

IN RE WESTBOROUGH AND WESTBOROUGH TREATMENT PLANT BOARD

NPDES Appeal No. 01-2

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided February 8, 2002

Syllabus

Petitioners, Town of Westborough, Massachusetts (“Town”) and the Westborough Treatment Plant Board (“WTPB”) jointly, “Westborough”) filed a Petition for Review (“Petition”) with the Environmental Appeals Board (“EAB” or “Board”) seeking review of several conditions contained in the National Pollutant Discharge Elimination System (“NPDES”) permit issued by U.S. EPA, Region 1 (“Region”) for the discharge of treated wastewater from Westborough’s publicly owned treatment works (“POTW”) into the adjacent Assabet River. Westborough argues that its NPDES permit warrants review by the EAB for the following reasons:

(1) The Region erred when it set the copper effluent limits because: (a) the Region failed to consider the dependency of copper toxicity upon total organic carbon (“TOC”); (b) the Region did not evaluate Westborough’s copper discharge in a soluble rather than total recoverable form; (c) the Region relied on an incorrect and unreasonable assumption of the available low flow in the Assabet River; and (d) were the copper limits otherwise valid, the Region should have established a compliance period prior to the effective date of the limits;

(2) The Region erred when setting the Chronic-No Observed Effect Concentration (“C-NOEC”) limit because: (a) the Region’s calculation relied upon an unreasonable and inaccurate calculation of the low flow in the Assabet River; and (b) the new C-NOEC limit is technologically infeasible and/or prohibitively costly;

(3) The permit should be modified to allow use of alternate standard dilution water when conducting C-NOEC tests;

(4) The permit’s chlorination system report requirement should be modified to clarify that daily monitoring can be used in preparing the report;

- (5) The phosphorous headworks analysis and possible imposition of a local limit requirement are premature and unreasonable at this time;
- (6) The permit condition requiring Westborough to eliminate infiltration and inflow ("I/I") from the sewer system is improper;
- (7) Westborough is not the proper party upon which to impose a compliance schedule for work being done by a consortium of POTWs; and
- (8) The permit provisions regarding sludge disposal should be modified to include a citation to the applicable regulations governing such disposal.

Held: Westborough's Petition is DENIED with regard to all issues except with regard to the issue of I/I elimination from the sewer system, which is REMANDED to the Region for further attention.

Issues raised by Westborough concerning the use of alternate dilution water for C-NOEC testing, modification of the permit regarding the chlorination system report, and clarification of sludge disposal provisions in the permit have already been addressed by the Region, and thus there is nothing for the Board to review concerning these matters.

With regard to the copper and C-NOEC permit limits, Westborough has not properly preserved for review its allegation that the Region should have considered TOC and solubility when calculating the effluent discharge limit for copper and has otherwise failed to meet the standards for granting review of these permit conditions. In order to preserve an issue for appeal, a petitioner must first have raised such issues with reasonable specificity during the comment period. Raising generalized questions during the comment period as to whether copper solubility was considered by the Region was insufficient to transform such questions into an objection to the permit or to support the specific allegations made by Westborough in its Petition. Furthermore, Westborough's request for a compliance schedule to meet the new copper limits was not raised during the comment period, nor do we find the Region's decision not to include such a schedule in the permit to be in error, an abuse of discretion, or otherwise warranting EAB review.

Westborough has not demonstrated abuse of discretion or other reviewable error on the part of the Region when it set Westborough's phosphorus permit conditions. A headworks "analysis" requirement was included in the permit to ensure Westborough's current and future compliance with its phosphorous permit discharge limits. The requirement is in essence a monitoring requirement. As such, the Region's authority to impose such a requirement is conferred by Clean Water Act ("CWA") § 308(a) and 40 C.F.R. § 122.44(d). Moreover, since the requirement relates to a state water quality standard, there is nothing in the CWA or its implementing regulations to constrain the Region's authority to include such a condition in the permit. Furthermore, because Westborough accepts industrial wastes and is subject to the pretreatment program requirements set forth in 40 C.F.R. part 403, the Region was bound to include a requirement that Westborough set local effluent limits on indirect dischargers to the POTW if necessary. It is clear that if the phosphorus headworks analysis indicates that phosphorus levels passing through the POTW are violating its permit requirements, Westborough is required under 40 C.F.R. § 403.5(c)(1) to set local limits to prevent such violations, and thus the Region was required by law to include such a provision in Westborough's NPDES permit.

Westborough is part of a four-member consortium of POTWs which has received funding to develop and implement a comprehensive wastewater management plan ("CWMP") addressing discharges to the Assabet River. Because the work to be performed under the CWMP addresses the Region's specific water quality concerns regarding the Assabet River, the Region issued similar permits to the consortium members, each including a required compliance schedule for completion of the CWMP. Westborough objected to this condition in its Comments, to which the Region made a substantive response in its Response to Comments. Westborough's failure to do more than reiterate its earlier objection without ever addressing the Region's response is fatal to its appeal of this issue. Further, we find the inclusion of such a provision by the Region to be reasonable in light of Westborough's acknowledged participation in the consortium and the likelihood that the work of the consortium will have future impacts on Westborough's NPDES permit.

Finally, because the provisions of Westborough's permit regarding I/I contain significant confusion regarding the correct identity or identities (and thus the appropriate responsibilities) of the permittee, the Board remands these provisions back to the Region for clarification consistent with this opinion.

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Ronald L. McCallum.

Opinion of the Board by Judge McCallum:

In a Petition for Review ("Petition") timely filed with the Environmental Appeals Board ("EAB" or "Board") on January 19, 2001, the Town of Westborough ("Town") and the Westborough Treatment Plant Board ("WTPB") (jointly, "Westborough") seek review of several conditions set forth in a National Pollutant Discharge Elimination System ("NPDES") permit¹ issued to Westborough by U.S. EPA, Region 1 ("Region") on December 19, 2000. At the request of the Board, the Region filed a Response to the Petition for Review ("Response") on March 15, 2001. Because we find that Westborough failed to demonstrate that the permit conditions it challenges are clearly erroneous, an abuse of discretion, or involve an important policy consideration that the Board should review, the Petition for Review is denied with regard to all issues but one, which is remanded to the Region for further attention.

I. BACKGROUND

Westborough owns and operates a publicly owned treatment works ("POTW") that collects and treats municipal, commercial, and industrial wastewater. Westborough's POTW discharges treated effluent into the Assabet River

¹ Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources into waters of the United States must obtain a permit in order for the discharge to be lawful. See CWA § 301, 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. 33 U.S.C. § 1342.

in Westborough, Massachusetts, approximately one mile downstream from the George H. Nichols Dam (“the dam”), which forms a multiple-use water reservoir known as the A-1 Impoundment above the dam. Response at 5. On February 20, 1998, Westborough applied to the Region and the Massachusetts Department of Environmental Protection (“MADEP”)² for reissuance of its prior NPDES permit, which was issued in 1993 and set to expire in September 1998.

