BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
	)	**NPDES Appeal No. 20-04**
Starkist Samoa Co.	)	
	)	
NPDES Permit No. AS0000019	)	
	)	

PETITION FOR REVIEW OF

STARKIST SAMOA CO. NPDES PERMIT AS0000019

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Date: April 27, 2020

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INTRODUCTION

Petitioner Starkist Samoa Co. ("Starkist"), through its undersigned counsel, respectfully submits this Petition for Review of National Pollution Discharge Elimination System ("NPDES") Permit No. AS0000019 (the "Final Permit") issued on February 26, 2020 by the U.S. Environmental Protection Agency ("U.S. EPA"), Region 9 (the "Region 9"). The Final Permit and accompanying Fact Sheet are attached as Exhibits 1 and 2. Starkist's deadline to file this Petition for Review was extended by the March 19, 2020 Order of the Environmental Appeals Board ("EAB" or "the Board") until April 27, 2020.

Starkist operates a tuna cannery in American Samoa. The process of thawing, butchering, cooking and packaging tuna generates wastewater that is discharged under authority of Starkist's NPDES Permit. NPDES permits for American Samoa are issued by Region 9. However, the American Samoa Environmental Protection Agency ("AS EPA"), not Region 9, promulgates Water Quality Standards for America Samoa ("AS WQS"). The current AS WQS are identified as Administrative Rule No. 001-2013.[1]

Starkist is challenging three specific provisions of the Final Permit and seeks remand of those provisions of the Final Permit to U.S. EPA. The challenged provisions are clearly erroneous, lack rational evidentiary support, involve an abuse of discretion and implicate important policy considerations that warrant review by the Board. *See* 40 C.F.R.§ 124.19(a)(4)(i)(A), (B). Specifically:

* The Final Permit, in Section I.A.3.h, includes a very stringent new requirement regarding dissolved oxygen ("DO") concentrations in the receiving water that is improper on multiple grounds:

  ** The DO requirement was not contained in the draft permit issued for public notice and comment, is not a logical outgrowth of that draft permit or any comments

[1] The core AS WQS regulations are available at https://www.epa.as.gov/sites/default/files/documents/regulations/ASWQS%202013.pdf and are attached hereto as Exhibit 14 for convenience.

received by U.S. EPA on the draft permit, and its belated addition was not explained or even noted in the Fact Sheet or Response to Comments documents.

** The DO requirement changes the evaluation of whether the AS WQS for DO is being achieved, by effectively replacing use of the median value from the relevant sampling data set with use of the lowest single data point in the data set, thus making the standard dramatically more stringent.

** The DO requirement, added in Section I.A.3.h of the Final Permit, has no basis in the underlying AS WQS and has not been used in other contemporaneous American Samoa NPDES permits issued by Region 9, including for discharges into Pago Pago Harbor, the same receiving water as the Starkist discharge. The AS WQS have been previously approved by U.S. EPA, and the new DO requirement represents an unauthorized revision by U.S. EPA of the AS WQS without proper rulemaking. There is no support for the new DO requirement in the administrative record, and no basis for U.S. EPA to override AS EPA.

** Certain aspects of the new DO requirement are confusing and impossible to understand or apply, such as to deprive Starkist of fair notice of what is being required.

* The Final Permit imposes monitoring requirements along the nearby coral reef crest that are internally contradictory and present severe safety issues to anyone attempting to conduct the sampling.

* The Final Permit includes overbroad and burdensome annual Priority Pollutant Scan requirements that cannot be justified under the circumstances of Starkist's Final Permit and are inconsistent with the position that Region 9 has taken elsewhere.

THRESHOLD PROCEDURAL REQUIREMENTS

Starkist satisfies the threshold requirements for filing a petition for review under 40 C.F.R. § 124.19:

1. Starkist has standing to petition for review of the Final Permit because it timely submitted extensive comments on the draft permit issued by U.S. EPA for public notice and comment in July 2019. *See* 40 C.F.R. § 124.19(a)(2). A copy of Starkist's August 15, 2019 Comments ("Comments") and U.S. EPA's Response to Comments ("Response to Comments") are attached as Exhibits 3 and 4, respectively; and

2. All issues discussed in this petition either (a) were raised with specificity during the public comment period, to the extent reasonably ascertainable at the time, or (b) concern changes from the draft permit to the Final Permit. *See* 40 C.F.R. § 124.19(a)(2) and (a)(4)(ii).

FACTUAL AND PROCEDURAL BACKGROUND

Starkist operates a tuna cannery in American Samoa. Exh. 2, at p. 3. The process of thawing, butchering, cooking and packaging tuna generates wastewater that is discharged under authority of Starkist's NPDES Permit. *See* February 12, 2019 NPDES Permit Application, attached as Exhibit 5, at p. 26 of 39. The wastewater is discharged into Pago Pago Harbor via a discharge line known as the Joint Cannery Outfall ("JCO"). Exh. 2, at p. 6. The JCO carries the combined wastewater discharge from Starkist's facility and from the adjacent Samoa Tuna Processors facility ("STP Facility"). *Id.* The STP Facility has ceased canning production, and is currently leased by Starkist for support operations related to the tuna canning operations at the Starkist Facility. *Id*.

Prior to the issuance of the Final Permit, Starkist's American Samoa facility (the "Facility") operated under an NPDES discharge permit issued in 2008 (the "2008 Permit"), which was administratively extended when Starkist filed a timely renewal application in 2012. *See* Exh. 2, at p. 1. The 2008 Permit is attached as Exhibit 6. Starkist's initial renewal application was submitted on September 18, 2012, and was supplemented and updated with the passage of time and to account for intervening changes at the Facility on April 29, 2016, March 25, 2017, January 31, 2018 and February 12, 2019. *See* Exh. 2, at p. 1. Region 9 provided two pre-public notice drafts of the permit renewal to Starkist in September 2018 and April 2019, before then publicly noticing a draft Permit renewal on July 3, 2019 ("the Public Notice Draft Permit"); a copy of the Public Notice Draft Permit is attached as Exhibit 7. Starkist timely submitted comments on August 15, 2019. *See* Exh. 3.

At the time the 2008 Permit was issued, Starkist was also subject to an ocean dumping permit, pursuant to which it disposed of certain fish processing waste streams directly into the ocean approximately five miles offshore, via transport on a boat and not via the JCO discharge or subject to NPDES Permitting. Exh. 2, at p. 4. Ocean dumping activities ceased in approximately July 2012, which resulted in a series of subsequent NPDES permit compliance issues, ultimately culminating in a Consent Decree entered in March 2018. *See* Exh. 8. Starkist subsequently submitted an ocean dumping permit application to resume ocean dumping activities, and a draft ocean dumping permit was issued by U.S. EPA for public notice and comment in December 2019. *See* Exh. 9. Starkist's final update to its NPDES permit application in February 2019 contemplated, and was based on, a resumption of ocean disposal. *See* Exh. 5, at pp. 2-3 and 30-33 of 39.

The Dissolved Oxygen Water Quality Standard

The 2008 Permit under which Starkist had operated for the past twelve years includes a permit condition that set forth the AS WQS for DO; the 2008 Permit contains the same numeric AS WQS levels for DO as in the current AS WQS. *See* Exh. 6, at Section I.B.9. During the renewal process, U.S. EPA provided Starkist with pre-public notice draft permits that did not contain the specific DO requirement from the 2008 Permit, but instead included a blanket requirement that the discharge comply with all provisions of the AS WQS. *See* Section I.A.3 in drafts from September 18, 2018 and April 25, 2019, attached as Exhibits 10 and 11. The Public Notice Draft Permit, issued on July 3, 2019, contained the same language in this respect as the earlier drafts. *See* Exh. 7. The Final Permit, however, added a new provision in Section I.A.3.h, not contained in the Public Notice Draft Permit (or the earlier non-public drafts), that incorporated a modified version of the AS WQS for DO that is superficially similar to the DO WQS requirement

from the 2008 Permit, but with additional wording that, as will be discussed herein, changes the DO standard significantly. *Compare* Exh. 6 at Section I.B.9 with Exh. 1 at Section I.A.3.h.

