UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ENVIRONMENTAL APPEALS BOARD

In the Matter of:	)	NPDES Appeal Nos. 09-12 & 10-08
CITY OF TWIN FALLS WASTEWATER TREATMENT PLANT	)	**EPA REGION 10'S RESPONSE BRIEF**
NPDES Permit No. ID-002127-0	)	

I. INTRODUCTION

Pursuant to the Environmental Appeals Board's ("EAB") letters dated October 26, 2009 and July 19, 2010, and orders dated December 1, 2009, December 31, 2009, February 2, 2010, and August 17, 2010, U.S. Environmental Protection Agency ("EPA"), Region 10 ("Region") respectfully submits this single response to the City of Twin Falls' ("City") petitions for review of National Pollutant Discharge Elimination System ("NPDES") Permit No. ID-002127-0 and a subsequent permit modification. The City's challenges to the permit and the permit modification fail to demonstrate that the Region clearly erred or abused its discretion in the permit decisions. Because the Region's determinations were reasonable, review of the permit and permit modification should be denied.

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II. STATEMENT OF THE CASE

A. Applicable Legal Standards and Relevant Policy

Section 301(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1311(a), prohibits the discharge of pollutants to waters of the United States unless authorized by, among other things, an NPDES permit. Pursuant to Section 402 of the CWA, 33 U.S.C. § 1342, EPA, or an authorized State, must issue NPDES permits that authorize the discharge of pollutants subject to limitations and requirements imposed pursuant to CWA Sections 301, 304, 306, 401, and 403, 33 U.S.C. §§ 1311, 1314, 1316, 1341, and 1343. Here, the State of Idaho is not authorized to issue NPDES permits; therefore, EPA – specifically, the Region – is the relevant permitting authority.

In general, the CWA provides for two types of effluent limits to be included in NPDES permits: technology-based effluent limits and water quality-based effluent limits. Technology-based effluent limits reflect a specified level of pollutant reducing technology available and economically achievable for the type of facility being permitted. The technology-based requirements for publicly owned treatment works ("POTWs"),[1] such as the City of Twin Falls' wastewater treatment facility that is the subject of the challenged permitting decisions, are secondary treatment requirements set forth in 40 C.F.R. Part 133. These standards identify applicable technology-based requirements for POTWs for biochemical oxygen demand, total suspended solids ("TSS") and pH.

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[1] A "POTW" means "a treatment works as defined by section 212 of the [Clean Water] Act, which is owned by a State or municipality (as defined by section 502(4) of the [Clean Water] Act). This definition includes any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature. It also includes sewers, pipes and other conveyances only if they convey wastewater to a POTW Treatment Plant. The term also means the municipality as defined in section 502(4) of the [Clean Water] Act, which has jurisdiction over the Indirect Discharges to and the discharges from such a treatment works." 40 C.F.R. § 403.3(q).

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In addition to technology-based effluent limits, NPDES permits must contain any more stringent effluent limit necessary to meet state water quality standards. 33 U.S.C. § 1311(b)(1)(C); *see U.S. Steel Corp. v. Train*, 556 F.2d 822, 838 (7th Cir. 1977). To determine whether it is necessary to include a water quality-based effluent limit, the permitting authority must first determine if a pollutant in the relevant discharge has the reasonable potential to cause or contribute to an exceedance of an applicable state water quality standard for the receiving water. 40 C.F.R. § 122.44(d)(1). This is commonly referred to as the reasonable potential analysis. If it is found that a particular pollutant has the reasonable potential to cause or contribute to an exceedance of a state water quality standard, the permitting authority must then calculate an appropriate water quality-based effluent limit. *Id.* The more stringent of the technology-based limit or water quality-based limit for a particular pollutant is then included in the NPDES permit. 33 U.S.C. § 1311(b)(1)(C).

If a receiving water is not attaining an applicable state water quality standard, Section 303(d) of the CWA, 33 U.S.C. § 1313(d), requires the state within which that impaired water lies to establish a total maximum daily load ("TMDL") for the impairing pollutants. In general, TMDLs contain waste load allocations ("WLAs") for point sources in a particular water body as well as load allocations ("LAs") for nonpoint sources in the water body. *See* 40 C.F.R. § 130.7. The TMDL (including its WLAs and LAs) must be established at levels necessary to attain and maintain the applicable narrative and/or numerical water quality standard. *Id.*

If there is a TMDL for the permittee's water body, the permit writer must determine whether there is an applicable WLA for the point source, and if there is, ensure that the permit's water quality-based effluent limit is consistent with the assumptions and requirements of any available WLA for the discharge. *Id.* § 122.44(d)(1)(vii)(B). If the resulting water quality-based effluent limit is more stringent than the applicable technology-based effluent limit, the water

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quality-based effluent limit must be included in the NPDES permit.

In implementing TMDLs, EPA supports innovative approaches, such as water quality trading within watersheds. NPDES Permit Writers' Manual § 6.4.1, at 106; Office of Water, U.S. EPA, *Water Quality Trading Policy* 1 (Jan. 13, 2003) ("EPA Trading Policy") (EPA Ex. 19, A.R. 72).[2] In general, water quality trading allows pollution sources to sell or barter their ability to reduce pollution with other sources that are unable to reduce their pollutant loads economically. EPA Trading Policy at 1 (EPA Ex. 19, A.R. 72); Water Permits Division, Office of Wastewater Management, U.S. EPA, EPA 833-R-07-004, *Water Quality Trading Toolkit for Permit Writers* 4 (updated June 2009) ("Water Quality Trading Toolkit") (EPA Ex. 20, A.R. 73). Additionally, EPA encourages states to develop water quality trading programs. EPA Trading Policy at 2 (EPA Ex. 19, A.R. 72); Water Quality Trading Toolkit at 6-7 (EPA Ex. 20, A.R. 73). To this end, the Idaho Department of Environmental Quality ("IDEQ") developed draft water quality trading guidance, which set a 1:1 trading ratio for total phosphorus ("phosphorus") in the Upper Snake Rock Subbasin of the Middle Snake River. IDEQ, *Pollutant Trading Guidance* at app. C (draft Nov. 2003) ("IDEQ Draft Trading Guidance") (EPA Ex. 21, A.R. 65). IDEQ has not developed trading guidance for TSS. EPA has indicated that "[t]rades and trading programs in impaired waters for which a TMDL has been approved or established by EPA should be consistent with the assumptions and requirements upon which the TMDL is established." EPA

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[2] Where applicable, parallel citations to the EPA exhibit and to the administrative record are provided in the following form: (EPA Ex. ___, A.R. ___). Because this response brief addresses petitions to review two NPDES permitting decisions, there are two administrative records. Administrative record documents 1 through 73 relate to the September 22, 2009 decision to renew NPDES Permit ID-002127-0. Administrative record documents 101 through 119 relate to the June 24, 2010 decision to modify the permit. Certain documents appear in both administrative records. Although the duplicative documents are identified separately in the certified indices to the administrative record, in this response brief, only the lowest administrative record document number is used in the citations. For example, the Upper Snake Rock TMDL Modification is identified as both A.R. 61 and A.R. 115; however, a citation to the TMDL Modification will only contain reference to A.R. 61.

