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

In re: City of Manchester, New Hampshire Manchester Wastewater Treatment Facility NPDES Permit No. NH0100447	NPDES Appeal No. _____

PETITION FOR REVIEW BY CONSERVATION LAW FOUNDATION

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INTRODUCTION

In 2021, the Environmental Protection Agency ("EPA") established a PFAS Strategic Roadmap policy that acknowledged the need to reduce PFAS exposures through Clean Water Act permits. In 2024, the agency established a policy that highlighted the importance of mitigating environmental injustice through Clean Water Act permits. Ignoring those policy directives, ignoring the role of EPA-approved state narrative water quality standards, and ignoring significant data submitted by Petitioner, EPA Region I ("the Region") finalized the National Pollutant Discharge Elimination System ("NPDES") permit for the City of Manchester's Wastewater Treatment Facility ("WWTF") – the largest WWTF in northern New England and the only one in New Hampshire with a sewage sludge incinerator – without conducting a reasonable potential analysis for per- and polyfluoroalkyl substances ("PFAS") or environmental justice analysis.

Along with failing to conduct these important analyses, the Region also weakened the benthic survey requirement in the Draft Permit without reopening the public comment period or adequately justifying the significant change.

The Region clearly erred and abused its discretion by failing to conduct a reasonable potential analysis for PFAS, which also is an important policy consideration warranting the Board's review. The Region also clearly erred by weakening the benthic survey requirement in the Permit. Finally, the Region clearly erred and abused its discretion in its responses to Petitioner's comments regarding environmental justice, which also is an important policy consideration warranting the Board's review.

THRESHOLD PROCEDURAL REQUIREMENTS

This petition is timely filed by the December 3, 2025 deadline pursuant to 40 C.F.R. § 124.19(a)(3).

I. Issues Presented for Review

Pursuant to 40 C.F.R. § 124.19(a)(4)(i), Petitioner identifies for review these challenges to the Permit decision:

(1) EPA's failure to consider whether the WWTF's PFAS discharges have a reasonable potential to cause or contribute to a violation of New Hampshire's narrative – not numeric – water quality standards for toxic substances and designated uses.

(2) EPA's weakening of the benthic survey requirement in Part 1.G.5 of the Permit with no notice and opportunity for public comment.

(3) EPA's failure to perform an environmental justice analysis pursuant to EPA's NPDES Program Policy Addressing Environmental Justice and Equity in NPDES Permitting.

II. Preservation of Issues

Petitioner is entitled to petition for review and met the requirements of 40 C.F.R. § 124.19(a)(2) by timely filing comments with the Region regarding the Draft Permit and Revised Draft Permit. Pursuant to 40 C.F.R. §§ 124.19(a)(2) and 124.19(a)(4)(ii), Petitioner identifies administrative record documents, appended as Att. 3 and Att. 4, as written comments submitted by Petitioner in which the issues in this Petition were raised during public comment periods, to the extent required by § 124.13. Petitioner commented that: EPA should perform a reasonable potential analysis for PFAS using PFAS data from Manchester's WWTF and in the Merrimack River and conduct an environmental justice analysis pursuant to its Program Policy.[1] Petitioner also provided oral comments at EPA's public hearing on the Draft Permit, held via Zoom on January 21, 2025, addressing these concerns.[2]

The Permit includes substantial changes from the Draft Permit and Revised Draft Permit, and issues corresponding to those post-comment-period changes could not have been raised

[1] Att. 3 at 12–14, 17–23; Att. 4 at 10, 12–13.
[2] Att. 2 at 157–59.

during the comment periods.[3] Specifically: (i) the Region's statements refusing to conduct a PFAS reasonable potential analysis and an environmental justice analysis emerged only in the Response to Comments accompanying the Permit, (ii) the Region's erroneous analysis that it could not conduct a reasonable potential analysis for PFAS under New Hampshire's narrative water quality standards emerged only in the Response to Comments, and (iii) the Revised Draft Permit included a benthic survey requirement, which the Region substantially weakened in the Permit without any notice and opportunity for public comment. Petitioner thus raised all reasonably ascertainable issues and available arguments in compliance with 40 C.F.R. § 124.13.

Pursuant to 40 C.F.R. § 124.19(a)(4)(ii), further citations to the Response to Comments and explanations for why the Region's response was clearly erroneous or otherwise warrants review are set forth in the Argument section, *infra*, for each issue.

STATUTORY AND REGULATORY FRAMEWORK

Congress passed the Clean Water Act with a clear goal: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[4] Section 301(a) of the Clean Water Act prohibits the discharge of a pollutant from a point source into waters of the United States unless in accordance with a NPDES permit or another specified provision.[5]

EPA may not issue a permit that fails to provide for compliance with the applicable requirements of the Clean Water Act or its implementing regulations.[6] Those applicable requirements encompass EPA-approved state water quality standards, including New Hampshire's narrative water quality criteria for toxic substances, Env-Wq 1703.21(a), and state standards to protect the designated uses of its water bodies, Env-Wq 1703.01(b).

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[3] *See* 40 C.F.R. §§ 124.19(a)(2), 124.19(a)(4)(ii), 124.13.
[4] 33 U.S.C. § 1251(a).
[5] *Id.* § 1311(a).
[6] 40 C.F.R. § 122.4 (a).

New Hampshire's narrative water quality criteria for toxic substances, Env-Wq 1703.21(a), requires that:

> (a) Unless naturally occurring or allowed under Env-Wq 1707, all surface waters shall be free from toxic substances or chemical constituents in concentrations or combinations that:
>
> (1) Injure or are inimical to plants, animals, humans, or aquatic life; or
>
> (2) Persist in the environment or accumulate in aquatic organisms to levels that result in harmful concentrations in:
>
> a. Edible portions of fish, shellfish, or other aquatic life; or
>
> b. Wildlife that might consume aquatic life.

New Hampshire's standard for designated uses, Env-Wq 1703.01(b), requires that "[a]ll surface waters shall be restored to meet the water quality criteria for their designated classification including existing and designated uses, and to maintain the chemical, physical, and biological integrity of surface waters." New Hampshire has designated the Merrimack River for fish consumption, requiring that the "surface water can support a population of fish free from toxicants and pathogens that could pose a human health risk to consumers[.]"[7]

To ensure that a permit "provide[s] for compliance" with the Clean Water Act and state water quality standards, a permit must include limitations to control pollutants or pollutant parameters that "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, *including State narrative criteria for water quality*."[8] To analyze whether the source has reasonable potential, EPA considers whether the "discharge, alone or in combination with other sources . . . could lead to an excursion above an applicable water quality standard."[9]

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[7] Env-Wq 1703.01(b); N.H. Dep't Env't Servs., Section 305(B) and 303(D) Consolidated Assessment and Listing Methodology (R-WD-20-20) at 10 (2022), https://www.des.nh.gov/sites/g/files/ehbemt341/files/documents/r-wd20-20.pdf. [hereinafter NHDES Methodology].

[8] 40 C.F.R. § 122.44(d)(1)(i) (emphasis added).

[9] EPA, Off. of Wastewater Mgmt., NPDES Permit Writers' Manual (EPA-833-K-10-001) at 6-23 (2010), https://www3.epa.gov/npdes/pubs/pwm_2010.pdf.

According to EPA's NPDES Permit Writers' Manual, "pollutants of concern" – which are "candidates for" water quality based effluent limits – consist of "any pollutants identified as present in the effluent through effluent monitoring," including data from "special studies" or "compliance inspection monitoring."[10] The NPDES permitting authority must analyze whether a permit applicant's discharges *could contribute* to the violation of state water quality standards and, if such potential exists, establish a water quality based effluent limit to ensure against water quality standard violations.[11]

In New Hampshire, these requirements mean the Region, as the permitting authority, must analyze whether the City's discharges "may . . . have the reasonable potential to cause, or contribute to"[12] violations of New Hampshire's narrative standards for toxics, Env-Wq 1703.21(a), and its standards protecting designated uses, Env-Wq 1703.01(b). The Region has interpreted narrative criteria and designated uses as bases for reasonable potential analyses, which accords with the plain language of 40 C.F.R. § 122.44(d)(1)(i).[13]

In *City & County of San Francisco, California v. Environmental Protection Agency*, the U.S. Supreme Court held that EPA lacks authority to include "end-result" provisions in NPDES permits, but "narrative limitations other than end-result requirements" remain authorized.[14] *San Francisco* highlights the critical role EPA plays in safeguarding water quality. The decision emphasizes EPA's authority – and importantly, its "responsibility" – to establish permit provisions that identify "steps a permittee must take *to ensure that water quality standards are*

[10] *Id.* at 6-15.
[11] *Id.*; 40 C.F.R. § 122.44(d)(1)(i).
[12] *Id*.
[13] *See In re Upper Blackstone Water Pollution Abatement District*, 14 E.A.D. 577, 596, 629-30 (EAB 2010).
[14] 145 S. Ct. 704, 720 (2025).

met[.]"[15] The Court concluded: "If the EPA does its work, our holding should have no adverse effect on water quality."[16]

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

The City of Manchester's WWTF is Northern New England's largest wastewater treatment facility. Designed to treat 34,000,000 gallons of wastewater per day,[17] it discharges effluent into the Merrimack River, an iconic waterbody of critical importance to New Hampshire and Massachusetts, a natural resource for aquatic and wildlife species, and a source of drinking water for more than 700,000 people, including communities downstream from the WWTF.[18] Along with discharging effluent into surface waters, the WWTF burns sewage sludge in an onsite incinerator, releasing emissions into the air. The Manchester WWTF is the only WWTF in New Hampshire that incinerates sewage sludge.[19]

A. Manchester's wastewater treatment facility discharges and emits PFAS.

PFAS—also known as "forever chemicals"—refers to a family of synthetic organic chemicals that persist in the environment for up to thousands of years.[20] PFAS have been linked

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[15] *Id.* at 720 (emphasis added).
[16] *Id.* at 711; *see also id.* at 720 ("If the EPA does what the CWA demands, water quality will not suffer.").
[17] Att. 5 at 3.
[18] EPA, About the Merrimack, https://www.epa.gov/merrimackriver/about-merrimack (July 11, 2025).
[19] National Biosolids Data Project, State Biosolids Survey: 2018 Data (2021), https://static1.squarespace.com/static/601837d1c67bcc4e1b11862f/t/6203f0b582fcfb750de408e1/1644425397690/N%20H_BiosolidsDataSummary_NBDP%26NEIWPCC_20220209.pdf.
[20] U.N. Env't Programme, Per- and Polyfluoroalkyl Substances (PFASs), https://www.unep.org/topics/chemicals-and-pollution-action/pollution-and-health/persistent-organic-pollutants-pops/and (last visited Dec. 2, 2025).

to cancer and other serious health harms.[21] Humans can become exposed to PFAS through contaminated drinking water, food (including fish), or air.[22] PFAS often disproportionately impact environmental justice communities, particularly communities of color.[23] EPA has recognized that PFAS bioaccumulate and harm human health and animals,[24] recommended that wastewater treatment facilities use their authority to reduce industrial sources of PFAS,[25] and

[21] *See* 87 Fed. Reg. 36848, 36849 (June 21, 2022); 89 Fed. Reg. 8606, 8613–8615 (Feb. 8, 2024); *Our Current Understanding of the Human Health and Environmental Risks of PFAS*, EPA, https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas (last updated Nov. 5, 2025).

