

BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

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ORAL ARGUMENT

IN THE MATTER OF: :

SPRINGFIELD WATER AND SEWER : NPDES Appeal No.
COMMISSION : 20-07

NPDES Permit No. MA0101613 :

Wednesday,
March 31, 2021

Video-Teleconference

The above-entitled matter came on for
hearing, pursuant to notice, at 1:30 p.m. EST

BEFORE:

THE HONORABLE MARY KAY LYNCH
Environmental Appeals Judge

THE HONORABLE AARON P. AVILA
Environmental Appeals Judge

THE HONORABLE KATHIE A. STEIN
Environmental Appeals Judge

APPEARANCES:

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Sewer Commission:

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ALSO PRESENT:

Eurika Durr, Clerk of the Board
Susan Gardinier Kimball, Counsel to the Board
Michelle Wenisch, Counsel to the Board

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2 1:31 p.m.

3 JUDGE LYNCH: Good afternoon,
4 everyone. This is Judge Lynch. And the three
5 Panel Judges are now present. And I believe
6 visible.

7 So with that, the Clerk of the Board
8 may commence the proceedings.

9 MS. DURR: Okay. The Environmental
10 Appeals Board of the United States Environmental
11 Protection Agency is now in session for oral
12 argument. In re Springfield Water and Sewer
13 Commission, Permit number MA0101613, Appeal
14 Number NPDES 20-07.

15 The honorable Judges, Mary Kay Lynch,
16 Aaron Avila, Kathie Stein presiding. Recording
17 devices are not allowed.

18 JUDGE LYNCH: Thank you. This is
19 Judge Lynch again. We're going to do a roll call
20 for the record in a few moments but I first
21 wanted to provide you with some reminders for
22 today's argument, with the understanding that you

1 may be somewhat tired of getting instructions, we
2 have found it useful to repeat these for the
3 record.

4 First, the Judges will keep our
5 cameras and microphones on for the duration of
6 the argument. The presenters will turn on their
7 camera and unmute their microphones when I ask
8 you to begin your portion of the argument.

9 And at the conclusion of your time,
10 please, once again, turn off your camera and mute
11 your microphone.

12 And be sure to speak directly into
13 your microphone. And try to avoid speaking over
14 others. This will help the court reporter in
15 transcribing the proceedings.

16 And observers will keep their
17 microphones and cameras off for the duration of
18 the argument.

19 And to the court reporter, I will ask
20 you that in the event there are occurrences
21 during the argument that interfere with your
22 ability to hear the speakers, to please turn on

1 your microphone and let us know immediately so
2 that we can repeat any statements.

3 I would like to now turn to the roll
4 call for the record. We are hearing oral
5 argument on one petition for review today, with
6 three amici present.

7 And we are going to do the roll call
8 by organization. When I call the party's
9 organization, the individuals presenting oral
10 argument should introduce themselves first. And
11 then they should identify the individuals in
12 their organization that were deemed necessary
13 participants or observers.

14 I will then ask one person from the
15 three amici and the other organizations, to
16 identify their observers and representatives
17 present today. So let's start with Petitioners,
18 Springfield Water and Sewer Commission. Counsel
19 Andes, if you could identify yourself and the
20 individuals with you for the Commission?

21 MR. ANDES: Sure. Thank you. I'm
22 Fredric Andes for the Commission. Also on for

1 the Commission are Erika Powers, Ashley Parr,
2 Norman Guz and Joshua Schimmel.

3 JUDGE LYNCH: Thank you. And next,
4 EPA Region 1 and EPA OGC. Counsel Bukhari, would
5 you please introduce yourself and the EPA
6 presenters and observers?

7 MR. BUKHARI: Good afternoon, Your
8 Honor. My name is Samir Bukhari, I am in the
9 Office of Regional Counsel. And I am joined
10 today by Michael Knapp, also a Regional Counsel,
11 and Pete Ford, our Counsel in OGC.

12 The former two will be presenting
13 argument in this case. In terms of observers,
14 Carl Dierker, Tim Conway, Andy Simons, Kristen
15 Scherb, Ellen Weitzler, Meridith Finegan, John
16 Kilborn, Dimple Chaudhary, and Mary Ellen Levine.
17 Thank you.

18 JUDGE LYNCH: Thank you. And then for
19 the amici, -- Connecticut DEP. If the Assistant
20 Attorney General could introduce himself and
21 those with him.

22 MR. KOSCHWITZ: Yes, Your Honor. It's

1 Assistant Attorney General Scott Koschwitz. And
2 we also have Kelly Streich from the Department of
3 Energy and Environmental Protection. And then we
4 will also have Denny Rowland joining us as well.

5 JUDGE LYNCH: All right, thank you.

6 And then the amicus Connecticut River
7 Conservancy.

8 MS. DONLON: Hi. This is Andrea
9 Donlon, I'm a River Steward for the Connecticut
10 River Conservancy. The other participant
11 listening in is Kelsey Wentling, who is also a
12 River Steward.

13 JUDGE LYNCH: Thank you. And then for
14 the amicus Save the Sound, Mr. Reynolds.

15 MR. REYNOLDS: Good afternoon. This
16 is Roger Reynolds, Counsel for Save the Sound.
17 And with me is Bill Lucey.

18 JUDGE LYNCH: Thank you. Now, if the
19 court reporter could identify himself please.

20 COURT REPORTER: I'm Sam Wojack.

21 JUDGE LYNCH: Thank you. And for the
22 Environmental Appeals Board, if the Clerk of the

1 Board could identify herself and then identify
2 those with you from the Board.

3 MS. DURR: I'm Eurika Durr, the Clerk
4 of the Board. In addition to myself we have two
5 Senior Counsels to the Board observing. Susan
6 Gardinier Kimball, Michelle Wensch.

7 And we have other Board
8 representatives observing as well. Ms. Annette
9 Duncan, Emilio Cortes, Caitlin Doak and Andrew
10 Revelle.

11 JUDGE LYNCH: Thank you. And I also
12 want to acknowledge Greg Miller, who has, and
13 will, provide us with excellent technical
14 assistance. Thank you, Mr. Miller.

15 MR. MILLER: Thank you. Glad to be
16 here.

17 JUDGE LYNCH: We're glad you're here,
18 believe me. And thank you, everyone.

19 And in fact, I want to note that while
20 the Environmental Appeals Board has conducted
21 oral arguments by videoconference previously,
22 this is our first oral argument conducted on the

1 Teams platform. So we're especially glad Mr.
2 Miller is with us.

3 And on behalf of the Board I want to
4 thank you for working with us, given the current
5 circumstances, to make this virtual oral argument
6 happen. We anticipate it will go smoothly, but
7 if we encounter any technical difficulties please
8 bear with us and we'll work through it.

9 And in terms of the subject matter,
10 the Environmental Appeals Board is hearing oral
11 argument today on a petition for review of the
12 Clean Water Act National Pollutant Discharge
13 Elimination System permit issued by Region 1 to
14 the Springfield Water and Sewer Commission.

15 And the petition filed by the
16 Commission is docketed as NPDES Appeal Number 20-
17 07.

18 Today's argument will generally
19 proceed as outlined in the Board's March 2nd,
20 2021 order. Specifically, the Board has
21 allocated 60 minutes for oral argument. And we
22 will first hear from the Petitioner, then EPA

1 Region 1.

2 The Petitioner has been allocated a
3 total of 30 minutes. We will then hear argument
4 from EPA Region 1, and the Region has been
5 allocated 30 minutes.

6 The order stated that Petitioner may
7 reserve up to ten minutes of its allocated time
8 for rebuttal. Since then, Counsel for Petitioner
9 asked if he could use any remaining unused time
10 from his primary argument to add to his rebuttal
11 time. And the Board will allow this.

12 I also want to note for the record
13 that both Counsel for Petitioner and the EPA
14 Region 1 intend to use exhibits today, that they
15 have shared with each other.

16 But please note that if you choose to
17 share the screen to display the exhibits during
18 the argument, when you have concluded the portion
19 of your argument that correlates to one of your
20 exhibits, we ask that you stop sharing your
21 screen.

22 And on behalf of the Board I would

1 like to tell you that we very much appreciate the
2 time and effort each of you, all of you, have
3 expended in connection with the briefing on the
4 petition in preparing for and participating in
5 the oral argument.

6 Oral arguments are a very important
7 opportunity for you to explain your contentions
8 and the key issues in this case to the Board.
9 It's also an opportunity for the Judges to
10 explore with you the contours of your arguments
11 and the issues in the case.

12 You should assume that we've read the
13 briefs and other submissions. And we'll ask
14 questions that will assist us in our
15 deliberations.

16 You should not assume that the Judges
17 have made up their minds about any of the issues
18 in the case. But instead, we're using this as an
19 opportunity to listen, to help us understand your
20 position and to probe the legal and record
21 support on which the Region based its permit
22 decision.

1 And to that end, we will be asking you
2 a number of questions. We find the dialogue most
3 helpful.

4 And as the Clerk stated, no recording
5 of any kind is allowed. We do have a court
6 reporter transcribing the oral argument. And a
7 transcript of the argument will be posted to the
8 docket in this matter.

9 Also, we do not have a timer that
10 everyone can see, but the Clerk of the Board will
11 inform you verbally when you have five minutes
12 remaining in your allotted time. And then again
13 when your time has expired.

14 So with that, let's proceed with oral
15 argument in NPDES Appeal Number 20-07, the
16 petition filed by the Springfield Water and Sewer
17 Commission. Counsel for the Commission, Mr.
18 Andes, please proceed. But first tell us whether
19 you wish to reserve time for rebuttal.

20 MR. ANDES: Yes. Thank you, Your
21 Honor. We would like to reserve seven minutes
22 for rebuttal.

1 JUDGE LYNCH: Thank you. The court
2 reporter will make a note of that -- the Clerk of
3 the Board would make a note of that please. All
4 right, thank you.

5 MR. ANDES: May it please the Board.
6 Good afternoon, my name is Fredric Andes. I am
7 Counsel for the Springfield Water and Sewer
8 Commission, which is the permittee and Petitioner
9 in this matter.

10 We have appealed the Commission's
11 NPDES permit on a number of grounds. We'd like
12 to focus in this argument on two of those
13 particular issues.

14 The first one is the classification of
15 Outfall 042 as a combined sewer overflow, instead
16 of a bypass.

17 The second issue is the binding
18 nitrogen limit in the permit.

19 On Outfall 042 the Commission has
20 shown that, and EPA has previously recognized in
21 all previous permits for this plant, that Outfall
22 042 is a bypass. The regulatory definition of

1 bypass is in 40 CFR 122.41(m) and says,
2 intentional diversion of waste streams from any
3 portion of a treatment facility. That is exactly
4 what Outfall 042 is.