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Trading Policy at 5 (EPA Ex. 19, A.R. 72).

B. Factual and Procedural Background

The City owns and operates a wastewater treatment plant ("Facility") that treats wastewater from domestic, industrial and commercial sources. An NPDES permit issued by the Region in 2000 ("Expired Permit") authorized the Facility to discharge secondarily treated effluent to the Snake River at about river mile 608.5. Fact Sheet for U.S. EPA Proposal to Reissue an NPDES Permit to the City of Twin Falls Wastewater Treatment Plant, NPDES Permit No. ID0021270, § III, at 8 (May 11, 2009) ("Permit Fact Sheet") (EPA Ex. 3, A.R. 23); Authorization to Discharge under the NPDES Permit No. ID-002127-0 (Mar. 1, 2000) ("Expired Permit") (EPA Ex. 26, A.R. 66).

The Facility discharges into a segment of the Snake River that is protected for the following designated uses: cold water biota, salmon spawning, primary contact recreation, agricultural and industrial water supply, wildlife habitat and aesthetics. Idaho Admin. Code r. 58.01.02.150.14 (providing Idaho water quality standards for surface waters US-20 Snake River – Milner Dam to Twin Falls in Upper Snake-Rock Basin sub-basin, in Upper Snake Basin); *see* Permit Fact Sheet at 8. In addition, this portion of the Snake River is listed on the State's CWA Section 303(d) list as impaired for phosphorus and TSS. IDEQ, *Working Principles and Policies for the 2008 Integrated (303[d]/305[b]) Report*, Section 4a, at 99, 102 (May 22, 2009) (listing EPA-approved TMDLs) (EPA Ex. 18, A.R. 71). Because the Snake River is an impaired water body on the State's CWA Section 303(d) list, IDEQ prepared TMDLs for phosphorus and TSS, which EPA approved in 2000. IDEQ, *Upper Snake Rock Watershed Management Plan* (Dec. 20, 1999) (discussing TMDL target, analysis and allocation) ("Watershed Management Plan") (EPA Ex. 15, A.R. 57); Letter from Randall F. Smith, Director, Office of Water, U.S. EPA Region 10, to David Mabe, State Water Quality Programs

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Administrator, IDEQ (Aug. 25, 2000) (approving sediment and phosphorus TMDLs for 34 segments in the Upper Snake Rock Watershed) ("TMDL Approval Letter") (EPA Ex. 22, A.R. 60). *See generally TMDL Executive Summary: Upper Snake/Rock Subbasin TMDL* at A-2 – -5 (July 6, 2000) ("TMDL Executive Summary") (describing scope of TMDL) (EPA Ex. 16, A.R. 58). The TMDLs for phosphorus and TSS were among those provided in the *Upper Snake Rock Watershed Management Plan* that EPA approved. TMDL Approval letter at 1 (EPA Ex. 22, A.R. 60). In September 2005, EPA approved a modification to the TMDL. Letter from Michael F. Gearheard, Director, Office of Water and Watersheds, U.S. EPA Region 10, to Toni Hardesty, Director, IDEQ (Sept. 14, 2005) ("TMDL Modification Approval Letter") (EPA Ex. 23, A.R. 62); IDEQ, *The Upper Snake Rock TMDL Modification* (July 22, 2005) ("TMDL Modification") (EPA Ex. 17, A.R. 61). The TMDL in the *Upper Snake Rock Watershed Management Plan* and the *Upper Snake Rock TMDL Modification* are together referred to as the "Upper Snake TMDL" in this response brief.

The Upper Snake TMDL establishes WLAs for the Facility of 710 lbs/day of phosphorus and 146.4 tons/year of TSS. TMDL Modification at 43-44 (EPA Ex. 17, A.R. 61). In addition, the Upper Snake TMDL allows phosphorus trading "on the Middle Snake River as described in the [IDEQ] guidance." *Id.* at 34-35. The Upper Snake TMDL does not address TSS trading within the watershed.

On May 15, 2009, the Region made available for public comment a draft NPDES permit and fact sheet for the Facility. Draft Authorization to Discharge under the NPDES, Permit No. ID-002127-0 (May 12, 2009) ("Draft Permit") (EPA Ex. 4, A.R. 22); Permit Fact Sheet (EPA Ex. 3, A.R. 23). The draft permit proposed phosphorus and TSS effluent limits based on the most current EPA-approved TMDL, the 2005 Upper Snake TMDL Modification. Permit Fact Sheet at 10 (EPA Ex. 3, A.R. 23). During the comment period, which closed July 15, 2009, the City, IDEQ, and Idaho Conservation League ("ICL") submitted comment letters. Letter from

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Michael J. Lidgard, Manager, NPDES Permits Unit, U.S. EPA Region 10, to Mike Trabert, Staff Engineer, City of Twin Falls (June 2, 2009) (EPA Ex. 24, A.R. 29) (granting thirty-day extension to comment period); Letter from Justin Hayes, Program Director, Idaho Conservation League, to Sharon Wilson, Office of Water & Watersheds, U.S. EPA Region 10 (June 16, 2009) ("ICL Comments to Draft Permit") (EPA Ex. 6, A.R. 36); Letter from Marti Bridges, TMDL Program Manager, Pollutant Trading Coordinator, IDEQ, to Sharon Wilson, Office of Water & Watersheds, U.S. EPA Region 10 (July 1, 2009) ("IDEQ Comments to Draft Permit") (EPA Ex. 7, A.R. 38); Detailed Comments from the City of Twin Falls on Draft NPDES Permit ID-0021270 (July 14, 2009) (EPA Ex. 5, A.R. 39) ("City Comments to Draft Permit"). One of the City's main comments concerned a new TSS mass limit that was based on the WLA in the Upper Snake TMDL and in the 2005 TMDL Modification. City Comments to Draft Permit at 1-2 (EPA Ex. 5, A.R. 39). On September 22, 2009, after reviewing all of the comments received during the comment period, the Region issued the final permit ("Permit") with changes as described in the response to comments document. Authorization to Discharge under the NPDES, Permit No. ID-002127-0 (Sept. 22, 2009) ("Final Permit") (EPA Ex. 1, A.R. 52); Response to Comments, City of Twin Falls Permit (Sept. 2009) ("Permit RTC") (EPA Ex. 2, A.R. 53). The Permit had an effective date of November 1, 2009. On October 20, 2009, the City filed a petition with the EAB.