[22] U.N. Env't Programme, Per- and Polyfluoroalkyl Substances (PFASs), https://www.unep.org/topics/chemicals-and-pollution-action/pollution-and-health/persistent-organic-pollutants-pops/and (last visited Dec. 2, 2025).

[23] *See Communities of color disproportionately exposed to PFAS pollution in drinking water*, HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH (May 15, 2023), https://www.hsph.harvard.edu/news/press-releases/communities-of-color-disproportionately-exposed-to-pfas-pollution-in-drinking-water/; Nadia Barbo et al., *Locally caught freshwater fish across the United States are likely a significant source of exposure to PFOS and other perfluorinated compounds*, 220 ENV'T RSCH. 1, 8 (2023) [hereinafter Barbo Study], https://doi.org/10.1016/j.envres.2022.115165; Ralph Jimenez, *'Forever chemicals' endanger health of anglers who eat what they catch,"* N.H. BULLETIN (April 11, 2023), https://newhampshirebulletin.com/2023/04/11/forever-chemicals-endanger-health-of-anglers-who-eat-what-they-catch/.

[24] *See, e.g.*, 89 Fed. Reg. 32532, 32536–38 (April 26, 2024); 89 Fed. Reg. 8606, 8613–8615 (Feb. 8, 2024); *see also Our Current Understanding of the Human Health and Environmental Risks of PFAS*, EPA (last updated Nov. 5, 2025), https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas.

[25] *See* Memorandum from Radhika Fox, EPA, to Water Division Directors, EPA Regions 1-10, regarding PFAS Discharges in EPA-issued NPDES permits and Expectations Where EPA Is the Pretreatment Control Authority (Apr. 28, 2022), https://www.epa.gov/system/files/documents/2022-04/npdes_pfas-memo.pdf [hereinafter April Memorandum]; Memorandum from Radhika Fox, EPA, to Water Division Directors, EPA Regions 1-10, regarding Addressing PFAS Discharges in NPDES Permits and Through the Pretreatment Program and Monitoring Programs (December 5, 2022) [hereinafter December Memorandum], https://www.epa.gov/system/files/documents/2022-12/NPDES_PFAS_State%20Memo_December_2022.pdf.

urged permit writers to consider disproportionate impacts of incinerating PFAS-containing materials on environmental justice communities.[26]

The Manchester WWTF's discharges into the Merrimack River and emissions into ambient air contain toxic PFAS, as demonstrated by two sources of data submitted as attachments to Petitioner's June 10 comments and appended as Att. 8 and Att. 9 to this Petition.

The first data source, a peer-reviewed paper (the "Battelle Study"), details the fate and transport of PFAS at the Manchester WWTF during a two-day PFAS sampling program in 2019. The Battelle Study documents PFAS in the WWTF's influent, effluent, sludge, incinerator ash slurry, and incinerator stack gas.[27] PFAS concentrations in treated wastewater effluent reached 167 parts per trillion ("ppt") for 30 PFAS compounds combined,[28] and total PFAS levels in wastewater increased after treatment, from 117 ppt in influent to 167 ppt in effluent discharged to the Merrimack River.[29] The level of GenX—a PFAS compound regulated in drinking water and known to cause health harms[30]—more than doubled from the WWTF's influent to its treated effluent.[31] These increases of total PFAS and some individual compounds correspond with findings in other studies[32] and highlight that wastewater treatment facilities do not remove PFAS; rather, they can exacerbate PFAS pollution.

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[26] EPA, 2024 Interim Guidance on PFAS Destruction and Disposal at 13, 58 (Apr. 2024), https://www.epa.gov/system/files/documents/2024-04/2024-interim-guidance-on-pfas-destruction-and-disposal.pdf [hereinafter Destruction & Disposal Guidance].
[27] *See* Att. 8 at 4, S19, S37.
[28] Att. 8 at tbl. S12.
[29] *Id.* at Text S5.
[30] *See* 89 Fed. Reg. 32532, 32532, 32548 (April 26, 2024).
[31] Att. 8 at tbl. S12.
[32] Att. 8 at 4.

The Battelle Study also shows that the WWTF's onsite incinerator emits PFAS.[33] The study estimated that the incinerator removed only 51 percent of the PFAS measured and concluded that the incinerator "may inadequately remove PFAS."[34] Comparing the 51 percent destruction and removal efficiency for PFAS to the 99.9 percent DRE required for polychlorinated biphenyls, another organic pollutant,[35] shows that the WWTF's incinerator subjects neighboring residents to unacceptable PFAS emissions and associated health risks. Importantly, the Battelle Study did not capture the full scope of PFAS pollution. The researchers only measured 30 PFAS compounds in emissions and calculated the 51 percent DRE without accounting for products of incomplete combustion.[36] Thus, the incinerator could be emitting unmeasured PFAS or other harmful byproducts not documented in the study. The researchers also observed that the incinerator formed GenX and emitted 44,000 times more inorganic fluoride than expected.[37]

The second data source is the Manchester WWTF's voluntarily monitoring data for four PFAS chemicals in influent, effluent, sludge, ash, landfill leachate, and septage, which the WWTF has been collecting monthly since 2019.[38] Between 2019 and 2023, PFAS levels in the WWTF's effluent ranged from 6 to 50.3 ppt when only four compounds were measured.[39] Some individual compound concentrations in effluent, documented in the WWTF monitoring data, exceed the Battelle Study's measured concentrations for PFOA, PFOS, and PFHxS, reaching

[33] *Id.* at 1.
[34] *Id.*
[35] 40 C.F.R. § 761.70(a)(2).
[36] *See* Att. 8 at 2, 9.
[37] *Id.* at 6, 8.
[38] Att. 9.
[39] *Id.*

20.6 ppt,[40] 30 ppt,[41] and 9.1 ppt[42] respectively. The WWTF monitoring data also demonstrate the WWTF is discharging PFAS into the Merrimack River on an ongoing basis, with no continuous trend of decreasing concentrations over time.

In addition to evidence of the WWTF's PFAS inputs and outputs, data indicates bioaccumulation of PFAS, particularly PFOS, in fish in the Merrimack River results in harmful concentrations in edible portions of fish. One sampling program, resulting in a peer reviewed study (the "Pickard Study") attached to Petitioner's June 10 comments and appended as Att. 10, gathered fish samples in 2017 and labeled some as from the Merrimack River in locations downstream from Manchester's WWTF.[43] All samples had PFAS in their edible muscle tissue.[44] PFOS in the Merrimack River fish samples downstream from the WWTF ranged from .205 ppb to 7.914 ppb.[45] The highest PFOS measurement closely approaches 8.41 ppb, the level at which eating one standard serving of fish is equivalent to drinking water at 48 ppt for an entire month.[46] Total PFAS levels ranged from 1.249 ppb (25 compounds) to 17.819 ppb (37 compounds).

Another sampling program, conducted after the public comment period for the Permit closed, further confirms the presence of PFAS in fish near the Manchester WWTF. The final memorandum summarizing data from this sampling program is appended as Att. 11.[47] The

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[40] *Id.* at 2021.
[41] *Id.* at 2022.
[42] *Id.*
[43] *See* Att. 10 at S-2–S-3.
[44] Att. 10 at S2-S3, TS16 (Fish Concentrations Table, Locations 5 and 6).
[45] *Id.*
[46] Barbo Study at 8.
[47] Although the sampling program results were not submitted during the public comment period or considered by the Region when finalizing the Permit, the Board should consider the sampling results provided as Att.11. In *In re Russell City Energy Ctr., LLC*, the Board recognized that "'[o]n occasion, the Board has 'considered newly submitted materials in the course of evaluating the merits of a petition . . .'" 15 E.A.D. 1, 37 (EAB 2010) (quoting *In re Dominion Energy Brayton Point, L.L.C.*, 13 E.A.D. 407, 418 (EAB 2007)). In *Russell City*, the Board held that

sampling program measured PFAS in fish filets and whole fish, concluding that in "all ten fish filet samples, PFOS concentrations exceeded" three health-based screening levels: New Hampshire's screening level for children, Massachusetts' candidate fish action level, and the Pickard Study's daily advisory trigger for children.[48] Concentrations of PFAS in whole fish were even higher, reaching 17.4 ppb PFOS in one sample.[49]

B. Manchester's wastewater treatment facility exacerbates environmental injustice and inequities.

The WWTF's PFAS discharges and incinerator emissions create health risks for Manchester residents, likely exacerbating cumulative impacts of pollution for environmental justice communities in Manchester and residents of downstream communities. Two U.S. Census Tracts located approximately two miles away from the WWTF and its incinerator are overburdened by environmental pollution. One of these communities has a population that is 56 percent people of color, 62 percent low income, and falls above the 96th state percentile for all but one of EPA's Environmental Justice Indexes.[50] Another has a population that is 41 percent people of color, 43 percent low income, and falls above the 94th state percentile for all thirteen

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"under the facts and circumstances of this case … it is appropriate to consider these two pages as the [Petitioner's] proffer of evidence in support of its assertions that the Region's analysis was erroneous . . ." Here, similarly, the report does not seek to add new information to the record but instead clarifies and contextualizes the issues raised by Petitioner's comments that are properly before the Board. The Merrimack River Sampling Program Memorandum is not offered to expand the administrative record, but rather to assist the Board's evaluation of the Region's decision to avoid a reasonable potential analysis for PFAS and its position that "the data gathered in accordance with the permit's monitoring requirements will help EPA to better understand these risks and take future action, if appropriate, to reduce those risks[.]" *See* Att. 2 at 85. Petitioner therefore requests that the Board treat the report as supporting documentation rather than as a motion to supplement.

[48] Att. 11 at 9.

[49] *Id.* at 6.

