IN RE GUAM WATERWORKS AUTHORITY

NPDES Nos. 09-15 & 09-16

ORDER DENYING REVIEW

Decided November 16, 2011

Syllabus

Section 301(h) of the Clean Water Act ("CWA") allows municipal wastewater treatment plants ("WWTPs") that discharge into marine waters to receive waivers from secondary treatment requirements. Before the Environmental Appeals Board ("Board") are two petitions from the Guam Waterworks Authority ("GWA") seeking review of EPA Region 9's ("Region") decision to deny reissuance of two section 301(h) waiver applications. GWA disputes the Region's decision on two basic grounds: (1) GWA challenges certain of the Region's determinations that GWA failed to comply with section 301(h); and (2) GWA claims other reasons why the Region should not have denied the waivers.

Held: Upon consideration of the arguments, the Board denies review of the Region's decision to deny the waivers.

1. GWA failed to demonstrate that it meets all of the criteria for obtaining a section 301(h) waiver. The CWA requires municipal WWTPs, like GWA's WWTPs, to comply with secondary treatment requirements unless the WWTP can demonstrate to the satisfaction of the permitting authority that it complies with all section 301(h) criteria. In this case, GWA does not claim that it meets all of the statutory criteria, and in fact it does not even challenge each of the determinations the Region made regarding compliance with section 301(h). GWA's failure to challenge each of the substantive determinations regarding compliance with section 301(h) is fatal to its challenges to the Region's determinations that GWA failed to comply with section 301(h). Moreover, of the challenges it does raise, several fail to meet threshold procedural requirements, such as articulating challenges to the permit decision with sufficient specificity and addressing the permitting authority's response to comments.

2. GWA failed to establish any other basis on which the Board should review the Region's decision to deny the waivers:

- The Board rejects GWA's argument that a 2002 Stipulated Order in an enforcement action the Agency brought against GWA in 2001 bars the permitting authority from denying the waivers. Enforcement and permit decision making are distinct and independent authorities Congress delegated to the Agency, serving different purposes. The fact that the Agency brought a lawsuit against GWA to compel compliance with then-existing National Pollutant Elimination Discharge System ("NPDES") permit conditions, and entered into a Stipulated Order that does not contain any secondary treatment require-

ments, does not bar the Agency from deciding on the pending waiver applications.

- The record does not support GWA's claim that the Region did not allow GWA to submit more information in support of its applications after 2001. The record only demonstrates that, having allowed a first revision of the application in 1998, the Region did not allow a second revision to the applications in 2008 to add disinfection as a treatment. The Board determines that the Region did not clearly err, as its decision comports with the regulations and the discretion available to the Agency. A section 301(h) applicant does not have endless opportunities to revise its application. Having provided multiple opportunities over an extensive period of time, the Region acted properly in refusing to allow GWA to change the bases of its application.

- GWA, not the Region, bears the responsibility for the lack of information to adequately support the permit applications. It is not the permitting authority's responsibility to request a section 301(h) applicant to continuously provide supplementation until an applicant satisfies applicable regulatory and statutory requirements. The applicant is responsible for submitting timely, accurate, and complete waiver applications.

- The Board determines that the Region did not abuse its discretion in deciding to assess compliance with section 301(h) criteria with available information rather than allowing additional time to gather information from new outfalls.

- GWA failed to demonstrate that there are other "federally driven directives and EPA statements and actions" that conflict with requiring GWA to install secondary treatment.

Before Environmental Appeals Judges Charles J. Sheehan, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

Section 301(h) of the Clean Water Act ("CWA" or "Act") allows municipal wastewater treatment facilities that discharge effluent into marine waters to receive waivers from secondary treatment requirements that otherwise would apply to such sources under section 301(b)(1)(B) of the Act. To qualify for a section 301(h) waiver, the applicant must demonstrate that its waste water treatment plants ("WWTPs") meet comprehensive standards established by Congress and the U.S. Environmental Protection Agency ("EPA" or "Agency") to protect the water quality of the ocean environment. *See* CWA § 301(h), 33 U.S.C. § 1311(h).

Since 1986, Guam Waterworks Authority ("GWA" or "Petitioner") has operated two of its WWTPs – the Northern District Sewage Treatment Plant and the Hagåtña Sewage Treatment Plant (or "Agana" as referred to by the parties) – under section 301(h) waivers. During the most recent renewal process for these waivers, EPA Region 9 ("Region") denied the requests. Accordingly, GWA faces

the prospect of installing secondary treatment on both WWTPs, at a considerable cost.

GWA challenges the Region's decision to deny the reissuance of the waivers, raising two basic types of challenges to the Region's denial. GWA challenges some of the Region's determinations that GWA failed to comply with section 301(h), and also claims that there are other reasons why the Region should not have denied the waivers. Notably, GWA does not claim that it satisfies all of the statutory factors it must meet to be granted a section 301(h) waiver. In fact, GWA does not challenge each of the Region's determinations regarding compliance with the section 301(h). Instead, GWA's main claims are that the Region provided a very short opportunity to submit additional information in support of the pending applications, and that the Region's actions bar it from denying the waivers. GWA requests that the Environmental Appeals Board ("Board") overturn the Region's decision to deny the waivers to "allow the Stipulated Order and Master Plan process to work,"[1] or, in the alternative, remand the matter "for consideration as to whether * * * there are other alternatives that better serve the public good and provide for better environment protection over the long-term." Pet.'s Supp. Br. at 41.

For the reasons set forth below, the Board denies review of the Region's decision to deny the waivers. The decision below identifies the issues for Board consideration (Part I), describes applicable statutory and regulatory provisions (Part II), summarizes the standard of Board review (Part III), describes relevant factual and procedural history of the case (Part IV), analyzes the issues on appeal (Part V), and follows the analysis with a conclusion (Part VI) and Order (Part VII).

I. *ISSUES ON APPEAL*

Based on the challenges GWA makes, the Board must decide the following issues:

1. Has GWA demonstrated that it meets all of the criteria for obtaining a section 301(h) waiver?

2. Has GWA established any other basis on which the Board should review the Region's decision to deny the waivers?

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[1] Later in this decision, the Board provides details about the "Stipulated Order and Master Plan." *See infra* Parts V.B.1, V.B.4.

II. *STATUTORY HISTORY*

A. *CWA Framework*

The CWA prohibits any person from discharging any pollutant to waters of the United States from a point source, unless the discharge complies with the requirements of the statute. *See* CWA § 301(a), 33 U.S.C. § 1311(a). Section 402 of the CWA constitutes the principal provision authorizing discharges of pollutants, provided that the discharger satisfies certain stringent statutory requirements. *See* CWA § 402(a), 33 U.S.C. § 1342(a). This section of the CWA establishes a permitting regime known as the "national pollutant discharge elimination system" or NPDES program.

In the NPDES context, the CWA requires that permits contain effluent limitations and conditions, which in turn vary based upon the type of discharger. *See* CWA §§ 301-302, 33 U.S.C. §§ 1311-1312. GWA's Agana and Northern District WWTPs are "publicly owned treatment works," or POTWs within the meaning of the CWA.[2]

In enacting the CWA, Congress singled out POTWs for special attention, specifying that these facilities must achieve effluent limitations based on "secondary treatment,"[3] by July 1, 1977. CWA §§ 301(b)(1)(B), 304(d)(1), 33 U.S.C. §§ 1311(b)(1)(B), 1314(d)(1). Following Congress' directive, the Agency established minimum levels of POTW effluent quality, to be achieved by secondary treatment, for three pollutant parameters: (1) biochemical oxygen demand measured over five days ("BOD_5"); (2) suspended solids ("SS"); and (3) pH. 40 C.F.R. § 133.102. The technology-based effluent limits for these three parameters apply nationwide and, under most circumstances, must be included in NPDES permits issued to POTWs. *See id.* § 125.3(a)(1)(i).

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[2] A POTW is "a treatment works as defined by CWA section 212, which is owned by a State or municipality." Office of Water, U.S. EPA Office, EPA-833-K-10-001, *NPDES Permit Writers' Manual* A-14 (Sept. 2010). "The term 'treatment works' means any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature." CWA § 212(2)(A), 33 U.S.C. § 1292(2)(A).

[3] "Secondary treatment" provides the second step in a sequence of wastewater treatment processes that POTWs typically employ to remove contaminants from wastewater. The first step, "primary treatment," involves removal of coarse solids. Secondary treatment, the next step, involves deployment of aeration tanks, trickling filters, or other biological processes to reduce organic material in primary-treated wastewater by encouraging bacteria to consume it and transform it into stable byproducts. In some cases, "tertiary treatment" serves as a third step to remove nonbiodegradable toxic pollutants and inorganic chemicals such as phosphorus and nitrogen. *See generally* Office of Water, U.S. EPA, EPA 832-R-04-001, *Primer for Municipal Wastewater Treatment Systems* (Sept. 2004), *available at* http://www.epa.gov/owm/primer.pdf; Office of Water, U.S. EPA, *Technology Fact Sheets*, http://www.epa.gov/owm/mtb/mtbfact.htm.

In 1977, however, Congress amended the CWA by adding a new section 301(h) (later amended in 1981 and 1987). Several seacoast municipalities convinced Congress that, in some cases, the tides and currents present in deep ocean waters are capable of rapidly assimilating, oxygenating, and dispersing POTW discharges receiving only primary treatment, without harm to water quality or the marine environment. In such circumstances, secondary treatment would be an unnecessary yet significant expense for those ocean dischargers. *See*, *e.g.*, *Natural Res. Def. Council, Inc. v. EPA*, 656 F.2d 768, 772-73 (D.C. Cir. 1981) (summarizing congressional testimony of cities of Seattle and Port Angeles, Washington, and Anchorage, Alaska); Modification of Secondary Treatment Requirements for Discharges into Marine Waters, 44 Fed. Reg. 34,784, 34,784 (June 15, 1979) (describing historical impetus behind section 301(h)).