Under Massachusetts regulations, the Assabet River is designated as a habitat for fish and wildlife and for recreation on and in the water. Mass. Regs. Code tit. 314, § 4.00; Fact Sheet to Draft NPDES Permit No. MA 0100412 (“Fact Sheet”), Respondent’s Exhibit (“R Ex.”) 2 at 2. At points below the dam, the Assabet is a low-flow river that is often composed entirely of wastewater effluent during periods of low flow, including effluent discharges from four main POTWs located on the Assabet.³ Response at 6. Because of its low flow below the dam and the contribution of excessive nutrients (including phosphorous), much of which come from the four POTWs, the Assabet suffers from eutrophication — a process by which a water body suffocates from receiving more nutrients (such as phosphorous and nitrogen) than it can assimilate. The excess nutrients promote the growth of nuisance algae and aquatic plants that then decay in a process generating strong odors and resulting in lower dissolved oxygen levels in the river. Response at 6; Fact Sheet, R Ex. 2 at 4 <http://www.epa.gov/iwi/help/indic/fs14.html>. When left unchecked, eutrophication is a serious problem that can deplete the oxygen necessary for aquatic life to survive. *See* Fact Sheet, R Ex. 2 at 4; *see also Index of Watershed Indicators — Indicator 14: Estuarine Eutrophic Conditions*, U.S. EPA (1996), at <http://www.epa.gov/iwi/help/indic/fs14.html>.

In response to the eutrophication problem and concerns regarding toxic discharges to the Assabet, MADEP commenced a Total Maximum Daily Load (“TMDL”) analysis to determine the maximum amount of pollutants that may be introduced into the Assabet while meeting and maintaining water quality standards. Response at 6; Fact Sheet, R Ex. 2 at 4. Additionally, the four POTW owners formed a consortium in 1999 (hereinafter “Assabet consortium”) that received funding from MADEP to develop and execute a comprehensive wastewater management plan (“CWMP”) for the purpose of basin-wide facilities planning. *Id.* Because the CWMP addresses some of the specific issues raised by the Region and MADEP, the Region decided to reissue the permits of the Assabet consortium simultaneously and with similar permit conditions. *Id.*

² Although EPA issues NPDES permits in Massachusetts, the State maintains water permitting authority under Massachusetts law; thus when the Region issues an NPDES permit in Massachusetts, MADEP jointly issues the permit under State law. Response at 2.

³ These include Westborough’s facility, as well as three POTWs in towns located below Westborough, namely the towns of Hudson, Maynard, and Marlborough Westerly. Response at 6.

In Westborough's case, the Region issued a Draft NPDES Permit and Fact Sheet for public comment on July 17, 2000. R Ex. 2. Westborough submitted timely comments (R Ex. 4) during the notice and comment period. Following certification of the permit by the State of Massachusetts on December 7, 2000,⁴ the Region issued a final NPDES permit for Westborough's facility (R Ex. 1) on December 14, 2000, and mailed a copy of the permit and the Region's Response to Public Comments ("RTC") (R Ex. 5) to Westborough on December 19, 2000. The final permit differs from Westborough's 1993 permit with respect to a number of conditions currently at issue. First, the new permit sets average monthly and maximum daily copper limits of 9.3 and 14 micrograms per liter ("ug/l") respectively, prior to which there was only a monitoring requirement for copper discharges.⁵ Fact Sheet, R Ex. 2 at 7. Additionally, the facility's Whole Effluent Toxicity ("WET")⁶ discharge limits changed under the new permit. Westborough's 1993 discharge limit for Chronic-No Observable Effect Concentration ("C-NOEC") — the maximum concentration of effluent at which there is no observable effect on tested organisms (e.g., growth, reproduction, mortality) — was 77.3%.⁷ The new permit sets a more stringent C-NOEC limit of 100%.

The new permit also includes additional reporting requirements at issue here, including a detailed report regarding the effectiveness of Westborough's chlorination system and the requirement that it conduct an analysis of the facility's maximum allowable headworks loading for phosphorous and that the facility impose local phosphorous limits on dischargers to the POTW system if necessary. Additionally, the new permit includes a requirement that Westborough eliminate

⁴ 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 either certifies that the permit complies with the state's water quality standards or waives certification. See 40 C.F.R. § 124.53.

⁵ The 1993 permit had originally contained more stringent copper discharge limits than those in the new permit; however, those limits were appealed by Petitioners and never went into effect. Fact Sheet, R Ex. 2 at 7.

⁶ 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 pollutants that might not be covered under chemical-specific permit limits. Response at 4; see also 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).

⁷ C-NOEC WET limits are "expressed as a percentage representing the highest effluent concentration at which no observed chronic effect will occur at continuous exposure to test organisms in a life-cycle or partial life-cycle test, and varies with the amount of available dilution water." Response at 4, citing *U.S. EPA NPDES Permit Writers' Manual* at 95-96.

excessive infiltration/inflow (“I/I”) to the sewer system and that it submit to the Region and MADEP an annual summary report of all actions taken to minimize I/I during the previous calendar year. Finally, the new permit incorporates a compliance schedule relating to the CWMP into the permit of each member of the Assabet consortium.

Westborough’s January 19, 2001 Petition to the Board challenges the above-mentioned changes included in the new permit. Westborough argues that the permit warrants review by the EAB for the following reasons:

(1) The Region erred when it set the copper effluent limits because: (a) the Region failed to consider the dependency of copper toxicity upon total organic carbon (“TOC”) when setting the copper limits (Petition at 3); (b) the Region failed to evaluate Westborough’s copper discharge in a soluble rather than total recoverable form (*id.* at 3-4); (c) the Region relied on an incorrect and unreasonable assumption of the available low flow in the Assabet River (which represents the River’s assimilative capacity) when it set the copper limit (*id.* at 4);⁸ and (d) were the copper limits otherwise valid, the Region should have established a compliance period prior to the effectiveness of the limits (*id.* at 4-5);

(2) The Region erred when it set the C-NOEC limit because: (a) the Region’s calculation of the C-NOEC value erroneously relied upon an unreasonable and inaccurate calculation of the available low flow in the Assabet River, which in turn resulted in an overly stringent C-NOEC limit (*id.* at 5); (b) the new C-NOEC limit is technologically infeasible and/or prohibitively costly;

(3) The permit should be modified to allow the use of alternate standard dilution water when conducting C-NOEC tests, since under the permit there is technically no available upstream water to use in such tests, as would normally be the case (*id.* at 5-6);

⁸ Westborough’s first three arguments, i.e., a, b, and c, essentially contend that the Region relied upon incorrect data when calculating the permit’s copper limit and that had the Region accounted for the issues raised by Westborough, it would have computed a less stringent copper value. Westborough argues that, but for this overly stringent value, there would not have been a reasonable potential for its copper discharge to violate Massachusetts water quality standards. *Id.* at 3-4.

- (4) The permit's requirement regarding the chlorination system report is unclear and needs to be modified to clarify that daily monitoring can be used in preparing the report (*id.* at 6);
- (5) The phosphorous headworks analysis and possible imposition of a local limit requirement are premature and unreasonable at this time in light of the analyses being conducted by MADEP and the Assabet consortium (*id.* at 6-7);
- (6) Because the sewers are owned, controlled and maintained by the towns of Hopkinton, Shrewsbury, and Westborough, the permit requirement that Westborough eliminate I/I from the sewer system is improper (*id.* at 7);
- (7) Westborough is not the proper party upon which to impose the compliance schedule for the CWMP work (*id.* at 7-8); and
- (8) The permit provisions regarding sludge disposal should be modified to include a citation to 40 C.F.R. part 503, which contains the regulations governing such disposal (*id.* at 7).

The Region's Response basically argues that the administrative record in this case supports its conclusion that Westborough's effluent discharge adversely impacts the Assabet River and that the effluent limitations set by the Region are necessary to meet Massachusetts water quality standards. Response at 1. The Region also asserts, among other things, that several of Westborough's arguments were not properly preserved for appellate review and that, in any case, Westborough has failed to meet its burden under 40 C.F.R. § 124.19 to demonstrate that the Region's permit decision was erroneous, unlawful, or otherwise meriting review, and that the Petition should therefore be denied. Response at 9.

