IN RE CITY OF IRVING, TEXAS MUNICIPAL SEPARATE STORM SEWER SYSTEM

NPDES Appeal No. 00-18

ORDER DENYING REVIEW

Decided July 16, 2001

Syllabus

Petitioner, City of Irving ("Irving"), filed a Petition for Review of a National Pollutant Discharge Elimination System ("NPDES") permit issued to it by U.S. Environmental Protection Agency, Region VI ("Region"), for operation of Irving's municipal separate storm sewer system ("MS4"). Irving's appeal seeks review of several permit conditions on the basis that they require Irving to regulate, legislate, and use its enforcement powers in violation of the principles of federalism contained in the Tenth Amendment, which Irving contends prohibits Congress or federal agencies from compelling states to enact or enforce a federal regulatory program. Irving also objects to permit conditions requiring it to develop training and education programs targeted to reduce storm water pollution, on the basis that such provisions compel it to speak to its citizens and to deliver a message chosen by the Region in violation of its First Amendment right to free speech.

In addition to its constitutional objections to the permit, Irving contends that other permit conditions evidence error, abuse of discretion, or other unlawful action by the Region that warrants review by the Board, including: (1) the permit's failure to authorize all forms of discharge from its MS4; (2) inclusion of permit language requiring Irving to develop a storm water management plan ("SWMP"); (3) inclusion of provisions making Irving jointly liable for failure of co-permittees to fulfill their permit obligations; (4) the establishment of a permit compliance certification date that precedes the effective date of the permit; (5) the requirement that Irving submit annual reports; and (6) the requirement that Irving seek approval prior to implementing certain changes to its SWMP, in that it places no time limit on the Region when processing such a request.

Held: The Board finds that while Irving attempts to present its constitutional arguments as a challenge to specific permit conditions established by the Region, the permit provisions in question fall within the immediate contemplation of both the Clean Water Act ("CWA") and its implementing regulations at 40 C.F.R. § 122.26(d). Thus, Irving is in reality challenging the validity of the statutory and regulatory provisions themselves, rather than the manner in which they were applied by the Region when it wrote Irving's permit. The Board denies review of Irving's constitutional arguments on the basis that the proper forum for Irving's challenge lies with the federal courts, finding, *inter alia*, that nothing in Irving's Petition or in the administrative record in this case presents circumstances sufficiently compelling to overcome the presumption of non-reviewability of Agency rules in the context of Board proceedings.

With regard to the balance of Irving's objections, we find nothing clearly erroneous in the Region's approach nor any other circumstances warranting review. Accordingly, the Petition for Review is denied in its entirety.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

Opinion of the Board by Judge Fulton:

The City of Irving ("Irving") has filed a Petition for Review ("Petition") dated August 14, 2000, seeking review of several conditions set forth in a National Pollutant Discharge Elimination System ("NPDES")[1] permit issued to Irving, Dallas County Utility and Reclamation District, Dallas County Flood Control District No. 1, and Irving Flood Control Districts Sections I and III by the U.S. Environmental Protection Agency, Region VI ("Region") on February 8, 1997. The permit would authorize storm water discharges from Irving's municipal separate storm sewer system ("MS4").[2] The Petition argues that several conditions violate Irving's constitutional rights under the First and Tenth Amendments and that the Region clearly erred or abused its discretion in setting several other permit conditions.

In its Response to Petition for Review ("Response"), the Region contends that its actions were a lawful exercise of its discretion and that the conditions objected to by Irving are required under the Clean Water Act ("CWA") and in no way violate Irving's constitutional rights. Response at 8-13. The Region further argues that, as a general matter, the Board does not review arguments challenging the constitutionality of statutes administered by EPA. *Id.* at 6.

Because we decline to assume jurisdiction over Irving's constitutional claims and Irving has failed otherwise to explain why the Board should review such a challenge or demonstrate how the Region's findings were clearly erroneous, an abuse of discretion, or otherwise unlawful, review is denied.

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

[2] Under CWA § 402(p) and 40 C.F.R. § 122.26, an NPDES permit is required for MS4s serving populations of 250,000 or more (large systems), and those serving populations of more than 100,000 but less than 250,000 (medium systems). It is undisputed that Irving satisfies the requirement of a medium system.

I. *BACKGROUND*

A. *Factual Background*

Irving owns and operates an MS4 that discharges storm water into a system of rivers and creeks in Texas. Administrative Record Exhibit ("AR Ex.") 1 at 4-4. Pursuant to the requirements for system-wide MS4 permitting set forth in CWA § 402(p)(4) ("Permit application requirements") and the implementing regulations at 40 C.F.R. § 122.26(d) ("Application requirements for large and medium municipal separate storm sewer discharges"), Irving joined with its co-permittees to submit Part 1 of the required NPDES permit application in 1992 and the Part 2 application in 1993.[3] AR Exs. 1, 3. From 1993 through 1997, Irving, its co-permittees, and the Region worked to revise the Part 2 application, resulting in the Region's issuance of a draft permit on February 8, 1997. Irving filed its Comments on Draft NPDES Permit No. TXS001301 ("Comments") on March 20, 1997, during an extension of the public comment period. Petitioner's Exhibit ("P Ex") 2. The Region continued negotiations with Irving and its co-permittees and, after having received certification from the Texas Natural Resource Conservation Commission,[4] issued its Response to Comments on Draft Permit ("RTC") (AR Ex. 33) and the final permit at issue here on September 11, 1998. Respondent's Exhibit ("R Ex") 34 (NPDES Permit No. TXS001301, hereinafter "Permit"). On November 2, 1998, Irving filed a Request for Evidentiary Hearing pursuant to regulations governing the NPDES program at that time. P Ex 4. On July 14, 2000, the Region returned Irving's Request for Evidentiary Hearing without prejudice to Irving's filing an appeal with the Board under changes made to the NPDES permit appeals process

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[3] As explained more fully *infra*, section I.B, the permitting process for an MS4 consists of a two-part application. Part 1 of the application requires an applicant to provide general owner information, describe its legal authority to implement permit requirements, identify sources of discharge to the MS4 and characterize the water quality of such discharges, describe existing pollutant management programs, commence identification of sources of illicit discharges that contribute to storm water pollution, and describe financial resources available for storm water programs. 40 C.F.R. § 122.26(d)(1). Part 2 of the application expands on the requirements of Part 1, and also requires permittees to develop a storm water management program that must include:

> a comprehensive planning process which involves public participation and where necessary intergovernmental coordination, to reduce the discharge of pollutants to the maximum extent practicable using management practices, control techniques and system, design and engineering methods, and such other provisions which are appropriate.

