior permit, and only recently added in reissued municipal permits by the Region. The Region said only that these new requirements are "reasonable" and "necessary to ensure proper maintenance of the collection systems." Fact Sheet, p. 20. The Town's comments mirror the Region's justification. The Town said these conditions expand greatly on what "could reasonably" be considered NPDES authority. Where the Region explains these new conditions "as reasonable and logical" in the most general, vague and generic terms, the Town cannot be faulted for responding likewise. The Town has met its burden to present this issue for review.

In its Response, the Region says "the conditions imposed were expressly tied to ensuring compliance with permit conditions and achievement of WQS, including prevention of SSOs." Response, p. 36. No such "express tie" to "achievement of WQS" was stated in the Fact Sheet or RTC. Instead, the Region then said only, and without foundation, that the conditions are "intended to minimize the occurrence of permit violations that have a reasonable likelihood of adversely affecting human health or the environment," and that the "elements of the O&M plan . . . are reasonable." No mention of WQS is provided. It is difficult to fathom under what circumstances detailed mapping or plan writing and reporting on the same to the Region would help achieve WQS.<sup>4</sup> The Region's mandate for collection system mapping, plans and annual reporting bears no relationship to effluent compliance and meeting water quality standards.

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<sup>4</sup> As opposed to actual maintenance and operation of facilities so as to achieve compliance, a condition already set in the permit.

Creating a system map in accordance to the Region's standards does not equate to permit compliance.

Finally, the Region challenges the Town's claim that the chemical dosing be reported daily for each month on the ground that it was not raised previously. It does so in the face of a WWTF CoMag process that allows for rapid changes in phosphorous removal by adjusting dosing, and where comparison of chemical dosing on different days may lead the Region to incorrectly conclude that the Town is using higher chemicals to meet the phosphorus limit, where in fact, changes in dosing are inherent to the treatment process and still result in phosphorous level lower than the permit limit. This issue, closely related to the Town's comments on O&M reporting, the Region says was waived. The Region nonetheless seeks to justify this provision on the ground that it will "provide verification that nutrient removal occurs throughout the month." Response, p. 40, n.25. Such sampling and reporting, however, will do no such thing. Like the mapping O&M planning and reporting requirements, it serves to only increase the burden and cost on the facility to provide reports where other permit conditions unequivocally set a limit for phosphorus the permittee must meet. Moreover, while the Region imposes this burdensome requirement in the Town's permit, it did not in the draft permit recently issued for another CoMag facility in the same watershed within the Region. The draft permit for Billerica has no similar reporting requirement. See

<http://www.epa.gov/region1/npdes/permits/draft/2013/draftma0101711permit.pdf>.

#### **E. DEHP Monitoring**

In its Response, the Region incorrectly states that the Town claimed the lack of reasonable potential to cause or contribute to a WQS violation as reason to remove the DEHP requirement from the permit. Response, p. 41. The Town, however makes no such claim. While Town notes the Region acknowledged no reasonable potential, what the Town did assert, and the



Region ignores, is that the analysis the Region provided for the first time with the final permit shows a dilution factor of approximately 100. RTC Appendix A, page 17. At that dilution factor, even the highest observed effluent concentration of DEHP would not result in a receiving water concentration exceeding either the human health criteria for DEHP. The Region does not respond to this fact supporting the Town's request to remand. It instead focuses on a claim the Town never made.

The Region says the Town's assertion that "DEHP will dissipate quickly" is an unsubstantiated conclusion that was waived as it could have been raised during the comment period. The Region, however, fails to note that the Region itself says "DEHP breaks down quickly in the presence of oxygen," that DEHP is "only slightly soluble in water," and has not been detected in the downstream drinking water. RTC Appendix A, pages 16-17. Where any discharge of DEHP via the Town's effluent is to a river where oxygen is present with, according to the Region's calculation, a streamflow below the Town's outfall at 18 MGD, it logically follows that DEHP will dissipate quickly, and do so long before it reaches the Billerica water supply intake.<sup>5</sup>

The Region, agreeing that DEHP is "ubiquitous," surprisingly questions why this fact should be a factor relevant to whether pollutants in a discharge have a reasonable potential. If, as the Region says, DEHP is "commonly detected in the environment due to wide spread use of plastic products," then there can be no connection between its presence in the environment and the discharge itself.

