

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

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ORAL ARGUMENT

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RE: :  
: :  
: NPDES Appeal No.  
CITY OF LOWELL : 19-03  
: :  
NPDES Permit No. MA0100633 :  
: :

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Thursday,  
February 20, 2020

Administrative Courtroom  
Room 1152  
EPA East Building  
1201 Constitution Avenue, NW  
Washington, DC

The above-entitled matter came on for  
hearing, pursuant to notice, at 10:30 a.m.

BEFORE:

THE HONORABLE KATHIE A. STEIN  
Environmental Appeals Judge

THE HONORABLE AARON AVILA  
Environmental Appeals Judge

THE HONORABLE MARY KAY LYNCH  
Environmental Appeals Judge

**APPEARANCES:**

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**ALSO PRESENT:**

EURIKA DURR, Clerk of the Board

1 P-R-O-C-E-E-D-I-N-G-S

2 (10:31 a.m.)

3 MS. DURR: The Environmental Appeals  
4 Board of United States Environmental Protection  
5 Agency is now in session for oral argument, in re  
6 City of Lowell, NPDES Permit Number MA0100633,  
7 NPDES Appeal Number 19-03.

8 The Honorable Judges Mary Kay Lynch,  
9 Kathie Stein, and Aaron Avila presiding. Please  
10 turn off all cell phones and no recording devices  
11 allowed. Please be seated.

12 JUDGE STEIN: Good morning, everyone.  
13 The Environmental Appeals Court is hearing oral  
14 argument today in an appeal filed by the City of  
15 Lowell, Massachusetts, of an NPDES permit issued  
16 by Region I, which has been docketed before the  
17 Board as NPDES Case Number 19-03.

18 The City challenges several aspects of  
19 the NPDES renewal permit that Region I issued.  
20 The argument will proceed in accordance with the  
21 Board's Order Scheduling Oral Argument, dated  
22 December 16, 2019.

1                   This is an important case, and the  
2 Board very much appreciates the time and the  
3 effort each of you has expended in preparing  
4 briefs before the Board and to come to  
5 Washington, D.C. today for this argument.

6                   We ask that you think of the next hour  
7 or so as an opportunity to have a conversation  
8 with us about the important issues in the case.

9                   You should assume that we've read all  
10 the briefs and that we have closely examined the  
11 record. We therefore are likely to ask you  
12 several questions that will assist us in our  
13 deliberations, and you shouldn't assume by these  
14 questions that the Board has made any decisions  
15 as to any of the issues or arguments in this  
16 case, as we have not.

17                   But we are going to use the  
18 opportunity to listen, to probe your legal  
19 positions; to be sure we understand your  
20 position, and the legal and the record support on  
21 which the permit is based.

22                   As you know, there are a large number

1 of issues in the time allotted, so we ask that  
2 Counsel and the Representatives come promptly to  
3 the podium in the time allotted.

4 There is no photographing, filming, or  
5 recording of any kind that is permitted in the  
6 courtroom, and we ask that everybody honor that.

7 A few additional items: If  
8 Plaintiff's Counsel or Petitioner's Counsel  
9 intends to reserve time for rebuttal, please  
10 advise is at the beginning of the argument.

11 And before we begin, I would like each  
12 party to introduce themselves and who is  
13 accompanying them at the panel. I'm going to  
14 start with the City of Lowell.

15 MR. CALAMITA: Thank you, Your Honors.  
16 My name is Paul Calamita. I'm here on behalf of  
17 the City of Lowell.

18 I'm with the firm of AquaLaw, and with  
19 me is my colleague, Amanda Waters, also with  
20 AquaLaw.

21 MR. KNAPP: Good morning, Your Honors.  
22 My name is Michael Knapp, Assistant Regional

1 Counsel with EPA Region I's Office of Regional  
2 Counsel.

3 With me this morning is my colleague,  
4 Cayleigh Eckhardt. Also with me are my  
5 colleagues Samir Bukhari of EPA Region I ORC and  
6 Pooja Parikh of the Office of General Counsel.

7 JUDGE STEIN: Thank you. Mr.  
8 Calamita, you may begin. And are you reserving  
9 time?

10 MR. CALAMITA: Your Honor, if I may  
11 reserve five minutes.

12 Good morning, Your Honors. Again, I  
13 am Paul Calamita with AquaLaw here on behalf of  
14 the City of Lowell, Massachusetts.

15 Lowell is a small, poor community that  
16 is trying its utmost to protect public health and  
17 the environment. We don't want to be here, but  
18 we are compelled to be here.

19 Our requests to meet with EPA before  
20 permit issuance were denied. Personally, I think  
21 if we'd had that opportunity either you would  
22 have fewer issues before you or maybe no issues

1 before you today.

2 We do not seek to avoid any necessary  
3 or appropriate requirements. We do seek a permit  
4 that is internally consistent, which will allow  
5 us to successfully provide the maximum treatment  
6 possible, particular of wet weather flows.

7 For example, I will explain today that  
8 the flow limit in the permit, the failure to  
9 authorize a secondary bypass, the daily maximum  
10 bacteria limit, hinder our ability to maximize  
11 the treatment of flow, to provide a net  
12 environmental benefit.

13 In other areas, such as the  
14 requirement that CSO discharges meet water  
15 quality standards today, it's impossible. We try  
16 hard, we work in good faith, we're not good at  
17 the impossible.

18 So we seek consistency and fairness in  
19 the permit. We also are here to raise certain  
20 legal concerns with a couple of the issues.

21 I'd like to touch on six of the  
22 issues, six of the ten issues that we've raised.

1 The first is phosphorous.

2 JUDGE STEIN: The first is  
3 phosphorous?

4 MR. CALAMITA: Phosphorous. You've  
5 heard phosphorous before, so what's different?  
6 We think three things are different. The first  
7 is, EPA continues to impose the same 0.1  
8 milligram per liter Gold Book value.

9 They may refer to it as a criteria,  
10 and it is not. It is a value.

11 JUDGE STEIN: Before you go into the  
12 Gold Book as a criterion, I do have a question.  
13 So if I understand the Region's Response to  
14 Comments, in response to a comment that there was  
15 no water quality criterion in the Gold Book, the  
16 Region explained that the Gold Book provided a  
17 rationale for the water quality criterion in  
18 various circumstances.

19 Can you point to where, if at all, the  
20 City responded to that argument in its Petition?

21 MR. CALAMITA: Absolutely. That  
22 argument goes to the EPA Regulation 12444

1 D(1)(6).

2 Our position is, and I think it's  
3 EPA's position, that D(1)(6), which both parties  
4 have briefed in their positions, EPA's position  
5 is they meet subsection A and B and D(1)(6).

6 Our position is that they don't meet  
7 either, and I'm happy to explain that to you.

8 JUDGE LYNCH: But where in your record  
9 or brief do you actually confront that article?  
10 That argument?

11 MR. CALAMITA: City Petition at 8,  
12 Your Honor, and EPA Responded at 9. So City  
13 Petition at 8.

14 JUDGE AVILA: And that's Subpart A?  
15 I saw Subpart B.

16 MR. CALAMITA: Your Honor, our  
17 position is that they don't meet either.

18 JUDGE AVILA: Okay.

19 MR. CALAMITA: We've briefed both.

20 JUDGE AVILA: Okay.

21 JUDGE LYNCH: Counsel, when I look at  
22 your Petition, it just restates a conclusory

1 statement. There's no analysis or, in fact,  
2 argument.

3 Is there any place I can look in the  
4 record for your actually confronting the Region's  
5 Response to Comments?

6 MR. CALAMITA: Your Honor, our  
7 position is that EPA didn't impose a limit that's  
8 consistent with that standard. EPA has responded  
9 at page --

10 JUDGE LYNCH: Can you show me where in  
11 the Comments the regulations were referenced? I  
12 didn't see that.

13 MR. CALAMITA: Where in our permit  
14 comments?

15 JUDGE LYNCH: Correct. I didn't see  
16 any comment that referenced the regulations.

17 MR. CALAMITA: Your Honor, we  
18 submitted 33 pages of comments that generally  
19 pointed out that EPA's, the Gold Book number, was  
20 not promulgated and it was not consistent with  
21 EPA's regulations.

22 I apologize. I'd be looking through

1 it now to go back through our petition to offer  
2 you more. I would ask that you allow me to  
3 continue to explain briefly why we don't think  
4 they've met the regulation.

5 And if you later conclude that the  
6 City of Lowell has not properly teed up these  
7 issues so that the Board can hear them, you'll  
8 rule how you will.

9 JUDGE LYNCH: Go ahead.

10 MR. CALAMITA: Thank you. So the  
11 first point, I told you there were three things  
12 that are new about our challenge to the Gold  
13 Book.

14 The first thing is that the Gold Book  
15 is four pages. There's no book. It's four  
16 pages. That's all it is as to fresh water.  
17 There's just four pages to it.

18 And it finishes with, no national  
19 criterion is presented for phosphate phosphorous  
20 for the control of eutrophication.

21 Our position is there's been hundreds  
22 of millions of dollars imposed on regulated

1 entities based on these four pages from 1986 or  
2 so that's never been promulgated.

3 JUDGE AVILA: Can I just inquire  
4 there. I mean, as I looked at the Facts Sheet at  
5 23 to 24 and the Response to Comments at 9 to 10,  
6 it looked like the Region looked at a variety of  
7 sources, one of which is the Gold Book, the  
8 Ecoregional Nutrient Criteria, and Nutrient  
9 Criteria Guidance.

10 So based on that, I mean, didn't they  
11 look at a wide variety of things and then  
12 ultimately decide that the Gold Book standard was  
13 the right one to use?

14 MR. CALAMITA: They did, Your --

15 JUDGE AVILA: They are using -- you  
16 seem to be arguing only using the Gold Book.

17 MR. CALAMITA: Bear with me just one  
18 second.

19 JUDGE AVILA: Okay.

20 MR. CALAMITA: Your Honor, none of  
21 those sources you just cited have been  
22 promulgated, Your Honor.

1                   And so our view is that what's  
2 different about this case is that it's yet  
3 another 0.1 Gold Book value with many more to  
4 come.

5                   And at some point, that regulatory  
6 branch will fail, because the public safeguards  
7 of rulemaking around the 0.1 milligram Gold Book  
8 value have been avoided intentionally and we  
9 believe illegally.

10                  JUDGE LYNCH: But Counsel, can I pause  
11 you for a moment? The Region responded that the  
12 Gold Book is not a rule, and they explained how  
13 they used it and other sources.