[50] *See* Att. 3 at 10. The EJ Index value "combines data on low income and people of color populations with a single environmental indicator" to highlight "potential EJ concerns." *Id.*

Environmental Justice Indexes.[51] These two communities are located north and northeast of the facility, exposing them to health risks from breathing contaminated air when wind blows from the south.[52] Manchester residents that fish near or downstream of the WWTF are also likely disproportionately impacted by the WWTF's PFAS pollution in water and air.

PFAS from the WWTF also threatens the health of residents, including residents of already-overburdened neighborhoods, in downstream communities that source drinking water from the Merrimack River, including in Nashua, NH.[53]

C. EPA policy directs EPA to reduce PFAS, and identify and mitigate environmental injustice, through Clean Water Act permits.

In 2021, EPA published a PFAS Strategic Roadmap, which commits EPA to several actions aimed at reducing PFAS, including "leveraging NPDES permitting to *reduce* PFAS discharges to waterways[.]"[54] The PFAS Strategic Roadmap also commits that "EPA will use a range of tools, such as EJSCREEN, to determine if PFAS air pollution disproportionately affects communities with environmental justice concerns."[55] As discussed below, the Region referenced the PFAS Strategic Roadmap in its Response to Comments for the Permit, indicating the Region interprets the Policy as in effect.

In 2022, EPA published two memoranda that recommended reducing PFAS discharges through NPDES permits and pretreatment program controlling PFAS discharges into WWTFs

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[51] *Id.* at 11.
[52] *Id.*
[53] EPA, Final NPDES Permit No. NH010047, Response to Comments at 7 (2015), https://www3.epa.gov/region1/npdes/permits/2015/finalnh0100447permit.pdf.
[54] Att. 2 at 75.
[55] EPA, PFAS Strategic Roadmap: EPA's Commitments to Action 2021–2024 at 18 (2021), https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf

from Industrial Users.[56] EPA's memoranda highlights the importance of reducing, not just monitoring for, PFAS through Clean Water Act permitting.

In 2024, EPA published Interim Guidance on the Destruction & Disposal of PFAS. That guidance emphasizes uncertainties associated with incinerating PFAS-contaminated sewage sludge in fluidized bed incinerators like that at Manchester's WWTF and explicitly highlights the need for permit writers to "screen communities located in the vicinity of potential releases from the destruction, disposal, and storage options [of PFAS] (considering fate and transport) in order to consider the potential for adverse and disproportionate impacts . . . and to consider potential measures to prevent, reduce, or address such impacts."[57]

Also in 2024, EPA established a program policy entitled Addressing Environmental Justice and Equity in NPDES Permitting, attached to Petitioner's June 10 comments and appended as Att. 7 ("Program Policy").[58] The Program Policy highlights environmental justice principles and recommends identifying potential environmental justice concerns on an individual-permit basis and conducting a "fit for purpose" environmental justice analysis for permits in "potentially overburdened" communities.[59] While the Program Policy references executive orders that have since been revoked, as discussed further below, it does not derive its authority from those executive orders and the Region's Response to Comments acknowledges the Region's discretion to implement the policy.

II. Procedural Background

In 2019, the City of Manchester applied for a renewed NPDES permit for its WWTF and sludge incinerator. In doing so, the City did not identify PFAS as pollutants in its discharges.

[56] April Memorandum; December Memorandum.
[57] Destruction & Disposal Guidance at 58.
[58] Att. 7 at 5.
[59] *Id.* at 3.

On April 10 2024, the Region issued a Draft Permit and Fact Sheet, appended as Att. 5. The Region did not consider the Battelle Study data or the City's PFAS monitoring data in crafting the Draft Permit and made no mention of environmental justice. The Draft Permit included monitoring provisions for PFAS but did not include any measures to reduce PFAS from the facility's discharges and air emissions.

On June 10 2024, Petitioner submitted comments on the Draft Permit, urging the Region to perform a reasonable potential analysis for PFAS under New Hampshire's narrative criteria for toxics and designated use for fish consumption. Petitioner also requested that the Region conduct an environmental justice analysis under EPA's Program Policy and hold a public hearing in person in Manchester.

On December 18, 2024, EPA released a Revised Draft Permit, appended as Att. 6, which included no modifications to address Petitioner's comments. Rather, in anticipation of *San Francisco v. EPA*, it eliminated "end-result" narrative permit provisions and replaced them with alternative provisions, including a requirement that "[d]uring the third calendar quarter (i.e., July through September) that begins at least 12 months after the effective date of the permit, a benthic survey shall be conducted once per permit term to assess impacts from the discharge on aquatic life in the benthic environment."[60]

On January 21, 2025, the Region held a public hearing by Zoom, at which Petitioner, members the Manchester community, and others urged the Region to conduct an environmental justice analysis and include PFAS reduction requirements in the permit.

On January 30, 2025, Petitioner submitted a second set of comments on the Revised Draft Permit, appended as Att. 4, supporting PFAS monitoring requirements but urging the Region to

[60] Att. 6 at Part I.A.G.

conduct a reasonable potential analysis for PFAS and include PFAS reduction measures in the final permit.

On November 3, 2025, the Region issued the Permit that is the subject of this Petition. As discussed further below, the Region refused to conduct an environmental justice analysis or a reasonable potential analysis and, accordingly, failed to require any PFAS reduction measures those analyses may have necessitated.

Rather than conducting the analyses required by law and recommended by agency policy, the Region weakened the permit's protections by adding triggering language to the otherwise-automatic benthic survey provision. Despite the Region's previous statement in the Fact Sheet accompanying its Revised Draft Permit that the automatic benthic survey requirement was needed to ensure compliance with New Hampshire standards, the Region weakened the benthic survey requirement in the Permit to require the survey only upon written notice from New Hampshire Department of Environmental Services ("NHDES") or EPA "that benthic deposits from the discharge are known or suspected to have a detrimental impact on downstream benthic communities[.]"[61] The Region did not reopen the public comment period to provide notice of this weakened Permit provision.

STANDARD OF REVIEW

Procedurally, when evaluating a petition for review, the Board considers whether the response to comments "demonstrate[s] that the Region considered and responded to all significant comments"[62] pursuant to 40 C.F.R. § 124.17(a).[63] Under Board precedent, the permit

[61] Att. 2 at 117.
[62] *In re Muskegon Development Company*, 17 E.A.D. 740, 751 (EAB 2019).
[63] *See* 40 C.F.R. § 124.17(a)(2) (requiring the response to comments to "[b]riefly describe and respond to all significant comments on the draft permit . . . raised during the public comment period, or during any hearing.")

issuer's response may "succinctly address the essence of each issue raised" as long as it "addresses the issues raised in a meaningful fashion and is clear and thorough enough to adequately encompass the issues raised by the commenter[.]"[64]

Substantively, when evaluating a petition for review, the Board considers whether each challenged permit condition is based on "[a] finding of fact or conclusion of law that is clearly erroneous;" or "[a]n exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review."[65]

To determine clear error, the Board considers whether the Region exercised "considered judgment."[66] The response to comments "must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied on when reaching its conclusion."[67] The whole permitting record "must demonstrate that the permit issuer duly considered the issues raised in the comments and ultimately adopted an approach that is rational in light of all information in the record."[68]

When "applying the clearly erroneous standard to a permit issuer's change in position," the Board is "guided by Supreme Court precedent on review of an administrative agency's reversal or change in a prior policy or interpretation as reflected in such decisions as *EncinoMotorcars, L.L.C. v. Navarro*, 579 U.S. 211, 221-22 (2016), and *FCC v. Fox Television*

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[64] *In re Muskegon Development Company*, 17 E.A.D. 740, 748 (EAB 2019) (quotation marks and alterations omitted) (quoting *In re Wash. Aqueduct Water Supply Sys*., 11 E.A.D. 565, 585 (EAB 2004)).
[65] 40 C.F.R. § 124.19(a)(4)(i).
[66] *See In re GSP Merrimack L.L.C.*, 18 E.A.D. 524, 528 (EAB 2021) (citing *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 191, 224-25 (EAB 2000); *In re Ash Grove Cement Co*., 7 E.A.D. 387, 417-18 (EAB 1997)).
[67] *Id.* (citing *Ash Grove*, 7 E.A.D. at 417).
[68] *Id.* (quoting *In re Gov't of D.C. Mun. Sep. Storm Sewer Sys*., 10 E.A.D. 323, 342 (EAB 2002)) (internal quotation marks and additional citations omitted).

Stations, Inc., 556 U.S. 502, 515 (2009)."[69] Under those precedents, "where an agency has changed position, the reasoned explanation standard requires that the agency 'display awareness that it *is* changing its position' and 'show that there are good reasons for the new policy.'"[70] "[I]f an agency's 'new policy rests upon factual findings that contradict those which underlay its prior policy,' then the reasoned explanation standard requires that the agency must 'provide a more detailed justification than what would suffice for a new policy created on a blank slate.'"[71]

To determine whether the Region's decision was "[a]n exercise of discretion" warranting review, the Board uses an abuse of discretion standard and considers whether the "decision is cogently explained and supported in the record."[72] To determine whether the Region's decision was "an important policy consideration that the Environmental Appeals Board should, in its discretion, review," the Board considers "a permit issuer's compliance with and application of important EPA policies and Executive orders[.]"[73]

ARGUMENT

I. The Region Clearly Erred by Failing to Conduct a Reasonable Potential Analysis for PFAS; Its Failure is an Abuse of Discretion and an Important Policy Consideration Warranting the Board's Review and Remand.

A. The Region failed to meaningfully address Petitioner's comments that the WWTF's PFAS discharges will likely cause or contribute to a violation of New Hampshire's narrative criteria and designated uses.

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[69] *See In re General Electric Co.*, 18 E.A.D. 575, 620–21 (EAB 2022) (citing *In re Springfield Water & Sewer Comm'n*, 18 E.A.D. 430, 494–95 (EAB 2021); *In re Arizona Pub. Serv. Co.*, 18 E.A.D. 245, 273 n.20 (EAB 2020)).
[70] *Id.* at 621 (citing *Fox*, 556 U.S. at 515; *Encino*, 579 U.S. at 221).
[71] *Id.* (*citing Fox*, 556 U.S. at 515; *see Encino*, 579 U.S. at 221-22).
[72] *See In re La Paloma Energy Center, LLC* (*citing Ash Grove*, 7 E.A.D. at 397 ("[A]cts of discretion must be adequately explained and justified.")); *see also In re City of Palmdale*, 15 E.A.D. 700, 704 (EAB 2012).
[73] *See* 86 Fed. Reg. 31172, 31173 (June 11, 2021).