On March 29, 2010, the Region gave public notice of the Region's proposal to modify the Permit by removing permit conditions related to pollutant trading of phosphorus and made available for public comment a draft permit modification.[3] Notice of Proposal to Modify a[n]

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[3] The conditions the Region proposed to delete in the permit modification were those ICL previously challenged in its petition for review filed with the EAB on October 24, 2009. Fact Sheet for U.S. EPA Plans to Modify NPDES Permit No. ID-002127-0 , at 1 (Mar. 29, 2010) ("Permit Modification Fact Sheet") (EPA Ex. 10, A.R. 109). "In accordance with federal regulations, EPA subsequently issued a (continued…)

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NPDES Permit Issued to City of Twin Falls Wastewater Treatment Plant, Permit No. ID-002127-0 (Mar. 29, 2010) (EPA Ex. 12, A.R. 110); Fact Sheet for U.S. EPA Plans to Modify NPDES Permit No. ID-002127-0, at 1 (Mar. 29, 2010) ("Permit Modification Fact Sheet") (EPA Ex. 10, A.R. 109); Draft Authorization to Discharge under the NPDES, Permit No. ID-002127-0, § I.B and app.A (reflecting proposed modifications in strikeout text) (EPA Ex. 11, A.R. 108). During the public comment period, the Region received comments from the City and ICL. Letter from Fritz Wonderlich, Twin Falls City Attorney, to Director, Office of Water and Watersheds, U.S. EPA (Apr. 27, 2010) ("City Comments to Draft Permit Modification") (EPA Ex. 13, A.R. 107); Letter from Justin Hayes, Program Director, Idaho Conservation League, to John Drabek, Office of Water and Watersheds, U.S. EPA (Apr. 29, 2010) ("ICL Comments to Draft Permit Modification") (EPA Ex. 14, A.R. 106). In general, the City's comments opposed the removal of permitting provisions that had allowed water quality trading for phosphorus. City Comments to Draft Permit Modification at 1-4 (EPA Ex. 13, A.R. 107). The Region responded to the comments submitted by the City and ICL, and on June 24, 2010, the Region issued the permit modification ("Modified Permit") without making any changes from the draft version. Authorization to Discharge under the NPDES, Permit No. ID-002127-0 (June 24, 2010) ("Modified Permit") (EPA Ex. 8, A.R. 101); Response to Comments on Modification, City of Twin Falls Wastewater Treatment Plant NPDES Permit #ID-00212170 (June 20, 2010) ("Modified Permit RTC") (EPA Ex. 9, A.R. 102). The City filed a petition for review of the Modified Permit on July 24, 2010.

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notification withdrawing the conditions, effective March 2, 2010, and stating EPA's intent to seek public comment on a proposed permit modification not to include those provisions in the permit." *Id.* at 1; *see also In re City of Twin Falls Wastewater Treatment Plant*, NDPES Appeal No. 09-13 (EAB Mar. 10, 2010) (Order Dismissing Petition); Letter from Michael A. Bussell, Director, Office of Water and Watersheds, U.S. EPA Region 10, to Jackie Fields, City Engineer, City of Twin Falls (Mar. 2, 2010) (EPA Ex. 25, A.R. 112).

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III. STANDARD OF REVIEW

Pursuant to 40 C.F.R. § 124.19(a), the EAB ordinarily will not review a permit decision unless the decision is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See In re Westborough & Westborough Treatment Plant Bd.*, 10 E.A.D. 297, 303 (EAB 2002). The preamble to 40 C.F.R. § 124.19 states that the "power of review should be only sparingly exercised," and "most permit conditions should be finally determined at the Regional level." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). As such, the Region's administrative record of a permitting decision must reflect that the permit issuer exercised "considered judgment." To this end, the permit issuer must articulate with reasonable clarity the reasons for the Region's conclusions and the significance of the crucial facts relied upon in making those conclusions, and also adequately document the decision making. *See In re Ash Grove Cement Co.*, 7 E.A.D. 387, 417-18 (EAB 1997); *In re Austin Powder Co.*, 6 E.A.D. 713, 720 (EAB 1997). *See generally In re Shell Offshore, Inc.*, 13 E.A.D. 357, 386 (EAB 2007) (discussing "considered judgment" standard).

The petitioner has the burden to demonstrate that there is clear error or an important policy consideration that warrants that the permit condition should be reviewed. 40 C.F.R. § 123.19(a)(1) & (2); *see also In re Three Mountain Power, LLC*, 10 E.A.D. 39, 47 (EAB 2001). It is not enough that the petitioner merely repeat the objections that it made during the comment period. Instead, the petitioner must (1) state the objections to the permit that are being raised for review and (2) explain why the permit decision maker's previous response to those objections is clearly erroneous or otherwise warrants review. *See In re Town of Ashland Wastewater Treatment Fac.*, 9 E.A.D. 661, 668 (EAB 2001). As the EAB previously stated, "[a] petitioner may not simply reiterate comments made during a public comment period, but must

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substantively confront the permit issuer's subsequent explanations." *In re City of Attleboro, Mass. Wastewater Treatment Plant*, NPDES Appeal No. 08-08, slip op. at 11 (EAB Sept. 15, 2009), 14 E.A.D. ___. Moreover, issues and arguments raised by a petitioner that are not raised during the public comment period will not be considered preserved for review without a demonstration that they were not reasonably ascertainable at the time. 40 C.F.R. § 124.13; *see, e.g., In re City of Moscow, Idaho*, 10 E.A.D. 135, 141 (EAB 2001); *In re City of Phoenix, Ariz. Squaw Peak & Deer Valley Wastewater Treatment Plants* , 9 E.A.D. 515, 524-25 (EAB 2000), *appeal dismissed per stip.*, No. 01-70263 (9th Cir. Mar. 21, 2002); *In re Masonite Corp.*, 5 E.A.D. 551, 585 (EAB 1994).

IV. ARGUMENT

The City raises the following arguments on appeal: (1) EPA erred in including final TSS mass effluent limits in the Permit; (2) EPA erred in failing to authorize the use of water quality trading to allow the City to meet the final TSS mass effluent limits in the Permit; and (3) EPA erred in issuing the Modified Permit without water quality trading provisions for phosphorus. As explained below, the City has failed to demonstrate clear error in a finding of fact or conclusion of law and has failed to raise any important policy considerations. Therefore, the EAB should deny review of the Permit and the Modified Permit.

A. The Region Did Not Err by Including the Final TSS Mass Effluent Limits in the Permit.

The City argues that (1) 40 C.F.R. § 122.45(f)(1)(ii) precluded the Region from including in the Permit final effluent limits for TSS expressed in terms of mass and (2) even if it was appropriate to establish a mass-based limit for TSS, the Region erred in relying on the Upper Snake TMDL when calculating the final TSS mass limit. *See* Petition for Review 5-8 (Oct. 20, 2009) ("First Petition"). For the reasons set forth below, both of the City's arguments fail.