Id. § 122.26(d)(2)(iv).

[4] Under CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1), the Region may not issue a permit until the state in which a facility is located (in this case Texas) either certifies that the permit complies with the state's water quality standards or waives certification. *See* 40 C.F.R. § 124.53.

effective June 14, 2000.[5] R Ex 3. Irving filed its Petition with the Board on August 14, 2000. Irving's co-permittees have not challenged the permit.

In its Petition, Irving makes several challenges to the permit on constitutional grounds. The first is that several provisions of the permit[6] violate the constitutional principles cited in cases such as *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996), *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), that Congress (and thus federal agencies by association) cannot, under the principles of federalism contained in the Tenth Amendment, compel states to enact or enforce a federal regulatory program. *See* Petition at 2-5, 15. Irving argues that the permit is structured in a way that requires Irving to regulate, legislate, and use its enforcement powers according to requirements set by EPA rather than in a manner chosen by Irving itself. *Id.* at 4. Irving suggests that the Region could have avoided these constitutional violations had it accepted Irving's proposed language to structure the permit so that permit compliance would be based on compliance with Irving's storm water management program ("SWMP") as outlined in Part 2 of its NPDES permit application. *Id.* at 9, 17; *see also* Comments at 5; P Ex 5 (Letter from M. Walter of Irving, to J. Ferguson of EPA Region 6 (Apr. 17, 1998)). For the same reasons, Irving argues that permit conditions requiring it to ensure legal authority to control discharges to and from its MS4 also go beyond the constitutional restrictions mentioned above.[7] Petition at 12. It is also Irving's contention that because, in its

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[5] Procedures for issuing, modifying, revoking, or terminating permits are governed generally by 40 C.F.R. pt. 124. Prior to June 14, 2000, subpart E of part 124 established an evidentiary hearing process for NPDES permits. Section 124.74 required that any person challenging a final NPDES permit decision submit a request to the Regional Administrator for an evidentiary hearing within 30 days of service of the notice. 40 C.F.R. § 124.74(a) (1998). Only a decision after an evidentiary hearing or a denial of the request for an evidentiary hearing could be appealed to the Board. *Id.* § 124.91. On May 15, 2000, EPA promulgated substantial changes to the permit review process. *See* Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations, 65 Fed. Reg. 30,886 (May 15, 2000) (codified at 40 C.F.R. § 124.19). Included in these changes was the elimination of the evidentiary hearing procedures for NPDES permits. *Id.* at 30,896. Under current procedures, persons appealing an NPDES permit condition may now file a petition directly with the Board within 30 days after the issuance of a final NPDES permit decision. 40 C.F.R. § 124.19(a).

[6] Irving's Petition cites Pts. I.B, II (Introductory Provisions), II.A, II.E-G, and V.C. Petition at 4-5, 10, 16-17, 20.

[7] Irving also objects to this provision on the basis of its First Amendment right to petition the government. While Irving asserts that the permit requires that Irving work with higher sovereign powers to ensure legal authority is maintained, it makes no argument as to why or how this violates Irving's First Amendment rights, nor cites any authority to support its claim. Petition at 12-13. Given Irving's failure to substantiate its First Amendment objection, we will not entertain it further. *See* 40 C.F.R. § 124.19(a) (petition shall include a statement of the reasons supporting that review); *In re City of Port St. Joe & Fla. Coast Paper Co.*, 7 E.A.D. 275, 283 n.17 (EAB 1997) (legal arguments presented in summary fashion without arguments or documentation do not meet regulatory requirements that petition shall include a statement of reasons supporting review).

view, EPA does not have the constitutional authority to set many of the requirements of the SWMP, Irving should be able to make changes to the SWMP at any time without prior approval by the Region.[8] Petition at 20.

Irving's second set of constitutional arguments challenges permit conditions[9] that require it to develop training and education programs designed to help reduce various sources of storm water pollution. Petition at 10-12. Irving argues that these provisions infringe upon its First Amendment right to free speech "by compelling Irving to 'speak' to its citizens and by compelling Irving to deliver a message chosen by EPA." *Id.* at 10.

Besides its constitutional claims, Irving argues that other permit conditions set by the Region evidence error or abuse of discretion, or are otherwise unlawful. First, Irving alleges that the Region violated CWA § 402(p) and its supporting regulations by failing to authorize all forms of discharges from Irving's MS4, and limiting its lawful discharge under the permit to municipal storm water discharges only. *Id.* at 13-16. Irving maintains that accidental spills, sanitary sewer overflow discharges, and storm water associated with industrial activity that enter the MS4 despite Irving's efforts to prevent their entry should be legally authorized under its NPDES permit. *Id.* at 13-14. It argues that the current structure of the permit would make Irving liable for every form of discharge that passes through the MS4 regardless of whether Irving has control over it. This structure, according to Irving, is contrary to EPA's stated approach to regulating storm water discharges from MS4s. *Id.* at 15-16.

Irving also argues that permit language requiring it to develop an SWMP is unnecessary and ambiguous.[10] *Id.* at 16-17. In particular, it argues that the language in the permit requiring development of an SWMP strongly suggests that the Region did not determine whether the SWMP incorporated in the permit already satisfies the statutory standards for MS4s under the CWA. *Id.* at 17. Irving argues that the inclusion of language that anticipates development of an SWMP thus creates a conflict in the operative provisions of the permit and is arbitrary and capricious.[11] *Id.*

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[8] Irving acknowledges, however, that if changes made by it to the SWMP so decrease the effectiveness of the MS4 program that it no longer attains the goals of the permit, the Region would then have the authority to modify the permit. Petition at 20.