II. DISCUSSION

A. Standard of Review

In appeals under 40 C.F.R. 124.19(a), the Board will not grant review unless the petition 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) (2001); *see also In re City of Irving*, 10 E.A.D. 111,

122 (EAB 2001); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 666-67 (EAB 2001). The Board exercises its authority to review permits sparingly, in recognition of Agency policy favoring resolution of most permit disputes at the Regional level. *In re New England Plating Co.*, 9 E.A.D. 726, 730 (EAB 2001); *Ashland*, 9 E.A.D. at 667; *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 petitioner bears the burden of establishing grounds for review. 40 C.F.R. § 124.19(a)(1) & (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 [that petitioner's] position" during the public comment period on the draft permit. 40 C.F.R. § 124.13; *New England Plating*, 9 E.A.D. at 731; *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 53 (EAB 1995); see also *In re City of San Marcos*, NPDES Appeal No. 97-6, at 4 (EAB, July 6, 1998); *In re Ketchikan Pulp Co.*, 6 E.A.D. 675, 688 (EAB 1996). 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 longstanding policy that most permit issues should be resolved at the Regional level, and to provide predictability and finality to the permitting process." *New England Plating*, 9 E.A.D. at 732; *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."); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 251 (EAB 1999) (same).

Furthermore, this Board has frequently emphasized that in order for an issue to be reviewed on appeal it must have been raised with a reasonable degree of specificity and clarity during the comment period. See *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 230 (EAB 2000); *New England Plating*, 9 E.A.D. at 730; *In re Maui Electric Company*, 8 E.A.D. 1, 9 (EAB 1998). Besides ensuring efficiency and finality, see *New England Plating*, 9 E.A.D. at 732, this requirement ensures that while the permit issuer will be held accountable for a full and meaningful response to comments, it need not guess the meaning behind imprecise comments. *Id.* at 735 ("Region is under no obligation to speculate about possible concerns that were not articulated in the comments * * *."); *Steel Dynamics*, 9 E.A.D. at 230. The Board has repeatedly found objections raised only in a general manner during the comment period insufficient to support review of more specific objections in the petition. See *Steel Dynamics*, 9 E.A.D. at 230-31 (denying review because the permit issuer was not presented with the issue raised on appeal during the public 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).

Finally, where the Region responds to comments when it issues a final permit, it is not sufficient for a petitioner to rely in its petition solely on previous statements of its objections, such as comments on a 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. *Ashland*, 9 E.A.D. at 668; *In re NPDES Permit for Wastewater Treatment Facility of Union Township*, NPDES Appeal Nos. 00-26 & 00-28, at 11 (EAB, Jan. 23, 2001); *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996).

We proceed now to consider Westborough's arguments in light of the foregoing framework.

B. *Petition*

1. *Previously Resolved Issues*

At the outset of our analysis, we note that the Region has taken steps to resolve three of the issues raised in the Petition, and thus these issues no longer require the Board's attention. They are:

(1) The use of alternate dilution water for C-NOEC testing (issue 3 above). As correctly observed by the Region, the permit language already allows for the use of alternative dilution water with written permission from the Region. Final Permit, R Ex. 1, Attachment A at 2. The Region has already given Westborough written permission to use alternative dilution water for C-NOEC testing (*see* Letter from B. Pitt, U.S. EPA, Region 1, to D. Cowles, Westborough Treatment Plant Board, Mar. 12, 2001, R Ex. 15). It is thus apparent that Westborough's request has been granted, and we therefore decline to examine this issue further.⁹

(2) The request for modification of the permit regarding the chlorination system report (issue 4 above). The permit language itself is fairly general as to what data are required of the permittee in preparing the report, stating only that "[s]ampling data shall be provided to support conclusions on how hourly and daily flow and chlorine demand variability affects permit compliance." Permit, R Ex. 1 at 5. The Region's March 12, 2001 letter to Westborough specifically clarifies, per Westborough's request, that the Region "does not intend to require additional testing or sampling data beyond that collected for discharge monitoring reports as part of Westborough's chlorination system report." R Ex. 15. As with the alternative dilution water issue, we find the Region to be bound by its March 12, 2001

⁹ Moreover, as final decision maker for the Agency, our interpretation that the permit language, along with the Region's letter, allows Westborough to use alternative dilution water is binding upon the Region in its implementation of the permit. *In re City of Irving*, 10 E.A.D. 111, 128-29 n.20 (EAB 2001).

letter, which effectively addresses Westborough's concern on this matter, and therefore we decline to examine this issue further as well. *Irving*, 10 E.A.D. at 128-29 n.20.

(3) Clarification of sludge disposal provisions by adding a reference to 40 C.F.R. part 503 in the permit (issue 8 above). Westborough's permit states: "The permittee shall comply with all existing federal and state laws and regulations that apply to sewage sludge use and disposal practices" and specifically that "[t]he requirements and technical standards of 40 C.F.R. part 503 apply to facilities which perform * * * [s]ewage sludge incineration in a sludge only incinerator[.]" Permit, R Ex. 1 at 9. Westborough is such a facility. Fact Sheet, R Ex. 2 at 9. In addition to the permit language, the Fact Sheet also specifically states that Westborough's sludge activities must adhere to the Part 503 regulations. *Id.* Finally, the Region again reiterated — in response to Westborough's concern — that "all sludge monitoring is to be conducted in accordance with 40 C.F.R. 503" in its March 12, 2001 letter to Westborough. R Ex. 15. It is thus abundantly clear to us that 40 C.F.R. part 503 governs sludge monitoring under Westborough's permit, and that the permit in fact includes a reference to those regulations. There is thus no issue for us to resolve.

2. *Copper and C-NOEC Limits*

As mentioned in section I above, Westborough objects to its copper and C-NOEC permit limits as being overly stringent and technically infeasible. Petition at 3-6. As explained more fully below, we find that not all of the arguments raised by Westborough concerning its effluent limits have been properly preserved for review, and that Westborough has otherwise failed to meet the standards for granting review of these permit conditions. Furthermore, Westborough's request for a compliance schedule to meet the new copper limits was not raised during the comment period, and we do not otherwise find the Region's decision not to include such a schedule in the permit to be in error, an abuse of its discretion or otherwise warranting review.

a. *Copper Effluent Limit — TOC Dependency and Solubility Issues*

Westborough's Petition states that the level at which copper is toxic to aquatic life is highly dependent upon total organic carbon ("TOC") and that Westborough's discharge has naturally low copper toxicity because of its high TOC concentration. Petition at 3. Westborough argues in its Petition that the Region erred in not accounting for copper's TOC dependency prior to setting copper effluent limits. *Id.* Westborough further argues that because the soluble portion (rather than total recoverable fraction) of copper is the biologically active portion, the Region erred in not considering the solubility of its copper discharge prior to

setting the copper limit, as EPA guidance recommends.¹⁰ *Id.* at 3-4. The basic thrust of the Petition with regard to solubility is that, for a variety of reasons, it was the Region's responsibility, not Westborough's, to develop a permit limitation for copper based on the soluble fraction of copper rather than total recoverable copper.¹¹ Westborough contends that (i) the Region made no showing that soluble copper in the receiving waters will violate water quality standards; (ii) EPA's own guidance recommends that water quality standards for metals be applied in the soluble form; and (iii) applicable state standards for copper require copper discharges to be measured as "soluble copper." *Id.* Finally, Westborough's Petition argues that had the foregoing factors been considered by the Region when calculating the copper limit, there would have been no finding by the Region of a reasonable potential for Westborough's copper effluent discharge to exceed in-stream water quality standards for copper. *Id.*