ARGUMENT

I. Standard of Review

A petition for review may be granted by the Board where U.S. EPA's decision was based on a clearly erroneous finding of fact or conclusion of law, or if the decision involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a)(4)(i)(A), (B). In assessing clear error, the Board examines the administrative record that serves "as the basis for the permit to determine whether the permit issuer exercised his or her 'considered judgment.'" *In re Town of Newmarket, N.H.*, 16 E.A.D. 182, 219 (EAB 2013). The burden is on the permit issuer to articulate with "reasonable clarity" the reasons supporting its conclusion. *Id.* Overall, an agency must cogently explain why it has exercised its discretion in a given manner. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 48 (1983). If there is no explanation for a permit change, then the record lacks the necessary "considered judgment" to support the permit determination. *In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility*, 12 E.A.D. 235, at 245 (EAB 2005).

Although the Board may typically defer to a regional office on technical issues, it will do so only if the "approach ultimately selected by the Region is rational in light of all of the information in the record." *In re NE Hub Partners, 7 E.A.D.* 561, 568 (EAB 1998). Yet, the Board will order a remand when the U.S. EPA's decision is "illogical or inadequately supported by the record." *Id.* Additionally, a remand is appropriate where there has been no discussion of the basis of the decision or proof of any analysis by the agency. *See, e.g., In re ConocoPhillips*, 13 E.A.D. 768, 793 (EAB 2008).

II. The Dissolved Oxygen Receiving Water Requirement Should Match the AS WQS for DO Without the More Stringent Provisions Added by U.S. EPA

The Final Permit improperly contains a new requirement, in Section I.A.3.h, regarding the concentration of DO in the receiving water that was not contained in the Public Notice Draft Permit. The addition of Section I.A.3.h to the Final Permit was not identified or cited in any way by the Fact Sheet or U.S. EPA's Response to Comments. This new DO requirement cannot be justified as a logical outgrowth of comments received on the permit, as no comments on the Public Notice Draft Permit sought the inclusion of this new condition. Starkist did not have fair notice of the DO requirement when commenting on the draft permit, nor did AS EPA have fair notice when commenting on the permit and providing its § 401 certification. U.S. EPA's addition of the new DO requirement without the opportunity for public comment is clearly erroneous and contrary to law.

Additionally, as explained in more detail in section II.B below, the new DO requirement significantly changes the AS WQS approach to measuring attainment of the DO water quality standard by changing American Samoa's use of the median value from a data set that included all relevant permit required sampling stations and effectively replacing it with use of the lowest individual data point from any station, thus imposing a requirement that is far more stringent than the AS WQS. This permit condition effectively revises the AS WQS, and this revision of the AS WQS by U.S. EPA Region 9 is without any explained basis, justification, or authority. The AS WQS are established by AS EPA, not by U.S. EPA. U.S. EPA's attempt to rewrite the approved AS WQS in context of an individual NPDES permit exceeds U.S. EPA's authority. This issue presents an important public policy concern that warrants review by the Board.

A. The New DO Requirement Created by Region 9 Was Improperly Added to the Final Permit

1. The DO Requirement Was Not Included in the Public Notice Draft

The Final Permit contains the following requirement in Section I.A.3.h (hereinafter "the DO Requirement"):

> The discharge shall not cause the concentration of dissolved oxygen in the receiving water to be less than 70 percent of saturation or less than 5.0 mg/l ***at any point*** beyond the boundary of the zone of initial dilution. If the natural level of dissolved oxygen is less than 5.0 mg/l ***at any point***, the discharge shall not cause dissolved oxygen to decline below the natural level ***at that point***.

See Exh. 1, at p. 4, Section I.A.3.h (emphasis added). In contrast, the Public Notice Draft Permit does not contain this provision. Instead, Section I.A.3 in the Public Notice Draft Permit stops at subsection (g). *See* Exh. 7, at p. 4.

The Final Permit, as with the Public Notice Draft Permit, otherwise contains the requirement that the discharge comply with all provisions of the AS WQS. *See* Exhs. 1 and 7, at Section I.A.3. As such, there was no need to incorporate additional language to ensure that the discharge comply with the AS WQS. The AS WQS contain numeric limits for parameters other than DO in Pago Pago Harbor, including Turbidity, Total Phosphorous, Total Nitrogen, Chlorophyll *a*, Light Penetration, Ammonia, pH and Enterococci, *see* AS WQS § 24.0206(m) (Exh. 14), yet no language was added to the Final Permit to set forth any version of a receiving water quality standard for any of these other parameters.

Starkist submitted extensive comments on the Public Notice Draft Permit. *See* Exh. 3. Those comments did not address the DO Requirement because, of course, it was not included in the Public Notice Draft Permit. However, Starkist may challenge the DO Requirement because it was a change in the final permit from the proposed draft. *See* 40 C.F.R. § 124.19(a)(2); *see*, *e.g.*,

In re American Soda, LLP, 9 E.A.D. 280, 288 (EAB 2000) (petitioners have standing for any changes between the draft and final permit.).

2. EPA Failed to Identify, Explain or Support the Addition of the DO Requirement

U.S. EPA did not identify the new DO Requirement added to the Final Permit in the Fact Sheet or the Response to Comments. Both documents are silent with regard to the fact that the new Section I.A.3.h had been added to the Final Permit. In contrast, other changes to the permit from the Public Notice Draft to the Final Permit are specifically identified. (For example, the outfall inspection requirements in Section II.C of the Final Permit are noted in Section IV.J of the Response to Comments. *See* Exhs. 1 and 4.)

Federal regulations require that U.S. EPA provide a response to any comments on a draft permit, and that the response must "[s]pecify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change." 40 C.F.R. § 124.17(a)(1). The Board has noted that this "requirement is not trivial." *ConocoPhillips,* 13 E.A.D. at 780. As the Board stated in *ConocoPhillips*:

> "[C]ompliance with this requirement is of primary importance because it ensures that all significant permit terms have been properly noted in the record of the proceeding and illuminates the permit issuer's rationale for including key terms. It further 'ensures that interested parties have an opportunity to adequately prepare a petition for review and that any changes in the draft permit are subject to effective review.'" *Indeck-Elwood*, 13 E.A.D. 126, 147 (EAB 2008) (*quoting In re City of Marlborough, Mass. Easterly Wastewater Treatment Facility*, 12 E.A.D. 235, 245 (EAB 2005)). Absent an explanation for permit changes, the record does not reflect the "considered judgment" necessary to support the permit *determination. See City of Marlborough, 12 E.A.D.* at 245 (*citing In re Austin Powder*, 6 E.A.D. 713, 720 (EAB 1997)). Where the permit issuer fails to adequately identify and explain changes to the permit as 40 C.F.R. § 124.17(a)(1) requires, the Board has not hesitated to remand the permit to the permitting agency for further consideration.

Id. (some citations omitted). Even when the agency believes that the reason for a change is logical and rational, or self-evident, it still must present its position in the administrative record. *In re Town of Concord Dep't of Pub. Works,* 16 E.A.D. 514, 524 (EAB 2014) (remanding permit to

agency for further explanation when permit issuer's response to comments was inadequate to explain change made from draft permit to final permit.)

Here, Region 9 failed to identify or explain the addition of Section I.A.3.h to the Final Permit. There is no explanation why the DO Requirement was added, or any explanation regarding the meaning and purpose of its contents. The change to the permit is significant, and the failure to provide the agency's "considered judgment" violates the requirements of 40 C.F.R. § 124.17 and merits remand of the permit to Region 9 for further consideration.