5 It is located at the treatment plant.

6 It is --

7 JUDGE AVILA: Excuse me, Counsel. Can
8 I interrupt? I thought you previously
9 characterized this as a plant emergency bypass
10 and I don't see that anywhere in the regulatory
11 definition. So what do you think Outfall 042 is?

12 MR. ANDES: It's a bypass. The term
13 plant emergency bypass is not in the regulation.
14 The regulatory term is bypass. This has always
15 been treated as a bypass that is used in
16 emergencies.

17 It is used, basically, to prevent
18 overloading and flooding of the rest of the
19 treatment system. Water will come in from
20 several different sources into the influent
21 structure. The inlet structure.

22 And when it comes in there it gets

1 mixed, the flow is measured, it can be
2 chlorinated for odor control. And if the
3 engineering judgment is --

4 JUDGE LYNCH: Counsel?

5 MR. ANDES: Yes.

6 JUDGE LYNCH: Can I pause you for a
7 moment? This is Judge Lynch.

8 MR. ANDES: Certainly.

9 JUDGE LYNCH: Is this above the
10 headworks of the plant?

11 MR. ANDES: No, it is part of the
12 headworks of the plant. As --

13 JUDGE LYNCH: So are you saying that
14 the inlet is the same as the headworks of the
15 plant?

16 MR. ANDES: The headworks is actually
17 not the defined term for these purposes. The --

18 JUDGE LYNCH: For what purposes?

19 MR. ANDES: For purposes of the bypass
20 regulation. But even also, for purposes of
21 defining a CSO.

22 JUDGE LYNCH: Well actually, the

1 Region in its response to comments cites a
2 definition contained in a case.

3 MR. ANDES: The regulation --
4 (Simultaneous speaking.)

5 JUDGE LYNCH: -- that they refer to.

6 MR. ANDES: Well, the regulatory term,
7 first, in terms of a bypass, is that --

8 JUDGE LYNCH: No, I got that. We have
9 that.

10 MR. ANDES: Okay.

11 JUDGE LYNCH: Thank you.

12 MR. ANDES: And the definition of a
13 combined sewer overflow is that it's before
14 entering the POTW treatment plant. So then the
15 real issue is, is this before the flow enters the
16 POTW treatment plant, and our answer is no
17 because the influent structure is part of the
18 POTW treatment plant.

19 JUDGE AVILA: How does it --

20 JUDGE STEIN: Excuse me, Counsel?

21 JUDGE AVILA: Go ahead, Judge Stein.

22 JUDGE STEIN: I had understood that

1 the headworks was on the other side of the
2 parking lot, so I'm a little confused.

3 MR. ANDES: Well, the bar screens were
4 on the other side of the parking lot. They are a
5 few hundred feet between the influent structure
6 and the bar screens.

7 They are connected by four, if I can
8 show the exhibit that illustrates this. Excuse
9 me, if I can just find that, where I have it.

10 Okay, now I need to find my, there we
11 go. I am hoping that it is showing that exhibit
12 now.

13 So if you can see on this exhibit, the
14 influent structure is the beginning of --

15 JUDGE LYNCH: We're not seeing
16 anything.

17 MR. ANDES: You're not seeing
18 anything, okay.

19 JUDGE LYNCH: We do have the exhibit
20 --

21 MR. ANDES: Okay.

22 JUDGE LYNCH: -- that you submitted.

1 Administrative record Number 24. It's Exhibit 12
2 to your petition. Is that the document you're --

3 MR. ANDES: Yes.

4 JUDGE LYNCH: Yes.

5 MR. ANDES: All right. Well, I will
6 proceed then.

7 So in that exhibit you'll see that the
8 influent structure is the beginning of the plant.
9 And the flow comes in there. And the emergency
10 overflow point comes out of there.

11 But the flow cone goes from the
12 influent structure into, through four pipes then
13 into grit and screening and then into other
14 treatment systems. So these are all part of the
15 same treatment plant.

16 There is no, there is no sort of
17 separation between the influent structure and the
18 bar screens, other than some distance during
19 which there are pipes that convey the water from
20 one to the other. It's --

21 JUDGE AVILA: Counsel, can I
22 interrupt? Just two things. One, I think you're

1 sharing your Teams screen with us right now.

2 MR. ANDES: Okay. I'll stop that.

3 JUDGE AVILA: Thanks.

4 MR. ANDES: You're welcome.

5 JUDGE AVILA: And so, I just want to
6 get back to the definition of a CSO. And that's
7 the discharge from a combined sewer system at a
8 point prior to the POTW treatment plant, right?

9 MR. ANDES: Yes.

10 JUDGE AVILA: And the POTW treatment
11 plant is that portion of the POTW which is
12 designed to provide treatment of municipal
13 sewage. What in the influent structure is
14 designed to provide treatment of municipal
15 sewage?

16 MR. ANDES: So, there are really
17 several different ways in which this is part of
18 the treatment process. One is, that it's simply,
19 the influent structure brings in influent from
20 three different communities and mixes it.

21 The mixing is important because that
22 will help us in terms of determining when the,

1 how much flow is coming in from which source --

2 JUDGE LYNCH: Counsel, if I could
3 pause you. The issue is, what treatment is being
4 provided. The definition of the treatment plant
5 is that it was designed to provide treatment.

6 MR. ANDES: Well, there are several
7 parts of treatment. Part of treatment is mixing
8 the various flows together --

9 JUDGE LYNCH: Well, Counsel, I'm
10 talking about the treatment that's required under
11 the CSO policy.

12 MR. ANDES: Well --

13 (Simultaneous speaking.)

14 JUDGE LYNCH: -- for bypasses. It's
15 not mixing.

16 MR. ANDES: Well, to be clear, the CSO
17 policy --

18 JUDGE LYNCH: Section 7, CSO Policy at
19 18693.

20 MR. ANDES: Yes.

21 JUDGE LYNCH: That's the treatment.

22 MR. ANDES: Well, the CSO --

1 (Simultaneous speaking.)

2 JUDGE LYNCH: -- for a bypass.

3 MR. ANDES: Right. Well first, let's
4 be clear that one of the whole purposes of having
5 the influent structure and CSO 042, I'm sorry,
6 Bypass 042, is to serve the purpose laid out in
7 part 7. Which is maximizing treatment at the
8 plant.

9 The concept is to, and the plant was
10 designed, and the system was designed, to bring
11 as much flow to the plant as possible. And this
12 helps fulfill --

13 JUDGE LYNCH: That's not the same
14 thing as treatment, is it?

15 MR. ANDES: Well, treatment, there are
16 a series of different steps that are a part of
17 treatment. There are preliminary steps in
18 treatment, including mixing, including
19 chlorination for odor control, which does happen
20 in the influent structure.

21 JUDGE LYNCH: Are you saying that
22 chlorine for odor control complies with the

1 treatment for bypasses in the CSO policy Section
2 7?

3 MR. ANDES: Well, Your Honor, Section
4 7 concerns CSO related bypasses. And those are a
5 much different animal.

6 A CSO related bypass, as noted in, on
7 Page 18693, the third column, says, EPA would
8 allow a permit to authorize a CSO related bypass
9 of the secondary treatment portion of the POTW
10 treatment plant.

11 That is, and it occurs here and at
12 other plants. Where you have water that goes
13 through the influent structure through primary
14 treatment.

15 But then there is not capacity to
16 treat it in the secondary treatment process. So
17 you at that point have to send it off to
18 chlorination and then to discharge.

19 That is an entirely different
20 situation. And it always has been recognized by
21 EPA as an entirely different situation.

22 JUDGE AVILA: But I guess that gets

1 back to my original question. What are you
2 calling this thing?

3 Did they, it's not a CSO bypass within
4 the definition of the CSO policy, right, because
5 it's not even getting primary treatment.

6 MR. ANDES: Right. It is a simple
7 bypass. And EPA has recognized it as such in
8 every previous permit. And in reviewing the --

9 JUDGE LYNCH: Counsel?

10 MR. ANDES: Yes.

11 JUDGE LYNCH: Go ahead. Are you
12 saying that the Region is forever barred from
13 changing the designation of this outfall, because
14 in prior permits it was either mislabeled or
15 labeled differently or treated differently?

16 MR. ANDES: Well, it wasn't
17 mislabeled. EPA is --

18 JUDGE LYNCH: Let's say it was labeled
19 differently. Are they forever barred from
20 treating this outfall differently than they have
21 in the past?

22 MR. ANDES: They are not forever

1 barred --

2 JUDGE LYNCH: And what's your legal
3 basis for saying that?

4 MR. ANDES: If they had a strong
5 explanation, did they commit it in error and were
6 simply correcting it that would be one thing.

7 And in fact, that's what they started
8 explaining in the first draft of their permit.
9 They said, oh, we inadvertently left out 042.
10 Which surprised us because all previous permits,
11 and the long-term control plan had, none of them
12 had considered this as a CSO.

13 The agency reviewed that long-term
14 control plan, said it had met the CSO policy.
15 And --

16 JUDGE LYNCH: Where does it say that?

17 JUDGE STEIN: Can I interrupt for a
18 moment?

19 JUDGE LYNCH: Yes.

20 JUDGE STEIN: I reviewed, just before
21 coming into this argument, a four or five page
22 section of the Region's response to comments on

1 this very issue. And under well established
2 Board case law, the Region can put its final word
3 into the response to comments.

4 I think the Region is quite clear in
5 those four or five pages in acknowledging what
6 its prior position was and what its position is
7 now. And it's asserting that under the Fox case
8 it can provide, and other Supreme Court cases, an
9 explanation.

10 So I'm not sure why we're looking at
11 the draft permit a few drafts ago and not looking
12 at the Region's explanation, which is quite
13 extensive in its response to comments.

14 MR. ANDES: Well, Your Honor, I think
15 the main reason that, the main reason is because
16 the explanation of the Agency, and the response
17 to comments, is wrong. And we think that is
18 confirmed by the fact that in all previous
19 permits, and the long-term control plan, this was
20 always recognized as a bypass under 122.41(m), a
21 regular simple bypass, not a CSO related bypass,
22 not a CSO.

1 Now, the explanation they put in the
2 response to comments, which was new, right, they
3 changed --

4 JUDGE STEIN: Which they're entitled
5 to do however, correct? I mean, the Region --

6 MR. ANDES: Yes.

7 JUDGE STEIN: -- is entitled to
8 improve its permit as it goes through the
9 process.

10 MR. ANDES: Right.

11 JUDGE STEIN: I mean, they're not
12 barred from saying something new in response to
13 comments, in the response to comments document,
14 are they?

15 MR. ANDES: But it goes to our
16 arbitrariness first, that first they said, oh, we
17 made a mistake, it should have been included as a
18 CSO all along. When we pointed out that in fact
19 it should not be included they said, oh, well, we
20 have a new explanation, there is no treatment
21 there.