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1. The Exception to 40 C.F.R. § 122.45(f) Cited by the City is Inapplicable.

During the public comment period, the City explained that the application of the new TSS mass limit would require installation of expensive treatment technology. City Comments to Draft Permit at 1-2 (EPA Ex. 5, A.R. 39). As such, the City requested that "the [TSS] limits should stay the same as in the existing permit, with the addition of an annual limit of 146.4 tons per year being added as a limit." *Id.* at 2. The City further requested that the TSS compliance schedule in the Permit be adjusted to allow an additional year at the beginning to allow for development of a TSS trading program and requested that the Region authorize TSS trading in the Permit. *Id.* at 3-4. The City's comments did not include an argument that 40 C.F.R. § 122.45(f)(1)(ii) precluded final TSS mass limits in the Permit, which the City now argues in its petition for review. *Id.* In fact, none of the commenters submitted such a comment. *See* ICL Comments to Draft Permit (EPA Ex. 6, A.R. 36); IDEQ Comments to Draft Permit (EPA Ex. 7, A.R. 38). Because the issue of whether 40 C.F.R. § 122.45(f)(1)(ii) precluded the Region from expressing the final TSS effluent limits in terms of mass was not raised during the public comment period and because the City has failed to explain why this issue was not reasonably ascertainable during the public comment period, this issue was not properly preserved for review, and the EAB should deny review of permit condition setting forth the final TSS mass effluent limits. 40 C.F.R. § 124.13; *see, e.g.*, *In re City of Moscow, Idaho*, 10 E.A.D. 135, 141 (EAB 2001).

Even if the City had preserved this issue for review, the argument that 40 C.F.R. § 122.45(f)(1)(ii) applies is flawed. The regulation requires that pollutant limits be expressed as mass except, among other situations, "[w]hen applicable standards and limitations are expressed in terms of other units of measurement." 40 C.F.R. § 122.45(f)(1)(ii); *see also In re Upper Blackstone Water Abatement District*, NPDES Appeal Nos. 08-11 to 08-18 & 09-16, slip op.

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at 65-66 (EAB May 28, 2010), 14 E.A.D. ___ (construing § 122.45(f)(1)(ii)). "Applicable standards and limitations" are "all State, interstate, and federal standards and limitations to which a discharge . . . is subject under the CWA, including 'effluent limitations' [and] water quality standards . . . ." 40 C.F.R. § 122.2. Finally, "[p]ollutants limited in terms of mass additionally may be limited in terms of other units of measurements." *Id*. § 122.45(f)(2).

In the Permit, the monthly and weekly average effluent limits for TSS are expressed in terms of both concentration and mass. Final Permit at 7-8 tbl.1 (Ex. 1, A.R. 52). The Permit establishes three categories of effluent limits for TSS: concentration-based limits, interim mass-based limits, and final mass-based limits.[4] The concentration-based limits in the Permit are based on the technology-based secondary treatment effluent limits that apply to POTWs as a class. Permit Fact Sheet at 29-30 (applying 40 C.F.R. § 133.102(b)) (Ex. 3, A.R. 23). The interim mass-based TSS limits in the Permit are the aforementioned technology-based secondary treatment limits calculated as mass-based limits. *Id.* at 30. The final mass-based TSS limits, which the City challenges, are water quality-based limits that the permit writer derived from the TSS WLA in the Upper Snake TMDL. *Id.* at 36-38. After converting the limits into the same units of measurement and comparing the technology-based limits (expressed in terms of mass) with the water quality-based limits, the Region determined that the water quality-based limits were the more stringent of the two. *Id.* at 38; *see* 33 U.S.C. § 1311; 40 C.F.R. § 122.44(d). Accordingly, the Region included the water quality-based limits in the Permit. Permit Fact Sheet at 38 (Ex. 3, A.R. 23). The Region also opted to retain the concentration-based technology-based limit. *Id.*

The City argues that 40 C.F.R. § 122.45(f)(ii) prohibits the inclusion of the final TSS

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[4] Interim mass-based limits for TSS "apply until the [F]acility achieves compliance with the final limits, but no later than July 14, 2014." Final Permit at 8 n.4.

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mass limit when the Permit also includes the concentration-based technology-based limit. First Petition at 5. The City misconstrues this exception to expressing effluent limits in terms of mass. The City argues that "[t]he permit already contains applicable standards and limitations for TSS expressed in average monthly and average weekly limits in mg/L, which is obviously an 'other unit of measurement.'" *Id.* However, the presence of other limits does not prohibit the permit writer from also including mass-expressed limits, especially when they are to meet water quality standards.

The City's interpretation of the regulation fails to recognize that the mass-based TSS limits are water quality-based controls and that, pursuant to the definition in 40 C.F.R. § 122.2, the "[a]pplicable standards and limitations" for discharges from the Facility include the Idaho narrative water quality standards. IDEQ has interpreted and applied the State narrative water quality standard to establish a mass-based WLA for TSS in the Upper Snake TMDL, for the purpose of controlling TSS. Permit Fact Sheet at 36 (Ex. 3, A.R. 23); Watershed Management Plan at 205 tbl.101 (EPA Ex. 15, A.R. 57); TMDL Modification at 44 (EPA Ex. 17, A.R. 61); *see also Upper Blackstone*, slip op. at 66 (finding reasonable a state's interpretation of its own narrative water quality standard in terms of a concentration of the pollutant in effluent discharges for the purpose of pollutant control). Thus, the "applicable standards and limitations" for the Facility's discharge for water quality-based TSS controls are expressed in terms of mass, the same unit of measurement used to express the TSS effluent limits at issue, and not an "other unit of measurement."

Moreover, the Region's decision to limit TSS with a second unit of measurement, concentration, does not somehow render the exception in 40 C.F.R. § 122.45(f)(1)(ii) applicable, as the City argues. Section 122.45(f)(ii) is an "exception" not a "prohibition." The general rule is that permit limits "shall" be expressed in terms of "mass," just like the TSS limit in the Permit. Section 122.45(f)(ii) excuses the permit writer from the requirement to express the limit in terms

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of mass when the "applicable standards and limitations" are expressed in other terms. However, section 122.45(f)(ii) does not *prohibit* the permit writer from also including mass-based limits just because the permit's limits are also expressed in other terms.