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<sup>5</sup> The Region states that the Town does not address information in an Agency for Toxic Substances and Disease Registry ("ASDR") summary of DEHP indicating that DEHP "attaches strongly to soil particles" and "does not break down easily when it is in deep in (sic) the soil or at the bottom of lakes or rivers." That DEHP has such characteristics in soil or at the bottom of a river shows only that its potential threat to human health via effluent discharge is limited. The ASDR statement also says "DEHP in soil or water can be broken down by microorganisms into harmless compounds."

The Region fails to address the fact, acknowledged by the Region, that sampling and analysis itself can vary widely and the it is “possible that plastics used in sampling or analysis have skewed previous sampling results.” RTC A13. The Region ignores the burden placed on the Town to sample and report a compound that may or may not be detected and may or may not be associated with Town’s discharge for which stringent QA/QC controls must be in place. This permitting action is not justified by the Region.

Finally, the Region did not respond to the Town’s request, if monitoring is not eliminated, that it be reduced with an “opt-out” provision if monitoring provides no value. Instead of acknowledging that it did not respond, the Region’s Response relies upon tortured logic to say that its response to comments indicated that it disagreed with very premise of the Town’s comment, apparently with the view all data yielded by monitoring has “value.” But nowhere does the Region say it considered and rejected the Town’s request. The issue should be remanded to the Region.

### **III. CONCLUSION**

For these reasons, and those set forth in the Town’s Petition, the Town requests:

- (1) The opportunity to present oral argument in this proceeding;
- (2) A remand to Region 1 with an order to issue an amended NPDES permit that conforms with EAB’s findings on the terms and provisions appealed;  
and
- (3) Such other relief as may be appropriate in these circumstances.

/s/

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Robert D. Cox Jr.  
Norman E. Bartlett, II  
BOWDITCH & DEWEY, LLP  
311 Main Street  
P.O. Box 15156  
Worcester, MA 01615-0156  
Telephone: 508-926-3409  
Facsimile: 508-929-3012  
E-mail: rcox@bowditch.com

Date: November 15, 2013

## **REQUEST FOR ORAL ARGUMENT**

Petitioner, the Town of Concord, hereby requests that the EAB schedule oral argument in the above-captioned matter. Oral argument would assist the EAB in the deliberation on issues presented by this case due to its nature and complexity. Specifically, the flow limit issue involves important policy considerations relating to state wastewater planning, disparate treatment of permittees in New Hampshire and Massachusetts, and presents a question of national significance in the regulation of water flow as a pollutant for which oral argument should assist the EAB. Similarly, oral argument on the issues raised relating to pH, aluminum, and monitoring and reporting are likely to assist the EAB. For these and other reasons specified in its Petition and this Reply, Petitioner respectfully request that the EAB schedule oral argument in the above-captioned matter.

**STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS**

I hereby certify that this reply contains less than 7,000 words in accordance with 40 CFR § 124.19(d)(3).

/s/  
Robert D. Cox, Jr.

Date: November 15, 2013

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Concord's Reply to Region 1's Response to Petition for Review in connection with In re Town of Concord, Department of Public Works, NPDES Appeal No. 13-08, was sent to the following persons in the manner indicated:

By Electronic Filing:

Ms. Eurika Durr  
Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1201 Constitution Avenue, NW  
U.S. EPA East Building, Room 3334  
Washington, DC 20004  
[Durr.Eurika@epa.gov](mailto:Durr.Eurika@epa.gov)

By U.S. Mail and Electronic Mail:

Samir Bukhari  
US Environmental Protection Agency  
Office of Regional Counsel, Region I  
5 Post Office Square – Suite 100  
Mail Code: ORA 18-1  
Boston, MA 02109-3912  
[bukhari.samir@epa.gov](mailto:bukhari.samir@epa.gov)

/s/

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Robert D. Cox, Jr.