Accordingly, under section 301(h), Congress authorized the Agency to issue NPDES permits that "modify" the secondary treatment requirements for POTWs discharging into "marine waters,"[4] known as "section 301(h) modified permits," provided those POTWs are able to demonstrate, on a case-specific basis, that they meet nine (originally eight) "stringent criteria." CWA § 301(h), 33 U.S.C. § 1311(h). *See also* H.R. Rep. No. 95-830, at 73-75 (1977) (Conf. Rep.), *reprinted in* 1977 U.S.C.C.A.N. 4424, 4448-49; S. Rep. No. 95-370, at 4-5 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4330-31.

B. *Section 301(h) Criteria*

To qualify for a section 301(h) modified permit, the applicant must demonstrate to the satisfaction of EPA Administrator that it meets *all* of the following criteria:

1. There is an applicable water quality standard specific to the pollutant for which a modified permit is requested;

2. The proposed discharges attain or maintain water quality that assures protection of public water supplies, assures protection and propagation of a balanced indigenous population ("BIP")[5] of shellfish, fish, and wildlife, and allows recreational activities;

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[4] A discharge into "marine waters" refers, among other things, to a discharge into deep waters of the territorial seas. CWA § 301(h), 33 U.S.C. § 1311(h).

[5] A BIP "means an ecological community which: (1) [e]xhibits characteristics similar to those of nearby, healthy communities existing under comparable but unpolluted environmental conditions; or (2) [m]ay reasonably be expected to become re-established in the polluted water body segment from adjacent waters if sources of pollution were removed." 40 C.F.R. § 125.58(f).

3. The applicant has established a monitoring program to assess the impacts of the proposed discharges;

4. The proposed discharges do not cause additional pollution control requirements on other point or non-point sources;

5. The POTW has an approved pretreatment program;

6. The POTW provides enhanced urban area pretreatment (if serving a population of 50,000 or more);

7. The POTW has a toxics control program;

8. The proposed discharges do not cause an increase in effluent volume or amount of pollutants discharge; and

9. The POTW provides a minimum of primary or equivalent treatment, and its discharges meet applicable water quality criteria after initial mixing in the water surrounding or adjacent to the point at which the effluent discharges.

See CWA § 301(h)(1)-(9), 33 U.S.C. § 1311(h)(1)-(9); *see also* 40 C.F.R. §§ 125.56-.68. The Region determined that GWA did not meet the requirements of seven of the section 301(h) subsections, specifically subsections (2) to (3) and (5) through (9), and their implementing regulations codified in 40 C.F.R. part 125, subpart G.

III. *STANDARD OF REVIEW*

A. *Procedural Rules Governing Section 301(h) Determinations*

Part 124 of 40 C.F.R., entitled "Procedures for Decisionmaking," governs the procedures for making section 301(h) determinations. 40 C.F.R. § 125.59(i)(4)(i) ("[a]ny section 301(h) modification permit shall[] * * * [b]e issued in accordance with the procedures set forth in 40 C.F.R. part 124"); *id.* § 125.59(i)(5) ("[a]ppeals of section 301(h) determinations shall be governed by the procedures in 40 C.F.R. part 124"). The terms and conditions of a section 301(h) waiver become operational by their incorporation into an NPDES permit, that is, by modifying an existing NPDES permit – hence the term "section 301(h) modified permit." *See id.* § 125.56. Section 124.5 prescribes the procedures for NPDES permit modifications, which include section 301(h) modified permits. *Id.* § 124.5 (prescribing rules for, *inter alia*, the modification and

reissuance of NPDES permits). In sum, the same procedural rules governing the issuance of NPDES permits apply to section 301(h) determinations.

B. *Scope of Board Review and Threshold Requirements*

In determining whether to review a petition filed under 40 C.F.R. § 124.19(a), the Board first considers whether the petitioner has met threshold procedural requirements such as, *inter alia*, issue preservation.[6] *See* 40 C.F.R. § 124.19; *In re Circle T Feedlot, Inc.*, 14 E.A.D. 653, 656 (EAB 2010); *In re Beeland Group LLC*, 14 E.A.D. 189, 195 (EAB 2008); *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006). For instance, a petitioner must demonstrate that any issues or arguments it raises on appeal have been preserved for Board review, unless the issues or arguments were not reasonably ascertainable. 40 C.F.R. §§ 124.13, .19; *see In re City of Attleboro*, 14 E.A.D. 398, 406 (EAB 2009); *In re City of Moscow*, 10 E.A.D.135, 141 (EAB 2001); *In re City of Phoenix*, 9 E.A.D. 515, 524 (EAB 2000), *appeal dismissed per stip.*, No. 01-70263 (9th Cir. Mar. 21, 2002). Assuming that a petitioner satisfies all threshold procedural obligations, the Board then evaluates the petition to determine if it warrants review. *Indeck*, 13 E.A.D. at 143; *see also Beeland*, 14 E.A.D. at 194-95.

Ordinarily, the Board will not review an NPDES permit decision unless the permit conditions at issue are based on "a finding of fact or conclusion of law which is clearly erroneous." 40 C.F.R. § 124.19(a)(1); *In re Deseret Power Elec. Coop.*, 14 E.A.D. 212, 226 (EAB 2008); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 509 (EAB 2006); *In re Inter-Power of N.Y., Inc.*, 5 E.A.D. 130, 144 (EAB 1994). In addition, in its discretion, the Board may review the exercise of discretion by the permit issuer or an important policy consideration.[7] 40 C.F.R. § 124.19(a)(2); *Dominion*, 12 E.A.D. at 509; *Deseret*, 14 E.A.D. at 226. The Board analyzes petitions for review guided by the caution in the preamble to the Part 124 permitting regulations that the Board's power of review "should be

[6] Other threshold procedural requirements include: timeliness, standing, and compliance with the standard of specificity for review. *See, e.g., In re Beeland Group, LLC*, 14 E.A.D. 189, 194-95 (EAB 2008) (explaining that a petitioner must demonstrate that the threshold procedural requirements for permit appeals are met, including timeliness, standing, preservation of issues for review, and articulation of the challenged permit conditions with sufficient specificity).

[7] In reviewing the exercise of discretion by the permitting authority and policy considerations, the Board applies an abuse of discretion standard, which comports with the standards the Administrative Procedure Act establishes for the review of agency actions. *See* 5 U.S.C. § 706; *see also In re Desert Rock Energy Co., LLC*, 14 E.A.D. 484, 530, 539-40 (EAB 2009) (concluding that permit issuer abused its discretion and remanding permit); *In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 607-08 (EAB 2010) (identifying clear error or abuse of discretion as the standard for technical judgment that falls within the permit issuer's discretion and technical expertise), *appeal dismissed sub nom. Conservation Law Found., Inc. v. U.S. EPA*, No. 10-2141 (1st Cir. Dec. 6, 2010); *City of Attleboro*, 14 E.A.D. at 398, 428, 453 (finding no abuse of discretion in permit issuer's discretionary actions).

only sparingly exercised." Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). This reflects EPA's policy that favors final adjudication of most permits at the permit issuer's level. *Id.* at 33,412.

A petitioner seeking review of a permit provision bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a)(1)-(2). In order to show clear error, the petitioner must specifically state its objections to the permit and explain why the permit issuer's previous response to those objections is clearly erroneous, an abuse of discretion, or otherwise warrants review. *In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 584 (EAB 2010), *appeal dismissed sub nom. Conservation Law Found., Inc. v. U.S. EPA*, No. 10-2141 (1st Cir. Dec. 6, 2010); *Attleboro*, 14 E.A.D. at 406. A petitioner may not simply reiterate comments made during the public comment period but rather must substantively confront the permit issuer's subsequent explanations. *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005); *accord Dominion*, 12 E.A.D. at 666.

Finally, a petitioner seeking review of issues that are technical in nature bears a heavy burden because the Board generally gives substantial deference to the permit issuer on questions of technical judgment. *In re Town of Ashland*, 9 E.A.D. 661, 667 (EAB 2001); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567-68 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA,* 185 F.3d 862 (3d Cir. 1999).

IV. *FACTUAL AND PROCEDURAL HISTORY*

A. *Factual History*

The Region issued the existing 301(h) modified permits for the Agana and the Northern District WWTPs in 1986, and the permits expired in 1991.[8] Since then, GWA has operated its WWTPs under administratively extended permits pursuant to 40 C.F.R. § 122.6.[9] In 1990, the Public Utility Agency of Guam ("PUAG"), the legal entity that preceded GWA, submitted timely applications for renewal of both modified permits. *See* AGA 12; ND 12. Between 1991 and 1997, the Region requested additional information from the applicant to supplement the renewal applications. AGA 12; ND 12. On April 4, 1997, the Region issued a

[8] These modifications or waivers are effective only for the term of the modified permit. Permits are valid for five years, *see* 40 C.F.R. § 122.46(a), at which point POTWs desiring to continue their discharges under a section 301(h) modified permit must apply for permit renewal along with a request for a section 301(h) modification. *See id.* § 125.59(c)(4).