[9] These include Pts. II.A.9.c, II.A.10, and III of the permit.

[10] Irving specifically references the introductory paragraphs in Pt. II and all of Pts. II.A, D-F.

[11] Irving also states that such language "could raise constitutional issues if wrongly interpreted" but fails to explain how this is so. Petition at 16.

Irving further alleges that the Region erred when it included permit provisions in Part I.C holding Irving jointly responsible for permit compliance where MS4 operational authority is shared. *Id.* at 18. Irving argues that such a provision would make it liable for failures of co-permittees to perform their obligations under the permit, the SWMP, or under agreements between the co-permittees on management and operation of the MS4 system, and that Irving has never consented to such liability. *Id.*

Irving also states that the Region erred by setting a compliance certification date that is prior to the effective date of the permit. *Id.* at 19. In addition, Irving argues that the requirement that Irving submit annual reports instead of adhering to the biannual reporting provision of its SWMP, is an abuse of the Region's discretion. *Id.* at 19-20. Finally, apart from its constitutional objection to the permit's requirement that Irving seek approval from the Region prior to implementing certain changes to its SWMP, Irving argues that such a provision is unreasonable because it places no time limit on the Region when processing such a request. *Id.* at 20.

The Region argues in response that Irving fails to meet its burden of showing that the Region committed any clear error of law or fact or abuse of discretion when it set the permit conditions. Response at 5-6. The Region cites CWA § 402(p)(3)(B)(ii) and (iii), 33 U.S.C. § 1342(p)(3)(B)(ii) and (iii), as requiring NPDES permits for MS4s to "effectively prohibit" non-storm water discharges into storm sewers and to require controls to reduce discharges of pollutants from an MS4 to the "maximum extent practicable." *Id.* at 2. The Region states that the storm water program is incidental to the general prohibition of all unpermitted discharges under CWA § 301(a), 33 U.S.C. § 1311(a). *Id.* at 9. The Region also points to the permitting process for MS4s set forth in 40 C.F.R.§ 122.26(d) as allowing EPA to work with municipalities in designing site-specific permits containing SWMPs and emphasizing the use of best management practices to meet the CWA § 402(p)(3)(B)(ii) and (iii) requirements. *Id.* at 2. The Region maintains that it properly issued Irving's permit in accordance with the CWA, implementing regulations, and EPA guidance, and that the permit provisions were supported by the administrative record in this case. *Id.* at 8, 12-13.

The Region argues that while the constitutional principles raised by Irving may involve an important policy decision, the Board, as a general matter, does not adjudicate arguments challenging the constitutionality of a statute, and "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." *Id.* at 6-7. Furthermore, the Region argues that the MS4 program does not violate the Constitution as asserted by Irving, because the Supreme Court has held that federal statutes of general applicability, such as the CWA, can be applied to states and municipalities so long as their application "does not excessively interfere with the functioning of those separate sovereign governments." *Id.* at 10 (citing

Reno v. Condon, 528 U.S. 141 (2000); *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988); *Printz v. United States*, 521 U.S. 898, 932 (1997)). The Region concludes that since Irving's objections do not allege such an interference, the Board should deny review of Irving's Petition. *Id.*

B. *Statutory and Regulatory Background*[12]

In 1972, Congress amended the Federal Water Pollution Control Act (what is now commonly referred to as the CWA) to prohibit the discharge of any pollutant to waters of the United States from a point source unless authorized by an NPDES permit. 33 U.S.C. §§ 301, 402. As originally structured, the NPDES program focused its attention primarily upon the reduction of pollutants coming from the discharge of industrial processing wastewater and municipal sewage by requiring pollution control mechanisms and tracking point sources primarily on an "end-of-pipe" basis. *See, e.g.,* National Pollutant Discharge Elimination System — Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722, 68,723 (Dec. 8, 1999). Although covered under the definition of a point source, storm water from conveyances such as separate storm sewers was not specifically addressed by the CWA and EPA initially attempted to provide exemptions for MS4s until the U.S. Court of Appeals for the District of Columbia ruled that EPA could not exempt such discharges under the CWA. *Id.; NRDC v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977); *see also* 132 Cong. Rec. S16,424 (1986), *reprinted in* 2 Environment and Natural Resources Policy Division, Library of Congress, *A Legislative History of the Water Quality Act of 1987*, at 646 (1988) (hereinafter "*Leg. Hist.*").

Moreover, in the wake of several major studies indicating that the leading cause of water quality impairment was pollution from diffuse sources such as storm water drainage from urban areas and construction sites, Congress passed the Water Quality Act of 1987 ("WQA"), which amended the CWA to specifically cover storm water discharges. *See* National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,991-92 (Nov. 16, 1990); *Legis. Hist.* at 646. Among other amendments, the WQA added § 402(p) to the CWA, which required permits to be obtained by October 1992 for four types of storm water discharges, namely: discharges associated with industrial activity; discharges from municipal storm sewer systems serving populations over 100,000; discharges with respect to which a permit had been issued prior to 1987; and any discharge determined by the permitting authority to be contributing to a violation of water quality standards or a significant source of pollutants to waters of the United States. 55 Fed. Reg. at

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[12] For additional discussion of the background of the storm water program, see *In re Arizona Municipal Storm Water NPDES Permits*, 7 E.A.D., 646, 654-57 (EAB 1998), *petition for review denied sub nom Defenders of Wildlife v. EPA*, 191 F.3d 1159 (9th Cir. 1999).

48,992. The WQA also required EPA to conduct studies on storm water discharges not already covered by CWA § 402, the purpose of which was to identify any other sources contributing to the degradation of water quality and to provide a basis for establishing a comprehensive program to regulate such sources. *Id.* at 47,993. Thus, the WQA set up a schedule for the gradual regulation of all storm water discharges deemed harmful to water quality, as currently embodied in CWA § 402(p). *See* 33 U.S.C. § 1342(p).

