IN RE CITY OF PORT ST. JOE AND FLORIDA COAST PAPER COMPANY

NPDES Appeal Nos. 94-8 and 94-9

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided July 30, 1997

Syllabus

Petitioners, the City of Port St. Joe and the Florida Coast Paper Company, petitioned for review of a National Pollutant Discharge Elimination System ("NPDES") permit that was issued by EPA Region IV (the "Region") to the City for the Port St. Joe Industrial Wastewater Treatment Plant (the "IWTP" or the "plant"). Under the NPDES permit program, dischargers are subject to different statutory and regulatory requirements depending on whether they are categorized as a "publicly owned treatment works" ("POTW") or "other than publicly owned treatment works" ("non-POTW"). A POTW is defined by Agency regulations to include "any * * * system used in the treatment * * * of municipal sewage or industrial wastes of a liquid nature which is owned by a 'State' or 'municipality.'" 40 C.F.R. § 122.2. Petitioners acknowledge that the IWTP is owned and operated by the City of Port St. Joe, which is a municipality. However, they argue that the IWTP's influent is atypical of POTWs in that most of the influent it receives consists of industrial process wastes from a local pulp and paper mill rather than municipal sewage. They argue that the Region should, as an exercise of discretion, regulate the IWTP as if it were a non-POTW because of the predominantly industrial nature of its influent. Petitioners raise multiple legal and factual objections to specific permit provisions, most of which stem in whole or in part from the Region's classification of the plant as a POTW.

Held: Petitioners' requests for review of all of the legal issues, and all but three of the alleged factual issues, raised by their petitions, are denied. Petitioners' request for review of three Constitutional issues is also denied.

Petitioners have not demonstrated that the Region erred when it classified the IWTP as a POTW. The IWTP falls within the regulatory definition of a POTW and Petitioners have cited no authority to support their contention that the Region has the discretion to ignore the regulatory definition and classify the IWTP as a non-POTW rather than as a POTW.

Petitioners have not demonstrated that the Region erred when it imposed an 85% removal requirement for the pollutant parameters Biochemical Oxygen Demand ("BOD_5") and Total Suspended Solids ("TSS"). The regulations mandate an 85% removal requirement for POTWs unless the POTW demonstrates eligibility for one of the specific regulatory exceptions to the requirement. Since Petitioners have not demonstrated eligibility for such an exception, the Region is required to impose the requirement.

The Region is required to incorporate sewage sludge management requirements in the IWTP's permit, pursuant to Section 405(f) of the Clean Water Act, 33 U.S.C. § 1345(f), and imple-

menting regulations at 40 C.F.R. Part 503 (Standards for the Use or Disposal of Sewage Sludge). Therefore it properly included sewage sludge management requirements in the permit.

Petitioners' request for an evidentiary hearing as to all of the alleged issues of fact raised in their petitions is denied, except for three issues identified below. Review of some issues is denied because they were not raised during the public comment period and therefore were not preserved for review. Review of most remaining issues is denied because they do not satisfy the regulatory criterion for review. Under the regulations, Petitioners are entitled to an evidentiary hearing only as to any *genuine* issue of *material* fact. Review of these issues raised by the petitions is denied because they do not satisfy the materiality requirement (*i.e.*, resolution of the issue would not affect the outcome of the proceeding). The permit is remanded to the Region for resolution of the following three issues:

(1) Petitioners argue that the Region incorrectly estimated the limits the IWTP can consistently achieve for BOD_5 and TSS because it based its estimate of the IWTP's past performance on data from a twelve-month period, and because a twelve-month period is too short to reflect the variations in the IWTP's past performance. The Region's explanation of the method it used to determine the permit limits is too vague to permit a determination whether it is valid. Therefore, the permit is remanded for the Region to provide Petitioners with a detailed explanation as to how it determined the initial average monthly mass limits for BOD_5 and TSS, and to consider whether an evidentiary hearing is warranted to resolve any issue of fact associated with determining these limits.

(2) Petitioners argue that the Region erroneously included four pages of specific pretreatment requirements in the permit that either duplicate or "go beyond" the provisions of the City's approved pretreatment program, which the permit incorporates by reference. The mere fact that the four specific pages of pretreatment requirements either duplicate or "go beyond" the provisions of the approved pretreatment program does not alone warrant review. However, the Region's various responses to Petitioners' argument are self-contradictory and do not satisfy the Region's regulatory obligation to respond to all significant comments on the draft permit during the public comment period. Therefore, the permit is remanded for the Region either to clarify its explanation of why these permit provisions are appropriate or to delete them.

(3) Petitioners request modification of the metals monitoring requirements of the permit to make them consistent with its State certification, which was modified after the issuance of the permit. On remand, the Region shall entertain Petitioners' request for a modification of these conditions, consistent with the revised State certification.

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

Opinion of the Board by Judge McCallum:

Petitioners, the City of Port St. Joe (the "City") and the Florida Coast Paper Company (the "Company"),[1] petition for review of multiple legal and factual issues relating to a permit issued by U.S. EPA Region IV (the

[1] The Company was owned by St. Joe Forest Products Company when the permit was issued and at the time the Petitions for Review were filed. Florida Coast Paper Company, L.L.C., notified the Board on June 19, 1996, that it had purchased the mill from St. Joe Forest Products Company on May 30, 1996. Motion for Leave to File a Reply Brief, June 19, 1996. For ease of reference, the term "Company" will be used throughout this decision to refer either to the St. Joe Forest Products Company or the Florida Coast Paper Company, L.L.C., as appropriate.

"Region") to the City of Port St. Joe for its Industrial Wastewater Treatment Plant (the "IWTP" or the "plant") under the National Pollutant Discharge Elimination System ("NPDES") permit program.[2] For the reasons discussed below, Petitioners' requests for review of all of the legal issues, and all but three of the alleged factual issues raised by their petitions, are denied. As to the three alleged factual issues, we are remanding the permit to Region IV for further action and consideration.

I. *BACKGROUND*

Under the NPDES permit program, which is authorized by Section 402(a)(1) of the Clean Water Act, 33 U.S.C. § 1342(a)(1), a permit is required for all discharges of pollutants from point sources into United States waters. Dischargers are subject to different statutory and regulatory NPDES requirements depending on which of two general categories they belong to: "publicly owned treatment works" ("POTWs") or "other than publicly owned treatment works" ("non-POTWs").[3, 4] A POTW is defined by Agency regulations to include "any * * * system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature *which is owned by a 'State' or 'municipality.'*" 40 C.F.R. § 122.2 (emphasis added). Typically, POTWs perform pollution control treatment on a mixture of wastewaters from different sources. Thus, "[a] typical POTW receives 60% of its influent from residential flow, 20% from commercial and 20% from industrial." Final Rule, General Pretreatment Regulations for Existing and New Sources, 46 Fed. Reg. 9404 (Jan. 28, 1981). The main contaminant in wastewaters treated by a POTW is usually biodegradable organic matter that responds to biological treatment ("secondary treatment").[5] By contrast, non-POTWs are primarily private, industrial

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[2] On May 1, 1995, after the Petitions were filed, the Region IV Regional Administrator approved the application of the State of Florida to administer the NPDES program within the State. 60 Fed. Reg. 25718 (May 12, 1995). The Region's approval of the Florida NPDES program does not affect this appeal because EPA has retained jurisdiction over permits for which an evidentiary hearing had been requested prior to the date the State program was approved.

[3] *See* Section 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B) (requiring POTWs to achieve effluent limits based upon secondary treatment) and Section 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (requiring point sources "other than publicly owned treatment works" to achieve technology-based effluent limits or to meet pretreatment standards if they discharge into POTWs).

[4] The term "non-POTW," while not a defined term, is used in the regulations to refer to treatment works that do not meet the definition of a POTW. *See, e.g.*, 40 C.F.R. § 122.21(m), referring to "variance requests by non-POTWs."

[5] "There are three levels of wastewater treatment. Primary treatment refers to a physical sedimentation process for removing settleable solids. Secondary treatment refers to a physical/
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dischargers whose wastewaters consist mostly of industrial process wastes that may require treatment technologies other than biological treatment.

The City, a municipality, owns and operates the IWTP.[6] The City constructed the IWTP and has operated it since 1973 under NPDES and Florida permits. The IWTP's influent is atypical of municipally owned treatment works in that the wastewaters it treats consist primarily of industrial process wastes. At the time of permit issuance, its influent was approximately "96 percent from [the Company], 1 percent from Arizona Chemical Company, and 3 percent from the City of Port St. Joe sanitary system." Fact Sheet, April 25, 1994, at 2. *See also* Region's Response to City's Notice of Appeal and Petition for Review, March 17, 1995 ("Response to City's Petition"), at 6.

The NPDES permit under consideration here was issued by the Region on August 23, 1994,[7] after an extensive exchange of views between the Region and the two Petitioners.[8] The State of Florida certified the permit on July 15, 1994, pursuant to Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a).[9] The Region classified the IWTP as a POTW for purposes of the NPDES program. Therefore, the permit, in addition to containing conditions generally applicable to all dischargers, contains some conditions that apply only to POTWs. Response to City's Petition at 6. Specifically, the Region imposed conditions based on the Secondary Treatment Regulation at 40 C.F.R. Part 133 (also

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biological process for removing solids and pollutants characterized by biological oxygen demand and pH. Tertiary treatment involves processes which remove other pollutants such as non-biodegradable toxics." *Natural Resources Defense Council v. EPA*, 790 F.2d 289, 293 n.2 (3d Cir. 1986).

[6] *See* City's Notice of Appeal and Petition for Review, Dec. 16, 1994, at 2-3. The use of the term "Industrial" in the formal name of the plant has no bearing on its legal status.

[7] The Region issued a minor modification of the permit on August 31, 1994.

[8] Earlier, the City had applied for a modification of the biochemical oxygen demand (BOD_5) and total suspended solids (TSS) limits in its then-effective permit on January 27, 1989. *See* n.13 *infra*. The Region issued a modified permit on August 16, 1990. The City submitted a request for an evidentiary hearing on that permit on September 14, 1990. The Region withdrew the permit on September 24, 1993, and subsequently proposed a new permit on September 30, 1993. The City appealed the withdrawal of the permit on the ground that it constituted a "defacto [sic] denial" of its request for an evidentiary hearing. City's Petition at 6. The Board dismissed the appeal by Order of January 11, 1994. *In re City of Port St. Joe, Florida*, 5 E.A.D. 6 (EAB 1994).

[9] Under Section 401(a) of the Clean Water Act, 33 U.S.C. § 1341(a), an NPDES permit cannot be issued until the State certifies, or waives its right to certify, that the discharge authorized by the permit will comply with, *inter alia*, all applicable federal effluent limitations and State water quality standards.

referred to herein as "the Part 133 regulations") and the pretreatment requirements applicable to POTWs pursuant to 40 C.F.R. Part 403.[10] The regulations implement Section 301(b)(1)(B) of the Clean Water Act, 33 U.S.C. § 1311(b)(1)(B), which requires POTWs to achieve "effluent limitations based on secondary treatment as defined by the Administrator."

The City and the Company filed requests for an evidentiary hearing on the permit on September 22, 1994. The Regional Administrator denied both requests on the ground that neither Petitioner had raised a material issue of fact. Denial of City's Hearing Request, Nov. 16, 1994; Denial of Forest Products' Hearing Request, Nov. 16, 1994.

The City and the Company each petitioned the Environmental Appeals Board pursuant to 40 C.F.R. § 124.91(a)(1) to review Region IV's denial of their evidentiary hearing requests. City's Notice of Appeal and Petition for Review, Dec. 16, 1994 ("City's Petition"); Forest Products' Notice of Appeal and Petition for Review, Dec. 16, 1994 ("FP's Petition"). The Company asserts that its interests are affected by the Agency's permit decision because the conditions of the City's permit will affect the City's ability to receive and treat the Company's effluent. FP's Petition at 1.

