IN RE TOWN OF ASHLAND WASTEWATER TREATMENT FACILITY

NPDES Appeal No. 00-15

ORDER DENYING PETITION FOR REVIEW

Decided February 23, 2001

Syllabus

Petitioner, the Town of Ashland ("Town"), filed a Petition for Review of a National Pollutant Discharge Elimination System ("NPDES") permit issued to it by U.S. Environmental Protection Agency, Region I ("Region"), for operation of the Town's wastewater treatment plant. The Town's appeal seeks review of two permit conditions. First, the Town challenges the assumptions that led the Region to establish a whole effluent toxicity ("WET") limit in the permit. Second, the Town challenges the permit requirement that it monitor for color when there is no color limit established by the permit.

Held: The Petition for Review of the Town's NPDES permit is denied. Review of the WET limit is denied because the Town's argument suffers from a lack of specificity. Based on the Town's failure to do more than reiterate previous comments it made on the draft permit without addressing the Region's previous response to those same comments, the Board concludes that the Town has failed to establish any clear error or abuse of discretion by the Region when it set the permit's WET limit. With regard to the color monitoring requirement, the Board finds that the Clean Water Act ("Act") confers broad authority on the Region to impose monitoring requirements in NPDES permits and that there is nothing in the Act or its implementing regulations that would limit monitoring requirements to just those that might be necessary to assess compliance with effluent limits established by the permit. Furthermore, the Region's inclusion of the color monitoring requirement was not clearly erroneous as the Region articulated a reasonable basis for the requirement that the Town failed to refute.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Fulton:

The Town of Ashland ("Town") has filed a Petition for Review ("Petition") dated August 14, 2000, seeking review of two conditions set forth in a National

Pollutant Discharge Elimination System ("NPDES")[1] permit issued to the Town by the U.S. Environmental Protection Agency, Region I ("Region") on March 31, 2000. The Petition challenges two permit conditions — the permit's whole effluent toxicity limit and its color monitoring requirement — on the basis that the Region's inclusion of such conditions was "unlawful, arbitrary, capricious, unsupported by any factual or legal basis in the administrative record, and constitute[s] an abuse of authority and/or discretion." *See* Petition at 2-3.

In its Memorandum in Opposition to Petition for Review ("Response"), the Region contends that its actions were not only a lawful exercise of its discretion, but asserts that the conditions objected to by the Town are required under the Clean Water Act. Response at 1-3, 18-19, 21-23. Because the Town has failed to demonstrate how the Region's findings were clearly erroneous, an abuse of discretion, or otherwise unlawful, review is denied.

I. *BACKGROUND*

The Town owns and operates a wastewater treatment facility that collects and treats municipal, commercial, and industrial wastewaters in Ashland, New Hampshire. The Town's facility consists of four aerated lagoons that discharge treated effluent from a single outfall to the nearby Squam River. Response at 4. A prior NPDES permit issued to the Town by the Region on September 30, 1991, was set to expire October 30, 1996. *See* Petitioner's Exhibit ("P Ex") D at 1. The Town reapplied for an NPDES permit in accordance with the requirements of 40 C.F.R. § 122.41(b) and received administrative extensions of its 1991 permit under 40 C.F.R. § 122.6 while the Region's review of the new permit application was pending. *Id.* at 1-2.

On January 21, 2000, the Region issued a fact sheet and draft permit for the Town's facility.[2] *Id.* at 20. The draft permit differed from the facility's 1991 permit with respect to the two conditions that are presently at issue. The first change from the 1991 permit involves testing for Whole Effluent Toxicity ("WET").[3] Un-

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[1] Under the Clean Water Act ("CWA"), 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 the principal permitting program under the CWA. CWA § 402, 33 U.S.C. § 1342.

[2] While the date on the fact sheet itself is January 21, 2000, both the Petition and the Response, as well as the Response to Comments (P Ex C), list February 3, 2000, as the issuance date. The Board assumes that this latter date is the date that the Town was served.