22 In fact, there is treatment there.

1 And it is part of an integral part of the
2 treatment plant. Part of the --

3 JUDGE LYNCH: Counsel, isn't your
4 argument that there was treatment a new argument?

5 MR. ANDES: They never, the Agency
6 never said in either of the draft permits, or
7 fact sheets, that it was relying on the fact that
8 on the claim that there is no treatment there.
9 They simply said, we inadvertently forgot to
10 include it.

11 So we said back, look, it's always
12 been included before. It's not a CSO it is at
13 the treatment plant and therefore it is a bypass
14 at the treatment plant.

15 Then they said, that when responding
16 in the final permit and response to comments, oh,
17 oh, well, now we think it's a CSO because there
18 is no treatment. Which, first of all, doesn't
19 really pertain because the issue isn't, is there
20 treatment? We think there is treatment.

21 So even if you apply the Agency's test
22 and said, oh, is there treatment, we think there

1 is. There is chlorination --

2 JUDGE LYNCH: Then what's the
3 treatment?

4 MR. ANDES: -- there is mixing. But
5 we don't --

6 JUDGE LYNCH: You're saying mixing is
7 treatment?

8 MR. ANDES: I'm sorry?

9 JUDGE LYNCH: You're saying mixing is
10 treatment? I just want to be clear.

11 MR. ANDES: Both mixing and
12 chlorination are part of the treatment process.
13 What we have to do, the treatment plant has a lot
14 of pieces.

15 And part of the treatments process is
16 to take flows from different communities and mix
17 them together. You then measure them and you
18 determine if you have to divert some of that flow
19 because otherwise you will overload or flood the
20 rest of the system. That's all part of the
21 treatment process.

22 But we don't think that's even

1 relevant. It should be clear, because the test
2 of a bypass, under 122.41(m), is clear.

3 It basically says, are you
4 intentionally diverting waste systems from any
5 portion of the treatment facility. We are doing
6 that. That is what we do at this point.

7 Therefore, whether there is treatment
8 or not in this system, we think this meets the
9 definition of bypass --

10 JUDGE LYNCH: So what's your
11 definition of CSO?

12 MR. ANDES: The definition of CSO is
13 the one in the CSO policy that indicates that
14 it's a discharge from the combined sewer system,
15 the pipes, before you get to the treatment plant.
16 This system is at the treatment plant. It's
17 connected to all the other parts of the treatment
18 process.

19 It's not some independent thing that
20 sits outside. In fact, the Agency itself, I'll
21 note, in the exhibits that it has submitted, has
22 a photo and calls the discharge location the

1 influent bypass discharge location. We think
2 that's right. This is a bypass at the treatment
3 plant.

4 JUDGE LYNCH: And by that you, and by
5 at the treatment plant you agree that it's at the
6 influent? The inlet structure. That's where the
7 outfall is?

8 MR. ANDES: The outfall is part of the
9 influent structure. Water goes in the influent
10 structure, mixed and chlorinated --

11 JUDGE LYNCH: And do you agree that
12 raw sewage is being discharged from this Outfall
13 042?

14 MR. ANDES: Well, when it's
15 chlorinated. Raw waste water is not really the
16 term in the regulations.

17 The issue is, is it part of the
18 treatment plant? Here it's --

19 JUDGE LYNCH: I'm asking you the facts
20 here.

21 MR. ANDES: I would say that's not --

22 JUDGE LYNCH: About the facts.

1 MR. ANDES: The raw sewage is what
2 comes into the influent structure. I would say
3 once processes have been applied to it in the
4 influent structure, that has possibly been
5 treated through chlorine for odor control, it has
6 been mixed together so it's acceptable to moving
7 on to the bar screens and the rest of the
8 treatment process.

9 It is an integral part of the
10 treatment process. You can't do the rest of the
11 stuff unless you have done this operation first.

12 JUDGE STEIN: The operation that
13 you're describing to take place at the inlet
14 structure, does that meet the regulatory
15 definition of primary treatment or is it the
16 mixing steps and odor control prior to primary
17 treatment?

18 I'm trying to figure out where in the
19 structure the primary treatment takes place.

20 MR. ANDES: Well, primary treatment
21 takes place right, there is several steps that
22 take place before primary treatment, Your Honor.

1 If you look at that exhibit, there is the
2 influent structure, then there is grit and
3 screening at the bar screens, when stuff gets
4 removed, et cetera, and then there are the
5 primary sedimentation basins.

6 So, there is several preliminary steps
7 in the treatment process at the plant. Which
8 include what happens in the influent structure
9 and what happens in the grit and screening steps
10 at the bar screens.

11 JUDGE STEIN: So primary treatment --

12 MS. DURR: Five minutes.

13 JUDGE STEIN: So primary treatment
14 isn't what takes place at the primary
15 sedimentation basins?

16 MR. ANDES: No, that is what takes
17 place at the primary sedimentation basins. But
18 all the pieces before it, including the grit and
19 screening process and the influent structure, are
20 both parts of the treatment plant.

21 No one would say that something going
22 into the grit and screening is a CSO, it's part

1 of the treatment plant just like the influent
2 structure is.

3 JUDGE STEIN: Okay.

4 MR. ANDES: Those are all part of one
5 system.

6 JUDGE STEIN: So unless you have
7 further, my colleagues have further questions
8 about this, you have five minutes remaining in
9 your opening argument. Do you want to cover your
10 second issue?

11 MR. ANDES: Surely. So our second
12 issue regards the nitrogen limits in the permit.

13 And as we stated in our briefs, the
14 Agency issued these final limits without proper
15 procedure under the APA and didn't follow EPA's
16 own regulations and policies under the Clean
17 Water Act.

18 They admitted, EPA, that in the final
19 permit they adopted a new approach. Those were
20 their words. Which we had no opportunity to
21 comment on previously.

22 It is not a logical outgrowth of the

1 two draft permits. They both used entirely
2 different approaches, whether it was benchmarks
3 or limits.

4 JUDGE LYNCH: Counsel, what I'm trying
5 to understand from your briefs, what's new?

6 MR. ANDES: What's new is they adopted
7 an approach which incorporated an effluent target
8 of five milligrams per liter, which was not part
9 of any of the previous steps. And we have
10 pointed out that that is a number that would be
11 very problematic for the Commission to meet.

12 JUDGE LYNCH: So is it the number
13 that's new?

14 MR. ANDES: It's an overall approach,
15 Your Honor, that included the flow used, the five
16 milligram per liter target, the concept of how
17 are we both determining whether a limit is
18 needed, and then determining what the limit is.

19 JUDGE LYNCH: Is it that it's a mass
20 based limit? I'm trying to understand what's new
21 in the final permit.

22 MR. ANDES: No, it's not that it's

1 mass based. The revised draft permit has a mass
2 based permit, but it was based on an entirely
3 different calculation based on performance of the
4 facility.

5 This one discards the issue of
6 performance of the facility and basically says,
7 we're going to make you meet a five, we're going
8 to make other people at eight or ten.

9 JUDGE LYNCH: So it's a concentration?
10 So it's the number that you --

11 MR. ANDES: Yes. That number --

12 JUDGE LYNCH: -- that's new?

13 MR. ANDES: Everything, I'm sorry,
14 Your Honor. Everything --

15 JUDGE LYNCH: So the Region -- go
16 ahead.

17 MR. ANDES: Everything was based on
18 that five milligram per liter, and that is
19 completely new. That was never a part of either
20 of the previous drafts.

21 JUDGE STEIN: So as I understand the
22 evolution of this permit, there was an original

1 draft that had more of an optimization rather
2 than an enforceable nitrogen limit. And then
3 there was a second proposal with an enforceable
4 nitrogen limit. And then you have your final
5 permit, which is essentially a little under 60
6 pounds less stringent than what was still an
7 enforceable mass limit.

8 I mean, each one of these iterations
9 of the permit, it seems to me the nitrogen limit
10 is getting less and less stringent. So I'm
11 having difficulty understanding how in response
12 to the comments that you made on the, that second
13 limit that was proposed and you moved to the
14 final permit, which gets 57 pounds less
15 stringent, same enforceable nitrogen limit, mass
16 limit, how that is something that you could not
17 have anticipated under the Board precedents when
18 you commented on the last permit?

19 MR. ANDES: Well, first of all I would
20 say that from the first draft to the second draft
21 it got markedly more stringent because it went
22 from a voluntary benchmark, basically, to a

1 binding limit. That was the significant change.

2 We registered concerns all along the
3 way. What they did in the final permit was they
4 junked the previous approaches entirely and
5 instead said, and we have registered concerns
6 that both of the previous approaches were
7 problematic and that we could not comply.

8 The final one, the final loading
9 number is a little bit higher. Doesn't make a
10 significant difference, doesn't make it really
11 any easier for the Commission to meet.

12 They still can't meet it. At least
13 one or two times a year they will have a month
14 that they will be out of compliance. We show
15 that statistically. That is very problematic and
16 we can't meet those numbers consistently.

17 The problem from an APA standpoint is
18 that the use of a five milligram per liter target
19 --

20 MS. DURR: Times up.

21 MR. ANDES: -- and the, if I can
22 finish that thought, and the whole concept of how

1 they constructed this new set of limits in a new
2 approach, a comprehensive approach across the
3 region is, A, something we never had a chance to
4 comment on, and B, simply doesn't follow any of
5 the requirements in the Clean Water Act.

6 JUDGE LYNCH: I do have one final
7 question on this topic. On Page 7 of your
8 petition you request that the final, that the
9 Board remand the final permit with instructions
10 to remove the total nitrogen limit. Well then
11 what? No nitrogen limit in the permit? I mean -
12 -

13 MR. ANDES: We, Your Honor, we said
14 several things on that in the comments. First of
15 all, that the Commission has met the targets in
16 the TMDL. In fact, far --

17 JUDGE LYNCH: No, that's all, what's
18 the next step --

19 MR. ANDES: Well, we believe that a
20 limit is --

21 JUDGE LYNCH: Should there be an
22 enforceable limit in the permit?

1 MR. ANDES: No. We believe that a
2 limit is not necessary, it's not justified. We
3 said in our comments we would accept --

4 JUDGE LYNCH: Okay, thank you.

5 MR. ANDES: -- a benchmark of eight
6 milligrams per liter.

7 JUDGE LYNCH: Thank you.

8 JUDGE STEIN: Can I ask a little bit,
9 I'd like to ask a little bit more about this.

10 Do you dispute that Long Island Sound
11 is impaired by nitrogen pollution and currently
12 does not meet Connecticut water quality
13 standards?

