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

In re:	)	
City of Newburyport Wastewater Treatment Facility	)	NPDES Appeal No. 04-06
NPDES Permit No. MA-0101427	)	

ORDER DENYING REVIEW IN PART
AND REMANDING IN PART

I. *INTRODUCTION*

In a timely petition dated June 7, 2004, and filed with the Environmental Appeals Board (the "Board") on June 9, 2004,[1] the Island Futures Group, Inc. ("IFG") seeks review of several aspects of a final National Pollutant Discharge Elimination System ("NPDES")[2] permit ("Permit") issued on May 3, 2004, to the City of Newburyport, Massachusetts (the "City"). The Permit, issued jointly by U.S. EPA Region I (the "Region") and the Massachusetts Department of Environmental Protection ("MADEP"),[3] authorizes the continued discharges of sanitary and industrial wastewater from the City's wastewater treatment facility ("WWTF") into the Merrimack River. The petitioner, IFG, is an environmental advocacy group "dedicated to the

[1] Documents are "filed" with the Board on the date they are *received*.

[2] Under the Clean Water Act ("CWA" or "Act"), persons who discharge pollutants from point sources into waters of the United States must have a permit in order for the discharge to be lawful. CWA § 301, 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System is one of the principal permitting programs under the CWA. *See* CWA § 402, 33 U.S.C. § 1342.

[3] Although EPA issues NPDES permits in Massachusetts, the State maintains permitting authority under Massachusetts law. Thus, when the Region issues an NPDES permit in Massachusetts, MADEP jointly issues the permit under State law.

restoration and protection of the Merrimack River Estuary and its coastal environs." IFG's Petition for Review/Appeal of NPDES Permit No. MA 0101427 ("IFG Petition") at 1 (June 9, 2004).

On August 27, 2004, the Region filed a response to IFG's Petition. *See* Response to Petition for Review ("Region's Response") (with attached exhibits)[4] (Aug. 27, 2004). With the Board's permission, the City also filed a response to IFG's petition. *See* City of Newburyport's Response to the Petition for Review Filed by Island Futures Group, Inc. ("City's Response") (Aug. 27 2004). On September 27, 2004, IFG filed a response to the Region's Response. *See* Response to EPA Region I's "Response to Petition for Review" ("IFG Response") (Sept. 27, 2004). By order dated October 18, 2004, the Board agreed to admit this response into the record on appeal in this matter, and to allow the Region to file a sur-reply. *See* Order Granting [Region's] Motion to File Sur-Reply (Oct. 18, 2004). The Region filed its sur-reply on November 5, 2004. *See* Sur-Reply ("Region's Sur-Reply") (Nov. 5, 2004).[5]

IFG raises the following eight arguments in support of its petition for review before this Board: (1) the Region erred in removing a dissolved oxygen effluent limitation from the draft permit; (2) in determining compliance with the Permit's average monthly flow limit, the Permit

[4] The Region's exhibits consist of various documents that are part of the administrative record in this matter, including the final Permit and the response to comments. These exhibits will be cited as Response Exhibit ("R. Ex.") followed by the exhibit number.

[5] We note that after the filing of these submissions, the Board stayed consideration of this matter while the parties engaged in settlement negotiations. By filings received on June 7, 2005, however, the Region and IFG both informed the Board that settlement discussions had been unsuccessful. The Board therefore resumed consideration of IFG's petition.

erroneously uses a twelve-month rolling average; (3) the State's water quality classification for the area of the WWTF's discharge does not result in effluent limitations sufficiently stringent to meet state water quality standards; (4) the Permit's fecal coliform effluent limitations are not sufficient to protect waters downstream of the WWTF; (5) the Region erred by failing to require that the City prepare a "projection of flows to plant capacity;" (6) the Permit's effluent limitation for total residual chlorine is not consistent with national criteria; (7) the Permit does not comply with the Massachusetts' antidegradation policy; and (8) the Region erred in failing to require the City to prepare a comprehensive water management plan. For the reasons explained below, the Petition is granted in part and denied in part, and the Permit is remanded for further proceedings consistent with this decision.

II. *BACKGROUND*

A. *Statutory and Regulatory Background*

Congress enacted the CWA in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). Towards this end, the Act prohibits the discharge of pollutants into waters of the United States from a point source[6] unless such discharge proceeds in compliance with a CWA permit. CWA § 301(a); 33 U.S.C. § 1311(a). Section 402 of the CWA authorizes the EPA Administrator to issue permits for the discharge of pollutants, provided that certain statutory requirements are satisfied. CWA § 402(a); 33 U.S.C. § 1342(a). The permitting program at issue in the present case is the NPDES

[6] A "point source" is defined as "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged." CWA § 502(14), 33 U.S.C. § 1362(14).

program, set forth in CWA § 402, 33 U.S.C. § 1342, and EPA's implementing regulations at 40 C.F.R. part 122. Under section 402 of the CWA, permitted discharges must, among other things, comply with sections 301 and 306 of the CWA. CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1).

Section 301 of the CWA provides for two types of effluent limitations to be included in NPDES permits: "technology-based" limitations and "water quality-based" limitations. *See* CWA §§ 301, 303, 304(b), 33 U.S.C. §§ 1311, 1313, 1314(b); 40 C.F.R. pts. 122, 125, 131. Technology-based limitations, generally developed on an industry-by-industry basis, reflect a specified level of pollutant-reducing technology available and economically achievable for the type of facility being permitted. CWA § 301(b), 33 U.S.C. § 1311(b). Water quality-based effluent limits, on the other hand, are designed to ensure that state water quality standards are met regardless of the decision made in establishing technology-based limitations.[7] In particular, section 301 requires achievement of "any more stringent limitation, including those necessary to meet water quality standards * * * established pursuant to any State law or regulation * * *." CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); *see also* 40 C.F.R. § 122.4(d) (prohibiting issuance of a permit "when the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected states"); 40 C.F.R. § 122.44(d)(1) (providing that a permit must contain effluent limits as necessary to protect state water quality

[7] States are primarily responsible for establishing the water quality standards applicable to water bodies within their borders. The CWA requires that states adopt water quality standards designed to protect the public health or welfare, enhance water quality, and advance the purposes of the CWA. CWA § 303(c)(2), 33 U.S.C. § 1313(c)(2). These standards are then subject to review by the Agency. CWA §§ 303(c)(1), (c)(2)(A), 33 U.S.C. § 1313(c)(1), (c)(2)(A). The Agency must examine water quality standards to determine conformance with the CWA and whether the standards support the state's designated uses for the water body. *See id.*; 40 C.F.R. § 131.5.

standards). The Permit conditions at issue in the present case are water quality-based effluent limits rather than technology-based effluent limits.

The CWA requires that states develop water quality standards for all water bodies within the state. CWA § 303, 33 U.S.C. § 1313. These standards have three parts: (1) one or more "designated uses" for each water body or water body segment in the state; (2) water quality "criteria," consisting of numerical concentration levels and/or narrative statements specifying the amounts of various pollutants that may be present in each water body without impairing the designated uses of that water body; and (3) an antidegradation provision, focused on protecting existing uses by generally prohibiting degradation of water quality below that necessary to maintain existing uses. *See* CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.12. The applicable Massachusetts water quality standards can be found in title 314 of the Code of Massachusetts Regulations, chapter 4.