[3] As explained by EPA guidance, WET testing evaluates interactions between all pollutants in a discharge rather than focusing on a specific chemical discharge. WET testing thus provides an "aggregate" or "overall" picture of the toxicity of a facility's discharge and also allows control of unknown

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like the 1991 permit, which had contained only a quarterly monitoring requirement for Chronic-No Observed Effect Concentration ("C-NOEC") WET, the new draft permit added a C-NOEC WET effluent limit of $\geq$ 9.7%.[4] *See* Respondent's Exhibit ("R Ex") 4 at 2. The fact sheet to the permit explained that this limit was established based on: (1) calculations made pursuant to New Hampshire Water Quality Criteria and EPA guidance documents; and (2) reports by the facility in April and July 1997 of C-NOEC WET values less than the calculated limit, thereby establishing a reasonable potential to violate the $\geq$ 9.7% C-NOEC WET limit. P Ex D at 10-11.

The new draft permit also added a monitoring requirement for color. *See* R Ex 4. The fact sheet stated that the Region established a color monitoring requirement because of reports by the Town that its discharge had discolored an area "approximately one half of the river's width and * * * 243 feet long." P Ex D at 10. The fact sheet explained that the Town's color discharge could interfere with the Squam River's designation as a recreational water, thereby violating New Hampshire Water Quality Standards preventing color concentrations "that would impair any existing or designated uses * * *." *Id.* The fact sheet further stated that color monitoring would be required "to ascertain the magnitude and duration" of the facility's color discharges so that an appropriate color limit could be established in the future, as necessary. *Id.*

Comments on the draft permit were made by the Town on March 1, 2000, and by L.W. Packard & Company (an industrial discharger to the Town's facility) on February 29, 2000. P Ex 3. Following certification of the permit by the State of New Hampshire on March 21, 2000,[5] the Region issued the final permit and a written response to comments on March 30, 2000. Response at 4.

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pollutants that might not be covered under chemical-specific permit limits. *See* P Ex D at 10 (citing Office of Water Enforcement and Permits, U.S. EPA, EPA/505/2-90-00, *Technical Support Document for Water Quality-Based Toxics Control* (1991)). There are two types of WET tests, both of which measure the response of aquatic organisms exposed to the subject effluent: acute tests are conducted over a short time period (e.g., 24 hours), and the endpoint measured is mortality; chronic tests are conducted over a longer period of time (e.g., a week), and the endpoints measured are both mortality and lesser effects, such as changes in reproduction and growth. *See* Office of Water Management, U.S. EPA, EPA/833-B96-003, *U.S. EPA NPDES Permit Writers' Manual* 96-97 (1996).

[4] C-NOEC WET limits are "based on available dilution and represent the highest * * * concentration [of effluent] that will exhibit no chronic toxicity after mixing with the receiving water." Response at 6, n.2. In other words, a C-NOEC WET permit limit measures the *highest* concentration of effluent at which there is no observable adverse effect; the lower the C-NOEC WET result, the higher the toxicity of the effluent. Thus, in this case, a C-NOEC WET value of less than 9.7% would be a violation of the permit.

[5] Under CWA § 401(a), 33 U.S.C. § 1341, the Region may not issue a permit until the State in which a facility is located (in this case New Hampshire) either certifies that the permit complies with the State's water quality standards or waives certification. *See* 40 C.F.R. § 124.53.

On May 5, 2000, the Town filed a request for an evidentiary hearing with the Regional Administrator. R Ex 8. On June 30, 2000, the Region returned the Town's Request for Evidentiary Hearing without prejudice to the Town's filing an appeal with the Environmental Appeals Board ("EAB" or "Board") under changes made to the NPDES permit appeals process effective June 14, 2000.[6] R Ex 9. The Town filed its Petition with the Board on August 14, 2000.