14 MR. ANDES: We don't dispute that Long
15 Island Sound is impaired and has a TMDL to
16 address that impairment.

17 We have not seen any identification of
18 an impairment in Connecticut other than that that
19 is already addressed by the TMDL, which has
20 resulted in a significant reduction in the
21 hypoxia area in the south. So we think the TMDL
22 process has been working.

1 If the Agency believes the TMDL isn't
2 working, the Agency can choose to reopen the TMDL
3 and develop new allocations. But it hasn't done
4 that. And until it's done that, it should be
5 bound by the TMDL that's in place.

6 JUDGE STEIN: Well how does that
7 position square with a series of Board precedents
8 that have been affirmed by the First Circuit in
9 which nitrogen limits have allowed to be added to
10 permits irrespective of the status of the TMDL?

11 MR. ANDES: Well, Your Honor, the
12 fundamental difference in this case, and those,
13 including Taunton and Upper Blackstone, is that
14 in none of those cases was there a TMDL in place.

15 So the Agency had developed water
16 quality based limitations in the absence of a
17 TMDL. And that was what this Board and the First
18 Circuit said was always in deference and was
19 upheld.

20 Here the fundamental difference is,
21 none of that analysis has been done and there is
22 a binding TMDL in place. We are meeting that

1 TMDL, and we have met it for 20 years. And there
2 is no indication that the Commission needs a
3 limit in order to comply with its targets under
4 that TMDL.

5 JUDGE LYNCH: Well, Counsel, I just
6 want to add that Connecticut DEEP in its brief
7 says you have been on notice, that you were going
8 to get a plant-wide nitrogen restriction for 20
9 years. Since the TMDL you're now pointing to.

10 And in fact, shortly before getting on
11 the argument I looked at Section 4 of the TMDL,
12 and that is what it says.

13 MR. ANDES: Oh, and, Your Honor, what
14 the Commission has been saying to EPA in fact,
15 separately, is the Agency believes that the TMDL
16 is not doing the job. The proper approach, under
17 Section 303(d) of the statute, is for the Agency
18 to, as indicated in that TMDL, reexamine it,
19 reopen it, consider whether different
20 restrictions and allocations are necessary.

21 If they do that, then we would be
22 able, and other stakeholders, would be able to

1 participate in that open public process. Which
2 would not be done permit-by-permit, but rather
3 across the entire watershed based on, hopefully,
4 current data and analyses that we would
5 participate in that process.

6 And we would have at the end, a new
7 set of allocations under a new TMDL, or revised
8 TMDL, that would then be incorporated into
9 permits. That's not what's happened here.

10 JUDGE STEIN: Yes.

11 JUDGE LYNCH: Well, I understand what
12 the Region is saying and what Connecticut is
13 saying is reading the TMDL, that they're actually
14 just implementing the TMDL, Section 4, that says
15 that they are going to provide facility specific
16 requirements for nitrogen limits for out of basin
17 contributors.

18 MR. ANDES: Well that, Your Honor, is
19 not, the TMDL did not give them some independent
20 authority to specify new limits, it indicated
21 that that could be done in the future, as
22 necessary.

1 JUDGE LYNCH: Yes. It's 20 years
2 later now and it looks like that's what --

3 JUDGE STEIN: But I would also add
4 that several Board precedents have, including, I
5 believe, the EME, in one of the Homedale cases
6 and others, have rejected the notion that a
7 permit limit needs to have identity with a TMDL
8 limit.

9 And I think that if you were to read
10 Taunton and read Upper Blackstone in a way that,
11 I understand the point that you're making about
12 there being no TMDL, but I think the overall
13 point is that the Agency has certain obligations
14 when it's issuing a Clean Water Act permit. And
15 those obligations include, you know, making
16 assurances about what a particular facility is
17 going to be discharging in relationship to water
18 quality standards.

19 MR. ANDES: I would agree with that,
20 Your Honor, but that is not boundless. The fact
21 is under 122.44 they have two obligations.

22 One is, they have to be consistent

1 with the TMDL. The Agency seems to feel that as
2 long as its number is under the TMDL that's
3 consistent. We believe that's not the case.

4 Here we are meeting the TMDL. The
5 Moscow case, which is the one they cite on this
6 issue, is not even relevant.

7 If you recall the Moscow case, the
8 allocation was for an expanded plant. The city
9 wanted the full allocation for the expanded plant
10 before they expanded the plant. EPA said, no,
11 you can only have the allocation for the current
12 plant for now. And the Board said, that made
13 sense.

14 That's totally different than this
15 situation. Here the Agency is looking, is
16 seeking carte blanche to issue whatever limit
17 they want irrespective of what's in the TMDL.
18 And that ignores the fact that the TMDL should
19 guide the process. As 122.44 says it should.

20 Also, the Agency mentions, and we
21 agree, that the other part of 122.44 that's
22 relevant is the part that says the limit needed

1 to derive from and comply with water quality
2 standards. At no point did EPA here show how
3 these limits of five for some plants, eight for
4 others, ten for others, no limit for others, how
5 those derive from and comply with the relevant
6 water quality standards.

7 So they haven't, can they issue
8 protective water quality limits, sure. Do they
9 have to do it following their own procedures,
10 yes. And they haven't done that here.

11 JUDGE AVILA: What, and I'm sorry,
12 what do you, where is the waste load allocation
13 for out of basin sources in the TMDL? What is
14 that, in your view?

15 MR. ANDES: The numbers talk about, at
16 a 25 percent reduction from, I believe, 21,000 to
17 16,000 pounds a day.

18 JUDGE LYNCH: Are you saying that's a
19 waste load allocation?

20 MR. ANDES: That's a waste load
21 allocation for the out of basin sources. And if
22 you look at Springfield's share of that on a flow

1 basis, Springfield did much, much better than --

2 JUDGE LYNCH: So the record is replete
3 with the Region saying that that's not an actual
4 waste load allocation, that it's a target. Do
5 you disagree with that and what's your legal
6 basis?

7 MR. ANDES: Oh absolutely. That's a
8 waste load allocation. That's what it's called
9 in the TMDL.

10 I don't read the Agency as saying it's
11 not a waste load allocation. I think they want
12 to walk away from it because it doesn't help
13 them, because we're meeting it. And there is no
14 demonstration that a limit is needed to make sure
15 that that allocation is met.

16 JUDGE LYNCH: All right.

17 JUDGE AVILA: Can I ask one --

18 JUDGE LYNCH: Sure.

19 JUDGE AVILA: I'll go back and reread
20 the TMDL, but my, I thought it was an assumption
21 for getting waste load allocations for in-basin
22 sources. The 25 percent.

1 MR. ANDES: No. The relevant number,
2 and I don't think the Agency has denied, it would
3 be a surprise to us if they denied it, that
4 that's the relevant number. They don't seem, and
5 I certainly haven't read their analysis to say
6 the TMDL doesn't matter at all, that it imposes
7 no constraints here.

8 There is a waste load allocation
9 there, there is an expectation in terms of what
10 would be, what would happen for the sources out
11 of the system. They can't just be not given an
12 allocation at all. They were given an
13 allocation, and we're meeting our share of the
14 allocation.

15 JUDGE AVILA: Thank you.

16 MR. ANDES: Thank you.

17 JUDGE LYNCH: I'd like to do a time
18 check with the Clerk of the Board. I believe we
19 went over and --

20 MS. DURR: Eight minutes.

21 JUDGE LYNCH: How much?

22 MS. DURR: Eight minutes.

1 JUDGE LYNCH: All right. Then if we
2 can please provide the Region with an additional
3 eight minutes, assuming it's necessary.

4 MS. DURR: Okay.

5 JUDGE LYNCH: So, why don't we proceed
6 with Region 1.

7 MR. BUKHARI: Good afternoon, Your
8 Honors. My name is Samir Bukhari, I'm in the
9 Office of Regional Counsel and I will be
10 presenting the nutrient related issues in this
11 case, along with any non-CSO issues.

12 My co-Counsel, Mike Knapp, will take
13 the CSO issues. On the brief with EPA were Pete
14 Ford and Pooja Parikh from the Office of General
15 Counsel with whom we coordinated closely on the
16 production of that brief.

17 I will address the procedural issues
18 in this case under the APA and 124.14(b), with
19 the focus on the circuit court cases relied on by
20 Petitioner before moving to the three independent
21 bases for the limit: consistency with the
22 available waste load allocation under

1 122.44(d)(1)(vii)(A) and (B); and conformity with
2 the state of Connecticut's anti-degradation
3 requirement; and narrative nutrient water quality
4 criteria under Section 301(b)(1)(c) and Section
5 401(a)(2) of the Act.

6 But before I do so, after listening
7 closely to the last several minutes of Mr. Andes'
8 argument I feel impelled to take just two minutes
9 to snap this matter back into its proper legal
10 framework and environmental context in a way that
11 I hope will assist the Board in coming to a
12 decision in this matter.

13 Enormous progress, Your Honors, has
14 been made over the past 20 years to restore water
15 quality in Long Island Sound. But these iconic
16 waters are in peril, with pervasive and severe
17 nitrogen driven nutrification and water quality
18 impairments.

19 In 2019, despite the waste load
20 allocation having been achieved, despite the
21 underlying assumption of the waste load
22 allocation, the 25 percent out of basin reduction

1 from the POTWs being achieved, Long Island Sound
2 suffered a hypoxic event lasting 48 days.

3 In Petitioner's view, this undisputed
4 fact, uncontroverted fact, is legally irrelevant
5 for the purposes of Section 301, because the
6 waste load allocation has been achieved and the
7 25 percent out of basin reduction assumption has
8 been met.

9 But a discharger may not wield Section
10 303 as a shield to indefinitely forestall the
11 imposition of necessary water quality based
12 effluent limitations under Section 301. That
13 reading of the act, in our view --

14 JUDGE AVILA: Can I interrupt?

15 MR. BUKHARI: Yes.

16 JUDGE AVILA: I'm sorry, Counsel. So
17 do you, what's your position on whether there is
18 a waste load allocation in the TMDL for out of
19 basin sources?

20 MR. BUKHARI: The TMDL is explicit on
21 this point. There was no waste load allocation
22 assigned to out of basin dischargers. Instead,

1 the 25 percent reduction from those out of basin
2 sources was an assumption of the TMDL, and formed
3 part of the reasonable assurance in the TMDL EPA
4 committed.

5 And the other five, the five, the
6 three states that didn't, that don't administer,
7 that administer their own NPDES program,
8 committed to utilizing NPDES authority to ensure
9 that that reduction in fact occurred.

10 JUDGE LYNCH: So, Counsel, this is
11 Judge Lynch, let's assume there is a terminology
12 difference between the Region on calling this an
13 assumption and target for out of basin and the
14 Commission calling it a TMDL. Legally does that
15 matter?