3. The DO Requirement is Not a Logical Outgrowth of any Permit Comments

U.S. EPA's ability to revise a draft permit without reopening public comment is limited, and U.S. EPA exceeded the bounds of its authority to do so here. Initially, it is well recognized that a final permit can differ from the version issued for public notice and comment. *NRDC v. U.S. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002); *In re D.C. Water and Sewer Auth.*, 13 E.A.D. 714, 758-59 (EAB 2008). Indeed, the very purpose of public comment is to solicit feedback with the purpose of modifying the terms of a draft permit consistent with any meritorious comments that are submitted. *NRDC*, 279 F.3d at 1186; *D.C. Water and Sewer Auth.*, 13 E.A.D. at 759. However, when the final version of a permit contains a change from the draft permit, the final permit must be a "logical outgrowth" of the draft permit. *NRDC*, 279 F.3d at 1186; *D.C. Water and Sewer Auth.*, 13 E.A.D. at 759:

> The essential inquiry focuses on whether interested parties reasonably could have anticipated the final rulemaking from the draft permit. In determining this, one of the most salient questions is whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule.

NRDC, 279 F.3d at 1186.

In this situation, it is readily apparent that the new DO Requirement is not a logical outgrowth of the Public Notice Draft Permit or any comments received by U.S. EPA on the Public

Notice Draft Permit. The only commenters on the permit were Starkist, the Governor of American Samoa and AS EPA. Starkist certainly did not advocate for the inclusion of this new requirement, which modifies and makes significantly more stringent the AS WQS for DO. *See* Exh. 3. Nor did the American Samoa government. *See* Exhs 12 and 13.

Specifically, following issuance of the Public Notice Draft Permit, the Governor of American Samoa and AS EPA submitted several letters to U.S. EPA, including comments on the Public Notice Draft Permit and AS EPA's § 401 Certification of the Public Notice Draft Permit. None of these letters advocated or suggested the addition of the DO Requirement to the permit. These letters included an August 13, 2019 cover letter from the Governor of American Samoa, which attached AS EPA's August 12, 2019 comment letter on the Public Notice Draft Permit. *See* Exh. 12 (both letters). The Governor's letter recognized the extreme importance of Starkist's operations to the welfare of American Samoa, and noted approvingly that the Public Notice Draft Permit had not compromised or undermined the intent of the law. *Id.* The AS EPA's comment letter was supportive of Starkist's permit application and advocated for greater flexibility in permit limits and requirements where possible. *Id.* For example, AS EPA noted that the Total Nitrogen and Total Phosphorous limits had been increased (i.e. made less stringent) from the 2008 Permit, and suggested that U.S. EPA determine if further increases could be supported. *Id.*, at pp. 1-2 of AS EPA comment letter. AS EPA also expressed support for removal of unnecessary receiving water quality monitoring requirements, where doing so would reduce the burden on Starkist. *Id.*, at pp. 2 and 3. In all, no comments were offered by the Governor or AS EPA seeking modification of the Public Notice Draft Permit to impose more stringent limits, suggesting that U.S. EPA modify existing AS WQS for purposes of Starkist's permit, or otherwise seeking additional DO provisions.

The other AS EPA letter, dated August 29, 2019, provided AS EPA's certification under Section 401 of the Clean Water Act ("CWA"). *See* Exh. 13. This letter certified that the Public

Notice Draft Permit was consistent with the AS WQS. According to the certification letter, AS EPA found that the Public Notice Draft Permit was "consistent with the protected uses for Pago Pago Harbor, as stated in the American Samoa Water Quality Standards and [the CWA]". *Id.* The letter also stated that "[c]ertification is hereby given for this activity, provided that the ASWQS continue to be met." *Id.* Accordingly, the AS EPA provided clear certification of the Public Notice Draft Permit as drafted, and that AS EPA did not believe any additional terms were necessary in the Public Notice Draft Permit.[2]

Ultimately, neither the August 12 and August 13, 2019 comment letters, nor the August 29, 2019 Certification letter, contain any request to U.S. EPA, of any kind, that U.S. EPA modify the existing AS WQS or impose new DO restrictions. Both of the comment letters implicitly evidence satisfaction with the existing language in Section I.A.3 of the Public Notice Draft Permit requiring compliance with the AS WQS, namely that "[t]he discharge shall comply with all provisions of the American Samoa Water Quality Standards, 2013 Revision (AS-WQS), including the narrative standards at § 24.0206". *See* Exh 1. The § 401 Certification letter provided AS EPA's certification that the terms of the Public Notice Draft Permit were sufficient to protect the quality of American Samoa's waters. None of the correspondence from the American Samoa government to U.S. EPA sought specific additional terms to include the AS WQS for DO, let alone inclusion of a revised and dramatically more stringent version of the AS WQS for DO.

[2] AS EPA's choice of language regarding the AS WQS continuing "to be met" is an acknowledgement that the AS WQS were being met at the time. This conclusion presumably would have been based on, and is supported by, the receiving water quality monitoring reports submitted by Starkist. Receiving water quality monitoring is required to be performed semi-annually by Starkist, and additional voluntary receiving water quality monitoring was done by Starkist during 2018. Key receiving water monitoring sampling results are summarized in Starkist's permit comments (Exh. 3, at p. 5-6), and the reports are expected to be incorporated in the administrative record. The receiving water quality monitoring reports are incorporated herein by reference.

4. The Failure of Region 9 to Include the DO Requirement in the Public Notice Draft Permit Subverted the CWA § 401 Certification Process

U.S. EPA's omission of the DO Requirement from the Public Notice Draft Permit deprived AS EPA of the opportunity to address the DO Requirement in the § 401 Certification submitted by AS EPA to U.S. EPA. AS EPA provided its § 401 Certification with regard to the Public Notice Draft Permit on August 29, 2019. *See* Exh. 13. Region 9's new DO Requirement in Section I.A.3.h was first revealed by U.S. EPA with the issuance of the Final Permit on February 26, 2020. As such, AS EPA's § 401 Certification could not and did not consider or address the DO Requirement inserted by Region 9. Since the DO Requirement contains a significant rewriting of the AS WQS for DO, the avoidance of subjecting the DO Requirement to the § 401 certification process represents a clear error of law by U.S. EPA and presents an important policy matter and an abuse of discretion that merits review by the Board.

Pursuant to CWA § 401 and implementing regulations at 40 C.F.R. Part 124, U.S. EPA has the obligation to present a proposed NPDES permit being issued by U.S. EPA to the relevant state or territory (in this case to American Samoa). 33 U.S.C. § 1341 (CWA § 401); 40 C.F.R. § 124.53. The affected state or territory then provides a certification as to whether the discharge allowed under the permit will satisfy relevant provisions of the CWA and state or territorial law, including local water quality standards. *Id.* The certification process established by the federal regulations provides the state or territory the opportunity and the obligation to identify any conditions more stringent than those in the draft permit that are necessary to comply with the CWA and state and territorial requirements. 40 C.F.R. § 124.53(e)(2). Here, AS EPA did not identify any such conditions. *See* Exh. 13. The certification process also allows the state or territory to identify each condition of a draft permit that can be made less stringent without violating the state or territory's requirements, including the water quality standards. *Id.* at 124.53(e)(3).