In its Petition, the Town makes three arguments: (1) the Region abused its discretion by ignoring relevant facts when it established the C-NOEC WET Limit in the final permit (Petition at 3); (2) the Region's low-flow assumptions for the Squam River led to an erroneous C-NOEC WET limit in the permit (*id*. at 5); and (3) the Region inappropriately established a color monitoring requirement in the permit (*id.* at 6).

The first two issues, at bottom, express a single concern: that the Region erred in calculating the rate of flow of the Squam River. In the Town's view, because the Region erroneously assumed a low flow rate (and thus less assimilative capacity) in the Squam River, it derived a C-NOEC WET value that was more stringent than that which a higher flow rate assumption would have produced. The Region then found a "reasonable potential to violate" the overly stringent C-NOEC WET value, giving rise to the requirement for a specific C-NOEC WET limit in the permit, in keeping with NPDES permitting regulations. According to the Town, had the Region properly calculated the flow rate, it would have computed a less stringent C-NOEC WET value, there would not have been a reasonable potential to violate that value, and there would have thus been no reason to include a C-NOEC WET limit in the permit. In sum, the Town's arguments related to C-NOEC WET hinge entirely on the appropriateness of the Region's flow rate calculation.[7]

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[6] Procedures for issuing, modifying, revoking, or terminating permits are governed generally by 40 C.F.R. pt. 124. Prior to June 14, 2000, subpart E of part 124 established an evidentiary hearing process for NPDES permits. Section 124.74 required that any person challenging a final NPDES permit decision submit a request to the Regional Administrator for an evidentiary hearing within 30 days of service of the notice. 40 C.F.R. § 124.74(a) (1998). Only a decision after an evidentiary hearing or a denial of the request for an evidentiary hearing could be appealed to the Board. *Id*. § 124.91. On May 15, 2000, EPA promulgated substantial changes to the permit review process. *See* 65 Fed. Reg. 30,887 (May 15, 2000). Included in these changes was the elimination of the evidentiary hearing procedures for NPDES permits. *Id.* at 30,896. Under current procedures, persons appealing an NPDES permit condition may now file a petition directly with the Board within 30 days after the issuance of a final NPDES permit decision. *Id*. at 30,911 (codified at 40 C.F.R. § 124.19(a)).

[7] The Town does not challenge the Region's methodology in calculating the C-NOEC WET limit, only the flow rate used in that calculation. The Town's own derivation of a C-NOEC WET limit is based on the same formula used by the Region in its calculation. P Ex B at 2. Thus, the only issue before the Board with regard to the appropriate C-NOEC WET limit is whether the Region erred in its calculation of the flow rate.

According to the Town, a key consideration ignored by the Region in calculating the flow rate is that flow in the Squam River is regulated by an upstream dam, and the Town is capable of regulating precisely "its discharge in conjunction with [the] dam['s] operations." Petition at 4.

As to the second issue on appeal, the Town argues that the inclusion of a color monitoring requirement in its permit was an abuse of the Region's discretion. *Id.* at 6. The Petition states that while the Region "notes that the Town * * * has reported detectable color discharges, [it] does not conclude that these have violated New Hampshire's narrative criteria for water color." *Id.* The Town argues that, having chosen not to establish a color limit in the permit, the Region cannot require it to monitor for color. Rather, according to the Town, 40 C.F.R. § 122.44(i), which governs when monitoring requirements may be included in NPDES permits, limits monitoring requirements to monitoring associated with effluent limits and conditions established by the permit.[8] *Id.*

The Region argues in response that the Town fails to meet its burden of showing any clear error of law or fact or abuse of discretion in setting the C-NOEC WET limit or imposing the color monitoring requirement. Response at 5-6. The Region cites CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), as requiring any NPDES permit it issues to contain limitations necessary to achieve water quality standards established by the State and approved by EPA, including narrative criteria for water quality. *See* Response at 2; 40 C.F.R. § 122.44(d).