The Region failed to adequately respond to Petitioner's comments that the Manchester WWTF's PFAS discharges will likely cause or contribute to state water quality standards violations. Under 40 C.F.R. § 124.17(a)(2), the Region's response to comments must "[b]riefly describe and respond to all significant comments on the draft permit . . . raised during the public comment period, or during any hearing." Accordingly, the response to comments must "address the issues raised in a meaningful fashion" and must be "clear and thorough enough to adequately encompass the issues raised by the commenter."[74]

Here, the Region failed to meaningfully address Petitioner's argument that "EPA must analyze whether the City's discharges 'may . . . have the reasonable potential to cause, or contribute to' violations of New Hampshire's narrative standards for toxics, and its standards protecting designated uses[.]"[75] Petitioner's June 10 comments specified that EPA must perform a reasonable potential analysis for PFAS under the state's narrative water quality criteria for toxics and the receiving water's designated use for fish consumption.[76] To support its comments, Petitioner attached and cited the City's monthly PFAS monitoring data, the Battelle Study, and the Pickard Study.

Petitioner argued that the WWTF's PFAS discharges likely violate Env-Wq 1703.21(a), entitled "Water Quality Criteria for Toxic Substances,"[77] which requires that: "all surface waters shall be free from toxic substances or chemical constituents in concentrations or combinations that . . . [i]njure or are inimical to plants, animals, humans, or aquatic life; or . . . [p]ersist in the environment or accumulate in aquatic organisms to levels that result in harmful concentrations in

[74] *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 585 (EAB 2004).
[75] Att. 3 at 22.
[76] Att. 3 at 19.
[77] *See id.* at 18, 21.

. . . [e]dible portions of fish, shellfish, or other aquatic life; or . . .[w]ildlife that might consume aquatic life."

In response, the Region quoted Env-Wq 1703.21(a) but failed to consider whether the WWTF's PFAS discharges violate that standard.[78] Instead, the Region avoided the issue by focusing on a lack of approved numeric criteria for PFAS, stating: "Although New Hampshire has updated the table accompanying this standard . . . to include MCLs for four PFAS chemicals in certain instances applicable to the Permittee, EPA has not approved these standards, and, as described previously, only EPA-approved standards apply."[79] The Region further avoided the issue by claiming that PFAS are not listed as toxics under the Clean Water Act and that the Whole Effluent Toxicity requirement ensures compliance with the narrative criterion – without acknowledging Petitioner's arguments that PFAS are toxic within the meaning of Env-1703.21(a) and without considering whether Whole Effluent Toxicity testing ensures Env-Wq 1703.21(a) compliance for PFAS.[80] Thus, the Region failed to "adequately encompass the issues raised by" Petitioner with respect to Env-Wq 1703.21(a).[81]

Petitioner also asserted that the WWTF's PFAS discharges likely violate Env-Wq 1703.01(b) and the receiving water's designated use for fish consumption. Env-Wq 1703.01(b) requires: "All surface waters shall be restored to meet the water quality criteria for their designated classification including existing and designated uses, and to maintain the chemical, physical, and biological integrity of surface waters." New Hampshire has designated the Merrimack River for fish consumption, requiring that the "surface water can support a

[78] Att. 2 at 81.
[79] *Id.* at 81.
[80] *Id.* at 81–82.
[81] *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 585 (EAB 2004).

population of fish free from toxicants and pathogens that could pose a human health risk to consumers[.]"[82] The Region "agree[d] that PFAS may pose risks to human health and aquatic life," but avoided considering Petitioner's comment advocating a reasonable potential analysis by referencing the state's failure to list the receiving water as impaired for PFAS and failure to include an effluent limit in its 401 certification conditions.[83] By centering its response around state designation and certification decisions, rather than referring to Petitioner's comments supported by the City's monitoring data, the Battelle Study, and the Pickard Study, EPA failed to "adequately encompass the issues raised by" Petitioner with respect to Env-Wq 1703.01(b).[84]

In responding to Petitioner's comments urging a reasonable potential analysis based on likely violations of Env-Wq 1703.21(a) and Env-Wq 1703.01(b), the Region cursorily mentioned but did not consider the City's monitoring data and the Battelle Study. The Region stated:

> [T]he commenter submitted the 'Battelle study' and 'City of Manchester WWTF PFAS Monitoring Reports (2019–23)' as attachments to its public comments, and these data are therefore already part of the administrative record for this proceeding. This data does not result in any changes to the draft permit because, as described next, there are neither technology-based requirements nor state water quality standards for PFAS contaminants.[85]

The Region's responses to comments did not mention the Pickard Study at all. The Region thus failed to meaningfully address Petitioner's comments providing and explaining data showing the WWTF's likely violations of Env-Wq 1703.21(a) and 1701.01(b).

In *In re Washington Aqueduct Water Supply System*, the Board determined that Region III violated 40 CFR §124.17(a)(2) and remanded a NPDES permit based on the Region's inadequate responses to the National Wilderness Institute's comments.[86] There, the National Wilderness

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[82] *See* Att. 3 at 18, 21; *see also* Env-Wq 1703.01(b); NHDES Methodology at 10.
[83] Att. 2 at 85.
[84] *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 585 (EAB 2004).
[85] Att. 2 at 76.
[86] *See In re Washington Aqueduct Water Supply System*, 11 E.A.D. 565, 586 (EAB 2004).

Institute submitted data and comments indicating the Region used pollutant levels lower than worst-case or average levels for its reasonable potential analysis and questioned the Region's approach.[87] The Region responded that the levels it used "fall within the range of other samples" and sufficed for a reasonable potential analysis.[88] The Board found the Region's response provided "insufficient justification" for its decision "considering the weight of the evidence in the record" indicating the Region did not use representative data.[89]

The National Wilderness Institute also submitted "three sets of data" supporting a separate argument that the Region should include water quality based effluent limits for several metals "because actual measured concentrations of these metals" in the permittee's discharges "indicated they had a reasonable potential to exceed D.C. water quality standards."[90] The Board considered the National Wilderness Institute's data submission "a 'significant' comment to which the Region owes consideration and at least a brief response in its response to comments document."[91] The Region ignored two of the datasets that National Wilderness Institute submitted, leaving the Board "to guess as to whether or not the Region dismissed these data for valid reasons or failed to consider them."[92] The Board's cursory response to the third dataset "seemingly exhibit[ed] an unwillingness to engage other data that might complicate the reasonable potential analysis and/or lead to different conclusions about necessary [water quality based effluent limits]."[93] The Board found the Region's response to comments inadequate and remanded.

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[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.* at 588.
[92] *Id.* at 589.
[93] *Id.*

Here, similarly, the Region violated 40 CFR § 124.17(a)(2) by failing to meaningfully respond to Petitioner's claims and supporting data that the Manchester WWTF likely violates Env-Wq 1703.21(a) and 1703.01(b). Like in *Washington Aqueduct*, here Petitioner submitted three sets of data to support its argument and the Region provided inadequate responses. Like in *Washington Aqueduct*, here the Region rejected some data (the City's monthly PFAS monitoring and the Battelle Study) with a cursory justification, stating: "[t]his data does not result in any changes to the draft permit because . . . there are neither technology-based requirements nor state water quality standards for PFAS contaminants[.]"[94] By failing to consider the substance of the data, this response "seemingly exhibit[s] an unwillingness to engage other data that might complicate the reasonable potential analysis and/or lead to different conclusions about necessary [water quality based effluent limitations]."[95] Just as in *Washington Aqueduct*, the Region here "did not mention" other data submitted by Petitioner – the Pickard Study – "even summarily[,]" leaving the Board "to guess as to whether or not the Region dismissed these data for valid reasons or failed to consider them[.]"[96] The Region violated 40 CFR § 124.17(a)(2); accordingly the Board must remand the Permit.

B. The Region clearly erred and abused its discretion in refusing to perform a reasonable potential analysis for PFAS, a decision involving an important policy consideration warranting the Board's review.

1. The Region clearly erred by refusing to perform a reasonable potential analysis for PFAS under Env-Wq 1703.21(a) and Env-Wq 1703.01(b).

The Region clearly erred in both law and fact when responding to Petitioner's comments urging a reasonable potential analysis for PFAS. To evaluate a permit decision for clear error, the

[94] Att. 2 at 76.
[95] *In re Washington Aqueduct Water Supply System*, 11 E.A.D. 565, 589 (EAB 2004).
[96] *Id.*

Board considers whether the permit issuer exercised "considered judgment."[97] The permit issuer must explain the reasons supporting its conclusions and the significance of the crucial facts underlying its decision.[98] The record must demonstrate the permit issuer's decision "is rational in light of all information in the record."[99]

The Region repeatedly stated it could not perform a reasonable potential analysis for PFAS because there are no EPA-approved water quality standards for PFAS.[100] The Region's response constitutes clear error of law because each time the Region avoided the reasonable potential analysis by citing a lack of EPA-approved standards, the Region conflated narrative standards with numeric standards.

Under 40 C.F.R. § 122.44(d)(1)(i), a permit must include limitations to control pollutants or pollutant parameters that "are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, *including State narrative criteria for water quality*."[101] New Hampshire currently lacks EPA-approved *numeric* standards for PFAS, but Petitioner identified and explained in comments

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[97] *In re Ash Grove Cement Co*., 7 E.A.D. 387, 417 (EAB 1997).
[98] *Id.*
[99] *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D 323, 342 (EAB 2002).
[100] *See* Att. 2 at 80 ("as described elsewhere in this Response to Comments, NPDES permits are written to ensure compliance with EPA-approved water quality standards."; *id.* at 81 (Although New Hampshire has updated the table accompanying this standard, Table 1703-1, Water Quality Criteria For Toxic Substances, to include MCLs for four PFAS chemicals in certain instances applicable to the Permittee, EPA has not approved these standards, and, as described previously, only EPA-approved standards apply.); *id.* at 89 ("To conduct a reasonable potential analysis, a permit writer needs an applicable water quality standard. As described in Responses 51-53, there is currently no EPA-approved state WQS for PFAS. Therefore, because there is no standard to apply, even with the data referenced by the commenter, EPA is unable to conduct a reasonable potential analysis at this time."); *id.* at 90–91 ("As described in Responses 51-55, there are no EPA-approved Water Quality Standards for PFAS and therefore no reasonable potential for the Permittee to cause or contribute to a violation of such WQS.").
[101] 40 C.F.R. § 122.44(d)(1)(i) (emphasis added).

how the Region should conduct a regional potential analysis under the EPA-approved state *narrative* standards.[102] The Region responded by quoting 40 C.F.R. § 122.44(d)(1)(i) – including its reference to narrative criteria – but then wholly ignored the narrative criteria's relevance, stating:

> This data does not result in any changes to the draft permit because . . . there are neither technology-based requirements nor state water quality standards for PFAS contaminants. . . .
>
> To conduct a reasonable potential analysis, a permit writer needs an applicable water quality standard. . . . [T]here is currently no EPA-approved state WQS for PFAS. Therefore, because there is no standard to apply, even with the data referenced by the commenter, EPA is unable to conduct a reasonable potential analysis at this time.[103]

The D.C. District Court has confirmed that EPA cannot use numeric criteria as a sole proxy for narrative criteria because doing so "renders the narrative criteria superfluous."[104] Here, when the Region stated it lacks water quality standards to conduct a reasonable potential analysis for PFAS, it committed clear legal error by using the lack of numeric PFAS criteria as a sole proxy for narrative criteria and designated uses, rendering the narrative standards superfluous.