B. *Factual and Procedural Background*

The WWTF is a 3.4 million gallon per day wastewater treatment plant originally built in 1964 and upgraded to a secondary treatment facility in the 1980's. Fact Sheet accompanying draft permit ("Fact Sheet") at 1, ¶ II (R. Ex. 7). The WWTF discharges treated effluent from a multiport diffuser located approximately 1120 feet offshore on the bottom of the Merrimack River. *Id*. The City's current permit, originally issued on September 17, 1998, *see* R. Ex. 10,

expired on October 17, 2002, but has been administratively extended following the City's timely application for a renewed permit on February 13, 2002.[8] Fact Sheet at 1.

Under Massachusetts regulations, the portion of the Merrimack River into which the WWTF discharges is designated as "Class SB." Mass. Regs. Code tit. 314, §§ 4.05, .06 (2004); Fact Sheet at 5. Class SB waters "are designated as a habitat for fish, other aquatic life and wildlife and for primary and secondary contact recreation." Mass. Regs. Code tit. 314, § 4.05(4)(b) (2004). Where appropriate, Class SB waters can be approved for restricted shellfishing (class "SB(R)"). *Id*. On November 24, 2003, the Massachusetts Division of Marine Fisheries approved restricted shell fishing in the area of the WWTF discharge.[9] *See* Region's Response at 3 n.3; Commonwealth of Massachusetts Division of Marine Fisheries, Marine Fisheries Advisory (Nov. 24, 2003) (R. Ex. 28).

On June 12, 2003, MADEP and the Region jointly issued a draft permit and sought public comment. Joint Public Notice (June 12, 2003) (R. Ex. 14). A public hearing was held on July 15, 2003, at which the public comment period was extended until August 29, 2003. *See* Hearing Transcript (July 15, 2003) (R. Ex. 15). Numerous parties, including the City and IFG, testified at the public hearing and submitted written comments on the draft permit.

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[8] Under 40 C.F.R. § 122.6, an expiring federal permit may continue in effect after its expiration date in circumstances where, as here, an application for permit renewal was timely filed by the permittee and is pending Agency review. 40 C.F.R. § 122.6.

[9] As discussed further below, this resulted in the incorporation of stricter fecal coliform Permit limitations in the final Permit than those in the draft permit.

On April 2, 2004, the MADEP certified the draft permit in accordance with section 401(a) of the CWA, 33 U.S.C. § 1341(a).[10] *See* Letter from Glen Haas, Director, Division of Watershed Management, MADEP, to Brian Pitt, U.S. EPA Region I, Granting State Certification (R. Ex. 30). In addition, on April 22, 2004, the Massachusetts Office of Coastal Zone Management certified that the provisions of the draft permit comply with the approved coastal zone management program.[11] *See* R. Ex. 31. Thereafter, on May 3, 2004, the Region and MADEP issued the final Permit along with a response to public comments. IFG's Petition followed.

C. *Standard of Review*

In proceedings under 40 C.F.R. § 124.19(a), the Board will not grant review unless the petition for review establishes that the Permit condition in question is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that the Board determines warrants review. 40 C.F.R. § 124.19(a); *see In re Carlota Copper Company*, NPDES Appeal Nos. 00-23 & 02-06, slip op. at

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[10] Section 401(a)(1) of the CWA requires all NPDES permit applicants to obtain a certification from the appropriate state agency stating that the permit will comply with all applicable federal effluent limitations and state water quality standards. *See* CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). The regulatory provisions pertaining to state certification provide that EPA may not issue a permit until a certification is granted or waived by the state in which the discharge originates. 40 C.F.R. § 124.53(a).

[11] Where, as here, the proposed activity is within a state's coastal zone boundaries, section 307(c)(3)(A) of the Coastal Zone Management Act requires that permit applicants provide a certification that the activity complies with requirements of the state's coastal zone management program. 16 U.S.C. § 1456; *see also*, 40 C.F.R. § 122.49(d) ("prohibit[ing] EPA from issuing a permit for an activity affecting land or water in the coastal zone until the applicant certifies that the proposed activity complies with the State Coastal Zone Management program, and the State or its designated agency concurs with the certification."); Fact Sheet at 13, ¶ XII.

21 (EAB, Sept. 30, 2004), 11 E.A.D. ___; *In re Gov't of D.C. Mun. Separate Storm Sewer Sys.*, 10 E.A.D. 323, 333 (EAB 2002) (hereinafter "*D.C. MS4*"). The Board's analysis of NPDES permits is guided by the preamble to the part 124 permitting regulations, which states that the Board's power of review "should be only sparingly exercised." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord In re Teck Cominco Alaska, Inc.*, NPDES Appeal No. 03-09, slip op. at 21 (EAB, June 15, 2004), 11 E.A.D. ___. In addition, Agency policy favors final adjudication of most permits at the Regional level. 45 Fed. Reg. at 33,412; *accord Carlota*, slip op. at 21; *Teck Cominco*, slip op. at 21-22. The petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a)(1), (a)(2).

Moreover, in order to preserve an issue for appeal, the regulations require any petitioner who believes that a permit condition is inappropriate to have first raised "all reasonably ascertainable issues and * * * all reasonably available arguments supporting [petitioner's] position" during the public comment period on the draft permit. 40 C.F.R. §§ 124.13, .19; *In re Westborough*, 10 E.A.D. 297, 304 (EAB 2002). The purpose of such a provision is to "ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final, thereby promoting the Agency's longstanding policy that most permit decisions should be decided at the Regional level, and to provide predictability and finality to the permitting process." *In re New England Plating Co.*, 9 E.A.D. 726, 732 (EAB 2001); *In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999) ("The intent of these rules is to ensure that the permitting authority * * * has the first opportunity to address any objections to the permit, and the permit process will have some finality."). The Board has also frequently emphasized that petitioners must raise issues with a reasonable degree of specificity and clarity during the

comment period in order for the issue to be preserved for review. *Carlota*, slip op. at 46; *New England Plating*, 9 E.A.D. at, 732; *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 230-231 (EAB 2000); *In re Maui Elec. Co.*, 8 E.A.D. 1, 9 (EAB 1998). On this basis, the Board has often denied review of issues raised on appeal that were not raised with the requisite specificity during the public comment period. *See, e.g.*, *New England Plating*, 9 E.A.D. at 732; *Maui*, 8 E.A.D. at 8-12; *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 54-55 (EAB 1995).

Further, where the Region responds to comments when it issues a final permit, it is not sufficient for a petitioner to rely solely on previous statements of its objections, such as comments on the draft permit. Rather, a petitioner must demonstrate with specificity in the petition why the Region's prior response to those objections is clearly erroneous or otherwise merits review. *See Westborough*, 10 E.A.D. at 305; *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996).