The main issue the Petitions raise is an issue of law. The City and the Company challenge the Region's classification of the IWTP as a POTW as well as certain conditions in the permit that are based on that classification.[11] City's Petition at 42-43; FP's Petition at 13. They do not

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[10] Section 307(b) of the Clean Water Act, 33 U.S.C. § 1317(b), requires the Agency to establish regulatory pretreatment requirements to prevent discharges into POTWs from interfering with the operations of the POTW. *See generally In re B.J. Carney Industries, Inc.*, 7 E.A.D. 171 (EAB, 1997); *In re City of Yankton*, 5 E.A.D. 376 (EAB 1994), for a discussion of the Agency's pretreatment requirements.

[11] The Company states in its Petition that it is incorporating the City's Petition by reference. FP's Petition at 13. Accordingly, we will consider all issues raised by the City as having also been raised by the Company. *See In re Suckla Farms, Inc.*, 4 E.A.D. 686, 681 n.9 (EAB 1993). In general, we cite to the City's petition only. To the extent the Company raises issues the City does not raise, we address them separately.

Earlier, in its evidentiary hearing request, the Company had sought to incorporate the City's hearing request by reference to avoid unnecessary duplication. FP's Hearing Request at 3. The Region declined to consider the City's arguments, stating that, to the extent that the Company sought to incorporate the City's hearing request by reference, it failed to conform to 40 C.F.R. § 124.74(b)(1), which requires, among other things, that a hearing request "state each legal or factual question alleged to be at issue * * *." Denial of FP's Hearing Request at 5. The Company appeals the Region's ruling. FP's Petition at 12-13. We are reversing the Region's ruling and reading the Company's hearing request as having raised the same issues raised by the City. By incorporating the City's Petition, the Company has provided adequate notice to the Region of its concerns.

dispute that the IWTP is municipally owned and that its influent includes some domestic sewage. Rather, they contend that the Region should recognize the "unique" nature of the IWTP as, in their words, a "publicly-owned, industrial wastewater treatment works." City's Petition at 17. They argue that, notwithstanding the IWTP's municipal ownership, the Region has the discretion to regulate the plant as an industrial treatment works (*i.e.*, as if it were a non-POTW) based on its primarily industrial influent and its industrial design. *Id*.; City's Evidentiary Hearing Request at 5. Petitioners contend that the Region should "derive the limits in the permit based on the concepts and details of Pulp, Paper, and Paperboard Effluent Guidelines (40 C.F.R. Part 430) as well as the Effluent Guidelines for Gum and Wood Chemicals Manufacturing (40 C.F.R. Part 454)."[12] City's Hearing Request at 5.

Petitioners object most strenuously to the permit's 85% removal requirements for Biochemical Oxygen Demand ("BOD_5") and Total Suspended Solids ("TSS" or "SS"),[13] which the Region imposed by applying the Secondary Treatment Regulation at 40 C.F.R. Part 133. Permit, Part I.A.2., page I-4. They contend that the Part 133 requirements were not intended for industrial facilities and therefore should not apply to the IWTP. They further argue that if the IWTP were regulated under the standards that apply to industrial dischargers, the IWTP would not be subject to a minimum percent removal requirement. City's Petition at 19-20. Alternatively, they contend that, even if the Part 133 regulations do apply to the plant, the Region has the flexibility to impose less stringent percentage removal requirements because of the industrial nature of the IWTP's influent. *Id*. at 16-17.

Petitioners also raise legal objections to other matters that stem in whole or in part from the Region's classification of the plant as a POTW. These include challenges to the permit's mass limits for BOD_5 and TSS, sewage sludge management requirements, and pretreatment requirements. Additionally, Petitioners allege that the Region's characterization of the plant as a POTW and the denial of their evidentiary hearing request have deprived them of Constitutionally guaranteed rights under the Fifth Amendment. City's Petition at 45-50; FP's

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[12] These effluent guidelines are regulations that EPA has promulgated pursuant to the Clean Water Act establishing national effluent limitations and/or pretreatment standards for particular pollutants for industries falling within the identified industrial groupings.

[13] The terms "SS" and "TSS" refer to the same pollutant. *See*, *e.g.*, Proposed Rule, 60 Fed. Reg. 62546, 62559 (Dec. 6, 1995) ("Secondary treatment is defined at 40 CFR 133.102 in terms of five-day biochemical oxygen demand (BOD_5), total suspended solids (SS or TSS), and pH.").

Petition at 17-21. Finally, Petitioners raise nineteen issues[14] (and the Company raises two additional issues) that they characterize as issues of fact. They contend that they are entitled to an evidentiary hearing on each of these issues.

At the Board's request, the Region responded to both Petitions on March 17, 1995.[15] The Region maintains that it properly classified the IWTP as a POTW based on its municipal ownership and that it has no discretion to treat the IWTP as a non-POTW. *See* Response to City's Petition at 8; Denial of City's Hearing Request at 3. It contends that the definition of a POTW includes plants that treat either municipal sewage or industrial process wastes and that the "composition of its influent" (*i.e.*, the relative proportions of these contributions to the IWTP's influent) is not relevant to the plant's classification as a POTW. Denial of City's Hearing Request at 3; Response to Written Comments of Oct. 28, 1993, at 8. The Region maintains, therefore, that it must impose on the IWTP all regulatory requirements that apply to POTWs except to the extent that Petitioners can demonstrate that the IWTP is entitled to a regulatory exemption from any particular requirement. *See* Response to City's Petition at 6, 8-9. The Region asserts that the Petitioners, however, did not succeed in making such a demonstration for any of the permit conditions to which they object. *Id*. The Region further contends that the Board should not consider Petitioners' Constitutional arguments because they were raised for the first time in the Petitions for Review. *Id*. at 26. Finally, the Region asserts that it "made an individual determination on each alleged factual issue" and that it determined that none of these issues raises a material issue of fact for which Petitioners are entitled to an evidentiary hearing. *Id*. at 4. The Region contends, with respect to all of the issues raised by the Petitions (the nineteen alleged factual issues raised by the City and the two additional alleged factual issues raised by the Company) that:

> [Petitioners] restate issues raised during the comment period without indicating why the Region's response was clearly erroneous, raises [sic] issues outside of the scope of the Board's jurisdiction, or raises [sic] issues that were not raised during the comment period.

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[14] The City identifies these nineteen alleged factual issues as Issues 1-16, and sub-issues 3(a), 3(b), and 3(c), in its Petition.

[15] Although the Board's Docket does not indicate receipt by the Board of the Region's March 17, 1995 Response to the Company's Petition, the Board has been informed by Florida Coast Paper Company, that Forest Products received a copy of the Response on March 27, 1995. The Board has been provided with a copy of the Region's Response to Forest Products' Petition and will take into account the views expressed in that document.

Id. at 30; Response to FP's Petition at 27.

We hereby deny Petitioners' requests for review of all of these legal issues and most of the factual issues. Our reasons for denying review of these issues are set forth below. However, we are remanding the permit to Region IV for further consideration with respect to three matters. The first is to provide a more complete explanation of how it determined the permit's initial average monthly mass limits for BOD_5 and TSS, and to reconsider whether an evidentiary hearing is warranted to resolve any material issues of fact associated with the determination of those limits. If the Region determines that a hearing is not necessary, Petitioners may seek review of the denial of the hearing on this issue. The second concerns the permit's pretreatment standards. The Region must clarify whether it is intending to add new pretreatment conditions to the permit that go beyond the requirements of the City's approved pretreatment program and if so the basis therefor. (Otherwise the Region is directed to remove the pretreatment conditions from the permit, except for the provision that incorporates the approved pretreatment program into the permit by reference.) The third relates to revision of metals monitoring provisions to conform to a revision in the State's certification of the permit.

II. *DISCUSSION*

A. *Standard of Review*

There is no administrative appeal as of right from a Regional Administrator's denial of an evidentiary hearing request.[16] *In re Florida Pulp and Paper Ass'n & Buckeye Florida, L.P.*, 6 E.A.D. 49, 51 (EAB 1995); *In re City of Hollywood, Florida*, 5 E.A.D. 157, 159 (EAB 1994). Ordinarily a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important and therefore should be reviewed by the Environmental Appeals Board. 40 C.F.R. § 124.91(b). "While the Board has broad power to review decisions in NPDES permit cases, the Agency intended this power to be exercised 'only sparingly.'" *Florida Pulp and Paper Ass'n*, *supra*, at 51 n.7; *In re J & L Specialty Products Corp.*, 5 E.A.D. 31, 41 (EAB 1994); *In re Town of Seabrook, N.H.*, 4 E.A.D. 806 (EAB 1993), *aff'd sub nom. Adams v. EPA*, 38 F.3d 43 (1st Cir. 1994). It is Agency policy that most permits should be finally adjudicated at the Regional level. *Florida Pulp and*

[16] The Environmental Appeals Board's jurisdiction to review appeals from denials of evidentiary hearing requests is conferred by 40 C.F.R. § 124.91(a)(1).

Paper Ass'n, supra, at 51 n. 7; 44 Fed. Reg. 32,887 (June 7, 1979). On appeal to the Board, a petitioner has the burden of demonstrating that the Region has made a clearly erroneous decision or an exercise of discretion or policy that is important and therefore should be reviewed. 40 C.F.R. § 124.91(a)(1). As explained below, Petitioners have not raised any legal, factual, policy or other issues in their appeals that merit review.[17]

Petitioners are appealing the Regional Administrator's denials of their evidentiary hearing requests. Agency regulations allow any interested person, including the permit applicant, to submit a request for an evidentiary hearing to the Regional Administrator for the purpose of contesting any provision of the Regional Administrator's final permit determination. 40 C.F.R. § 124.74. There are three threshold criteria the request must satisfy. First, it must meet the pleading requirements of Section 124.74(b)(1), which include the requirement that "requests shall state each legal or factual question alleged to be at issue, and their relevance to the permit decision * * *." If the evidentiary hearing request is based solely on an issue of law, the Regional Administrator must deny it; however, a hearing may be held if it is to resolve issues of law and fact that are interconnected.[18] *See* 40 C.F.R. § 124.74(b)(1)(note). *See also In re Boise Cascade Corp.*, 4 E.A.D. 474, 485 (EAB 1993)(where a legal issue is "interlaced with" a factual issue, both issues may be decided at an evidentiary hearing). Second, the factual issues identified in the request must be material issues of fact relevant to the issuance of the permit. 40 C.F.R. § 124.75. This embodies

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[17] Agency regulations also provide that a petition for review shall include "a statement of the supporting reasons * * *." 40 C.F.R. § 124.91(a). The City's Petition lists seven legal and/or policy issues in summary fashion at pages 43-45 of its Petition, for which it provides no arguments or documentation. Petitioners' request for review of all seven issues is denied because none meet the supporting statement requirement. *See In re Adcom Wire, d/b/a Adcom Wire Co.*, 4 E.A.D. 221, 228-9 (EAB 1992), citing *In re City of Los Angeles, Dep't of Public Works*, NPDES Permit No. CA010999 (JO, Aug. 29, 1983) ("[M]ere incorporation of hearing request in petition for review, without statement of 'supporting reasons' as required by Section 124.91(a)(1), is not sufficient to demonstrate clear error or important policy considerations."); *In re 1989 NPDES Permits for Alaska Placer Miners et al.*, NPDES Appeal No. 90-7, at 2 n.2 (CJO Sept. 4, 1990)("[A] request alone cannot serve as a statement of the 'supporting reasons' for reviewing the Regional Administrator's decision * * *. It is incumbent upon Petitioner in its petition to state why the denial of the request was improper.").

[18] If an evidentiary hearing request is denied, any issues of law raised by a petitioner in the hearing request may be heard in an appeal from the Regional Administrator's decision to the Environmental Appeals Board. "Legal and policy issues may be raised in an evidentiary hearing request, although they cannot themselves provide a basis for an evidentiary hearing, a procedure reserved for factual issues." *In re Town of Seabrook, N.H.*, 4 E.A.D. 806, 817 (EAB 1993), *aff'd sub nom. Adams v. EPA*, 38 F.3d 43 (1st Cir. 1994).

the requirement that one must raise actual, relevant, and material disputes of fact in order to obtain an evidentiary hearing. In administering this requirement the Board is governed by an administrative summary judgment standard requiring the presentation of a genuine and material factual dispute, similar to judicial summary judgment under Rule 56, Fed. R. Civ. P. *In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993), *aff'd sub nom. Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994).[19] Third, the petitioner ordinarily must have afforded the Regional Administrator a prior opportunity to resolve the issue for which an evidentiary hearing is requested.