As stated earlier, in order to preserve the issue of whether the Region erred in setting Westborough's copper limit without regard to TOC dependency or solubility, Westborough must first have raised these issues during the public comment period.¹² In commenting on the draft permit, Westborough undeniably objected to the copper limits of 9.3 ppb (monthly average) and 14 ppb (daily maximum), stating that it disagreed with these numbers and felt that it could not meet the limits on a consistent basis. Westborough did not, however, state the specific basis for its disagreement or provide a justification for less stringent alternative limits. In-

¹⁰ Westborough's Petition does not identify the EPA guidance to which it refers. Nonetheless, as explained *infra*, note 14, the Region's determination of the permit limit for copper is consistent with EPA guidance contained in Memorandum from the U.S. EPA, Office of Water, *Office of Water Policy and Technical Guidance on Interpretation and Implementation of Aquatic Life Metals Criteria* (Oct. 1, 1993) ("Metals Policy") and Office of Water, U.S. EPA, *The Metals Translator: Guidance for Calculating a Total Recoverable Permit Limit From a Dissolved Criterion*, EPA 923-B-96-007 (June 1996) ("Metals Translator"). As a result of applying that guidance, and contrary to Westborough's assertion, the Region did in fact take the soluble fraction of copper into account in setting the permit's copper limitation. In doing so, the limit is also consistent with EPA's regulatory requirements, which provide for expressing copper limitations in the total recoverable form. See notes 11 and 14.

¹¹ Form 2A of the general permit application requires POTWs such as Westborough to report testing data for copper and other metals as "total recoverable" metals. 40 C.F.R. § 122.21(j)(4)(x) ("Unless otherwise required by the Director, metals must be reported as total recoverable."); 40 C.F.R. pt. 122 (Appendix J, Table 2); and 40 C.F.R. § 122.45(c) (requiring metals limitations to be expressed as "total recoverable metal," unless certain specified conditions are met (none of which are applicable here)).

¹² The purpose behind the requirement that issues, to be preserved for appeal, be properly raised during the comment period on the draft permit is to ensure, as discussed earlier, that the permit issuer has the opportunity in the first instance to address any objections to the permit. Consequently, if an issue is properly raised by any commenter during the comment period, any other commenter may raise the issue on appeal even though the person raising the issue on appeal did not previously comment on the issue. See, e.g., *In re Brine Disposal Well, Montmorency Co.*, 4 E.A.D. 736, 740 (EAB 1993). In this instance, no other commenter on Westborough's permit properly raised the TOC dependency or solubility issues during the comment period.

stead, under a heading captioned “comments, concerns, and/or questions,” Westborough posed the following questions to the Region:

- (i) What is the effect of copper on the existing water quality of the Assabet River and ecosystem?
- (ii) What are the instream conditions affecting the relative toxicity of copper and how do the permit limitations relate?
- (iii) Do the organisms which may be adversely affected by the copper exceeding the limits in the effluent currently exist in the Assabet River?
- (iv) Furthermore, the limit does not address soluble copper. It is our understanding that EPA is considering measuring soluble copper, not total copper. Doesn't soluble copper represent the biologically active fraction of copper?

Comments at 1.

As the applicable procedural regulations make abundantly clear, general questions of the type posed by Westborough in its Comments do not provide the kind of information needed by the Region to either act on or respond to the very specific objections Westborough now raises to the copper limits in its Petition. For an objection to a permit limit to receive meaningful consideration by the Region, the regulations provide that a commenter on a draft permit must “submit all reasonably available arguments supporting [its] position” during the public comment period. 40 C.F.R. § 124.13. In this instance, Westborough did not submit *any* arguments in support of its position. Instead, it merely posed questions without indicating how the answers to those questions would affect the permit limits for copper. The mere asking of such questions does not transform those questions into an objection to the permit.

The arguments about TOC dependency and solubility that Westborough now makes in its Petition are hardly the inevitable, much less sole set of arguments that might conceivably have emerged from the questions Westborough raised during the comment period on the draft permit.¹³ As a consequence, it

¹³ We note that the question of solubility is arguably more focused in Westborough's Comments than other questions it now appeals. Even so, after reading the Comments and Petition together, the precise nature of Westborough's objection remains unclear. It appears that Westborough may be expressing a concern that the Region either gave no consideration to solubility when the Region calcu-
Continued

would not be reasonable at this juncture to maintain that the Region should have foreseen those specific arguments during the comment period. Had it been afforded an opportunity to preview those arguments at that time, it could have responded to the arguments in some appropriate fashion before it issued the final permit, all in accordance with the orderly process set forth in the regulations as described earlier. Instead, the Region was effectively denied that opportunity by reason of Westborough's failure to make focused arguments in support of its objections to the permit's copper limits. Accordingly, having failed to raise the TOC dependency and solubility arguments in a timely manner during the comment period, Westborough has forfeited any right to challenge the copper limits on appeal based on considerations of TOC dependency and solubility.¹⁴ As noted

(continued)

lated the permit's copper limit or, in the alternative, that the Region's calculation should have, but did not, use site-specific data regarding the solubility of Westborough's copper discharge. In either event, we are in no position to reconstruct Westborough's objection. Given the lack of clarity in Westborough's objection at this late stage of the proceedings, it necessarily follows that there are no reasonable grounds for concluding that Westborough, through its Comments on the draft permit, had earlier afforded the Region with an opportunity to address Westborough's objections before the Region made its final permit determination. As it stands, the Region's RTC answered Westborough's general inquiry in straightforward fashion, and clearly indicated that the Region did not have the type of information that would allow it to set a limitation based on soluble copper. The Region stated that Westborough's "understanding [of whether EPA was considering measuring soluble copper] is correct, but we would need to have information on how copper partitions instream before we could establish dissolved copper limits." See, RTC, R Ex. 5 at 8. The Region also stated that guidance was available from EPA on how to gather such information. *Id.* We view the Region's act of responding to this inquiry as a legitimate effort to provide an answer to Westborough's question, but in doing so the Region did not somehow transform the inquiry into a comment with the requisite specificity and focus for Westborough's appeal. See, e.g., *In re New England Plating*, 9 E.A.D. at 732, 734-35 (EAB 2001); *In re Town of Milford*, NPDES Appeal No. 00-30, at 9-11 (EAB, Jul. 9, 2001).