Finally, in permit appeals, the Board traditionally assigns a heavy burden to petitioners seeking review of issues that are technical in nature. *See Teck Cominco*, slip op. at 22; In re City of Moscow, 10 E.A.D. 135, 142 (EAB 2001); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001). When "presented with technical issues, we look to determine whether the record demonstrates that the Region duly considered the issues raised in the comments and whether the approach ultimately adopted by the Region is rational in light of all the information in the record. If we are satisfied that the Region gave due consideration to comments received and adopted an approach in the final permit decision that is rational and supportable, we typically will defer to the Region's position." *Moscow*, 10 E.A.D. at 142. Clear

error or reviewable exercise of discretion are not established simply because the petitioner presents a different opinion or alternative theory regarding a technical matter, particularly when the theory is unsubstantiated. *In re Washington Aqueduct Water Supply Sys.*, NPDES Appeal No. 03-06, slip op. at 12 (EAB, July 29, 2004), 11 E.A.D. ___; *D.C. MS4*, 10 E.A.D. at 334; *Ashland*, 9 E.A.D. at 667. The Region's rationale for its conclusions, however, must be adequately explained and supported in the record. *D.C. MS4*, 10 E.A.D. at 342-43 ("Without any articulation by the permit writer of his [or her] analysis, we cannot properly perform any review whatsoever of that analysis and, therefore, cannot conclude that it meets the requirements of rationality.").

We now turn now to a discussion of the specific issues raised in IFG's Petition.

III. *DISCUSSION*

A. *Dissolved Oxygen*

Under the State of Massachusetts' water quality standards, the minimum level for dissolved oxygen ("DO") in the portion of Merrimack River at issue in this case is 5.0 mg/l. *See* Mass. Regs. Code tit. 314, § 4.05(4)(b)(1) (2004) (dissolved oxygen "shall not be less than 5.0 mg/l unless background conditions are lower"). Because DO levels reported by the City in its Permit application were lower than 5.0 mg/l, the draft permit included a DO minimum in the WWTF discharge of 5.0 mg/l and required daily monitoring for DO. *See* Draft Permit at 2, Part I A.1 (R. Ex. 6). The DO limitation, however, was removed from the final Permit.

In the Response to Public Comments document accompanying the Final Permit, the Region explained this change as follows:

> EPA has removed this [DO] limit from the final permit. In discussions with the permittee, EPA and MADEP were informed that the few DO results submitted in the application were collected from the beginning of the effluent pump building prior to a drop where air is incorporated. A second set of samples were collected at the end of the building after the drop. Those results were never below 6 mg/l.

Response to Comments at 2 (R. Ex. 5).

According to the Region, the decision to remove the DO requirement was based primarily on a July 30, 2003 meeting with representatives of the City, and an August 27, 2003 letter from the City commenting on the draft permit.[12] *See* Region's Response at 10-14. In both the July 30 meeting and the August 27 letter, the City expressed the position that sampling data submitted with the permit application were not representative of DO discharges from its outfall. *Id* at 11; *see* Agenda for Discussion and attached handwritten meeting notes (July 30, 2003) (R. Ex. 18); Letter from Brendan B. O'Regan, Superintendent, City of Newburyport, Massachusetts, Office of the Sewer Department, to Michele Cobban Barden, U.S. EPA Region I, Re: City of Newburyport's Comments on Draft NPDES Permit (Aug. 27, 2003) (hereinafter "Aug. 27 Letter") (R. Ex. 20). The August 27 letter, among other things, summarized sampling results at the second location mentioned in the above quotation showing that DO levels were actually higher than previously reported in the permit application. According to the City:

[12] IFG states, incorrectly, that these communications took place after the comment period had ended. *See* July 15, 2003, Public Hearing Transcript (R. Ex. 15) at 66 (extending public comment period until August 29, 2003). In fact, both communications took place during the comment period.

> DO measurements have historically been taken at the down gradient end of the chlorine contact tank, prior to discharge over the effluent weir into the stilling basin at the head end of the outfall pipe. Although only a limited data base is currently available, monitoring of DO in the stilling basin indicates that DO increases at this point and that effluent DO is greater than 5 mg/l prior to entering the outfall pipe. Therefore, the city requests that the effluent limitation for DO be removed from the permit, and that additional data be collected from the stilling basin during the period of this permit to more accurately characterize effluent DO entering the outfall pipe.

August 27 Letter at 4. Based on this representation, the Region agreed that the data submitted with the City's permit application were not representative of the discharge and that existing DO levels in the discharge would actually meet the 5.0 mg/l minimum required by the applicable Massachusetts water quality standard.[13] *See* Region's Response at 11-12. The Region, therefore, removed the DO limitation and sampling requirement from the final Permit.[14]

In its Petition, IFG makes several arguments objecting to the removal of the DO limitation. These are: (1) the Region failed to provide a sufficient justification for removing the DO limitations, IFG Petition at 4; (2) the final Permit must include a DO limitation because the

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[13] It does not appear that the actual sampling results are part of the record on appeal.

[14] In its Sur-Reply, in an apparent effort to shore up its decision to remove the DO limitation from the Permit, the Region states:

> Notwithstanding the fact that the Region continues to believe * * * that the DO concentration in the effluent does not have the reasonable potential to cause or contribute to violations of water quality criteria, the Region is prepared to process a permit modification requiring DO monitoring 5 days per week in order to confirm this conclusion. The permit modification would also provide that this sampling requirement would be eliminated if, after one year of monitoring, the data clearly establish that the effluent DO is consistently greater than 5 mg/l.

Region's Sur-Reply at 2.

discharge is to receiving waters on the CWA section 303(d) list of impaired waters, *id.* at 5;[15] (3) the final Permit's limitations for total residual chlorine and coliform bacteria "will require the use of more chlorine and hence more of the sulfur dioxide chemical used to dechlorination [sic] the effluent and this sulfur dioxide can deplete oxygen in the receiving waters," *Id* at 6; and (4) the WWTF discharges into "high-quality estuary waters" and low DO levels in these waters will harm fish and shellfish, *id*. at 5-6. In its reply, Petitioner further notes that complete elimination of the DO requirement was not a reasonably foreseeable outcome of the public comment process and the public did not have a chance to submit comments on this change. *See* IFG Reply at 4.

Upon review, we conclude that the record before us does not support the Region's decision to remove altogether the DO limitation and monitoring requirement from the draft permit. The only support that the Region cited for removing these requirements was the above-mentioned representations by the permittee during the comment period regarding new sampling results at an alternative location. Data in support of these representations were not made available for public review and comment, nor are they part of the administrative record before this Board. The Region's cursory explanation is insufficient to support what strikes us as a significant permit change. Under these circumstances, we conclude that a remand is appropriate.

[15] The Clean Water Act requires states to identify and prioritize those waters within the state's boundaries that, despite the use of technical controls for pollution, do not meet the state's water quality standards. CWA § 303(d), 33 U.S.C. § 1313(d). This list of "impaired waters" is known as the § 303(d) list. *See supra* note 7.

The Board has frequently remanded permits where, as here, the Region's explanation for a permit condition lacks sufficient support in the administrative record. *See In re Beckman Prod. Servs.*, 8 E.A.D. 302, 311 (EAB 1999) (remanding permit and requiring the Region to supplement the record with a "clearer rationale" for its permit determination); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997) (remanding permit where Region rationale for permit determination was not "clearly explained" in the record); *In re Chem. Waste Mgmt. of Ind. Inc.*, 6 E.A.D. 144, 154 (EAB 1995) (remanding permit and requiring Region to supplement record with a more "detailed explanation" for permit determination). Because we conclude that the record in this matter does not contain an adequate explanation for removal of the DO limitation and monitoring requirement, the permit is remanded.

