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

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

AMICUS BRIEF OF SAVE THE SOUND, INC.

Dated: December 16, 2020

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I. INTRODUCTION

Save the Sound, Inc., hereby files this Amicus Brief in response to the Springfield Water and Sewer Commission and Springfield Regional Wastewater Treatment Facility ("SWSC", "SRWTF or "Petitioner") petition for review ("Petition") of the reissuance of NPDES Permit No. MA0101613 ("Permit"). We hereby urge the Environmental Appeals Board ("EAB" or "Board") to deny the Petition or, if the Board grants review, to affirm the Permit.

The SWSC claims that EPA clearly erred by imposing a total nitrogen limit of 2,974 lbs/day using a target concentration of 5 mg/L and that such a limit was arbitrary and capricious. To the contrary, EPA has, for a long time, forborne from requiring enforceable limits in Massachusetts permits for nitrogen, despite the fact that their nitrogen discharges clearly impact Long Island Sound. This action, of imposing limits based upon design flow and reductions required by the 2000 TMDL, though overdue, is a reasonable exercise of the agency's discretion at this period in time. However, much more needs to be done. Once EPA completes its ongoing Nitrogen Reduction Strategy and develops more detailed information about specific nitrogen sources' continuing impact and Long Island Sound, it will be necessary to re-evaluate these limits to move forward and achieve actual compliance with water quality standards ("water quality standards" or "WQS").

II. STANDARD OF REVIEW

The Petitioner bears a heavy burden to demonstrate the Board should review a permit. 40 C.F.R. §124.19(a)(1)-(2). *See In RE Town of Newmarket, New Hampshire*, 16 E.A.D. 182 at 186 (EAB 2013). The Board will deny review unless the Petition can show that the permit decision is clearly erroneous. 40

C.F.R. § 124.19(a)(4)(i), *Id. at 185.* The Board is guided by the preamble to the regulations authorizing appeal stating that the "Board's power to grant review 'should be only sparingly exercised' and that 'most permit conditions should be finally determined at the [permit issuer's] level." *Id.* at 186 citing 45 Fed. Reg. at 33,412. On matters that are fundamentally technical or scientific, the Board will defer to the permit issuer's technical expertise so long as there is an adequate explanation in the administrative record." *Id.* citing *In re Dominion Energy Brayton Point, LLC,* 12 E.A.D. 490, 510 (EAB 2006).

III. ARGUMENT

The Petitioner has manifestly failed to meet their burden to demonstrate that EPA's decision was clearly erroneous or an abuse of discretion in any manner. Long Island Sound has been, and continues to be, polluted due, in part, to nitrogen discharges from Massachusetts sewage treatment plants. The petitioner has made no attempt to rebut that basic fact. Moreover, the Petitioner has done nothing other than to explain that they would have proceeded in a different manner. They have completely failed to show any clear error or arbitrariness or capriciousness in the EPA's decision-making.

A. Long Island Sound fails to Meet Water Quality Standards Due, in Part, to Discharges from Petitioner and other Massachusetts Sewage Treatment Plants

Hypoxia is the condition of low dissolved oxygen ("DO") levels (below 3 mg/l) in water and occurs many times a year in Long Island Sound. The Sound has not always suffered from hypoxia. It is driven by the massive increase of human sewage (and wastewater treatment effluent) that has occurred since the colonial population and industrialization of the Long Island Sound watershed.[1]

[1] https://longislandsoundstudy.net/wp-content/uploads/2017/10/increases-in-population-and-sewage.pdf

Hypoxic conditions are caused, in part, by an overabundance of nitrogen present in the water and large sewage treatment plants within the Long Island Sound watershed, such as SRWTF.[2] Nitrogen is the primary limiting factor in Long Island Sound for algal growth and causes harmful algal blooms, low DO, poor water clarity, loss of aquatic vegetation and tidal wetlands as well as coastal acidification. While there was a TMDL issued in 2000 to address this issue, it is clear that without further permit limits and restrictions on nitrogen, Long Island Sound will continue to violate water quality standards and be unable to adequately support aquatic life as the Clean Water Act requires. Unless this impairment is considered, and addressed in the SWSC permit and otherwise, Long Island Sound will continue to be polluted. While Save the Sound believes that much work will need to be done to address this ongoing problem, we believe that the permit limits contained in this and other Massachusetts sewage treatment plants in capping total discharges at their current level, are a reasonable start by the EPA and MassDEP toward taking on the larger problem.