[9] This provision authorizes the Agency to allow for the conditions of an expired permit to continue in force until the effective date of a new permit. 40 C.F.R. § 122.6(a).

tentative decision notifying GWA of the Region's intention to deny the waivers. *See* AGA 2647-50 (Letter from Felicia Marcus, Regional Administrator, U.S. EPA Region 9 to Richard A. Quintanilla, General Manager, Guam Waterworks Authority (April 4, 1997)) [hereinafter referred to as "1997 Marcus Letter"]. The 1997 Marcus Letter explained that: (1) the Region had requested information from the applicant on various occasions but that the applicant had not responded to the various requests; (2) the applicant had failed to carry out sufficient monitoring and failed to demonstrate that the proposed discharges will not adversely impact public health or coral reef communities; and (3) based on the available data and the design and operation of the WWTPs, it would be necessary to deny the applications. 1997 Marcus Letter at 1-3. The Region explained that "one option to improve the chances of obtaining a favorable 301(h) decision is outfall extension with proper diffuser maintenance," and suggested that the applicant consider extending "both outfalls to deeper water farther from reef areas and shoreline beaches" and then file revised 301(h) applications. *Id.* at 3. The Region then advised the applicant that it had forty-five days to submit a letter of intent to revise its 301(h) applications for the Agana and Northern District WWTPs. *Id.*

On May 6, 1997, GWA submitted its letter of intent, which stated that GWA had opted to "improve its chances of obtaining a favorable 301(h) decision" by extending both outfalls and implementing a proper diffuser maintenance program, and that it would fill out the Application Questionnaire (required under 40 C.F.R. section 125.59(c)) to "adequately demonstrate compliance with all 301(h) requirements." AGA 2653-56 (Letter from Richard A. Quintanilla, General Manager, Guam Waterworks Authority, to Felicia Marcus, Regional Administrator, U.S. EPA Region 9 (May 6, 1997)) [hereinafter referred to as "Letter of Intent"]. On June 18, 1997, the Region confirmed receipt of GWA's letter of intent. *See* AGA 2657-58 (Letter from Alexis Strauss, Acting Director, Water Division, U.S. EPA Region 9, to Richard Quintanilla, General Manager, Guam Waterworks Authority (June 18, 1997)) [hereinafter referred to as "1997 Strauss Letter"]. In the 1997 Strauss Letter, the Region also suggested approaches for completing acceptable revised permit applications, identified the information needed to support the revised applications, encouraged GWA to refer to EPA guidance when filling out the Application Questionnaire and clarified that GWA's WWTPs would be considered "large dischargers," and therefore, GWA needed to respond to sections in the Application Questionnaire relating to large dischargers. *Id.*

On March 27, 1998, GWA timely submitted revised section 301(h) renewal applications for each WWTP. *See* AGA 13; ND 13. The revised applications provided architectural and engineering design and construction schedules for the outfall extensions at each of the WWTPs, stating that the Northern District outfall would be completed by 1999, and providing no completion date for the Agana outfall. *See* Reg.'s Resp. Br. at 10 (citing AGA 1760 and ND 1383).

On April 21, 1998, the Region issued a new letter notifying GWA that the applications were "significantly deficient in providing essential information supporting the outfall extensions." *See* AGA 2664-65 (Letter from Alexis Strauss, Acting Director, Water Division U.S. EPA Region 9 to Richard Quintanilla, General Manager, Guam Waterworks Authority (April 21, 1998) [hereinafter referred to as "1998 Strauss Letter"]. The 1998 Strauss Letter concluded, among other things, that: the outfall extension schedules appeared inconsistent with supporting documentation; the timeline for baseline studies and design work commencement and implementation was unclear; and GWA needed to demonstrate its commitment to providing the requested information. *Id.* at 1-2. The Region directed GWA to submit revised schedules for commencing, implementing and completing the required baseline studies and outfall extensions; identify secure funding sources; and complete a "Sewage Sludge Permit Application Form," which GWA had failed to provide. *Id.* at 2. The Region also informed GWA that it had not completed its review of the two modified permit applications and that it was possible that GWA would need to provide further information to support compliance of the permit applications with section 301(h) requirements. *Id.*

On June 30, 2000, GWA responded with additional information in support of its application for the Agana facility. *See* Reg.'s Resp. Br. at 11 (citing AGA 1417-2058). Later on, in February 2001 and August 2001, GWA submitted "Basis of Design" reports for the Northern District and Agana WWTPs, respectively. *Id.* at 11-12 (citing ND 1426-2007; AGA 1417-2058, 2733-2849). Between 2001 and 2009, the Region maintained only intermittent and informal communications with GWA regarding the permit applications. *Id.* at 12.

GWA completed construction of the Agana outfall and began its operation in December 2008. AGA 13. Completion of the Northern District outfall was achieved in January 2009, but GWA did not at that time install the diffuser for the outfall at this facility. ND 13 n.4.

On January 5, 2009, the Region issued Tentative Decision Documents proposing to deny both 301(h) renewal applications. AGA 72-138; ND 125-93. On June 3, 2009, the Region held a public hearing, and accepted public comments until June 30, 2009. On September 30, 2009, the Region issued its final decision denying both waivers, explaining that GWA failed to comply with the requirements of sections 301 (h)(2)-(3), (5)-(9) and their implementing regulations, particularly 40 C.F.R. §§ 125.60, .62(a)(1)(i), .62(b)-(d), .63, .65, .66, .67, .59(b)(3), and 122.44(d). *See* AGA 1-67 (AGA Final Decision Document ("AGA FDD")); ND 1-72 (Northern District Final Decision Document ("ND FDD")).

B. *Basis for Denial*

Specifically, the Region found and concluded that:

1. The applicant's proposed discharges will not comply with primary treatment requirements [section 301(h)(9); 40 C.F.R. § 125.60];

2. The applicant failed to show that it can consistently achieve Guam WQSs beyond the zone of initial dilution ("ZID"). Specifically, the applicant cannot consistently achieve the WQS for bacteria. In addition, the applicant failed to submit the information required to assess whether the proposed discharges would achieve WQSs for nutrients, whole effluent toxicity, toxic pollutants, and pesticides [section 301(h)(9); 40 C.F.R. §§ 125.62(a)(1)(i), 122.44(d)];

3. The applicant's proposed discharges may interfere with the protection and propagation of a balanced indigenous population ("BIP") of fish, shellfish, and wildlife, and may adversely affect recreational activities [section 301(h)(2); 40 C.F.R. § 125.62(b)-(d)];

4. The applicant did not continue the monitoring programs specified in its current section 301(h) modified permits and the current monitoring is not sufficient [section 301(h)(3); 40 C.F.R. § 125.63];

5. The applicant failed to develop and implement the required urban area pretreatment programs in accordance with CWA section 301(h)(6) and 40 C.F.R. § 125.66. The applicant failed to submit the necessary toxic pollutant analysis in accordance with 40 C.F.R. § 125.66(a). Consequently, the applicant failed to identify and categorize known or suspected sources of toxic pollutants or pesticides (40 C.F.R. § 125.66(b)). The applicant also failed to develop and implement non-industrial source control programs that would have informed the public about non-point and wastewater issues and household toxic control measures (40 C.F.R. § 125.66(d)). In addition, the applicant did not indicate that it plans to implement pre-treatment [section 301(h)(5), (6), (7); 40 C.F.R. §§ 125.65, 125.66];

6. The applicant failed to demonstrate that there will be no new or substantially increased discharges from the point sources of the pollutants to which the section 301(h) variance will apply above those specified in the current

> section 301(h)-modified permit [section 301(h)(8); 40 C.F.R. § 125.67];
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> 7. The applicant did not provide determinations or concurrences from the Guam Bureau of Planning, Guam Department of Agriculture, and Guam Environmental Protection Agency that the applicant's discharges are consistent with the Territory of Guam's Coastal Zone Management Program, nor did the applicant provide determinations from the National Oceanic and Atmospheric Administration (NOAA) that the applicant's discharges are in accordance with Title III of the Marine Protection, Research and Sanctuaries Act, or from the U.S. Fish and Wildlife Service and NOAA's National Marine Fisheries Service that the discharges are not likely to adversely affect listed threatened or endangered species or habitat. 40 C.F.R. § 125.59(b)(3).

AGA FDD at 4-6 (Summary of Findings); ND FDD at 4-6 (Summary of Findings). GWA seeks review of the Region's decision to deny the waivers.

V. *ANALYSIS*

A. *Has GWA Demonstrated that It Meets All of the Criteria for Obtaining a section 301(h) Waiver?*

While GWA raises several arguments explaining why, in its view, the Region clearly erred or was arbitrary and capricious in denying re-issuance of the waivers, GWA has not demonstrated that it meets all the criteria for obtaining a section 310(h) waiver. Indeed, GWA does not even argue that it meets all of the statutory and regulatory requirements to be granted section 301(h) modified permits, and in fact, it does not even challenge all of the determinations the Region made regarding compliance with the section 301(h) criteria. As noted earlier in this decision, the Region found that GWA failed to comply with seven of the nine section 301(h) criteria and their implementing regulations.[10] On appeal, GWA appears to challenge only five of the Region's determinations, leaving two determinations unchallenged.[11]

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[10] Specifically, the Region found that GWA failed to meet the requirements of section 301 (h) subsections (2), (3), (5), (6), (7), (8), and (9), and their implementing regulations, particularly 40 C.F.R. §§ 125.60, .62(a)(1)(i), .62(b)-(d), .63, .65, .66, .67, .59(b)(3), 122.44(d).

[11] The Board uses the term "appears" because GWA's appeal does not clearly articulate which part of the Region's analysis it challenges.

Specifically, GWA appears to challenge the Region's determinations regarding compliance with: (1) section 301(h)(2) (protection and propagation of a BIP of shellfish, fish, and wildlife and attainment of water quality that allows recreational activities); (2) section 301(h)(3) (establishment of a system for monitoring impact of proposed discharges); (3) sections 301(h)(5) and (7) (pretreatment and toxics control program); (4) section 301(h)(9) (attainment of primary treatment and state WQSs beyond the ZID); and (5) 40 C.F.R. § 125.59(b)(3) (concurrences from State, local and/or Federal agencies that discharges will not interfere with local or federal laws or regulations).

GWA, however, does not challenge the Region's findings regarding compliance with the requirements of the urban area pretreatment program (section 301(h)(6)) or the requirement that there be no new or substantially increased discharges from the point sources of the pollutants to which the section 301(h) variance will apply above those specified in the current section 301(h) modified permit (section 301(h)(8)). This is significant because the permitting authority may not grant a waiver unless the applicant demonstrates compliance with *all* the statutory factors and regulatory requirements. *See* CWA § 301(h), 33 U.S.C. § 1311; 40 C.F.R. § 125.59(h)(i)(1). As noted earlier in this decision, the CWA requires all POTWs to comply with secondary treatment requirements unless a POTW can demonstrate to the satisfaction of the permitting authority that it complies with all section 301(h) criteria. *See* CWA §§ 301(b)(1)(B), (h), 33 U.S.C. §§ 1311(b)(1)(B), (h).