On remand, the Region must either restore the DO limitation and monitoring requirement in the permit, or supplement the record with sufficient data and/or analysis to support the removal of these conditions. If the Region chooses to supplement the record rather than restore the DO limitation, it must reopen the comment period and allow IFG and other interested parties the opportunity to submit comments.[16] *See Ash Grove Cement Co.*, 7 E.A.D. at 419. While a reopening of the comment period is generally at the discretion of the Region, *see* 40 C.F.R. § 124.14(b), where, as here, the change is significant, where the record does not contain sufficient support for the change, and where the insufficiency of the record relating to the significant change has frustrated the public's opportunity to meaningfully comment and the

[16] If, on remand, the Region decides to supplement the administrative record and reopen the comment period, it must provide the public with an opportunity to comment on any proposed permit modifications to the monitoring requirements for DO as well, including the changes described in the Region's Sur-Reply. *See supra* note14.

permit issuer's opportunity to be informed by public comments, reopening the comment period is appropriate. *See In re Amoco Oil Co.*, 4 E.A.D. 954, 981 (EAB 1993) (remanding permit and reopening public comment period where the Region failed to provide the public with an opportunity to prepare an adequately informed challenge to a permit change); *In re GSX Servs. of S.C., Inc.*, 4 E.A.D. 451, 467 (EAB 1992) (remanding permit and reopening public comment period where public was not given the opportunity to comment on significant permit changes); *see also In re Old Dominion Elec. Coop.*, 3 E.A.D. 779, 797 (Adm'r 1992) ("[T]here may be times when a revised permit differs so greatly from the draft version that additional public comment is required (the discretionary wording of 40 C.F.R. § 124.14(b) notwithstanding) * * *.").

B. *Monthly Flow Limits*

Permit condition I.A.1. contains an average monthly flow limit of 3.4 mgd. *See* R. Ex. 4. Unlike the prior permit, however, the renewed Permit at issue in this case states that the flow limit shall be expressed as an annual monthly average. *See* Fact Sheet at 6. In particular, the Permit states:

> For flow, report maximum and minimum daily rates and total flow for each operating date. This is an annual average limit, which shall be reported as a rolling average. The first value will be calculated using the monthly average flow for the first full month ending after the effective date of the permit and the eleven previous monthly average flows. Each subsequent month's [discharge monitoring report] will report the annual average flow that is calculated from that month and the previous 11 months.

Permit Condition I.A.1 n.2. According to the Fact Sheet accompanying the draft permit, "[t]his change is being made to all POTW permits in MA at the request of MADEP." Fact Sheet at 6.

In its Petition, IFG objects to the expression of the flow limit as an annual average, rather than a monthly average. In particular, IFG argues that the Permit's use of annual effluent limitations violates 40 C.F.R. § 122.45(d)(2). IFG Petition at 7. That section states, in part that: "For continuous discharges all permit effluent limitations, standards, and prohibitions, including those necessary to achieve water quality standards, shall unless impracticable be stated as: * * * (2) average weekly and average monthly discharge limitations for POTWs." 40 C.F.R. § 122.45(d)(2). However, as IFG's argument in this regard was not raised during the comment period, we decline to consider it in the context of a permit appeal. As stated earlier, in order to preserve an issue for appeal, the regulations require any petitioner who believes that a permit condition is inappropriate to have first raised "all reasonably ascertainable issues and all reasonably available arguments supporting their position" during the public comment period on the draft permit. *Id*. § 124.13.

The requirement that an issue must have been raised during the comment period in order to preserve it for review is not a arbitrary hurdle placed in the path of potential petitioners. *See In re City of Marlborough*, NPDES Appeal No. 04-13, slip op. at 13 n.13 (EAB, Aug. 11, 2005), 12 E.A.D. ___; *In re BP Cherry Point*, PSD Appeal No. 05-01, slip op. at 14-15 (EAB, June 21, 2005), 12 E.A.D. ___. Rather, the requirement serves an important function related to the efficiency and integrity of the overall administrative permitting scheme. *Marlborough*, slip op. at 13 n.13. The intent of the rules is to ensure that the permitting authority first has the opportunity to address permit objections, and to give some finality to the permitting process. *Id; In re Sutter Power Plant*, 8 E.A.D. 670, 687 (EAB 1999). As we have explained, "[t]he effective, efficient and predictable administration of the permitting process demands that the

permit issuer be given the opportunity to address potential problems with draft permits before they become final." *In re Teck Cominco*, NPDES Appeal No. 03-09, slip op at 31 (EAB, June 15, 2004), 11 E.A.D. ___ (quoting *In re Encogen Cogeneration Facility*, 9 E.A.D. 244, 249-50 (EAB 1999)). "In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary." *In re Essex County (N.J.) Res. Recovery Facility*, 5 E.A.D. 218, 224 (EAB 1994).

IFG also argues that expressing the Permit's flow limitation as a annual average will result in an increase in BOD, TSS, and fecal coliform discharges into the Merrimack River and, therefore, violate "anti-degradation"[17] and "anti-backsliding"[18] requirements. *See* Petition at 7-10, 27-34. According to IFG, the Permit's limitations on these pollutants may not be stringent enough to protect water quality and existing uses in the Merrimack River.

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[17] As stated above, the CWA requires that states develop water quality standards for water bodies within the state, including an antidegradation provision, focused on protecting existing uses by generally prohibiting degradation of water quality below that necessary to maintain existing uses. Under the applicable regulations, states must "develop and adopt a statewide antidegradation policy" that will, with limited exceptions, maintain and protect "[e]xisting instream water uses and the level of water quality necessary to protect the existing uses." 40 C.F.R. § 131.12(a)(1). Each state's antidegradation policy must comply with the federal antidegradation policy. *See* 40 C.F.R. § 131.12; see also Office of Water, U.S. EPA, NPDES Permit Writers' Manual § 6.1.1 at 90 (1996). Under the Massachusetts Antidegradation Policy, "[i]n all cases existing uses and the level of water quality necessary to protect the existing uses shall be maintained and protected." Mass. Regs. Code tit. 314, § 4.04 (2004).

[18] The Clean Water Act's "anti-backsliding" prohibition is found at CWA § 402(o), 33 U.S.C. § 1342(o). The relevant portion of this provision states that "a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit." This portion of section 404(o) is referred to as the anti-backsliding provision for water quality-based effluent limitations. *See also* 40 C.F.R. § 122.44(l).

Upon review, we conclude that while the use of an annual monthly average might increase flow in some months (and reduce flow in other months), IFG has failed to provide any support for its assertion that this will result in any overall increase in pollutants. The Petition merely assumes that an overall increase in certain pollutants, i.e., fecal coliform, TSS, and BOD, will occur. Such conclusory assertions, however, are not sufficient to justify review. *See In re Carlota Copper Company*, NPDES Appeal Nos. 00-23 & 02-06, slip op. at 46 (EAB, Sept. 30, 2004), 11 E.A.D. ___ (in order to be preserved for review, issues must be raise with reasonable degree of specificity and clarity); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 665 n.8 (EAB 2001) (conclusory contention without more is insufficient to demonstrate review is warranted under 40 C.F.R. § 124.19) (citing *In re LCP Chems.*, 4 E.A.D. 661, 669 (EAB 1993)).