16 Is our analysis the same in terms of
17 the assumption made?

18 MR. BUKHARI: We don't think that
19 makes a difference in this case. If you look at
20 122.44(d)(1)(vii)(A), that calls for any
21 condition imposed under that particular provision
22 to be derived from and conform to applicable

1 water quality standards.

2 And there then is a conjunction after
3 that, at the end, after that provision, which
4 then leads to Subsection (B), which calls for its
5 consistency with the assumptions and requirements
6 of any available waste load allocation.

7 The available waste load allocation
8 here is the one assigned to POTWs and other point
9 source dischargers in Connecticut and New York.
10 And undistinguished, and inherent in that, that
11 number, that waste load allocation, is this
12 underlying assumption, this tradeoff, made
13 explicitly in the approval process, in the TMDL
14 development process, between the out of basin and
15 in basin sources.

16 JUDGE AVILA: So could I just --

17 JUDGE LYNCH: Can I --

18 JUDGE AVILA: Just --

19 JUDGE LYNCH: Go ahead.

20 JUDGE AVILA: Just so I am clear, your
21 position is, basically, under the regulation and
22 Clean Water Act Section 301, basically any NPDES

1 permit has to ensure compliance with downstream
2 water quality standards, right?

3 MR. BUKHARI: Correct.

4 JUDGE AVILA: Okay, thank you.

5 JUDGE LYNCH: And I had a question
6 about the assumptions. In reading your brief,
7 you said you had six reasons that led the Region
8 to decide to impose the enforceable nitrogen
9 limit.

10 And I was interested in, well, all of
11 them. But in Number 4 you indicated that the
12 Region started to have doubts about some of the
13 underlying data that led to some of the
14 assumptions in the TMDL. Could you tell us a
15 little bit more about that and how it affected
16 your decision making?

17 MR. BUKHARI: Judge, there has always
18 been uncertainty around the baseline from which
19 that 25 percent reduction had a, needed to occur.

20 So when the TMDL was approved in 2001,
21 and submitted to EPA in 2000, there is very
22 little contemporaneous data on the actual level

1 of nitrogen loading into Long Island Sound. The
2 actual level of nitrogen loading from out of
3 basin sources.

4 So those are largely derived from
5 estimates. The estimates, I believe, assumed the
6 design flow from these facilities. And assumed
7 that they were meeting a, discharging at a level
8 of 15.6 or 19.9 total, milligrams per liter of
9 total nitrogen.

10 And it became clear in subsequent
11 years as more data was collected that there was
12 uncertainty. And that baseline may have been set
13 too high.

14 And there is a 2004 and 2005 data set
15 that suggested as much. And so, we viewed that
16 as an additional reason not to take at face value
17 the representation from out of basin dischargers
18 that the 25 percent reduction was being exceeded
19 by the extent that it was. We couldn't actually
20 say that based on the data in the records we have
21 because the data actually did not exist. It
22 wasn't collected, you know, in the late 1990s and

1 early 2000s.

2 So we, for that reason, thought an
3 enforceable effluent limitation, a hold the load
4 approach, would provide an extra layer of
5 conservatism. Which is important here given
6 that, as I just mentioned, the pervasive and very
7 severe water quality impairments, cultural
8 eutrophication driven water quality impairments
9 that continue to unfold and present a clear, and
10 we think very present risk, to the restoration of
11 uses in Long Island Sound.

12 JUDGE LYNCH: And am I correct, I
13 believe I read this in your brief and in Save the
14 Sound's brief, that the Long Island Sound is not
15 meeting water quality standards?

16 MR. BUKHARI: Far from it, Your Honor.
17 We've detailed the Long Island Sound's annual
18 reports from Long Island Sound developed by the
19 Long Island Sound study that has tracked water
20 quality over many years in Long Island Sound.

21 And the conclusion has been that
22 while, as I said, really enormous progress has

1 been made, the nitrogen impairments and the
2 causes of the nitrogen impairments are
3 intractable. And we'll take sort of everything
4 on deck. All hands on deck.

5 And so that accounts for our recent
6 initiative, the Long Island Sound nitrogen
7 reduction strategy. And it accounts for our now
8 approach to controlling the out of basin load so
9 as to not exacerbate the existing impairments.

10 And I'll say, just in response to Mr.
11 Andes' arguments about perhaps forestalling the
12 imposition of necessary QBELs under Section 301
13 in NPDES permits, in lieu of more studies,
14 opening and revising the TMDL, it struck me as
15 problematic, to put it lightly, given that it has
16 taken EPA, an agency intensely focused and under
17 pressure from downstream states, to do something
18 on Long Island Sound this long, to actually
19 devise a strategy to impose a comprehensive
20 scheme to limit nitrogen into the bay, into Long
21 Island Sound, from out of basin sources.

22 JUDGE AVILA: So on --

1 MR. BUKHARI: And the prospect --

2 JUDGE AVILA: Excuse me. So on that
3 point, how do you respond to the Commissions kind
4 of notice and comment argument, that they really
5 were never on notice as to your approach that
6 showed up in the final permit?

7 MR. BUKHARI: I think that the
8 Petitioner's view on this point is based
9 primarily on a, perhaps wholly, on a factual
10 misunderstanding of the permit. And that is that
11 there was a shift, a sudden shift, a peremptory
12 shift, between draft, revised draft and final,
13 from eight milligrams per liter to five
14 milligrams per liter.

15 In fact, neither of the drafts were
16 derived using eight milligrams per liter. They
17 were derived by looking at actual effluent data,
18 discharge data from the facility from 2012 to
19 2016, that showed annual average nitrogen loading
20 of 2,279 pounds per day using annual averages.
21 And a maximum of 2,534 pounds per day using a
22 maximum annual average.

1 And so, those were the mass based
2 limits on the table in the revised draft permit.
3 The revised draft permit had a maximum annual
4 average number.

5 JUDGE LYNCH: Well, Counsel, I had a,
6 can I pause you for a moment?

7 MR. BUKHARI: Sure.

8 JUDGE LYNCH: I had a question about
9 the number in the revised draft permit. The
10 2,591.4 pounds per day.

11 I have not figured out how that was
12 derived. And both the Petitioner and the Region
13 point to a loading limits handout; well, the
14 Petitioner does. Administrative Record G-29.

15 And the chart lists Springfield and it
16 lists that specific number. And it's in Footnote
17 2 and it says, see the Springfield draft permit
18 for an explanation of the effluent derivation.

19 But I look at the permit and I don't
20 see that explanation. There is a discussion of
21 how to report it, but can you tell us, and then I
22 note, you know, on the limit basis if you look at

1 the handout, the summary table, that second
2 column is blank. Limit basis, milligrams per
3 liter design flow. Everybody else has a number
4 in there.

5 So, can you first explain why that
6 column is blank but then my bigger question is,
7 can you briefly describe how that specific number
8 was derived?

9 MR. BUKHARI: Yes, Your Honor. So
10 that number was derived using the maximum annual
11 average. And we looked at effluent data from the
12 facility from 2016. From 2012 to 2016. And we
13 sliced and diced that data in different ways.

14 Number one, we looked at the annual
15 average. We averaged the data and arrived at an
16 annual average of 2,279. That was one of the
17 numbers, proposed numbers, in the draft permit.

18 And then we looked at the data a
19 different way, and looked at the maximum annual
20 average. And that number, based on our
21 consideration of that data, was 2,534.

22 And I do believe that analysis is set

1 forth in attachments G and H of the original fact
2 sheet.

3 And with respect to your question on
4 the handout at the informational meeting, we were
5 in the midst of responding to comments when we
6 prepared that table on the Springfield permit.
7 And so, for ease of reference we pointed back to
8 the analysis that had been conducted in the final
9 permit and then brought forward into the revised,
10 into the draft permit and then brought forward
11 into the revised draft permit.

12 If you look at the number, if you
13 actually look at that 2,534 number, we realized
14 and this actually goes to Mr. Andes' point about
15 the use of eight or five, we realized that if you
16 back calculate from that number you would
17 actually end up with an effluent limitation of
18 4.43 -- 4.53 milligrams per liter.

19 But we decided, when looking at the
20 overall load coming from out of basin, to bump up
21 the Springfield allocation to five milligrams per
22 liter at design flow. Which accounts for that

1 upward revision you see in the final permit.

2 So that's the evolution of these mass
3 based limits. And these are not in dispute in
4 this proceeding.

5 JUDGE LYNCH: And how would the
6 Commission have anticipated, based on that
7 handout and then in your brief you point to a
8 PowerPoint, which is Administrative Record G-27,
9 on Page 10, how would they have anticipated that
10 they were going to get the five milligrams per
11 liter because in the handout it uses that
12 specific number, 2,591.4, which is different than
13 what they got.

14 And even in the PowerPoint, on Page
15 10, says, facilities greater than 50, which they
16 are the only one, it gives that specific number
17 again, 2,591.4. The five milligrams per liter is
18 for facilities greater than ten but less than 50.
19 And that --

20 MR. BUKHARI: And, Your Honor, and if
21 I could, just to, again, focus on what we
22 actually did here. EPA never imposed an eight

1 milligram per liter, or proposed to impose an
2 eight milligram per liter concentration based
3 limit on the facility. And we never proposed to
4 impose a five.

5 What we proposed to do in the revised
6 draft permit, and the final permit, was to impose
7 a mass limitation. And that's a through line
8 between all three permits, in fact. There are
9 options for mass limitations on all three
10 permits.

11 But the overarching scheme here is
12 that, number one, the sort of analytical object,
13 the subject at issue that was on the table in the
14 revised draft permit, was a determination by EPA,
15 clearly expressed on the record, that the out of
16 basin, the total aggregate out of basin load
17 needed to be held constant and could not
18 increase.

19 And inherent in that is a need to
20 allocate the available load. And so, the
21 subsidiary question, or the downstream question
22 so to speak, was what was a reasonable way of

1 allocating that total aggregate load such that
2 it's kept constant and no one, and would not
3 cause or contribute to water quality standard
4 violations that were ongoing.

5 And so, in order to do that -- go
6 ahead, Your Honor.

7 JUDGE LYNCH: Thank you. Well, what
8 about the Commission's claim that you actually
9 contradict yourself on the trajectory of the
10 loading anyway?

11 On the one hand you're saying it's
12 increasing, on the other it's decreasing.

13 MR. BUKHARI: Your Honor, we disagree.
14 It's a question of frame. Over the -- What
15 caught our attention from Connecticut and
16 comments on the draft permit was a demonstration
17 that over a long period of time, a 20-year,
18 basically a 20-year time horizon, in fact, loads
19 from the facility and loads from out of basin
20 were not decreasing.

21 They were, in fact, increasing over
22 time, and that gave us significant pause given

1 the existing water quality impairments and the
2 fact that it could be exacerbated by any
3 incremental loading from out of basin.