Rather, where a permit limits a pollutant in terms of mass, a permit writer is authorized to include additional effluent limits for the pollutant in other units of measurement. 40 C.F.R. § 122.45(f)(2). EPA interprets 40 C.F.R. § 122.45(f)(2) as follows:

> [T]he permit writer may determine that expressing limits in more than one unit is appropriate under certain circumstances. For example, expressing limitations in terms of concentration as well as mass encourages the proper operation of a treatment facility at all times. In the absence of concentration limits, a permittee would be able to increase its effluent concentration (i.e., reduce its level of treatment) during low flow periods and still meet its mass-based effluent limits. Concentration limits discourage the reduction in treatment efficiency during low flow periods, and require proper operation of treatment units at all times.

Office of Water, U.S. EPA, EPA-833-B-96-003, *NPDES Permit Writers' Manual* § 5.1.3, at 66-67 ("NPDES Permit Writers' Manual"). In the fact sheet, the Region explained that the purpose of retaining the concentration-based technology-based standards was to "assure that water quality in the Snake River does not deteriorate from the current condition" while the City "upgrade[d] its [F]acility to meet the more stringent water quality based limits." Permit Fact Sheet at 38-39 (Ex. 3, A.R. 23). The Region's decision to include a concentration-based limit in addition to the mass-based limit for TSS is reasonable and adequately supported in the administrative record.

Accordingly, should the EAB reach the merits of this issue, it should conclude that 40 C.F.R. § 122.45(f)(1)(ii) does not apply here to preclude the final TSS mass limit. The expression of the final TSS mass effluent limits in the Permit is appropriate, and the EAB should deny review of the Permit condition.

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2. EPA Did Not Err in Using the WLA in the TMDL to Calculate the Final TSS Mass Effluent Limits.

The City argues that EPA erred in using the WLA in the Upper Snake TMDL to establish the final TSS mass effluent limits in the Permit because the Upper Snake TMDL "found that the NPDES permit limits for point sources existing at the time of the TMDL were sufficient to protect the water quality of the river," First Petition at 5, and "the TMDL was never intended to be used to set limits for TSS in NPDES permits." *Id.* at 6. The City argues that EPA should have disregarded the WLA in an EPA-approved TMDL when establishing effluent limits for TSS in an NPDES permit. This argument fails.

As a preliminary matter, during the public comment period, the City did not submit a comment stating that EPA erred in calculating the final TSS mass effluent limits based upon the Upper Snake TMDL or that the final TSS mass limits otherwise contravened the TMDL. Neither ICL nor IDEQ submitted comments addressing this issue, either. *See* ICL Comments to Draft Permit (EPA Ex. 6, A.R. 36); IDEQ Comments to Draft Permit (EPA Ex. 7, A.R. 38). As previously discussed, the City's comments explained the cost associated with upgrading the Facility to meet the new TSS mass effluent limits and requested the following changes for the Permit: (1) incorporation of the WLA as an annual TSS limit of 146.4 tons/year; (2) authorization for water quality trading for TSS; and (3) modification of the TSS compliance schedule to provide an additional year up front to allow for development of a TSS trading program. City Comments to Permit at 1-4 (EPA Ex. 5, A.R. 39). Therefore, the City did not preserve for appeal the issue as to whether EPA erred in using the WLA in the Upper Snake TMDL to establish the final TSS mass effluent limits. Because this issue was not raised during the public comment period and because the City fails to explain why this issue was not reasonably ascertainable during the public comment period, this issue was not properly preserved for review, and the EAB should deny review of this issue. 40 C.F.R. § 124.13; *see, e.g.*, *In re*

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City of Moscow, Idaho, 10 E.A.D. 135, 141 (EAB 2001).

Should the EAB reach the merits of this issue, the EAB should still deny review of the final TSS mass limit because the Region properly applied the applicable WLA. It is well settled that effluent limits based on an EPA-approved WLA "must be accepted by EPA." *U.S. Steel Corp. v. Train*, 556 F.2d 822, 846 (7th Cir. 1977). The NPDES regulations mandate that the permit issuer develop water quality-based effluent limits that are "consistent with the assumptions and requirements of any available [WLA] for the discharge prepared by the State and approved by EPA." 40 C.F.R. § 122.44(d)(1)(vii)(B). Unless impracticable, effluent limits for POTWs must be expressed as average monthly and average weekly discharge limits. *Id.* § 122.45(d)(2). *See generally* NPDES Permit Writers' Manual § 6.5.1, at 112 (discussing expression of permit limits).

The Region explained in the fact sheet that the Upper Snake TMDL established a WLA for the City of 146.4 tons/year of TSS. Permit Fact Sheet at 36 (EPA Ex. 3, A.R. 23); *see also* Watershed Management Plan at 205 tbl.101 (EPA Ex. 15, A.R. 57). In September 2005, EPA approved the modification to the TMDL and reaffirmed the applicable TSS WLA of 146.4 tons/year for the City's Facility. TMDL Modification Approval Letter (EPA Ex. 23, A.R. 62); *see* TMDL Modification at 44 tbl.2-A (EPA Ex. 17, A.R. 61). The Region further explained that it used procedures and formulas in EPA's *Technical Support Document for Water Quality-based Toxics Control* to statistically convert the annual WLA into an average monthly limit and an average weekly limit. Permit Fact Sheet at 36-38 (citing Office of Water, U.S. EPA, EPA/505/2-90-001, *Technical Support Document for Water Quality-based Toxics Control* at 103, 106, tbls. 5-2, 5-3 (Mar. 1991)) (EPA Ex. 3, A.R. 23). The Region then included these water quality-based effluent limits for TSS in the Permit after determining that they were more stringent than the technology based effluent limits. *Id.* at 38.

The City neither disputes the Region's calculations nor explains why they were incorrect.

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Instead, the City argues that the effluent limits for TSS in the Permit should remain the same as those in the Expired Permit. To support its argument, the City disregards entirely the actual WLA for the Facility that the State calculated and included in the Upper Snake TMDL. Instead, the City asks the EAB to draw some favorable inferences from certain ambiguous and/or irrelevant statements in three documents: (1) the *Upper Snake Rock Watershed Management Plan*; (2) the *TMDL Executive Summary*; and (3) the draft *Upper Snake Rock Watershed Management Plan 5-Year TMDL Review* ("draft *5-Year TMDL Review*"). First Petition at 5-8.

In support of its claim that the TSS WLA may be disregarded, the City first points to the following statement in the *Upper Snake Rock Watershed Management Plan*:[5]

> No additional reductions [of TSS loads] are proposed for any of the point sources discharging directly or indirectly to the Middle Snake River at this time since these have undergone a permit change this year which addresses TSS.

Watershed Management Plan at 201 (EPA Ex. 15, A.R. 57), quoted in First Petition at 6. The City interprets this statement to mean that "the TMDL found that the limits contained in the [Expired Permit] . . . were sufficient to protect the water quality of the river[,]" and thus, the final TSS mass effluent limits for the Permit should be identical to those expressed in the Expired Permit. First Petition at 6.