Moreover, as the Region stated in its response to comments on this issue, while the use of an annual average might increase flow in some months, the renewed Permit imposes additional mass limitations on BOD and TSS. Response to Comments at 12 (R. Ex. 5). The final Permit also strengthens infiltration and inflow requirements to ensure that the City maintains efforts to minimize extraneous flows to the collection system. *Id*. In addition, the Region revised the draft permit to include more stringent fecal coliform bacteria limits. *Id*. at 14. Indeed, the final Permit incorporates the more stringent fecal coliform limits sought by IFG in its comments on the draft permit. *See id.* at 13-14. As the Region stated in the Fact Sheet:

> The purpose of this change was to allow some variation in POTW flows in response to wet weather, and in recognition that the flow rate used as the monthly average is in most cases presented in the treatment plant planning documents as an annual average. As part of this change in how flow limits are written, [MADEP] and EPA agree that mass limitations for [biochemical oxygen demand

("BOD")] and [total suspended solids ("TSS")] should be included as permit conditions to ensure that existing controls on mass discharges of BOD and TSS were maintained, in order to prevent degradation of the receiving water.

To provide some background, every treatment plant has any number of design flows. The design engineer could provide a design flow for any time period, including yearly, monthly, daily, and hourly. A design flow is simply the flow rate which the designer establishes can be adequately treated over a given time period. Typically, a treatment facility can provide adequate treatment for higher flow rates for short periods than it can for longer periods, meaning that design flow increases as the time period decreases. The annual average design flow is almost always provided in the planning documents for POTWs. Other design flow rates are not as consistently calculated or provided in planning documents. The Newburyport facilities [sic] plan, updated February 1974, estimates the annual average flow of 3.4 mgd and a peak flow of 9.45 mgd.

There, the previous use of an annual average flow as a monthly average limit provided some conservatism to the permit by not allowing the facility to operate at its maximum monthly hydraulic capacity. We believe that this was the intention of EPA and MADEP in limiting the flow in this manner. We have now decided to relax the flow limit somewhat, but have sought to balance this action by imposing mass limitations on the discharge of BOD and TSS to ensure that the easing of flow restrictions does not result in a significant increase of pollutants during months when the monthly average discharge flow exceeds the limit established in the current permit. We have also strengthened the [infiltration and inflow ("I/I")] requirements of the permit to ensure that the permittee maintains efforts to minimize extraneous flows to the collection system.[19]

Id. at 6-7. The Region thus concluded that while flows might increase in some months, the final Permit strengthens effluent limitations compared to the previous permit and contains provisions sufficient to ensure continued compliance with applicable water quality standards[20] and to

[19] The Agency defines "inflow" as water other than wastewater entering a sewer system from sources such as drains, manhole covers, surface runoff and various types of drainage. 40 C.F.R. § 35.2005(21). "Infiltration" is defined as water other than wastewater entering a sewer system from the ground, via such means as defective pipes, connections, and joints. *Id*. § 35.2005(20).

[20] To the extent that IFG is challenging the adequacy of the applicable Massachusetts' water quality standards, such an argument cannot be heard in this forum. *See In re Teck Cominco*, NPDES Appeal No. 03-09, slip op. at 53 (EAB, June 15, 2004) (declining to consider challenge to adequacy of state water quality standard).

maintain the existing uses for the segment of the Merrimack River receiving the City's discharges. While IFG clearly disagrees with these conclusions, IFG has failed to meet its burden of establishing that the Region's judgments in this regard are clearly erroneous or otherwise warrants Board review.[21] *See In re Carlota Copper Co.*, NPDES Appeal Nos. 00-23 & 02-06, slip op. at 22 (EAB Sept. 30, 2004), 11 E.A.D. __ (explaining that "a petitioner seeking review of issues that are technical in nature bears a heavy burden because the Board generally defers to the Region on questions of technical judgment"); *In re City of Moscow*, 10 E.A.D. 135, 142 (EAB 2001) (same).

C. *Effluent Limitations*

1. *State Classification*

As stated above, under applicable Massachusetts water quality standards, the portion of the Merrimack River into which the WWTF discharges is classified as "Class SB" with restricted shellfishing. Mass. Regs. Code tit. 314, § 4.05(4)(b) (2004); Fact Sheet at 5. According to IFG, however, this classification does not result in effluent limitations sufficient to meet the requirements of the Act. IFG asserts that effluent discharges should be set at levels sufficient to

[21] IFG also states that because the Permit's expression of the flow limit as an annual average would result in the addition of "more pollutants," the permit cannot be issued until Massachusetts develops a Total Maximum Daily Load ("TMDL") because the applicable segment of the Merrimack River is listed as impaired for pathogens. *See* Petition at 29-30. Under section 303(d) of the CWA, states are required to identify those water segments where technology-based controls are insufficient to implement the applicable water quality standards, and which are therefore "water quality limited." *See* 33 U.S.C. § 1313(d)(1)(A). Once a segment is identified as water-quality limited, the state must establish TMDLs. CWA § 303(d)(1)(C), 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7. As stated above, however, the Region has concluded that the disputed Permit provision will not result in increased pollution loadings to the Merrimack River, and IFG has failed to meet its burden of demonstrating that the Region's technical judgment in this regard was clearly erroneous or otherwise warrants review.

ensure compliance with water quality standards for waters classified as "SA(O)."[22] *See* IFG Petition at 12 (stating that the receiving water must meet the standards for open shellfishing "the listing for which in Massachusetts is SA(O)"), 14 (water quality classification of SA(O) should be the basis for effluent limitations), 15 (Massachusetts did not properly designate waters as SA(O)), and 16 ("the designated use for all the discharge waters should be SA(O)"). In response, the Region asserts, among other things, that IFG's arguments in this regard were not raised during the comment period and were not, therefore, preserved for review with the Board. *See* Region's Response at 17-18.

As the Board has previously stated, "a petitioner cannot argue in this forum that a State's water quality standards * * * are inadequate or somehow flawed." *Teck Cominco*, slip op. at 53. Issues relating to whether the Agency erred in approving a state water quality standard in the first instance are beyond the Board's jurisdiction. Rather, the Board's jurisdiction is limited to whether the Region included conditions in the permit that properly implement the standard.[23] *In*

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[22] Under Massachusetts water quality standards, Class SA waters "are designated as an excellent habitat for fish, other aquatic life and wildlife and for primary and secondary contact recreation. In approved areas they shall be suitable for shellfish harvesting without depuration (Open Shellfish Areas)." Mass. Regs. Code tit. 314, § 4.05(4)(a) (2004). The "(O)" indicates that an area has been approved for open shellfishing. *Id*. at § 4.06(1)(d)(4).

[23] IFG has also argued that the Permit's effluent limitations should meet the requirements for waters classified as SA(O) in order to ensure protection of downstream waters. *See* Petition at 17-20. However, as this issue was not raised with sufficient specificity during the comment period, it was not preserved for review. As stated above, IFG argued in its comments that the draft permit's fecal coliform limitations should be revised to reflect the fact that the receiving waters had been approved for restricted shell fishing. *See* July 15 Comments at ¶ 3. Although IFG stated that waters downstream from the WWTF had been classified as SA(O), IFG did not argue that the Permit's effluent limitations must meet the requirements for downstream waters. Rather, IFG argued stated that the draft permit should be revised so that the Permit's fecal coliform effluent limitations meet the requirements for waters classified as SB(R). *Id*.; *see also*

re City of Hollywood, 5 E.A.D. 157, 176 (EAB 1994). Accordingly, we deny review of this issue.