> No issues shall be raised by any party that were not submitted to the administrative record * * * as part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them.

40 C.F.R. § 124.76. "[A]dherence to [the third] requirement is necessary to ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final * * *." *In re Florida Pulp and Paper Ass'n, supra*, at 6. In this case, the Regional Administrator denied each of the Petitioners' evidentiary hearing requests because they failed to satisfy one or more of the foregoing threshold criteria.

The remainder of the discussion is organized as follows: Section II.B. addresses Petitioners' objections to classifying the IWTP as a POTW. Section II.C. addresses Petitioners' challenges to the permit's limitations on BOD_5 and TSS. Sections II.D. and II.E., respectively, address Petitioners' objections to the inclusion in the permit of sewage sludge management and pretreatment requirements. Section II.F. addresses Petitioners' objections to the permit monitoring and reporting requirements for dioxins, furans, and dioxin/furan isomers.

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[19] As explained in *Mayaguez, supra*, at 781-82, the procedure for requiring a petitioner to raise a material issue of fact requires that the issue raised by the petitioner also be a "genuine" issue of fact.

> [I]n the context of an evidentiary hearing request, a genuine issue of material fact exists only if a party requesting an evidentiary hearing presents sufficient probative evidence from which a reasonable decisionmaker could find in that party's favor by a preponderance of the evidence.

Id. at 782.

Section II.G. addresses the factual issues raised by the Petitioners that are not covered in the previous sections. Section II.H. addresses the Constitutional issues.

B. *Classification of IWTP as a POTW*

Under the authority of the Clean Water Act and related appropriations laws the federal government has awarded grants and other funding amounting to billions of dollars for the construction of many of America's municipal sewage treatment plants. *See, e.g.,* Section 207 of the Clean Water Act, 33 U.S.C. § 1287. The City was one such recipient of construction grant funds when it built the IWTP in 1973. City's Petition at 2-3. These construction grants are intended for public projects undertaken by States and municipalities, specifically, projects for the construction of "publicly owned treatment works." Section 201(g)(1) of the Clean Water Act, 33 U.S.C. § 1281. It is not surprising under these circumstances that the Agency in implementing the NPDES permitting program defined the term POTW by reference to its ownership by a municipality or State. 40 C.F.R. § 122.2. It also is not surprising that one consequence of a municipality's receiving funding for construction of a POTW is that the facility must comply with a general set of standards applicable to POTWs generally. The only really surprising matter is that the City should be questioning the applicability of these standards to the IWTP at this late date.[20]

The main issue both petitions raise is the legal question of whether Region IV erred when it classified the IWTP as a POTW because the plant is municipally owned. Petitioners contend that the Region should regulate the IWTP as an industrial treatment works (*i.e.*, as a non-POTW), not as a POTW, because the design of the facility, and the characteristics of its effluent, "are typical of an industrial plant." City's Petition at 42. They contend that the "ownership of a plant is irrelevant to the characteristics of the influent/effluent and should not be the controlling factor in the regulation of the facility's discharges." *Id*. at 43.

The Region responds that the flaw in Petitioners' argument is that "Petitioner wants to be treated as a non-POTW, when in fact it is a POTW." Response to City's Petition at 27. It maintains that it properly

[20] The record does not reflect the terms and conditions of the various NPDES permits to which the IWTP has been subject since its construction in 1973. Presumably, however, the facility has been classified as a POTW throughout the entire period. Nevertheless, because the Region has not challenged the Petitioners' right to question the facility's status as a POTW despite its prior classification as a POTW, we address the issue now.

classified the IWTP as a POTW because it is a "system used in the treatment * * * of municipal sewage or industrial wastes of a liquid nature which is owned by * * * a 'municipality.'" 40 C.F.R. § 122.2. The Region explains that:

> Under the [Clean Water Act], whether a facility is subject to secondary treatment (and its users to pretreatment) requirements * * * depends *solely* upon whether the plant is publicly or privately owned, and *not* on the nature of the wastes being treated. Any publicly owned (by a State or municipality) device or system used in the treatment of municipal sewage or industrial wastes of a liquid nature is a POTW.

Denial of City's Hearing Request at 3. Therefore, the Region asserts that Petitioners have not demonstrated that it made an error of law in classifying the IWTP as a POTW. The Region further asserts that, to the extent the Petitioners argue that it is not "appropriate" to classify the plant as a POTW, they are in effect challenging the validity of the regulations. The Region contends that Petitioners may not challenge the regulations in a proceeding to review a permit determination but should instead have raised any objections to the regulations during the public comment period that preceded their issuance. *Id*. at 3-4.

Petitioners' arguments are without merit. The regulatory definition is free from any particular ambiguity. It classifies as a POTW any treatment works that is municipally owned and that treats municipal sewage or industrial wastes of a liquid nature, without regard to the relative quantities of each type of waste. Since it is undisputed that the IWTP is owned by the City of Port St. Joe, a municipality, and since the IWTP treats both municipal and industrial liquid waste, it falls squarely within the definition. Therefore, the Region did not err when it classified the IWTP as a POTW. As explained at the beginning of this decision, there are two general categories of dischargers: POTWs and non-POTWs. Petitioners have cited no authority to support their contention that the Region has discretion to ignore the regulatory definition and classify the IWTP as a non-POTW rather than as a POTW. Nor have they supported their contention that the Agency intended to exclude facilities such as the IWTP from regulation as POTWs. Moreover, to the extent that Petitioners argue that it is "inappropriate" for the IWTP to be classified as a POTW, they are challenging the validity of the regulations and the policy considerations on which the regulations are based. A permit appeal proceeding is not the appropriate forum in which to challenge either the validity of Agency regulations or the policy judgments that underlie them. *In re*

Suckla Farms, Inc., 4 E.A.D. 686, 699 (EAB 1993) (underground injection control permit); *In re Ford Motor Co.*, 3 E.A.D. 677, 682 n.2 (Adm'r 1991) (RCRA permit) ("Section 124.19, which governs this appeal, authorizes me to review contested permit conditions, but it is not intended to provide a forum for entertaining challenges to the validity of the applicable regulations."). Therefore, for the foregoing reasons, Petitioners' request for review of this issue is denied.

C. *Claimed Basis for Relaxing the Limitations for a POTW*

As an alternative to arguing that the IWTP is not a POTW, Petitioners contend that even if the Part 133 requirements apply to the IWTP plant, the Region has the flexibility to impose less stringent conditions than required by the permit. Petitioners' objections center on (i) the 85% removal requirement for BOD_5 and TSS, and (ii) the mass-based limits for BOD_5 and TSS. In making these objections, however, Petitioners for the most part fail to identify any express authority in the statute or regulations that would allow the Region to make any special concessions to the IWTP by reason of the predominantly industrial character of its influent. The objections are discussed more specifically below.

1. *85% Removal Requirement for BOD_5 and TSS*

Petitioners argue that the imposition of an 85% removal requirement for the pollutant parameters BOD_5 and TSS is both inappropriate and unreasonably burdensome for the IWTP, and that the requirement should be deleted from the permit. Specifically, they argue that the Region has discretion either to exempt the IWTP from the 85% requirement or to impose a lower percentage removal requirement. In making this argument, however, Petitioners do not contend that they qualify for any of the specific regulatory exemptions from the 85% removal requirement that are set forth in Sections 133.103 or 133.105. They assert instead that the Region "has the authority, flexibility, and *the duty* to implement its rules utilizing some common sense" and "its technological expertise." City's Petition at 10 (emphasis in original).

The Region responds that the regulations mandate an 85% removal requirement for POTWs and that the Part 133 regulations do not give it the discretion to lower the percent removal requirement for BOD_5 and TSS on a case-by-case basis. Response to City's Petition at 8-9. It asserts that "[a]ll publicly owned treatment plants are required to meet the minimum removal requirements unless they fall within one of the regulatory exceptions provided at 40 CFR §§ 133.103 or 133.105" and "Petitioner has not provided any data or

other information demonstrating that it would be eligible for such exemptions." *Id*. at 9.

After giving consideration to the parties' respective arguments, it is our conclusion that Petitioners have not demonstrated that the Region made a clear error of law by imposing an 85% removal requirement for BOD_5 and TSS in this permit. As the Board previously stated in *In re City of Hollywood, Fla.*, 5 E.A.D. 157 (EAB 1994) (in which we held that the City of Hollywood had failed to demonstrate its eligibility for an adjustment of the 85% removal requirement):

> [The 85% removal requirement] comes directly from the Secondary Treatment regulation at 40 C.F.R. Part 133, and specifically from sections 133.102(a) and (b)(3), which provide that for both BOD_5 and [TSS], "The 30-day average percent removal shall not be less than 85 percent."

5 E.A.D. at 160. We further stated that:

> Absent grounds for relaxation of the percent removal requirements under section 133.103 — which have not been shown to exist — the Region has no discretion not to include the percent removal requirements as * * * permit conditions.

Id. at 162. Since Petitioners have not alleged or cited evidence demonstrating that they qualify for an exemption from the 85% removal requirement for BOD_5 and TSS under 40 C.F.R. § 133.103 or 133.105, they have no basis for requesting the Region not to impose such a requirement. The Region is required to impose permit conditions in accordance with the statute and regulations, and absent a basis in the statute or regulations for making an exception to the 85% removal requirement, the Region's determination must stand.

In their petitions for review and requests for an evidentiary hearing Petitioners have also identified and enumerated various other issues relating to the 85% removal requirement, asserting that the issues are factual and thus suitable for an evidentiary hearing. Whether the issues are factual is not, of course, the sole determinant of whether the Agency should hold an evidentiary hearing: the issues must also be material to the outcome of the proceeding. *See In re J & L Specialty Products Corp.*, 5 E.A.D. 31, 42 (EAB 1994) (rejecting a Petitioner's argument that it was entitled to an evidentiary hearing) ("[A] question of material fact * * * [is] one that might affect the out-

come of the proceeding * * *"). *See also In re Town of Seabrook, N.H.*, 4 E.A.D. 806 (EAB 1993), *aff'd sub nom. Adams v. EPA*, 38 F.2d 43 (1st Cir. 1994); *In re Mayaguez Regional Sewage Treatment Plant, supra*, at 781. The issues raised by Petitioners do not satisfy the materiality requirement, for in each instance resolution of the factual dispute in Petitioners' favor would still leave the Region without any lawful basis to modify the 85% removal requirement.[21] A couple of examples will serve to make the point.

Petitioners contend that the 85% removal requirement is inappropriate because it fails to consider the hydraulic residence time of the IWTP:

> The Region's specification of a minimum 85 percent removal effluent limit on monthly average BOD_5 and TSS concentration *imposes an inappropriate domestic limitation on an industrial facility*, and fails to consider the hydraulic residence time of the Industrial Waste Treatment Plant (IWTP) * * * .

City's Petition at 10 (emphasis added). Petitioners further describe the factual issue as follows:

> The *factual issue* raised is the effect of the hydraulic residence time, and the associated lag time between influent and effluent quality on the operation of the facility and on the calculation of the percent removal limit.