Under CWA § 402(p), the requirements for an MS4 permit differ considerably from the technology-based treatment standards and numeric effluent criteria required of other end-of-pipe dischargers. CWA § 403(p)(3)(B) states that permits for MS4 discharges:

> (i) may be issued on a system- or jurisdiction-wide basis;
>
> (ii) shall include a requirement to effectively prohibit non-stormwater discharges into the storm sewers; and
>
> (iii) shall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

33 U.S.C.§ 1342(p)(3)(B)(i)-(iii). The rationale for the difference in treatment standards can be found in the legislative history to the WQA, which stresses Congress' concern that the variability of MS4 discharges — due to the fact that the type and extent of the pollutants in such discharges will depend on the activities occurring in the drainage area — would make regulation of MS4s based solely on the technical and numeric effluent standards under CWA § 301 inappropriate.[13] *Legis. Hist.* at 617. Congress therefore created the "maximum extent practicable" ("MEP") standard and the requirement to "effectively prohibit non-storm water discharges" into the MS4 in an effort to allow permit writers the flexibility necessary to tailor permits to the site-specific nature of MS4 discharges. *Legis. Hist.* at

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[13] As explained by EPA in its 1996 guidance on storm water regulations, the difficulty of applying numeric effluent limits to storm water discharge stems from the fact that such limits are derived from methodologies designed primarily to calculate water quality impacts from "process wastewater discharges which occur at predictable rates with predictable pollutant loadings under low flow conditions in receiving waters." Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 57,425, 57,426 (Nov. 6, 1996). By contrast, storm water discharge is highly variable both as to flow and pollutant type and concentration, and storm water permits are issued on a system-wide basis, thus rendering it largely incompatible with numeric effluent calculation methodologies. *Id.*

646; House Committee on Public Works and Transportation, Section-by-Section Analysis (100th Sess. 1987), *reprinted in* 1987 U.S.C.C.A.N. (101 Stat. 7) 5, 38-39; *see also* 55 Fed. Reg. at 48,038. Included in that flexibility was the capacity to direct permit requirements at the *sources* of pollution in the MS4 rather than solely at the end of the pipe. 55 Fed. Reg. at 48,038. Thus, the MS4 permit requirements set forth under CWA § 402(p)(3)(iii) were designed to allow permit writers to use a combination of pollution controls that, as Congress noted, "may be different in different permits;" not all of the types of controls listed in § 402(p)(3)(iii) are required to be incorporated into each MS4 permit. 1987 U.S.C.C.A.N. at 39.

In 1990, EPA promulgated its first set of regulations implementing CWA § 402(p) as it pertained to permit requirements for storm water discharges associated with industrial activity and discharges from large and medium municipal separate storm sewer systems (commonly referred to as "Phase I" regulations). 55 Fed. Reg. at 47,990; 40 C.F.R. pt. 122. In the preamble to the final rule, EPA noted that while the MS4 program required a substantial amount of flexibility, it should not be "to such an extent that all municipalities do not face essentially the same responsibilities and commitment for achieving the goals of the CWA" and that the regulations being promulgated would "build in substantial flexibility in designing programs that meet particular needs, without abandoning a nationally consistent structure * * *." 55 Fed. Reg. at 48,038. To achieve these ends, the permit application requirements established in 40 C.F.R. part 122 centered on the development of site-specific SWMPs to be issued primarily on a system-wide basis. *Id.* at 48,043. Such an approach would, as appropriate, allow several municipal entities responsible for different parts of a single MS4 system to be co-permittees on a single permit. This would in turn facilitate coordination and consolidation of MS4 activities, as well as spread the resource burden for monitoring, analysis, and development and implementation of water pollution controls.[14] *Id.* Additionally, EPA established a two-part permit application for the development of MS4 permits that would assist permittees in developing SWMPs capable of meeting statutory and regulatory requirements. *Id.* This application process also provides information to the permit writers for use in setting permit conditions; it was anticipated that if a municipality submitted a satisfactory application all or part of its proposed SWMP would likely become an integrated part of its final permit. Office of Water, U.S. EPA, EPA 833-B-92-002, *Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems* 1-9 (1992) (hereinafter "*Part 2 Guidance Manual*"). The two parts of the permit application cover the six general elements necessary for an MS4 permit: adequate legal authority, source

[14] Where a permit has more than one legal entity as permittee, applications require a description of the roles and responsibilities of each legal entity and procedures in place to ensure effective coordination. 40 C.F.R. § 122.26(d)(2)(vii).

identification, discharge characterization, proposed SWMP, assessment of controls, and fiscal analysis. *Id.* at 2-1 to 2-4. Details of these elements of the permit application process for medium and large MS4s are set forth at 40 C.F.R. § 122.26(d). Because, as discussed below, several of the issues presented depend on an understanding of the regulatory framework for MS4 permits, we will briefly review several of the key elements of that framework.

1. *Adequate Legal Authority*

Municipalities applying for an MS4 permit must demonstrate adequate legal authority to control and prohibit certain discharges to the MS4; to carry out all inspection, surveillance, and monitoring procedures necessary to determine compliance and noncompliance with permit conditions; and to require dischargers to the MS4 to comply with permit or other conditions. 40 C.F.R. § 122.26(d)(2)(i). This is because the municipality, as the permittee, "is responsible for compliance with its permit and must have the authority to implement the conditions in its permit." *Part 2 Guidance Manual* at 3-1. Compliance with the MEP and "effective prohibition" standards set forth in CWA § 402(p)(3) requires a permittee to do more than plan for pollution controls during the term of its permit; it must also make a "strong effort to have the necessary police powers and controls" necessary to meet statutory standards prior to issuance of the permit. 55 Fed. Reg. at 48,044. In order to meet this requirement, applicants must cite to and describe how specific state and/or local ordinances currently in effect meet the federal requirements set forth in 40 C.F.R. § 122.36(d)(2)(i). *Part 2 Guidance Manual* at 3-4. Should existing authority be insufficient to meet such requirements, applicants must describe what changes are needed and provide a schedule for implementation of such changes. *Id.*