Moreover, even if this issue were reviewable by the Board, IFG failed to raise the issue with sufficient specificity to preserve the issue for review. Nowhere in its comments did IFG assert that the applicable Massachusetts water quality standard had incorrectly classified the segment of the Merrimack River into which the WWTF discharges. In attempting to demonstrate that it had raised the issue, IFG points to a statement in the "background" section of its July 15, 2003 comments on the draft permit in which IFG stated, in part, as follows:

> Today, over thirty years after the passage of the [CWA], the "fishable-swimmable" goal established by the Congress for the Merrimack River estuary remains unachieved. This is due, in material part, to the discharge from the Facility. The quality of effluent from the Facility is not consistent with satisfying the SB/SA standards set for its receiving waters and areas influenced by tidal effects.

Letter from IFG to Region I (July 15, 2003) with attached comments on the draft permit (hereinafter "July 15 Comments") (R. Ex. 16); IFG Response at 14. This comment, however, clearly lacked the degree of specificity required to put the Region on notice as to the specific objection now being raised. That is, this comment did not put the Region on notice that IFG was objecting to Massachusetts' classification of the specific water segment at issue in this matter. As this Board has repeatedly stated, objections raised only in a general manner during the comment period are insufficient to support review of more specific objections in the petition.

Letter from IFG to Region I (August 29, 2003) with attached comments on the draft permit ("Aug. 29 Comments") (R. Ex. 21) at 2. As stated above, the final Permit incorporated IFG's suggested revisions. Under these circumstances, review is denied on this issue. Moreover, to the extent that IFG is arguing that the waters into which the WWTF discharges should be classified as SA(O), review is denied for the reasons stated above.

See In re Westborough, 10 E.A.D. 297, 304 (EAB 2002*); In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 230-31 (EAB 2000) (denying review because the permit issuer was not presented with the issue raised on appeal during the comment period with sufficient clarity to enable a meaningful response); *In re Pollution Control Indus. of Ind., Inc.*, 4 E.A.D. 162, 166-69 (EAB 1992). Under these circumstances, the issue was not preserved for review. *See Teck Cominco*, slip op. at 34 ("Issues raised during the comment period must be 'raised with a reasonable degree of certainty,' which serves to ensure 'that while the permit issuer will be held accountable for a full and meaningful response to comments, [the permit issuer] need not guess the meaning behind imprecise comments.'") (quoting *Westborough*, 10 E.A.D. at 304).

2. *Fecal Coliform Effluent Limitations*

IFG argues that the Permit's fecal coliform effluent limitations are not sufficient to meet state water quality requirements. Under Massachusetts' water quality standards, waters classified as SB(R), such as the section of the Merrimack River at issue here, "shall not exceed a fecal coliform median or geometric mean MPN[24] of 88 per 100 ml." Mass. Regs. Code tit. 314, § 4.05(4)(b)(4)(a) (2004). As the Region points out in its Response, during development of the draft permit in this matter, the area surrounding the discharge had not been approved for restricted shell fishing and, thus, the fecal coliform levels in the draft permit were higher than the limits quoted above.[25] Upon approval of restricted shellfishing, however, and as requested by

[24] MPN or "most probable number" refers to a commonly used method for measuring fecal coliform bacteria.

[25] The Fact Sheet accompanying the draft permit states, in part:

Currently, the Merrimack River in the vicinity of the discharge is closed to

IFG in its comments on the draft permit,[26] the final Permit was revised to include the more stringent limitations required by the applicable Massachusetts water quality standards. *See* Response to Comments at 8 (R. Ex. 5) (stating that because the portion of the Merrimack River at the point of discharge had been approved for restricted shellfishing, the draft permit would be revised to include the more stringent fecal coliform limitations). Because the Region has revised the Permit in a manner consistent with applicable water quality standards,[27] IFG has failed to convince us that the Region's determination was clearly erroneous or otherwise warrants review.[28]

> shellfishing. Therefore, the limits on fecal coliform are maintained as 200/100 ml average monthly and 400/100 ml maximum daily.
> ****
> If the waters in the vicinity of the discharge are approved for conditionally restricted shellfishing, fecal coliform bacteria shall not exceed a median or geometric mean MPN of 88 per 100 ml * * *. EPA will modify the permit when this occurs.

Fact Sheet at 8.

[26] *See* Aug. 29 Comments at 2 (stating that because of the SB(R) classification in the vicinity of the discharge, the Permit's fecal coliform effluent limitation should be strengthened so that discharges do not exceed the applicable State requirements, i.e., a median geometric mean MPN of 88 per 100 ml); July 15 Comments at ¶ 3 (seeking a revision of the Permit to reduce fecal coliform discharges to levels specified in Massachusetts water quality standards, i.e., "88 MPN per 100ml").

[27] These revisions are also consistent with the revisions IFG sought in its comments on the draft permit. *See supra* note 26.

[28] IFG has also objected to the Permit's 4-month compliance schedule for meeting the more stringent fecal coliform effluent limitations. In its Sur-Reply, however, the Region states that it "is planning on removing the 4-month compliance schedule considering the amount of time that has passed since the final Permit has been issued and appealed." Region's Sur-Reply at 7 n.3. On remand, the Region must therefore revise the Permit accordingly.

D. *Projection of Flow to Plant Capacity*

As stated earlier, the renewed Permit at issue in this matter replaces a permit issued in 1988. The 1988 permit expired in 2002 (*see* R. Ex. 10), but has been administratively extended pending review of the renewed Permit. *See* 40 C.F.R. § 122.6 (expiring federal permit may continue in effect after its expiration date in circumstances where, as here, an application for permit renewal was timely filed by the permittee and is pending Agency review). The 1988 permit contained the following provision:

> When the effluent discharges exceeds 80 percent of the designed flow, for a period of 90 consecutive days the permittee shall submit to the permitting authorities a projection of loadings up to the time when the design capacity of the treatment facility will be reached, and a program for maintaining satisfactory treatment levels consistent with approved water quality management plans.

1988 Permit, Condition I.A.1.e (R. Ex. 10). The reissued Permit at issue in this proceeding contains a similar requirement:

> When the effluent discharged for a period of 90 consecutive days exceeds 80 percent of the designed flow, the permittee shall submit to the permitting authorities a projection of loadings up to the time when the design capacity of the treatment facility will be reached, and a program for maintaining satisfactory treatment levels consistent with approved water quality management plans.

Permit, Condition I.A.1.f. Petitioners argue that between January and June of 2001, discharges from the WWTF exceeded 80% of design flow for 90 consecutive days. Thus, according to IFG, under condition I.A.1.e of the 1988 permit the Region should have required that the WWTF prepare a projection of loadings and should require such a projection of loadings as a condition of the reissued Permit. Petition at 21. It is important to note that IFG does not object to the above-quoted condition in the reissued Permit (condition I.A.1.f). Rather, in essence, IFG is

objecting to the Region's oversight under the similarly worded provision of the 1988 Permit.[29] *See* IFG's Response at 26 (asserting that the Region failed to enforce the 1988 permit and that the inclusion of the above-quoted provision in the revised permit would not result in "any more vigorous" enforcement).