The failure to challenge all of the substantive determinations regarding compliance with section 301(h) criteria is fatal to GWA's attempt to demonstrate clear error in the Region's assessment of section 301(h) compliance. Even if GWA were to succeed in its challenges to the Region's determinations regarding compliance with one or more of the section 301(h) criteria, the Region's denial would still be proper, as the permitting authority may reject a modified permit request for failure to comply with any of the statutory and regulatory criteria.

In addition, even if GWA would have challenged the determinations it has failed to address (i.e., compliance with sections 301(h)(6) and 301(h)(8)), GWA's petition would still fall short. Most of the arguments GWA raises on appeal fail to meet threshold procedural requirements. For instance, most of the arguments are a reiteration of comments raised below without addressing the Region's response to comments or explaining why the Region's response is clearly erroneous. This is the case for GWA's challenges to the Region's determinations regarding compliance with sections 301(h)(5) and (7) and for most of the arguments regarding

section 301(h)(9).[12] As explained earlier in this decision, a petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's explanations in its response to comments document. *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005); *accord In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 666 (EAB 2006). Other arguments, like GWA's challenges to the Region's determination regarding section 301(h)(3), lack required specificity and fail to address the Region's response to comments.[13] These substantive and procedural flaws in the petition are fatal to GWA's request for review of the Region's basis for denial.

In sum, not only has GWA failed to demonstrate that it meets all of the criteria for obtaining a section 301(h) waiver, its petition fails to satisfy threshold procedural requirements necessary to obtain Board review of the Region's determinations regarding compliance with section 301(h).

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[12] *Compare* Pet.'s Supp. Br. at 35-37 (arguments about pretreatment component of the Toxic Control Program), *with* RTC at 36-37 (GWA Comment 22); Pet.'s Supp Br. at 37-38 (arguments about nonindustrial source control component of Toxic Control Program), *with* RTC at 37-38 (GWA Comment 23); Pet.'s Supp. Br. at 27-29 (arguments regarding the use of enterococcus as pathogen indicator), *with* RTC at 30-31 (GWA Comment 18); Pet.'s Supp. Br. at 30-32 (arguments about nutrients), *with* RTC at 33 (GWA Comment 19); Pet.'s Supp. Br. at 32-34 (arguments about toxicity), *with* RTC at 34 (GWA Comment 20); Pet.'s Supp. Br. at 33-34 (arguments about toxic pollutants and pesticides), *with* RTC at 35 (GWA Comment 21).

[13] *Compare* Pet.'s Supp. Br. at 17-21 (arguing that GWA conducted off-shore monitoring, that it completed priority pollutants and toxicity testing in 1998, 2000, 2003, 2007, and 2008, and that EPA never requested certain monitoring, but failing to make the necessary connections between its arguments and the Region's findings in the Final Decision Document and the Region's response to comments), *with* AGA FDD at 4, 50-57 (concluding that GWA failed to established a monitoring program that meets the requirements of section 301(h)(3) and 40 C.F.R. § 125.63 because GWA's program was deficient in each of the three required components: biological monitoring; receiving water quality monitoring; and effluent monitoring), *and* RTC at 27-28 (Response GWA Comment 15) (explaining, *inter alia*: the monitoring requirements applicable to section 301(h) applicants; problems with newly acquired data concerning offshore monitoring; that GWA failed to submit adequate baseline monitoring for the proposed extended outfalls; and that GWA failed to establish and comply with appropriate biological monitoring such as sediment and fish tissue analysis).

As the Board has stated on numerous occasions, to warrant review, allegations must be specific and substantiated. *See*, *e.g.*, *In re New Eng. Plating Co.*, 9 E.A.D. 726, 737-39 (EAB 2001) (finding that petition lacked sufficient specificity for the Board to make a determination on the issue petitioner presented and concluding that the permit issuer did not clearly err; stating that to warrant review allegations must be specific and substantiated); *see also In re Envotech, L.P.*, 6 E.A.D. 260, 267 (EAB 1996) (denying review of petitions for lack of specificity). The burden of demonstrating that review is warranted falls on the petitioner, and the Board does not entertain vague or unsubstantiated claims. *In re City of Attleboro*, 14 E.A.D. 398, 443-44 (EAB 2009).

B. *Has GWA Established Any Other Basis on Which the Board Should Review the Region's Decision to Deny the Waivers?*

Because GWA does not challenge all of the Region's determinations, which would be necessary to obtain a favorable Board decision, GWA must demonstrate that there are other compelling reasons why the Region clearly erred or abused its discretion in denying the waivers, such as fundamental procedural errors in the decision making process. GWA does raise other arguments in an effort to obtain a favorable Board decision. GWA claims, in general, that the Region should not have issued the decisions because: (1) EPA's own actions bar the Region from denying the waivers; (2) the Region provided a very short opportunity to provide information to support the pending applications by not allowing information after 2001; (3) the Region should have allowed adequate time for GWA to operate with the new outfalls and collect more information; and (4) other "federally driven directives and EPA statements and actions" conflict with requiring GWA to install secondary treatment.[14] *See* Pet.'s Supp. Br. at 39 (Conclusion). In sum, GWA raises procedural challenges and equitable arguments.

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[14] On appeal, Petitioner makes the following general assertions: (1) The timing of the denial is arbitrary and capricious and factually incorrect because the Region failed to consider the existence of other federally driven directives and EPA statements and actions, including, but not limited to, Stipulated Order, the 2006 Amended Stipulated Order, Petitioner's Water Resources Master Plan and the pending military buildup; (2) The Region failed to consider changes GWA was undertaking at the direction of EPA that would have had an effect on its sewage discharges from the plants; (3) The Region failed to adequately consider and address scientific facts relative to non-point source pollution and septage discharges; (4) The Region acted in an arbitrary and capricious manner by concluding that EPA's own standards and policies governing affordability of secondary treatment are irrelevant; (5) The Region lacked an adequate basis for refusing to consider the scientific bases of Petitioner's responses to the 2008 Tentative Determination; (6) The Region failed to properly consider all of Petitioner's non-industrial source control programs; (7) The Region failed to present accurate and factual information in the final decision and the associated documentation; (8) The Region did not give adequate reasons, and did not have an adequate basis, to change position, and Petitioner was entitled to rely on EPA's prior actions and statements. *See* Pet.'s Supp. Br. at 6-38.

As noted above, GWA's petition is unclear. For example, the petition does not make the necessary connections between the arguments GWA raises and the determinations the Region made regarding compliance with each of the criteria section 301(h) sets forth. In addition, when attempting to address the Region's response to comments, the petition does not provide specific citations; instead it cites to the "Administrative Record" in general. *See* Pet.'s Supp. Br. at 12, 15, 17-22, 25, 27-28, 30, 32, 34, 36. Apart from the fact that this case concerns a lengthy record that extends over a period of more than twenty years, and a 44-page, single-spaced, response to comments document, the burden of demonstrating that review is warranted rests with the petitioner. It is not incumbent upon the Board to scour the record to determine whether an issue was properly raised below or determine what part of the Region's analysis the petitioner is challenging. *See*, *e.g.*, *In re Encogen*, 8 E.A.D. 244, 250 n.10 (1999).

Despite these flaws in the petition, the Board strives to fairly construe GWA's claims and in the text above addresses GWA's principal claims.

To determine if any of these claims have merit, the Board considers whether: (1) the Region is barred from denying the waivers; (2) the record supports GWA's claim that the Region impermissibly did not allow GWA to submit information after 2001; (3) the Region abused its discretion in not allowing additional time to gather information from the new outfalls; and (4) there are other "federally driven directives and EPA statements and actions" that conflict with requiring GWA to install secondary treatment. The Board begins its analysis by first addressing whether the denial of the waivers is legally barred.

1. *Is the Region Barred from Denying the Waivers?*

GWA asserts that other "federally driven directives and EPA statements and actions" conflict with requiring GWA to install secondary treatment, specifically, the existence of a Stipulated Order addressing CWA violations at GWA's WWTPs.[15] *See* Pet.'s Supp. Br. at 16-17.

In December 2002, EPA sued GWA in the United States District Court of Guam seeking injunctive relief and civil penalties for CWA and Safe Drinking Water Act ("SDWA") violations at several of GWA's POTWs (the Agana and Northern District POTWs included) and three public water systems. *See* Reg.'s Reply Br. at 75. In 2003, the court entered a Stipulated Order, which required GWA to take certain actions to come into compliance with the then-existing permit requirements. *Id.*; *see United States v. Guam Waterworks Auth.*, No. 02-00035 (D. Guam June 5, 2003) (stipulated order for preliminary relief) [hereinafter "Stipulated Order"]. In 2006, the parties consented to amendments to the Stipulated Order. Pet.'s Supp. Br. at 5; *United States v. Guam Waterworks Auth.*, No. 02-00035 (D. Guam Oct. 19, 2006) (stipulation and order amending stipulated order for preliminary relief) [hereinafter "Amended Stipulated Order"].

GWA suggests that the enforcement action the Region initiated against GWA bars the Region from denying the waivers because the Stipulated Order and its 2006 amendment do not contemplate installation of secondary treatment. *See* Pet.'s Supp. Br. at 16-17. In GWA's words it is "arbitrary, capricious and unlawful for the EPA to initiate *another enforcement* action relative to denying Petitioner's waivers when the EPA has already waived its ability to deny Petitioner's waivers by entering into the Stipulated Order that did not contain any secondary treatment requirement." *Id.* at 16 (emphasis added).