Id. at 10 (emphasis added). It is apparent from the foregoing statements that any adjustment to the 85% removal requirement is predicated on Petitioners' insistence that allowances should be made for the fact that the IWTP is an atypical POTW, rather than on the basis of any specific exemption in the statute or regulations. Petitioners have not alleged that any statutory or regulatory provision authorizes the Region to adjust the 85% removal requirement based on a plant's hydraulic residence time. Therefore, even if the issue as framed by the Petitioners were resolved in their favor following an evidentiary hearing, the Region would not have the legal authority to relax the requirement by changing the percentage removal requirement to a

[21] The Region also points out that several of the so-called "factual issues" relating to the 85% removal requirement address matters that were raised for the first time on appeal rather than in the evidentiary hearing request. Response to City's Petition at 7-12. Review of these issues is also denied because they were not preserved for review.

percentage deemed more favorable by Petitioners. Because of that restriction, the issue is not material to the outcome of the permit proceeding, and therefore the Region's denial of the evidentiary hearing request was proper.

As another example, Petitioners argue that the permit's minimum percent removal requirements for BOD_5 and TSS are "arbitrary and scientifically inappropriate" for industrial effluent. City's Petition at 18. This argument is clearly a challenge to the technical and scientific basis for the 85% removal requirement for POTWs and as such is fundamentally a challenge to the regulations. NPDES administrative proceedings are not the appropriate forum in which to raise such challenges. Matters relating to the scientific and technical validity of regulatory provisions should be raised with the Agency at the time it proposes the regulations or in a timely manner with the courts after the regulations have been promulgated by the Agency. *See supra* Section II.B., and cases cited therein. For those reasons, issues pertaining to the scientific and technical validity of regulations are outside the scope of an NPDES permit proceeding and thus are not material to the outcome of the proceeding.

Accordingly, review of Petitioners' objections to the 85% removal requirement and to the Region's denial of an evidentiary hearing on that requirement is denied.

2. *Mass-Based Limits for BOD_5 and TSS*

Petitioners appeal the Region's denial of their request for an evidentiary hearing on the permit's average monthly mass limits for the pollutants BOD_5 and TSS. Issues 4 and 5, City's Petition at 21-25 (Issue II, City's Hearing Request at 2, 6, and 13-15). Part I.A.1. of the permit imposes initial average monthly discharge limits of 8,695 pounds per day for BOD_5 and 12,210 pounds per day for TSS (the "initial limits"). Permit, Part I.A.1., page I-1.[22] These limits take effect immediately upon the effective date of the permit, and are based on an assumption that the paper mill that generates most of the IWTP's influent is operating at "55% capacity." Part I.A.9. of the permit imposes less stringent alternative average monthly discharge limits of 10,130 pounds per day for BOD_5 and 16,440 pounds per day for TSS (the "alternative limits") that become effective when the permittee notifies the Region that a planned production increase at the paper mill to

[22] Part I.A.1. of the permit also contains daily maximum limits for BOD_5 and TSS. Petitioners do not object to these limits.

"65% capacity" will occur. Permit, Part I.A.9., page I-4.

Petitioners contend that the initial limits are "technically flawed" and that the IWTP cannot consistently comply with them. They argue that the initial limits should be deleted, and that the permit should contain one set of average monthly discharge limits for BOD_5 and TSS that take effect upon the effective date of the permit and that are based on 65% capacity operations at the paper mill. They propose a 10,130 pounds per day limit for BOD_5 (the same as the alternative limit) and a 21,495 pounds per day limit for TSS (a more lenient limit than the alternative limit). City's Petition at 27.[23]

We read the Petitions as raising two main objections to the initial average monthly discharge limits in the permit. First, Petitioners argue that the initial limits are too constraining because they are based on 55% capacity operations at the mill. They contend that the Region should impose one set of limits, based on 65% capacity operations, to allow the mill to increase production and discharge larger loads to the IWTP without causing the IWTP to violate the permit's mass limits.

Second, Petitioners argue that the initial limits are too stringent because they are based on an erroneous assessment of the IWTP's past performance. Specifically, Petitioners contend that, in calculating the initial limits, the Region should not have used the City's discharge data from the twelve-month period of October 1990 to September 1991 as a measure of the BOD_5 and TSS levels the IWTP can consistently achieve, because a twelve-month period "ignor[es] the typical and actual long-term variability associated with an industrially based operation." City's Petition at 24. They contend that the quantity and quality of industrial influent (in this case, paper mill influent) fluctuates widely due to "operational, economic, and market" factors and that these wide fluctuations cannot be accurately reflected in data from a time period as short as twelve months. The Region responds that it established the discharge limits for both BOD_5 and TSS using its best professional judgment ("BPJ"),[24] and that Petitioners have not

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[23] *See also* City's Petition at 24, referencing a July 28, 1994 letter from Alvarez, Lehman & Associates, Inc. to Region IV ("Alvarez letter"), asking the Region to adopt the substantially similar BOD_5 and TSS limits in the IWTP's Florida industrial operations permit of 10,130 pounds per day for BOD_5 and 21,710 pounds per day for TSS.

[24] The authority to exercise BPJ in prescribing permit conditions is found inferentially in Section 402(a)(1) of the Clean Water Act, which authorizes the Administrator to issue a permit containing "such conditions as the Administrator determines are necessary to carry out the provisions of this Act * * *." BPJ is specifically referred to in the NPDES implementing regulations. *See, e.g.*, 40 C.F.R. § 125.3(a)(2)(i)(B).

raised a genuine issue of material fact concerning either the Part I.A.1. or the Part I.A.9. limits. Response to City's Petition at 12-15.

We do not see anything clearly wrong in the Region's decision to impose initial limits for BOD_5 and TSS, based on the 55% capacity production level that existed at the paper mill when the permit was issued; and alternative limits, based on an anticipated production increase to 65% capacity at the paper mill. Petitioners do not contend that the Region lacks the discretion to impose two sets of mass limits nor have they given any convincing reason why the Region may not defer the effective date of the more lenient limits until it receives notification that the production increase will actually occur. Therefore, we are denying review of the Region's decision to employ two sets of mass limits in the permit.

However, as discussed below, the Region has failed to respond adequately to Petitioners' argument that the Region analyzed data from too short a time period when it established the specific numerical limits in the permit. In the absence of such a response, we are unable to determine whether the basis for the Region's choice of a time period for its statistical analysis is valid. Therefore, we are remanding the permit to the Region to provide Petitioners with a more complete explanation of how it determined the permit's mass limits for BOD_5 and TSS, with particular reference to its choice of a time period for analysis. *See In re Broward County*, 4 E.A.D. 705 (EAB 1993).[25]

We turn first to the Region's explanation of how it determined the contested numerical permit limits, and then to Petitioners' objections to these limits.

The Region is required by regulation to impose "mass-based limits" on BOD_5 and TSS, normally expressed in terms of the pounds or kilograms of each pollutant that may be discharged during a specific time period. 40 C.F.R. § 122.45(f). *See, e.g.*, Training Manual for NPDES Permit Writers at 26 (EPA May 1987). Mass limits are generally keyed to concentration limits, since a major purpose for imposing mass limits is to prevent a regulated facility from diluting its effluent to meet

[25] In the *Broward* case, we concluded that the incompleteness of the administrative record prevented us from determining whether an issue of material fact existed that required an evidentiary hearing. 4 E.A.D. at 713. Therefore, we remanded the permit condition to the Region to address the issue raised by the petitioner.

the concentration limits in its permit.[26] The NPDES regulations do not provide guidance to the Regions on how to establish appropriate mass limits for a POTW, except for the general direction that "[i]n the case of POTWs, permit effluent limitations, standards, or prohibitions shall be based on design flow." 40 C.F.R. § 122.45(b)(1). Therefore, the Region is authorized to establish these limits using BPJ. *See generally* Training Manual for NPDES Permit Writers at 16 (EPA May 1987).

The Region issued a draft permit on April 28, 1994, in which it proposed only one set of BOD_5 and TSS limits: 8,695 pounds per day for BOD_5 and 12,210 pounds per day for TSS. City officials met with Regional personnel on July 18, 1994, and asked the Region to impose more lenient limits of 10,130 pounds per day for BOD_5 and 21,710 pounds per day for TSS, consistent with the limits in the industrial operation permit issued to the IWTP by the State of Florida on August 17, 1993. Fact Sheet at 3. The City provided technical information to the Region to support the request in a July 28, 1994 letter. Alvarez letter, *supra*, n.23. When the Region issued the final permit on August 23, 1994, it retained the initial limits for BOD_5 and TSS but addressed Petitioners' request for more lenient mass limits by adding the alternative limits at Part I.A.9., page I-4.[27]

The Region states that it calculated the initial average monthly limit for BOD_5 based on the IWTP's "design flow" of 34.75 million gallons per day average annual flow and the 30 mg/l monthly average concentration limit for BOD_5 that applies to all POTWs pursuant to 40 C.F.R. § 133.102(a)(1).[28] The Region explains that it also calculated hypothetical BOD_5 limits based on data from the City's Discharge Monitoring Reports for purposes of comparison. The Region first selected the period of January 1990 to September 1993 for a statistical analysis. Based on the Region's consideration of that time period "as a whole and on a yearly basis," it selected the twelve-month period of October 1990 to September 1991 for its calculations.[29] Response to

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[26] As discussed *supra*, concentration limits are imposed on POTWs pursuant to 40 C.F.R. §§ 133.102(a)(1) and (b)(1), which provide that the 30-day average concentrations for BOD_5 and TSS for a POTW shall not exceed 30 mg/l, unless the plant qualifies for an exception to that requirement under 40 C.F.R. § 133.103 or § 133.105.

[27] *See* Amendment to the Fact Sheet, dated Aug. 23, 1994.

[28] Municipal Facility Fact Sheet (Apr. 28, 1994), at 1 and 6. *See supra* n.26. The Region apparently further adjusted the limit it had calculated to take into account the industrial nature of the influent from the paper mill. *See* City's Petition at 24.

[29] Response to City's Petition at 13. The Region states that it analyzed the data as a whole and on a yearly basis in order to compare performance trends. Municipal Facility Fact Sheet at 6.

City's Petition at 12-14. The Region states that it calculated the hypothetical limit based on site-specific data "pursuant to 40 CFR § 133.101(f)* * *." [30] *Id.* at 12. When the Region compared the limit based on the 30 mg/l concentration limit at 40 C.F.R. § 133.102(a)(1) with the mass limit based on the City's data for October 1990 to September 1991, it determined that the mass limit based on the actual data would be more stringent than a mass limit based on the 30 mg/l concentration requirement. Response to City's Petition at 14. The Region further concluded that "there are no water quality concerns that would justify the inclusion of the more stringent limit," and therefore it imposed the less stringent limit derived from the 30 mg/l concentration requirement. Fact Sheet at 6.

The Region used the same method to determine the monthly average discharge limit for TSS in Part I.A.1: it calculated a TSS limit based on the 30 mg/l concentration requirement at 40 C.F.R. § 133.102(b)(1) and also calculated a TSS limit based on the City's data from October 1990 to September 1991. Response to City's Petition at 14. In this instance, however, the Region determined that the limit based on the site-specific data would be *less stringent* than a limit based on the 30 mg/l concentration requirement. It concluded that "there are no water quality concerns associated with this parameter which would justify the inclusion of the more stringent limit * * *." *Id*. Therefore, it imposed the *less stringent* limit based on the City's data. *Id*.

Petitioners argue that the Region overestimated the discharge limits the IWTP can consistently achieve because it relied on data from too short a time period to assess the City's past performance. Specifically, Petitioners argue that the Region's analysis is erroneous

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[30] Section 133.101(f) does not actually prescribe a method for calculating mass limits. It is a definition of the term "effluent *concentrations* consistently achievable through proper operation and maintenance" (emphasis added), which appears in the Definitions section of the Secondary Treatment Regulation. The full text of the definition is:

> For a given pollutant parameter, the 95th percentile value for the 30-day average effluent quality achieved by a treatment works in a period of at least two years, excluding values attributable to upsets, bypasses, operational errors, or other unusual conditions * * *.