Regarding the C-NOEC WET issue, the Region cites the New Hampshire water quality criteria for toxic substances, which include a requirement that surface waters be free from toxics in concentrations that are harmful to plant, animal, human, or aquatic life or that "persist in the environment or accumulate in aquatic organisms to levels that result in harmful concentrations in edible portions of fish * * * or other aquatic life, or wildlife which might consume aquatic life." Response at 2 (citing N.H. Code Admin. R. Ann. Env-Ws ("Env-Ws") 1703.21(a)). The Region states that when it set the C-NOEC WET limit it considered all relevant information, including the presence of an upstream dam, and properly computed the low-flow rate of the Squam River. According to the Region, it used four steps to derive the Town's C-NOEC WET limit. These are: (1) calculating the

[8] The Town included in its objection on this issue a reference to a condition in the permit allowing the reopening of the permit if color monitoring reveals the facility to be in violation of state water quality standards. Petition at 3. However, nothing in the Town's brief substantiates a challenge to the reopener condition. Because, as stated below, we find that the permit's color monitoring requirement is reasonable, and because the Town has provided nothing more than a general objection to the reopener condition, we decline to review the Region's decision to include the reopener condition. *In re LCP Chems., New York*, 4 E.A.D. 661, 669 (holding that a conclusory contention, without more, is insufficient to meet pleading burden under 40 C.F.R. § 124.19).

Squam River's low-flow rate, also known as the "7Q10,"[9] by applying widely accepted United States Geological Survey ("USGS") low-flow analysis methods to nearly 50 years of streamflow data from a flow gauging station approximately 1.8 miles upstream from the facility;[10] (2) using standard USGS "basin comparison" methodology to estimate the 7Q10 value of the section of the Squam River between the upstream gauging station and the facility; (3) following standard EPA practice by combining the first and second 7Q10 values together to determine the 7Q10 value at the point of discharge and thus the "available dilution" available to the facility; and (4) using the available dilution factor for the facility to determine the C-NOEC WET limit according to EPA guidance on water quality-based toxics control. *Id.* at 7. Based on this methodology, the Region calculated a 7Q10 value of 26 cubic feet per second ("cfs") for the Squam River at the point of discharge. *Id.* at 16.

The Region further states that its decision to require color monitoring is supported by facts in the record reporting recurring incidents of blood-red colored discharge coming from the facility. *Id*. at 22. The Region cites New Hampshire water quality standards for color and points out that "blood-colored discharge can reduces [sic] the river's appeal for swimming and other recreation [and] can also interfere with the transmission of light needed by microflora for photosynthesis, thus affecting the aquatic ecosystem for fish life." *Id*. at 23. The Region cites 40 C.F.R. § 122.44(d)(1) as authority to include in the permit "any requirements" necessary to achieve water quality compliance, including monitoring requirements. *Id.*

II. *DISCUSSION*

A. *Standard of Review*

In appeals under 40 C.F.R. § 124.19(a), the Board will not grant review unless it appears from the petition that the condition in question is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of

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[9] "7Q10" is the annual mean low flow over seven consecutive days, recurring every ten years, and expressed in terms of volume per time period. Response at 7. Under New Hampshire water quality standards, the 7Q10 value of a receiving stream is "the critical hydrologic condition used when applying stream * * * water quality * * * criteria to develop water quality-based NPDES permit limits." *Id.* at 7 n.3; *see also* Env-Ws 1705.02.

[10] This station is, however, approximately one-half mile below the dam. *See* P Ex B at 2 (dam is approximately one mile below Little Squam Lake); P Ex D at 8 (gauging station located 1.4 miles below Little Squam Lake).