¹⁴ Notwithstanding the foregoing conclusion, were we to consider Westborough's inquiry to be a legitimate comment, and thus one which would preserve the solubility matter for appeal, we would still decline to review the Region's copper effluent limit. As the Region explained in detail in response to the arguments advanced by Westborough on appeal, see Response, 21-24, because the applicable water quality standards are expressed in a dissolved form, some consideration of copper solubility is built into the initial determination of whether a particular effluent discharge has the reasonable potential to violate water quality standards. See *id.* at 23; *Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants; States' Compliance — Revision of Metals Criteria*, 60 Fed. Reg. 22,229 (May 4, 1995) (new metals criteria — expressed in soluble form — are more reflective of the biologically available fraction of water borne metals). Because NPDES permitting regulations continue to require that water quality-based permit limits for metals be expressed as a total recoverable form, 40 C.F.R. § 122.45(c), EPA has provided guidance in the Metals Policy and *Metals Translator*, see note 10, *supra*, for calculating a total recoverable metal permit limit from a dissolved metal criterion. This conversion process is known as a "metals translator." The Region applied the metals translator in setting the copper limitation in Westborough's permit. Therefore, the solubility of copper is accounted for in the permit, albeit not using site-specific data. Had Westborough supplied the necessary data, the metals translator would have adjusted for the data accordingly. Without such data, we find no error on the part of the Region when it set Westborough's copper limit. As the permit applicant, Westborough bears the burden of supplying information necessary to establish permit limitations on terms other than those established by the permit writer.

earlier, the Board will not review an issue on appeal that, as here, should have been but was not raised in the first instance with the permit issuer, i.e., when the Region solicited comments on the draft permit.

b. *Low-Flow Value Calculation*

Massachusetts regulations specify that certain permit limits (including copper and C-NOEC) must be based upon the receiving water's annual mean low flow for seven consecutive days, recurring every ten years, and expressed in terms of volume per time period — what is generally referred to as the “7Q10” value. Mass. Reg. tit. 314, § 4.03(3)(a). The draft permit included a change to the 7Q10 value that had been used in Westborough's previous permit, specifically, from 3.5 cubic feet per second (“cfs”) to 0 cfs. This reduction eliminated any calculable effect attributable to the receiving water's assimilative capacity in setting Westborough's copper and C-NOEC limits. As a consequence, the limits for both pollutants are more stringent than would have otherwise been the case. The Fact Sheet explained that the Region calculated Westborough's revised 7Q10 value based on data both upstream and downstream of the facility. Fact Sheet, R Ex. 2 at 3-4.

In order to assign a 7Q10 value to Westborough's point of discharge, the Region made three general calculations. Briefly, the Region first calculated the mean low flow value at the closest United States Geological Service (“USGS”) gauging station downstream from the facility, using the most recent 30 years of USGS data from the station. The resulting value was determined to be 14 cfs. RTC, R Ex. 5, Att. 1. The Region then calculated the average flow discharge from each of the POTWs upstream from the USGS gauging station (calculated, using the most recent 10 years of data, to be 11.4 cfs) and subtracted this amount from the 14 cfs value which resulted in what is termed the “base” 7Q10 flow at the gauging station of 2.6 cfs.¹⁵ *Id.* To calculate the 7Q10 flow of the Assabet at the point where each of the POTWs discharges, the Region divided the base 7Q10 flow at the gauging station by the drainage area from the station to the dam located upstream (a value of 109 square miles), which resulted in a value of 0.024 cfs per square mile. *Id.* Because Westborough's facility is in such close proximity to the dam, the calculated base flow at its point of discharge was 0.024 cfs. Fact Sheet, R Ex. 2 at 3. Finally, since this value (0.024 cfs) was nearly zero, as explained by the Region, it used 0 cfs as the basis for calculating Westborough's permit limits. *Id.* at 3-4.

¹⁵ The base 7Q10 flow is thus what the flow of the river is at the gauge minus additional flow contributed from upstream dischargers, i.e., what the natural flow of the river would be without additional water sources. This is especially relevant here, where Westborough is the first discharger between the dam and the USGS gauging station.

Westborough objected in its Comments to the 7Q10 value of 0 cfs as being unreasonable, pointing out that by the Region's own calculations there was some flow that could be used to set permit limits. Comments, R Ex. 4 at 3. Westborough also stated that because the Assabet is impacted by the upstream dam, consideration should be given to removing the dam in order to provide additional flow to the river. *Id.*

In its RTC, the Region explained that the estimated 7Q10 it calculated of 0.024 cfs, while not zero, is close enough to zero so as to make no difference in calculating Westborough's permit limits. RTC, R Ex. 5 at 8. In addition, the Region explained that it had also relied on documentation that under certain conditions there was no flow between the dam and Westborough's facility. *Id.*; see also Geologic Services Corp., *Hydrologic Budget Analysis: A-1 Impoundment on the Assabet River, Westborough, Massachusetts*, pp. 9, 15, May 1999, R Ex. 7 (finding no flow over impoundment from Sept. 1, 1997 — Dec. 30, 1997 and from Aug. 10-31, 1998); E-mail from David Pincumbe, U.S. EPA, Region I, to Roger Fleming, U.S. EPA, Region I (Feb. 23, 2001, 12:13 PM), R Ex. 13. However, in response to Westborough's comment, the Region revised the 7Q10 value in the final permit to include 0.01 cfs of flow. RTC, R Ex. 5 at 17. The Region further stated that removal of the dam was an issue that would be separately evaluated under the CWMP and would be part of the coordination between the Assabet consortium and MADEP's TMDL work. *Id.* at 10.

Westborough's Petition essentially reiterates the same arguments made in its Comments, without ever addressing the Region's RTC or explaining why the Region's defense of the 7Q10 value used in the permit was clearly erroneous. The Petition also fails to even acknowledge or respond to the change in the 7Q10 flow made by the Region in response to Westborough's Comments. Finally, the Petition fails to cite any evidence to support its allegations that the 7Q10 is "unreasonable, inaccurately calculated and inadequately investigated." Petition at 4.

The Board has repeatedly held that "mere allegations of error" are insufficient to support review and that it will not entertain vague and unsubstantiated arguments. See *In re City of Moscow*, 10 E.A.D. at 172 (EAB 2001); *In re New England Plating Co.*, 9 E.A.D. 726, 730 (EAB 2001). This principle is especially true where a petitioner challenges technical judgments made by the permit-writing authority. *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 404 (EAB 1997). Westborough's failure to respond to the concerns raised in the Region's RTC leaves us with a record that supports the Region's approach. Accordingly, we "decline to second-guess the Region's technical judgments and explanations for rejecting [Westborough's] alternate approach." *In re Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 670 (EAB 2001). Because Westborough's objections to the 7Q10 value employed by the Region in setting the permit's copper and C-NOEC effluent limits are deficient for failing to address the RTC, we deny

review of those effluent limits to the extent they are grounded on an alleged erroneous 7Q10 determination.

c. Technical Feasibility Issues

Westborough states in its Petition that the C-NOEC limit in its permit is currently unattainable by the facility, and “may not be attainable through any known technology reasonably applied to” POTWs, or would only be attainable at an unreasonable cost.¹⁶ Petition at 5. As noted by the Region in its Response, permit-writing authorities are required under CWA §§ 301(b)(1)(C) and 402(a) to set permit limitations necessary to meet water quality standards set by states and approved by EPA, even if those limits are more stringent than those required under technology-based effluent limits. 33 U.S.C. §§ 1311(b)(1)(C) and 1342(a); *see also* 40 C.F.R. § 122.44(d)(1)(iii) (requiring permit effluent limits for any pollutant determined by EPA to cause or have the reasonable potential to violate water quality standards).

With regard to technical or economic feasibility arguments, we have consistently held that cost and technological considerations are not permitted under the CWA to be considered by the permit-writer when setting water quality-based effluent limits. *See In re City of Moscow*, 10 E.A.D. at 168; *In re New England Plating Co.*, 9 E.A.D. 726, 738 (EAB 2001) (finding that CWA does not make exceptions for cost or technological feasibility); *In re Town of Hopedale*, NPDES Appeal No. 00-04, at 24 (EAB, Feb. 13, 2001) (Order Denying Review); *In re Mass. Corr. Inst.-Bridgewater*, NPDES Appeal No. 00-9, at 10 (EAB, Oct. 16, 2000) (Order Dismissing Petition for Review); *In re J & L Specialty Prod. Corp.*, 5 E.A.D. 3, 48-49 (EAB 1994) (stating that Region is not authorized under CWA to grant variances from water quality-based limitations because of technical feasibility); *see also, e.g., Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999) (holding that EPA is obligated to set water quality standards without regard to practicability); *United States Steel Corp. v. Train*, 556 F.2d 822, 838 (7th Cir. 1977) (finding “states are free to force technology” and “[i]f the states wish to achieve better water quality, they may [do so], even at the cost of economic and social dislocations* * *”).