The Region does not explain either how it used the definition of "effluent concentrations" to derive *mass* limits or how its calculations meet the terms of the definition, since the Region did not use data from a period of at least two years for its calculations. The actual data relied upon by the Region, as noted in the text above, is from the twelve-month period from October 1990 to September 1991.

because the Region "only considered a 2 3/4 year period[31] and used only a 12-month period * * * to derive the limits."[32] City's Hearing Request at 14. They argue that data from a twelve-month period within the period of January 1990 to October 1993 do not accurately reflect the "typical variability of an industrially based system, including operational, economic, and market variability." City's Petition at 22. Petitioners argue that "longer term historical data show greater influent and IWTP performance variations than were experienced during the 12-month period used by EPA * * *" and therefore the Region should have analyzed a period of at least six years, such as the period of 1987 to 1993.

The Region's response to that argument, in a written response to comments on the draft permit, merely stated the obvious — that "the statistics described by the City in their comments are not for the same time frame analyzed by EPA." Response to City's Written Comments of February 24, 1994, at 2. The Region subsequently stated that the time period it analyzed "is the one that better represents the treatment capabilities of the facility and does not 'artificially constrain' the capacity of it." Response to City's Written Comments of May 27, 1994, at 12. In its Response to the City's Petition, the Region made the further vague statements that it used the 1990-1993 data to "establish the trend that the treatment facility has been following," and that "the continuous proper application of the facility is the best indicator of the actual percentage of violation." Response to City's Petition at 13.

The Region then offers the following explanation why it used data from the particular twelve-month period of October 1990 to September 1991 as opposed to some other twelve-month period within the time frame of January 1990 to September 1993. The Region asserts that it did not use data from the period of January 1990 to September 1990 because loads from the paper mill were "uncharacteristic" during that period. It states that it did not use data from the period of October 1991 to September 1992, or October 1992 to

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[31] Based on an apparent arithmetical error, Petitioners consistently characterize the period of January 1990 to October 1993 (the time period the Region analyzed) as a 2 3/4 year period, when it is actually a 3 3/4 year period. *See* City's Hearing Request at 14, referring to "a 2 3/4 year period * * *;" and City's Petition at 22, stating that the Region's estimate is "based on the overall consideration of only a 2 3/4 year period."

[32] Petitioners incorrectly assert that the Region improperly "calculated" both the BOD_5 and TSS limits based on data from a twelve-month period. The BOD_5 limit was not based on that data but was instead based on the 30 mg/l concentration limit. We assume that Petitioners mean that the Region's selection of an inappropriately short time period for its site-specific calculations affected its decision to impose a mass limit based on the 30 mg/l concentration limit.

September 1993, because these periods "do not properly represent the operations of the treatment plant." Amendment to Fact Sheet (Aug. 23, 1994), at 6.

The Region's explanation of the method it used to determine initial mass limits for this permit, re-stated above, is entirely too vague to enable us to determine whether the basis for the Region's choice of a time period for its statistical analysis (and its choice of a twelve-month period within that time period for its calculations) is valid. The Region provides no adequate explanation of why it selected the period of January 1990 to September 1993 for overall consideration and why it considers that period a better predictor of the IWTP's future performance than the six-year period Petitioners propose.[33] It does not explain why it based its calculations on data from a twelve-month period rather than on the entire three and 3/4 year period it analyzed. It does not respond to Petitioners' argument that the twelve-month period the Region analyzed is too short to reflect the normal variations associated with industrial influent.

Due to the shortcomings in the Region's explanations, it appears to us that Petitioners have potentially raised an issue of material fact as to the appropriate period of time for analyzing the site-specific data. This in turn may have resulted in the Region prescribing mass limits for BOD_5 and TSS that are more stringent than necessary. Accordingly, this permit is remanded to the Region to provide Petitioners with a detailed explanation of how it determined the average monthly mass limits for BOD_5 and TSS. As part of that explanation, the Region shall explain why it restricted its site specific calculations to data from the period of October 1990 to September 1991. Petitioners may then request a hearing based on the Region's explanation. If the Region determines that a hearing is necessary, it shall conduct such a hearing as soon as possible. If the Region determines that a hearing is not necessary, it shall respond to Petitioners' arguments and explain why a hearing is not necessary to address them. Petitioners may then petition for review of the denial of the hearing on this issue.

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[33] There *may* be some merit to the Region's statement in its response to comments on the draft permit that the City's statistics are not reliable because they "cover the time where no pretreatment was provided, making it hard to effectively analyze the performance of the treatment plant." Region's Response to Written Comments of February 24, 1994, at 2. However, the record does not indicate when the pretreatment began.

Petitioners also raise several other objections to the initial limits for BOD_5 and TSS and one objection to the alternative limit for TSS.[34] For the reasons discussed below, none of these objections raises a material issue of fact. We are denying review of these issues.

(1) Petitioners argue that the initial limits for BOD_5 and TSS:

> [W]ill cause the City to be in violation more than five percent of the time * * *. The Region has estimated 5% non-compliance, the City has estimated higher non-compliance. This factual determination is relevant to the permit decision in that it will define the City's potential for violation of these permit limits.

Issue 4, City's Petition at 21-22. The Region denies that it estimated any rate of noncompliance with either the initial BOD_5 or TSS limits, and characterizes Petitioners' argument as "disingenuous" and statistically invalid. Response to City's Petition at 13.

We agree with the Region that Petitioners' argument lacks merit. Petitioners do not explain the basis for their assertion that the Region estimated 5% noncompliance with the initial BOD_5 and TSS limits. We can find no factual basis for Petitioners' assertion that the Region estimated 5% noncompliance with the permit's BOD_5 limit. That limit was based on the 30 mg/l concentration limit in the regulations, not on the City's data. We assume that Petitioners believe that the Region estimated 5% noncompliance with the *TSS* limit because the Region calculated the TSS limit from the City's data using a "95th percentile value." That argument rests on a misconception. A limit based on a *95th percentile value* is not a limit that necessarily will be exceeded 5% *of the time*. Rather, a 95th percentile value is the value that is exceeded by 5% *of the samples* in a given distribution.[35]

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[34] As noted *supra*, the alternative average monthly mass limit for BOD_5 is not in dispute.

[35] The argument that the calculation of a 95th percentile value equates to a determination of 95% compliance has been decisively rejected by the Court of Appeals for the Fifth Circuit. In *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177 (5th Cir. 1989), petitioners had argued that a statistical model used by EPA to establish 95th percentile effluent limits "demonstrat[e] that a well-operated plant * * * can be expected to perform within the * * * monthly effluent limitations only 95 percent of the time." 870 F.2d at 229. The Court held that petitioners' argument was "based on an apparent misunderstanding of the EPA statistical model." *Id*. It relied on the Agency's explanation that permit limits based on a 95th percentile value "should result in compliance at all times apart from instances of upsets * * *."

(2) Petitioners argue that, because the Region estimated 5% noncompliance for each of the two parameters, it actually estimated that the IWTP will be "in noncompliance" with the permit's BOD_5 and TSS limits 10% of the time. City's Petition at 23. They contend that:

> [F]or this facility and the character of the influent treated, TSS and BOD_5 are interrelated. Given this interrelationship, a 5% noncompliance for BOD_5 plus a 5% non-compliance for TSS would actually result in a 10% total noncompliance.

Id. Since, as explained immediately above, the Region did not estimate a 5% rate of noncompliance with either the BOD_5 or the TSS limit, Petitioners' argument is without merit. Moreover, we know of no legal or factual reason why the noncompliance rates for these two pollutant parameters, had they been calculated, should necessarily be added together.

(3) Petitioners argue that the initial limits are inappropriate for an industrial wastewater treatment plant because they are based on domestic wastewater criteria (*i.e.*, the 30 mg/l concentration and design flow) and the IWTP should not be regulated as a POTW. Issue 5, City's Petition at 23. That argument has been addressed and rejected *supra*.

(4) Petitioners assert, in broad generalizations: (1) that "[i]t is a factual issue as to whether [the permit limits] are technically, scientifically, and statistically valid;" (2) that the permit limits are "derived from an inconsistent and flawed application of various methods, procedures and judgements * * *;" and (3) that "there is a factual issue whether or not the Region used 'best professional judgement' in the development of [ ] these limits, and whether the judgement applied is either 'best' or 'professional' * * *." City's Petition at 23 and 25. We are denying review of these arguments because they are conclusory and therefore lack the requisite specificity for review. *See J & L Specialty Products Corp.*, 5 E.A.D. 333, 340 (EAB 1994).

(5) Petitioners argue that the Region used "inconsistent" methods for determining the BOD_5 and TSS limits in the permit. The apparent basis for this contention is that the Region used the 30 mg/l regulatory concentration requirement as a basis for the BOD_5 limit and used the City's data as a basis for the TSS limit. City's Petition at 24. We do not agree that the Region's methods are inconsistent: they are merely two different applications of BPJ. Moreover, we note that, for each pollutant parameter, the Region used the method that resulted in the *more lenient* limit.

Petitioners also object to the method the Region used to determine the alternative limits. Issue 6, City's Petition at 25-28. Their sole objection is that the Region "inappropriately" used "the monthly average load data, specifically the median value, as the basis for the alternate limits" for BOD_5 and TSS, and that the Region should have used the City's "load-performance curves and the maximum load generation values provided by the City * * *." City's Petition at 27. They assert that the use of the median load "ignores the fact that 50% of the loads were greater than that value."[36] *Id*. The Region responds that the issue was not raised during the public comment period on the draft permit and therefore was not preserved for review. Response to City's Petition at 19. Review of this issue is denied because the record does not show that the issue was raised during the public comment period.

D. *Sewage Sludge Management Requirements*

Petitioners argue that the IWTP is not subject to 40 C.F.R. Part 503 (Standards for the Use or Disposal of Sewage Sludge) because its sludge does not meet the definition of sewage sludge, which is "solid, semi-solid or liquid residue generated during the treatment of domestic sewage in a treatment works." 40 C.F.R. § 503.9(w).[37] Petitioners contend that the IWTP's sludge is "predominantly pulp and paper fibers," and therefore the IWTP's sludge should be regulated as industrial sludge, not sewage sludge.[38] The Company adds that the Region's "ownership-based approach" produces the "irrational" result that "the identical combination of domestic and industrial wastewater received at two different facilities - one publicly owned and one 'an industrial facility' - would be subject to different sludge management requirements." FP's Petition at 15. Alternatively, Petitioners argue that even if the sludge meets the definition of sewage sludge, the IWTP is exempt from coverage under 40 C.F.R. § 503.6(d), which exempts industrial facilities from the requirements.

The Region responds that it is required to incorporate sewage sludge management provisions in any permit issued to a POTW,

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[36] Notwithstanding that objection, they find the actual limit for BOD_5 acceptable, but contend that the TSS limit is too stringent.

[37] We note that the City states in its hearing request that it is "in agreement" with the sewage sludge requirements in the permit but objects to the characterization of the IWTP's sludge as sewage sludge. The City states that it would not object to retaining the permit requirements relating to sewage sludge provided that references to Part 503 as the authority for the requirements are deleted from the permit.

[38] City's Request for Evidentiary Hearing at 4.

regardless of the composition of its influent, by Section 405(f) of the Clean Water Act, 33 U.S.C. § 1345(f), which provides that:

> Any permit issued under section 1342 of this title to a [POTW] or any other treatment works treating domestic sewage shall include requirements for the use and disposal of sludge that implement the regulations established pursuant to subsection (d) of this section [1345] * * *.

The Part 503 regulations, which were issued pursuant to subsection (d) of 33 U.S.C. § 1345, provide that "[t]he requirements in this part [are to] be implemented through a permit * * * [i]ssued to a 'treatment works treating domestic sewage', as defined in 40 CFR 122.2 * * *." 40 C.F.R. § 503.3(a). According to Section 122.2, a "[t]reatment works treating domestic sewage" is defined as a "POTW or any other sewage sludge or waste water treatment devices or systems, regardless of ownership * * * used in the * * * [treatment of] municipal or domestic sewage." The regulation defines "domestic sewage" to include "waste and waste water from humans or household operations that are discharged to or otherwise enter a treatment works." *Id*.