14                  And the only thing I saw in your  
15 petition and reply is just a repetition of your  
16 argument, not really analyzing or confronting  
17 their response.

18                  MR. CALAMITA: You're correct, Your  
19 Honor. Their response was we do this  
20 consistently. That's their word. Consistently.  
21 We have a consistent process --

22                  JUDGE LYNCH: They had other

1 responses, but go ahead.

2 MR. CALAMITA: -- to apply the Gold  
3 Book value, and our position is we don't care.  
4 It's not promulgated. That's number one.

5 Number two, going to the regulation,  
6 there are two potential parts of the regulation  
7 of D(1)(6). There's A and B. A identifies three  
8 specific state documents.

9 One is a state-proposed criterion,  
10 which we don't have. A second is an explicit  
11 state policy on phosphorous, which we don't have.  
12 And the third is a state regulation interpreting  
13 the narrative water quality standard at issue,  
14 which we don't have.

15 What it goes on to say in A is, EPA  
16 can supplement, not supplant, supplement these  
17 three state documents with other information,  
18 include EPA criteria documents.

19 We don't believe EPA fits under A,  
20 because they're taking these four pages of the  
21 Gold Book to supplant, not supplement, the three  
22 very specific state items. That's A. B says --

1 JUDGE LYNCH: Can I pause you on A?

2 MR. CALAMITA: Yes, Your Honor.

3 JUDGE LYNCH: On Page 4 of your  
4 petition, you claim that the Region erroneously  
5 and illegally applied the state narrative  
6 standard to arrive at the phosphorous limit.

7 Isn't it the case that Massachusetts  
8 issued an identical permit?

9 MR. CALAMITA: Yes, Your Honor, but  
10 not pursuant to EPA's regulation. There is no  
11 state proposed criteria --

12 JUDGE LYNCH: But in interpreting  
13 their narrative criteria, presumably.

14 MR. CALAMITA: We don't find  
15 presumably in the regulations or in the briefs,  
16 Your Honor, on this point. We feel EPA fails to  
17 satisfy --

18 JUDGE LYNCH: I was asking about the  
19 state issuing an identical permit with the same  
20 phosphorous limit in it.

21 MR. CALAMITA: Yes, Your Honor. But  
22 again, I don't believe that state permit

1 constitutes the three things, the three very  
2 specific things, that the EPA regulation  
3 identifies. It doesn't say, or state permit.

4 JUDGE STEIN: So let me ask a separate  
5 but related question. So the Gold Book, which is  
6 guidance, and it's been used by EPA for many  
7 years as guidance, as a number of states, does  
8 have some data in it as to why it is the 0.1  
9 number is recommended.

10 Did you anywhere in your comments or  
11 in your petition provide any counter to that  
12 particular study, which is cited by the Gold Book  
13 as guidance?

14 MR. CALAMITA: No, Your Honor. There  
15 is one 1973 study which we don't think says much  
16 of anything, but we are not here to challenge EPA  
17 on the science.

18 On the phosphorous limit, we think it  
19 needs to be promulgated.

20 Second, we don't think it meets the  
21 regulation, and the second part of that  
22 regulation is B, which says a national, a 304(A)

1 criterion, they don't make B, even though they  
2 cite it, because of the very last sentence of the  
3 Gold Book, which says this is not a national  
4 criterion.

5 JUDGE STEIN: But that goes back to  
6 the first question that I asked you, which is  
7 that in the Response, and maybe, you know, you'll  
8 have an answer after you look at the record, but  
9 it seems to me that in its Response to Comments,  
10 the Region in fact gives a rationale for the  
11 water quality standards.

12 And that's the question that I think  
13 we've been asking of whether you gave us, if  
14 there is something else that you cited to, I  
15 think it would be helpful for us to know that.

16 MR. CALAMITA: Your Honor, I can't  
17 help you. The focus of our disagreement with EPA  
18 was the non-promulgation and not meeting the  
19 regulation.

20 We were not challenging the scientific  
21 information that they put in the record, even  
22 though, quite frankly, we don't think it was

1       adequate. I should also --

2                   JUDGE LYNCH: Counsel, are you -- I'm  
3 not clear. Are you challenging the Gold Book or  
4 the application of the Gold Book in this case?

5                   MR. CALAMITA: We are challenging the  
6 application of the Gold Book because it is  
7 unpromulgated, number one.

8                   Number two, it doesn't satisfy either  
9 A or B in EPA's regulation. The use of it is  
10 inconsistent with those very specific  
11 requirements in A or B.

12                   In B, it's by its own terms. It's not  
13 a national criterion. So they've got to find  
14 their way into A, and we don't think they've done  
15 that.

16                   JUDGE STEIN: I'm going to suggest we  
17 move on. Just, we have five other issues, so  
18 we've spent a lot of time on the --

19                   JUDGE LYNCH: I have one other  
20 question in this area, and that is, what's the  
21 current state of your reactive model that you  
22 reference in your petition on Page 9?

1 MR. CALAMITA: I believe the model's  
2 been developed, Your Honor. I'm not 100 percent  
3 sure, but I think the City has continued to work  
4 on that.

5 And I should have mentioned that the  
6 City is in the process, we're close to completing  
7 a phosphorous upgrade. So I told you, we're not  
8 trying to avoid necessary or appropriate  
9 requirements.

10 As we are on the cusp of finishing  
11 that upgrade, we're getting a Gold Book based  
12 number, then there may be an ecoregion number.  
13 And then some time in the future we may get a  
14 promulgated water quality standard.

15 I will point out also, in this permit,  
16 the only pollutant limit, there are dozens of  
17 pollutant limits, and the only one that's not  
18 promulgated is phosphorous, and we don't  
19 understand why that should be.

20 I'd like to turn to effluent flow, the  
21 flow limit. This is part of the internal  
22 inconsistency.

1                   On one hand, we're a wet weather  
2 facility. We want to maximize CSO flows so we  
3 minimize the discharge of raw sewage.

4                   On the other hand, the Region put a  
5 flow limit on us, which we have violated in the  
6 past because we tried to do the right thing by  
7 treating flow rather than letting it discharge  
8 untreated.

9                   EPA's response to our violating that  
10 limit is very instructive. They didn't fine us.  
11 They gave us an administrative order that waived  
12 the limit. We got an administrative order that  
13 said for nine years --

14                   JUDGE STEIN: Did it waive the limit  
15 or did it simply provide that for a period of  
16 time, you simply needed to monitor?

17                   MR. CALAMITA: For nine years, it  
18 changed the limit to monitor only, from 32  
19 million gallons to monitor only in --

20                   (Simultaneous speaking.)

21                   JUDGE STEIN: Did it change the limit  
22 or did they simply exercise enforcement

1 discretion to allow -- I mean, I don't know that  
2 they went in and changed the limit.

3 MR. CALAMITA: You're correct, Your  
4 Honor. They exercised enforcement discretion.  
5 They were so upset that they said, we're going to  
6 exercise your enforcement discretion here, give  
7 you a monitor only, and keep doing it. They  
8 didn't say, oh, no, no, stop. This really  
9 matters.

10 JUDGE LYNCH: What are you quoting  
11 from? Where is this in the record? The  
12 enforcement order is in the record, but you're  
13 testifying about what the Region said or thought.

14 MR. CALAMITA: You're correct, Your  
15 Honor. I stand corrected. The document speaks  
16 for itself. The document says the document  
17 imposed an indefinite, until the order is  
18 modified or --

19 JUDGE LYNCH: The word in the order is  
20 interim.

21 MR. CALAMITA: An interim --

22 JUDGE LYNCH: Until a new permit is in

1 place.

2 MR. CALAMITA: Right. That turned out  
3 to be nine years, Your Honor. And our point is  
4 that EPA points to nothing in that nine-year  
5 period where exercising enforcement discretion,  
6 to not enforce that limit was a problem.

7 We have to, the permit says we have to  
8 meet all limits. And so we've got a provision  
9 that says maximize flow, and a provision that  
10 says don't exceed 32 MGD as an annual average.

11 So in a wet year, what are we to do?  
12 In November, are we to stop taking wet weather  
13 flow so that we protect and make sure we don't  
14 exceed this arbitrary number? Environmentally,  
15 that would be the wrong answer.

16 JUDGE STEIN: If I understand  
17 correctly, the limit that you're objecting to was  
18 in your prior permit, is that correct?

19 MR. CALAMITA: That's correct.

20 JUDGE STEIN: And part of what -- I  
21 understand the flow argument that you're making.

22 I've read your submissions, but I'm

1 also looking at the regulations in 122.45(B)(1)  
2 that seems to require that permit effluent limits  
3 be calculated based on design flow.

4 So in light of that language, why was  
5 it improper for the Region -- maybe your argument  
6 isn't that it's improper -- why was it improper  
7 given that the Region was required to look at  
8 design flow?

9 And it looks like they looked at the  
10 maximum design flow in calculating these limits?  
11 Why is that improper in light of the regulatory  
12 requirements?

13 MR. CALAMITA: It's not improper at  
14 all, Your Honor. Every state and EPA Region  
15 looks at design flow when they calculate permit  
16 limits.

17 So they take design flow into account  
18 in calculating permit limits. They don't make  
19 flow a permit limit itself. They take it into --

20 JUDGE STEIN: So why was it okay in  
21 2005, but it's not okay in 2020?

22 MR. CALAMITA: It was an error. It's

1       been an error all along, Your Honor. And for  
2       example, we sit here in the District of Columbia.

3               We have the world's largest advanced  
4       plant. The permit's in the record. It has no  
5       flow limit. D.C. and EPA Region III took design  
6       flow into account and wrote a permit that didn't  
7       have a flow limit.

8               JUDGE STEIN: I mean, I understand  
9       that not all NPDES permits have flow limits, but  
10       I'm trying to sort of understand for the City of  
11       Lowell's permit why is it improper, you know,  
12       unlawful, or a clear error, for that limit to be  
13       there? I mean, I understand that some of this  
14       kind of segues into some of your other issues  
15       about CSOs and the long-term control plan.

16               But with respect to that limit, which  
17       was based on the regs, I'm assuming that that  
18       design flow was part of what led, at least from  
19       the briefs, the Region to set the limit where it  
20       set it.

21               MR. CALAMITA: That's correct. And  
22       any flow above the 32 still has to meet the same

1 32-based limits, which means if our flow goes  
2 above 32, our concentrations have to come down to  
3 still meet our mass limits.