The City's reliance on this statement in the *Upper Snake Rock Watershed Management Plan* does not demonstrate that the Region clearly erred. It is ambiguous whether the quoted

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[5] The *Upper Snake Rock Watershed Management Plan* consists of the Upper Snake Rock Subbasin Assessment and the Upper Snake Rock Total Maximum Daily Load. Watershed Management Plan at 1 (providing executive summary) (EPA Ex. 15, A.R. 57). The Subbasin Assessment "is not a TMDL, but rather provides information that may be used in the development of TMDLs for these water quality limited water bodies based on pollutants described in the § 303(d) list. . . . [The Subbasin Assessment] is but a continuation of the TMDL process in the Upper Snake Rock so that all water quality limited streams and their associated pollutants are brought into the TMDL development process." *Id.* at 1-2.

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language refers to the Facility and whether the Expired Permit even falls within the category of permits described in the quoted language. Although EPA did not approve the TMDLs in the *Upper Snake Rock Watershed Management Plan* until August 2000, IDEQ had completed the document and submitted it to EPA in December 1999. *See* TMDL Approval Letter (EPA Ex. 22, A.R. 60). The Region issued the Expired Permit in March 2000. As the Expired Permit had not yet been issued at the time IDEQ submitted the *Upper Snake Rock Watershed Management Plan* to EPA, it is unclear whether the Facility is one of "the point sources . . . [that] ha[s] undergone a permit change this year which addresses TSS." Accordingly, it is inconclusive whether IDEQ concluded that the effluent limits for TSS in the Expired Permit were sufficient.

Even if the correct interpretation of the statement is, as the City insists, that IDEQ found the TSS effluent limits in the Expired Permit were adequate to protect the water quality, such a conclusion does not somehow require the Region to include those effluent limits in the Permit or otherwise absolve the Region of the CWA mandate to independently determine the effluent limits that will ensure compliance with the applicable water quality standards. *Natural Res. Def. Council v. EPA*, 279 F.3d 1180, 1186-87 (9th Cir. 2002) (construing 33 U.S.C. § 1311(b)(1)(C)). *See generally In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 632 (EAB 2006). The administrative record reflects that the Region satisfied this obligation, as previously described, and the Region's determination of the TSS mass limits was reasonable. Finally, the City does not explain how the quoted language supersedes the TSS WLA set forth four pages later. In fact, the City does not even acknowledge the WLA for the Facility in Table 101 of the *Upper Snake Rock Watershed Management Plan*. Accordingly, the statement in the *Upper Snake Rock Watershed Management Plan* does not show that the Region unreasonably relied on the WLA.

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> The second statement the City relies upon is from the *TMDL Executive Summary*:
>
> Loading capacities for TSS and total phosphorus (TP) in the Upper Snake/Rock Subbasin TMDL are calculated as an annual average load (tons/year). Determination of the loading capacity is a function of streamflow and target concentrations. While TP loading capacity was calculated as an annual load, allocations of TP are expressed as lbs/day to facilitate NPDES permitting and comparison to the Mid-Snake TP TMDL approved in 1997. It is reductions in annual loading of phosphorus that are expected to be effective in meeting water quality criteria. The relationship of these parameters to identification of the loading capacity and subsequent development of the TMDL is discussed below.

TMDL Executive Summary at A-6 (referring to TMDL in *Upper Snake Rock Watershed Management Plan* while pending EPA approval) (EPA Ex. 16, A.R. 58); *see* First Petition at 6. Based on this language, the City concludes that the TMDL's TSS WLAs are, essentially, inapplicable to *all* point sources and can be disregarded because "the TMDL was never intended to be used for setting TSS limits in . . . NPDES [permits], but rather was intended to facilitate NPDES permitting only for [phosphorus]." First Petition at 6-7. The City then claims that the Region "erred . . . by attempting to convert TSS from tons/year mean averages to lbs/day." First Petition at 7.

The quoted language from the *TMDL Executive Summary* does not demonstrate that it was unreasonable for the Region to employ the TSS WLA provided in the TMDL. The quoted statement merely explains why the WLAs for two different pollutants are expressed using two different terms. The statement does not, as the City insists, advise not using the TSS WLA for permitting. The City's interpretation that the WLAs for TSS are not to be used for permitting ignores, among other things, the relationship between TMDLs, WLAs, and water quality-based effluent limits. Where, as here, there is a TMDL for the permittee's water body, the permit writer must determine whether there is an applicable WLA for the point source, and if there is, ensure that the permit's water quality-based effluent limit is consistent with the assumptions and

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requirements of any available WLA for the discharge. 40 C.F.R. § 122.44(d)(1)(vii)(B). *See generally* NPDES Permit Writers' Manual § 6.4, at 104. The Region identified the TSS WLA applicable to the Facility and developed water quality-based effluent limits consistent with that WLA. Consistent with the NPDES permitting regulations, the Region expressed the TSS effluent limits as average monthly and average weekly discharge limits. *See* 40 C.F.R. § 122.45(d)(2). The City does not demonstrate that the Region's actions were clearly erroneous.

Finally, the City claims that IDEQ's draft *5-Year TMDL Review* indicates that the appropriate TSS effluent limits are those stated in the Expired Permit because the draft *5-Year TMDL Review* neither recommended altering TSS limits in existing NPDES permits nor set WLAs for any point source. First Petition at 7 (citing IDEQ, *Upper Snake Rock Watershed Management Plan 5-Year TMDL Review* 61-62 (draft Mar. 2009) ("Draft 5-Year TMDL Review") (First Petition Ex. 7)). This argument is unsubstantiated. The pages from the draft *5-Year TMDL Review* that the City cites do not appear to discuss TSS effluent limits in existing permits. Only an inference based on an *absence* of a discussion or recommendation to alter NPDES permits supports the City's argument. The sole discussion in the cited excerpt that concerns the TSS WLA is a statement that "[n]o changes to the [WLAs and LAs] are proposed." Draft 5-Year TMDL Review at 61-62. The City's arguments based on the draft *5-Year TMDL Review* hardly show that the Region clearly erred.

These ambiguous and irrelevant statements that the City quotes from the *Upper Snake Rock Watershed Management Plan*, the *TMDL Executive Summary*, and the draft *5-Year TMDL Review* fail to demonstrate that the Region clearly erred in developing the TSS effluent limits in the Permit. Most importantly, none of the statements constitute (or negate) the actual TSS WLA for the Facility, nor do the statements alter the 146.4 tons/year WLA for TSS. None of the statements that the City relies upon explicitly state that the approved WLA cannot or should not

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be used to establish effluent limits in a NPDES permit. Moreover, the State's draft *5-Year TMDL Review* cannot legally change the applicable TMDL, its TSS WLA, or EPA's approval of the existing TMDL. *See* First Petition at 7 (citing Draft 5-Year TMDL Review at 61-62). Pursuant to 40 C.F.R. § 122.44(d)(1)(vii)(B), the Region reasonably identified and employed the WLA in the EPA-approved Upper Snake TMDL to establish the final TSS mass effluent limits in the Permit. The City fails to demonstrate that the Region's reliance on the WLA for TSS was clearly erroneous, and the EAB should deny review of the final TSS effluent limits.