In light of the foregoing, review of the C-NOEC limit on the basis of technological or economic infeasibility is denied.

¹⁶ We note that Westborough makes this argument as to the copper effluent limits set by the Region as well. Petition at 3. To the extent that Westborough makes such an argument, our finding with regard to the technological/economic feasibility of the C-NOEC limit applies equally to Westborough’s copper limit.

d. *Compliance Schedule for Copper Limit*

Westborough's Petition argues that if the copper effluent limits are otherwise valid, the Region "should have established a compliance period within the Permit prior to the effectiveness of those limits." Petition at 4. No mention of this issue was made by Westborough whatsoever prior to its Petition, an omission which is fatal to its appeal of this issue. As explained earlier, petitioners "must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period" in order to preserve an issue for appeal to the Board. 40 C.F.R. §§ 124.13; 124.19(a); *see also Moscow*, slip op. at 10; *New England Plating*, 9 E.A.D. at 730-31; *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 53-55 (EAB 1995). The Board has consistently declined review of issues that fail to meet this basic requirement. *Moscow*, slip op. at 10; *New England Plating*, 9 E.A.D. at 731.

Westborough was aware at the time it submitted its Comments that it was unlikely to be able to meet the new copper limit,¹⁷ and thus the issue of a compliance schedule was certainly reasonably ascertainable by Westborough at that time. Its failure to raise the issue of a compliance schedule for copper in its Comments prevents it from raising it now in its Petition.¹⁸

3. *Issues Pertaining to Phosphorus Requirements*

Westborough's final, as well as its draft, permit contains several prohibitions concerning interference and pass-through of pollutants coming from non-domestic sources that discharge wastewater into Westborough's POTW.^{19,20}

¹⁷ Westborough admitted as much in its Comments. R Ex. 4 at 1.

¹⁸ We further note that under Massachusetts law, the decision of whether to include a compliance schedule is discretionary and may only be granted "when appropriate." Mass. Regs. Code tit. 314, § 4.03(1)(2001). We have denied review of requests for a compliance schedule where, as here, a petitioner fails to support such a request with specific facts and data. *See In re Town of Ipswich Wastewater Treatment Plant*, NPDES Appeal No. 00-19, at 26 (EAB, Jul. 26, 2001) (Order Denying Review); *New England Plating*, 9 E.A.D. at 739.

¹⁹ The term "interference" refers to a discharge from a source to a POTW which, alone or in conjunction with a discharge or discharges from other sources both:

- (1) Inhibits or disrupts the POTW, its treatment processes or operations, or its sludge processes, use or disposal; and
- (2) Therefore is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation) * * *.

40 C.F.R. § 403.3(i).

²⁰ The term "pass through" is defined as:

Continued

Part 1.A.3.c of its permit requires Westborough to develop and enforce local limits on industrial and other users who discharge to Westborough's POTW system. It also requires Westborough to prepare and submit a written technical local limit report to the Region. The only difference between the draft and final versions of this permit provision is the addition to the final permit of specific requirements that Westborough include in its technical local limit report a maximum allowable headworks loading analysis for phosphorus and to impose local limits for discharges of phosphorus into the POTW if deemed necessary.

Westborough objects to these added requirements as being unreasonable and unnecessary in light of the TMDL analysis being conducted by MADEP on the Assabet River and the work being done under the CWMP by the Assabet consortium. Petition at 6-7.

According to the Region's RTC, the Region added the specific reference to phosphorus in Westborough's local limits requirements because of concerns raised during the public comment period. The Organization for the Assabet River (hereinafter "OAR") had commented that the draft permits being issued to the POTWs of the Assabet consortium would allow increased flow to the treatment plants themselves, with the likely result that phosphorus loadings to the Assabet would increase over the period of the permit. OAR argued that this would, in turn, contribute to the river's eutrophication problem. RTC, R Ex. 5 at 12. OAR suggested specifically that Westborough be required to do a headworks analysis and set local limits for phosphorus. *Id.* at 14. The Region acknowledged the seriousness of OAR's concerns and stated in the RTC that Westborough's

permit[] include[s] the requirement to revise local limits. Although we would expect these permittees to focus its [sic] efforts on minimizing influent phosphorus, we have made it a permit requirement that they specifically do a maximum allowable headworks loading for phosphorus and impose local limits for phosphorus if necessary.

Id. at 12-14.

(continued)

[A] Discharge which exits the POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a discharge or discharges from other sources, is a cause of violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation).

40 C.F.R. § 403.3(n).

The Region's Response reiterates that the eutrophication problem afflicting the Assabet is due primarily to excessive phosphorus and other nutrients being discharged from the POTWs into the river. Response at 31.²¹ The Region explained that Westborough's permit is designed to deal with the eutrophication problem in two ways. *Id.* at 31-32. The first method of phosphorous control is the interim and final effluent limits set in Westborough's NPDES permit for its own discharge. *Id.* at 32. These limits are not at issue.²² The second method of phosphorus control relates to the prohibitions in the permit concerning pass-through and interference of pollutants coming from non-domestic sources discharging into the POTW. The requirements added in response to OAR's comments pertain to this second method of phosphorus control. The purpose of the headworks analysis is to determine the amount of phosphorus coming into the Westborough facility as well as its capacity for treating phosphorus. *Id.* at 31-32. However, as explained below, these requirements are only detailed steps the Region included to clarify general permit obligations shared by all POTWs that accept waste from indirect dischargers.

²¹ We note here that the Region originally objected to Westborough's challenge to the permit condition at issue on the grounds that Westborough had failed to raise the issue in its Comments. Response at 31. However, the Region later withdrew this argument due to the fact that the challenged permit condition was not included in the draft permit and therefore Westborough "may not have had fair notice of the need to [comment] because the specific language" regarding phosphorus was not included in the draft permit. Correction to Response to the Petition for Review at 1-2. The Board does not require a petitioner to have raised an issue in its comments if the issue "was not reasonably ascertainable" by the petitioner during the public comment period or if the issue resulted from a change made to the final permit. *New England Plating*, 9 E.A.D. at 731; 40 C.F.R. § 124.19(a); *see also In re Envotech, L.P.* 6 E.A.D. 260, 266 (EAB 1995); *In re Beckman Prods.*, 5 E.A.D. 10, 16 (EAB 1994). Because the phosphorus permit condition represented a change to the final permit not reasonably ascertainable by Westborough during the comment period, this issue is properly preserved for appeal.