4 So there's no scenario where higher  
5 flow jeopardizes water quality, and that's why we  
6 don't have a flow limit here in the District or  
7 Columbia or in a whole number of states.

8 JUDGE LYNCH: Well, Counsel, I have a  
9 question about your argument in your reply brief  
10 that you don't need to worry about flow because  
11 the mass limits in the permit will take care of  
12 it.

13 But isn't it the case that not all the  
14 parameters have mass limits, including  
15 phosphorous, which is a concentration limit?

16 MR. CALAMITA: Your Honor, we were  
17 given, we still would have to meet that  
18 phosphorous concentration. And so if our flows  
19 are higher --

20 JUDGE LYNCH: I'm asking about your  
21 argument that mass limits take care of any flow  
22 issue.

1 MR. CALAMITA: We think all the  
2 pollutants that are mass dependent, that where  
3 mass matters in the permit, have mass limits.  
4 It's no different than here in the District of  
5 Columbia. They --

6 JUDGE LYNCH: And that does not  
7 include phosphorous, is that correct?

8 MR. CALAMITA: That does not include  
9 phosphorous, correct?

10 MR. CALAMITA: That does not include  
11 phosphorus.

12 JUDGE LYNCH: One other question in  
13 your brief on Page 8 to 9 of your reply brief you  
14 say exceedance of flow limit only happens during  
15 wet weather. Where in the record can I look to  
16 substantiate that?

17 MR. CALAMITA: Your Honor, the EPA  
18 Facts Sheet, Fact Sheets normally specify a dry  
19 weather flow. It did not. I did look for that  
20 last night.

21 The reality is that these -- the flow  
22 has to come from somewhere, and at these plants,

1 it's when rivers are high or it's raining. And  
2 in either of those contexts, you can't be at a  
3 drought condition.

4 And so that's why there isn't a flow  
5 limit here in D.C. and in so many of these wet  
6 weather facility permits because it's not a  
7 concern.

8 JUDGE LYNCH: I was asking for the  
9 record's support for your specific statement.

10 JUDGE STEIN: So I'm looking at the  
11 clock here, and you have several more issues. I  
12 am going to ask the clerk to add ten minutes to  
13 your time, and to do the same for the Region,  
14 because we want to be sure that you have an  
15 opportunity to give us what you came here to do.  
16 But I'm going to suggest we move on to --

17 JUDGE AVILA: Could I ask one question  
18 about the flow reg?

19 JUDGE STEIN: Sure.

20 JUDGE AVILA: Just putting aside the  
21 regulation, I thought in the Facts Statement, the  
22 Facts Sheet and the Response to Comments, the

1       Region said that without the flow rate the  
2       effluent criteria may not be protective of the  
3       water quality standards, and they go through why,  
4       the dilution problem and things like that.

5                 And I didn't see anything in your  
6       petition addressing that part of the issue. So  
7       is there anything that I'm missing on that, on  
8       the science part of it?

9                 MR. CALAMATI: Your Honor, we noted  
10       that the concern of high flow during sub-drought  
11       river conditions are mutually exclusive.

12                And what I would ask on the flow issue  
13       is what's different about Lowell versus the  
14       District of Columbia? Sure, we're smaller and  
15       poorer, but we're both CSO communities.

16                We have the same permit limits. Why  
17       is there no flow limit here? I hope Mr. Knapp  
18       will explain that to you.

19                And whatever your concern is about the  
20       science, why that concern isn't here in a permit  
21       that's gone before this Board several times and  
22       is scrutinized heavily, but Lowell needs it.

1           As I stand here today, I honestly, I  
2 do not know the answer and couldn't explain to my  
3 client. The big thing to think about here,  
4 though, is if we really comply with this flow  
5 limit, we will throttle our plan in wet years.  
6 And that will require untreated sewage to go out.

7           Lowell hasn't done that. We have done  
8 the right thing, and that's why we had that  
9 enforcement order. But while we're doing the  
10 right thing of intentionally not complying with  
11 our flow limit, we also think EPA should do the  
12 right thing and maybe we ought to get a little  
13 bit of the D.C. water treatment on flow.

14           On bacteria, the key issue here is we  
15 have an instream single sample -- not daily max -  
16 - an instream single sample on a number of 235.

17           And the Region's position is that  
18 there's some Massachusetts regulation that  
19 requires, that mandates, a daily maximum permit.

20           We can't find it. There's nowhere  
21 we've seen in any Massachusetts regulation that  
22 says a POTW or any discharger has a daily maximum

1 for bacteria. We don't see it.

2 And as a matter of fact, the Region  
3 didn't do that. The Region manipulated it, but  
4 didn't, as I'll explain in a second, but didn't  
5 manipulate it consistent with the regulation that  
6 you've heard several times before about monthly,  
7 weekly limits, unless impracticable, for POTWs.

8 The manipulation was, they took a  
9 single sample 235, and they changed it into a  
10 daily maximum. Daily maximum is not single  
11 sample. We could take -- these are grab samples.  
12 We could take four or five of them and they made  
13 the number 409.

14 So they had no qualms about doing some  
15 math and manipulating the single sample into a  
16 daily max at a different number.

17 What they didn't do was the proper  
18 math of monthly, weekly limits unless  
19 impracticable, and the --

20 JUDGE LYNCH: But Counsel, did you --  
21 what the Region cites to is the Massachusetts  
22 regulation, which talks about a single sample

1 maximum. Did you review that?

2 MR. CALAMATI: I have. That is the  
3 water quality standard, Your Honor.

4 JUDGE LYNCH: And so, what's the  
5 difference between that and the daily limit?

6 MR. CALAMATI: As the court in the  
7 Anacostia case, the Federal District Court here  
8 in the Anacostia bacteria TMDL case so eloquently  
9 said is just because you have a water quality  
10 standard or even a TMDL implementing that  
11 standard, fear not, it doesn't mean it gets  
12 copied into the permit.

13 And as a matter of fact, it didn't.  
14 The 235 was not copied into the permit. It would  
15 have been a single sample 235. It's not. It's a  
16 daily max 409.

17 And our only point is, while they were  
18 doing that math, they should have respected the  
19 regulation. They can calculate a weekly number,  
20 just like a lot of other states have, just as  
21 easily as they calculated that daily maximum.

22 JUDGE LYNCH: And then in your

1 petition and in reply, you raise an argument that  
2 the Region had the burden to show that the weekly  
3 limit was impracticable.

4 That looks like a new argument to me.  
5 I did not find that in any of the comments.

6 MR. CALAMATI: Your Honor, we raised  
7 that argument in relation to the three limits, a  
8 daily maximum total suspended solid limit, BOD  
9 limit, and bacteria limit.

10 And I just looked at this yesterday.  
11 On the daily maximum and BOD, we very clearly  
12 laid out that regulation on Pages 6 or 8 of our  
13 comments, and then two pages later when we got to  
14 the bacteria daily maximum, we said for the same  
15 reasons noted above.

16 We didn't regurgitate the whole thing,  
17 but we did incorporate the same argument that we  
18 use for the two daily maxes by the way that were  
19 removed from the permit.

20 This is the daily max that's not  
21 removed, and we would just suggest that you need  
22 to find somewhere in the regulation that commands

1 a permit limit of daily max for their argument to  
2 prevail on that.

3 One of the major issues in the permit,  
4 this is the impossible, is there's language in  
5 the permit that requires that Lowell's CSO  
6 discharges meet water quality standards now.

7 And of course, we don't. That's  
8 impossible. And EPA, the applicable, it says we  
9 have to -- I'm sorry, the CSO policy says we have  
10 to apply with the applicable water quality  
11 standards no later than the date allowed under  
12 the State Water Quality Standards. Same language  
13 that EPA cites. It's at their response at 21, so  
14 they acknowledge that.

15 The Massachusetts Compliance Schedule  
16 Language requires compliance at the earliest  
17 practical time as determined by the Department.

18 And so Lowell sits here, by the way,  
19 in a city that doesn't have to meet water quality  
20 standards today for their CSO discharges. They  
21 got a compliance schedule. You have that case.

22 Lowell sits there and says, well, what

1 was the date? Where did Massachusetts determine  
2 the earliest practicable time? And how is it the  
3 past? Because we're still building our program.  
4 We don't even have an approved long-term control  
5 plan.

6 The other thing is the CSO policy  
7 further speaks to this. It says as part of  
8 developing that long-term control plan, the state  
9 and EPA and the community should work together to  
10 figure out what the right water quality standards  
11 are and whether they need to be tailored.

12 So our position is we're not even sure  
13 yet what the right standards are as contemplated  
14 by the policy.

15 JUDGE STEIN: But isn't this being  
16 dealt with in the 2017 Enforcement Order, that I  
17 had understood that an enforcement order had been  
18 issued and certain requirements were put on the  
19 City of Lowell and that Lowell's in the process  
20 of submitting various things that are required by  
21 that Enforcement Order? I don't understand why --

22 JUDGE LYNCH: The Order required

1 Lowell to submit their integrated plan, including  
2 CSO plan, which the previous one you submitted  
3 was not approved because it was deficient.

4 It required you to submit that in  
5 December 2019. Has that happened? Have you  
6 submitted it?

7 MR. CALAMATI: I don't know, Your  
8 Honor, because that's not part of what's before  
9 us, but the question is, the compliance  
10 schedule's a matter of state discretion, and  
11 Massachusetts says compliance at the earliest  
12 practicable time.

13 And so I'm just asking when was that?  
14 When was the earliest practicable time? Because  
15 we're not aware of it.

16 And again, the CSO policy has other  
17 provisions in it that suggest that we haven't  
18 even identified what those water quality  
19 standards are.

20 And then equally importantly, the  
21 policy in Section 4 identifies two types of  
22 permits language, Phase 1 and Phase 2.

1                   And the Phase 2, which is when you  
2                   have an approved long-term control plan, that's  
3                   the first time it says numerical limits.

4                   JUDGE STEIN: So what with respect to  
5                   the CSO, what is it that you're challenging? The  
6                   Region's refusal to sign off on your secondary  
7                   bypass for (unintelligible)?

8                   MR. CALAMATI: No, this issue is the  
9                   provision in the permit that says the CSO  
10                  discharges can't violate water quality standards.

11                  JUDGE LYNCH: Well, the policy  
12                  requires that to be in a permit, on Page 18696 of  
13                  the policy.