The Region contends that the residue generated during the treatment process at the IWTP contains sewage sludge "as a result of * * * [the] IWTP being a publicly owned treatment works that does treat domestic sewage, in addition to the industrial contributions * * *."[39] It acknowledges that the regulations "do not specifically address the special circumstances of this treatment plant" (presumably referring to the primarily industrial nature of its influent) but asserts that "the rule clearly states that all POTWs must comply with it." Response to City's Written Comments of May 27, 1994, at 7. It asserts that the Petitioners' reference to the regulatory exclusion at 40 C.F.R. § 503.6(d), for the use and disposal of sludge generated at an "industrial facility," is inapplicable to the IWTP because the IWTP is a POTW, not a non-POTW industrial facility. Denial of City's Hearing Request at 10.

We are in agreement with the Region's reasoning and therefore reject the arguments advanced by the Petitioners. It is clear from the regulations and statutory provisions cited by the Region that 40 C.F.R. Part 503 applies to all POTWs. The applicability of these regulations to POTWs is absolute and explicit; there can be no serious argument about this point. Petitioners are merely rearguing the issue, discussed and rejected *supra*, that the IWTP is not a POTW.

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[39] Response to City's Written Comments of Oct. 28, 1993, and Nov. 29, 1993, at 7.

It is equally clear that Petitioners have not demonstrated that the IWTP qualifies for an exemption or waiver of the Part 503 requirements. The Petitioners misread the scope of the exclusion afforded by 40 C.F.R. § 503.6(d). By its terms that section applies to an "industrial facility," whereas the IWTP is a POTW. The text of the regulation is clear on this point:

> This part does not establish requirements for the use or disposal of *sludge generated at an industrial facility* during the treatment of industrial wastewater, including sewage sludge generated during the treatment of industrial wastewater combined with domestic sewage.

40 C.F.R. § 503.6(d) (emphasis added). The sludge under consideration here is *not* sludge generated at an industrial facility. The IWTP is generating sludge through its treatment of wastewaters it receives from the Company and other contributors (previously identified as Arizona Chemical Company and the City of Port St. Joe sanitary system). The permit under review is for the IWTP, not the Company, and the IWTP is the source of the sewage sludge.[40] We therefore look to the attributes of the IWTP to determine whether the exclusion afforded by 40 C.F.R. § 503.6(d) is available in this case.

Petitioners further argue that they are entitled to an evidentiary hearing on the factual issue of whether the sewage sludge management requirements of the permit are "technically and scientifically appropriate" for the material generated by the IWTP, which is primarily pulp and paper fiber. City's Petition at 28, 29-30 (Issue 7); Issue III.A., City's Hearing Request at 16-17. The Region responds that this argument raises an impermissible challenge to the validity of the regulations rather than a factual issue. Response to City's Petition at 15. The Region adds that:

> EPA understands that the requirements of 40 CFR Part 503 do not specifically address the special circumstances of this treatment plant; however, the rule clearly states that all POTWs must comply with it.

Response to City's Written Comments of May 27, 1994, at 7.

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[40] If the Company (an industrial facility) were applying for its own NPDES permit because it was generating its own sewage sludge, and discharging its effluent directly into waters of the United States instead of into the IWTP (a POTW), then the Company would likely be a beneficiary of this section and would be excluded from Part 503's sewage sludge management requirements. That is not the case here however.

We agree with the Region that the challenge goes to the validity of the regulation rather than raising an issue of material fact. As stated *supra* in Section II.B., a permit appeal is not the appropriate forum for entertaining challenges to the validity of the applicable regulations. Therefore, Petitioners' request for review on this issue is denied.

E. *Pretreatment Requirements*

The Clean Water Act requires EPA to establish regulatory standards for the pretreatment of industrial discharges into POTWs. 33 U.S.C. § 1317(b). "The purpose of these pretreatment standards is to 'prevent the discharge of any pollutant through [POTWs] * * * which pollutant interferes with, passes through or otherwise is incompatible with such works.'" *United Automobile, Aerospace and Agricultural Implement Workers v. Amerace Corp.*, 740 F. Supp. 1072, 1079 (D.N.J. 1990). *See also In re B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 174 (EAB 1997). Each POTW in turn is responsible for ensuring that sources subject to the pretreatment standards comply with those standards as they pertain to the particular POTW. *See* 40 C.F.R. §§ 403.8(f)(1)(iii) and 403.8(f)(2); *B.J. Carney Industries, Inc.*, 7 E.A.D. at 175 n.4. To that end, each POTW must establish, and obtain approval for, its own Pretreatment Program.[41] The regulations provide that the Region shall "incorporate the approved Program conditions as enforceable conditions of the [NPDES] permit." 40 C.F.R. § 403.8(c). The City established a pretreatment program for the IWTP, which EPA approved on September 12, 1991.

In accordance with the regulations, the IWTP's permit provides that "the permittee's Approved POTW Pretreatment Program is hereby made an enforceable condition of this permit * * *." Permit, Part C.1.a., page III-2. In addition to this permit provision, the IWTP's permit also contains more than four pages of additional pretreatment provisions (the "additional pretreatment provisions") at Part C., pages III-2 through III-6, consisting of "Program Requirements" at Part C.1. and "Annual Reporting Requirements" at Part C.2. Part C.1. lists many of the specific pretreatment requirements the regulations impose on POTWs, and requires the IWTP to comply with them. Part C.2. contains specific requirements for the contents of the annual report the permittee must submit to EPA.

[41] POTWs with a design flow exceeding 5 million gallons per day are subject to the pretreatment program requirement. 40 C.F.R. § 403.8(a). The applicability of this criterion to the IWTP's design flow is not in dispute.

In response to the City's comments on the draft permit objecting to these four pages of pretreatment provisions, the Region stated that "[t]he language contained in the permit summarizes the requirements of the pretreatment program. It is true that some of the language is duplicative; however, the inclusion of it does not impose any new conditions on the City." Response to City's Written Comments of Feb. 26, 1994, at 13-14. *See also* Response to Written Comments of Arizona Chemical Co. of May 26, 1994, at 5. In the Region's brief on appeal, the Region affirms this point, stating that "some of the language is duplicative; however, no new conditions are imposed on Petitioner." Response to City's Petition at 20.

Petitioners argue that the IWTP should not be required to comply with regulatory pretreatment requirements because it is not a POTW.[42] That argument is rejected because, for the reasons discussed at length *supra*, the plant is a POTW, not a non-POTW industrial discharger. Therefore, the IWTP is subject to the pretreatment regulations.

Additionally, Petitioners argue that even assuming the IWTP is subject to the pretreatment regulations, the permit should not contain the pretreatment provisions at Part C.1. and Part C.2. because they "go beyond the specifics of the regulations and approved pretreatment program which was designed specifically for the City and its specific users."[43] City's Petition at 34. Petitioners argue that approximately $200,000 was spent over a five-year period in developing a pretreatment program and ordinance that were acceptable to the Region and approved by it in 1991. They contend that the additional pretreatment provisions are unnecessary as a practical matter since all necessary pretreatment requirements appear in the IWTP's approved pretreatment program. As an example of provisions that go beyond the approved pretreatment program and specific provisions of the pretreatment regulations, Petitioners allege that the additional pretreatment provisions contain "more elaborate" annual reporting requirements than are otherwise required by the pretreatment regulations or are imposed on

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[42] The City developed the Approved POTW Pretreatment Program to comply with the regulatory requirements applicable to POTWs but does not concede that it is subject to these requirements.

[43] City's Hearing Request at 4. The City's Petition identifies the following as an issue:

> Incorporation of the City's pretreatment program as a condition of the permit is sufficient to assure compliance with 40 CFR Part 403.

Issue 11, City's Petition at 33.

"other similar facilities." *Id*. As a second example, Petitioners allege that the additional pretreatment provisions contain sludge management reporting requirements that "are not described elsewhere in the annual report" and "elaborate" on sludge management requirements," even though the permit contains a separate sludge management section. City's Petition at 34. Petitioners further argue that even those additional pretreatment provisions that merely duplicate those in the approved pretreatment program should be deleted from the permit. They contend that duplicative provisions impose an economic burden and have the potential to cause confusion.

With regard to Petitioners' argument that some of the additional pretreatment provisions are duplicative of other permit conditions, their request for review is denied. A permit requirement covering a topic that is also addressed elsewhere in the permit is not, without more, a reviewable matter.

As for Petitioners' contention that the additional pretreatment provisions should be deleted because they impose requirements that were not part of the IWTP's approved pretreatment program, that objection would not normally provide sufficient grounds for review. Inclusion of the annual reporting provisions to which Petitioners object is presumptively authorized by 40 C.F.R. § 403.12(i)(4), which requires POTWs to provide "any other relevant information required by the Regional Administrator." The broad scope of this language confers authority for this type of permit condition.[44] Notwithstanding this conclusion, we are remanding this issue for clarification of the Region's response to Petitioners' arguments. The Region has stated, in several responses to comments on the draft permit, that the additional permit provisions did not impose any "new" conditions. Yet, on appeal, the Region acknowledges that the permit contains more detailed annual reporting requirements than those spelled out in the approved pretreatment program. These contradictory positions are confusing, and the statements on appeal cast doubt on the accuracy of the Region's responses to the Petitioners' comments on the draft

[44] Moreover, the assertion that the annual reporting requirement is more burdensome than requirements imposed on other similar facilities does not provide grounds for review, especially since Petitioners' reference to "other similar facilities" is too vague for us to know what it means. If Petitioners intend to compare the IWTP to industrial facilities, that comparison would be legally irrelevant since the IWTP is a POTW not an industrial facility. If Petitioners intend to compare the IWTP to other POTWs, that comparison would also be legally irrelevant since a disparity in requirements imposed on POTWs is not by itself a matter warranting review, because permits are issued on an individual basis, taking into account individual differences where appropriate.

permit. The Region has an express regulatory obligation to "respond to all significant comments on the draft permit * * * raised during the public comment period."[45] 40 C.F.R. § 124.17. The Petitioners are entitled to know the Region's basis for the more detailed annual reporting requirement.

Accordingly, we are remanding the permit to the Region for the purpose of either deleting *all* such added pretreatment conditions from the permit (thereby eliminating any question as to whether conditions in the permit duplicate or go beyond requirements in the approved pretreatment program) or providing an explanation of why the conditions are appropriate in light of the approved pretreatment program, which is already incorporated by reference in the permit.

F. *Requirements for Monitoring Dioxin (TCDD), Furan (TCDF), and Dioxin/Furan Isomers*

1. *Dioxin (TCDD)*

The permit requires the City to perform quarterly monitoring and reporting on the presence of 2,3,7,8-tetrachloro-dibenzo-p-dioxin (TCDD or dioxin) in its discharge. Permit, Parts I.A.1. and I.A.11 and I.A.12., pages I-2 and I-5.[46] The City raises no objection to these monitoring and reporting requirements. *See* City's Petition at 30. However, the Company argues that the Region lacks a factual justification for imposing them, given that TCDD has only been detected in the IWTP's *influent* and that none has been detected in its *effluent.*[47]

Review of this issue is denied because the record does not show that the issue was raised during the public comment period, and therefore the issue was not preserved for review.[48]

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[45] The Region also argues that Petitioners did not raise "this issue" as part of their comments on the draft permit. Although Petitioners did not identify in their comments the particular reporting requirements to which they object, they did object generally to the extensive annual reporting requirements in the draft permit. City's Comments on EPA's Revised Draft NPDES Permit of May 26, 1994, at 18-19.

[46] The permit further provides that EPA will review monitoring data submitted by the permittee and, "if needed," will modify the permit to incorporate an effluent limitation for TCDD. Permit, I.A.12, page I-5.

[47] This issue is in addition to the nineteen alleged factual issues raised in the City's Petition. *See supra* n.14 and accompanying text.