B. The Region Did Not Err When it Declined to Authorize Water Quality Trading for TSS in the Permit.

Even though the IDEQ Water Quality Trading Guidance did not address water quality trading for TSS, the City argues that the Region erred by failing to include TSS water quality trading provisions in the Permit where the City had identified a non-point source trading partner and where EPA policy promoted water quality trading. First Petition at 8-11. During the comment period, the City indicated that "pollution trading is one of the preferred methods by EPA to reach the target water quality limits in water bodies that are impaired" and recited the steps the City had taken in anticipation of working with EPA, IDEQ and the Mid-Snake Watershed Advisory Group to develop a water quality trading program for TSS. City Comments to Permit at 2-4 (EPA Ex. 5, A.R. 39). In response to this comment, the Region stated:

> [W]e cannot prospectively include provisions in a permit that depend on future changes in the [Draft IDEQ Pollutant Trading Guidance Document]. If the State modifies the Guidance to provide for trading TSS, we would consider modifying the permit to include such provisions.

Permit RTC at 8-9 (EPA Ex. 2, A.R. 53).

In its appeal, the City does not explain why the Region's response was inadequate. Rather, the City quotes extensively from EPA policy documents that describe water quality trading and argues that because the EPA "promotes" and "encourages" water quality trading, the

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permit writer's decision not to include such provisions in the Permit warrants EAB review. First Petition at 8-11 (citing Water Quality Trading Toolkit at 6-7 (EPA Ex. 20, A.R. 73); Office of Policy, Economics & Innovation, U.S. EPA, *Water Quality Trading Evaluation Final Report* 1-1 (Oct. 2008); EPA Trading Policy at 2 (EPA Ex. 19, A.R. 72)).

While the City is correct that EPA policies support the inclusion of water quality trading provisions in NPDES permits, these policies, having not undergone the rulemaking process, are not binding regulations. The policy documents do not, as the City argues, *require* a permitting authority to authorize water quality trading in a particular NPDES permit. Language in the policy documents describes permissive, rather than mandatory, actions and also provides a general process by which permit writers may include trading in NPDES permits if the permit writers opted to proceed with such provisions. *See* Water Quality Trading Toolkit at 3 ("The Toolkit is intended to assist with developing and implementing NPDES permits that allow for water quality trading.") (EPA Ex. 20, A.R. 73); EPA Trading Policy at 2 ("The purpose of this policy is to encourage states . . . to develop and implement water quality trading programs . . . .") (EPA Ex. 19, A.R. 72). Moreover, EPA specifically noted the discretionary nature of its water quality trading policy documents. In particular, the disclaimer to the *Water Quality Trading Toolkit for Permit Writers* ("*Toolkit*") distinguishes between the legally binding requirements of the CWA and its regulations and the permissive nature of the *Toolkit*, and the *Toolkit* clearly states that it provides non-mandatory recommendations:

> Implementation of water quality trading will be governed by existing requirements of the [CWA] and EPA's NPDES implementing regulations. Those CWA provisions and regulations contain legally binding requirements. This document does not substitute for those provisions or regulations. The recommendations in this guidance are not binding; the permitting authority may consider other approaches consistent with the CWA and EPA regulations. The use of non-mandatory words like "should," "could," "would," "may," "might," "recommend," "encourage," "expect," and "can" in this guidance mean solely that something is suggested or recommended, and not that it is legally required, or that the suggestion or recommendation imposes legally binding requirements, or that following the suggestion or recommendation necessarily creates an expectation of

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> EPA approval. When EPA makes a permitting decision, it will make each decision on a case-by-case basis and will be guided by the applicable requirements of the CWA and implementing regulations, taking into account comments and information presented at that time by interested persons regarding the appropriateness of applying these recommendations to the particular situation.

Water Quality Trading Toolkit at disclaimer (EPA Ex. 20, A.R. 73). EPA's water quality trading policy documents do not render water quality trading a mandatory aspect of the NPDES program. Neither the *Toolkit* nor the *Water Quality Trading Policy* requires the Region to authorize water quality trading for TSS in the Permit, and to do so would be discretionary.

The Region, as the City correctly recognized in its comments, has the discretion to determine what provisions are appropriate to include in a particular NPDES permit. City Comments to Permit at 2 ("[I]ncluding provisions is based on the judgment of the permit writer.") (EPA Ex. 5, A.R. 39). The Region properly exercised that discretion. The Region considered the City's comment regarding the inclusion of water quality trading for TSS, and in its response to comments, the Region explained its reluctance to include TSS trading provisions in an NPDES permit where the State water quality trading guidance had not already developed a program for doing so. Permit RTC at 8-9. "It is entirely reasonable for the Region, in the exercise of its discretion, to give credence to State policy and guidance documents in effect under State law at the time of permit issuance." *In re J&L Specialty Prods. Corp.*, 5 EAD 31, 81 (EAB 1994). The City has not shown that the Region's decision not to include TSS water quality trading provisions in these circumstances was clearly erroneous or raised an important policy consideration. As such, the EAB should deny review of the Region's decision not to include water quality trading provisions for TSS.

C. <u>The Region Did Not Err When it Declined to Authorize Water Quality Trading for Phosphorus in the Modified Permit.</u>

At issue is the absence in the Modified Permit of water quality trading authorization for phosphorus. The City claims that the Region's decision not to include provisions allowing water

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quality trading for phosphorus is clearly erroneous because (1) the Region misinterpreted values in the TMDL Modification as assuming attenuation, Petition for Review at 1-9 (July 24, 2010) ("Second Petition"), and (2) EPA encourages the incorporation of water quality trading into NPDES permits, *id.* at 9-11.

1. Region 10 Reasonably Construed the TMDL to Assume Attenuation.

EPA has indicated that "[t]rades and trading programs in impaired waters for which a TMDL has been approved or established by EPA should be consistent with the assumptions and requirements upon which the TMDL is established." EPA Trading Policy at 5 (EPA Ex. 19, A.R. 72). As described in greater detail below, the Region concluded that the Upper Snake TMDL for phosphorus assumed attenuation.[6] The Region explained the significance of this assumption:

> The attenuation factor in [a] TMDL complicates a pollutant trading system [] because it alters the equivalency of phosphorus trading. Since phosphorus discharged is lost over distance, one pound of phosphorus discharged at one location is not equivalent to one pound discharge at another location. In general, a downstream source must purchase more than one pound of upstream load for each pound of allowance it receives. Otherwise, the transfer of allocated loads in the downstream direction will violate the assumptions of the TMDL and potentially exceed the instream target.