The Clean Water Act, requires that every state develop water quality standards to "establish the desired condition of a waterway."[3] The Sound is located within the territories of both Connecticut and New York, therefore both states have created WQS for it.[4] Connecticut

[2] *See* NYSDEC and CT DEP, A Total Maximum Daily Load Analysis to Achieve Water Quality Standards for Dissolved Oxygen in Long Island Sound, December 2000, http://www.dec.ny.gov/docs/water_pdf/tmdllis.pdf [hereinafter "2000 LIS Nitrogen TMDL"] .

[3] *Arkansas v. Oklahoma*, 503 U.S. 96, 101, 112 S.Ct. 1046 (1992), "A WQS for any given waterway, or "water body," has two components: (1) the designated beneficial uses of the water body and (2) the water quality criteria sufficient to protect those uses. Water quality criteria can be either numeric or narrative. Numeric criteria establish quantitative limitations on pollutant concentrations or levels, necessary to protect designated uses of the water body. When criteria are met, water quality will generally protect the designated uses of each water body."; *see also* 33 U.S.C. § 1313(a).

[4] *See* R.C.S.A. § 22a-426-9(a)(1) Table 1 – Surface Water Criteria by Classification: "Nutrients;" *see also* 6 N.Y.C.R.R. Chapter X Subchapter B, Part 935: Upper East River and Long Island Sound Within Queens, Bronx and Westchester Counties; *see also* 6 N.Y.C.R.R. Parts 800-941; *see also* 6 N.Y.C.R.R. § 701.10-701.12, 703.2.

and New York have set an identical "acute toxicity" standard for the marine waters of the Sound (classified SA and SB) that the level of DO in the waters may not drop below 3.0 mg/L **at any time**.[5] Each state has also adopted a "chronic toxicity" standard to account for levels of DO that are hazardous to marine life over time. While the chronic standards differ slightly, both states' standard allows DO levels between 3.0 and 4.8 mg/L for a period of time specified by regulation—two to thirty days.[6]

In 1985, the Long Island Sound Study ("LISS"), an EPA-led, bi-state national estuary program consisting of federal and state agencies, user groups, concerned organizations, and individuals, was formed to study and monitor the condition of the Sound, and to plan for the protection of it and its abundant resources. LISS has been monitoring water quality during summer months since 1987, and has tracked the size, duration, and severity of hypoxic zones each year.

In 2000, Connecticut and New York completed *A Total Maximum Daily Load Analysis to Achieve Water Quality Standards for Dissolved Oxygen in Long Island Sound* ("the 2000 LIS Nitrogen TMDL" or "the TMDL"), which EPA formally approved in 2001. A TMDL is "a calculation of the maximum amount ("load") of a pollutant that a waterbody can receive and still meet

[5] R.C.S.A. § 22a-426-9(a)(1) Table 1 – Surface Water Criteria by Classification: "Dissolved Oxygen".
[6] *See* R.C.S.A. § 22a-426-9(a)(1) Table 1, Note 1, "Cumulative Dissolved Oxygen exposure parameters," Table A: (Levels less than 4.8 mg/L to 4.5 mg/L may not exceed a period of 30 days; levels less than 4.5 mg/L to 4.0 mg/L may not exceed 14 days; levels less than 4.0 mg/L to 3.5 mg/L may not exceed 7 days; levels less than 3.5 mg/L to 3.0 mg/L may not exceed 2 days); *see also* 6 N.Y.C.R.R. § 703.3, ("The DO concentration may fall below 4.8 mg/L for a limited number of days, as defined by the formula: $DO = {}^{13.0}/_{2.80 + 1.84e^{-0.1t}}$ where DO = DO concentration in mg/L between 3.0-4.8 mg/L and t = time in days. This equation is applied by dividing the DO range of 3.0-4.8 mg/L into a number of equal intervals. DO is the lower bound of each interval (i) and t is the allowable number of days that the DO concentration can be within that interval. The actual number of days that the measured DO concentration falls within each interval (i) is divided by the allowable number of days that the DO can fall within interval (t). The sum of the quotients of all intervals (i...n) cannot exceed 1.0: *i.e.*")

WQS, and an allocation of that load among the various sources of that pollutant."[7] In 1992, both New York and Connecticut included the Sound on their CWA Section 303(d) list[8] of "impaired" waterbodies ("those waters . . . for which effluent limitations . . . are not stringent enough to implement any water quality standard applicable to such waters").[9] The 303(d) listing triggered the requirement that the states or EPA establish the TMDL.[10]