GWA's arguments are fundamentally flawed. First, GWA confuses the exercise of enforcement authority with permit decision making. Enforcement and permit decision making are distinct and independent authorities Congress dele-

[15] Later in this decision, the Board addresses the other arguments GWA makes in support of this assertion. *See infra* Part V.B.4.

gated to the Agency, serving different, yet complementary purposes. Each of these authorities is guided and governed by different legal provisions. For instance, the CWA authorizes EPA to issue NPDES permits allowing discharges of pollutants into navigable waters of the United States, provided that the discharges comply with the requirements of the CWA. *See* CWA §§ 301, 402, 33 U.S.C. §§ 1311(h), 1342. Enforcement, on the other hand, is the authority to initiate administrative or judicial action to compel compliance with the statute and, where appropriate, permit conditions. *See* Black's Law Dictionary 549 (7th ed. 1999) ("the act or process of compelling compliance with the law"). The authority to enforce CWA violations is governed by section 309, 33 U.S.C. § 1319. The proceeding at stake in this case – examination of section 301(h) applications – is governed by sections 301(h) and 402 of the CWA. The fact that the Agency brought a lawsuit against GWA for CWA violations, in particular NPDES permit violations at some of GWA's POTWs, including the Agana and Northern District WWTPs, and entered into a Stipulated Order addressing NPDES compliance does not, without more, bar the Agency from making NPDES permit determinations for these facilities. More importantly, it does not bar the Agency from deciding the pending section 301(h) waiver applications. Contrary to GWA's characterizations, the Region's decision to deny the waivers is not "another enforcement action" on NPDES compliance at the same facilities. The Region's determination to deny the waivers is part of the permit decision making process GWA initiated when it applied for section 301(h) waivers, a separate and distinct legal procedure from the enforcement action the Region initiated in 2002 to compel compliance with the then-existing permit conditions and SDWA requirements.

Second, GWA does not claim that the issue of secondary treatment was addressed in the Stipulated Order or that it was adjudicated as part of the 2002 lawsuit. Nor does GWA claim that the pending applications were the subject of the Stipulated Order.[16] GWA's chief claim is that because the Stipulated Order is silent about the need for secondary treatment, the Region somehow waived its right to rule on the waiver applications in a manner that would require GWA to install secondary treatment. As explained more fully in Part V.B.4 of this decision, neither the CWA nor the applicable regulations authorize the permit issuer to waive secondary treatment requirements without a demonstration by the applicant of compliance with the requirements of section 301(h). Moreover, the mere fact

[16] Other than requiring GWA to develop "a scope of work and schedule for initiating and completing a baseline monitoring survey in the area of the proposed outfall extension to support GWA's revised CWA section 301(h)" applications for the Agana and Northern District WWTPs, the Stipulated Order does not address the waivers or the issue of secondary treatment. *See* Stipulated Order ¶¶ 35-36; Amended Stipulated Order ¶¶ 35-36. The issue of secondary treatment was not adjudicated as part of the enforcement action or its resolution through the Stipulated Order. At the time GWA was operating under administratively extended waivers, the Region had not completed its evaluation of the pending waiver applications, and therefore, the Region had no basis at that time to require GWA to design for, or upgrade to, secondary treatment. *See* Reg.'s Resp. Br. at 75-76.

that the Stipulated Order is silent about the need for installation of secondary treatment cannot be construed as an indication that the Region intended to grant the waivers. *See* Reg.'s Resp. Br. at 75-76. As the Region explains, the Stipulated Order was based on, and designed to, remediate GWA's non-compliance with the then-applicable permit requirements. *Id*. There is simply no legal basis for construing silence in such a way or leaping to the conclusions GWA proffers.[17] Since GWA's arguments lack legal support,[18] the Board rejects GWA's contention that the Stipulated Order and its amendment bar the Region from denying the waivers.

2. *Does the Record Support GWA's Claim that the Region Did Not Allow Any More Information After 2001?*

Next the Board turns to GWA's claim that the Region prevented GWA from submitting information in support of its pending waiver applications. According to GWA, the Region "closed the window" of opportunity to provide information to support the 1998 applications in 2001.[19] Pet.'s Supp. Br. at 10-12. To support its claim, GWA relies on Exhibit G of its petition, a declaration from Julie Shane (Senior Engineer Supervisor from GWA) and a declaration from Paul J. Kemp (GWA's Assistant General Manager for Compliance and Safety) stating that during an April 3, 2008 teleconference, Doug Eberhardt, a Region official,"unequivocally" informed GWA "that the 'window' for GWA to submit additional information with regard to the 301(h) waiver application had closed in 2001." *Id*. at 9; *id*. Ex. G. GWA's appeal also references a March 2008 teleconference in which Region officials allegedly made the same comment. Pet.'s Supp. Br. at 11.[20]

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[17] In this section the Board addressed GWA's argument that the enforcement action the Region initiated bars the Region from denying the waivers. Later in this decision, *see infra* Part V.B.4, the Board addresses GWA's argument that the negotiations of, and entering into, the Stipulated Order and 2006 Amended Stipulated Order evidences the Region's commitment to grant the waivers.

[18] GWA cites to *United States v. Armour & Co.*, 402 U.S. 673 (1971), for the proposition that "the EPA is bound to the terms of the [Stipulated] Order." Pet.'s Supp. Br. at 16. This case is not on point. The case GWA cites stands for the proposition that parties that have agreed to the terms of a consent decree waive their rights to litigate *the issues raised in the case*. *Id.* at 681-82. As noted above, neither the waiver applications nor the need for secondary treatment were part of the 2002 enforcement action.

[19] The year 2001 seems to be the last time GWA submitted supplemental information in support of its 1998 revised section 301(h) applications.

[20] GWA made similar comments during the public comment period by mentioning the March 2008 and the April 2008 teleconferences. With respect to the March conference call, GWA's comments stated that the Region informed GWA that "there is no opportunity for *revision* of the application;" with respect to the April 3rd conference call, GWA claimed that "EPA stated that the 'window' for GWA to *submit additional information* had closed in 2001." RTC at 29 (GWA Comment 17) (emphasis added). In its response to comments, the Region did not address each of these comments separately. The Region, however, stated that it did not prevent *submittal of information* at any time,

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Notably, other than implying that the Region did not allow GWA to submit information related to its request to treat bacteria with disinfection,[21] GWA is not arguing that the Region rejected specific information GWA submitted after 2001. GWA's argument is that on two occasions in 2008, the Region informed GWA that the opportunity to submit any additional information to support the pending applications closed in 2001.

For its part, the Region denies having "closed the window" of opportunity to "submit additional information" after 2001. *See* Resp. Br. at 20. The Region, however, clarifies that during a March 20, 2008 conference call, the Region and GWA discussed the issue of disinfection. *Id*. at 22. According to the Region, during that call, GWA suggested that it could begin to disinfect its discharges to address the bacteria issue.[22] *Id*. The Region explains that it advised GWA that the Region could not accept additional information regarding disinfection under the 301(h) regulations because that would constitute a revision to the applications and that the window to change the bases of the applications closed in 2001. *Id*. at 22-23 (citing AGA 190-91, 2730-32; ND 2658-60). Therefore, according to the Region, rather than the opportunity to submit supplemental information, what was closed was the opportunity to submit information that would change the bases for the applications, and thus would be considered revisions.[23] In this case, accepting GWA's proposal to treat bacteria with disinfection would require another revision to the applications.

As a preliminary matter, the Board must address whether in the course of evaluating the merits of GWA's petition it should consider the declarations GWA proffers as Exhibit G. These declarations are not part of the administrative record,

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that it encouraged GWA to submit any additional information during the public comment period, and that it has not offered GWA another opportunity to *revise* its applications. *Id*. at 30 (Response GWA Comment 17).

[21] *See* Pet.'s Supp. Br. at 30 (claiming that during the March 2008 teleconference, it requested the opportunity to implement disinfection, but that the Region denied such opportunity by informing GWA that the window to submit additional information was closed in 2001).

[22] In its 1998 applications, GWA stated that the effluent from both POTWS will not achieve the State's water quality standards for bacteria. RTC at 30 (Response GWA Comment 17).

[23] The record supports the Region's explanation that during a March 2008 teleconference it notified GWA that the window to change the bases of the applications, or opportunity *to revise* the application, closed in 2001. In fact, GWA's own comments during the public comment period support the Region's position. AGA 190; RTC at 29 (GWA Comment 17) (stating that during a March 2008 teleconference Region personnel informed GWA that "there is no opportunity for *revision* of the applications") (emphasis added).

and on that basis the Region opposes Board consideration of these documents.[24] Then the Board will examine GWA's claims regarding the opportunity to submit information in support of the pending applications. Specifically the Board will examine whether the Region erred in denying GWA the opportunity to submit information related to its request to treat bacteria with disinfection and whether the Region prevented GWA from submitting supplemental information.

a. *Should the Board Consider Exhibit G in Its Examination of GWA's Claims?*

Although a document is not part of the administrative record, the Board may nonetheless consider it. The Board has on numerous occasions, considered, in examining a case, documents presented on appeal that were not part of the administrative record. This is particularly true in cases where, as here, a petitioner submits such documents as support for its arguments on appeal and where the appeal process is the logical and/or first opportunity to present such documentation. *See, e.g., In re Russell City Energy Ctr., LLC*, 15 E.A.D. 1, 39 (EAB 2010) (considering certain documents submitted in support of the petition even though documents were not part of the administrative record), *appeal docketed sub nom. Chabot-Las Positas Cmty Coll. Dist. v. EPA*, No. 10-73870 (9th Cir. Dec. 20, 2010); *In re Dominion Energy Brayton Point, LLC*, 13 E.A.D. 407, 418 (EAB 2007) (citing numerous other Board cases for the same proposition). In this particular case, GWA proffers the declarations in Exhibit G as support for one of its main claims on appeal – that the Region "closed the window" of opportunity to provide information in support of the application after 2001 – and to counter the Region's response to comments. While the declarations post-date the public comment period, GWA raised the issue for which the declarations provide support in its comments below. RTC at 29 (GWA Comment 17).[25] Further, it appears that the purpose of the declarations is to respond to the Region's response to comments. On balance, it appears that the appeal process is the logical place for these declarations to have emerged. Therefore, the Board declines to deny consideration of these declarations.

[24] The Region claims that the declarations were not submitted during the public comment period and are not part of the administrative record, and asks that the Board decline to supplement the administrative record with this Exhibit. *See* Resp. Br. at 23-24 & n.15. Notably, GWA is not requesting that the Board supplement the record. However, GWA does request, and the Board does address, whether it should consider the declarations in its examination of GWA's appeal.