The Region's conflation of narrative and numeric standards departs from its previous, rational interpretation of 40 C.F.R. § 122.44(d)(1)(i), further demonstrating clear error of law. In *In re Upper Blackstone Water Pollution Abatement District*, the Board upheld effluent limits the Region set for total nitrogen and phosphorous, after conducting a reasonable potential analyses, to achieve compliance with Rhode Island's and Massachusetts' narrative water quality criteria and designated uses.[105] The Region there conducted reasonable potential analyses to evaluate

[102] Att. 3 at 18-22.
[103] Att. 2 at 76, 89.
[104] *Anacostia Riverkeeper, Inc. v. Wheeler*, 404 F. Supp. 3d 160, 187 (D.D.C. 2019).
[105] 14 E.A.D. 577, 629–31 (EAB 2010).

compliance with narrative criteria similar to the narrative criteria relevant here. Specifically, the Region conducted reasonable potential analyses under:

> Rhode Island water quality criteria . . . that nutrients shall not be allowed "in such concentration that would impair any usages specifically assigned to said Class, or cause undesirable or nuisance aquatic species associated with cultural eutrophication." . . .
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> Rhode Island water quality criteria . . . that waters shall be free of pollutants in concentrations or combinations or from anthropogenic activities that "[a]dversely affect the composition of fish and wildlife," "[a]dversely affect the physicical integrity of the habitat," "[i]nterfere with the propagation of fish and wildlife," or "[a]dversely alter the life cycle functions, uses, processes and activities of fish and wildlife." . . .
>
> Massachusetts' narrative water quality criteria . . . that "the Blackstone River has been designated by Massachusetts as a habitat for fish, other aquatic life and wildlife and for primary (e.g. swimming) and secondary (e.g. fishing and boating) contact recreation." . . .[and] that such waters must be "free of floating, suspended or settleable solids that are aesthetically objectionable or could impair uses" and that "[c]hanges to color or turbidity of the waters that are aesthetically objectionable or use-impairing are also prohibited." [106]

In *Upper Blackstone*, the Region crafted the total nitrogen effluent limit to ensure compliance with the narrative criteria by "using a wide range of relevant information, including EPA technical guidance, state laws and policies applicable to the narrative water quality criterion, and site-specific studies."[107] The Board rejected the permittee's attempt to invalidate the effluent limit, citing the D.C. Circuit's declaration that the Clean Water Act "is not hospitable to the concept that the appropriate response to a difficult pollution problem is not to try at all."[108] The Board determined that the permittee's proposed "'wait and see' approach would allow the [permittee] to continue discharging without any limit on total nitrogen discharges – effectively

[106] *Id.* at 596, 629-30.
[107] *Id.* at 602.
[108] *Id.* at 606 (quoting *NRDC, Inc. v. Costle*, 568 F.2d 1369, 1380 (D.C. Cir. 1977)).

abdicating the responsibility to set permit limits when faced with difficulty establishing the limit."[109]

Here, Petitioner's comments urged the Region to conduct a reasonable potential analysis under similar narrative standards and designated uses using site-specific data – including the City's monthly monitoring data, the Battelle Study data, and the Pickard Study fish sampling data. Like the permittee's approach in *Upper Blackstone*, the Region's approach here (to repeatedly conflate narrative and numeric standards to avoid performing a reasonable potential analysis for PFAS under narrative standards) is an improper "wait and see" approach that would allow the Manchester WWTF "to continue discharging without any limit" on PFAS despite data indicating that a reasonable potential analysis is necessary. The Region's refusal to conduct a reasonable potential analysis under the narrative criteria for toxics and the fish consumption designated use constitutes clear error of law and represents the Region's untenable conclusion that "the appropriate response to" the difficult problem of PFAS pollution "is not to try at all."[110]

The Region also committed clear error of fact by ignoring "crucial facts"[111] in refusing to perform a reasonable potential analysis for PFAS under Env-Wq 1703.21(a) and Env-Wq 1703.01(b). As outlined in Petitioner's June 10 comments, the Pickard Study data indicates that bioaccumulation of PFAS, particularly the well-studied compound PFOS, in fish in the Merrimack River results in harmful concentrations in edible portions of fish. All fish muscle samples from the Merrimack River downstream of the WWTF had PFAS in their edible muscle tissue.[112] The highest PFOS measurement from the Merrimack River samples downstream from

[109] *Id.*
[110] *NRDC, Inc. v. Costle*, 568 F.2d 1369, 1380 (D.C. Cir. 1977).
[111] *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417 (EAB 1997).
[112] Att. 10 at S2-S3, TS16 (Fish Concentrations Table, Locations 5 and 6).

the WWTF, 7.914 ppb, closely approached 8.41 ppb, the level of PFOS at which eating one standard serving of fish is equivalent to drinking water at 48 ppt for an entire month.[113] That level is harmful and indicates a violation of Env-Wq 1703.21(a) and Env-Wq 1703.01(b), considering EPA set a maximum contaminant level of 4 ppt for PFOS and a maximum contaminant level goal of 0 ppt PFOS in drinking water.[114] The maximum combined PFAS level detected in a sample, measuring 37 compounds, was 17.819 ppb. The Region refused to acknowledge these data entirely, ignoring "crucial facts" necessary to address Petitioner's comment that the data show a likely violation of Env-Wq 1703.21(a) and Env-Wq 1703.01(b).

The Merrimack River Sampling Memorandum further rebuts the Region's response of avoiding facts submitted by Petitioner indicating the need for a PFAS reasonable potential analysis. That data further confirms the presence of PFAS in fish near the Manchester WWTF, showing that PFAS exceeded health-based thresholds in "all ten fish filet samples" in 2025 and detecting even higher levels in whole fish samples. The Merrimack River Sampling Memorandum demonstrates that the Region can use existing data to perform a reasonable potential analysis under Env-Wq 1703.21(a) and 1703.01(b), rather than avoiding the issue for this permitting process and relying only on "data gathered in accordance with the permit's monitoring requirements" in the future.[115]

2. The Region's refusal to perform a reasonable potential analysis for PFAS was an abuse of discretion.

When reviewing the Region's exercise of discretion, the Board applies an abuse of discretion standard.[116] Under that standard, "acts of discretion must be adequately explained and

[113] Barbo Study at 8.
[114] *See* 40 C.F.R §§ 141.61(2)(c), 141 App'x A.
[115] *See* Att. 2 at 85.
[116] *In re Guam Waterworks Auth*., 15 E.A.D. 437, 443 at n.7 (EAB 2011).

justified" in the administrative record.[117] The Board will remand permits when they lack "adequate rationale" or when the "permitting authority provides inconsistent or conflicting explanations for its actions[.]"[118]

Here, the Region refused to substantively consider PFAS monitoring data and refused to conduct a reasonable potential analysis for PFAS under Env-1703.21(a) and Env-Wq 1703.01(b). The Region's explanation for that refusal is inconsistent and conflicting. First, the Region stated it would not require the City to submit its PFAS monitoring data for this permit issuance because the data were collected before Method 1633 was finalized and thus purportedly "would not be consistent with EPA's national approach."[119] In the following paragraph, the Region stated it would consider the same data "in future permit reissuances" even though the data's purported limitation would not be remedied.[120] If the Region can consider pre-2024 data in "future permit reissuances," it must consider the data for this Permit. The Region's failure to consider factual data submitted by Petitioner and analyze such data in its Response to Comments constitutes abuse of discretion.

As discussed above, the Region also refused to conduct a reasonable potential analysis because "a permit writer needs an applicable water quality standard," and "there is currently no EPA-approved state WQS for PFAS."[121] This explanation is inconsistent with the Region's acknowledgment of two state water quality standards that implicate PFAS: Env-Wq 1703.21(a)

[117] *See In re Ash Grove*, 7 E.A.D. at 397.
[118] *In re Chukchansi Gold Resort*, 14 E.A.D. 260, 280 (EAB 2009).
[119] Att. 2 at 76.
[120] *Id.*
[121] *Id.* at 89.

and Env-Wq 1703.01(b).[122] The Region's response to Petitioner's reasonable potential analysis comments thus constitutes abuse of discretion.

Even improperly interpreting "water quality standards" to reference only numeric standards as the Region did, the Region's repeated statements fail to acknowledge – much less adequately explain – the agency's own responsibility for the lack of EPA-approved numeric standards for PFAS in New Hampshire. New Hampshire submitted its standards for approval to the Region on April 21, 2025. Under 40 C.F.R. § 131.21, the Region was required to approve the standards by June 20, 2025 or disapprove the standards by July 20, 2025. The Region missed its statutory deadline for approval by 166 days and disapproval by 136 days. The Region abused its discretion by relying on the lack of EPA-approved standards to avoid a reasonable potential analysis while failing to acknowledge that it bears responsibility for the lack of standards.

3. The Region's refusal to perform a reasonable potential analysis for PFAS raises an important policy consideration warranting the Board's review.

The Region's Response to Comments highlighted that the PFAS Strategic Roadmap commits to "leveraging NPDES permitting to *reduce* PFAS discharges to waterways[.]"[123] The Region then immediately contradicted itself (and the agency's PFAS Strategic Roadmap) by stating "the PFAS monitoring requirements in this permit" – which themselves do nothing to reduce PFAS discharges to waterways – "conform with EPA guidance and policy objectives[.]"[124]

EPA has recognized that PFAS jeopardize the integrity of the Nation's waters and pose serious hazards to human health and the environment.[125] EPA and academic literature has

[122] *Id.* at 81, 85.
[123] Att. 2 at 75.
[124] *Id.*
[125] EPA, PFAS Strategic Roadmap: EPA's Commitments to Action 2021–2024 at 5, 7 (Oct. 2021), https://www.epa.gov/system/files/documents/2021-10/pfas-roadmap_final-508.pdf.

affirmed that WWTFs like Manchester's do not remove or destroy PFAS, resulting in PFAS releases to the environment through WWTF effluent and sludge disposal.[126] Not only do WWTFs not remove or destroy PFAS – they can also increase PFAS concentrations.[127] The Region's refusal to address documented PFAS pollution at the Manchester WWTF through permit *reduction* requirements (not just monitoring requirements), despite available PFAS data from the WWTF and a general recognition among EPA and scientists that WWTFs contribute to the serious PFAS pollution problem, is an important policy consideration that the Board should review under 40 C.F.R. § 124.19(a)(4)(B).