The failure to include the DO Requirement in the Public Notice Draft Permit deprived American Samoa of the ability to respond to the federal action of imposing the DO Requirement in the Final Permit via the certification process. AS EPA was not given the opportunity to include in its certification any response to the DO Requirement, including the opportunity to state that the DO Requirement incorrectly reflects AS WQS, and that it can be made less stringent while still preserving the AS WQS. Had AS EPA been provided with the opportunity, such a response from AS EPA would have shifted the burden onto U.S. EPA to strongly justify the DO Requirement before it could be included. In the situation where a state or territory "prescribes a permit condition or limitation that interprets one of the State's water quality standards less strictly" than U.S. EPA, the burden shifts to U.S. EPA to justify its position. In this circumstance, U.S. EPA "would have to provide a compelling reason" for rejecting the State's position. *See In re Am. Cyanamid, Santa Rosa Plant*, 4 E.A.D. 790, 801 n. 12 (EAB 1993). In one instance, faced with competing interpretations of an Arizona water quality standard in an NPDES permit issued by U.S. EPA Region 9, the Board held that where both interpretations were "equally persuasive", Region 9 needed to show that the state's interpretation, as set forth in the state's certification, contained "clear error" before U.S. EPA could impose its own interpretation. *In re Ina Rd Water Pollution Control Facility*, 2 E.A.D. 99, 101 (EAB 1985).

Here, U.S. EPA's failure to include the DO Requirement in the Draft Public Notice Permit deprived AS EPA of the opportunity to evaluate it, or to respond to it in the § 401 Certification submitted by AS EPA to Region 9 on August 29, 2019. *See* Exh. 13. Instead of adhering to the existing AS WQS, or trying to clear the high bar of defending its revision of AS WQS, U.S. EPA's actions here circumvented the § 401 process for the DO Requirement. Since the DO Requirement contains a significant rewriting of how attainment with the AS WQS for DO is to be determined, the avoidance of the § 401 process for the DO Requirement is a material failure to comply with

the requirements of § 401 and presents a unique and important policy issue, and an abuse of discretion, that should be reviewed by the Board.

5. The Failure to Provide Starkist the Opportunity to Comment on the New DO Requirement Deprived Starkist of Due Process

The Administrative Procedures Act requires U.S. EPA to provide the public with notice and an opportunity to comment before it issues an NPDES Permit. *See NRDC*, 279 F.3d at 1186 (citing 5 U.S.C. §§ 553(b)-(c) and 40 C.F.R. §§ 124.6(d), 124.10(a)(1)(ii), (b)). Since the DO Requirement was not contained in the Public Notice Draft Permit and is not a logical outgrowth of any comments on the draft, the inclusion of the DO Requirement without the opportunity for Starkist to comment on the DO Requirement violates the Administrative Procedures Act. The U.S. EPA wrongfully deprived Starkist of the opportunity to comment on the DO Requirement.

B. The DO Requirement Contradicts American Samoa Water Quality Standards

As noted above, the Final Permit contains a general provision requiring that the discharge comply with all provisions of the AS WQS. *See* Exh. 1, at Section I.A.3. This provision is identical to that contained in the Public Notice Draft Permit. *See* Exh. 7, at Section I.A.3. No comments were offered, or objections made, to this requirement. *See* Exhs. 3, 12 and 13. Superficially, because the new DO Requirement uses the same numeric values as the AS WQS, a cursory review might leave the impression that the DO Requirement is merely a more specific listing of this one particular aspect of the AS WQS. However, as explained below, the new DO Requirement includes language that contradicts the detailed methodology specified in the AS WQS and significantly changes how attainment of the AS WQS for DO is evaluated, making the standard significantly more stringent.

1. The AS WQS and Implementation Guidance Manual

The AS WQS consist of the regulations set forth as AS EPA Administrative Rule No. 001-2013 ("the Rule") and the AS EPA Water Quality Standards Implementation Guidance Manual.[3] *See* Exhs 14 and 15. The Rule incorporates by reference the Implementation Guidance Manual throughout the water quality standards set forth in § 24.026 of the regulations. The Rule establishes separate water quality standards for all of the receiving water bodies in American Samoa, including Pago Pago Harbor, which receives the Starkist discharge through the JCO. *See* § 24.0206(m), in Exh. 14.

The AS WQS state that the standard for DO in Pago Pago Harbor is "[n]ot less than 70% saturation or less than 5.0 mg/l. If the natural level of dissolved oxygen is less than 5.0 mg/l, the natural level shall become the standard." *See* AS WQS Section 24.0206(m). The Implementation Guidance Manual defines DO as a "conventional non-statistical parameter", along with several other parameters, and explains that attainment of WQS for conventional non-statistical parameters is evaluated by use of the **median value** of the relevant data set:

> Compliance for conventional non-statistical parameters shall be determined by comparing **the median of the data set** to the appropriate ASWQS numeric criteria. The median is a measure of central tendency for the overall range of the data (lowest to highest value), and is the middle value for an ordered data set. Thus, an equal number of data values are greater than and less than the median.
>
> For purposes of this manual, analytical results for ammonia, dissolved oxygen, and pH are assumed to follow a normal distribution, and standard methods for determining the median are applied. These parameters are expected to have relatively low variability in the natural systems of streams and marine waters if no pollution is present, although out-liers are expected to occur. The median is therefore considered to be the appropriate measure of central tendency to evaluate analytical results, to detect elevated levels of these parameters as a result of a pollution input.

[3] The Board may take official notice of relevant non-record information, such as statutes, regulations, judicial proceedings, public records and agency documents. *See In re Russell City Energy Ctr*, 15 E.A.D. 1, 36 (EAB 2010); *In re City of Ruidoso Downs & Village of Ruidoso Wastewater Treatment Plant*, 17 E.A.D. 697, 713 n. 18 (EAB 2019) (taking official notice of a prior NPDES permit issued by U.S. EPA).

Exh. 15, at p. 2, Section 4.0 (emphasis added).

Section 4.0 of the Implementation Guidance Manual then proceeds to explain how to calculate the median of a data set. For DO sampling in marine waters (as here), samples are to be taken at a few specified depths at each sampling station:

> For marine waters, samples are to be taken at mid-depth for waters of depth 30 ft or less, and at two depths (3 ft below surface and near bottom, 60 ft maximum) for waters of depth greater than 30 ft. The analytical result for each water sample from each depth at each sampling station shall be considered as a discrete data point for the purposes of compliance determination.

The Implementation Guidance Manual states that compliance should be evaluated by using at least 12 samples, and ideally 24 or more samples.

> Compliance for conventional non-statistical parameters shall be determined utilizing not less than 12 measurements taken over a consecutive 12-24 month period to account for seasonality of prevailing trade wind and non-trade wind conditions, localized weather conditions, and various tidal stages. Although the minimum required number of samples is 12, 24 or more samples are recommended to improve the representativeness of analytical results.

Id. at p. 3. The Implementation Guidance Manual then specifies that for NPDES permittees, compliance should be determined by using all data collected over a 12 month period:

> For NPDES permittees, permit compliance for marine receiving waters shall be determined utilizing all measurements (all depths, all sampling stations, as required in the permit) over a running 12 month period.

It is in the context of these detailed instructions from AS EPA for evaluating a comprehensive set of sampling data to determine if the AS WQS for DO was being attained, that U.S. EPA wrongfully imposed a different methodology in the DO Requirement, in Section I.A.3.h of the Final Permit, which uses each receiving water measurement individually.

2. <u>The DO Requirement in the Final Permit is More Stringent than the AS WQS</u>

As noted, the DO requirement in the Final Permit is similar to the AS WQS, but contains added language that changes how DO compliance is assessed, which results in the Final Permit being significantly more stringent than the AS WQS. Specifically, the DO Requirement states:

> The discharge shall not cause the concentration of dissolved oxygen in the receiving water to be less than 70 percent of saturation or less than 5.0 mg/l **at any point** beyond the boundary of the zone of initial dilution. If the natural level of dissolved oxygen is less than 5.0 mg/l **at any point**, the discharge shall not cause dissolved oxygen to decline below the natural level **at that point**.