[48] According to the Region, the Company had requested in comments on the draft permit that the permit require monitoring for TCDD on a quarterly basis for the first year, and there
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2. *Dioxin/Furan Isomers (Including TCDF)*

The permit also requires the permittee to perform quarterly monitoring and reporting on the presence of "all isomers of polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans" ("dioxin/furan isomers"), including 2,3,7,8-tetrachlorodibenzo-p-furan ("TCDF"), in its discharge. Parts I.A.1. and I.A.12., pages I-2 and I-5, respectively.[49] The Region asserts that it has authority to require the monitoring and reporting conditions of the permit under Sections 308(a) and 402(a)(1) of the Clean Water Act, 33 U.S.C. §§ 1318(a) and 1342(a)(1), and that it has a reasonable factual basis for imposing them. Response to City's Petition at 18. Section 308(a) confers broad authority on the Agency to impose monitoring requirements on any point source. It provides 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, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), 1345, and 1364 of this title —

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after allow annual monitoring until detectable levels of TCDD were found. Response to FP's Written Comments of May 26, 1994, at 2. The Company does not challenge the Region's description of the Company's comments. Therefore, we conclude that the Company has not met its burden of demonstrating that the issue the Company raises now was properly raised during the comment period on the draft permit, so as to give the Region an opportunity to respond to the Company's concerns before the issuance of a final permit.

The Company nevertheless represents in its Petition that it had raised the issue in its Request for Evidentiary Hearing, where it supposedly asserted that "[m]onitoring and reporting requirements for 2,3,7,8-TCDD should not be included in the City's permit * * *." FP's Petition at 4. The Company's representation is not supported by the record. The Company's hearing request expressly states that "[t]he Company does *not* object to monitoring and reporting requirements for [TCDD]." FP's Hearing Request at 3-4 (emphasis in original). We further note that the Region stated in its denial of that hearing request that the Company had objected to the monitoring requirements in Part I.A.12, pages I-5 and I-6, "other than 2,3,7,8-TCDD." Denial of FP's Hearing Request at 3.

[49] The permit provides that sampling may be reduced to once per year for any isomer for which there are three consecutive non-detection results. Permit, Part I.A.12., page I-5.

> (A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; * * *.

See In re Simpson Paper Co. and Louisiana-Pacific Corp., 3 E.A.D. 541, 548-49 (CJO 1991). Section 402(a)(2) provides that the conditions of an NPDES permit may include "conditions on data and information collection, reporting, and such other requirements as [the Administrator] deems appropriate."

Petitioners challenge the monitoring requirements as "unreasonable and burdensome." City's Petition at 30. The City contends that "[t]his is a factual issue, which is of significance, particularly if the Region relies on Section 308(a) as the legal basis for [the permit conditions]." *Id.* at 30-31. *See also* FP's Petition at 8. Petitioners contend that the requirements are not reasonable because there is very limited evidence that dioxin and furan isomers are present in St. Joseph Bay and Gulf County Canal (the waters that are affected by the IWTP's discharges). They argue that the Fact Sheets for the permit rely on site-specific data from "only one fish sample and [do] not reflect * * * data provided EPA by the City," which showed "no detectable levels of dioxin in any fish or shellfish samples taken" from Gulf County Canal and St. Joseph Bay in 1989. City's Petition at 22 and 31. *See also* City's Hearing Request at 18-22 and FP's Petition at 8-9. They acknowledge, however, that "[s]ome very low levels of furan [TCDF] were detected in some samples * * *." City's Hearing Request at 18-19. Petitioners further argue that, even if dioxin and furan isomers are present in very small amounts in Gulf County Canal and St. Joseph Bay, the Region hasn't established that the City's discharge is a source of these pollutants. City's Petition at 30-31; FP's Petition at 7-8. They assert that "no dioxin or furan discharges from the City's IWTP have ever been detected," that there is no evidence that paper mills are a source of dioxin and furan isomers other than TCDD, and that any dioxin and furan isomers identified in the vicinity of the IWTP were not necessarily discharged from the IWTP since these pollutants are "ubiquitous" in the environment. City's Petition at 31; FP's Petition at 8-9. They add that the samples containing furan were predominantly from migratory species. City's Hearing Request at 18-19. They argue that

monitoring and reporting requirements for furan and dioxin isomers impose an "expensive burden" on the City. The City adds that monitoring for these pollutants should be "a shared responsibility between the City" and public agencies, not an enforceable permit condition of the IWTP's permit. City's Hearing Request at 19. *See also* City's Petition at 31. The City notes that it offered to participate in the joint funding and conduct of a study. City's Hearing Request at 19.

The Region does not dispute that none of the samples of the IWTP's effluent to date have contained detectable levels of dioxin and furan isomers. However, the Region contends that it may reasonably impose the monitoring and reporting requirements in the permit because there is evidence in the record that bleached kraft paper mills (such as the mill that discharges into the IWTP) are known to be sources of various types of dioxin and because there are recent data in the record indicating the presence of some dioxin and furan isomers in the vicinity of the IWTP's discharge. The Region cites the *National Study of Chemical Residues in Fish* (1992) as "document[ing] the presence of a variety of non-TCDD dioxins and furans in effluent from or in fish collected near pulp and paper mills." Response to FP's Petition at 7. The Region further states that:

> The U.S. Fish and Wildlife Service has indicated the presence of [TCDD] and various other dioxin and furan isomers in sediment and/or fish and shellfish tissue collected from St. Joseph Bay in the area of the wastewater treatment plant's discharge.

Response at 18. *See* Letter from Gail A. Carmody, Project Leader, Fish and Wildlife Service, U.S. Department of the Interior, to Region IV, May 27, 1994. The Region adds that "this factual basis has not been challenged." Response to FP's Petition at 18.

The U.S. Fish and Wildlife Service stated in its letter to Region IV that it had analyzed sediment samples for dioxin compounds that had been collected during the summers of 1992 and 1993 from St. Joseph Bay and found "over a dozen" dioxin and furan isomers. *Id*. at 10. The letter further stated, based on an analysis of spotted seatrout, blue crabs, and brown shrimp, that "dioxin compounds are entering the biotic portion of the [St. Joseph Bay] ecosystem." *Id*. at 12. It also stated that:

> [T]he concentrations observed in the current samples, while acceptable for human consumption, may be high enough to subtlety [sic] affect the reproductive,

> immune and endocrine systems of the three species that were analyzed.

Id. at 12.

The Region further argues that even extremely low levels of dioxin and furan isomers pose an environmental threat and therefore warrant monitoring. Therefore, the Region contends, while there is insufficient evidence to warrant a discharge limitation in the permit, it may reasonably require the permittee to monitor these pollutants.

We are denying review of this issue because Petitioners have not raised a genuine issue of material fact warranting review.

> A factual dispute is genuine if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor. [Citation omitted.] If so, summary judgment is inappropriate and the issue must be resolved by a finder of fact.

In re Mayaguez Regional Sewage Treatment Plant, 4 E.A.D. 772, 781 (EAB 1993), *aff'd sub nom. Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994). Petitioners have not proffered evidence creating such a genuine factual dispute.

First, Petitioners have mounted no challenge to the validity of the U.S. Fish and Wildlife Service data showing the presence of some dioxin and furan isomers in St. Joseph Bay and the Gulf County Canal. The mere fact that furan and dioxin isomers were not detected in the earlier studies Petitioners cite does not contradict the more recent evidence the Region relied on. Moreover, while Petitioners argue that there is no evidence linking dioxin and furan isomers to pulp and paper mill effluent, they do not challenge the validity of the *National Study of Chemical Residues in Fish*, on which the Region relied and which refutes Petitioners' assertions.

Moreover, the U.S. Fish and Wildlife Service, which reviewed the draft permit, strongly supports the Region's position that monitoring and reporting on dioxin and furan isomers is not only appropriate but necessary. Its letter contains the express recommendation to EPA that "the permit not be reissued unless * * * [it requires] analyses of all 2,3,7,8-substituted dioxin and furan compounds on a semi-annual basis." The letter further states that:

> Although the Service cannot, at this time, be certain regarding the degree of injury to wildlife species that

> may be caused by the dioxin compounds, we believe that *any contamination is undesirable* * * *. Until it can be proven that the concentrations of dioxin compounds in the sediments are not causing harm, we believe it is prudent to stop any further habitat degradation. The areal distribution of the contamination needs to be evaluated, and the extent of risk to wildlife and fish species that inhabit the St. Joseph Bay ecosystem needs to be determined.

Id. at 10 and 12.

The environmental risk posed by dioxin and furan isomers is substantial. The Agency stated in a recent Federal Register notice that:

> EPA has done extensive risk and hazard assessments over the years for dioxin and dioxin-like compounds and is in the final steps of reassessment of these compounds based on up-to-date data * * *. [N]othing in the current reassessment indicates less than high hazard levels for these compounds.

62 Fed. Reg. 24887, 24890 (May 7, 1997). Petitioners' contention that these isomers have not previously been detected in the IWTP's effluent is simply not sufficient to raise an issue of material fact given that there is nothing in the record to indicate the frequency and scope of any previous monitoring of the effluent the City has performed. Petitioners' contention also ignores an obvious purpose behind Section 308(a), which is to enable EPA to require dischargers to gather data so that EPA can make informed regulatory decisions. "Section 308(a) is an information gathering tool * * *." *Simpson Paper Co.*, 3 E.A.D. at 549. *In re Liquid Air Puerto Rico Corporation*, 5 E.A.D. 247, 262 n. 24 (EAB 1994) (quoting *Simpson Paper Co.*). If the exercise of that authority were to be defeated upon a mere allegation that the available data does not indicate a serious problem, the purpose of this information gathering provision of the Clean Water Act would be undermined. Therefore, for a petitioner to raise a material issue of fact as to whether an information gathering requirement in a permit is unreasonable and therefore exceeds the Agency's authority under Section 308(a), a petitioner must cite evidence sufficient to support a finding that there is no basis in fact for the Agency to require information gathering in the first place. Petitioners have not made that showing in this instance, for the Region's decision to require monitoring is firmly grounded on factual evidence suggesting further investigation is warranted. Therefore, this issue does not warrant review.

The City's additional contention that it is inappropriate to burden a permittee with the expense of monitoring raises an issue of public policy, not an issue of material fact. Accordingly, we are denying review of the issue because we do not think that the issue warrants review as a matter of discretion.

3. *Additional Arguments Relating to Dioxin/Furan Isomers (Including TCDF)*

Petitioners further contend that there are no State numerical water quality standards for 2,3,7,8-TCDF (and presumably intend to argue that the Region may not impose monitoring and reporting requirements for furan in the absence of such standards). Issue 9, City's Petition at 31. The Region responds that "State numerical standards for 2,3,7,8-TCDF are not necessary to impose the contested monitoring requirements. Petitioner has failed to show otherwise."[50] Response to Appeal at 18. It contends that it has broad authority under the Clean Water Act to require effluent sampling and monitoring "to carry out the objectives of the Act." *Id*.

We agree with the Region. Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), expressly prohibits the discharge of *any* pollutant without an NPDES permit. Therefore, the Region has clear authority to investigate, through the mechanism of a monitoring requirement, whether pollutants are present in the discharge of a regulated facility. *See In re Simpson Paper Co. and Louisiana-Pacific Corp., supra*. The Region's authority to impose monitoring requirements is unrelated to any State authority to establish numerical water quality standards.

Since Petitioners have not demonstrated that the existence of numerical water quality standards for TCDF is a prerequisite for imposing monitoring and reporting requirements, review of this issue is denied.

Additionally, Petitioners object to the requirement that the permittee assess and report the toxicity of the furans and dioxin/furan isomers using Toxicity Equivalent Factors ("TEFs"). Permit, Part I.A.12., page I-5. Issue 10, City's Hearing Request at 21. They argue that there are no federal or State numerical standards for TEFs and

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[50] The Company asserts that EPA's ability to impose monitoring requirements in the absence of State and federal water quality standards presents "legal issues." FP's Petition at 10. As noted *supra* in n.17, the mere assertion of the existence of a legal issue does not entitle Petitioner to review of that issue.

therefore that they are entitled to an evidentiary hearing on the question of whether the TEFs used by the Region are accurate.[51] The Company adds that "there can be no presumption" that the TEFs are accurate since they were not promulgated by regulation, and therefore "the burden * * * should be on the Region to justify its TEFs, not on the City or the Company to disprove the accuracy of those TEFs." FP's Petition at 11-12. Review of this issue is denied because it does not appear from the record that the issue was raised during the public comment period.