²² Westborough's draft and final permits both included a phosphorous effluent discharge limit from its facility of 0.75 milligrams per liter between the months of April and October. Final Permit, Part I.A.1, R Ex. 1 at 3. Additionally, both the draft and final permit state that this limit:

is an interim limit, which shall be in effect for the term of the permit, unless the permit is modified * * *. The final permit limit requires that "highest and best practical treatment" be achieved in accordance with [Massachusetts law]. If, upon completion of a Total Maximum Daily Load (TMDL) and a Comprehensive Wastewater Management Plan (CWMP), it is determined that either a higher or lower limit will result in compliance with water quality standards, then the final permit limit will be modified accordingly. Consistent with Section B.1 of Part II of the permit, the permittee shall properly operate and maintain the phosphorus removal facility at the treatment plant *to achieve the lowest phosphorus concentration possible.*

Final Permit, Part I.A n.5, R Ex. 1 at 4 (emphasis added).

a. *The Headworks Analysis*

The headworks analysis required by the Region in Westborough's permit differs significantly from the TMDL and CWMP work mentioned by Westborough in its Petition, in that neither of those tasks focus on the actual influent of phosphorus coming *into* the Westborough POTW from industrial and other sources discharging waste into the sewer system prior to treatment by the POTW; rather, the TMDL and CWMP work is designed to determine the maximum allowance of pollutants to the Assabet River being discharged *from* the various facilities. Response at 32. Thus, the work being done by the TMDL and CWMP are not directly relevant to the need for a separate headworks analysis. *See id.* More specifically, the Region argues that because it is anticipated that the TMDL will require significant reductions in phosphorus discharges to the Assabet by the POTWs, "[r]eductions of influent to the Westborough facility * * * could be a critical component of evaluating the alternatives for phosphorus reductions." *Id.* The Region further states that the headworks analysis requirement is important "to determine whether alternatives for meeting anticipated future reductions in Westborough's phosphorus limits could include influent reductions." *Id.; see also* RTC, R Ex. 5 at 12. Additionally, the Region notes that the analysis is important to determine whether Westborough needs to impose local phosphorus limits on the dischargers to its sewer system in order to meet the interim and final phosphorus effluent discharge limits in Westborough's permit or to eliminate any unnecessary discharge of phosphorus to the Assabet. Response at 32-33.

We do not find Westborough's argument that the headworks analysis is unnecessary in light of the anticipated work of the TMDL and CWMP to demonstrate clear error or other unlawful action by the Region when it set the headworks analysis requirement. The regulatory scheme clearly anticipates that both discharges *from* and discharges *into* POTWs are subject to regulation by means of NPDES permits. *Compare* CWA § 301(a) with CWA § 307(b) and the implementing regulations at 40 C.F.R. §§ 122.44(j), 403.5. In this case, the Region has explained that the analysis is intended to ensure that Westborough is meeting its current permit requirements as well as to determine whether Westborough will be able to meet stricter water quality-based permit limits in the future. RTC, R Ex. 5 at 12. Westborough's argument that the analysis is unnecessary, without more, and in light of the Region's justification in its RTC and Response for its decision, does not demonstrate clear error or abuse of discretion by the Region and thus fails to warrant review by the Board.

Furthermore, the headworks analysis itself is, in essence, a requirement by the Region to monitor its phosphorus inflow as well as its phosphorus discharge. Thus, as this permit condition is primarily a monitoring condition, we are mindful of a permit-writer's broad authority under CWA § 308(a) and 40 C.F.R. § 122.44(d), which empower EPA to require effluent sampling or include any other requirements necessary to achieve water quality standards. *See also In re*

Town of Ashland Wastewater Treatment Facility, 9 E.A.D. 661, 671-72 (EAB 2001). The Board has repeatedly held that where monitoring relates to a state water quality standard, as is the case at hand, there is nothing in the CWA or its implementing regulations that would constrain the Region's authority to include such conditions. *Id.*; *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).

b. *Local Limits*

We now address the requirement that Westborough set local effluent limits on dischargers to the POTW if necessary. Because Westborough accepts industrial wastes and is subject to the pretreatment program requirements set forth in 40 C.F.R. part 403,²³ the Region was bound to include such a provision by law. Specifically, under CWA § 307(b), the Administrator is required to establish pretreatment standards to prevent the introduction of pollutants which may interfere with or pass-through a POTW, or otherwise be incompatible with a POTW. 33 U.S.C. § 1317(b)(1). This requirement is reflected in the general requirements for pretreatment standards set by EPA in 40 C.F.R. part 403. *See, e.g.*, 40 C.F.R. §§ 403.1(a), 403.2, 403.5(a)(1). A POTW subject to the pretreatment program requirements is further required to establish specific local limits to prevent discharge of a pollutant into the POTW system that causes pass through or interference and to ensure compliance with its NPDES permit. *Id.* § 403.5 (c)(1)-(2); *see also National Ass'n of Metal Finishers v. EPA*, 719 F.2d 624, 638-39 (3rd Cir. 1983), *rev'd on other grounds sub nom Chemical Mfgs. Ass'n v. NRDC*, 470 U.S. 116 (1985). Developing such limits must be done on a continuing basis as necessary. 40 C.F.R. § 403.5(c).

Westborough's draft permit already included the general requirement that Westborough "develop and enforce specific effluent limits (local limits)" for indirect dischargers to its system. This requirement plainly requires Westborough to set local limits for any pollutant which passes through, causes interference, or is otherwise necessary to ensure its NPDES permit compliance. *See* Draft Permit, R Ex. 2, Part I.A.3.c. It is thus clear that if the headworks analysis indicates that the levels of phosphorus passing through the POTW is violating Westborough's pass-through or other permit requirements, Westborough is required under 40 C.F.R. § 403.5(c)(1) to set local limits to prevent such violations. Thus, the Region's inclusion of a provision requiring Westborough to set local limits for phosphorus if its headworks analysis demonstrates the need for such limits is not only not in error, but is required by law.

²³ *See* Fact Sheet, R Ex. 2 at 9 (stating that Westborough must comply with federal regulations governing pretreatment programs).

Finally, we do not see how the specific mention in the final permit that Westborough set local limits for phosphorus if necessary is any different from the general regulatory requirement already reflected in part I.A.3.c of its permit that Westborough set local limits for any pollutant as needed to ensure permit compliance, a point which Westborough has also failed to address in its Petition. We thus find no error in the Region's decision on this matter and therefore deny review of this issue.

4. *Responsibility for Eliminating Infiltration/Inflow, CWMP Compliance Schedule*

EPA 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). Excessive infiltration/inflow (commonly referred to as "I/I") refers to those

quantities of infiltration/inflow which can be economically eliminated from a sewer system as determined in a cost-effectiveness analysis that compares the costs for correcting the infiltration/inflow conditions to the total costs for transportation and treatment of the infiltration/inflow.

Id. § 35.3005(16).

Westborough's permit requirements governing operation and maintenance of the POTW system include a provision that excessive I/I be eliminated from the sewer systems. Final Permit, R Ex. 1, Pt. I.C.2. The permit itself states that

[s]ince the permittee, wastewater treatment plant board, does not control the sewers in the [sic] Westborough, Shrewsbury or Hopkinton, the permittee shall initiate agreements and/or build upon existing agreements with these communities to assure that this permit condition is met. The permittee is responsible for collecting all the pertinent information from the communities and reporting it as required in this permit. Relevant I/I studies or work done in conjunction with the CWMP may be used as part of this requirement.

Final Permit, R Ex. 1 at 8. Westborough argues that while it will submit the required information set forth under this requirement, it further contends that because the sewers are owned, controlled, and maintained by the towns of Hopkin-

ton, Shrewsbury, and Westborough, it cannot be held responsible for the elimination of I/I from the sewer system.²⁴ Petition at 7.