Exh. 1, at Section I.A.3.h (emphasis added). This language differs significantly from that of a parallel DO requirement in the 2008 Permit. The 2008 Permit stated the same numeric AS WQS for DO, but without the using the phrases "at any point" and "at that point".[4] It is the use of the phrases "at any point" and "at that point" in the Final Permit that makes this requirement significantly different and more stringent than the Public Notice Draft Permit and the AS WQS.

The Final Permit requires that DO be collected as continuous depth profiles (also known as vertical profiles). Exh. 1, at Section I.E, page 11. As required in the Final Permit, vertical profiles are to include a sample at every meter of depth. *Id.* at p. 11 (per the "Sampling Depth" column in the page 11 table). Accordingly, vertical profiles result in hundreds of measurements of DO, from various depths, across all sampling stations, during each receiving water quality sampling event. Under the AS WQS and Implementation Guidance Manual, this data would be evaluated as described above, by determining the median of the sampling data at the depths and across the sampling stations specified in the regulations, over a 12 month period.

In contrast, the new language in the final permit dictates a very different approach. The Final Permit specifies that DO cannot be lower than 5 mg/l "at any point" in the vertical profile. As such, any single individual measurement of DO less than 5 mg/l "at any point" in the many measurements taken for each vertical profile would result in a non-compliance situation. This approach is completely unlike the method stipulated by the AS WQS where attainment is measured

[4] Specifically, Section I.B.9 of the 2008 NPDES Permit (Exh. 6) states:

> The discharge shall not cause the concentration of dissolved oxygen to be less than 70 percent of saturation or less than 5.0 mg/l at and beyond the boundary of the zone of initial dilution. If the natural level of dissolved oxygen is less than 5.0 mg/l, the natural level shall become the standard.

by the ***median value*** of samples collected at specific depths at all permit-required sampling stations, over a running 12 month period.

Stated simply, the alteration in language changes the water quality standard from a median value (*i.e.*, to be achieved at least 50% of the time), calculated from data collected at multiple depths and sampling stations, to a minimum value that must be reached at all depths and all sampling stations (*i.e.*, to be achieved 100% of the time). Specifically, the AS WQS Implementation Guidance Manual specifies use of the median of all DO measurements from all required stations where attainment of the DO WQS is being measured, which allows for measurements to be less than 5 mg/l (or the natural level, if the natural level of DO is less than 5.0 mg/l) as long as the median value is at that level. By taking the overall median at all stations and depths, this also allows the portion of allowable individual measurements less than 5 mg/l (or the natural level, if applicable) to be unevenly distributed among receiving water sampling stations required in the permit, allowing for variability in the water in the Harbor as long as the overall water quality has a median value achieving the standard. Additionally, the AS WQS specifies that the median value is to be calculated over a running 12 month period, which allows for some temporal variation.

In contrast, the new DO Requirement in the Final Permit specifies that DO cannot be lower than 5 mg/l at any point in the vertical profile. Under the Final Permit, any individual measurement of DO less than 5 mg/l in the vertical profile, at any receiving water sampling station, would result in non-compliance. In other words, 100% of all DO measurements at every depth, at every sampling station, during every receiving water sampling event, would need to be 5 mg/l or greater for DO (or not less than the natural level, if the natural level is less than 5 mg/l). The AS WQS Implementation Guidance Manual states that "out-liers are expected". Exh. 15, at p. 2. However, the new DO requirement in the Final Permit does not allow for any such out-liers. This is clearly

very different from the implementation of the AS WQS for DO established in the AS WQS Implementation Guidance Manual. Requiring 100% of DO measurements to be greater than 5 mg/l clearly varies significantly from requiring the overall median (or 50%) of all measurements to be greater than 5 mg/l.

3. U.S. EPA Cannot Unilaterally Revise the AS WQS

States and territories are required to establish water quality standards. 40 C.F.R. § 131.4. U.S. EPA reviews and approves state and territorial water quality standards and the states' and territories' revisions thereto.[5] 40 C.F.R. §§ 131.5, 131.21. Federal regulations also allow the U.S. EPA to promulgate new or revised water quality standards for a state or territory when the U.S. EPA deems it necessary to meet the requirements of the CWA. 40 C.F.R. § 131.22. Yet, issuance of such a water quality standard requires promulgation of a regulation, subject to the process of notice and comment rulemaking. *Id.* U.S. EPA has not engaged in any such rulemaking process to modify the existing AS WQS. Similarly, U.S. EPA's NPDES Permit Writers Manual [6] includes guidance on establishing effluent limitations and determination of applicable water quality standards. It does not contain any guidance recommending that U.S. EPA substitute its judgment for that of a state or territory as to what constitutes an appropriate water quality standard.

Per § 131.22, the U.S. EPA Administrator can issue a new or revised water quality standard when determined to be necessary. The regulation states, in relevant part:

[5] Pursuant to the "Alaska Rule," U.S. EPA removed the annual reporting requirement of approval actions in the Federal Register in favor of an online Clean Water Act Water Quality Standards Docket ("CWA WQS Docket"). 65 Fed. Reg. 24641 (April 27, 2000). U.S. EPA's website includes a page titled "State-Specific Water Quality Standards Effective under the Clean Water Act (CWA)," which appears to be the CWA WQS Docket identified in the "Alaska Rule". In selecting "American Samoa," the reader is directed to a page titled "Water Quality Standards Regulations: American Samoa" with a link to the " water quality standards in effect for Clean Water Act (CWA) purposes," which includes the American Samoa Water Quality Standards, 2013 Revision, Administrative Rule No. 001-2013 referenced herein and attached as Exhibit 14.

[6] *United States Environmental Protection Agency National Pollutant Discharge Elimination System (NPDES) Permit Writers' Manual*, EPA-833-K-10-001, (September 2010).

> (b) The Administrator may also propose and promulgate a regulation, applicable to one or more navigable waters, setting forth a new or revised standard upon determining such a standard is necessary to meet the requirements of the Act. To constitute an Administrator's determination that a new or revised standard is necessary to meet the requirements of the Act, such determination must:
>
> > (1) Be signed by the Administrator or his or her duly authorized delegate, and
> >
> > (2) Contain a statement that the document constitutes an Administrator's determination under section 303(c)(4)(B) of the Act.
>
> (c) In promulgating water quality standards, the Administrator is subject to the same policies, procedures, analyses, and public participation requirements established for States in these regulations.

40 C.F.R. § 131.22. No federal standards have been promulgated by U.S. EPA for American Samoa. The U.S. EPA Administrator has not issued any determination that a revised AS WQS for DO is necessary, or engaged in the necessary rulemaking process to promulgate such a revision. There is no authority in the regulations for Region 9 to change the AS WQS on an ad hoc basis for an individual facility in the context of an NPDES permit renewal.

Unsurprisingly, the Permit Writers' Manual (p. 6-3) instructs similarly, stating that "[w]hen writing an NPDES permit, the permit writer must identify and use the state water quality standards in effect for CWA purposes." As such, the Permit Writers' Manual is clear that NPDES permits for facilities in American Samoa should use American Samoa's water quality standards. The Permit Writers' Manual does not identify any circumstances where the agency can modify a state or territory's water quality standards on a one-time basis for an individual NPDES permit.

AS EPA developed water quality standards, as set forth in the AS WQS regulations, to be protective of the beneficial uses of the receiving waters. Therefore, compliance with the water quality standards, as outlined in the AS WQS and Implementation Guidance Manual, will be protective of the uses of Pago Pago Harbor.