4 So for that reason we determined that
5 it was necessary in order to ensure, not only
6 consistency with the TMDL, but also consistency
7 with the downstream effect of today's water
8 quality standards it was necessary to impose an
9 effluent limitation to make sure that that
10 overall load didn't increase.

11 And when we were -- We were looking
12 specifically at Springfield, but Connecticut I
13 think very wisely commented that you can't just
14 look at this permit-by-permit because you are
15 looking at an aggregate load.

16 You have to define an overall
17 comprehensive scheme and allocation. I would
18 note on this point that number. I would make two
19 quick points on this point before, I see Judge
20 Avila, I think, wants to ask something, but two
21 quick points.

22 Number one, that this scheme from the

1 revised draft permit to the final permit was
2 based on size and location of the facility. The
3 Springfield plant is on the main stem of the
4 Connecticut River. It's the biggest contributor
5 to Long Island Sound from that river and there is
6 no attenuation or very little attenuation.

7 Number two, the discharger itself, the
8 Petitioner itself, never proposed an alternative
9 scheme that would meet the criteria set by EPA,
10 which was some allocative scheme that would
11 actually hold the out of basin load.

12 Instead, it proposed the concentration
13 only based limit of eight which would have
14 doubled the load into this already impaired
15 water.

16 Unacceptable from many quarters,
17 including the EPA and the downstream State of
18 Connecticut, and, indeed, Massachusetts, the
19 certifying state which issued an identical permit
20 with the same limit to this discharger.

21 JUDGE LYNCH: I have a question on the
22 compliance schedule for the nitrogen limit.

1 MR. BUKHARI: Okay.

2 JUDGE LYNCH: It looks to me like the
3 Massachusetts Water Quality Standards would allow
4 for a compliance schedule.

5 MR. BUKHARI: Okay.

6 JUDGE LYNCH: It looked to me like the
7 Connecticut Water Quality Standards would not.
8 Can you tell me what the Connecticut Water
9 Quality Standards provide in that regard?

10 MR. BUKHARI: Your Honor, I don't have
11 the text in front of me, but when we looked to,
12 when in the first instance we looked to whether a
13 compliance schedule was reasonable, we looked to
14 122.47 and determined whether such a compliance
15 schedule would be appropriate and whether
16 compliance would be achieved as soon as possible.

17 And given our -- Going back to your
18 original question about whether loads are
19 increasing or decreasing, again, there is a
20 question of timeframe.

21 Looking at the plant performance of
22 the Springfield POTW over the past five years we

1 in fact see that the loads are well below the
2 actual limit in here, in the permit.

3 And so a compliance schedule here
4 wouldn't meet the federal requirement of 122.47,
5 okay. It would not be appropriate in that case.
6 It would not be as soon as possible because
7 compliance is already being achieved.

8 I think there is an interesting
9 question where there is conflicting compliance
10 schedule requirements for authorization under a
11 certifying state and a downstream state.

12 I suppose that we would say that the
13 more stringent of the two would obtain --

14 JUDGE LYNCH: Well, we have case law
15 on that. Upper Blackstone dealt with that. All
16 right.

17 JUDGE STEIN: USGen.

18 JUDGE LYNCH: Yes. So, thank you.

19 JUDGE AVILA: Can I just ask, and I'm
20 sorry, you may have -- I think I got a little
21 confused in one of your answers and I just want
22 to be clear.

1 What role does the five milligram per
2 liter concentration play in setting the final
3 mass based effluent limitation in the final
4 permit? What role, if any?

5 MR. BUKHARI: Well, the role -- Well,
6 we wanted to, our overarching objective was,
7 number one, to define an allocative scheme that
8 ensured the overall nitrogen loading from out of
9 basin would not increase and then, two, to
10 allocate those loads according to the size and
11 the location of the facility and, number three,
12 to ensure that such limits could be achieved with
13 a readily available treatment technology, and,
14 number four, to make sure that there was some
15 equitable distribution of the load such that the
16 smaller dischargers didn't have to treat
17 disproportionately more than the bigger
18 dischargers.

19 So that five was a reasonable number
20 that the discharger could meet over time. They
21 don't have to meet it now. They have to meet it
22 at the design flow should they ever reach design

1 flow.

2 It addresses the significant concerns
3 we have about these large scale dischargers,
4 thousands of pounds per day going into the
5 Connecticut River, a stone's throw, 50 miles, but
6 a stone's throw given there is no attenuation,
7 into these very important waters of Long Island
8 Sound. So that was the overall genesis of the
9 five.

10 JUDGE AVILA: Thanks.

11 JUDGE LYNCH: I had a question about
12 optimization. In the response to comments at
13 Page 32 you wrote that efforts to optimize
14 nitrogen removal that the Commission, at a
15 minimum, must not increase its nitrogen discharge
16 loadings.

17 Increase over what, the WQBEL, the
18 historical loadings, or something else?

19 MR. BUKHARI: Our notion there was
20 that they should take all steps and we outlined
21 what those were to ensure that the overall
22 increase -- So the WQBEL is the WQBEL.

1 The mass based limit is the WQBEL and
2 so they are entitled to continue to discharge and
3 to continue to treat, you know, up until, up to
4 that mass based limit that is in the final
5 permit, but they need to take a series of steps,
6 which we have outlined with reasonable clarity,
7 to make sure that they minimize the discharge of
8 nitrogen to the extent possible.

9 So for that to be -- That's the -- And
10 we thought that that optimization requirement was
11 yet another conservative element of this permit
12 given that we actually, that we are only holding
13 the load.

14 We could have gone lower, but we
15 wanted to see how Long Island Sound would respond
16 once the various stressors were held constant and
17 the system had a chance to respond.

18 JUDGE LYNCH: Thank you. Shall we
19 move to your co-counsel?

20 MR. BUKHARI: Yes. Thank you, Your
21 Honor.

22 JUDGE LYNCH: Thank you.

1 MR. KNAPP: Good afternoon, Your
2 Honors. My name is Michael Knapp. I am a staff
3 attorney with EPA Region 1 in Boston. I will be
4 addressing the combined sewer overflow issues. I
5 will address Outfall 042 and any of the other CSO
6 issues the Board may wish for me to address.

7 In a moment I am going to walk through
8 some visual exhibits to help situate the Board's
9 analysis, but in order to frame that I would just
10 like to start out by pointing out that the Clean
11 Water Act at Section 402(q) mandates that all
12 permits for combined sewer systems shall conform
13 to the CSO policy. That is a matter of statutory
14 law.

15 The CSO policy defines, as the Board
16 clearly knows from argument already, defines that
17 CSO is a discharge from a combined sewer system
18 at a point prior to the treatment plant.

19 The question here is whether conveying
20 raw sewage to the very doorstep of the treatment
21 plant but ultimately discharging it to the
22 receiving water before that flow enters any

1 portion of the treatment plant process comes to a
2 point prior to the treatment plant and in EPA's
3 mind from both a legal and a technical rationale
4 that discharge is clearly a combined sewer
5 overflow.

6 So with that I would like to quickly
7 go through some exhibits to demonstrate what
8 Outfall 042 is. Could the Board just acknowledge
9 that you can see my screen, please?

10 JUDGE LYNCH: Yes.

11 MR. KNAPP: Thank you.

12 JUDGE LYNCH: Thanks.

13 MR. KNAPP: So this first schematic is
14 a schematic -- And these exhibits have been
15 provided to the Board and opposing counsel. This
16 first schematic was provided to the Region in
17 2017 by the Commission as part of an inspection.

18 I would like to point out here this
19 influent structure. This has been what the Board
20 was talking about with counsel for the Commission
21 --

22 JUDGE LYNCH: And what number document

1 is this just for the record?

2 MR. KNAPP: Yes, sorry. I have it
3 right here. This is Exhibit DD.

4 JUDGE LYNCH: All right. Thank you.

5 MR. KNAPP: Yes. And there is at the
6 beginning of this exhibit I have the citations in
7 there as well on the first page.

8 So this influent structure is what we
9 have been talking about so far this afternoon.
10 There are two things I would like to point out
11 here on this schematic.

12 First, this influent structure is
13 clearly located upstream or before the bar
14 screens. The bar screens are the process of a
15 treatment plant that remove the inorganics, the
16 solids, anything that could get into the
17 treatment system and potentially damage that
18 equipment, the treatment equipment.

19 Bar screens are what is --

20 JUDGE STEIN: Mr. Knapp?

21 MR. KNAPP: Yes?

22 JUDGE STEIN: Are the bar screens the

1 beginning of the headworks or are the primary
2 clarifiers the beginning of the headworks?

3 MR. KNAPP: The bar screens --

4 JUDGE STEIN: Am I asking the wrong
5 question?

6 MR. KNAPP: EPA's conclusion is that
7 the bar screens are the headworks of the
8 treatment plant.

9 JUDGE STEIN: Okay.

10 MR. KNAPP: Yes.

11 JUDGE STEIN: And are the bar screens
12 across the parking lot from the influent
13 structure?

14 MR. KNAPP: Correct, Your Honor.

15 JUDGE LYNCH: And what are the bar
16 screens doing? What are they removing?

17 MR. KNAPP: Any large solids, any
18 trash, anything inorganic, large objects that if
19 they went down and got into the primary
20 clarifiers or further on down the system could
21 potentially damage that treatment equipment.

22 JUDGE LYNCH: Thank you.

1 MR. KNAPP: And so I think it is
2 undisputed that this influent structure occurs
3 before there. I would also point out the label
4 here, Wet Weather Overflow to the Connecticut
5 River, while certainly not determinative, the
6 Region thinks the Commission's labeling there is
7 an accurate description.

8 One more quick schematic. This was in
9 our fact sheet, Exhibit C. This was another
10 schematic provided to EPA by the Commission and
11 what is notable here is that the influent
12 structure doesn't even occur on the process flow
13 diagram and that in the Region's perspective is
14 accurate and okay because that influent structure
15 is not part of the process, rather you see --

16 JUDGE LYNCH: Can you go back?

17 MR. KNAPP: Yes.

18 JUDGE LYNCH: Sorry. Go ahead.

19 MR. KNAPP: So --

20 JUDGE LYNCH: So what's happening in
21 the influent structure?

22 MR. KNAPP: The influent structure is

1 gathering the raw sewage from the various client
2 communities that the Commission serves. So it is
3 gathering that flow and then they have gates to
4 gauge the amount of flow going into the treatment
5 plant. So that's --

6 JUDGE LYNCH: And is that where the
7 mixing, what the Commission calls mixing, do you
8 dispute that mixing?

9 MR. KNAPP: No. Mixing --

10 (Simultaneous speaking.)

11 MR. KNAPP: The mixing of the raw
12 sewage, in our understanding, certainly occurs
13 there. We would dispute that that is any form of
14 treatment, that you are just mixing raw sewage
15 together.