discretion or an important policy consideration that warrants review.[11] 40 C.F.R. § 124.19(a) (2000). As we have observed in other contexts, the Board exercises its authority to review permits sparingly, in recognition of Agency policy favoring resolution of most permit disputes at the Regional level. *See, e.g., In re Caribe Gen. Elec. Prods., Inc.*, 8 E.A.D. 696, 702 (EAB 2000) (involving review of a permit issued under the Resource Conservation and Recovery Act); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997) (involving review of a Clean Air Act Prevention of Significant Deterioration permit); *In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 725 (EAB 1997) (involving review of an Underground Injection Control permit issued pursuant to the Safe Drinking Water Act). *See also In re Town of Hopedale, Bd. of Water & Sewer Comm'rs.*, NPDES Appeal No. 00-04, at 8-9 n.13 (EAB, Feb. 13, 2001). The burden of establishing grounds for review rests upon the petitioner. 40 C.F.R. § 124.19(a)(1)-(2). To meet this burden, a petitioner must identify a clearly erroneous finding of fact or conclusion of law in the underlying permit decision or an important policy consideration or exercise of discretion that warrants Board review. *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998). Moreover, the Board traditionally assigns a heavy burden to petitioners seeking review of issues that are essentially technical; clear error or a reviewable exercise of discretion is not established simply because the petitioner presents a difference of opinion or alternative theory regarding a technical matter. *NE Hub*, 7 E.A.D. at 567.

The Town's arguments are considered in light of this framework. For the reasons set forth below, the petition for review is denied.

B. *Issues Pertaining to the C-NOEC WET Limit*

While the Town acknowledges that 40 C.F.R. § 122.44(d)(1)(v) requires the Region to establish WET limits when a facility "'causes, has the reasonable

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[11] As noted *supra*, note 6, prior to the Amendments to Streamline the NPDES Program Regulations, 65 Fed. Reg. 30,886-30,913 (May 15, 2000), the rules governing petitions for review of NPDES permitting decisions were set out in 40 C.F.R. § 124.91 (1998). Even though these amendments have eliminated the evidentiary hearing requirement in favor of direct appeal to the Board, it bears noting that the standard of review has not changed. The standard of review under 40 C.F.R. § 124.91 is essentially identical to that of 40 C.F.R. § 124.19. For instance, under section 124.91, a petition for review was not granted unless the decision of the Administrative Law Judge (or, in the case of a hearing denial, the Regional Administrator) was clearly erroneous or involved an exercise of discretion or important policy that merited review. This same principle applies under section 124.19. *See* 40 C.F.R. § 124.19(a)(1)-(2). Likewise, other principles, such as the ideas that power of review should be exercised sparingly and that petitioners bear the burden of demonstrating that the petition warrants review had the same force under 40 C.F.R. § 124.91 as they do under section 124.19. *See, e.g., In re City of Port St. Joe & Fla. Coast Paper Co.*, 7 E.A.D. 275, 282-83 (EAB 1997); *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 51-52 (EAB 1995); *In re J & L Specialty Prods. Corp.*, 5 E.A.D. 31, 41 (EAB 1994).

potential to cause, or contributes to an in-stream excursion above a narrative criterion' of state water quality standards," the Town contends that the Region erred in establishing a C-NOEC WET limit in its permit. Petition at 3. As discussed above, this issue turns on the question of whether the Region erred in its calculation of the low-flow, or 7Q10, value for the Squam River at the Town's point of discharge of 26 cfs. As discussed below, the Town's argument that the Region's assessment of a 26 cfs 7Q10 value was incorrect suffers from a lack of specificity.

In establishing grounds for review, it is not sufficient for a petitioner to rely on previous statements of its objections, such as prior comments on a draft permit; a petitioner must demonstrate with specificity why the Region's response to those objections is clearly erroneous or otherwise merits review. *In re NPDES Permit for Wastewater Treatment Facility of Union Township*, NPDES Appeal Nos. 00-26 & 00-28, at 11 (EAB, Jan. 23, 2001); *Caribe*, 8 E.A.D. at 727; *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996). As stated by the Board in *Envotech*, a petitioner seeking review of a permit decision must do more than just rely on comments made during the public notice period. *Envotech*, 6 E.A.D. at 268. When the Region has responded to objections made by the petitioner, a petitioner must "demonstrate why the Region's response to those objections is clearly erroneous or otherwise warrants review." *Id.*; *see also In re Ash Grove Cement Co.*, 7 E.A.D. 387, 404 (EAB 1997) ("Petitioners must provide compelling arguments as to why the Region's technical judgments or its previous explanations of those judgments are clearly erroneous or worthy of discretionary review.").