II. The Region Clearly Erred by Significantly Weakening the Benthic Monitoring Survey Requirement at Part I.A.G.

In the Draft Permit, the Region included several narrative conditions intended to provide a backstop to ensure compliance with state water quality standards, including the requirement that the WWTF's discharges "shall not cause or contribute to violations of federal or state water quality standards."[128] In anticipation of a decision in *San Francisco v. EPA*, the Region issued a Revised Draft Permit in which it eliminated narrative "end-result" permit provisions and established a new benthic monitoring requirement: "During the third calendar quarter (i.e., July through September) that begins at least 12 months after the effective date of the permit, a benthic survey shall be conducted once per permit term to assess impacts from the discharge on aquatic

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[126] 90 Fed. Reg. 3859, 3861, 3863 (Jan. 25, 2025) ("Traditional wastewater treatment technology does not remove or destroy PFOA or PFOS, and these chemicals typically accumulate in the sewage sludge."); *see also* Ruyle et al., 122 PNAS 3, *High organofluorine concentrations in municipal wastewater affect downstream drinking water supplies for millions of Americans* (2025), https://doi.org/10.1073/pnas.2417156122 ("Data presented here suggest that US [publicly owned treatment works] do not effectively remove most [extractable organofluoride] prior to effluent discharge, regardless of whether they have secondary or tertiary treatment . . . Aquatic discharges from POTWs contain elevated levels of PFAS[.].").
[127] Att. 8 at 4.
[128] Att. 5 at Part I.A. 3–8.

life in the benthic environment. . . ."[129] The Region established this requirement as an "alternate provision[] to ensure the discharge continues to protect water quality standards[,]" – i.e., as an alternative to the Draft Permit's narrative requirement that discharges "shall not cause or contribute to violations of federal or state water quality standards."[130]

The Revised Draft Permit provided no notice that the Permit might weaken this benthic survey requirement. Instead, the Region stated that "EPA may remove or reduce these new requirements in the future and/or implement an alternative permitting approach *if EPA finds that the additional data are no longer necessary to protect these water quality standards*[,]" suggesting the requirement could be weakened or removed after the Permittee completed the initial survey.

In response to a comment, without reopening the public comment period, EPA added triggering language to the benthic survey requirement at Part I.A.G, requiring benthic monitoring only upon written notice from NHDES or EPA "that benthic deposits from the discharge are known or suspected to have a detrimental impact on downstream benthic communities[.]"[131] By not requiring benthic monitoring absent written notice, the Region effectively eliminated any benthic monitoring requirement for the Manchester WWTF. The Region itself acknowledged this effect in its Response to Comments, stating:

> While EPA expects that facilities with a smaller dilution factor will have a higher potential to impact the downstream benthic community, EPA also acknowledges that benthic surveys can be expensive (especially in larger rivers such as the Merrimack River) . . . EPA expects that this change will generally limit the applicability of benthic surveys to facilities with very low dilution factors into relatively small receiving waters (given that the triggers of the study and potential detrimental impacts are more likely for those discharges).[132]

[129] Att. 6 at Part I.A.1, Footnote 15.
[130] Att. 6 at Fact Sheet 4.
[131] Att. 2 at 117.
[132] Att. 2 at 119.

The Region also referenced, and "agree[d]" with, NHDES's 401 certification condition and response that introduced and purported to justify this weakened language, without providing its own fact-based analysis.[133]

A. The Region clearly erred by significantly altering Part I.A.G without reopening the public comment period.

The Administrative Procedure Act and the Clean Water Act require public notice and comment on NPDES permits.[134] Changes to a draft permit require additional public notice and comment unless the changed provision in the final permit is a "logical outgrowth" of the draft permit.[135] A changed provision is a "logical outgrowth" of the draft permit only if interested parties can reasonably anticipate the final permit condition as a result of the draft permit.[136]

Here, Part I.A.G is not a logical outgrowth of the drafts because the parties could not have reasonably anticipated that EPA would substantially weaken Part I.G.5 by replacing the requirement that the City conduct a benthic monitoring survey with a new provision triggering the requirement for a benthic survey only upon written notice from NHDES or EPA.[137]

The Fact Sheet accompanying the Revised Draft Permit explained the purpose of the original, automatically-required, benthic survey, stating: "The results of the benthic survey will assist EPA in the development of any future permit conditions needed to ensure compliance with" New Hampshire's water quality standards for benthic pollutants, Env-Wq 1703.03(c)(1)

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[133] Att. 2 at 119.
[134] 5 U.S.C. § 553(b), (c); 40 C.F.R. §§ 124.6(d), (e), 124.10(a)(1)(ii).
[135] *See S. Terminal Corp. v. EPA*, 504 F.2d 646, 659 (1st Cir. 1974); *see also In re Springfield Water & Sewer Comm'n*, 18 E.A.D. 430, 450 (EAB 2021).
[136] *NRDC, Inc. v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002) (internal quotation marks omitted); *see also In re Springfield Water & Sewer Comm'n*, 18 E.A.D. 430, 451 (EAB 2021) (citations omitted).
[137] *See* Att. 1 at 32; Att. 2 at 118–19.

and 1703.08(b).[138] The Region established this automatic requirement in anticipation of *San Franscisco v. EPA* to ensure compliance with water quality standards in the absence of "end-result" provisions.[139] Neither the Revised Draft Permit nor its Fact Sheet referenced a potential weakening of this requirement to allow the public to reasonably anticipate the final permit provision, which essentially removes the benthic survey requirement entirely.

B. The Region clearly erred and abused its discretion because the Permit's benthic survey requirement does not ensure compliance with the Clean Water Act and the Region insufficiently justified its change.

Under the clear error standard, the Region must explain "the reasons supporting its conclusion[s]" and "the significance of the crucial facts" on which it relied.[140]

Here, the Region clearly erred by adding triggering language to the benthic survey requirement because it did not adequately explain how the weakened permit provision will ensure compliance with water quality requirements. In its Response to Comments, the Region stated it added triggering language to the Permit (i.e., eliminated the automatic benthic monitoring requirement in the Revised Draft Permit) because "there is uncertainty regarding the potential impacts to the benthic community from this discharge."[141] However, the presence of uncertainty is the very reason why an automatic benthic survey is necessary and should be required –to provide a baseline understanding of whether the WWTF is complying with Env-Wq 1703.03(c)(1) and Env-Wq 1703.08(b). Absent the automatic benthic survey requirement, the Region cannot demonstrate – nor has it attempted to demonstrate – that the discharges from the WWTF will not cause or contribute to the violation of state water quality standards.

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[138] Att. 6 at Fact Sheet 4.
[139] *Id.*
[140] *See In re GSP Merrimack L.L.C.*, 18 E.A.D. 524, 528 (EAB 2021) (citation omitted).
[141] Att. 2 at 119.

The Region also clearly erred by relying on NHDES's 401 certification condition and justification, along with the difference in benthic impacts from facilities with smaller versus larger dilution factors, to justify its change – without providing "crucial facts" or data on Manchester's WWTF, and without acknowledging that Env-Wq 1703.03(c)(1) and 1703.08(b) are statewide standards that apply regardless of facility flow, receiving water, or dilution factor. For example, the Region failed to acknowledge that persistent pollutants like PFAS, which are consistently discharged by the Manchester WWTF, impact the benthic environment downstream regardless of dilution factor and should be monitored through an automatic benthic survey.

Finally, the Region committed clear legal error and abuse of discretion when it attempted to justify its significant change to the benthic survey requirement by stating that "benthic surveys can be expensive (especially in larger rivers such as the Merrimack River)." The Board will remand permits for abuse of discretion when the "permitting authority provides inconsistent or conflicting explanations for its actions[.]"[142]

Here, in the Fact Sheet accompanying the Revised Draft Permit, the Region cited Clean Water Act section 301(b)(1)(C) as authority for establishing the benthic survey requirement.[143] The Region's Response to Comments (Response 4) highlighted that cost cannot be considered when establishing requirements under section 301(b)(1)(C).[144] Despite this appropriate

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[142] *In re Chukchansi Gold Resort*, 14 E.A.D. 260, 280 (EAB 2009).
[143] *See* Att. 6 at Fact Sheet 3.
[144] *See* Att. 2 at 14 ("Although EPA appreciates the commenter's financial concerns, it is well-established that CWA section 301(b)(1)(C) requires effluent limits to meet water quality standards, without exception for cost or technical feasibility. *Upper Blackstone Water Pollution Abatement Dist. v. EPA*, 690 F.3d 9, 33 (1st Cir. 2012), cert. denied, 569 U.S. 972 (2013) ['. . . cost considerations may not be considered by the EPA in the setting of permit limits to assure compliance with state water quality standards.']; *In re City of Fayetteville, Ark.*, 2 E.A.D. 594, 600-601 (CJO 1988) ['The meaning of [CWA § 301(b)(1)(C)] is plain and straightforward. It requires unequivocal compliance with applicable water quality standards and does not make any exceptions for cost or technological feasibility.'], *aff'd sub nom Arkansas v. Oklahoma*, 503 U.S.

acknowledgment, the Region attempted to justify its benthic survey change based on cost considerations (Response 71). The Region clearly erred by considering cost in establishing a requirement under section 301(b)(1)(C), *and* it abused its discretion by asserting conflicting explanations in its Response to Comments.

III. The Region Clearly Erred and Abused Its Discretion By Failing to Analyze and Consider Environmental Justice Concerns Pursuant to EPA's Environmental Justice Program Policy; Its Refusal to Follow EPA's Program Policy Also is an Important Policy Consideration Warranting the Board's Review and Remand.

On January 1, 2024, EPA issued a NPDES Program Policy titled "Addressing Environmental Justice and Equity in NPDES Permitting."[145] The Program Policy identifies seven principles and five recommended practices for EPA to follow when issuing a NPDES permit. The seven principles outline general actions EPA should take throughout the permitting process, including: identifying potential EJ concerns; conducting meaningful participation; enhancing public involvement; conducting a "fit for purpose" EJ analysis and including results in the permit's administrative record; and minimizing, avoiding, and mitigating disproportionate effects of the permit. The five recommended practices outline specific steps EPA should take to achieve the principles, including, but not limited to, using EJScreen to identify environmental justice concerns and developing a simple information sheet for impacted communities.