14                  MR. CALAMATI: It does. No later, the  
15                  policy says, put that in and require compliance,  
16                  no later than the date allowed under the state's  
17                  water quality standards.

18                  JUDGE LYNCH: Where does the Clean  
19                  Water Act or the policy excuse -- where does the  
20                  Clean Water Act excuse non-compliance?

21                  MR. CALAMATI: There is no non-  
22                  compliance, Your Honor. The CSO policy 4022 says

1 identify a program to meet water quality, build  
2 the program in accordance with a compliance  
3 schedule as soon as ---

4 (Simultaneous speaking.)

5 JUDGE LYNCH: I thought you said that  
6 your CSOs were not meeting water quality  
7 standards?

8 MR. CALAMATI: They don't, and they  
9 can't until we've done that program and then  
10 that's the practicable, that's the right time.

11 But our position is, EPA needs to show  
12 where in the Massachusetts rules it requires CSO  
13 compliance. And again, Lowell is being treated  
14 differently than other folk --

15 JUDGE LYNCH: Well, what are your  
16 obligations under the CSO policy? To submit a  
17 plan, which you did in 2014 that was deficient,  
18 correct?

19 MR. CALAMATI: Your Honor, I was not  
20 Counsel to the city at that time. All I can  
21 speak to is that no CSO community can meet this  
22 language and the policy, nor Massachusetts

1 compliance schedule provision, neither supports  
2 the inclusion of this restriction in the permit.

3 JUDGE STEIN: Okay, so I would like to  
4 ask and be sure that before your time expires, I  
5 understand your argument about narrative  
6 standards.

7 Are you arguing that narrative  
8 standards can never be included in permits, or  
9 only that narrative standards can't be included  
10 in a permit if a numeric standard has been set  
11 for the permit?

12 MR. CALAMATI: Our argument, Your  
13 Honor, is that we're entitled to -- if you put a  
14 catch-all that says don't violate water quality  
15 standards, you write the permit shield section  
16 out of the Clean Water Act.

17 That section says EPA is supposed to  
18 identify the limitations that are necessary.  
19 They do their Reasonable Potential Analysis. We  
20 get a permit.

21 And as long as we comply with that,  
22 we're in compliance. If they put a catch all, we

1 have no fair notice of what we can discharge in  
2 what amounts.

3 And let me give you one example.  
4 Phosphorous. If these folks are right that we  
5 need a limit, well, arguably we've been  
6 discharging too much phosphorous for years and  
7 that general water quality standard compliance,  
8 we've been violating that.

9 JUDGE LYNCH: Can a permit ever have  
10 (Simultaneous speaking.)

11 JUDGE LYNCH: -- narrative criteria?

12 MR. CALAMATI: I think a permit can  
13 have narrative criteria. We're not unreasonable.  
14 We will take the general water quality standards  
15 language in the District of Columbia's permit in  
16 Part 2(A)(2).

17 We're not unreasonable. We think  
18 that's okay language. We think it checks the box  
19 that you feel like you need to check.

20 JUDGE STEIN: I'm not familiar with  
21 that language off the top of my head. I might  
22 have been familiar some years ago, but I'm not

1 familiar at the moment.

2 But let me ask you a hypothetical.  
3 Why is it unlawful or improper for the Region to  
4 include a state narrative standard for nutrients  
5 as well as a numeric standard for phosphorous,  
6 given that the narrative standard would also  
7 apply to other pollutants that may impact  
8 nutrients?

9 For example, nitrogen. So if you have  
10 a -- at least in a circumstance where you have a  
11 general narrative standard for nutrients that  
12 would cover more than just phosphorous -- why  
13 couldn't you have a narrative standard for  
14 nutrients and a numeric standard for phosphorous  
15 under those circumstances? Why is that wrong?

16 MR. CALAMATI: It's wrong, Your Honor,  
17 because there's no fair notice of how much of  
18 that other nutrient we can discharge.

19 There's no opportunity for the public  
20 -- may I finish my --

21 JUDGE STEIN: Yes.

22 MR. CALAMATI: There's no opportunity

1 for the public to comment on that. There's no  
2 right of appeal.

3 And most importantly, as a local  
4 government, there's no opportunity for a  
5 compliance schedule that Massachusetts law would  
6 allow. It's a gotcha. It's behind us. I might  
7 have been --

8 JUDGE STEIN: Doesn't that simply  
9 write the concept of narrative standards out of  
10 existence, if that's your argument?

11 I mean, for years there have been  
12 numerous narrative standards and a smaller subset  
13 of numeric, but if I understand your argument,  
14 what you're saying is because we don't have a  
15 number; therefore we don't know what we have to  
16 comply with.

17 I mean, it seems to me that that  
18 fundamentally attacks the concept of narrative  
19 standards to begin with.

20 MR. CALAMATI: Five seconds to respond  
21 to that?

22 JUDGE STEIN: Yes.

1                   MR. CALAMATI: No, there's perfectly  
2 good narrative standards. No visible sheen, no  
3 fish kill.

4                   There are all sorts of narrative  
5 standards that are okay, but this general water  
6 quality standards provision in our permit  
7 probably has us violating the permit for  
8 phosphorous based on what they've found.

9                   And no due -- no fair notice, no due  
10 process, no compliance schedule. So we --

11                  JUDGE AVILA: So are you saying that  
12 rather than saying in the permit that the  
13 discharge shall not cause a violation of the  
14 water quality standards of the receiving water,  
15 that they had put the discharge shall not cause  
16 fish kill? That would be okay?

17                  MR. CALAMATI: We would have no  
18 objection to that, Your Honor.

19                  JUDGE AVILA: So that's what --

20                  MR. CALAMATI: I also want to  
21 reiterate, we'll take the language in the D.C.  
22 permit that's in the record. Thank you, Your

1 Honors.

2 JUDGE STEIN: Anything else for you?

3 JUDGE LYNCH: No.

4 JUDGE STEIN: Thank you very much.

5 And I would like to give the Region equal time,  
6 so if we can assure that that happens.

7 MR. KNAPP: Good morning, Your Honors.

8 My name again is Michael Knapp. I'm with EPA  
9 Region I.

10 I will be addressing four of the  
11 issues that are before the Board today. My  
12 colleague, Cayleigh Eckhardt, will be addressing  
13 the remaining.

14 Before I get into those four issues,  
15 there's two broad points I'd like to make.

16 First, I think much of what you just heard from  
17 Counselor reveals a fundamental flaw of what  
18 they're asking, and that is they are asking for  
19 the Region to do in a permit what is more  
20 appropriately done in an Enforcement Order. And  
21 we will get into that as I get into the four  
22 issues. But I think that was revealed in the

1 conversation that was just had.

2 Second, I would like to emphasize that  
3 this petition is riddled with procedural errors.  
4 The Region has documented those in both our reply  
5 and in our surreply.

6 We won't take the time now to rehash  
7 those, but we do urge the Board to take those  
8 procedural errors seriously.

9 Moving on to the four issues that I  
10 will be addressing, I'm going to lay them out,  
11 give you a quick bullet point of why you should  
12 affirm the Region's position, and then I'll move  
13 on to more detail.

14 First, with regards to the effluent  
15 flow limit, this was an appropriate condition or  
16 limitation necessary to achieve compliance with  
17 water quality standards and therefore consistent  
18 with Section 402 and 301 of the Act.

19 With regards to Petitioner's claim  
20 with during the long-term control plan, the CSO  
21 policy very clearly gives the permitting  
22 authority discretion as to which document to

1        enshrine requirements for the long-term control  
2        plan, and the Region reasonably put those  
3        requirements in an Enforcement Order, which is  
4        part of this record.

5                Third, with regards to the bypass  
6        language, that language is required under EPA  
7        regulations. EPA included it verbatim as it  
8        appears in the regulations, as it has in the  
9        previous versions of this Permittee's permit.

10               Finally, with regards to the e-Coli  
11        daily maximum limit, this permit term was based  
12        clearly and directly on the Massachusetts Water  
13        Quality Standard, and therefore consistent and  
14        drives from our authority at 301 and 402.

15               I will address the four issues in that  
16        order, unless the Board has a preference.

17               With regards to the effluence  
18        wastewater flow limit, this limit is a condition  
19        or limitation necessary to ensure compliance with  
20        water quality standards. Again, thus rooted in  
21        402 and 301 and EPA regulations at 122.4(D).

22               This is so because the Region uses the

1 facility's design flow, as the Board noted  
2 previously, which they're required, the Region is  
3 required, all permitting authorities are required  
4 to use in calculating water quality standards.

5 We used that flow in the formulas,  
6 both to set the water quality-based effluent  
7 limitations and to conduct the reasonable  
8 potential analyses.

9 If the facility discharges at levels  
10 beyond that flow, the Region cannot be assured  
11 that those calculations were accurate, and  
12 therefore ---

13 (Simultaneous speaking.)

14 JUDGE LYNCH: Why is that? What does  
15 that increase in flow, how does it cause a  
16 problem?

17 MR. KNAPP: Well, for example, Your  
18 Honor, as you were proposing earlier with regards  
19 to concentration-based only limits in this permit  
20 there are several.

21 If they increase their flow, the  
22 overall amount of the pollutant entering into the

1 water body is more than what the Region assumed  
2 when we calculated the assimilative capacity of  
3 that water body and how much it could handle, and  
4 therefore we could not be sure that it could  
5 handle that additional amount of the pollutant  
6 and still achieve water quality standards.

7 JUDGE STEIN: So how do you respond to  
8 Mr. Calamita's argument that there -- made here  
9 and in the briefs, that there are numerous  
10 permits around the country that don't have flow  
11 limits?

12 And if you do, in fact -- this is more  
13 of my comment than his -- if you do in fact have  
14 a problem, you've got enforcement mechanisms to  
15 deal with the problem. How do you respond to  
16 those questions?

17 MR. KNAPP: With regards to your first  
18 question, Your Honor, first of all, citations to  
19 other permits that have unique facts, situations,  
20 that may inform the direction a permit writer  
21 made, we think, and we think this Board's  
22 precedent is clear, that that's an inappropriate

1 line of argument.

2 Beyond that, there may be different  
3 reasonable approaches a permit writer could take  
4 to address the issue of flow and how it relates  
5 to water quality standards.

6 When you have a mass-based and a  
7 concentration-based limit, that may be sufficient  
8 to ensure water quality standards for that  
9 effluent limitation.

10 Again, here, we do not have just mass  
11 and concentration-based limits. And this is  
12 appropriate because the regulations direct EPA to  
13 mirror the form that the state's water quality  
14 standards have when writing permit limits.