16 What ultimately is coming out of 042
17 is still raw sewage. Yes, it is mixed between
18 all of the client communities, but it's
19 nonetheless raw sewage.

20 JUDGE LYNCH: And what about the
21 application of chlorine there in the influent
22 structures?

1 MS. DURR: Five minutes.

2 MR. KNAPP: Yes, Your Honor. So the
3 application of chlorine, that issue came up only
4 on petition, not in the comments, but what I
5 would say on that in our understanding --

6 JUDGE LYNCH: Can I pause on the time
7 for a moment?

8 MR. KNAPP: Yes.

9 JUDGE LYNCH: Is that five minutes
10 with the additional eight or?

11 MS. DURR: Yes.

12 JUDGE LYNCH: Okay. Thank you.

13 MS. DURR: Mm-hmm.

14 MR. KNAPP: So the application of
15 chlorine as we understand it from the
16 Commission's representation is for odor control.
17 That would do nothing to address the amount of
18 pollutants going out Outfall 042 or the water
19 quality impacts.

20 The impacts of the flow going out
21 Outfall 042 are no different than the impacts of
22 the discharges from any of the other 23 combined

1 sewer overflows in the system.

2 And, importantly, when counsel for the
3 Commission talks about chlorination, this is not
4 the same thing as disinfection, which is the last
5 stage of the actual treatment process for the
6 full flow.

7 That is important because if the
8 Commission was just putting chlorine in the
9 actual flow to go out that would be incredibly
10 problematic. The water quality impacts from
11 dumping chlorine into that flow without doing any
12 de-chlorination would present significant water
13 quality impacts.

14 So this is not disinfection, this is
15 not chlorination as you see in the full treatment
16 process.

17 JUDGE AVILA: Go ahead, Judge Stein.

18 JUDGE STEIN: So is it correct if
19 Outfall 042 came out of the bar screens, and I
20 don't even know if that is technically possible,
21 then you might have a different interpretation of
22 whether or not 042 is a CSO, is that correct?

1 MR. KNAPP: Your Honor, that would
2 present a more difficult question because that
3 would be, our common understanding is the bar
4 screens are the headworks and so that would occur
5 after the headworks of the treatment plant.

6 And so in that instance I think we
7 would hypothetically consider that a bypass, but
8 where there would be no bypass, where there would
9 be no secondary treatment, no primary treatment,
10 that would certainly be an unauthorized bypass
11 and, you know, that would never meet the elements
12 needed in order to be an approved discharge on
13 that case-by-case bypass approach.

14 JUDGE AVILA: I think that's --

15 JUDGE STEIN: So related to that -- Go
16 ahead, Judge Avila.

17 JUDGE AVILA: Go ahead. Go ahead.

18 JUDGE AVILA: All right.

19 JUDGE STEIN: What is it that flagged
20 the Region's attention about Outfall 042 in this
21 permit that didn't in prior permits?

22 I mean clearly you have explained that

1 you have made a shift here and I don't know if
2 there is an explanation that's in the record that
3 would help us understand what was really going on
4 in the Region's thinking.

5 I mean, obviously, this is something
6 that is quite important to the City, or to the
7 Commission. They wouldn't have spent three-
8 quarters of their argument on it. So I am just
9 trying to understand what it is that caused the
10 Region to re-think its approach here.

11 MR. KNAPP: Certainly, Your Honor. I
12 think part of the explanation there is, as I said
13 from the exhibits, there was an inspection done
14 in 2017 and as part of that inspection the
15 inspector gained a better understanding of how
16 exactly Outfall 042 works and where it is located
17 relative to the influent structure, and so we
18 gained a better understanding of what this
19 Outfall actually does and I think, you know, over
20 the lifecycle of a permit in a facility we gain a
21 better understanding of the facility.

22 We have a high flow management plan

1 that lays out how the facility handles high flows
2 that was submitted in 2016 that also gave us a
3 better understanding of how this facility works
4 and just taking in all of that information it was
5 clear to us that 042 had been improperly
6 permitted in prior permits.

7 JUDGE AVILA: So is your basic
8 response you got additional facts about what
9 Outfall 042 was doing or how it functioned
10 between the last permit, which was 15 years ago
11 or whatever, and now?

12 MR. KNAPP: I think that -- Yes, Your
13 Honor. I think that's right. I mean I can't
14 speak to exactly what facts were before the
15 Agency in 2009 when it was last permitted,
16 whether it could have, you know, should have
17 properly permitted as an Outfall then, but I
18 think we certainly have a better understanding
19 now between inspection and high flow management
20 plan, integrated waste plan, et cetera.

21 JUDGE LYNCH: Well is that
22 explanation, and I think it's around Page 53 in

1 the response to comments, the Commission is
2 saying that that's a shift, that originally you
3 said, well, it was an error that it wasn't
4 included in at least one earlier permit.

5 MR. KNAPP: Yes. The fact sheet --

6 MS. DURR: Time is up.

7 JUDGE LYNCH: All right. Well please
8 proceed with your answer.

9 MR. KNAPP: Certainly, Your Honor.
10 The fact sheet did identify that it was a shift
11 in position from treating 042 as a CSO.

12 The fact sheet also clearly stated at
13 Page 8 in Exhibit C that it was now our
14 understanding that 042 receives no treatment, and
15 so, yes, we acknowledge that it was a mistake.

16 I don't think in the fact sheet we got
17 into exactly in what ways that was a mistake.
18 Then in response to the detailed comments we
19 received from the Commission we spent several
20 pages explaining the analysis and our history to
21 permitting this Outfall.

22 JUDGE LYNCH: Thank you. I have one

1 other question and that is we've been, the Board
2 has been trying to determine the status of the
3 Commission's long term control plan. Has the
4 Region approved it or not?

5 MR. KNAPP: Your Honor, the Region has
6 approved portions of their long term control plan
7 as incorporated into their integrated wastewater
8 plan, but has not --

9 JUDGE LYNCH: And is there an approval
10 letter in the record that we can look at?

11 MR. KNAPP: Your Honor, I do not
12 believe we have -- I believe the most recent
13 letter that went out, it postdated this permit
14 issuance, but I can verify that, but there has
15 not been an approval of the entire integrated
16 wastewater plan, rather the Region has looked at
17 it on a project-by-project basis through our
18 Enforcement Division.

19 JUDGE LYNCH: Well, the long term
20 control plan is incorporated into the integrated
21 wastewater plan what is the status, have you
22 approved the long term control plan itself or

1 just portions of it?

2 MR. KNAPP: Not -- Just portions of
3 it, Your Honor.

4 JUDGE LYNCH: Okay, all right.
5 Thanks, again.

6 JUDGE AVILA: So which phase -- The
7 CSO policy talks about Phase 1, Phase 2 permits,
8 what phase are we under here in light of that?

9 MR. KNAPP: Yes. I would say, Your
10 Honor, that it is in Phase 2 where they are
11 working to actually implement their long term
12 control plan, but there is not a final approved
13 entire long term control plan. The Region has
14 taken an approach with its CSO communities. We
15 typically have not approved entire long term
16 control plans, rather we have identified project-
17 by-project bases and worked on it in kind of that
18 piecemeal fashion.

19 JUDGE AVILA: So with respect to the
20 portions that have been approved it's a Phase 2
21 kind of thing?

22 MR. KNAPP: I think that is an

1 accurate characterization, Your Honor.

2 JUDGE AVILA: Okay. Thank you.

3 JUDGE LYNCH: Any other Judges for
4 counsel, any other questions?

5 JUDGE STEIN: Yes.

6 JUDGE LYNCH: Yes.

7 JUDGE STEIN: Yes I had a question. I
8 wasn't entirely clear what the third speaker was
9 intending to address, or am I misunderstanding
10 that there was a third OGC speaker --

11 MR. KNAPP: We do not -- Your Honor,
12 we do not have a third speaker. We have had OGC
13 support on this case, but just --

14 JUDGE STEIN: Okay. I just wanted to
15 make sure that there wasn't another person who
16 had something to say who we hadn't heard from. I
17 have no further questions.

18 MR. KNAPP: Thank you, Your Honor.

19 JUDGE LYNCH: Thank you. So now we
20 will turn to rebuttal. And just to confirm we
21 have seven minutes for rebuttal, is that correct?
22 All right.

1 MR. ANDES: I believe so.

2 JUDGE LYNCH: Yes. All right. Please
3 proceed, Mr. Andes.

4 MR. ANDES: Thank you. Yes. I would
5 like to take that time to correct some
6 misimpressions created by what EPA just said.
7 First of all, there is absolutely a letter in the
8 record. It was Exhibit 14 to our petition but
9 also it was attached to our comments in which EPA
10 -- What EPA did with the CSO plan, to be clear,
11 was review the entire plan.

12 They then issued an administrative
13 order directing the Commission to implement the
14 first part of the plan. But the cover letter in
15 2014 said that the analysis in the plan was
16 consistent with the CSO policy, not pieces of the
17 plan, the entire plan was consistent with the CSO
18 policy and that plan did not call 042 a CSO, so
19 there is clearly an inconsistency.

20 For the Agency now to say, oh, we
21 inspected the plant and we realized something,
22 every, you know, the schematics we have talked

1 about were available in previous permits which
2 clearly illustrated that the influent structure
3 was an integral part of the plant. It has shown
4 chlorine additions, so that was not a secret. By
5 the way, during the EPA discussion I did have an
6 opportunity to consult with my client to clarify
7 the issue of the headworks and the Commission's
8 position is that the influent structure is the
9 headworks for the plant.

10 The bar screens are not the headworks,
11 they come after the headworks, so --

12 JUDGE LYNCH: So, Mr. Andes, I am
13 reading the September 18, 2014, cover letter and
14 it doesn't say that the plan is approved or that
15 it is consistent. It says some of the analysis
16 and some of the work is consistent with the EPA's
17 CSO policy and integrated planning framework.
18 That seems different to me.

19 MR. ANDES: Well, first, I should
20 mention EPA doesn't approve anyway. The other
21 issue is at no point during that process, and we
22 submitted a whole plan, we didn't submit pieces,

1 and we said we would do administrative orders by
2 phase, at no point in that process did EPA say,
3 hey, you really need to include 042 in this plan
4 because it's a CSO. We included all of the --

5 JUDGE LYNCH: Well, this letter was
6 issued just months after you submitted your plan,
7 correct?

8 MR. ANDES: I'm sorry?

9 JUDGE LYNCH: This letter was issued
10 just shortly --

11 MR. ANDES: Oh, we have been working
12 -- I'm sorry. We had been working on that long
13 term control plan for years, so that was a
14 culmination of a process. Remember also that in
15 2009 when certainly the Agency had done
16 inspections and was aware of how this plant
17 operated a specific comment was raised in the
18 permit for the CSOs in which someone said, hey,
19 042 should be included.