Here, the Town alleges that the Region failed to take into account what it contends are undisputed facts in the record regarding the flow of the Squam River and Ashland's discharge practices which support its argument that the appropriate 7Q10 value to use for setting the C-NOEC WET limit is 60 cfs. Petition at 4. Although not explained in the Petition, the Town's 60 cfs value apparently comes from a point made in the Town's comments on the draft permit, namely that the New Hampshire Department of Environmental Services ("NHDES"), which operates the dam upstream from the Town's facility, "consistently maintains a minimum flow in the Squam River of 60 cfs." P Ex B at 2. In its comments, the Town points out that NHDES notifies the Town when flows below 60 cfs are about to occur, thereby allowing the Town to cease discharging during such periods. *Id.* In its Petition, the Town states that the facility is capable of, "and in fact has consistently withheld discharges to the Squam River during any periods in which flows in the Squam River were less than 60 cfs." *Id.* The Town is able to do this, it argues, because its facility discharges on an intermittent, rather than continuous, basis, "thereby allowing it to precisely regulate its discharge in conjunction with DES's dam operations." *Id.*

The Town also contends that historical flow data used by the Region in its calculation of the 7Q10 flow were flawed because of "known deficiencies" in the data caused by freezing of the flow gauges below the dam. *Id.* at 5. The Town

supports its arguments by referencing its March 1, 2000 comments to the draft permit, which present these same objections in greater detail. *Id.* at 4-5; P Ex B.

In these comments, the Town stated that, with the exception of dam maintenance periods in June and July when the permit requires the facility to withhold its discharge, NHDES is able to maintain a consistent flow of 60 cfs in the Squam. P Ex B at 2. The Town attached to its comments USGS flow data from the 1980-1995 period demonstrating "how well the Department is able to maintain minimum flows above 60 cfs at almost all periods of the year except for the time required for maintenance of the dam." *Id.* For those periods of the year when flow dropped below 60 cfs that were not during dam maintenance, the Town argued that the Region "should note the fact that the gauge site freezes in the winter months and * * * [m]any of the apparent dips in flow during the winter months are actually faulty gauge readings." *Id.* The Town also stated in its comments that it would be willing to accept a permit restriction requiring it to coordinate with NHDES and only discharge when flows were at 60 cfs or above. *Id.*

The Town included in its comments its calculation (according to the same methodology used by the Region) of what the appropriate C-NOEC WET limit should be, using 60 cfs as the 7Q10 value. It concluded that since the resulting C-NOEC WET limit would only be 4.4%, there was no evidence that the Town's April and July 1997 WET tests violated the proposed 4.4% C-NOEC WET limit. Thus, according to the Town, because no reasonable potential to violate such a limit existed, there was no need for a C-NOEC WET limit to be written into the permit. *Id.* However, the Town did concede that it did not conduct a C-NOEC WET test at 4.4%, but stated that it was "unlikely" that it would have exceeded such a limit. *Id.*

The Region's March 27, 2000 Response to Comments (RTC) shows that the facts the Town contends are undisputed were in fact addressed by the Region in great detail. P Ex C. According to its RTC, the Region reviewed the Squam River flow data presented by the Town in its comments, but reached a different conclusion as to its meaning. *Id.* at 4. The Region explained that while it acknowledged that flow on the Squam River drops below 60 cfs primarily during dam maintenance in June and July, the data presented by the Town demonstrated numerous occasions when flow was below 60 cfs that were not due to either dam maintenance or freezing conditions. *Id.* The Region pointed out that in 1989 flows dropped below 60 cfs every month of the year, including the month of April, when the daily mean flow was only 8 cfs, and in September 1995, when the daily mean flow was only 20.7 cfs. *Id.* at 2, 4. The Region concluded that "[b]ecause natural conditions can cause low flows in the Squam River at times other than dam maintenance, EPA feels it is appropriate to base dilution on the 7Q10 low flow as determined from recorded streamflow data." *Id.* at 2.