The TMDL agreement instituted three new phases of a Hypoxia Management Program intended to meet and attain WQS by 2014 – Phases III, IV, and V.[11] Phases I and II were completed prior to the formation of the TMDL. In 1990, Phase I froze nitrogen point source and nonpoint source loadings at their 1990 levels in key geographic areas.[12] In 1994, Phase II reduced nitrogen loads through the implementation of low cost actions and retrofits to high-priority wastewater treatment plants.[13] Phase III, the centerpiece of the 2000 TMDL, required a 58.5 percent reduction in nitrogen loading from point sources and terrestrial nonpoint sources in Connecticut and New York.[14] Phase IV, at issue in part in this permit, focused on out-of-basin

[7] EPA Website, "Water: TMDL 303(d), What is a TMDL?," http://water.epa.gov/lawsregs/lawsguidance/cwa/tmdl/overviewoftmdl.cfm.
[8] 33 U.S. Code § 1313 (d)(1)(A): Each State shall identify those waters within its boundaries for which the effluent limitations … are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.
[9] 2000 LIS Nitrogen TMDL at 9.
[10] 33 U.S.C. § 1313 (d)(1)(C).
[11] Specifically, Phase III established a WLA from in-basin point sources of 15,556 tons per year and a LA for terrestrial nonpoint sources of 8,410 tons per year. Together these loads amounted to a 58.5 percent reduction from the 1990 baseline. Phase IV established a WLA for out-of-basin point sources of 2,243 tons per year, a 25 percent reduction from the 1990 baseline, and a LA for out-of-basin terrestrial nonpoint sources of 10,574 tons per year. Phase IV also envisioned an 18 percent reduction of atmospheric nitrogen deposition from Clean Air Act implementation throughout the basin. *See* 2000 LIS Nitrogen TMDL at 27, 34-36, 40, 43-46.
[12] 2000 LIS Nitrogen TMDL at 2.
[13] *Id.* at 2.
[14] *Id.* at 42.

sources,[15] requiring nitrogen reductions of 25 percent from point sources, 10 percent from terrestrial nonpoint sources, and 18 percent from atmospheric deposition.[16] Finally, Phase V required reevaluation and revision of the TMDL every five years to keep it on pace to meet WQS by 2014, and implementation of non-treatment alternatives to make up for any shortfall in the ability to meet WQS through effluent reductions.[17]

The reductions of Phase III are complete. Connecticut met its obligation to reduce discharges from sewage treatment plants by 58.5 percent in 2014 and New York met its obligation in 2017.[18] Phase V has not been pursued or implemented in a manner that could achieve WQS, there are no credible plans to do so in the foreseeable future, and the required five year reassessments of the TMDL have not occurred.

Yet Long Island Sound is still suffering impairments from nitrogen. While hypoxic zones in Long Island Sound have trended in a variable, but generally positive, direction, the Long Island Study has concluded there is still significant hypoxia and additional reductions in nitrogen, above and beyond those achieved in the 2000 TMDL, will be necessary through at least 2035.[19] Save the Sound issues a Long Island Sound report card periodically tracking indicators for aquatic life such as dissolved oxygen, chlorophyll a and water quality. In 2020, the Western Narrows section of Long Island Sound (the Western Narrows) received F grades in all

[15] The TMDL refers to "in-basin" and "out-of-basin" sources of nitrogen. "In-basin" refers to sources from within Connecticut and New York, and out-of-basin refers to sources from outside of Connecticut and New York, i.e. from Massachusetts, New Hampshire, Vermont, the Atlantic Ocean, and the atmosphere.
[16] *Id.* at 43.
[17] *Id.* at 46.
[18] EPA Long Island Sound Study, *Long Island Sound Comprehensive Conservation and Management Plan*, (2015) (hereinafter "CCMP").
[19] https://longislandsoundstudy.net/ecosystem-target-indicators/lis-hypoxia/

of these areas. The Eastern Narrows received D grades for dissolved oxygen and chlorophyll a and the Western Basin received a C for dissolved oxygen.[20] This is despite all of the actions taken pursuant to the 2000 TMDL. An annual report by CT DEEP, the Interstate and Environmental Commission and LISS has also documented each year the fact that, despite the 2000 TMDL, Long Island Sound is failing to meet water quality standards.[21]

Much of this history, and conclusions regarding next steps, is documented in the LISS' Comprehensive Conservation and Management Plan ("CCMP").[22] One of the conclusions in the CCMP is that to meet water quality standards in Long Island Sound, we must evaluate and improve the clean water infrastructure for wastewater treatment facilities that are smaller, more diffuse or further from Long Island Sound.[23] Upstream wastewater treatment plants such as SRWTF are a prime example.