The Company also challenges the permit requirement that the permittee develop a Plan of Study to sample and study the tissue of fish and shellfish in the Gulf County Canal and St. Joseph Bay for 2,3,7,8-TCDD and all dioxin and furan isomers. FP Petition at 9-10. Permit, Part I.A.12.d., page I-6. The permit provides that fish sampling for any particular isomer may be discontinued if it is not detected after two annual samplings. The Company does not argue that the Region lacks authority to require it to perform the study. It merely suggests that the permit be modified to require a plan of study only after 2,3,7,8-TCDD is detected in two consecutive effluent samples. FP's Petition at 9-10. The Region responds that it has authority to require a Plan of Study as a "monitoring technique that will indicate possible bioaccumulation of the pollutants." Response to FP's Petition at 11. The Region characterizes the study requirements as "modest" and not unduly burdensome. Response to City's Written Comments of October 28, 1993, and November 29, 1993, at 5.

Review of this condition is denied. The Company bears the burden of demonstrating that the permit condition is based on a clear error of fact or law. The Company has not made such a demonstration. It merely proposes an alternative plan of study that it considers less burdensome.

G. *Other Issues*

The Petitions raise two additional issues that are addressed below.

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[51] The TEF method is a procedure for evaluating the risks of exposure to various chemical compounds containing chlorinated dibenzo-p-dioxins and dibenzofurans. Response to Appeal at 19. The TEFs in the permit represent the "relative toxicity assigned" to certain isomers of dioxins and furans. The Company argues that, since the TEF values are not established in regulations, there is no presumption that they are correct and therefore the Region has the burden of supporting them in an evidentiary hearing. FP's Petition at 11-12.

First, Petitioners object to the permit's monitoring and reporting requirements for certain metals as "total recoverable metals." Issues 13 and 14, City's Petition at 36-39 (Issues VI.A. and VI.B., City's Hearing Request at 25 and 26). *See* Permit, Part I.A.1., page I-3. They propose that they be allowed instead to monitor for total metals. City's Petition at 37. They contend that they are unaware of an EPA-approved methodology for reporting "total recoverable metals" and that it would be "unnecessarily burdensome" to develop such procedures. *Id*. The City further claims that the State notified the City on November 4, 1994, that it will allow the IWTP to monitor and report either "total chromium" or "total recoverable chromium."[52] City's Petition at 39.

The Region responds that it has authority to impose requirements for total recoverable metals under Agency regulations at 40 C.F.R. § 122.45(c)(3), which provide that:

> All permit effluent limitations, standards, or prohibitions for a metal shall be expressed in terms of "total recoverable metals" * * * unless:
>
> * * * * * * *
>
> (3) All approved analytical methods for the metal inherently measure only its dissolved form * * *.

Response to City's Petition at 22. The Region adds that the requisite test procedures are outlined in 40 C.F.R. § 136.3, Table 1B. *Id*.; Denial of City's Hearing Request at 8; Response to City's Written Comments of Oct. 28, 1993, at 3. However, it states that it will change the requirement for "Total Recoverable Chromium VI" to "Total Chromium VI" because there is no known method to analyze for total recoverable chromium VI.

Petitioners have not demonstrated that they cannot comply with the test procedures cited by the Region. Therefore, their request does not raise an issue of material fact. Accordingly, the request for an evidentiary hearing on this issue is denied.

In addition, Petitioners contend that the requirement for "permanent" metals monitoring is inconsistent with the State's permit. They

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[52] *See* Letter from Florida DEP to Region V of November 4, 1994, stating that the City may use total or total recoverable chromium to demonstrate compliance with the water quality criterion for the hexavalent chromium fraction of total chromium.

argue that the State has agreed to drop the metals monitoring requirement for certain metals after the City completes dredging of the facultative lagoon, and that "EPA will need to delete these metal limits and modify the NPDES permit to be consistent with the modified 401 certification from the State." City's Hearing Request at 26.

The Region responds that it imposed permit requirements for metals monitoring that were based on the conditions certified by the State of Florida on July 15, 1994. (The permit was issued on August 23, 1994.) It adds that the State modified its certification of the permit on October 19, 1994, after the permit was issued. The Region states that it will modify the permit to "accurately reflect any changes that the State has requested pursuant to state certification." Response to City's Petition at 23-24. On remand, the Region shall entertain Petitioners' request for a modification of the metals monitoring conditions of the permit consistent with the revised State certification.

Second, Petitioners argue that the Region has not yet provided the IWTP with copies of the Discharge Monitoring Report ("DMR") forms specified in the permit. Issue 15, City's Petition at 39-40 (Issue VII.A., City's Hearing Request at 27). They assert that the City would like to review the proposed forms "in advance of accepting the permit" to avoid misunderstandings. City's Hearing Request at 28. The reports to which Petitioners refer are forms specified for reporting results of monitoring of sludge use or disposal practices. The Region responds that Petitioners are "plac[ing] the 'cart before the horse'" and that it cannot provide the forms until this appeal is resolved and the permit limits are determined. Response to City's Petition at 24.

Petitioners have not asserted that they are entitled to review the DMR forms before the issuance of the permit. They merely made a request that the Region has declined to grant. Since Petitioners have not demonstrated that the Region erred in denying the request, their request for an evidentiary hearing on this issue is denied.

H. *Constitutional Issues*

Petitioners raise three Constitutional issues for the first time in their Petitions. We are denying review of two of these issues because they were not raised prior to the close of the public comment period and therefore these issues were not preserved for review.[53] These two

[53] As noted *supra*, no issues shall be raised in an evidentiary hearing request that were not "submitted to the administrative record * * * as part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them." 40 C.F.R. § 124.76.

issues are (1) that regulating the IWTP as a POTW deprives Petitioners of equal protection of the laws because it "poses a burden on the City and its users which are [sic] not otherwise imposed on other similarly situated cities or other pulp and paper mills discharging to privately owned facilities";[54] and (2) that the permit provisions relating to toxicity equivalent factors ("TEFs") for dioxin and furan isomers are "unconstitutionally vague" and should be stricken from the permit.[55]

Petitioners' third Constitutional argument is that the Region's denial of the City's request for an evidentiary hearing on the nineteen alleged factual issues it raised in its Petition deprived Petitioners of their right to due process of law because Petitioners are "constitutionally entitled to an evidentiary hearing when there are factual issues underlying the Region's regulatory decisions."[56] FP's Petition at 18. *See also* City's Petition at 46-47. They argue that:

> The factual assumptions which underlie the Region's imposition of expensive and burdensome permit conditions must be established through hearing and the Agency must consider all evidence and argument on these issues.

City's Petition at 47.

Unlike the other two Constitutional issues raised in the Petitions, Petitioners could not have raised this issue prior to the close of the public comment period because Petitioners' evidentiary hearing request, and the Region's denial of that request, occurred after the issuance of a final permit decision. Therefore, the issue is not foreclosed from review even though it was not raised during the public comment period. However, as explained below, review of the issue is denied on substantive grounds.

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[54] Section IV.A., City's Petition at 45; FP's Petition at 17.

[55] Section IV.C., City's Petition at 48-49; FP's Petition at 20.

[56] As discussed *supra*, the Regional Administrator determined that none of the arguments in the Petitions raised a genuine issue of material fact meriting an evidentiary hearing. We agree with the Region (except as to one alleged factual issue that Petitioners raised relating to the permit's average mass limits for BOD_5 and TSS).

Petitioners further argue that the imposition of the challenged permit conditions without an evidentiary hearing constitutes a "taking" of the City's property without due process of law. City's Petition at 48. Since we conclude that Petitioners have been afforded due process of law, we reject that argument.

Petitioners are not entitled to an evidentiary hearing merely by raising factual issues in their Petitions. As explained elsewhere, the issues raised must meet various procedural criteria, including pleading requirements requiring that evidentiary hearing requests state each legal or factual question alleged to be at issue, together with their relevance to the permit decision; that the factual issues identified in the request must raise material and genuine issues of fact relevant to the issuance of the permit; and finally, the petitioner ordinarily must have afforded the Regional Administrator a prior opportunity to resolve the issue for which an evidentiary hearing is requested. In various respects, as identified elsewhere in this decision, the Petitioners have not generally satisfied these requirements for the alleged factual issues. As a result, the appeals of the denials of their respective requests for an evidentiary hearing have been denied for all but three issues. The process by which this result came about fully satisfies Constitutional due process requirements. In fact, the summary procedure[57] outlined in *In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 781-82 (EAB 1993), was specifically affirmed in *Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994), as satisfying the Constitutional criteria for due process of law. The Court stated in that decision that "[a]dministrative summary judgment is not only widely accepted, but also intrinsically valid." *Puerto Rico* at 606. "Due process simply does not require an agency to convene an evidentiary hearing when it appears conclusively from the papers that, on the available evidence, the case only can be decided one way." *Id*.

As discussed throughout this decision, the various alleged factual issues have been evaluated in accordance with the procedures just described and have been found lacking for a variety of reasons, including untimeliness, failure to raise during the comment period, lack of materiality, and failure to raise a genuine issue of fact. We therefore reject Petitioners' contention that the denial of their eviden-

[57] This summary determination procedure that the Agency employs in deciding whether to grant or deny an evidentiary hearing is preceded by an opportunity for the permit applicant and public to comment on the draft permit, to receive a response to comments from the permit-issuing Region, to request an evidentiary hearing on any remaining disputed issues of material fact as discussed above, and thereafter to appeal any denial of such request to the EPA Environmental Appeals Board. *See generally* 40 C.F.R. §§ 124.10 (Public notice of permit actions and public comment period), 124.17 (Response to comments), 124.57 (Public notice), 124.74 (Requests for evidentiary hearing), and 124.91 (Appeal to the Administrator [EAB]).

tiary hearing requests deprives them of their Constitutionally guaranteed right to due process of law.[58] Review of this issue is denied.

III. *CONCLUSION*

The permit is remanded to Region IV regarding three matters. The first is to provide Petitioners with an explanation of how it determined the initial average monthly mass limits for BOD_5 and TSS in the permit, and to reconsider whether an evidentiary hearing is warranted to resolve any material issues of fact associated with the determination of those limits. If the Region determines that a hearing is not necessary, Petitioners may seek review of the denial of the hearing on this issue. The second concerns the permit's pretreatment standards. The Region must clarify whether it is intending to add new pretreatment conditions to the permit that go beyond the requirements of the City's approved pretreatment program and if so the basis therefor. Otherwise the Region is directed to remove the pretreatment conditions from the permit, except for the provision that incorporates the approved pretreatment program into the permit by reference. The third relates to revision of metals monitoring provisions to conform to a revision in the State's certification of the permit after the City's permit was issued. Review of the petitions is denied in all other respects.

So ordered.

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[58] We further note that Constitutional challenges to the NPDES regulations are generally not cognizable in an administrative proceeding under 40 C.F.R. § 124.91 except under the most compelling circumstances. *See In re 170 Placer Mines, More or Less*, 1 E.A.D. 616, 630 (Adm'r 1980)(rejecting constitutional challenge to monitoring conditions in NPDES permit as attacking the validity of Section 308 of Clean Water Act). *Cf. B.J. Carney Industries, Inc., supra*, at 32 ("[C]onstitutional challenges to regulations, even challenges based upon due process claims, are rarely entertained in Agency enforcement proceedings * * *."); *In re Norma J. Echevarria*, 5 E.A.D. 626, 637 (EAB 1994) ("[T]he mere assertion of a constitutional claim alone does not amount to a compelling circumstance justifying a deviation from the general rule against reviewing the validity of regulations in administrative enforcement actions."); *In re Pontiki Coal Corp.*, 3 E.A.D. 572, 578 (Adm'r 1991) ("Constitutional challenges to the [UIC] regulations themselves are beyond the scope of review under Section 124.19, which only contemplates challenges to specific permit decisions").