The Board's role in considering petitions for review filed under 40 C.F.R. § 124.19 is to examine and rule on objections to specific permit conditions that are alleged to be erroneous or that otherwise warrant Board review. *See* 40 C.F.R. § 124.19(a) (parties may petition the Board to review "any condition" of the permit decision); *In re Ecoelectrica, L.P.*, 7 E.A.D. 56, 70 (EAB 1997). The Board has declined to review generalized concerns or objections regarding the enforcement of a permit condition. *See In re Federated Oil & Gas*, 6 E.A.D. 722, 730 (EAB 1997) (declining to review objections related to the ability of a permit issuer to ensure compliance); *In re Envotech, L.P.*, 6 E.A.D. 260, 273-74 (EAB 1996) ("The Board has no jurisdictional basis to review a permit based solely on a company's past compliance history."); *In re Brine Disposal Well*, 4 E.A.D. 736, 746 (EAB 1993) (denying review where petitioner alleged concern over EPA's ability to enforce compliance with regulatory requirements). Because IFG has not objected to the Permit condition at issue or identified a specific Permit

[29] We note that in its response to comments on the draft permit, the Region stated incorrectly that the WWTF's discharge monitoring reports for 2001 had not shown that flows to the plant had exceeded the 80% threshold level for 90 consecutive days. The Region acknowledged this error in its response to IFG's Petition. Region's Response at 27. The Region also states, however, that more recent data suggest that the 80% threshold was not exceeded. *Id.*

condition that it claims to be erroneous, the request for review is denied. *See Envotech,* 6 E.A.D. at 274.[30]

E. *Total Residual Chlorine Limitations*

IFG argues that the Permit's limits for total residual chlorine ("TRC") are incorrect and exceed the limits in applicable EPA guidance. *See* Petition at 21. Although IFG did not raise this issue during the comment period, it was, as the Region points out in its response,[31] raised by another commenter, David McFarlane. In his commenting on the Permit, Mr. McFarlane stated, as follows:

> Concerns remain about the actual levels of TRC being discharged to the estuary as estimates are based on uncertainty in the effluent metering, past repetitive DMR reports containing the maximum level in the existing permit of .3 mg/l, uncertainty in diffuser condition and dilution, the 30 percent increase in a maximum value and the actual acute and chronic criteria specified in the draft permit.
>
> Notwithstanding the dilution factor, measurement and flow uncertainties, the TRC acute criteria are listed as maximum daily in the draft permit and the chronic criteria is listed as a monthly average. EPA [G]old [B]ook[32] lists the chronic

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[30] Of course, we would expect that the Region will oversee the final Permit, including this provision, particularly in view of the compliance problems related thereto that have surfaced through this permit proceeding. We further expect that, as appropriate, the Region will initiate action to enforce the Permit should it become necessary. *See In re Laidlaw Envtl. Serv.*, 4 E.A.D. 870, 882-83 (EAB 1993).

[31] *See* Region's Response at 28 n.21.

[32] According to the Region, the "Gold Book" refers to a U.S. EPA guidance document titled "Quality Criteria for Water 1986, Data on Chlorine, EPA 440/5-84-030" ("1986 Guidance"). *See* Region's Response at 28 (citing R. Exh. 33). Apparently, the Region relied on the 1986 Guidance in establishing the permit's TRC limits. *See id.* However, the record is not entirely clear on this issue. That is, while Exhibit 33 to the Region's Response contains a document titled "Quality Criteria for Water 1986," it contains a different reference number than the document cited in the Region's Response, i.e., "EPA 440/5-86-001." *See* R. Ex. 33. Moreover, in its response to comments, the Region states that TRC limits were based on an

> criteria level used as a 1-hour average not to be exceeded more than once every three years on average, and the chronic criteria level used as a 4 day average not to be exceeded more than once every three years on average. These EPA [G]old [B]ook levels seem more stringent tha[n] those included in the draft permit due primarily to the 1 hour and four day average as opposed to a maximum daily and monthly average. It is unclear how the Gold [B]ook standards for TRC will be calculated and reported if they are the appropriate criteria.
>
> Questions: Are TRC values listed appropriately in the draft permit as average monthly values and maximum daily values? How does this relate to the Gold [B]ook criteria? How will these levels be calculated and reported and how will they be calculated and reported if they are as defined in EPA [G]old [B]ook for marine waters?

Letter from David J. McFarlane to Michele Barden, U.S. EPA Region I, attaching comments on draft permit, at 5 (July 27, 2003).

The Region's response to comments document is divided into various sections, each responding to comments filed by a different commenter. Section D purports to respond to comments submitted by Mr. McFarlane. In this section, the Region summarizes Mr. McFarlane's above-quoted comments on the Permit's TRC limitations as follows:

> Are TRC values listed appropriately in the draft permit as average monthly values and maximum daily values? How does this relate to the Gold Book criteria? How will these levels be calculated and reported and how will they be calculated and reported if they are defined in EPA gold book for marine waters.

Response to Comments at 21. The Region's summary includes only the questions presented at the end of Mr. McFarlane's comment and seems to ignore the previous paragraph explaining the

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entirely different guidance document, i.e., "National Recommended Water Quality Criteria, 2002 (EPA-822-R-02-047)." Response to Comments at 5. Finally, the Region cites to yet another guidance document in its response to the Petition titled "Technical Support Document for Water Quality-based Toxics Control, EPA/505/2-90-001, March, 1991." Region's Response at 28-29. Under these circumstances, it is unclear to the Board and, we suspect, to the public which document or combination of documents served as the basis for the Region's determination.

context for the question. The Region does not directly respond to the comment but refers readers to its response to comment "A.3." *Id*. Section A of the Response to Comments responds to comments submitted by the City. Comment A.3 responds to the City's argument objecting to the draft permit's TRC limitation which "proposes to modify the existing maximum day Permit limit for [TRC] of 0.30 mg/l and replace it with an average monthly discharge limitation of 0.23 mg/l and a maximum daily limit of 0.39 ml/l." *Id*. at 4. The City's comment, however, does not appear to raise the same issue as Mr. McFarlane, i.e., whether the Region used the correct TRC acute and chronic criteria values. In its response to the City's comment, the Region states:

> The issue of the dilution factor was addressed in a previous response. The dilution factor will remain 30 as set forth in the draft permit. The [TRC] limits are based on the National Recommended Water Quality Criteria, 2002 (EPA-822-R-02-047). In the previous permit, the chronic criteria (monthly average) was used to calculate the acute limit (maximum daily). This error resulted in a maximum day limitation which was more stringent than required. EPA has corrected that error in this permit and has included a monthly average limit based on the chronic criteria.

Id. at 5. While this statement is arguably responsive to the City's comments, we find it inadequate as it relates to Mr. McFarlane's comments.

Under the regulations that govern this permitting proceeding, a permit issuer must "briefly describe and respond to all significant comments on the draft permit." 40 C.F.R. § 124.17(a)(2). The Board has interpreted this provision as meaning that a response to comments need not be of the same length or level of detail as the comments, and that related comments may be grouped together and responded to as a unit. *See, e.g., In re Hillman Power Co.*, 10 E.A.D. 673, 696 (EAB 2002); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 582-84 (EAB 1998), *review denied sub nom. Penn. Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3rd Cir. 1999).