Neither the Region's Draft Permit nor its accompanying Fact Sheet referenced EPA's Program Policy; nor did they mention environmental justice or equity in any way.

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91 (1992); *see also, e.g., In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 734 (EAB 2006).").

[145] *See* Att. 5. While the Program Policy was posted to EPA's Combined Sewer Overflow Guidance docket, https://www.regulations.gov/docket/EPA-HQ-OW-2023-0475/document, the policy is not specific to CSO measures in NPDES permits; it applies to environmental justice in NPDES permitting more broadly.

In its June 10 comments, Petitioner urged EPA to conduct an environmental justice analysis for the WWTF, including the WWTF's sludge incinerator, to inform and guide the permit's development.[146] Petitioner provided important information about Manchester's demographics, including information about two nearby U.S. Census Tracts that fall at or above the 94th state percentile for at least twelve of EPA's thirteen EJ Indexes, and raised concerns about the WWTF and its sludge incinerator adding cumulative burdens to environmental justice communities.[147] Petitioner commented that many residents of environmental justice communities eat locally-caught fish at higher rates for cultural and/or subsistence reasons, increasing their exposure to PFAS chemicals.[148]

Petitioner directed the Region to EPA's Program Policy, including the principles of identifying potential environmental justice concerns related to the permit and conducting a "fit for purpose" environmental justice analysis for permits in potentially overburdened communities.[149] Petitioner urged EPA to comply with the Program Policy, and stated, *inter alia*:

> The policy recommends that the administrative record for the permitting action should include the "fit for purpose analysis" results to "transparently show whether and how the permit could adversely and disproportionately affect a community." The EJ analysis should include demographic data, environmental data ("including surface water quality monitoring"), public health information, "potential pollutant and non-pollutant stressors," cumulative impacts, and "potential methods for avoiding, minimizing, or mitigating adverse effects on the community." The policy recommends using EPA's EJScreen tool "to identify potential or existing environmental justice concerns in communities affected by the permit."[150]

Petitioner also directed the Region to its PFAS Destruction & Disposal Guidance and PFAS Strategic Roadmap, noting that the two documents highlight EJScreen as a useful tool to assess

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[146] *See* Att. 3 at 12-14.
[147] *Id.* at 10-11.
[148] *Id.* at *10.*
[149] *Id.* at 13.
[150] *Id.* at 13 (citations omitted).

environmental justice concerns in the context of PFAS air emissions and making clear that failing to conduct an environmental analysis would contravene these policies[151]

Finally, consistent with the Program Policy, Petitioner urged the Region to hold an in-person public hearing in Manchester at a time and location that would "facilitate[] meaningful participation by members of the community."[152]

Despite Petitioner's comments and the presence of overburdened communities in Manchester, the Region, contravening EPA's Program Policy, engaged in no analysis or consideration of environmental justice concerns and failed even to hold a public hearing in the community. Rather, in response to Petitioner's comments, EPA simply stated:

> This comment references EPA's *NPDES Program Policy – Addressing Environmental Justice and Equity in NPDES Permitting* and suggests that this document requires a "fit for purpose" environmental justice analysis to be conducted for this permit. However, a series of Presidential executive orders in January 2025 revoked or abolished the Executive Orders (EO) on which this EPA policy was based. EO 14175 (1/21/24) has revoked EO 12898 (2/6/94) and EO 14154 (1/20/25) has abolished EO 14096 (4/21/23 and EO 14008 (1/27/21).
>
> EPA has ensured that this permit reissuance fully protects all updated water quality standards and does not allow any increased water quality impacts to the environment or human health. The commenter is concerned about PFAS in the effluent discharge. As described elsewhere in this response to comments, the permit's PFAS monitoring requirements are equivalent to those in other recent POTW permits issued by EPA Region 1 and include PFAS monitoring requirements consistent with EPA guidance and EPA's strategic plan for addressing PFAS in wastewater. For these reasons and within its discretion, EPA is not conducting the requested analysis.
>
> Regarding emissions from the incinerator, EPA notes that this permitting action is not authorizing such emissions (of PFAS or any other pollutant) because these emissions are regulated under a separate state permit. . . .[153]

[151] *Id*. at 13-14.
[152] *Id.* at 36-37.
[153] Att. 2 at 72 (citations omitted).

In a *post hoc* rationalization for failing to address environmental justice considerations in developing and processing the Draft Permit, the Region clearly erred and abused its discretion by failing to address environmental justice and equity concerns under EPA's Program Policy. It also represents an important policy consideration warranting the Board's review and remand of the Permit to require proper application of EPA's Program Policy.

A. The Region clearly erred and abused its discretion by providing an ambiguous response to CLF's environmental justice comments.

The Region's Response 49 is muddled and unclear, failing to "articulate with reasonable clarity" the Region's decision not to conduct an environmental justice analysis pursuant to the Program Policy. Its first paragraph discusses two executive orders issued in January 2025 as revoking prior executive orders "on which [the Program Policy] was based," yet its second paragraph suggests the Region has discretion to either conduct, or not, the environmental justice analysis urged by Petitioner. While the second paragraph indicates the Region's recognition that the Program Policy remains in effect, to the extent the Region simultaneously suggests that EPA's Program Policy has been "revoked or abolished," it failed to provide a clear, internally consistent response to Petitioner's comments urging an environmental justice analysis. That failure, alone, constitutes clear error (because the Region's response fails to "articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied on when reaching its conclusion")[154] and an abuse of discretion (because the "decision is [not] cogently explained and supported in the record.").[155] In addition, as set forth below, to the extent the Region's response relies on the notion that the Program Policy is no longer in effect, its position is both clearly erroneous as a matter of fact and law and is an important policy

[154] *See In re GSP Merrimack LLC*, 18 E.A.D. 524, 528 (EAB 2021) (citations omitted).
[155] *See In re La Paloma Energy Center, LLC*, 16 E.A.D. 267, 270 (EAB 2014).

consideration warranting the Board's review and remand with instruction to apply and implement the Program Policy.

B. As a matter of fact and law, EPA's Program Policy and the important analyses and considerations it affords remain in effect.

1. The Program Policy has not been revoked by the January 2025 executive orders.

The Region's Response 49 notes that in January 2025 two executive orders "revoked or abolished the Executive Orders (EO) on which [the Program Policy] was based."[156] It goes on to state: "EO 14173 (1/21/24) has revoked EO 12898 (2/6/94) and EO 14154 (1/20/25) has abolished EO 14096 (4/21/23) and EO 14008 (1/27/21)."[157] Importantly, nowhere in its response does the Region state that the January 2025 executive orders revoked or abolished EPA's Program Policy. The remainder of its response indicates the Region has *not* adopted this position. However, to the extent the Region referenced the executive orders to suggest that the Program Policy is not in effect, it clearly erred as a matter of fact and law.

EPA's Program Policy states that the three pre-2024 executive orders – plus a third executive order not referenced in Response 49 (Executive Order 13985) – "direct agencies to make achieving environmental justice and equity a part of their mission."[158] The Program Policy does not state that the policy derives its authority from the four executive orders. To the contrary, it states:

> The creation of this nationally applicable framework outlines how the EPA's NPDES program aims to use existing *Clean Water Act* authorities and discretion, and encourages, where appropriate, the use of other applicable federal laws, including federal civil rights laws, to help mitigate potential adverse and

[156] *See* Att. 2 at 72.
[157] *Id.*
[158] *See* Att. 5 at 1.

> disproportionate effects of a permitting action where the EPA is the permitting authority or where the EPA is supporting a state in issuing and NPDES permit.[159]

Additionally, the Region referenced its discretion to undertake an environmental justice analysis in Response 49. Thus, while the January 2025 executive orders may have revoked the executive orders *referenced* in the Program Policy, they did not revoke the Program Policy itself. Indeed, shortly after the January 2025 executive orders, on March 12, 2025, EPA's Acting Assistant Administrator issued a memorandum stating that EJ considerations "shall no longer inform EPA's *enforcement and compliance assurance* work."[160] The memorandum did not address permitting.[161] Because EPA has not specifically revoked the Program Policy, the Region cannot claim as a matter of law or fact that the Program Policy is not in effect.

2. If the Region claims EPA's Program Policy has been revoked, it has provided no reasoned explanation for such revocation, including a reasoned explanation for abandoning long-standing facts and considerations related to environmental justice.

If it is the Region's position that EPA's Program Policy itself has been revoked, its position is clearly erroneous as a matter of fact and law because it provided no reasoned explanation for (1) abandoning the long-standing recognition that some communities have

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[159] *Id.* (italics in original; underlining added). *See also id.* at 1 ("The principles [in the Program Policy] encourage consideration of *all relevant statutory and regulatory authorities* to develop permit terms and conditions to mitigate identified water quality concerns and other disproportionate environmental impacts as appropriate.") (emphasis added).

[160] EPA, Implementing National Enforcement and Compliance Initiatives Consistently with Executive Orders and Agency Priorities (Mar. 12, 2025), https://www.epa.gov/system/files/documents/2025-03/implementingnecisconsistentlywitheosandagencypriorities.pdf (emphasis added).

[161] *Id. See also* EPA, EPA Administrator Lee Zeldin Announces EPA's "Powering the Great American Comeback" Initiative (Feb. 4, 2025), https://www.epa.gov/newsreleases/epa-administrator-lee-zeldin-announces-epas-powering-great-american-comeback (EPA Administrator Zeldin's February 4, 2025 announcement of EPA initiative titled "Powering the Great American Comeback" (Feb. 4, 2025) which includes a commitment to "Permitting Reform" and reducing "costly permitting processes" generally but does not reference the Program Policy or otherwise address environmental justice in permitting).

experienced and continue to experience disproportionate environmental burden, and (2) abandoning measures to better involve such communities in the permitting process and mitigate burdens through permit terms.