While a main focus of the nitrogen TMDL must be to attain WQS for dissolved oxygen, nitrogen pollution also contributes to other problems such as the deterioration of tidal marshes, which help remove excess nitrogen, further perpetuating the nitrogen problem in the Sound. Therefore, further reductions to nitrogen loading will likely result in important auxiliary benefits, such as curbing the loss of tidal marshes.

Because of the circumstances outlined above, EPA is working with the Long Island Sound watershed states to develop a Nitrogen Strategy to effectuate the requirement that Long Island

[20] https://www.savethesound.org/report-card
[21] CT DEEP, Interstate Environmental Commission and LISS, *2019 Long Island Sound Hypoxia Season Review. http://www.iec-nynjct.org/sites/default/files/2020-07/FINAL_LISound-Hypoxia-2019-Combined-Report_april2020.pdf*
[22] *CCMP.*
[23] *Id.* at 19–21.

Sound meet water quality standards. [24] EPA officially commenced the reduction strategy in 2015 and has since engaged in an extensive process to study Long Island Sound and what nitrogen reductions from which sources will be necessary to meet water quality standards.[25]

To be clear, the Nitrogen Reduction Strategy has not been completed and the limits that EPA has imposed in the SWSC permit are not a part of this process. Such limits will not go toward achieving the necessary nitrogen reductions for WQS compliance that are referenced in both the CCMP and the Nitrogen Reduction Strategy. Instead, they work like a placeholder, designed to cap total loads at their current levels required by the 2000 TMDL and antidegradation standards while the Sound can be further studied.

B. EPA Must Impose Water Quality Based Effluent Limits Designed to Achieve Water Quality Standards in Long Island Sound

Because Petitioner discharges nitrogen into the Connecticut River and such nitrogen reaches Long Island Sound, Petitioner is causing or contributing to a water quality standard violation. There is no dispute that, despite the fact that the 2000 TMDL has been implemented (now 20 years old and never seriously revised) water quality standards in Long Island Sound are not being met and will not be met until more is done, including reducing discharges from smaller and more remote point sources. Given this, the question to be asked of EPA's permit is not whether it went too far. The question is whether the permit went far enough to meet the mandate to meet water quality standards.

[24] EPA, *Evolving the Long Island Sound Nitrogen Reduction Strategy* (2015). https://longislandsoundstudy.net/wp-content/uploads/2016/02/LIS-Nitrogen-Strategy-Enclosures-12-23-15-1.pdf
[25] *See* https://longislandsoundstudy.net/our-vision-and-plan/clean-waters-and-healthy-watersheds/nitrogen-strategy/

Save the Sound believes a more aggressive approach, designed to start achieving the reductions that scientific consensus agrees are necessary, is the preferable approach and fully justifiable, perhaps even required, under the Clean Water Act and relevant caselaw referenced below. That being said, Save the Sound believes that EPA's imposition of these modest limits based on design flow to meet 2000 TMDL requirements and antidegradation standards will serve to prevent further increases and are welcome, even if long overdue. We are also encouraged by the progress that is being made toward developing the more comprehensive Nitrogen Reduction Strategy, which will establish thresholds, caps and identify non-point source reductions to ultimately achieve water quality standards as required. Thus, we are supportive of EPA's approach at this time.

A permit may not be issued if it "cannot ensure compliance with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.44(d)(4), *see also, Upper Blackstone Water Pollution Dist v. EPA*, 690 F.3d 9, 15 (1st Cir. 2012). Moreover, 40 C.F.R. § 122.44(d)(1)(vii)(A) provides that WQBELs must ensure that all applicable water quality standards are met.