[25] GWA stated in comments below that "[d]uring a teleconference with EPA staff on April 3, 2009, EPA stated that the 'window' for GWA to submit any additional information had closed in 2001." RTC at 29 (GWA Comment 17). The Board reads the reference to 2009 as a typographical error, because the declarations in Exhibit G identify the April call as having occurred on April 3, 2008.

Having clarified this point, the Board examines whether the Region clearly erred in denying GWA the opportunity to submit information related to its request to treat bacteria with disinfection.

b. *Did the Region Clearly Err in Denying GWA the Opportunity to Submit Information Related to GWA's Request to Add Disinfection?*

The Board determines that the Region did not clearly err in its decision to deny GWA the opportunity to submit information related to adding disinfection on the basis that it would require another revision to the applications. Similarly, the Board determines that the Region did not clearly err in its decision to deny such a revision.

As the Region points out, under the applicable regulations, changes in treatment levels, for example to add disinfection, are considered revisions. *See* 40 C.F.R. § 125.59(d)(2)-(3) (allowing applicants to propose changes "in treatment levels, outfall and diffuser location and design" through a revision). A section 301(h) applicant does not have endless opportunities to revise its applications or to submit information. As the Region noted in its response to comments, the section 301(h) regulations do not contemplate that a discharger will be given multiple opportunities to revise its application in an attempt to find the minimum level of treatment that would meet the section 301(h) criteria. RTC at 30 (Response GWA Comment 17). The Board agrees.

In promulgating the section 301(h) regulations, EPA was mindful of the disruptions to the review process and delays in compliance with the CWA that allowing multiple revisions could create.[26] Therefore, EPA decided to provide two separate and distinct opportunities to revise section 301(h) applications instead of allowing multiple revisions.[27] One opportunity allows applicants to propose upgrades or downgrades to treatment levels and/or outfall and diffuser location or design if EPA's tentative decision is to deny the application. 40 C.F.R. § 125.59(d)(2).[28] GWA used this opportunity in 1998 when it submitted revised

[26] *See* Modification of Secondary Treatment Requirements for Discharges Into Marine Waters, 47 Fed. Reg. 53,666, 53,668 (Nov. 26, 1982) (noting that "because revisions to proposed treatment levels will require a reanalysis by EPA to determine compliance with the 301(h) criteria, such revisions can result in disruptions to the review process and attendant delays in compliance with the CWA.").

[27] *See* 47 Fed. Reg. at 53,668 (noting that "submission of multiple options or revisions can create confusion as to what the applicant is actually proposing.").

[28] According to section 125.59(d)(2), "Applicants may revise their applications one time following a tentative decision to propose changes to treatment levels and/or outfall and diffuser location and design in accordance with § 125.59(f)(2)(I)." 40 C.F.R. § 125.59(d)(2). Applicants proposing to
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applications based on improved discharges involving new outfalls discharging farther offshore and in deeper water. The other opportunity to revise a section 301(h) application is under section 125.59(d)(3).[29] However, this opportunity is at the discretion of the permitting authority. An applicant desiring to revise its application under section (d)(3) must either be requested to submit information by the permitting authority or be authorized by the permitting authority to submit additional information.[30] *Id.* § 125.59(d)(3). The record does not show that the Region either requested or authorized GWA to submit information that would change the proposed treatment levels. In its response to comments, the Region explains that because the permit under which the GWA's WWTPs are operating were issued in 1986, EPA did not believe that an additional round of waiver applications and tentative decisions would be appropriate. RTC at 30 (Response GWA Comment 17). Given that prior to the 2009 Tentative Decision Documents the Region had issued an earlier tentative decision in 1997 and a letter in 1998 notifying GWA of deficiencies in its applications, the Board does not find clear error or abuse of discretion in the Region's decision to deny another round of applications and tentative decision documents. In addition, an applicant, like GWA, seeking authorization to submit information must demonstrate that it made a diligent effort to provide such information with the application and was unable to do so, and must submit a plan of study, including a schedule, for data collection and submittal of the additional information. 40 C.F.R. § 125.59(g)(1)-(2). GWA does not claim, and the record does not show, that GWA complied with these requirements.

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downgrade "treatment levels and/or outfall and diffuser location and design" must justify their revisions "on the basis of substantial changes in circumstances beyond the applicant's control since the time of application submission." *Id.* Applicants who desire to revise their applications under section 125.59(d)(2) are required to submit a letter of intent within forty five days of EPA's tentative decision, and submit the revised application within one year of EPA's tentative decision on their original applications. *Id.* § 125.59(f)(2)(A)-(B).

[29] "Applicants *authorized or requested to* submit additional information under § 125.59(g) may submit a revised application in accordance with § 125.59(f)(2)(ii) where such additional information supports changes in proposed treatment levels and/or outfall location and diffuser design." 40 C.F.R. § 125.59(d)(3)(emphasis added). Applicants desiring to revise their applications under section 125.59(d)(3)) are required to submit the revised application as described for new applications in section 125.59(f)(1) concurrent with submission of the additional information under section 125.59(g). *Id.* § 125.59(f)(2)(ii).

[30] Interestingly, section 125.59(d)(3) was envisioned as an opportunity to request revisions to treatment levels *prior to the tentative decision*. *See* 47 Fed. Reg. at 53,668. The Agency felt that limiting the opportunity to seek revisions only after issuance of a tentative decision (i.e., 125.59(d)(2)) could be disadvantageous in cases where applicants are authorized or requested under section 125.59(f) to collect substantial additional data. *Id.* Notably, in this particular case, the Agency issued its first tentative decision in 1997.

In light of all this, the Board determines that the Region did not clearly err in its decision to deny GWA the opportunity to submit disinfection-related information on the basis that it would constitute a revision to the applications. The Board now examines whether the Region prevented GWA from submitting supplemental information.

c. *Did the Region Prevent GWA from Submitting Supplemental Information?*

Upon examination of the totality of the record, and the facts surrounding this case, even if the Board were to admit as true the declarations GWA proffers and conclude that indeed Region 9 personnel informed GWA during the April 2008 teleconference[31] that its opportunity to submit any additional information closed in 2001, the Board is not persuaded that the Region is to blame for the lack of information supporting GWA's applications or GWA's decision not to provide supplemental information before or during the public comment period. The record strongly indicates that GWA is to blame for the lack of supporting information for GWA's section 301(h) waiver request.

Significantly, GWA does not claim that it submitted, and that the Region denied, information submitted after 2001. One of the arguments GWA makes on appeal is that Guam's WQSs changed in 2001, and that GWA has been deprived of the opportunity to update its application based on the new standards. Pet's. Supp. Br. at 32, 39. Yet, GWA does not claim that immediately thereafter, in the time between 2001 and the 2008 teleconferences, or during the public comment period, it attempted to submit new information to EPA based on the new standards. GWA could have tried to submit additional information between 2001 and 2008, but did not do so. Instead, GWA implies that it had no reason to submit additional information after 2001 because it assumed that its applications were complete, that the Region led GWA to believe that it was going to approve the applications,[32] and that it was the Region's responsibility to request any additional information needed for GWA to show compliance with section 301(h) require-

[31] As noted above, the record supports the Region's explanation that during the March 2008 teleconference it notified GWA that the opportunity *to revise* its application had closed in 2001, *see supra* note 20. However, the record is unclear as to what transpired during the April teleconference. GWA claims that during that teleconference the Region notified GWA that the opportunity to *submit additional information* closed in 2001. According to the Region, what was closed was the opportunity to submit information that would change the basis of the applications and would require revisions.

[32] Because GWA raises this argument in other parts of its petition the Board provides its analysis of this specific argument later in this decision. *See* Part V.B.4 *infra* (addressing GWA's arguments that it has a right to rely on the Region's representations).

ments.[33] As explained more fully below, the Board is not persuaded by any of these arguments.

Regardless of what transpired during the April 2008 teleconference, GWA was given the opportunity to submit information during the public comment period on the Tentative Decision. At that point, the Region invited anyone who believed that the tentative decisions to deny the waivers were inappropriate to submit information in support of their positions. *See* AGA 145-47 (Notice of Public Hearing); ND 200-02 (Notice of Public Hearing). GWA failed to provide additional information during the public comment period on the Tentative Decision. Instead, GWA asked for more time to gather information, to work with EPA to improve its monitoring programs, and claimed that it would provide any information the Region would request. *See* RTC at 12 (Response GWA Comment 8), 23 (GWA Comment 12).

Contrary to GWA's suggestions, it is not the permitting authority's responsibility to request a section 301(h) applicant to continuously provide supplementation until an applicant satisfies applicable regulatory and statutory requirements. It is the applicant, not the permitting authority, who is responsible for submitting timely, accurate, and complete waiver applications.

In addition, as previously noted, the regulations do not allow endless opportunities for a section 301(h) applicant to submit information in support of its applications. The regulations authorize the Agency to, in its discretion, request more information from an applicant, or allow an applicant seeking to submit information to do so, but the applicant seeking authorization to submit information must, among other things, demonstrate that it made a diligent effort to provide such information with its application and was unable to do so. 40 C.F.R. § 125.59(g)(1)-(2). If GWA wanted to submit additional information, it should have followed the requirements section 125.59(g) sets forth instead of passively waiting for the Region to request information.

Moreover, the record is replete with examples where the Region asked for information, even post 2001 information,[34] or informed GWA that its applications

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[33] GWA claims that, other than information related to the outfall extensions, the Region did not ask for any other information during that period. Pet.'s Supp. Br. at 4, 39. The implication of GWA's argument is that it was the Region's obligation to request information from GWA regarding other aspects of the applications.