2. *Proposed Storm Water Management Program*

The proposed SWMP is generally considered to be the most important part of the permit application and the lynchpin of the program. *Part 2 Guidance Manual* at 6-1. Part 1 of the application requires submission of a description of existing management programs to control pollutants from the MS4 and a description of existing programs to identify and prevent illicit discharges to the system. 40 C.F.R. § 122.26(d)(1)(v). Part 2 requires the permittee to propose control measures meeting the MEP standard for the most expected types of discharge to an MS4, namely: (1) runoff from commercial and residential areas; (2) storm water runoff associated with industrial activity; (3) storm water runoff from construction sites; and (4) non-storm water discharges (e.g., illicit discharges and improper disposal). 55 Fed. Reg. at 48,052. While the SWMP provisions are designed to allow for flexibility and tailoring to the needs of each particular MS4, all SWMPs must meet certain minimum requirements, including establishing a comprehensive planning process that provides for public participation and any necessary intergovernmental coordination concerning management practices, control techniques,

system design, and engineering or other methods to reduce the discharge of the above-listed types of pollutants to the maximum extent practicable, as well as a description of staff and equipment available to implement the SWMP. 40 C.F.R. § 122.26(d)(2)(iv). Other specific SWMP provisions require the municipality to submit a description of programs for public education and outreach, implementation and enforcement of ordinances preventing illicit discharges to the MS4, investigation and monitoring of discharge sources to the MS4, and implementation and maintenance of site planning and best management practices ("BMPs") for construction sites. *Id.* § 122.26(d)(2)(iv)(B)-(D). Because a permitting authority is likely to incorporate all or part of an SWMP meeting regulatory requirements into the NPDES permit and utilize the SWMP to develop effluent limits, these provisions provide a municipality with an opportunity to have substantial input into permit conditions. *Part 2 Guidance Manual* at 6-1.

3. *Assessment of Controls*

In order for an SWMP to be successful, assessing its effectiveness is imperative; in this way, successful parts of the program may be enhanced and unsuccessful control measures can be changed. As the first step of this process, Part 2 applications require MS4s to submit an estimate of anticipated pollutant reduction once the SWMP is in place. 40 C.F.R. § 122.26(d)(2)(v). Subsequently, in order to determine whether an SWMP is achieving its anticipated effectiveness, MS4 permittees are required to provide annual reports on the progress of their SWMPs covering, among other things, the status of SWMP implementation, any proposed SWMP revisions, a summary of any monitoring data, projected annual expenditures, a summary of any enforcement actions, inspections, or educational programs, and any changes to water quality. 40 C.F.R. § 122.42(c). EPA guidance encourages permittees to provide both direct evidence of SWMP effectiveness (such as reductions in pollutant loads) as well as indirect evidence (such as measurements demonstrating increased public awareness of storm water issues) to assist the permittee and permit writer in:

> [d]etermining whether the most cost-effective best management practices (BMPs) are included in the [SWMP]; [e]nsuring that the [SWMP] includes adequate public participation programs and intergovernmental coordination; [e]stablishing on-going monitoring inspection and surveillance programs that help refine estimates of program effectiveness; and [d]eveloping a strategy to evaluate progress toward achieving water quality goals.

Part 2 Guidance Manual at 7-1.

II. *DISCUSSION*

A. *Standard of Review*

In appeals under 40 C.F.R. § 124.19(a), the Board will not grant review unless it appears from the petition that the condition in question is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that warrants review.[15] 40 C.F.R. § 124.19(a). The Board exercises its authority to review permits sparingly, in recognition of Agency policy favoring resolution of most permit disputes at the Regional level. *In re New England Plating Co.*, 9 E.A.D. 726, 729-30 (EAB 2001); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 (EAB 2001); *In re Town of Hopedale, Bd. of Water & Sewer Comm'rs*, NPDES Appeal No. 00-4, at 8-9 n.13 (EAB, Feb. 13, 2001). The burden of establishing grounds for review rests upon the petitioner. 40 C.F.R. § 124.19(a)(1)-(2).

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

B. *Issues Pertaining to Irving's Constitutional Rights*

Irving argues that several permit conditions require it to legislate and regulate in a manner that violates its constitutional rights under the Tenth Amendment, and sets forth a list of specific provisions Irving finds to be beyond EPA's constitutional power to impose. Petition at 4-5. Upon closer scrutiny, however, the provisions cited by Irving in its Petition come directly from provisions set forth in the CWA and EPA's implementing regulations.[16] When viewed in this light, it ap-

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[15] As noted *supra*, note 5, prior to the Amendments to Streamline the NPDES Program Regulations, 65 Fed. Reg. 30,886 (May 15, 2000), the rules governing petitions for review of NPDES permitting decisions were set out in 40 C.F.R. § 124.91 (1998). Even though these amendments have eliminated the evidentiary hearing requirement in favor of direct appeal to the Board, the standard of review under 40 C.F.R. § 124.91 is essentially identical to that of 40 C.F.R. § 124.19. *See, e.g., In re New England Plating Co.*, 9 E.A.D. 726, 729 n.10 (EAB 2001); *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 667 n.11 (EAB 2001).

[16] For example, Irving objects to Part I.B, Part II (Introductory Provisions) and Part II.E of the permit which requires it to effectively prohibit discharge of non-storm water into the MS4, but this requirement comes verbatim from CWA § 402(p)(3)(B)(ii). Furthermore, the implementing regulations at 40 C.F.R. § 122.26(d)(2)(iv) require an MS4 permit applicant to provide an SWMP that "reduce[s] the discharge of pollutants to the maximum extent practicable * * *." Under § 122.43, the Region is required to establish permit conditions that "provide for and assure compliance with all applicable requirements of CWA and regulations." 40 C.F.R. § 122.43(a).

Irving also argues that Parts II.A.9 and 10 and Part III of the permit, which require it to develop public education programs, compel Irving to speak in violation of its First Amendment rights. Petition at 10-12. As discussed in section I.B above, these requirements come directly from the statutory

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pears that Irving's real complaint is with the statute itself and its implementing regulations.