C. The DO Requirement Deprives Starkist of Fair Notice of What is Being Required.

Due process requires that a permittee receive fair notice of what requirements are being imposed on it. When a party is subject to potential penalties for failure to comply, "it must receive fair notice of the conduct required or prohibited by the Agency." *In re Advanced Elec.*, 10 E.A.D. 385, 403 (EAB 2002); *In re Carbon Injection Sys.*, 17 E.A.D. 1, 28 (EAB 2016) (*citing Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir 1995)). Fair notice is determined by an "ascertainable certainty test", in which "the question is not whether a regulation is susceptible to only one possible interpretation, but rather, whether the particular interpretation advanced by the regulator was ascertainable by the regulated community." *Carbon Injection Sys.*, 17 E.A.D. at 28 (*quoting In re Tenn. Valley Auth.*, 9 E.A.D. 357, 412 (EAB 2000)).

1. U.S. EPA's Belated Addition of the DO Requirement Lacks Fair Notice

Starkist is entitled to fair notice of its compliance requirements. U.S. EPA's failure to include the DO Requirement in the Public Notice Draft Permit deprived Starkist of its ability to comment on the differences between the DO Requirement and the AS WQS, and the vastly increased stringency of the DO Requirement. The Public Notice Draft Permit did not provide Starkist any reasonable way to ascertain that U.S. EPA would reinterpret the AS WQS to require every individual sampling point achieve a certain minimum DO level, as opposed to the median approach over multiple depths, sampling stations and months prescribed by the AS WQS.

The mere inclusion of a general requirement to comply with all provisions of the AS WQS, as is contained in Part I.A.3 of the Public Notice Draft Permit (and continued in the Final Permit), is not a credible basis from which to have predicted or expected the DO Requirement. Similarly, while Starkist's 2008 Permit specifically states the DO water quality standard, Starkist could not have predicted or ascertained that U.S. EPA would add the "at any point" language that converts the median approach of the AS WQS into a much more stringent minimum value requirement.

Additionally, as described at greater length below, the absence of this version of a DO Requirement in other recent NPDES permits issued by Region 9, for discharges to Pago Pago Harbor, did not serve to provide Starkist with fair notice of the DO Requirement.

Had Starkist been provided with fair notice of the DO Requirement, and had the Public Notice Draft Permit contained a basis to ascertain that U.S. EPA would reinterpret the AS WQS, Starkist could have provided comments on this issue. U.S. EPA, in turn, would have been required to respond to those comments. Because Starkist was deprived of fair notice and the ability to offer comments on the DO Requirement, and receive a response to those comments, clear error is present and the Final Permit should be remanded to U.S. EPA.

2. The Second Sentence of the DO Requirement is Ambiguous and Deprives Starkist of Fair Notice.

The second half of the DO Requirement is so confusing and ambiguous that it violates considerations of fair notice. The second sentence of the DO Requirement states that: "[i]f the natural level of dissolved oxygen is less than 5.0 mg/l at any point, the discharge shall not cause dissolved oxygen to decline below that natural level at that point." Exh. 1, at Section I.A.3.h. The term "natural level" is nowhere defined in the Final Permit, and is not used at all in the Fact Sheet or the Response to Comments, thus introducing an initial level of uncertainty. This term could mean the level that would exist but-for the Starkist discharge, or but-for Starkist and other NPDES dischargers to Pago Pago Harbor, or it could also reasonably mean the level that would exist in nature in the absence of any man-made influences on the Harbor.[7] What is meant by "natural level" is not readily ascertainable.

[7] "Natural" is defined in the AS WQS as meaning "free of substances or conditions, which are attributable to the activities of man", but it is unclear that this definition is necessarily being incorporated in the Final Permit. *See* Exh. 14 at § 24.0201

Further though, whatever meaning is given to "natural level", it is nearly impossible to understand how to implement this portion of the DO Requirement. It requires that if the "natural level" has a DO concentration of less than 5.0 mg/l, Starkist must ensure that its discharge is not causing the DO concentration to decline below that "natural level." So, when the DO sampling result is less than 5.0 mg/l, Starkist needs to compare the "natural level" of the DO to the DO level of the water as affected by the Starkist discharge to ensure that the Starkist discharge has not caused the natural level to decrease. Yet Starkist will only have a single DO value for each point where a sample is being taken. A comparison requires multiple data points. If the DO concentration at any given point is less than 5.0 mg/L, how is Starkist to determine whether that is the "natural level" or whether the discharge had caused the DO level to be below the "natural level"? The Final Permit does not say, nor do the Fact Sheet or Response to Comments provide any information. As such, it is impossible to ascertain what interpretation would be advanced or imposed by U.S. EPA.

It is notable that the 2008 Permit did not suffer from these problems, as it did not include the "at any point" or "at that point" language in the DO Requirement in the Final Permit. The 2008 Permit reads:

> The discharge shall not cause the concentration of dissolved oxygen in the receiving water to be less than 70 percent of saturation or less than 5.0 mg/l at and beyond the boundary of the zone of initial dilution. If the natural level of dissolved oxygen is less than 5.0 mg/l, the natural level shall become the standard.

Exh. 6, at Section I.B.9. In the 2008 Permit, the second sentence serves as clarification of the requirement in the first sentence. And, the concept of "natural level" makes sense because the 2008 Permit allows the use of a reference sampling site to determine background levels in the Harbor.[8]

[8] Starkist notes that it expressed concerns over the location of reference station established by the 2008 Permit, which were supported by AS EPA's comments. *See* Exh. 3, at p. 14 and Exh. 12, at p. 2 of the August 12, 2019 comment letter.

Id. at Section V.B.1.a. As such, sampling under the 2008 Permit allowed a comparison between the reference station and the result at another sampling station (and subject to the AS WQS provisions regarding use of median values). The comparison allowed that if the natural level (at the reference station) was less than the water quality standard of 5 mg/l, then that natural level could be considered the water quality standard. In contrast, in the Final Permit, the DO Requirement stipulates that the comparison is between the DO sampling result "at any point" and the natural level "at that point," with both "points" therefore being the same "point". This language provides no opportunity to use a reference station, and lacks clarity about what is required.

D. U.S. EPA's Action is Inconsistent With Region 9's Approach to This Issue in Other NPDES Permits Issued in American Samoa

U.S. EPA Region 9's approach here is inconsistent with the Region's approach to other recent NPDES permits[9] in American Samoa for discharges to Pago Pago Harbor. As noted, Starkist's 2008 Permit contained language mirroring the current AS WQS for DO, without the "at any point" or "at that point" language added in the Final Permit. *See* Exh. 6, at Section I.B.9. Notably, other recent NPDES permits issued by Region 9 for American Samoa do not contain the "at any point" or "at that point" language that was added to the AS WQS for DO in the Final Permit. That language is unique to Starkist's Final Permit, even though the AS WQS for DO apply to all permittees, and all dischargers to Pago Pago Harbor.

This is true of the permit for American Samoa Power Authority's Utulei Sewage Treatment Plant (Permit No. AS0020001), which was issued in November 2019 with an effective date of January 1, 2020 ("Utulei Permit").[10] Part I(E) of the Utulei Permit requires that DO be sampled at several receiving water quality monitoring stations, but the permit does not attempt to revise the

[9] *See* footnote 3 regarding the Board's ability to take official notice of other Region 9 permits.
[10] The Utulei Permit was appealed to the Board on other grounds. *See* EAB Docket NPDES-19-07.

AS WQS for DO. *See* Exh. 16. This is also true of the *NPDES Permit for Pacific Energy South West Pacific Ltd.* (Permit No. AS0020028), effective November 1, 2019, which recites the AS WQS for DO without the additional language added to Starkist's permit. *See* Exh. 17, at Section I.D.3. No other NPDES permits have been issued in American Samoa within the past ten years, although none of the other three known[11] existing NPDES permits (issued in 1999, 2008 and 2010) contain the "at any point" modification to the AS WQS for DO. That language is unique to the Starkist permit.