In making this argument, Westborough is apparently relying on the contention that it is a separate legal entity from the owners of the sewers and therefore, by reason of that separateness, is not in a position to be held responsible for any failure to eliminate excessive I/I from the sewer system. The permit itself lends a measure of credence to this argument, for it notes that the wastewater treatment plant board, i.e., the WTPB, “does not control the sewers” in those Towns. Similarly, the Region’s response to the Petition appears to acknowledge that some significance attaches to the issue of separate identities. Based on our examination of the Permit and the parties’ arguments on appeal, it is apparent that there is confusion as to the permittee’s identity and the resulting level of control it can exercise over the sewer system that feeds into the POTW. This confusion in turn clouds the otherwise unambiguous command that directs the permittee to “eliminate excessive infiltration/inflow to the sewer system.”

As noted at the outset of this Order, the Petition in this case was filed jointly by two distinct entities: the Town of Westborough and the WTPB. This joinder of the two entities in filing the single Petition is mirrored in the permit application and the permit itself. Specifically, the permit application lists the organization responsible for the facility as being “Town of Westborough, Acting By and Through Westborough Treatment Plant Board.” NPDES Application dated 2/20/98, Administrative Record II.2. As for the permit, it was issued to: “Town of Westborough: Westborough Wastewater Treatment Plant Board.” Permit, R Ex. 1. Therefore, to the extent that the “permittee,” as thus identified, is claiming that it has no responsibility over the sewer system, we find such a claim to be without merit, for it is clear that at least one of the entities constituting the permittee in this matter — specifically, the Town of Westborough — is a part owner of the sewer system. Indeed, the Petition states specifically that the Town of Westborough owns, controls, and maintains part of the sewer system. Petition at 7. While it is unclear from the record whether the Town of Westborough owns a discrete section of the sewer system serving the three towns or whether the entire sewer system is jointly owned and/or operated by the towns, it remains that as part owner of the sewer system, along with the Towns of Hopkinton and Shrewsbury, and as one of the two entities in whose name the permit was issued, the Town of Westborough must necessarily assume some responsibility under the permit for eliminating excessive I/I from the sewer system. It therefore would not

²⁴ Our reading of the argument made by Westborough, as presented in its Comments and in the Petition, is that Westborough’s objection to the permit requirement that it eliminate excessive I/I is limited to the question of ownership/control over the sewer system ostensibly necessary to meet this requirement, and does not challenge the Region’s legal authority to include such a permit condition in the first instance. We have therefore limited our review to the question of whether Westborough may be held responsible for meeting this permit condition.

seem to matter insofar as the permittee's obligations are concerned that the WTPB may not have any legal right, acting alone, to exercise control over the sewer system. It is enough that the Town of Westborough, as a part owner of the sewer system, is named in the permit. It would certainly be ironic if the Town of Westborough, as part owner of the sewer system that feeds into the POTW, and as a municipal contributor of sewage to that very same system, were able to rely on its less than sole ownership interest in the entire sewer system as a basis for defeating the POTW's responsibilities under the NPDES permit.

The validity of the foregoing analysis is cast in doubt, however, by portions of the text of the permit itself and the Region's apparent acquiescence in the notion that the separateness of the two entities comprising the "permittee" is somehow relevant. For example, in the excerpt from the permit quoted earlier, the I/I section of the permit identifies the permittee as "the wastewater treatment plant board" without reference to the Town of Westborough. This section of the permit then declares that "the permittee [referring still to the WTPB only] * * * does not control the sewers" in the Towns of Westborough, Shrewsbury or Hopkinton. Permit, R Ex. 1 at 8. In other words, this provision of the permit appears to be oblivious to the identity of the permittee as reflected in the permit application and elsewhere in the permit itself.

The Region's response to the Petition compounds the confusion by extending the scope of non-responsibility over the sewer system to include the Town of Westborough as well as the WTPB. Specifically, the Region states that "[t]he permit does not require Westborough [referring now to both the Town of Westborough and the WTPB] to operate and maintain the sewer system of its communities or to undertake direct actions within the contributing communities to eliminate excessive I/I." Response at 34. In other words, the Region apparently overlooks the fact that the Town of Westborough is a part owner of the sewer system and that the permit provision in question refers to the WTPB only.

In sum, it is readily apparent that the I/I provisions of the permit need further attention. Accordingly, we are remanding these provisions to the Region for the purpose of clarifying the obligations of the permittee thereunder. We assume for this purpose that the permittee is the dual entity that submitted the permit application and to which the permit was issued. If this assumption is incorrect, the identity of the permittee should also be clarified. In clarifying the permittee's obligations, the Region also needs to revise the permit in a way that reconciles the tension between the permit's absolute command directing the permittee to "eliminate excessive infiltration/inflow to the sewer system" and the Region's subsequent statements on appeal, cited above, that relieve the permittee of responsibility to "undertake direct actions within the contributing communities to eliminate excessive I/I."

5. *Whether the Region Erred in Including the CWMP Compliance Schedule in Westborough's Permit*

Westborough's Petition objects to the inclusion of a compliance schedule relating to work pertaining to the CWMP. Petition at 7-8. Westborough's Petition states that the Town of Hudson (one of the other members of the Assabet consortium) has contracted with a private company to perform the CWMP, and that Westborough has a contract with the Town of Hudson to pay a portion of the contractor's costs. *Id.*

As noted by the Region in its Response, Westborough made an identical argument in its Comments. The Region responded to Westborough's argument in its RTC, where it stated that it believed Westborough to be responsible — in cooperation with the other Assabet consortium members — for the CWMP compliance schedule. RTC, R Ex. 5 at 10. The Region explained that the schedule was a reasonable reflection of discussions between it, the Assabet Consortium members, and MADEP, and that if Westborough was unable to meet the compliance schedule due to events beyond its control, such facts would be taken into account by the Region in determining the appropriate action. *Id.*

As mentioned earlier in section II.A, the fact that Westborough has failed to respond whatsoever to the Region's RTC is fatal to its appeal of this issue. *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 668 (EAB 2001); *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996). Were we to visit the issue on the merits, however, the result would be the same. The Region notes in its Response that because Westborough is part of the consortium conducting the CWMP, which will in turn have a direct impact on Westborough's future permit terms, it shares responsibility for meeting CWMP compliance deadlines. Response at 37. It further argues that whether Westborough is merely contributing to the payment of the contractor hired by the Assabet consortium to perform the CWMP work or whether it performs the work itself or deals directly with the consultant, does not impact Westborough's obligations under the permit. *Id.*

Based on the Region's representation, we do not see how inclusion of the CWMP compliance schedule is clearly erroneous, an abuse of discretion, or otherwise unlawful action by the Region. Westborough's own Petition acknowledges that it is part of the consortium performing the CWMP, that it has contracted with another member of the Assabet consortium to pay for a portion of the CWMP work, and that the CWMP is likely to have an impact on its future permit limits — specifically for phosphorus. Petition at 7. Westborough also states that it will assume the responsibility to "take all reasonable steps and use good faith efforts to allow adherence to the CWMP schedule" in its permit. *Id.* at 8. In light of these acknowledgments, of the obvious importance of completing the CWMP work, and the Region's statement that it will consider events beyond Westborough's control in evaluating compliance, we find the Region's inclusion of such a sched-

ule in Westborough's permit to be reasonable. Westborough has shown no clear error, abuse of discretion or other unlawful action by the Region in this regard, and we therefore deny review of this issue as well.

III. CONCLUSION

For the foregoing reasons, review of NPDES Permit No. MA0100412 is denied with the exception of the issue of infiltration and inflow control, which is remanded to the Region for clarification consistent with this decision.