[34] The record shows that the Region asked for, and considered in its review of the applications, the following post 2001 information: discharge monitoring reports from 2005 to 2009 and whole effluent toxicity data from 2007. RTC at 12-13 (Response GWA Comment 8), 22 (GWA Comment 12). The record also shows that in January 2002 and December 2004, the Region requested that GWA conduct additional baseline monitoring. *See id.* at 22 (GWA Comment 12).

were deficient,[35] yet GWA did not provide the level of information required to support its waiver applications. To expect that the permitting authority identify each and every flaw in a permit application, notify the applicant of such flaws, and wait until an applicant is able to satisfy all statutory requirements, places an undue burden on the permitting authority, one which was not intended by the statute or the regulations. As stated in the preamble of the first set of section 301(h) regulations: "[T]he legislative history of the Act makes it clear that the relief afforded by section 301(h) was intended for those communities which had accumulated, or could accumulate on a timely basis, the information necessary to make their case for a modification." 44 Fed. Reg. at 34791.

In light of this record, GWA's arguments strike the Board as an attempt to justify its failure to provide complete and accurate applications, rather than valid reasons that would merit a remand. The Board concludes that the record does not support GWA's claim that the Region did not allow any more information after 2001. Therefore, the Board declines to review the Region's decision to deny the waivers on this basis.

3. *Did the Region Clearly Err or Abuse Its Discretion in Not Allowing Additional Time to Gather Information from the New Outfalls?*

Another argument GWA makes is that the Region abused its discretion by not allowing additional time to gather information from the new outfalls. According to GWA, the lack of additional time deprived it of the opportunity to show there were no impacts to the marine environment from the new discharge points. *See*, *e.g.*, Pet.'s Supp. Br. at 18-19, 21.

The Board is not persuaded that the Region abused its discretion by not allowing additional time for GWA to obtain data from the new outfalls. While data from the new outfalls would have provided current information, a section 301(h) applicant need not wait until implementation of improvements to show compliance with the requirements of section 301(h) and its implementing regulations. The Region explains that obtaining data from the new outfalls is neither required nor necessary for the permit issuer to make a section 301(h) de-

[35] For instance, on April 4, 1997, the Region stated its intention to deny the section 301(h) waiver applications and noted that the applicant had failed to provide sufficient information. *See* 1997 Marcus Letter. In June 1997, the Region sent a letter informing the applicant of the information needed to submit complete revised applications. *See* 1997 Strauss Letter. In April 1998, the Region sent another letter notifying the applicant that the applications were significantly deficient. *See* 1998 Strauss Letter.

termination. *See* Region's Reply Br. at 79 (citing 40 C.F.R. § 125.62(e)).[36] The Agency has issued guidance documents, which are publically available, that help applicants like GWA prepare their applications and explain what is needed to show compliance with section 301(h) requirements. *See* Office of Water, U.S. EPA, EPA 842-B-94-007, *Amended section 301(h) Technical Support Document* (Sept. 1994) ("ATSD"); *see also id.* at 125 (noting that "[a]pplicants that propose improvements to outfall or treatment systems will need to predict the values of parameters relevant to 301(h) criteria that can be expected following implementation of the proposed improvements"). The ATSD provides guidance on how an applicant for an improved or altered discharge, like GWA, who cannot monitor the impacts of that discharge until implementation of the improvements, can predict the physical, chemical and biological conditions that would occur in the receiving water following implementation of the proposed improvement, based on predictive assessment of available data. *See*, *e.g.*, ATSD at 52-60 (physical conditions), 61-72 (chemical conditions), 78-95 (biological conditions), 131-33 (evaluation of predicted conditions and predicted continued compliance); Region's Resp. Br. at 59.

According to the Region, despite the guidance the ATSD provides, GWA did not provide any predictive assessment of the physical, chemical, and biological conditions that would occur after the construction of the new outfalls. Region's Resp. Br. at 59. Clearly, GWA had the tools available to make the necessary showings and had the opportunity to do so at an earlier stage in the process, before implementation of the outfalls.

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[36] This section establishes requirements for applications based on improved or altered discharges and provides as follows:

> An application for a section 301(h) modified permit on the basis of an improved or altered discharge must include:
>
> (1) A demonstration that such improvements or alterations have been thoroughly planned and studied and can be completed or implemented expeditiously;
>
> (2) Detailed analyses projecting changes in average and maximum monthly flow rates and composition of the applicant's discharge which are expected to result from proposed improvements or alterations;
>
> (3) The assessments required by paragraphs (a) through (d) of this section based on its current discharge; and
>
> (4) A detailed analysis of how the applicant's planned improvements or alterations will comply with the requirements of paragraphs (a) through (d) of this section.

40 C.F.R. § 125.62(e). As is clear from the language of this section, the requirements are based on projections and do not require the Agency to wait until an improvement, modification, or alteration has been fully implemented.

Since GWA did not provide the required assessments, the Region chose to assess compliance with section 301(h) requirements by evaluating relevant information from the previous outfalls. GWA has shown no clear error in this approach,[37] and the Board determines that the Region did not abuse its discretion. Therefore, the Board denies review of the Region's denial of the waivers on this particular basis.

4. *Do Other "Federally Driven Directives and EPA Statements and Actions" Conflict with Requiring GWA to Install Secondary Treatment?*

GWA asserts that the denial of the waivers is arbitrary and capricious because the Region failed to consider the existence of other "federally driven directives and EPA statements and actions." Pet.'s Supp. Br. at 6-17. According to GWA, other "federally driven directives and EPA statements and actions" conflict with the Region's decision to deny the waivers. To support this assertion, GWA claims that "there was a very clear commitment and policy by EPA to allow Petitioner to maintain the waivers," *id.* at 6-10, and that such commitment was evidenced by: (1) the negotiation of, and entering into, the Stipulated Order and 2006 Amended Stipulated Order; (2) letters and other communications from EPA to GWA, in which EPA allegedly stated and or implied that GWA could retain the waivers if GWA built new outfalls; (3) the amount of time between the first tentative denial issued in 1997 and the final decision denying the waivers issued in 2009;[38] and (4) EPA's decision to approve GWA's twenty-year Waste Resource Master Plan, which does not contemplate secondary treatment.[39] *See id.* at 7-10, 12-17. GWA claims that it is entitled to rely on the Region's representations. *Id.* at 8-9, 39. Although not articulated as such, in essence GWA advances an equitable estoppel argument,[40] the argument being that the Region is precluded from

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[37] On page 21 of its petition, GWA claims that the outfalls are so new that no model could conceivably be effective. Pet.'s Supp. Br. at 21. To the extent that GWA raises this argument as a challenge to the Region's use of predictive modeling, the Board rejects such attempt. The Board has often emphasized that a petitioner seeking review of a technical issue, like the decision to use predictive modeling, bears a particularly heavy burden and that mere allegations of error are not sufficient to support review. *E.g., In re City of Moscow,* 10 E.A.D. 135, 172 (EAB 2001); *In re New Eng. Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001); *In re Hadson Power 14 Buena Vista*, 4 E.A.D. 258, 294 n.54 (EAB 1992). GWA's conclusory statements do not meet this heavy burden.

[38] *See* Pet.'s Supp. Br. at 14 (claiming that "the building of the outfalls was the component that forestalled the first denial and the [Stipulated Order] should have forestalled the latter.").

[39] As noted earlier, the Stipulated Order requires GWA to take certain actions to come into compliance with the CWA. One of those requirements involves preparation of a Water Resources Master Plan, which was subject to EPA's comments and approval. *See* Region's Reply Br. at 75.

[40] Equitable estoppel precludes a party from asserting a right that the party would otherwise enjoy if that party takes actions upon which its adversary reasonably relies to its detriment. *In re BWX*

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denying the waivers because its actions led GWA to believe that if it built the outfalls, the Region would grant the waivers. *See id.* at 9.

GWA also claims that the Region's decision is arbitrary and capricious because: the Region failed to factor affordability into its decision making, *id.* at 25-26; the military build-up prompted the Region's denial,[41] *id.* at 14-15; the denial will derail GWA's efforts to address more important water quality concerns, *see id.* at 22-25; and secondary treatment is unnecessary because pollution comes from sources other than GWA's WWTPs, *id.* at 21-26.

The Board has examined the record, and it does not support GWA's assertions that there are federally-driven directives in conflict with requiring GWA to install secondary treatment. Nor does the record support an estoppel claim.

A party asserting equitable estoppel against the government bears an especially heavy burden. *In re BWX Techs., Inc.*, 9 E.A.D. 61, 80 (EAB 2000). Not only must the party prove the traditional elements of estoppel (i.e., that it reasonably relied upon its adversary's actions to its detriment), the party must also show that the government "engaged in some affirmative misconduct." *In re Envtl. Disposal Sys., Inc.*, 14 E.A.D. 96, 128 n.26 (EAB 2008); *In re Envtl. Prot. Servs., Inc.*, 13 E.A.D. 506, 541 (EAB 2008); *In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 196-200 (EAB 1997). Affirmative misconduct, in this context, refers to "an affirmative misrepresentation or affirmative concealment of a material fact by the government." *In re V-1 Oil Co.*, 8 E.A.D. 729, 749 (EAB 2000) (citing *In re Linkous v. United States*, 142 F.3d 271, 278 (5th Cir. 1998)). Courts have routinely held that "mere [n]egligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct" sufficient to estop the government. *Envtl. Prot. Servs.*, 13 E.A.D. at 541.

None of the arguments GWA raises demonstrate affirmative misconduct or any other conduct on the part of the Region that would support an equitable estoppel claim in this case. Contrary to GWA's assertions, the record does not show "a commitment" or an affirmative representation on the part of the Region to renew the waivers if the outfalls were built. Nor does the record show an affirmative concealment of material facts by the Region.

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Techs., Inc., 9 E.A.D. 61, 80 (EAB 2000) (citing *Heckler v. Cmty. Health Servs. of Crawford City, Inc.*, 467 U.S. 51, 59 (1984); *Wilber Nat'l Bank of Oneonta, N.Y. v. United States*, 294 U.S. 120, 124-25 (1935)). Equitable estoppel is usually invoked as an affirmative defense to an enforcement action. This is the first time the Board considers whether equitable estoppel is appropriately raised as an affirmative defense to a permit issuer's decision to deny a section 301(h) waiver.