Since U.S. EPA failed to explain the "at any point" language in the Fact Sheet or Response to Comments, it is undeniably true that U.S. EPA has offered no justification for the disparate treatment of Starkist as compared to other American Samoa NPDES permit holders. Yet, if an agency is to treat similarly situated parties differently, the agency must justify such disparate treatment. *Motor Vehicle Mfrs.*, 463 U.S. at 42; *Atchison v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (an agency has a duty to "explain its departure from prior norms"). In the absence of such an explanation, Region 9's use of the "at any point" and "at that point" language in the Starkist permit when other permits have not been subject to such language is the very definition of arbitrary agency behavior. As such, this represents clear error and an abuse of discretion that merits review by the Board.

III. The Coral Reef Monitoring Requirements are Confusing and Unsafe

The Final Permit contains requirements for monitoring the receiving water along the coral reef that is in the vicinity of (to the east of) the discharge. *See* Exh. 1, at pp. 10-12, Section I.E.1.g, including the map on p. 10. However, the Final Permit contains contradictory statements about exactly where the monitoring should be conducted, and at what depths the sampling should be

[11] Based on the information provided by U.S. EPA at www.epa.gov/npdes-permits/american-samoa-npdes-permits.

conducted. Additionally, the Final Permit imposes sampling requirements that would severely threaten the health and safety of anyone attempting to collect samples in compliance with the requirements of the Final Permit. The imposition of sampling requirements that are not only confusing and impractical, but actually dangerous, presents important policy considerations that merit review by the Board.

The Public Notice Draft Permit (Exh. 7, at p. 10, Section I.E.1.g) contained a requirement to conduct receiving water quality monitoring at coral reef monitoring locations, and both Starkist and AS EPA objected to certain aspects of this requirement, as described below. *See* Exh. 3, at p. 15, and Exh. 12, at p. 3. In response, U.S. EPA modified the coral reef monitoring requirement in Section I.E.1.g, and the Response to Comments includes a statement by U.S. EPA that it adopted the suggestions of AS EPA. *See* Exh. 4, at p. 17, Section VI.E. However, the Final Permit modified the AS EPA's proposal in a way that ultimately fails to protect against the impracticality and safety concerns raised by Starkist and AS EPA. This failure is not addressed or explained in the Fact Sheet or Response to Comments, and the U.S. EPA did not explain how use of its considered judgment served to arrive at the requirements in the Final Permit.

The Public Notice Draft Permit contained the requirement that monitoring at the coral reef be conducted "directly above the reef crest" at depths of 1 meter below the surface, 1 meter above bottom, and at the midpoint between those depths. Exh. 7, at pp. 10-11, in Section I.E.g and following the table on p. 11. Starkist objected to this requirement as impractical and unsafe. *See* Exh. 3, at p. 15. Specifically, Starkist pointed out that the reef crest is sometimes exposed above the water line at low tide, and at most there is a depth of about 3 feet at high tide. *Id.* As such, at best the sample locations would be so closely situated that they would be essentially identical and redundant, while at other times a location 1 meter below the surface would also be below the ocean floor, and 1 meter above the ocean floor would be in the open air. Starkist also pointed out that

attempting to station a boat at the reef crest, for the conduct of a sampling exercise, as waves are breaking at the reef crest, posed a very serious threat to human health, vessel safety and the coral reef organisms. *Id.*

AS EPA echoed Starkist's concerns in its comment letter. Exh. 12, at p. 3. AS EPA stated that it supported the relocation of the coral reef stations and proposed specific language to accomplish this. AS EPA recommended that the permit require that the coral reef monitoring stations be located as close to the reef crest as could be reasonably achieved with due consideration to vessel safety. *Id.* AS EPA recommended that there be "one sampling point at 30 feet depth for each station", referring to the three coral reef stations. *Id.*

The Final Permit both adopted AS EPA's recommended language and retained language from the Public Notice Draft Permit, resulting in confusing and ambiguous permit terms. U.S. EPA's Response to Comments states that U.S. EPA "incorporated AS-EPA's proposed coral reef monitoring locations" into the monitoring requirements. Exh. 4, at p. 17. Initially, this appears to be correct, with respect to the language on page 10 of the Final Permit, in Section I.E.1.g, providing that the stations shall be as near to the breaking waves of the reef crest as can be achieved, "with due consideration given to vessel safety as determined by the vessel operator." *See* Exh. 1, at p. 10. However, at the top of the very next page (page 11), the Final Permit retained the language from the Public Notice Draft Permit that calls for coral reef monitoring stations to be directly above the reef crest. *Id.* at p. 11. This presents the very same dangerous situation that Starkist and AS-EPA challenged in the permit comments, and which U.S. EPA claimed to have addressed in the Response to Comments.

The Final Permit is also contradictory as to the depth where the samples are to be taken. AS EPA suggested collecting a sample from a depth of 30 feet to characterize the water quality along the reef face that extends to a depth of about 60 feet. Exh. 12, at p. 3. While U.S. EPA

stated its intent to adopt AS EPA's language in the Response to Comments (Exh. 4, at p. 17), the Final Permit again contains inconsistent language regarding sampling depth in Section I.E.1.g. At the bottom of page 10, the Final Permit indicates collection of a sample from a depth of not greater than 30 feet. *See* Exh. 1. This matches AS EPA's comments. *See* Exh. 12, at pp. 3-4. Yet, the Final Permit also retained the sampling depths from the Public Notice Draft Permit, of sampling at 1 meter below the surface, 1 meter above the bottom, and the midpoint of those depths, rather than a single sample from a depth of 30 feet as recommended by AS EPA. *See* Exh. 1, at p. 12 (immediately following the table continued from page 11). These contradictory statements introduce confusion and ambiguity regarding what is being required by the Final Permit.

The Final Permit's imposition of contradictory and inconsistent monitoring and sampling requirements at the coral reef, especially where those requirements threaten the health and safety of anyone conducting the sampling, is an abuse of discretion by Region 9. This is especially true where the agency's Response to Comments claimed to have addressed the safety issue, but then failed to modify the terms in the Public Notice Draft Permit sufficiently to achieve that objective.

IV. The Final Permit's Monitoring Requirements for Priority Pollution Scans are Overbroad and Unreasonable and Without Supporting Justification from Region 9

The Final Permit requires that a Priority Pollutant Scan ("PPS") be conducted annually. A PPS is a sampling event in which the wastewater is sampled for 126 different pollutants. *See* Exh. 1, at Section I.B, Table 1 and Attachment F. The annual frequency requirement for the PPS far exceeds the frequency in Starkist's 2008 Permit, which only required one (1) sampling event during the fourth or fifth year of the five-year permit term, and in other NPDES permits issued by U.S. EPA Region 9. U.S. EPA has not offered any reasonable explanation for the annual frequency it is attempting to impose on Starkist.

While Region 9 may typically be entitled to a level of deference on matters that are technical or scientific in nature, such deference applies only if the agency "explains its rationale and supports its reasoning in the administrative record." *Town of Concord*, 16 E.A.D. at 517. As such, the agency's decision must be "cogently explained and supported in the record." *Id.*; *see also Motor Vehicles Mfrs.*, 463 U.S. at 48 ("We have frequently reiterated that an agency must cogently explain why it has exercised its discretion in a given manner.") Here, Region 9 failed to cogently explain the basis for its annual PPS requirement.

The NPDES Permit Writers' Manual (Section 8.1, page 8-1, and Section 8.1.3, page 8-5) and U.S. EPA's Technical Support Document for Water Quality-based Toxics Control[12] (Section 5.7.5, page 113) both identify a number of factors that should be considered in determining effluent monitoring frequency. The "cost of monitoring relative to permittee's capabilities" is included as a factor that should be considered. The guidance states that "[t]he monitoring frequency should not be excessive and should be what is necessary to provide sufficient information about the discharge."