The First Circuit and EAB have regularly upheld EPA's ability to exercise its discretion in implementing WQBELs when necessary to meet water quality standards. For example, in *Upper Blackstone*, EPA determined that efforts being made by the Upper Blackstone Water Pollution Abatement District ("District") under its NPDES permit were not sufficient to meet WQS; EPA

therefore issued a new NPDES permit for the District that required more stringent levels of control of its nitrogen, phosphorous, and aluminum.[26]

The District petitioned for a review of the permit with the EAB claiming, *inter alia,* that EPA's decision to tighten the nitrogen and phosphorous limits in the Permit was not reasonable because the District had not yet completed its facility upgrades and the completion of a new computer model of the Blackstone River (then under development by the District), and that EPA did not have enough information on nutrient impairment in the Narragansett Bay.[27] EPA had determined that even with the fully completed upgrades, the District's discharge would still "cause, have the reasonable potential to cause, or contribute to a violation of water quality standards."[28]

The First Circuit held that EPA did not err by issuing the new permit without waiting for additional information.[29] The Court stated that "neither the CWA nor EPA regulations permit the EPA to delay issuance of a new permit indefinitely until better science can be developed, even when there is uncertainty in existing data." [30] Indeed,

> In almost every case, more data can be collected, models further calibrated to match real world conditions; the hope or anticipation that better science will materialize is always present, to some degree, in the context of science-based agency decision making. Congress was aware of this when it nonetheless set a firm deadline for issuing new permits.[31]

[26] *Upper Blackstone Water Pollution Abatement District v. EPA*, 690 F.3d 9 (1st Cir. 2012).
[27] *Id.* at 18-19.
[28] *Id.* [*citing*] 40 C.F.R. 122.44(d)(1)(i).
[29] *Id.* at 21.
[30] *Id.* at 22.
[31] *Id.* at 15.

Similarly, in *City of Taunton, Massachusetts v. EPA,* 895 F.3d 120 (2018) the First Circuit upheld EAB's decision affirming EPA's imposition of water quality based effluent standards on the City of Taunton. The court found that the EPA in that case did not have to establish a direct causal relationship between nitrogen discharges and WQS excursions, but that they simply had to show a "reasonable potential" of WQS excursions pursuant to 40 C.F.R. § 122.44(d)(1) and the agency had a "significant amount of flexibility" in doing so.[32] The court also found that in calculating the nitrogen threshold for the river, EPA was well within its discretion in applying its scientific judgment and using data from a comparable bay -- "where the agency follows the proper procedures and acts with a reasonable basis, both its choice of scientific data and interpretation and application of that data to real world conditions are entitled to deference.".[33]

The scenarios in the *Upper Blackstone* and *City of Taunton* cases go far beyond the facts in this case and would support issuing more stringent limits than the current ones based upon the known science about the continued impact of nitrogen in Long Island Sound. Comparison with EPA's approach here (simply capping current loads) and in those cases (reducing nitrogen loads to meet WQS) demonstrates how conservative EPA has been in setting these limits. The task of actually bringing Long Island Sound into compliance with water quality standards has been left for another day.

While there will clearly have to be more done to meet the water quality standards, we believe that this is a reasonable step at this point. As set forth above, EPA has spent several

[32] *City of Taunton*, *Massachusetts v. EPA*, 895 F.3d 120, 136 (2018)
[33] *Id.*, at 138, *quoting*, *Upper Blackstone*, 690 F.3d at 26

years studying Long Island Sound and developing a Nitrogen Reduction Strategy. Upon the conclusion of this process, EPA will have a reasoned basis to require specific reductions of specific sources to actually achieve water quality standards as the law requires. Given that this thoughtful transparent and scientifically sound process is underway and continuing, it is reasonable for this permit cycle to ensure that any reductions required in the 2000 TMDL are maintained and that there is no backsliding. However, given the enormous challenges facing Long Island Sound, and the clearly documented contribution of SWSC, anything less than this would flatly violate the mandate to comply with water quality standards.

While the Petitioner has argued that a WQBEL imposed under Section 122.44(d)(1)(vii)(A)-(B) may not exceed a waste load allocation set in a TMDL, they have (1) provided no authority whatsoever for this argument and (2) failed to demonstrate that EPA's approach is inconsistent with the TMDL.[34] Indeed, such an assumption would be directly contrary to the Clean Water Act's purpose described in Section 101(a) to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." There is simply no way that a 20 year old TMDL that has never gone through a significant revision could reflect the best current scientific understanding of a waterbody. This is one of the key reasons that permits must be re-issued every 5 years.

If outdated and unrevised TMDLs were to act as a barrier to meeting water quality standards, TMDLs would quickly become a way to ensure that a water body is degraded, rather than protected. Indeed, that is precisely the result the petitioner is seeking, as there is no claim,

[34] To be clear, the limits imposed by EPA onto SWSC do not actually exceed those in the TMDL but rather are simply designed to fully implement such limits in an enforceable and equitable manner.

with support in the record, that Long Island Sound will meet water quality standards absent significant additional nitrogen reductions. That result would be unacceptable to Long Island Sound and directly contrary to the Clean Water Act which consistently and universally requires water quality standards to be met. The EAB has ruled that when faced with a choice between following faulty and outdated assumptions of a TMDL and following well documented actual conditions, the agency should properly follow the actual conditions. *In re City of Moscow,* 10 E.A.D. 135, 148 (EAB 2001)(finding that EPA did not err when it used "the facility's current, known design flow in developing WQBELs rather than the higher number reference in the TMDL.")