In response to the Town's contention that it could simply be required under the permit to withhold its discharge when flows dropped below 60 cfs, the Region stated that it decided not to accept the proposal due to a number of reasons, none of which have been addressed by the Town in its Petition. *See id.* at 4-5. Included among the Region's reasons were concerns that in very dry years like 1989, if the Town's lagoons reached their capacity, the Town would be forced to discharge when flows in the Squam River were below 60 cfs. *Id.* at 4. Such a scenario would "place both the permittee and regulators * * * in a rather precarious position, that is, one where a discharge is clearly needed to protect the treatment works from catastrophic failure * * *, but that discharge is clearly prohibited by the NPDES permit." *Id.* The Region ultimately concluded that such a scenario would be untenable. *Id.* The Region also pointed out the potential for several other hydroelectric plants below the dam but upstream of the Town's facility to malfunction, causing erratic flows at the Town's point of discharge, and noted that one of these plants has experienced such problems in the last 15 years. *Id.* at 5. Additionally, the Region noted that there is currently no continuous flow monitor near the facility's outfall and thus the Region and the Town would have no way to verify the stream flow during the facility's discharge. According to the Region, the absence of a flow verification system rendered a "no discharge below 60 cfs" scenario unworkable. *Id.*

The Town's Petition merely restates objections from its earlier comments without ever addressing why the Region's RTC was clearly erroneous. Thus, the Town has provided no substantive response to the Region's comments, which strike us as material, regarding its defense of the 7Q10 value relied on in the permit and its rejection of the Town's proposed 7Q10 value.[12] Based on the Town's failure to do more than reiterate its previous comments without addressing the issues raised in the Region's RTC, we conclude that the Town has failed to establish any clear error or abuse of discretion by the Region when it set the 7Q10 value of 26 cfs at the Town's point of discharge. *In re Caribe Gen. Elec. Prods., Inc.*, 8 E.A.D. 696, 727-28 (EAB 2000); *In re Austin Powder Co.*, 6 E.A.D. 713, 721 (EAB 1997); *Ash Grove*, 7 E.A.D. at 406; *Envotech*, 6 E.A.D. at 268. Indeed, absent a meaningful rebuttal of the serious questions raised by the Region regarding the Town's proposed 7Q10 value, we are left with a record that is generally supportive of the Region's approach. Accordingly, we decline to second-guess the Region's technical judgments and explanations for rejecting the Town's alternate approach. Review of this issue is denied.

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[12] We find it particularly striking that the Town fails to address the Region's concerns that in times of drought the facility may in fact exceed its capacity to withhold discharge to the Squam River, since the Town's contention of adequate storage capacity underpins its argument that it never discharges when Squam River flow drops below 60 cfs.

C. *Issues Pertaining to the Color Monitoring Limit*

The Town argues that the Region abused its discretion in establishing a color monitoring requirement because "[m]onitoring requirements designed to generate data for future regulatory activity are not" authorized under 40 C.F.R. § 122.44(i).[13] Petition at 6. This regulation is one of several that implement CWA § 402, which governs the NPDES program generally, and CWA § 308, which governs records, reports, and inspections. 33 U.S.C. § 1318. The Board has repeatedly found that broad authority is conveyed by CWA § 308(a), which states that:

> Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard * * *; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard * * *; *or (4) carrying out section[] * * * 1342 * * * of this title [CWA § 402]:*
>
> > (A) the Administrator shall require the owner or operator of any point source to * * * sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe) * * *.