15 So where the state water quality  
16 standard's concentration only, that is the form  
17 that EPA uses in writing our permits. And that's  
18 where the flow limit really becomes key. In  
19 addition --

20 JUDGE AVILA: Can I just pause there?  
21 So then how much of your argument for the flow is  
22 based on the fact that the reg is requiring that

1 the effluent limitations, what is the language,  
2 be based on design flow? I mean, because -- go  
3 ahead.

4 MR. KNAPP: That is a key part, it's  
5 a key element of support, but it's certainly not  
6 the only one.

7 We think it's indicative that the  
8 Agency intended for permit writers to use that  
9 design flow and for that to be a limitation on  
10 the discharge.

11 But really, at the end, it's Sections  
12 402 and 301 that really roots this authority  
13 because it's necessary to achieve water quality  
14 standards.

15 JUDGE LYNCH: I have a question  
16 related to that, the problem with increasing the  
17 flow.

18 On Page 8 of your Facts Sheet, you say  
19 that increasing the flow will decrease the  
20 dilution. Can you explain that?

21 MR. KNAPP: Increasing the flow, I  
22 think, where we said it could decrease the

1 dilution, I think again that's a scenario we were  
2 trying to analyze.

3 What were the potential implications  
4 if there were --

5 JUDGE LYNCH: That's fine. So  
6 potentially, how would that work?

7 MR. KNAPP: Your Honor, I can't speak  
8 directly to that question, that technical  
9 question.

10 I can tell you, I reiterate, though,  
11 that the record is clear that if there were  
12 increased flow, there is the potential for more  
13 pollutant in the water body, and therefore  
14 calling into question those calculations that the  
15 Region used to determine whether water quality  
16 standards would be met.

17 Or again, there's the second part of  
18 that under the reasonable potential analyses,  
19 because there were several.

20 For example, the metals here, where we  
21 determined there wasn't reasonable potential  
22 based on that design flow.

1                   JUDGE AVILA: I suppose that if  
2 there's more pollutant in the water and the  
3 instream flow is low, then there wouldn't be as  
4 much dilution. Is that a possibility?

5                   MR. KNAPP: That does stand to reason,  
6 Your Honor.

7                   I'd move on to the second point, and  
8 that is the Region has demonstrated in the past  
9 with this Permittee that it can balance this  
10 necessary water quality-based condition or  
11 limitation with the CSO policy's direction to  
12 maximize flow to the treatment plant.

13                   There's a couple subpoints I'd like to  
14 make here.

15                   First, the provisions are not  
16 inherently contradictory or intention. It is  
17 only where the facility is, in maximizing flow,  
18 brings in more flow than what it's designed to  
19 do, that these two permit terms --

20                   JUDGE STEIN: But doesn't that happen?  
21 I mean, if you look at the weather in  
22 Massachusetts on any given day, you can't really

1 expect Lowell to be, well, Lowell's not in charge  
2 of the weather, so --

3 MR. KNAPP: It undoubtedly --

4 JUDGE STEIN: -- there is an  
5 unpredictability element to what the wet weather  
6 events are going to be. So doesn't Lowell have a  
7 point?

8 MR. KNAPP: It is clear that this  
9 Permittee has struggled with this flow limit, and  
10 it should be to be expected, based on where this  
11 Permittee is.

12 But the proper response to this, with  
13 the Permittee's inability to comply with a permit  
14 term, is not to remove the permit term with which  
15 they are struggling to comply with and create a  
16 perverse incentive where non-compliance results  
17 in ever-less strict permit terms.

18 The proper response, which the Region  
19 has done here, is to use our enforcement tools to  
20 provide the facility, the Permittee, with the  
21 time and the space necessary to make its  
22 improvements to its facility, ideally through

1 developing a long-term control plan, implementing  
2 the provision of the long-term control plan, so  
3 that one day they might get to the point where  
4 they can both maximize flow and operate within  
5 the design capacity of its treatment plant. That  
6 is the goal at the end of the day.

7 JUDGE STEIN: Do you know whether the  
8 submissions -- excuse me -- that were required by  
9 the 2017 Order were made at the end of December?

10 MR. KNAPP: They were. On December  
11 31st of this past year, EPA received the city's  
12 integrated plan, which included updated long-term  
13 control plan. And we are in the process of  
14 reviewing that document.

15 JUDGE LYNCH: I had a question about  
16 Lowell's argument on the CSO water quality  
17 standard compliance language.

18 What Counsel for Lowell said was he  
19 recognized that the CSO policy calls for that  
20 language to be in permits, but it says no later  
21 than the date allowed under the state's water  
22 quality standards expressed in the form of a

1 narrative limitation.

2 What's your response to that, his  
3 argument?

4 MR. KNAPP: Your Honor, if I may, that  
5 is an issue that my colleague is going to  
6 respond, but I will say one thing, is that this  
7 permit, that term is included identically in the  
8 Commonwealth of Massachusetts Permit, which I  
9 think is instructive on that point.

10 But on the CSO narrative water quality  
11 standard, my colleague will be addressing that.

12 JUDGE LYNCH: Okay. That's fine

13 MR. KNAPP: If there are no more  
14 questions on flow, I will move on to the long-  
15 term control plan, four substantive points to  
16 make on this point.

17 CSO policy, which is implemented in  
18 the Act at 402(Q), very clearly gives the  
19 permitting authority discretion with regard to  
20 what document to include the requirements both to  
21 submit an LTCP and to require its implementation.

22 It uses the term appropriate

1 enforceable mechanism eight times in the policy.  
2 It talks about NPS permits, enforcement orders or  
3 information requests. I think it's very clear  
4 that the Region had the discretion, appropriately  
5 used that direction to include it in and  
6 enforcement order, which it did. It's Exhibit 12  
7 in this record.

8           Second, using an enforcement order  
9 provides the Permittee with important flexibility  
10 in its development of a long-term control plan  
11 that would be more difficult to achieve in the  
12 context of an NPDES permit.

13           So if you look at the 2017  
14 Administrative Order requiring its development,  
15 it talks about the Permittee using an adaptive  
16 management approach to develop its long-term  
17 control plan.

18           That is more easily done in an  
19 enforcement context than it is if we enshrine  
20 everything right there in an NPDES permit.

21           And that is part of the reason the  
22 Region took this approach, and it's reasonable.

1                   JUDGE STEIN:  So how, if at all, do  
2 those two different documents marry themselves  
3 up?  You've got an enforcement order.  You've got  
4 a permit.

5                   This is something that would be  
6 addressed in a renewal permit?  Or do we always  
7 have these two separate tracks -- excuse me, one  
8 the permit, two the enforcement order?

9                   MR. KNAPP:  At this point, Your Honor,  
10 based on where the City of Lowell is, they are  
11 operating on separate tracks, at the point where  
12 the city has implemented its long-term control  
13 plan and it should be at the point at  
14 demonstrating it can achieve water quality  
15 standards.

16                   I think the CSO policy envisions that  
17 the permit at that point may include numeric-  
18 based water quality standards effluent  
19 limitations, and that's kind of the point where  
20 those two documents converge.

21                   But the City of Lowell is far from  
22 being at that point, as Counselor mentioned.

1 They don't even have a long-term control plan  
2 approved at this point.

3 With that, I'll move on to the issue  
4 of bypass. This language that the Region  
5 included in the permit term, which again was  
6 included in previous versions of Permittee's  
7 permit, is required under 40 CFR 122.41(M)(4)(1).

8 The Region included it verbatim. The  
9 CSO policy is clear that bypass is prohibited and  
10 that the regs require this.

11 Second, the CSO policy does articulate  
12 an alternative approach where bypass could be  
13 approved prospectively rather than on a case-by-  
14 case basis as is the default under the regs and  
15 this permit term.

16 And the Region noted this to  
17 Petitioner in our response to its comments.  
18 However, there's factual predicates that  
19 Petitioner, the Permittee, must provide to the  
20 Region to give us an informed basis to invoke  
21 that prospective approach, and Petitioner simply  
22 has not provided that.

1                   For example, a key element of the  
2 analysis is an analysis of reasonable  
3 alternatives.

4                   And if you look at EPA's 2016 letter,  
5 which is Exhibit 8 in the record, rejecting their  
6 long-term control plan, one of the bases for  
7 rejecting that plan was that it did not have any  
8 reasonable alternatives analysis.

9                   JUDGE LYNCH: Counsel, Counsel for  
10 Lowell said that the City tried to meet with the  
11 Region about their permit and that the Region  
12 declined. Can you tell me about that?

13                   MR. KNAPP: Certainly, Your Honor. So  
14 the Region met with the City of Lowell and its  
15 contractors on May 15th, 2019, before issuing the  
16 draft permit.

17                   Additionally, the permit writer had a  
18 meeting directly with the City of Lowell on April  
19 9th of 2019.

20                   The Region did decline a request to  
21 meet with the Permittee after the comment period  
22 had concluded. And that decision was partially

1 based on the fact that the Region is, and the  
2 Agency as a whole, is committed to reducing its  
3 NPDES permit backlog.

4 We frequently get requests from  
5 permittees to meet after the comment period. And  
6 in an effort to get permits out efficiently and  
7 expeditiously, those requests are most commonly  
8 denied.

9 But we did meet with them before the  
10 draft permit was issued. They had their required  
11 ability to comment on the draft permit.

12 JUDGE LYNCH: Am I correct that in one  
13 of your filings, you indicated that with respect  
14 to the CSO bypass alternative flexibility or  
15 mechanism, that the Region does stand ready to  
16 meet with Lowell?

17 MR. KNAPP: Absolutely. That is  
18 something the Region is very much prepared to do  
19 and presumably would be a reasonable conversation  
20 to have with its most recent submission at the  
21 end of this last year. Those are conversations  
22 that the Region is happy to have.

1                   With that, I'll move on to my last  
2                   issue, which is the e-Coli daily maximum limit.  
3                   I haven't been honing in on procedural flaws, but  
4                   this is one where I really want to emphasize that  
5                   we think it's one of the more egregious  
6                   procedural flaws for two reasons.

7                   One, the City simply did not raise the  
8                   issue of impracticability at the time in its  
9                   Petition or in its comments on the draft permit -  
10                  - sorry, in its comments on the draft permit did  
11                  not raise this issue.