To the extent that Irving objects to the substance of the storm water regulations, CWA § 509(b)(1) contemplates that challenges to administrative regulations be brought in a federal circuit court of appeals within 120 days from the date of promulgation of such regulations. CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1). As a consequence, the Board does not ordinarily allow a permit appeal to be used as a vehicle for collateral challenge of regulatory provisions when the time for such challenge has long since passed. *See In re Woodkiln, Inc.*, 7 E.A.D. 254, 269-70 (EAB 1997) (refusing to review final Agency regulations attacked on substantive content or alleged invalidity, either in exercise of Board's permit review authority and in an enforcement context); *In re City of Hollywood*, 5 E.A.D. 157, 176 (EAB 1994). Indeed, we have observed that the presumption of nonreviewability in the administrative arena is a rule of practicality and is espe-

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scheme established by Congress and detailed by EPA in the implementing regulations at 40 C.F.R. § 122.26(d)(2)(iv)(B)(*5*) and (*6*).

Similarly, Irving objects to Part II.A.2 and III.A, which require Irving to "implement changes to its ordinances to minimize the discharge of pollutants from areas of new development and significant redevelopment," including revisions to its landscaping ordinance. Petition at 4. As the Region correctly points out, these requirements are taken directly from the permit application requirements at 40 C.F.R. § 122.26(d)(2)(iv)(A)(*2*).

Irving objects to Part II.A.5 of its permit, which requires reduction of the discharge of pollutants related to the application and distribution of pesticides, herbicides, and fertilizers. Petition at 4. Again, this requirement comes directly from 40 C.F.R. § 122.26(d)(2)(iv)(*6*). Irving also objects to provisions in Part II.A.6 requiring it to effectively prohibit certain sources of illicit discharge and improper disposal to the MS4, but again, such requirements are found at 40 C.F.R. § 122.26(d)(2)(iv)(B)(*1*)-(*7*). Part II.A.8 of the permit, which requires implementation of an industrial and high risk inspection program, and is also objectionable to Irving, is a nearly-verbatim copy of language found at 40 C.F.R. § 122.26(d)(2)(iv)(C). Likewise with Part II.A.8 of the permit, which requires implementation and maintenance of BMPs to reduce pollution from construction sites to the MS4; this provision also comes nearly verbatim from 40 C.F.R. § 122.26(d)(2)(iv)(C). Part II.A.10, requiring Irving to implement a public education program targeting illicit discharges, improper disposal, and the proper use, application, and disposal of pesticides, herbicides, and fertilizers — also on Irving's list — comes from language found at 40 C.F.R. § 122.26(d)(2)(iv)(A)(6) and (B)(5), (6). The Part II.E requirements for ensuring legal authority to control discharges to and from the MS4 to which Irving objects can be found in nearly identical form at 40 C.F.R. § 122.26(d)(1)(ii) and (2)(i). The objected-to SWMP resource requirements set forth in Part II.F are reflected in and driven by 40 C.F.R. § 122.26(d)(1)(vi) and (2)(vi). Finally, Irving objects to the requirement that it provide evidence that its governing body has reviewed or been appraised of its annual report, but the provisions to which it cites make no such reference. Assuming Irving intended to refer to Part V.D, it appears that the Region is following the signatory requirements for all NPDES permit applications and reports as required by 40 C.F.R. § 122.22(a)(3). While those provisions do not specifically require a statement or resolution that the permittees' governing body has been appraised of a report, we do not see how this is any different in essence from the signatory requirement, nor how inclusion of it can be said to violate Irving's Tenth Amendment rights.

cially appropriate in the context of a provision like CWA § 509(b), which sets limits on the availability of a judicial forum for challenging particular kinds of regulations:

> [O]rdinarily, the only way for a regulation that is subject to a preclusive review provision to be invalidated is by a court in accordance with the terms of the preclusive review provision. * * * Once the rule is no longer subject to court challenge by reason of the statutory preclusive review provision, the Agency is entitled to close the book on the rule insofar as its validity is concerned.

In re Echevarria, 5 E.A.D. 626, 634-35 (EAB 1994).[17]

Moreover, we have repeatedly recognized that the regulations authorizing appeals to the Board contemplate review of *conditions* of permits, not review of the statutes and regulations which are predicates for such conditions. *See, e.g., In re City of Port St. Joe & Fla. Coast Paper Co.*, 7 E.A.D. 275, 286-87 (EAB 1997) (rejecting challenge to validity of regulations or policy judgments underlying them in permit appeal proceeding); *In re Suckla Farms, Inc.*, 4 E.A.D. 686, 696 (EAB 1993); *In re Ford Motor Co.*, 3 E.A.D. 677, 682 n.2 (Adm'r 1991).

In any case, as a general rule, constitutional questions of the kind argued by Irving here are reserved to the federal courts. *In re Britton Constr. Co.*, 8 E.A.D. 261, 279 n.6 (EAB 1999) (citing *Johnson v. Robinson*, 415 U.S. 361, 368 (1974)). While the Board has entertained matters that question whether a statute or regulation is being *applied* in a manner which passes constitutional muster (*see, e.g., In re Ocean State Asbestos Removal, Inc.* 7 E.A.D. 522, 558 (EAB 1998); *In re Gen. Elec. Co.*, 4 E.A.D. 615, 627-36 (EAB 1993)), we have also repeatedly refused to entertain challenges to the constitutionality of statutes and Agency regulations themselves. *See Britton*, 8 E.A.D. at 279 n.6; *City of Port St. Joe*, 7 E.A.D. at 317 n.58 (EAB 1997); *In re Echevarria*, 5 E.A.D. 626, 634 (EAB 1994). *See also In re Pontiki Coal Corp.*, 3 E.A.D. 572, 578 (Adm'r 1991) (holding that the scope of review under 40 C.F.R. § 124.19 only contemplates challenges to specific permit decisions, not to constitutional validity of regulations themselves).

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[17] The Board will review the vitality of an Agency regulation only in "an exceptional case," such as where a challenged regulation has been effectively invalidated by a court but has yet to be formally repealed by the Agency. *Echevarria,* 5 E.A.D. at 635 n.13; s*ee also In re B.J. Carney Indus.*, 7 E.A.D. 171, 194 (EAB 1997) (holding that the Board will entertain a challenge to an Agency regulation only in "the most compelling circumstances"). Nothing in Irving's brief or in the administrative record persuades us that this case presents any compelling circumstances warranting a departure from our practice of not reviewing final Agency regulations in the context of Board cases.