As is clear from the number of samples required, a PPS is a very significant undertaking. This is especially true in a remote location like American Samoa. In Starkist's Comments on the Public Notice Draft Permit, Starkist requested that the monitoring frequency of the PPS be corrected to once per permit term. Exh. 3, Part V(B), p. 18. In the Comments, Starkist argued that:

> A PPS is typically only required once per permit term (once every five years), and other recent permits in Region 9, including local permits for discharges to Pago Pago harbor, only require the PPS to be conducted once per permit term. An annual PPS requirement is excessive and unsupported by EPA precedent and practice. The Fact Sheet [for the Public Notice Draft] offers no explanation for the imposition of an annual requirement for this permit. Starkist's tuna cannery operations are relatively consistent, in that they produce the same product, using the same process, from the same raw material, and there is no reason to expect significant changes in priority pollutants from year to year. Starkist believes that it is not necessary to conduct the PPS annually and the requirement results in unnecessary cost and

[12] EPA/505-2-90-001 (March 1991).

> effort. It is requested that the monitoring frequency of the PPS is reduced to once per permit term.

Id.

U.S. EPA did not accept this request and the final permit includes an annual PPS requirement. In the Response to Comments, EPA stated that:

> Contrary to StarKists' comment, monitoring data show significant changes in individual priority pollutants since the Facility's production and processes changed substantially beginning in 2017. Therefore, the permit requires annual monitoring for priority pollutants. Also, based on the most recent priority pollutant scan, which was submitted as part of the permit application update in February 2016, the effluent analyses result for metals and (semi)volatile organics indicates that thirteen (13) metals were detected (*e.g.*, aluminum, arsenic, barium, boron, cadmium, chromium, iron, magnesium, manganese, molybdenum, nickel, selenium, and titanium) along with eight (semi)volatile organics (*e.g.*, methylene chloride, chloroform, benzene, 1,2-dichloropropane, toluene, ethylbenzene, phenol, and bis(2-ethylhexyl)phthalate). Because sulfide, arsenic, cadmium, and bis(2-ethylhexyl) phthalate concentrations were even higher than the applicable criteria for saltwater, it was addressed in the report that additional sampling of the effluent is recommended to further evaluate these results. The other reported pollutant values did not directly exceed applicable criteria, but applying the standard statistical reasonable potential multiplying factor suggests levels of these pollutants may at times exceed the criteria due to the uncertainty caused by the limited number of samples taken. Therefore, it is necessary to monitor these pollutants as part of annual priority pollutant scans, which will provide information to determine reasonable potential in the next permit reissuance.

Exh. 4, at Part VII.A, p. 20

While this response contains a number of factual assertions that Starkist does not contest, U.S. EPA's reasoning is illogical and completely fails to adequately explain or support the decision to include an annual frequency for the PPS requirement. It also fails to respond to important components of Starkist's Comments. Even if U.S. EPA does not agree with a comment and does not modify the permit, it must still establish that it considered the comment. *See* 40 C.F.R. § 124.17(a)(2); *see, e.g.*, *In re NE Hub Partners*, 7 E.A.D. at 583; *In re City & County of Honolulu Sand Island Wastewater Treatment Plant, 2010 EPA App. Lexis 39, NPDES Appeal No.* 09-07 (EAB August 12, 2010) (Order Denying Review).

U.S. EPA's response starts by asserting that monitoring data shows significant changes in individual priority pollutants since upgrades to the facility in 2017. However, U.S. EPA does not identify what "monitoring data" it is referring to, and the rest of the discussion only references data from before 2017. As such, this response is so ambiguous that it completely fails to explain U.S. EPA's reasoning, or demonstrate any exercise of considered judgment by Region 9. In fact, as set forth in the U.S. EPA's Fact Sheet, effluent data from the facility has changed since 2017, but in all cases the quality of the effluent has significantly improved as wastewater treatment has improved. *See, e.g.*, Exh. 2, at p. 7, Table 1. As such, there is no information put forward by U.S. EPA that would indicate a negative change in priority pollutants.

U.S. EPA appears to rely on the most recent PPS, from 2016, as indicating detection of a small subset of the overall list of 126 priority pollutants. Exh. 4, at p. 20, Part VII.A. However, as the initial portion of U.S. EPA's response states, there have been significant changes at the facility since 2017. And the facility is now expected to resume ocean disposal in the near future, further changing and improving the effluent. As such, it is illogical to use 2016 data to draw conclusions about the content of future discharge at Starkist given all of the changes.

Even if the 2016 data is used here as a basis for imposing an annual PPS requirement, U.S. EPA's Response to Comments indicates that only 13 of the 126 chemicals on the PPS list were detected. As such, the other 113 were not. Based on U.S. EPA's reasoning, even if "applying the standard statistical reasonable potential multiplying factor" for these 13 chemicals raises a concern such as to merit annual sampling, the same is not true of the other 113. At a minimum, even if changes at the Starkist facility since 2016 are ignored, only these 13 chemicals should receive an annual monitoring requirement. U.S. EPA has offered no explanation why the other 113 chemicals were given the same frequency as the small set that were detected in the earlier sampling. Absent

a credible explanation showing the exercise of considered judgment, the other 113 chemicals should only be sampled once per permit term.

Overall, Starkist agrees that an updated PPS to evaluate the priority pollutants in the discharge is appropriate. But, nothing in U.S. EPA's response explains why an annual PPS requirement is necessary or appropriate. In fact, U.S. EPA entirely failed to respond to the arguments in Starkist's comments that Starkist's underlying process is stable, and there is every reason to expect that PPS results will not change over time. U.S. EPA also failed to respond to Starkist's comments about avoiding unnecessary cost and burden. This failure to respond to Starkist's comments is an additional reason why U.S. EPA's response is inadequate and an abuse of discretion, and the annual PPS requirement should be remanded to the agency.

It should also be noted that the recently renewed permit for the Utulei Sewage Treatment Plant, which became effective on January 1, 2020, only requires a PPS to be conducted once, in the fourth year of the permit term. *See* Exh. 16, at p. 5.

CONCLUSION

Starkist therefore respectfully requests that the Board grant review of the terms and conditions of the Final Permit challenged by this Petition. After such review, Starkist respectfully requests that:

A. The Board remand the Final Permit to Region 9 with an order to issue an amended NPDES Permit consistent with the Board's findings; and

B. The Board provide all other relief that the Board deems appropriate under the circumstances.

Respectfully Submitted:

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Attorneys for Petitioner,
Starkist Samoa Co.

Date: April 27, 2020

REQUEST FOR ORAL ARGUMENT

Petitioner, Starkist Samoa Co., respectfully requests oral argument before the Environmental Appeals Board on its petition for review of NPDES Permit No. AS0000019 because it believes oral argument will be of assistance to the Board.

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Attorneys for Petitioner,
Starkist Samoa Co.

Date: April 27, 2020

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R. § 124.19(d)(1)(iv) and (d)3), I hereby certify that this Petition for Review, including all relevant portions, contains fewer than 14,000 words.

/s/ Scott R. Dismukes
Scott R. Dismukes

Table of Attachments

Exhibit 17. September 4, 2019 Pacific Energy South West Pacific, Ltd. NPDES Permit No. AS0020028

CERTIFICATE OF SERVICE

I, David A. Rockman, hereby certify that on April 27, 2020, I caused to be served a true and correct copy of the foregoing Petition for Review, and accompanying Exhibits, on the following:

Via electronic filing, on the following:

Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, N.W.
WJC East Building, Room 3322
Washington, DC 2004

Via email, as authorized by agreement with the U.S. EPA Region 9's Regional Counsel's Office, as communicated by email from U.S. EPA Assistant Regional Counsel, Sara Goldsmith, to Eurika Durr, Clerk of the Board, on April 24, 2020:

John Busterud
Regional Administrator
U.S. EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105
Busterud.John@epa.gov

/s/ David A. Rockman
David A. Rockman