The Petitioner has failed to meaningfully challenge the scientific assumptions the EPA relied upon in creating the WQBELs and concluding that SWSC's discharge did not comply with water quality standards. In similar instances, EPA has consistently upheld WQBELs imposed by the agency exercising reasonable discretion based upon available information.[35] As set forth below, however, the Board does not even have to reach this analysis as EPA's limits in this case are based on enforceably implementing the 2000 TMDL rather than going beyond it.

C. Enforceable WQBELs are Minimally Necessary to Meet the Requirements of the 2000 TMDL and to Comply with Connecticut Antidegradation Requirements.

Indeed, while WQBELs can go beyond TMDLs if the assumptions upon which the TMDLs are based are inconsistent, the WQBELs in this instance are not only consistent with, but based

[35] *See*, *City of Taunton v. EPA*, 895 F.3d 120 (1st Cir. 2018); *Upper Blackstone*, 690 F.3d 9 (1st Cir. 2012).

upon, the minimal 25% reduction required by the 2000 TMDL. EPA has addressed these issues extensively in their Response to Comments, so Save the Sound will only briefly summarize here.

In short, while SWSC has claimed to have met its share of the WLA for Massachusetts plants for the 2000 TMDL, there has never been any enforceable permit requirement for it or any other Massachusetts facility to do so. Thus, there is no guarantee that with growth, the Towns will continue to meet such limits. While SWSC has proposed an alternative possible way to meet the WLA, it has manifestly failed to demonstrate that EPA's method is clearly erroneous or an improper exercise of discretion.

The basic problem with SWSC's reasoning is that there are currently no permit limits included in permits that will require SWSC or any other discharger in Massachusetts to meet the 2000 TMDL wasteload allocation or not increase its loading. Thus, the required 25% reduction, to the extent it actually exists at all, is completely unenforceable. When EPA faced the decision of whether to impose permits based upon total loading or based upon design capacity, the agency made the reasoned discretionary decision to do so through design capacity to give towns the opportunity to grow in proportion to their allotted design capacity.

The WQBELs imposed by EPA in this instance are also justified and indeed required by antidegradation requirements in 40 C.F.R. § 131.12 and R.C.S.A. § 22a-426-8(a)(1). Pursuant to Tier 1 review, a discharge must be consistent with the maintenance, restoration, and protection of existing and designated uses assigned to the receiving water body . . ." R.C.S.A. § 22a-426-8(b)(2). Designated uses for Long Island Sound include habitat for marine fish, other aquatic life and wildlife and shellfish harvesting. R.C.S.A. § 22a-426-4(f). Again, given the scientific

consensus (unchallenged on this record) that Long Island Sound continues to be impaired for these uses, requiring total levels to be capped at the 2000 TMDL and/or current level is the absolute minimum an agency can do to seek to ensure that the water body is not further degraded. Moreover, this provision cannot be seen in a vacuum. It is necessary to at least maintain the status quo for total nitrogen released to Long Island Sound while EPA continues studying Long Island Sound and completes the Nitrogen Reduction Strategy which will, inevitably, require far more significant reductions.

IV. CONCLUSION

In light of the need to address (1) the impaired condition of Long Island Sound, (2) the requirements of the TMDL, and (3) antidegradation requirements, EPA's decision to enforceably cap Massachusetts loadings at their current levels (determined by the 2000 TMDL) is a modest but reasonable step toward meeting Long Island Sound water quality standards. The Petitioner has entirely failed to meet its high burden to show that such limits are unduly strict or unwarranted by the conditions in Long Island Sound. Save the Sound respectfully requests that the Petition for Review be denied.

Respectfully Submitted,
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I hereby certify that a copy of the foregoing Amicus Brief in the above captioned matter was sent to the following persons in the manner indicated:

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Dated December 16, 2020

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STATEMENT OF COMPLIANCE WITH WORD LIMITATION

I hereby certify that this amicus brief contains less than 7,000 words and is no more than 15 pages in compliance with 40 C.F.R. § 124.19(e) and (d)(3).

Dated December 16, 2020

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