12                  Second, the Region was clear in its  
13                  Response to Comments that this permit term was  
14                  based on the Massachusetts water quality  
15                  standard, and it is not until Petitioner's  
16                  surreply that it first meaningfully engages in  
17                  that basis and tries to offer some rebuttal for  
18                  that basis.

19                  So we'd urge the Board to take those  
20                  procedural flaws seriously. I will say, second,  
21                  this limit is based on the Massachusetts water  
22                  quality standard. It was cited earlier in the

1 discussion with Counsel.

2 I'll note that the Commonwealth issued  
3 this permit with the exact same identical permit  
4 term.

5 JUDGE LYNCH: So a technical question.  
6 Are you saying, and you may or may not be, that  
7 the Massachusetts -- I'll refer to it as the  
8 single sample maximum, is that the same or  
9 equivalent to a daily limit?

10 MR. KNAPP: It is the basis for the  
11 daily limit. And so EPA, in coordination with  
12 the Commonwealth, looks at that standard. The  
13 permit writer looks at that standard, and this  
14 has been the practice for some years on this  
15 specific standard, and determines the most  
16 reasonable way to implement that standard is a  
17 daily maximum limit.

18 I understand Counselor's argument that  
19 it is not verbatim, the exact terms, but I would  
20 argue it's a distinction without a difference  
21 where you have a daily maximum, no single sample  
22 taken within that day could exceed the threshold

1 provided there.

2 And so I think it's a very reasonable  
3 approach to take, just buttressed by the fact  
4 that the Commonwealth uses the same permit term.

5 JUDGE AVILA: But if it's the same,  
6 why not make life easier and just track the  
7 Massachusetts reg language?

8 I guess I'm struggling to figure out,  
9 it's a distinction without a difference, why  
10 create the difference in the first place?

11 MR. KNAPP: That could be a reasonable  
12 approach, Your Honor. That's not the approach  
13 that the EPA and the Commonwealth has used.

14 And this is a permit term that has  
15 appeared for some years now, and this is the  
16 approach that has been --

17 JUDGE AVILA: That's why I wanted to  
18 be clear, that your position is it's a  
19 distinction without a difference.

20 MR. KNAPP: If we were to say, no  
21 single sample, yes, as compared to the daily  
22 maximum limit. Yes.

1 JUDGE AVILA: All right.

2 JUDGE STEIN: I want to be sure that  
3 your co-counsel has time for her arguments.

4 MR. KNAPP: Thank you, Your Honor.

5 JUDGE STEIN: So if you have any final  
6 questions --

7 JUDGE LYNCH: I just need a  
8 clarification. I have a question about the  
9 phosphorous limit and the Gold Book. Is that

10 MR. KNAPP: Yes.

11 JUDGE LYNCH: Okay. Great. Thank you.

12 MR. KNAPP: Thank you.

13 MS. ECKHARDT: Thank you, Your Honors.  
14 Again, my name is Cayleigh Eckhardt for Region 1.

15 JUDGE STEIN: Can you put the  
16 microphone a little closer? I'm having trouble  
17 hearing you.

18 MS. ECKHARDT: Sure. Is that better?

19 JUDGE STEIN: Yes.

20 MS. ECKHARDT: So as my co-counsel  
21 stated, I'm going to talk about three major  
22 issues, one being the narrative water quality

1 standard permit limits included in the permit.  
2 Two, the phosphorous limits, and three, if  
3 there's any remaining time or interest by the  
4 Board, I can discuss the testing and monitoring  
5 requirements that are included in the permit.

6 But before I begin, I just want to  
7 make one slight clarification related to a  
8 question that you asked of my co-counsel related  
9 to the dilution factor issue.

10 So to answer your question more  
11 precisely, the more flow going into the water --  
12 so more flow going into the water will change the  
13 ratio between the effluent flow and the receiving  
14 water flow.

15 And EPA sets permit limits and  
16 determines them to be protective, pursuant to 402  
17 and 301, based on a constant ratio calculated on  
18 the worst case effluent flow.

19 So that's equal to the design flow and  
20 receiving water flow at 7Q10. And so that's why  
21 when flow is increased into the receiving water,  
22 it could impact water quality standards.

1                   And without going down a rabbit hole,  
2 I'll now turn to the issues that I'm going to  
3 discuss.

4                   JUDGE AVILA: Sorry. I'm going to go  
5 down the rabbit hole. If that's true, why don't  
6 all permits have that requirement in them? That  
7 the design flow not being seen in them?

8                   MS. ECHKARDT: I think that's the  
9 mechanism by which we ensure compliance with 301  
10 and 402. Other permitting authorities have found  
11 other means and ways of ensuring compliance.

12                  JUDGE AVILA: Thank you. Sorry.

13                  MS. ECKHARDT: So now I'll first talk  
14 about the water quality standards compliance  
15 language, the narrative permit limits.

16                  So there are two in this permit,  
17 Section 1(A)(2) and 1(F)(2)(B) in the final  
18 permit, which as my opposing counsel has stated,  
19 provide that discharges shall not cause a  
20 violation of water quality standards.

21                  He referenced the one provision  
22 related to CSO discharges. However, there's

1 another provision that relates to all effluent  
2 discharges from the treatment facility.

3 And these two provisions are grounded  
4 in the Clean Water Act, mandate that water  
5 quality standards must be achieved and are well  
6 supported by EPA's record.

7 JUDGE AVILA: If they're in compliance  
8 with the phosphorous numeric criteria in the  
9 permit, could an enforcement action still be  
10 brought for them if the evidence showed that they  
11 weren't meeting the state water quality standard.

12 MS. ECKHARDT: So the way that this  
13 particular provision functions for Region 1 and  
14 implemented into this permit, the answer to that  
15 would be no.

16 So that leads me to talk about what is  
17 the purpose of these provisions. The purpose is  
18 two-fold.

19 First, these provisions serve as a  
20 reinforcement, as a legal assurance that water  
21 quality standards will be met. And they  
22 reinforce the explicit and numeric obligations

1 otherwise expressed in the permit, as Judge Avila  
2 has just asked about. And then the second  
3 important purpose of this provision is that it  
4 acts as a safety net.

5 So it addresses, as necessary, water  
6 quality standards violations cause by the  
7 Permittee due to unanticipated circumstances. So  
8 changes in the effluent or effluent quality or a  
9 discharge of pollutants that weren't identified  
10 at the time of permit issuance, and it allows the  
11 Agency to address those violations of water  
12 quality standards without waiting for the next  
13 permit cycle, without waiting for a permit  
14 modification, but to address them in a timely and  
15 expeditious manner, and that is extremely  
16 valuable to the Region and to the receiving  
17 water, the Merrimack River.

18 JUDGE STEIN: So to go back to the  
19 question that I asked Mr. Calamita about  
20 nitrogen, is that the kind of circumstance that  
21 you're contemplate or referring to, or not  
22 necessarily?

1 MS. ECKHARDT: Absolutely. I think  
2 that's an excellent example where, should the  
3 conditions of the discharge include elevated  
4 levels of nitrogen during this permit cycle that  
5 cause an exceedance in the narrative water  
6 quality standard for nutrients and impact the  
7 designated uses in the Merrimack River, then  
8 that's exactly the scenario in which EPA could  
9 use this particular provision in the permit and  
10 work cooperatively with the Permittee to address  
11 that in a very timely manner.

12 And I think that that lends itself to  
13 the objectives of the Clean Water Act itself and  
14 the mandates under 301 again.

15 And those are the mandates to which  
16 these provisions are firmly grounded.

17 JUDGE STEIN: So how do you respond to  
18 Counsel for Lowell's argument on the issues of  
19 fair notice, the permit shield, that, you know,  
20 this is just unfair.

21 I mean, there is no, my understanding  
22 is there's not a -- I may be incorrect, but there

1 may or may not be, and I don't think there's a  
2 nitrogen limit in this permit.

3 MS. ECKHARDT: You're correct, there  
4 is no nitrogen limit in this permit. So I would  
5 say that the Region's position is that the City  
6 of Lowell has in fact been provided fair notice  
7 and has not been deprived of these alleged due  
8 process, the alleged due process that --

9 JUDGE LYNCH: Counsel, you're saying  
10 this is Region I's position. Is this also OGC's  
11 position?

12 MS. ECKHARDT: OGC has worked together  
13 with us in issuing this permit, and they are on  
14 the same page as us in including these permit  
15 conditions to satisfy 301 and they're -- so, yes,  
16 I think that would be the position of both OGC  
17 and Region I.

18 However, I would note that this is not  
19 -- again, this isn't the only manner by which a  
20 permitting authority could ensure that 301 is  
21 being satisfied.

22 And as the Petitioner has included in

1 its briefs, it referred to, for example, West  
2 Virginia's authorized NPDES program. They take a  
3 different tactic, a different approach, but the  
4 endpoint is the same.

5 The endpoint is compliance with  
6 Section 301 and an assurance that state water  
7 quality standards will not be violated.

8 And while there are two alternative  
9 methods, nothing that Petitioner has put forth in  
10 its submissions or in its comments in the draft  
11 permit, demonstrates that EPA's alternative  
12 method here in Region I was inappropriate or  
13 otherwise unlawful.

14 And I would just go back to speak to  
15 this idea of notice a bit further, is that there  
16 is notice of what this provision means in that it  
17 states what it means.

18 It states, there shall be no violation  
19 of Massachusetts water quality standards. Now  
20 these standards, set forth in 314 CMR Section 4,  
21 are known. The scope of the provision is  
22 therefore known. This is not an infinite

1 universe.

2 JUDGE LYNCH: Was this in the 2005  
3 permit?

4 MS. ECKHARDT: Yes, importantly so,  
5 because this Petitioner or this Permittee has  
6 been in compliance with these exact two  
7 provisions that they challenge today for 15  
8 years.

9 No enforcement action has been taken  
10 against them on the basis of these two  
11 provisions. And as the Fourth Circuit stated in  
12 the Fola case, which we cited in our briefs and  
13 in Response to Comments, that experience with  
14 having a permit, the exact permit term in a  
15 permit, supports a finding that the Permittee had  
16 notice of that provision and what the provision  
17 meant.

18 And further, if Your Honors don't have  
19 any more questions about narrative water quality  
20 standards, I would then turn to the discussion of  
21 phosphorous.

22 So the limits included in this permit

1 for phosphorous, the numeric limits, were  
2 developed consistent with the framework  
3 established by the Clean Water Act and its  
4 regulations.