As we have discussed, while Irving attempts to present its constitutional arguments as a challenge to specific permit decisions made by the Region, it is fairly plain that the permit provisions in question fall within the immediate contemplation of both the CWA and the implementing regulations at 40 C.F.R. § 122.26(d). Thus, Irving's "as applied" challenge is, as we see it, in actuality a challenge to the constitutionality of the CWA and EPA's implementing regulations.

For all of the foregoing reasons, we decline to review Irving's constitutional claims.

C. *Whether the Region Erred in Failing to Authorize All Discharges from Irving's MS4*

Irving objects to the Region's failure to permit all discharges from its MS4, arguing that CWA § 402(p) and its implementing regulations require the Region to permit all discharges from its MS4, including non-storm water discharges and storm water associated with industrial activities. Petition at 13-16. Irving argues that by refusing to authorize such discharges under its permit, liability for them transfers to Irving, a position which forces it to use its police powers to stop such discharges and violates the scheme established by the storm water regulations, which places responsibility for controlling and obtaining legal authorization for storm water discharges on the discharger rather than the municipality. *Id.* This, according to Irving, runs counter to the thrust of EPA's regulations and constitutional principles.

Upon review, Irving's regulatory arguments misrepresent the structure of the storm water program. While Irving is correct that the "storm water permitting rules expressly require permits for '*all discharges* from large and medium municipal separate storm sewer systems,'" *id.* at 14, neither this phrase nor any other regulatory text supports Irving's conclusion that a single permit must address all such discharges. Indeed, the opposite appears to be contemplated. With respect to non-storm water discharges that find their way into the MS4, the statute itself requires storm water permits issued to an MS4 to effectively *prohibit all such discharges*. CWA § 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B). Thus, the Region would appear to lack the authority to authorize within the context of a storm water permit non-storm water discharges such as those listed by Irving in its Petition.

Similarly, with respect to storm water associated with industrial activity, the permit appears to comport both with the regulations and the Federal Register preamble cited by Irving in its Petition. *See* Petition at 16; National Pollutant Discharge Elimination System Permit Application Regulations for Storm Water Discharges, 55 Fed. Reg. 47,990, 47,997-98 (Nov. 16, 1990). The regulations contemplate that storm water associated with industrial activity is to be permitted

separately from municipal storm water.[18] 40 C.F.R. § 122.26(c). Because, as the Region points out, Irving did not apply for a permit for storm water associated with industrial activity, this particular permit does not authorize such discharges. Rather, such discharges will, consistent with the preambular discussion of the program, be addressed in permits to be subsequently issued, presumably to sources of such storm water. The language of the final permit expressly stating that liability for unauthorized discharges through the MS4 does not transfer from the discharger to the permittee would appear to ameliorate Irving's concern about incurring liability for such discharges. Permit, Pt. I.B.2.

As touched on earlier in section I.B, the language of Part I.B.2 of the permit was taken directly from CWA § 402(p)(3)(B) as well as implementing regulations at 40 C.F.R. § 122.26(d)(2)(iv) requiring MS4s to eliminate the type of discharges Irving argues should be permitted. Irving's constitutional objection to this permit provision, because it takes issue with the substance of the regulation itself, is, for the reasons we have already stated, an argument the Board will not entertain. In sum, we do not see any clear error by the Region on this point and therefore deny review.

D. *Whether Language Requiring Irving to Submit an SWMP is Arbitrary and Capricious*

Irving objects to language in its permit it states requires it "to develop, prospectively, an SWMP that will be assessed, also prospectively, for compliance with the 'effective prohibition' and 'MEP' standards." Petition at 17. Irving argues that this language raises questions regarding whether the Region in fact accepted Irving's SWMP. If the SWMP has been accepted by the Region, then, according to Irving, the language creates a conflict within the operative provisions within the permit. *Id.*

We do not see the ambiguity or the conflict alleged by Irving. The SWMP is intended to be a dynamic document, changing over time to reflect changing conditions and improved practices. 55 Fed. Reg. at 48,052-54. The permit, in boilerplate fashion, sets out the general requirements of an SWMP, including a requirement that it be updated, as necessary; provision for how modifications are to be made; and a statement that compliance with Irving's SWMP and any approved updates "shall be deemed compliance with Parts II.A, B, and F" and that all approved updates made in accordance with the permit "are hereby incorporated by reference." Permit, Pt. II. Accordingly, by its terms, the permit serves as the rule by which the SWMP, over time, will be measured. The prospective language is

[18] Additionally, all industrial storm water permittees are required to provide information regarding such discharges to the MS4 owner/operator under 40 C.F.R. § 122.26(a)(4).

thus not without purpose — it anticipates likely changes to a dynamic document. For these reasons, we deny review of this issue.

E. *Whether EPA Erred in Making Irving Jointly Liable for Compliance by Other Co-permittees*

Irving argues that Part I.C.1.e and Part I.C.2 of its permit might together be read to hold Irving responsible for, or force it to assume, permit obligations of one or more co-permittees should a co-permittee fail to meet its permit obligations, creating liabilities beyond those contemplated by the operative regulations and Irving's intra-system agreements. Petition at 18. In particular, Irving appears to be concerned that it would incur liabilities for parts of the broader system beyond Irving's operational control. For its part, the Region argues that Irving is overstating the impact of these provisions and that they were added to ensure that, "regardless of any private contractual or inter-governmental agreements the co-permittees may enter into to perform their responsibilities," Response at 33, Irving continues to "comply with the terms of the final Permit for which [it is] responsible." *Id.* In terms of the scope of that responsibility, the Region states that "Petitioner is responsible only for permit compliance and SWMP implementation for those portions of the MS4 that the Petitioner operates." *Id.* at 32. Although not as clear as the Region's Response, the RTC appears to be consistent with the idea that these provisions were intended not to enlarge Irving's liability but rather to ensure that Irving could not transfer away its responsibilities under its permit. RTC at 3. In particular, the RTC observes, "It is not EPA's intent or purpose to redistribute the roles and responsibilities of the permittees." *Id.*

In examining the issue, our starting point is, of course, the text of the permit itself. The provisions of the permit with which Irving is concerned read as follows:

> 1. Each permittee is responsible for:
>
> * * * * * * *
>
> e. A plan of action to assume responsibility for implementation of storm water management and monitoring programs on their portions of the Municipal Separate Storm Sewer System should interjurisdictional agreements allocating responsibility between permittees be dissolved or in default.
>
> * * * * * * *

> 2. Permittees are jointly responsible for permit compliance on portions of the Municipal Separate Storm Sewer System where operational or Storm Water Management Program implementation authority over portions of the Municipal Separate Storm Sewer System is shared or has been transferred from one permittee to another in accordance with legally binding instruments.