20 The Agency specifically rejected that
21 comment and said, no, it's not a CSO. There is
22 nothing factual that has changed here. The

1 Agency was fully aware of the situation, it knew
2 chlorine was being added, it knew that this was
3 part of the headworks at the plant. It is
4 connected to the rest of the plant by these four
5 major pipes. It is fundamental because what it
6 functions as, the influent structure, is a plant
7 protection line. It makes sure we don't kill the
8 rest of the plant. It's not like a CSO --

9 JUDGE STEIN: Can I ask you whether
10 the documents you just referred to are in the
11 record, is that a prior permitting proceeding you
12 are referring to?

13 MR. ANDES: Yes. And that is all in
14 the record.

15 JUDGE STEIN: That's in this record?

16 MR. ANDES: Yes.

17 JUDGE STEIN: Okay.

18 MR. ANDES: Yes. So --

19 JUDGE STEIN: Including the Region's
20 rejection of the comment?

21 MR. ANDES: Yes, absolutely.

22 JUDGE STEIN: Is that something you

1 relied on?

2 MR. ANDES: Yes, we did. We cited
3 that in our briefs.

4 JUDGE STEIN: Thank you.

5 MR. ANDES: And, in fact, we cited it
6 in our comments as well. It's also worth noting,
7 again to correct the misimpression, when the
8 Agency says, oh, we never used the number of
9 eight, that is just wrong. In the first draft
10 permit they basically had benchmarks of eight.
11 In the second draft permit they had a
12 concentration rate, a performance based mass
13 limit and an optimization target of eight.

14 At no point was five in there. At no
15 point did they multiply five times the design
16 flow and say, hey, what do you think of this.
17 This is an entirely new option that they put in
18 there. And by the way, when they say, oh, we're
19 doing this because of Connecticut, Connecticut
20 never asked for the five. Connecticut did want a
21 limit. Connecticut in their comments never asked
22 for a five limit. So to justify it based on

1 Connecticut DEEP's comments is just not accurate.

2 JUDGE LYNCH: So what I understand the
3 Region to be in part saying that this is a
4 logical outgrowth and there is no surprise
5 because, in fact, you, the Commission, was the
6 one that asked that the draft permit be
7 redesigned and based on the design flow and, in
8 fact, that was the change in the new approach
9 that they used.

10 MR. ANDES: That is a -- And, Your
11 Honor, that is a very misleading statement by
12 EPA. What we said about design flow was the fact
13 that in determining a limit for the Commission
14 that when they were looking at performance over
15 the last few years when we've had economic
16 downturn, et cetera, that it was not good to just
17 look at the numbers over the last few years and
18 say that's a limit you're going to have to meet
19 forever, you should look at what the plant was
20 designed for.

21 What they did in the final permit,
22 which had nothing to do with that, was they said

1 we're going to set up a structure where different
2 kinds of plants based on their design flow will
3 get different limits and bear in mind we have to
4 assume that at some point we will meet our design
5 flow, right. That's what the plant is designed
6 for. If we have economic growth that would be a
7 good thing. We would be able to better -- We
8 also have CSO control projects pending under our
9 long term control plan, which will result in less
10 CSOs and that flow being directed to the plant.

11 So, again, we need the room to move
12 forward in terms of toward our design flow. We
13 have to assume that at some point this plant will
14 meet its design flow and have to meet that five
15 and we can't do that.

16 JUDGE LYNCH: How close are you now to
17 operating at the design flow?

18 MR. ANDES: I don't have that number
19 handy, Your Honor, but given the economic
20 downturns over the last few years we are below
21 that.

22 JUDGE LYNCH: Okay.

1 MR. ANDES: But, again, as we have
2 discussed, the Agency has been inconsistent. It
3 is saying, oh, we are very concerned, they are
4 going up and we have to impose a limit and we
5 have said, well, wait a minute, if you are that
6 concerned and you are telling us we have to
7 impose controls, which they are saying, we have
8 to impose controls on this plant and require new
9 treatment technologies and we need time to do
10 that, and they said, oh, no problem, your
11 discharges are pretty low anyway. I mean you
12 can't have it both --

13 JUDGE STEIN: I'm going to just go
14 back to basics here. I mean you've had two, at
15 least two public comment periods and extended
16 public comment periods and a public hearing on
17 this nitrogen limit.

18 MR. ANDES: Yes.

19 MS. DURR: Time is up.

20 JUDGE STEIN: I'd like to continue
21 with my question.

22 JUDGE LYNCH: Yes, please.

1 JUDGE STEIN: And you had an
2 opportunity both in the first comment period and
3 in the second comment period to express concerns
4 about a mass based limit. The Region continued,
5 outside of the public comment process, to have,
6 you know, some further, you know, dialogue with
7 stakeholders, but I don't see how the issue of
8 this limit was not reasonably ascertainable. You
9 had a full opportunity to express concerns.

10 The ultimate limit that you got is not
11 fundamentally different from the limit that was
12 in, you know, the second version. I am having
13 trouble squaring your argument with what I
14 understand the federal case and Board precedent
15 to be in terms of when you need to reopen a
16 comment period. I mean you don't need to reopen
17 a comment period every time some little thing
18 changes.

19 JUDGE AVILA: Right.

20 JUDGE STEIN: So why is this so
21 fundamental that under the very discretionary
22 standard that is called for under EPA regulations

1 a further comment period would be required?

2 MR. ANDES: Well, Your Honor, if they
3 had finalized the revised draft permit, we had
4 expressed a lot of concern about that approach,
5 about that mass based approach, and we felt that
6 it was not compliant with the Clean Water Act.
7 And if they had issued that as a final we would
8 have still had those as arguments that it's not
9 compliant with the Clean Water Act, but we would
10 not have had an APA argument because we had
11 notice and we commented fully --

12 JUDGE LYNCH: Well, the APA argument
13 is new, isn't it?

14 MR. ANDES: Yes, because they changed
15 the approach entirely. As the EPA counsel said,
16 they came up with a comprehensive scheme, a brand
17 new approach which did not rely on their
18 performance numbers for the plant, which we
19 disagreed with anyway. They junked that whole
20 approach. They went with something entirely new,
21 which as we approach design flow will be an
22 enormous problem because we can't meet that five

1 and we showed them we can't meet that five. The
2 five was never raised as a possibility in any of
3 the previous rounds.

4 If the five had been raised as a
5 possibility in previous rounds we would have
6 absolutely said, look, this number might be a
7 little bigger than the last one, but we still
8 cannot meet it and you have no basis for the
9 five. Your arbitrary --

10 JUDGE LYNCH: So are you saying you
11 wouldn't have -- Are you saying you would or
12 wouldn't have challenged the 2018 revised draft?

13 MR. ANDES: We would have challenged
14 that on Clean Water Act grounds because we felt
15 that was also problematic in terms of meeting the
16 122.44 requirements, but we would not have had an
17 APA argument because we would have had a full
18 chance to comment on that draft.

19 JUDGE AVILA: So what --

20 JUDGE LYNCH: And what about the
21 original 2017 draft?

22 MR. ANDES: In the original, the first

1 draft had several different options in terms of
2 benchmarks and we had, in fact, noted at that
3 point that if there was a benchmark of eight
4 milligrams per liter we believed we could accept
5 that. Even though a benchmark is not really a
6 Clean Water Act thing we said we can see
7 achieving that and we thought we could accept it.
8 They --

9 JUDGE LYNCH: So as of the 2018 -- You
10 are saying as of the 2018 revised draft you would
11 have challenged that?

12 MR. ANDES: The second draft in 2018
13 we would have challenged it on Clean Water Act
14 grounds because we thought it was also
15 problematic, but not on APA grounds.

16 JUDGE LYNCH: And what argument have
17 you been precluded from making because of this
18 what you say is a new approach?

19 MR. ANDES: Well, EPA tried to argue
20 that we couldn't contest a new approach and there
21 is more information. The information that we
22 have now been able to put before the Board and

1 more information we would put together on a
2 technical level as well as the legal issues to
3 show them why that five based limit is not
4 appropriate. And, as I said, we had said all
5 along that if they want to revisit this, if they
6 want to do what the TMDL envisioned all along,
7 which was that eventually you would revise that
8 TMDL and determine watershed wide limits for
9 everybody, that is what we would want to
10 participate in and that would form the basis for
11 suitable limits for all sources.

12 I want to mention in that regard one
13 final thing, is just to clarify is we talked
14 earlier about is there a wasteload allocation
15 here. I understood the Agency to concede that
16 these numbers for Springfield and other out of
17 basin sources were assumptions of the wasteload
18 allocations in the TMDL. The 122.44(d)(1)(vii)(B)
19 clearly says that the limits here have to be
20 consistent with the assumptions and requirements
21 of any available wasteload allocation. So that
22 does apply here. And, again, we believe this is

1 not consistent with what is in that TMDL.

2 JUDGE AVILA: Can I ask one question?

3 I know we've gone well over, but could you just

4 tell me, I think this is just a one-sentence

5 answer, on the notice and comment APA point.

6 What permit term in the final permit do you claim

7 you didn't have an adequate notice and

8 opportunity to comment on?

9 MR. ANDES: The nitrogen limit and the
10 basis on which it was derived.

11 JUDGE AVILA: When you say nitrogen
12 limit what do you mean? What --

13 MR. ANDES: Well, the binding limit is
14 the 2794 pounds per day, which we can't meet. We
15 showed that and we believe that if that were
16 reopened for comment we would have more
17 information to provide to the Agency for their
18 decision-making process on that issue both
19 technical and legal.

20 JUDGE AVILA: But it's the 2794 number?

21 MR. ANDES: Yes.

22 JUDGE AVILA: Okay. Thank you.

1 MR. ANDES: Are we out of time?

2 JUDGE LYNCH: Thank you. Yes.

3 MR. ANDES: Thank you.

4 JUDGE LYNCH: Judges, do you have any
5 other questions?

6 JUDGE AVILA: I don't have any.

7 JUDGE STEIN: No questions.

8 JUDGE LYNCH: Well, thank you, and
9 thank you very much to all of the parties and to
10 the amici, I mean this has been extremely
11 helpful. At least from our perspective the
12 dialogue really does aid us in our deliberations.
13 So with that the Clerk may now close the
14 proceedings.

15 MS. DURR: This session of the
16 Environmental Appeals Board is adjourned.

17 JUDGE LYNCH: Thank you.

18 JUDGE AVILA: Thank you, counsel.

19 MR. ANDES: Thank you.

20 JUDGE LYNCH: Thanks.

21 (Whereupon, the above-entitled matter
22 went off the record at 3:12 p.m.)

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Before: USEPA/EAB

Date: 03-31-21

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was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate record of the proceedings.

Neal R Gross

Court Reporter

NEAL R. GROSS

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