The response to comments must, however, address the issues raised in a meaningful fashion. *See In re Wash. Aqueduct Water Supply Sys.*, NPDES Appeal No. 03-06, slip op. at 28 (EAB, July 29, 2004), 11 E.A.D. at ___. While the response may be brief, it must nonetheless be clear and thorough enough to adequately encompass the issues raised by the commenter. *Id*.; *see also Hillman*, 10 E.A.D. at 696 n.20; *In re Steel Dynamics, Inc*, 9 E.A.D. 165, 180-81 (EAB 2000) (finding clear error and remanding permit where permit issuer failed to adequately address significant comment on the draft permit); *In re RockGen Energy Ctr.*, 8 E.A.D. 536, 556 (EAB 1999) (remanding permit where permit issuer failed to issue a complete response to comments). Further, the administrative record must reflect the permit issuer's "considered judgment," meaning that the permit issuer must articulate with reasonable clarity the reasons for its conclusions and the crucial facts it relied upon in reaching those conclusions. *Wash. Aqueduct Water Supply Sys.*, slip op. at 29, 11 E.A.D. at ___; *RockGen*, 8 E.A.D. at 557 ("The rules providing for public comments and requiring that the permit issuer respond to those comments contemplate that the permit issuer will be informed by and give serious consideration to public comments."); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997); *In re GSX Servs. of S.C., Inc.*, 4 E.A.D. 451, 454 (EAB 1992) (remanding permit where administrative record did not reflect the Region's "considered judgmen."); *see also In re Prairie State Generation Station*, PSD Appeal No. 05-02, slip op. at 5-7 (EAB, Mar. 25, 2005), 12 E.A.D. ___.

In the case before us, the Region was presented with a comment pointing out what the commenter viewed as a conflict between the EPA guidance document relied upon by the Region in establishing the Permit's TRC limitation and the limitation appearing in the final Permit. Rather than respond directly to this concern, the Region's response to comments document

referred readers to the Region's response to a comment submitted by the permittee. That comment, however, did not raise the same issue as Mr. McFarlane's comment, i.e., whether the permit contains the correct TRC values as reflected in the EPA's Gold Book criteria.[33] Based on our review, it does not appear, and the Region does not allege, that the Region directly addressed Mr. McFarlane's comment.[34] Thus, it does not appear that the Region provided interested parties with a sufficient justification for the applicable Permit decision.[35] We therefore conclude that the

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[33] The City's comment stated that it disagreed with the permit's revision's to the TRC effluent limitations for the following reasons:

- The key factor in driving the TRC effluent limitations contained in the draft permit is the available dilution.
- The revised average monthly [TRC] concentration * * * will increase operation and maintenance (O&M) costs for dechlorination, but is not expected to have any beneficial impact on receiving water.
- Reducing the TRC level at the down gradient end of the chlorine contact tank may adversely impact disinfection efficiency of the treatment facility.

Response to Comments at 4.

[34] In its Petition, IFG states that the Region did not directly address Mr. McFarlane's comments on the Permit's TRC limitations. Petition at 22. The Region has not disputed this assertion in either its response to the Petition or its Sur-Reply, nor do either of these submissions contain any references or citations to the response to comments document discussing or related to this issue.

[35] Although the Region attempts to justify the Permit's TRC limitations in its response to the petition and in its Sur-Reply, such after-the-fact explanations do not ensure that the Region fully complied with the requirement to give adequate and timely consideration to public comments at the time of issuing the final Permit decision. *See Prairie State*, slip op. at 6, 12 E.A.D. ___ (holding that a permit does not reflect the "considered judgment" of the permit issuer where a response to comments document was not issued until after the final permit decision was made); *Washington Aqueduct Water Supply Sys.*, NPDES Appeal No. 03-06, slip op. at 33 (July 29, 2004), 11 E.A.D. at ___ (holding that the Region cannot, through its arguments on appeal, augment the record upon which the permit decision was based); *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 101 (EAB 1998) (remanding air permit where permit issuer failed to adequately address specific comments raised during the comment period and declining to consider new data provided by the permit issuer in its response to the petition for review); *In re Chem. Waste Mgmt. of Ind., Inc.*, 6 E.A.D. 144, 151-52 (EAB 1995) (rejecting permit issuer's

Region committed clear error by failing to comply with its obligation under 40 C.F.R. § 124.17(a)(2) to respond to significant comments. The permit is therefore remanded on this issue so that the Region can respond to Mr. McFarlane's comments in a fashion that is sufficiently clear and adequately encompasses the issues raised. *See Wash. Aqueduct*, slip op. at 29, 11 E.A.D. at ___ (remanding permit where Region failed adequately respond to public comment); *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 101-103 (EAB 1998) (remanding air permit where permit issuer failed to adequately address specific comments raised during the comment period and declining to consider new data provided by the permit issuer in its response to the petition for review). While a remand may not necessarily result in any change to the Region's Permit determination, we believe that a remand on this issue is nevertheless appropriate to ensure that the Region complies with the requirement to give adequate and timely consideration to all significant public comments.

F. *Comprehensive Water Management Plan*

IFG argues that the Region erred in failing to require the City to undertake preparation of a comprehensive wastewater management plan for the estuary region of the Merrimack River. Petition at 37. In responding to comments on this issue, the Region stated that it is without authority to require the preparation of such a plan. *See* Response to Comments at 16.

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explanation for permit condition because explanation was raised for the first time on appeal, rather than in response to comments document); *In re Amoco Oil Co.*, 4 E.A.D. 954, 964 (EAB 1993) (declining to consider permit issuer's rationale for permit condition raised for the first time on appeal).

Upon review, we conclude that IFG has failed to demonstrate either the need for such a plan or that the Region has the statutory or regulatory authority to require one. As the Region states in its Response, comprehensive wastewater management planning is a state planning process for evaluating wastewater needs. *See* Region's Response at 35. Indeed, the only citation IFG provides in support of its argument is to an MADEP regulation. *See* Petition at 37. Thus, IFG has failed to convince us that the Region erred by failing to include a provision requiring the City to undertake preparation of a comprehensive wastewater management plan. Moreover, IFG's objection does not appear to relate to a condition of the Permit at issue in this case. *See* 40 C.F.R. § 124.19 (allowing for filing of petitions to review "any condition of the permit decision."). Under these circumstances, review is denied.

IV. *CONCLUSION*

For the foregoing reasons, we remand this Permit to the Region for further proceedings consistent with this decision. On remand, the Region must: (1) either restore the DO limitation and monitoring requirement to the permit or publically notice the removal of these provisions from the final Permit and allow IFG and other interested parties the opportunity to submit comments; (2) publically notice the Region's proposal to require DO monitoring 5 days per week if a modification along these lines is pursued; (3) remove the Permit's 4-month schedule of compliance; and (4) provide an adequate response to Mr. McFarlane's comments related to the

Permit's TRC limitations or revise the Permit accordingly.[36] IFG's Petition is denied in all other respects.

So ordered.[37]

Dated: 12/08/05 ENVIRONMENTAL APPEALS BOARD

/s/
Kathie A. Stein
Environmental Appeals Judge

[36] Although 40 C.F.R. § 124.19(c) contemplates that additional briefing typically will be submitted upon a grant of a petition for review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues to be addressed on remand. An administrative appeal of the determination on remand is required to exhaust administrative remedies under 40 C.F.R. § 124.19(f)(1). Any such appeal shall be limited to the issues on remand.

[37] The panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in Part and Remanding in Part in the matter of City of Newburyport Wastewater Treatment Facility, NPDES Appeal No. 04-06, were sent to the following persons in the manner indicated:

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_____/s/_____
Annette Duncan
Secretary