[41] GWA refers to the expected relocation of U.S. military troops from Okinawa, Japan, to Guam.

First, GWA completely mischaracterizes the communications between the Region and GWA. Neither the 1997 Marcus Letter nor the 1998 Strauss Letter state or imply that EPA would grant the waivers if GWA built the new outfalls. The 1997 Marcus Letter only suggested that GWA consider extending its outfalls, which would "*improve the chances* of obtaining a favorable 301(h) decision." 1997 Marcus Letter at 3 (emphasis added). For its part, the 1998 Strauss Letter informed GWA of the deficiencies in its revised applications and asked GWA to submit certain information. *See* 1998 Strauss Letter. The same letter also informed GWA that the Region had not completed its review of the two applications. *Id.* at 2. The fact that the Region noted that the failure to submit the requested information could result in a denial of the waivers by no means implies, as GWA proposes, that construction of the outfalls would guarantee re-issuance of the waivers.[42]

Second, the fact that the Stipulated Order includes construction of the outfalls and primary treatment, and that the Stipulated Order and Water Resources Master Plan do not include secondary treatment does not constitute evidence that the Region had committed to grant the waivers if the outfalls were built. Nor are these documents binding on the Region in the manner GWA proposes (*i.e.*, that their silence about secondary treatment bars the Region from denying the waivers). As the Region explained in its response to comments, the Region lacked the legal authority to bind itself to reissue Guam's 301(h) permit during the negotiations leading to the execution of the Stipulated Order. RTC at 15 (Response GWA Comment 10). In its response to comments, the Region explains that: (1) a decision to grant the waivers cannot be made through an informal process that does not allow for public comment; (2) the Region cannot legally negotiate the terms of a permit while negotiating resolution of an enforcement action; (3) the Region could not have discussed the terms of an NPDES permit for secondary treatment for GWA's plants before reaching a final decision that such permits would be necessary; and (4) negotiating any NPDES permit terms during discussions of the Stipulated Order would have been improper. *Id.* at 16 (Response GWA Comment 10). On appeal, the Region also explains that at the time these stipulations were negotiated and implemented the Region had not finished its review of the waiver applications and did not have a basis to require secondary treatment. Reg.'s Resp. Br. at 76.

The Region is correct. The CWA establishes the NPDES permitting process as the vehicle for considering a waiver of secondary treatment requirements,[43] a

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[42] *See* Pet.'s Supp. Br. at 7 (claiming that the 1998 Strauss Letter "implied that the outfalls were necessary in order for EPA to process the waivers.").

[43] CWA § 301(h), 33 U.S.C. § 1311 ("The Administrator * * * may issue a permit under section 1342 of this title [the NPDES program] which modifies the requirements of subsection (b)(1)(B)
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process that requires public participation.[44] To suggest that by not contemplating secondary treatment in the Stipulated Order or the Waste Resource Master Plan, the Region agreed to grant the modified permits wrongly implies that the permit issuer has authority to grant section 301(h) waivers without consideration of the criteria or process set forth in section 301(h).

In addition, GWA's argument ignores the temporal nature of section 301(h) waivers. Waivers are temporal instruments intended to have an effective life of five years. 40 C.F.R. § 122.46. Facilities must reapply for section 301(h) waivers every time their NPDES permits expire. Each time a facility reapplies, it must demonstrate compliance with section 301(h), which means that facilities with modified NPDES permits are always at risk of losing their waivers and of having to comply with secondary treatment standards. To accept GWA's claims suggests that the Stipulated Order and the Waste Resource Master Plan[45] give GWA the right to operate for an indefinite amount of time with an expired modified permit, and circumvent secondary treatment requirements, an outcome that does not square with the applicable statutory and regulatory scheme. A POTW has no entitlement to operate indefinitely on an expired modified permit. GWA's claims also suggest that a waiver can be obtained without demonstrating compliance with section 301(h). The CWA is clear that all POTWs must comply with secondary treatment requirements unless they can demonstrate compliance with section 301(h) and obtain a waiver through the permitting process.

Contrary to GWA's suggestions, the record shows that GWA was fully aware of the possibility of denial. GWA could not have reasonably believed that construction of the outfall would guarantee approval of the waivers. As the Region explained in its response to comments, "the criteria by which EPA must evaluate a section 301(h) waiver are not related solely to the issue of diffusion of the effluent in the receiving waters." RTC at 20 (Response GWA Comment 11). Numerous other factors play into a section 301(h) determination.

In addition, the Region's delay in acting on the applications does not constitute clear error, provide a reason for a remand, or meet the standard to justify an

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* * * with respect to the discharge of any pollutant from a [POTW] into marine waters" if the applicant demonstrates compliance with section 301(h) criteria.).

[44] CWA § 402, 33 U.S.C. § 1342 (a)(1) ("[T]he Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants * * * .").

[45] As noted earlier in this decision, GWA requests that the Board overturn the Region's decision to deny the waiver to "allow the Stipulated Order and Master Plan process to work," or, in the alternative remand the matter "for consideration as to whether * * * there are other alternatives that better serve the public good and provide for better environment protection over the long-term." Pet.'s Supp. Br. at 41.

estoppel claim. *See Envtl. Prot. Servs.*, 13 E.A.D. at 541 ("'mere [n]egligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct' sufficient to estop the government.").

In light of all this, the Board rejects GWA's suggestion that the Stipulated Order and EPA's approval of GWA's Waste Resource Master Plan evidence the Region's commitment to grant the waivers, or constitute an affirmative misrepresentation by the Region upon which GWA is entitled to rely.

Finally, none of the other arguments that GWA raises (i.e., the Region failed to factor affordability into its decision making; the military build-up prompted the Region's denial; the denial will derail GWA's efforts to address more important water quality concerns; and secondary treatment is unnecessary since pollution comes from sources other than GWA's WWTPs) provides the Board with a basis for a remand.

First, the argument GWA raises about factoring in affordability was not raised in comments below, and therefore, was not preserved for Board review.[46] *See In re City of Attleboro*, 14 E.A.D. 398, 405 (EAB 2009) ("A petitioner seeking review must *demonstrate* that any issues and arguments it raises on appeal have been preserved for Board review, unless the issues or arguments were not reasonably ascertainable.") (emphasis added); *In re Arecibo & Aguadilla Reg. Wastewater Treatment Plants*, 12 E.A.D. 97, 116-17, 122 (declining to entertain arguments not raised in comments below).[47]

Second, GWA claims that what prompted the denials was the military build-up, *see* Pet.'s Supp. Br. at 14-15, yet GWA has provided no persuasive support for this assertion. Contrary to GWA's assertion, the record shows that the Region based its decision to deny the waivers on an evaluation of compliance with section 301(h) criteria, not the military build-up. *See*, *e.g.*, AGA FDD at 4-6; ND FDD at 4-6. In its response to comments, the Region addressed comments

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[46] The Board notes that the Region is fully aware of the financial challenges that GWA faces and has expressed its willingness to work with GWA to develop a schedule of compliance that would take into account cost considerations. In the Region's own words "EPA is committed to working with GWA to develop a schedule of compliance that is appropriate, given the financial constraints and competing infrastructure priorities facing GWA." RTC at 18 (Response GWA Comment 10); *see also* Region's Reply Br. at 81. The Board encourages GWA to work with the Region to develop such a compliance schedule.

[47] In addition, even if the argument would have been preserved, the Board would have denied review. Petitioner claims that the Region failed to consider a certain policy document that allegedly factors in affordability in its decision making, yet the petition does not demonstrate that this particular policy document is applicable in the context of this case. The petitioner bears the burden of demonstrating that a petition warrants review. The Board does not entertain vague claims. *Attleboro*, 14 E.A.D. at 443.

GWA made regarding the military build-up, which happen to be the same statements GWA makes on appeal.[48] Specifically, GWA claimed that the need for secondary treatment was driven by the U.S. Department of Defense ("DoD")'s military build-up impacts and proposed that "DoD is fully responsible for any necessary upgrades to secondary treatment that take place within [the twenty-year] planning horizon" of GWA's Waste Resource Master Plan. RTC at 38 (GWA Comment 25). The Region explained that the rationale for any necessary upgrades to facilities is not relevant to EPA's 301(h) analysis. *Id.* at 39. The Board agrees with the Region.

Similarly, none of the other arguments GWA raises are relevant to the Region's determination to deny the waivers (i.e., that denial will derail efforts to address more important water quality concerns and that secondary treatment is unnecessary). As stated before, the CWA requires all POTWs, except for those that can satisfy section 301(h), to comply with secondary treatment, regardless of other water quality concerns for the receiving waters or the impacts (or lack thereof) in the receiving water body of a POTW's discharges.

In sum, GWA has failed to establish any basis on which the Board should review the Region's decision to deny the waiver applications.

VI. *CONCLUSION*

Based on the foregoing discussion, the Board determines that:

1. GWA has not demonstrated that it meets all of the criteria for obtaining a section 301(h) waiver; and

2. GWA has not established any other basis on which the Board should review the Region's decision to deny the waivers.

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[48] *Compare* RTC at 38 (GWA Comment 25), *with* Pet.'s Supp. Br. at 38-39. As noted above, a petitioner may not simply reiterate comments made during the public comment period; it must substantively confront the permit issuer's explanations. The Board has consistently denied review of petitions that merely cite, attach, incorporate, or reiterate comments previously submitted on the draft permit, and federal courts have upheld the Board's decisions in these cases. *E.g.*, *In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), *aff'd*, 614 F.3d 7, 13 (1st Cir. 2010); *In re Wastewater Treatment Facility of Union Twp.*, NPDES Appeal Nos. 00-26 & 00-28 (EAB Jan. 23, 2001) (Order Denying Petitions for Review), *aff'd sub nom. Mich. Dep't Envtl. Quality v. U.S. EPA*, 318 F.3d 705, 708 (6th Cir. 2003).

VII. *ORDER*

The Board denies review of the Region's decisions to deny the waiver applications.

So ordered.