5 And ensure, again, that discharges  
6 will meet water quality standards. So I'm first  
7 going to discuss a bit about the methodology  
8 employed, because it seems to be the focus of  
9 Petitioner's arguments, specifically the use of  
10 the Gold Book.

11 And then I will, if time permits, move  
12 on to a few specific arguments that the  
13 Petitioner had related to our development of  
14 these phosphorous limits.

15 So first, EPA's methodology for  
16 translating the Massachusetts narrative nutrient  
17 water quality standards is this.

18 As Your Honors noted earlier, EPA  
19 reviewed not only the Gold Book, it reviewed the  
20 Ambient Water Quality Criteria Recommendations  
21 for Eco-Region 14, which is the geographic area  
22 that encompasses Massachusetts, and it also

1 looked at the Nutrient Criteria Technical  
2 Guidance Manual for Rivers and Streams.

3 These are all peer-reviewed materials,  
4 published under Section 304 A of the Clean Water  
5 Act. And in reviewing all these materials, EPA  
6 using its technical expertise determined there is  
7 a range of appropriate instream target limits for  
8 phosphorous.

9 While the Gold Book's limit is 0.1 is  
10 the upper end of that range, EPA considered the  
11 entire range and cite specific factors for the  
12 Merrimack River and the City of Lowell and  
13 determined the application of the Gold Book value  
14 was appropriate here, not has a criteria, but as  
15 a rationale supporting EPA's case by case  
16 determination of a criteria, which is then used  
17 to develop the site specific phosphorous limits  
18 in this case.

19 JUDGE LYNCH: Counsel, where do I find  
20 the site specific factors you used?

21 MS. ECKHARDT: The site specific  
22 factors we used to develop this limit include,

1 for example, the effluent data, the ambient data  
2 that's included in our record, the 303 D List --  
3 which for the segment of the river that into  
4 which Lowell's facility discharges, the Merrimack  
5 River Watershed 2004 to 2009 Water Quality  
6 Assessment Report, which gives a little bit more  
7 context and information about the impairment  
8 included the 303(D) List, and that's just to name  
9 a few of the sources that are specific and were  
10 considered in developing and in translating the  
11 narrative standard into a numeric effluent limit,  
12 water quality based effluent limit here.

13 And furthermore, I'd say that Region  
14 1's employment of this methodology is not new,  
15 Your Honors. This methodology has been before  
16 the Board and has been affirmed by the Board in  
17 other cases.

18 For examples, the Attleboro appeal,  
19 the Blackstone appeal, and it has been affirmed  
20 by the First Circuit in these same cases.

21 So I would hope that we need not  
22 relitigate the approach and methodology employed

1 here today.

2 JUDGE LYNCH: I have a question about  
3 the use of the 7Q10. Lowell says, and Counsel  
4 can correct me if I'm misstating this, but part  
5 of what they said was 7Q10 in Massachusetts only  
6 applies to aquatic life criteria, implying that  
7 the phosphorous criteria for non-aquatic life, or  
8 -- what's your response their argument on that  
9 point?

10 MS. ECKHARDT: A 7Q10 value applies,  
11 as Massachusetts explains in its regulations, to  
12 the development of water quality standards, may  
13 that be related to aquatic life or otherwise.

14 And to the extent the Petitioner seeks  
15 to or suggests that high levels of phosphorous  
16 don't impact aquatic life, I would say that the  
17 Region disagrees with that.

18 But more importantly, EPA Region I's  
19 use of the 7Q10 value is in line with the  
20 Massachusetts regulation, set forth at 314 CMR  
21 4.033, which requires compliance with water  
22 quality standards during the most severe

1 hydrological conditions.

2 And it further sets out that that  
3 means the 7Q10 value here. And this use of the  
4 7Q10 value has, again, been affirmed by this  
5 Board in the Attleboro and PDS permit appeal.

6 And moving on from that, I would --

7 JUDGE AVILA: Can I just ask on the  
8 reg, I'm trying to tease out Judge Lynch's  
9 question, the reg says for rivers and streams,  
10 the lowest flow condition at and above which  
11 aquatic life criteria must be applied is a lowest  
12 7Q10.

13 So I'm trying to tease out, did you  
14 use the 7Q10 analysis because of the impacts of  
15 aquatic life or because of nuisance, or how  
16 exactly does it fall in the Massachusetts reg?  
17 Because your brief categorically states that  
18 NPDES permit limit for discharges to rivers and  
19 streams must be calculated based on the 7Q10, and  
20 that's at Page 5 of the brief.

21 But then the cite does refer to  
22 aquatic life. So I'm still a little confused.

1 MS. ECKHARDT: Your Honor is right in  
2 that Subsection A of that provision does refer to  
3 aquatic life. And in referring to aquatic life,  
4 I think that is equally applicable to this  
5 particular scenario.

6 So I can't speak for every other  
7 permitting scenario and whether or not the 7Q10  
8 is always the most severe, or always demonstrates  
9 the most severe hydrological condition.

10 But here it does, and absolutely  
11 aquatic life is impacted as is at issue in this  
12 case.

13 And furthermore, I'd just touch upon,  
14 because Your Honors noted the city's reactive  
15 model that it's working on, I would just  
16 emphasize the fact that EPA decided not to delay  
17 permit issuance to wait for this model, is  
18 appropriate and is consistent with the mandates  
19 of the Clean Water Act.

20 And further, as we heard opposing  
21 Counsel state earlier today, he's not sure where  
22 the city is at with developing this model. We

1 don't know when this model will be complete.

2           And nowhere in the Permittee's  
3 comments on the draft permit or in their --  
4 pardon me, submissions to this Board, have they  
5 identified a timeframe at which this reactive  
6 model will be completed.

7           And so EPA was reasonable in issuing  
8 the permit without delay. And I see that I am  
9 over time.

10           JUDGE LYNCH: I had my pending  
11 question on the CSO water quality standard  
12 compliance language. Can you answer that?

13           MS. ECKHARDT: Of course. Could you  
14 repeat it for me?

15           JUDGE LYNCH: I'll repeat it. I was  
16 referring to the CSO policy, Page 18696, that  
17 calls for inclusion of that language in a permit,  
18 and counsel for Lowell replied, and he can  
19 correct me if I misstate this, but yes, but it  
20 says, no later than the date allowed under the  
21 state water quality standards expressed in the  
22 form of a narrative limitation.

1                   And he's saying we don't know when  
2                   that is. So what's your response to that?

3                   MS. ECHARDT: The response is similar  
4                   to the abbreviated response that my co-counsel  
5                   gave you, is that first off and most importantly,  
6                   the Commonwealth of Massachusetts worked  
7                   collectively with us to develop these permits in  
8                   a way, and they issued the exact same language,  
9                   the exact permit.

10                   So to the extent that this quotation  
11                   from the CSO policy refers to the state's  
12                   development of a date of compliance, EPA would  
13                   not seek to speak for the state on what date is  
14                   appropriate, more importantly, these provisions  
15                   for the CSO discharges and for the treatment  
16                   facility in general, must comport with the  
17                   mandates of the Clean Water Act itself.

18                   So the Clean Water Act requires  
19                   discharges comply with water quality standards  
20                   immediately upon permit issuance.

21                   And so to the extent that there's  
22                   disagreement between these two terms, I think

1 that the Clean Water Act mandates govern in this  
2 case, and that's how we've written the permit  
3 terms include in the permit.

4 JUDGE LYNCH: I had one question about  
5 the monitoring requirements and the fact that  
6 they're more stringent than what's in  
7 122.21(J)(4) and (5), and at least in part your  
8 response in the brief is that permitting  
9 requirements for applicants are different for  
10 renewal permits. And explain that to me, or why  
11 is that?

12 MS. EKCHARDT: Sure. I think that our  
13 response in the brief was identifying that the  
14 regulation that was cited by Petitioner relates  
15 to the minimum requirements that a Permittee  
16 needs in the permit renewal application process.

17 That in no way binds the Agency to  
18 only those monitoring and sampling requirements.

19 Should other information or data  
20 support or create a basis for EPA adding  
21 additional monitoring or slightly different  
22 sampling requirements, that is not inconsistent

1 with the regulation that Petitioner cited.

2 And in fact, here, we have a robust  
3 basis that's supported by the record for  
4 including these particular specific limits.

5 And if you'd like, I can go into the  
6 basis that we've provided in the record and our  
7 Response to Comments and Facts Sheet, or I can  
8 conclude.

9 JUDGE LYNCH: We have the record.  
10 Thank you.

11 JUDGE AVILA: I had one question. How  
12 common is it to, as I understand it, this permit  
13 requires some monitoring at specific times on  
14 particular days, consistently. How common is  
15 that? It seems pretty prescriptive.

16 MS. EKCHART: It is prescriptive. I  
17 agree. However, this is not new. These permit  
18 provisions are included in Massachusetts  
19 municipal permits across the Board.

20 It's a consistent approach that we  
21 take here in Region I. And we think that it  
22 ensures representativeness and ensures that we

1 can use the data points to track long-term trends  
2 and better monitor and understand the effluent  
3 for future permit cycles.

4 JUDGE AVILA: Thanks.

5 MS. ECKARD: Thank you.

6 JUDGE STEIN: Thank you, and we will  
7 be generous in your rebuttal time because I know  
8 that the Region has gone significantly over their  
9 time.

10 MR. CALAMATI: Well, I was going to  
11 say thank you, but you beat me up so much the  
12 last time, that I should be careful what I wish  
13 for.

14 The date and time of the Massachusetts  
15 water quality standards compliance deadline  
16 matters. And they don't know.

17 They just told you, well,  
18 Massachusetts put it in, and that's okay for  
19 Massachusetts, but not as a federal matter.

20 If Massachusetts sticks it in, that's  
21 a state permit violation. When EPA puts it in,  
22 they're supposed to follow the law.

1                   JUDGE LYNCH: But didn't the state  
2 certify EPA's permit under the 401 certification  
3 provisions of the Clean Water Act?

4                   MR. CALAMATI: But the whole point,  
5 Your Honor, is today as they stand here before  
6 you, they don't know what the deadline was for  
7 compliance.

8                   The state didn't know what it was  
9 certifying on that point. On the sampling point,  
10 which is a minor point, that goes to the  
11 professionalism of my client.

12                   They are public servants. EPA doesn't  
13 trust them. So they have to be told a date and  
14 time to ensure that it's represented. That's not  
15 done elsewhere, and, while a minor point, Your  
16 Honors, that is offensive to the professionalism  
17 of my clients.