It is foundational – and has been recognized by the Board in discussing U.S. Supreme Court decisions *Encino Motorcars, L.L.C. v. Navarro*, 579 U.S. 211 (2016) and *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) – that an agency's reversal or change of a prior policy must be supported by a reasoned explanation. In applying the clearly erroneous standard to a permit issuer's change in position, the Board has explained:

> The [Supreme] Court specified in both *Fox* and *Encino*, that where an agency has changed position, the reasoned explanation standard requires that the agency "display awareness that it *is* changing its position" and "show that there are good reasons for the new policy." . . . Additionally, in these cases, the Court explained that if an agency's "new policy rests upon factual findings that contradict those which underlay its prior policy," then the reasoned explanation standard requires that the agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate." . . . Concurring in *Fox*, Justice Kennedy stated this latter point more concisely: "an agency's decision to change course may be arbitrary and capricious if the agency ignores or countermands its earlier factual findings without reasoned explanation for doing so." . . . [162]

Here, the Region provided *no* explanation, let alone a cogent explanation, for abandoning EPA's Program Policy and the analysis and considerations it entails. Nor has it provided any facts countermanding the reality – well-recognized by EPA – that some communities experience greater environmental burden than other communities, and that meaningful public involvement

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[162] *In Re: General Electric Co.,* 18 E.A.D. 575, 621 (EAB 2022) (citations omitted; *quoting Fox*, 556 U.S. at 515, 537; *Encino*, 579 U.S. at 221–22) (further stating: "Consistent with Supreme Court precedent on changes in an agency's position, we examine the Region's decision on the 2020 Permit by evaluating whether the Region provided a cogent explanation for that decision and any underlying factual determinations, including any factual determinations that contradict earlier findings."). *See also Department of Homeland Security v. Regents of Univ. of Cal.*, 140 S.Ct. 1891, 1907-1915 (2020) (vacating Acting Secretary of Homeland Security's rescission of Deferred Action for Childhood Arrivals program as arbitrary and capricious for failure to adequately explain basis of rescission).

of those communities and permit writers' attention to disparities – are necessary to mitigate inequities. The Region's reliance on the January 2025 executive orders utterly fails to provide a reasoned explanation for abandoning EPA's Program Policy.[163]

Finally, even if EPA had eliminated the Program Policy (which it has not), the Region's reliance on that elimination would be clearly erroneous and an abuse of discretion because the notion that environmental injustices and inequities do not exist, or that addressing environmental injustices and inequities is somehow discriminatory or unlawful, is not supported in fact or law.

3. The status of EPA's Program Policy is an important policy matter warranting the Board's review.

The status and effectiveness of the Program Policy – which recognizes and is designed to address environmental injustices and inequities in overburdened communities in the NPDES permitting process – is a critically important policy consideration that the Board should address. For the reasons discussed above, the Board should determine that the Program Policy remains effective and should remand the Permit to the Region with instructions to implement the Program Policy.

C. The Region clearly erred and abused its discretion by refusing to conduct an environmental justice analysis on the basis of four grounds that are inconsistent with, and demonstrate a failure to understand, the Program Policy.

In Response 49, the Region suggests that EPA's Program Policy remains effective and that it exercised its discretion not to apply the policy on four grounds: (1) that the "permit reissuance fully protects all updated water quality standards," (2) that the Permit "does not allow

[163] *See* Exec. Order 14173, 90 Fed. Reg. 8633, 8633 (Jan. 21, 2025) (titled "Ending Illegal Discrimination and Restoring Merit-Based Opportunity" and providing no mention, let alone analysis, of environmental justice in its purpose and policy sections); *see generally* Exec. Order 14154, 90 Fed. Reg. 8353 (Jan. 20, 2025) (titled "Unleashing American Energy" and focusing on energy-related matters and regulations, with no discussion of non-energy-related matters or any bases for eliminating environmental justice considerations in NPDES permitting).

any increased water quality impacts to the environment or public health," (3) that the Permit's PFAS monitoring requirements are equivalent to monitoring requirements in other recent WWTF permits issued by the Region, and (4) that the Region need not consider impacts from the WWTF's sludge incinerator because its emissions are regulated under a separate permit.[164] The Region's response demonstrates a failure to understand or rationally address EPA's Program Policy and a failure to cogently explain its decisionmaking, rendering its refusal to conduct an environmental justice analysis clearly erroneous and an abuse of discretion.

1. The Region clearly erred and abused its discretion by refusing to engage in an environmental justice analysis based on the claim that the Permit "fully protects all updated water quality standards."

The Region clearly erred by refusing to conduct an environmental justice analysis on the ground that the Permit "fully protects all updated water quality standards." As discussed above, the Permit does *not* fully protect all updated water quality standards; rather, it fails to address narrative water quality criteria and a designated use requirement that are specifically designed to protect public health. Rules Env-Wq 1703.21(a) and Env-Wq 1703.01(b) are particularly important for protecting environmental justice community members who may consume more fish – and therefore may be exposed to more PFAS – than people in other communities.

Had the Region conducted an environmental justice analysis under EPA's Program Policy, it may have reached a different conclusion – and a different substantive result – with respect to Rules Env-Wq 1703.21(a) and 1703.01(b) and permit terms necessary to reduce PFAS in fish. Its refusal to conduct that analysis based on a conclusory statement about water quality standards *un*informed by environmental justice considerations and other data provided by Petitioners – if upheld – would not only deprive this permitting process of important information

[164] Att. 2 at 72.

that could substantively shape the permit; it also would establish precedent rendering EPA's Program Policy a nullity.

This basis for refusing to conduct an environmental justice assessment renders the Region's decision clearly erroneous – because the Permit does *not* fully protect all water quality standards. Even if the Permit *did* fully protect all water quality standards, the Region also abused its discretion by failing to provide a cogent explanation for why this consideration renders the Program Policy inapplicable to this NPDES permitting process.

2. The Region clearly erred and abused its discretion by refusing to engage in an environmental justice analysis based on the claim that the Permit does not allow any "increased" water quality impacts to the environment or human health.

The Region clearly erred, and demonstrated a misunderstanding of EPA's Program Policy, by refusing to conduct an environmental justice analysis on the ground that the Permit does not allow any "increased" water quality impacts to the environment or human health. As a matter of fact, the Permit contains no effluent limit for any PFAS chemicals; it does nothing to prevent an increase in PFAS discharges into or from the WWTF or an increase in PFAS concentrations in the sludge burned by the WWTF's incinerator. As a matter of law and policy, even if the Permit *did* prevent PFAS pollution from increasing, maintaining the current level of PFAS discharges and emissions does not obviate the need for an environmental justice analysis. Rather, such an analysis, including but not limited to consideration of demographic data and cumulative impacts under EPA's Program Policy, may justify *reducing* – as opposed to *not increasing* – PFAS discharges into and from the WWTF and PFAS concentrations in the WWTF's sludge.

This basis for refusing to conduct an environmental justice assessment is clearly erroneous – because the Permit does *not* prevent any "increased" water quality impacts to the environment or human health. Even if the Permit *did* prevent increased water quality impacts to

the environment or human health, the Region abused its discretion in failing to provide a cogent explanation for (1) how the Permit does so and (2) why this consideration obviates the need to apply EPA's Program Policy.

3. The Region clearly erred and abused its discretion by refusing to engage in an environmental justice analysis on the ground that the Permit's PFAS monitoring requirements are "equivalent to" requirements in other recent permits for POTWs.

The Region demonstrated a fundamental misunderstanding of EPA's Program Policy by refusing to conduct an environmental justice analysis on the ground that the Permit's PFAS monitoring requirements are "equivalent to" PFAS monitoring requirements in other recently-issued NPDES permits. The Program Policy highlights that "environmental justice and equity should be evaluated on a permit-by-permit basis."[165] The Region's failure to conduct an environmental justice analysis on the ground that the Permit contains monitoring requirements that are "equivalent to" requirements in permits for WWTFs *in other communities* defies the permit-by-permit evaluation explicitly contemplated by the Program Policy. Pursuant to the Program Policy, the Region should have assessed and considered the demographics and pollution exposures of people in Manchester. Adopting monitoring requirements equivalent to those for WWTFs in communities like Portsmouth and Rochester – communities with differing demographics and environmental burdens – provides no rational or lawful basis for refusing to conduct an environmental justice analysis pursuant to the Program Policy. The Region's approach rests on a clearly erroneous interpretation of the Program Policy. Moreover, the Region abused its discretion in failing to explain *why* this consideration excuses it from conducting an environmental justice analysis under the Program Policy.

[165] Att. 5 at 2.

4. The Region clearly erred and abused its discretion by not considering PFAS emissions from the WWTF's sludge-burning incinerator.

The Region may be correct that the Permit does not independently establish emissions limitations for the WWTF's sludge incinerator (though it *does* include conditions for the incinerator's emissions).[166] However, considering PFAS emissions from the incinerator is essential to understanding and addressing the cumulative impacts of PFAS exposures, and to following the Program Policy's principles, which "encourage consideration of all relevant statutory and regulatory authorities to develop permit terms and conditions to mitigate identified water quality concerns *and other disproportionate environmental impacts* as appropriate."[167] By regulating industrial users, the Permit can directly affect PFAS levels in the sludge the incinerator burns and, by extension, the concentrations of PFAS emitted into the air. This is consistent with Permit Part I.F.10 establishing limits for the "daily concentration of" pollutants "in the sewage sludge fed to the incinerator" and Clean Water Act 40 CFR Part 503 regulations controlling the content of sludge incinerated and requiring emissions monitoring.[168]

The Region clearly erred by relying on this basis to avoid an environmental justice analysis under the Program Policy and to avoid Petitioner's comments that the agency's PFAS Strategic Roadmap and Destruction & Disposal Guidance recommend screening for and mitigating disproportionate impacts of PFAS in air emissions. The Region also abused its discretion by failing to explain why a separate permitting process for the sludge incinerator's air emissions obviates the need to apply the Program Policy, including the consideration of cumulative impacts.

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[166] Att. 1 at Part 1.F.10 (titled "Incinerator Conditions and Limitations" and including, *inter alia*, limits on the daily concentrations of metals in the sewage sludge "fed to the incinerator.").
[167] Att. 5 at 1 (emphasis added).
[168] *Id.*

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that that the Board review and remand the contested conditions, decisions, and determinations in the issuance of NPDES Permit No. NH0100447.

Dated: December 3, 2025

Respectfully Submitted,
/s/ Thomas F. Irwin
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STATEMENT REQUESTING ORAL ARGUMENT

Petitioner believes that oral argument will be of assistance to the Board and, therefore, requests oral argument on its Petition.

STATEMENT OF COMPLIANCE WITH WORD LIMITATION

In accordance with 40 C.F.R §§ 124.19(d)(1)(iv) & (d)(3), I hereby certify that this petition does not exceed 14,000 words. Not including the cover page, tables, signature blocks, statement requesting oral argument, statement of compliance with word limitation, and certificate of service, this petition contains 13,912 (including headings, footnotes, and quotations), as counted by Microsoft Word. This petition is written in Times New Roman, 12-point font.

/s/Jillian Aicher
Jillian Aicher

CERTIFICATE OF SERVICE

I, Jillian Aicher, hereby certify that on December 3, 2025, I caused to be served a true and correct copy of the foregoing Petition for Review and Attachments to the following persons, in the manner specified below:

By electronic filing to:

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U.S. Environmental Protection Agency
Environmental Appeals Board
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