33 U.S.C. § 1318(a)(A) (emphasis added); *see In re City of Port St. Joe & Fla. Coast Paper Co.*, 7 E.A.D. 275, 306 (EAB 1997) (holding that section 308(a) confers broad authority on Region to impose monitoring requirements); *In re Liquid Air Puerto Rico Corp.*, 5 E.A.D. 247, 261 n.24 (EAB 1994); *see also In re NPDES Permit for Wastewater Treatment Facility of Union Township*, NPDES Appeal Nos. 00-26 & 00-28, at 18 (EAB, Jan. 23, 2001) ("[T]he Administrator has broad discretion to establish the reporting requirements in NPDES permits.").

The regulatory provision cited by the Region — 40 C.F.R. § 122.44(d) — is likewise very broad in scope, requiring NPDES permits to include *any* requirements "necessary to * * * [a]chieve water quality standards * * * including State narrative criteria for water quality." *Id.* In view of

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[13] Agency regulations, at 40 C.F.R. § 122.44, set forth a lengthy list of requirements that provide the basis for conditions that, when applicable, must be included in an NPDES permit. Specific monitoring requirements to assure permit compliance are set forth under § 122.44(i), which requires, among other things, monitoring of the mass of each pollutant, volume of effluent, and "[o]ther measurements as appropriate * * *." Section 122.44(i) also requires reporting of monitoring results, the frequency of which is to be established on a case-by-case basis but in no case less than once per year. *Id.*

the breadth of CWA § 308(a) and 40 C.F.R. § 122.44(d), the regulation cited by the Town — 40 C.F.R. § 122.44(i) — is appropriately viewed as establishing a floor, rather than a ceiling, for monitoring requirements in permits. Where, as here, the monitoring relates to maintaining a State water quality standard, we find nothing in the statute or the implementing regulations that would constrain the Region's authority to include such a monitoring provision. *See Union Township*, at 18-19 (citing *United States v. Hartz Constr. Co.*, 2000 WL 1220919, at *4-5 (N.D. Ill. Aug. 17, 2000) ("The court discerns no reasonable basis * * * for limiting the EPA's discretion to requesting only that information that is expressly called for by regulation, rather than simply making reasonable requests, as the statute itself provides.")).[14]

Having established the Region's authority to include such a provision, the question remains whether the Region's inclusion of the color monitoring requirement in this permit was clearly erroneous. We find that it was not. The fact sheet to the permit set forth the Region's basis for including color monitoring in the permit as coming from the facility's own reports[15] of significant blood-colored discharge into the Squam River discoloring "an area approximately one half of the river's width and * * * 243 feet long." P Ex D at 10. The Region stated that it was requiring color monitoring due to the fact that color "could interfere with designated uses" of the Squam River, including reducing the river's appeal for recreation and interference with photosynthesis necessary for support of the aquatic ecosystem. *Id.*; Response at 23-24. Since the Region has articulated a reasonable basis for setting a color monitoring requirement, which the Town has not refuted, we conclude that inclusion of the color monitoring requirement was not clearly erroneous and we deny review of this issue as well.

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[14] This conclusion is consistent with our prior observation that the CWA § 308(a) information gathering authority is broad enough to allow EPA to require a person to undertake monitoring "without reference to whether such person has a permit * * * , subject only to a reasonableness standard." *Liquid Air*, 5 E.A.D. at 261-62 n.24 (quoting *In re Simpson Paper Co.*, 3 E.A.D. 541, 549 (CJO 1991)). Since CWA § 308(a) empowers the Agency to require, outside a permit proceeding, monitoring that is independent of and supplemental to the terms and conditions of the applicable permit, then, by extension, that same statutory predicate is surely broad enough to support the provision of comparable monitoring requirements in the permit itself.

[15] The Region's Response included four different reports from the facility regarding this problem, as well as a Regional inspection report, indicating that the facility believed its color discharge to be a problem. R Exs. 24-28.

III. *CONCLUSION*

For the foregoing reasons, the petition for review of NPDES NH0100005 is denied in all respects.

So ordered.