18                   Fair notice. Your Honor, you asked  
19 EPA do they have fair notice of how much nitrogen  
20 they can discharge, and the happy answer was,  
21 yes. I have no clue.

22                   I hope you do. You kind of nodded and

1 everybody's happy. I hope you have some idea what  
2 the nitrogen -- we have no idea and I'd love to  
3 cede time to ask them to come up and give you a  
4 number. I think we all know they can't.

5 By the way, you also heard that we've  
6 complied with this general water quality  
7 standards language. We have not.

8 In the 2010 order, on Page 4, Section  
9 3, Paragraph 10, it recites that our CSOs have  
10 violated the impossible, thou shall not violate  
11 water quality standards. Page 4, Part 3,  
12 Paragraph 10. That's just incorrect. This is  
13 real stuff that we're violating that's  
14 impossible. It's not fair. It's not right.

15 On the flow, I've got a compromise for  
16 you on flow here if you're interested, but what  
17 EPA does is they take the 7Q10 flow and they  
18 figure out the max concentration and mass for  
19 things that need mass, not everything needs mass.  
20 And if it's protective at the 7Q10, it's  
21 protective, holding those concentrations as mass,  
22 is protective at every higher level.

1                   Here's what's different about Lowell's  
2 permit. If there's more flow at any time, it  
3 means there's more treated flow and less  
4 untreated flow.

5                   So if we go above the 32, it means  
6 that there's a net environmental benefit, that  
7 it's actually being treated as opposed to being  
8 discharged untreated.

9                   And if you don't take this flow limit  
10 out and you tell me that I shall not  
11 intentionally violate my permit, I'm going to  
12 have to throttle my plant when I get close to the  
13 32 mgd.

14                   And that's never -- that argument,  
15 some treatment always beats no treatment, it's  
16 never been a winning argument. We'll take the 32  
17 mgd limit at flows under the 7Q10.

18                   They say they've developed a permit  
19 that's protective at the 7Q10 for 32, simply  
20 change it to say, any flow below 32, we can't  
21 exceed 32. We will accept that because it never  
22 happens.

1 JUDGE LYNCH: On the higher flow,  
2 there's more flow. Isn't there more phosphorous?

3 MR. CALAMITA: On a higher flow,  
4 there's more phosphorous, but there's much more  
5 dilution.

6 JUDGE LYNCH: That's contrary to EPA's  
7 view.

8 MR. CALAMATI: But, hold on. That  
9 phosphorous leaving my CSO might be, pick a  
10 number, 20 milligrams per liter. That  
11 phosphorous leaving my treatment plant is going  
12 to meet the permit limit, whatever it is.

13 Let's say it's 1.08 milligrams per  
14 liter. Twenty or 1.08, which one do you want?  
15 We want to work hard and give you the 1.08.

16 Don't give us a permit that makes me  
17 deliver the 20 to you so that I'm not a criminal  
18 and intentionally violating limits that have  
19 unintended consequences that we don't put in here  
20 in D.C.

21 On the secondary bypass provision,  
22 this is a very important provision. Their answer

1 is, we never provided what we were supposed to.

2 They never told us. They met with us  
3 in May. I don't believe they ever said, could  
4 have an NFA from you, last May. They also met in  
5 May without Counsel.

6 JUDGE LYNCH: But isn't that the  
7 City's responsibility? The CSO policy has been  
8 in effect for decades.

9 MR. CALAMATI: Today let's say it's  
10 raining in Lowell. What are they doing today in  
11 Lowell? They're bypassing. They're maximizing  
12 flow of the treatment, they're doing a secondary  
13 bypass.

14 EPA knows that. We've been doing that  
15 for 20 years. In 2010, they're so conscious of  
16 this issue, they asked us for the high flow  
17 management plan as part of enforcement.

18 We delivered that high flow management  
19 plan. They've done nothing but we in good faith  
20 have been implementing that high flow management  
21 plan.

22 What EPA tells you is, I don't have to

1 stop -- oh my gosh, I don't have to stop --

2 JUDGE LYNCH: You can finish.

3 MR. CALAMATI: I don't have to stop  
4 bypassing. I can still maximize that flow. And  
5 what I do is I give you a one timer.

6 What I do is, the day of I say, hey,  
7 it's raining. We want to treat this flow. Don't  
8 send it out untreated. I'll give you a bypass  
9 demonstration.

10 JUDGE LYNCH: But the bottom line is  
11 you have not provided the information that would  
12 justify the preapproval.

13 And in your brief, you said that it's  
14 form over substance. But when I look at the  
15 information that's called for under the policy,  
16 it seems quite substantive to me.

17 MR. CALAMATI: Your Honor, we gave  
18 them exactly what they asked for in the  
19 Enforcement Order. How we maximize --

20 JUDGE LYNCH: I'm not talking about  
21 what's in the Enforcement Order. I'm talking  
22 about the alternative flexibility with respect to

1 bypasses.

2 MR. CALAMATI: Your Honor, our  
3 position is that the substance we gave them in  
4 response to the Enforcement Order absolutely  
5 satisfied the NFA requirements.

6 It's just two different labels, high  
7 flow management plan, no feasible alternatives.  
8 But here's the problem I have. Their happy  
9 answer is, just send me today a bypass  
10 demonstration.

11 And there are two problems with that.  
12 For the last 20 years, they've never asked for it  
13 and they've never told us we're in non-compliance  
14 for not giving them that bypass notice.

15 JUDGE LYNCH: It's optional.

16 MR. CALAMATI: Or otherwise I'm in  
17 noncompliance, and they've never said over the  
18 last 20 years that I was in noncompliance for  
19 using the bypass.

20 In the 2010 order, they very detailed  
21 list noncompliance, and bypassing or not giving  
22 notices is not one of them. And here's the

1 problem I have.

2 I can't honestly give it to you,  
3 because it's death, injury, or severe property  
4 damage, and I don't have any of the three.

5 None of our people are going to die,  
6 they're not going to be injured, and we're not  
7 going to have severe property damage because I'm  
8 just going to throttle flow at the plant.

9 So if you leave this provision in  
10 here, we can't bypass. And the other thing was,  
11 in the Springfield draft permit, they gave them  
12 better language -- if I may just, Your Honor --

13 JUDGE LYNCH: Sure.

14 MR. CALAMATI: They gave them  
15 different language that we would accept. It  
16 wasn't perfect, but we're not looking for  
17 perfect.

18 And the Response to Comments says,  
19 ooh, that was just a draft. We're going to go  
20 reconsider it. Two wrongs don't make a right on  
21 bypass. I'm sorry, Your Honor.

22 JUDGE LYNCH: So what are you saying

1 you can't provide? The cutoff point for  
2 bypasses? Cost benefit comparing bypass to  
3 abatement projects? No feasibility analysis?  
4 Those are three things that are called for.

5 MR. CALAMATI: Your Honor, we think,  
6 we absolutely think we can do a no feasible  
7 alternative showing, which we think the high flow  
8 management plan has done, and they've implicitly  
9 recognized that by their conduct, because they  
10 haven't said we're noncompliance, they haven't  
11 taken any enforcement, and they haven't requested  
12 these daily notices that all of a sudden now they  
13 want. We think we can make that.

14 We can't make the bypass showing  
15 honestly, Judge. We can wink and nod with you,  
16 if you like, but I can't tell you that there's  
17 going to be death, injury, or severe property  
18 damage.

19 All I'm going to do is throttle the  
20 plant, and that would be the wrong thing for the  
21 environment. The permit needs to get out of the  
22 way. D.C. gets to bypass all these other

1 systems.

2 And one other quick thing, on the  
3 long-term control plan permit requirements, EPA  
4 normally loves public notice and public  
5 participation and public transparency, and here,  
6 contrary to the policy, which says the permit  
7 should at least require nine moan controls, the  
8 narrative water quality standards, when the state  
9 says it's due, and long-term control plan  
10 development.

11 There's a Phase 1, Phase 2. It's Part  
12 4(A) of the policy. There's specific permit  
13 requirements, and the public in Lowell, despite  
14 EPA normally loving the public to know what's  
15 going on, they know nothing in the permit. They  
16 didn't get to comment. They don't get to  
17 challenge it.

18 You rejected that for D.C. When D.C.  
19 came to you and said the schedule, the compliance  
20 schedule, should be in our permit so everybody  
21 can see it and challenge it, you agreed.

22 You said, no, no, EPA. You don't get

1 to keep it, hide it in an Enforcement Order. It  
2 needs to be in the permit.

3 JUDGE STEIN: My recollection is that  
4 that was otherwise required by D.C. law.

5 MR. CALAMATI: Yes, there may be a  
6 D.C. compliance schedule provision that says the  
7 compliance schedule shall be in the permit, but I  
8 think the concept is the same.

9 JUDGE AVILA: But isn't that the  
10 problem with looking at other permits, that we  
11 don't have all of the -- I mean, you can point to  
12 permits all over the place and we don't know what  
13 the underlying state water quality standards, we  
14 don't know -- I mean, so, we have to be a little  
15 careful when we start looking at other permit  
16 provisions, right?

17 MR. CALAMATI: Yes, Your Honor, but I  
18 will tell you something. We all know from right  
19 here in Washington, name any community in the  
20 country that discharges raw sewage, and there are  
21 plenty of them, none of those discharges meet  
22 water quality standards.

1                   They just don't. We don't have to be  
2 there, we don't have to measure. If it's raw  
3 sewage, it doesn't meet water quality standards  
4 and the point is that Lowell is being told,  
5 you've got to meet it now.

6                   And that's inconsistent with the law  
7 and it's inconsistent with other permits. And  
8 you should be asking those folks why. Why?  
9 Because we're not trying to avoid necessary and  
10 appropriate requirements.

11                   You're beating me up on a phosphorous  
12 limit. We're just about to finish voluntary  
13 phosphorous upgrading. We're trying our best,  
14 but we're just trying to make sure the permit  
15 doesn't inappropriately restrict us.

16                   And we think it's fair to point where  
17 the wheel has been created by the EPA itself  
18 elsewhere. I see my time is up, unless there are  
19 any questions, I thank you for your time.

20                   JUDGE LYNCH: No. Thank you.

21                   JUDGE STEIN: Thank you. We  
22 appreciate everybody's advocacy this morning in

1       answering our questions, and the case is now  
2       submitted, and we will take this into account as  
3       we make our decision. Thank you very much.

4                   MS. DURR: All rise.

5                   (Whereupon, the above-entitled matter  
6       went off the record at 12:02 p.m.)

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