Permit, Pt. I.C.1.e and 2.

We agree with the Region that, as to Part I.C.1.e, Irving's concern is overstated. First, the only liability produced by this provision is liability for preparing a contingency plan. Second, and more importantly, the fact that the provision contemplates ultimate responsibility only for each participant's *portion* of the MS4 belies any notion that Irving would ultimately be subject to liability under the plan for matters beyond its operational control.

Part I.C.2 presents a more difficult question, as the language of the provision is not tightly drafted and is open to more than one interpretation. We are not without assistance on this question, however, as the regulations upon which these provisions were predicated provide additional grist for consideration. In anticipation of intra-system, multiple-permit approaches to storm water management, the rules provide:

> Co-permittees need only comply with permit conditions relating to discharges from the muncipal separate storm sewers *for which they are operators.*

40 C.F.R. § 122.26(a)(iv) (emphasis added). We conclude that the better interpretation here is one that reconciles the text of the permit with the rule upon which it is based, and thus interpret Part I.C.2 to mean that, irrespective of any agreements into which Irving might enter related to storm water management, Irving remains ultimately responsible for those portions — and only those portions — of the MS4 within its operational control.[19] Interpreting the provision thusly, we deny review of the issue.[20]

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[19] This does not mean that Irving cannot enter into legally binding agreements which themselves enlarge Irving's liability beyond its operational control. If Irving chooses to assume additional liabilities by virtue of intra-system agreements, it of course may do so, but the resulting liabilities would arise from those agreements and not from Part I.C.1.e and 2 of Irving's permit.

[20] While it appears that the Region's interpretation of this permit condition is similar or identical to ours, we note that because we serve as the final decision maker for the Agency in this matter, our interpretation will be binding on the Region in its implementation of the permit. *See, e.g., In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 542-43 n. 22 (EAB 1998); *In re Austin Powder*
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F. *The Permit's Compliance Certification Date*

Irving has objected to the date in its permit for certification of its compliance with the floatable monitoring program as being incorrect. Petition at 19. In its Response, the Region recognizes that the date is incorrect and states that it will make all necessary schedule adjustments pending final disposition of this appeal. Based on this representation, we deny review of this issue, and direct the Region to make the necessary changes.

G. *Whether the Region Erred in its Inclusion of Annual Reporting and Prior Approval Requirements*

Irving objects that the annual reporting requirements set forth in Part V.D of its permit represent an abuse of discretion because they conflict with the biannual reporting requirements set forth in Irving's SWMP. Petition at 19-20. Irving stated in its Petition that it knew of no requirements calling for an annual report. *Id.* at 19. However, as pointed out *supra* in section I.B, 40 C.F.R. § 122.42(c) requires an MS4 permittee to submit annual reports. Accordingly, the Region's decision to include this condition was not erroneous.[21]

Irving also argues that permit conditions requiring Regional approval before certain changes to its SWMP may be implemented is unreasonable because it places no time limit on the Region's response to the request. Petition at 20. This is not entirely true, however. Under Parts II.G.2.b and c of the permit, which cover most possible changes to the SWMP, changes to the SWMP covered by the provision are deemed approved and may be implemented unless the Region denies the proposed change within 60 days. The only changes to the SWMP which are not subject to this sixty-day default and which must receive formal approval by the Region prior to inclusion into the SWMP are those which propose deletion of a BMP without substitution of another BMP. *See* Response at 36.

As pointed out by the Region in its RTC, Part II.G was modified in response to Irving's comments to clarify what changes to its SWMP would not be considered to be minor modifications to its permit. RTC at 13. In its Petition, Irving merely reiterates the comments that gave rise to these changes. As we have observed in the past, something more is required to sustain a petition for review — namely, a petitioner must demonstrate with specificity why the Region's response to the petitioner's comments was clearly erroneous. *See, e.g., In*

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Co., 6 E.A.D. 713, 717 (EAB 1997); *In re Mobil Oil Corp.*, 5 E.A.D. 490, 590 n.30 (EAB 1994). It should thus address Irving's concern in appealing this issue.

[21] As we have already observed, to the extent that Irving is challenging the underlying rule, this is the wrong forum for such a challenge.

re Town of Ashland Wastewater Treatment Plant, 9 E.A.D. 661, 668 (EAB 2001) (A petitioner in an NPDES appeal must demonstrate with specificity why the Region's response to its comments is clearly erroneous or otherwise merits review). Moreover, in view of the fact that Irving's SWMP was an important part of Irving's application for an MS4 permit and a predicate for the Region's granting the permit, it does not strike us as unreasonable that the Region reserve a review and approval function with respect to significant changes to the SWMP as a means of ensuring that the SWMP continues over time to comport with the SWMP framework set forth in the permit. Furthermore, because deletion of a BMP may raise particular concerns regarding the integrity of the SWMP, it is not obvious to us that the decision by the Region not to limit itself to a sixty-day review period for review of BMP deletions is erroneous. Any failure by the Region to act is remediable through an unreasonable delay suit under section 706 of the Administrative Procedures Act, 5 U.S.C. § 706(1).

III. *CONCLUSION*

For the foregoing reasons, review of NPDES Permit No. TXS001301 is denied in all respects. Consistent with the discussion in section II.F, *supra*, we direct the Region to make all necessary corrections to erroneous compliance dates listed in the permit.

So ordered.