Permit Modification Fact Sheet at 2 (EPA Ex. 10, A.R. 109). The Region then construed the IDEQ draft Pollutant Trading Guidance as using a 1:1 trading ratio for phosphorus. *Id.* at 2-3. In

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[6] In the fact sheet for the proposed permit modification, the Region explained:

> Some TMDLs employ simple mass balance models that assume no loss of the pollutant from the water column. Other[] [TMDLs] employ water quality models that estimate pollutant loss from the water column (through nutrient uptake by aquatic plants, settling of solids, etc.). This uptake is sometimes referred to as 'attenuation' of the instream phosphorus concentration or load.

Permit Modification Fact Sheet at 2 (EPA Ex. 10, A.R. 109).

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particular, the Region stated that "the Snake River water quality trading ratios were based on assumptions that did not include attenuation and were set to 1:1 for all trades. . . . The assumptions used to establish the water quality trading ratios are not consistent with the attenuation assumptions of the TMDL." *Id.* at 2. The Region concluded that implementing water quality trading with a 1:1 ratio when the TMDL assumed attenuation would risk "the water quality improvements called for in the TMDL in this segment of the Snake River" because the TMDL loading capacity for the traded pollutant could be exceeded. *Id.* Therefore, the Region proposed a permit modification that did not include water quality trading for phosphorus. *Id.* at 1. The City now challenges the Region's conclusion that the Upper Snake TMDL for phosphorus assumed attenuation.

The Region identified the "TP Loss/Attenuation" table in the TMDL Modification and interpreted the values in the column labeled "% Loss/Attenuation" as reflecting the estimated percentage reduction in phosphorus due to attenuation in a particular river segment. *Id.* at 3 (citing TMDL Modification at 34 (EPA Ex. 17, A.R. 61)). Based on this table, the Region concluded that the TMDL applicable to phosphorus in the Modified Permit employed a mass balance model with attenuation. *Id.* at 2-3.

In its comments, the City disputed the Region's interpretation of the Upper Snake TMDL and stated that the "TMDL modification contains no loss/attenuation percentages, nor any other data inconsistent with the 1:1 phosphorus trading." City Comments to Draft Permit Modification at 1 (EPA Ex. 13, A.R. 107). The City stated that the table that the Region relied upon to support the conclusion that the TMDL assumed attenuation was "in reality a table comparing the derived concentrations of [phosphorus] at each compliance point . . . to the target [phosphorus] concentration for the river of 0.0075-mg/L." *Id.* at 1-2 (citation and emphasis omitted). The

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City commented that the values in the "Total" column of the chart constituted the target concentration for phosphorus. *Id.* at 2. The City's comments included calculations that purported to reflect that the "percent difference" between the values in the "Sub Total" and "Total" columns was the "amount of [phosphorus] reduction required to meet the 0.0075-mg/L target[,]" which were the "*identical* percentages as contained in the . . . column labeled 'Loss/Attenuation.'" *Id.* at 2-3. Thus, according to the City, the values in the "% Loss/Attenuation" column in the TMDL Modification did not reflect the percent of loss or attenuation in a particular segment of the river, but rather, the values in the "% Loss/Attenuation" column were the percent reduction in phosphorus necessary to attain the target phosphorus concentration. *Id.* at 3. Finally, the City stated that "the last sentence of section 8.0 [of the TMDL Modification] confirmed that the . . . TMDL Modification does nothing to change the [phosphorus] export and attenuation data contained in the 2000 Upper Snake Rock TMDL." *Id.*

The Region addressed the City's comments and explained that several factors led the Region to interpret the TMDL as assuming attenuation. First, Section 8.0 of the TMDL Modification, in which the aforementioned table appears, is titled and discusses "Loss and Attenuation." Modified Permit RTC at 2 (EPA Ex. 9, A.R. 102); *see* TMDL Modification at 32-34 (EPA Ex. 17, A.R. 61). The Region also relied on the plain meanings of "loss" and "attenuation." Modified Permit RTC at 2 (EPA Ex. 9, A.R. 102). The Region then explained that the City's interpretation was not supportable in the TMDL framework, and that for the City's interpretation to be correct, IDEQ would have had to "highlight[] a series of necessary loading reductions, erroneously labeled them 'loss/attenuation,' and failed to assign these reductions to specific sources." *Id.*

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On appeal, the City appears to quote in their entirety the City's comments made during the public comment period and challenges the sufficiency of the Region's responses to the City's comments. Second Petition at 7. The City then insists that the Region should not rely on the approved TMDL. *Id.* ("[T]he numbers relied on by the EPA . . . do not measure loss or attenuation, despite the label."). The City's arguments do not demonstrate that the Region clearly erred in its interpretation of the TMDL, and at best, the City appears to challenge the underlying TMDL.

The language of the approved TMDL Modification is clear that the TMDL models assume attenuation. An entire section of the TMDL Modification, Section 8.0, discusses loss and attenuation and their assumption into the mass-balance model used to develop the phosphorus TMDL. The TMDL Modification explains that "[w]ithin the [Middle Snake River] system, there is 'loss' (downstream transport) and 'attenuation' (localized placement) of sediment and total phosphorus." TMDL Modification at 32 (EPA Ex. 17, A.R. 61). "The Middle Snake River has phosphorus export losses that range from 4.2 – 36.5%. . . . It is assumed that the export [sic] [phosphorus] export loss includes some level of attenuation. . . ." *Id.* at 33-34 (citations omitted). In describing the model employed to derive the phosphorus TMDL, the TMDL Modification provides:

> From the standpoint of a simple mass-balance model, a number of assumptions are necessary. These assumptions include:
>
> . . . .
>
> 2. Total Losses: The assumption is made that total losses to volatilization, soil adsorption, sedimentation, groundwater storage, and denitrification equal the difference between total inputs and the output. . . . [Phosphorus] attenuation may

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be a combination of substrate sedimentation and as well as plant uptake.

Id. at 33.[7] Finally, after discussing the meaning of loss and attenuation, describing their inclusion in the mass-balance model for the phosphorus TMDL, and explaining that "some level of attenuation" is assumed in the phosphorus export losses measured at various compliance points in separate research conducted on the Middle Snake River, *id.* at 32-34, the TMDL Modification states, immediately preceding the TP Loss/Attenuation chart that the City claims that the Region has misinterpreted: "[T]he instream estimate [phosphorus] export *loss/attenuation values* at the compliance points per segment are as follows . . . ." *Id.* at 34 (emphasis added). Following the chart, the TMDL provides that phosphorus "export (loss) and attenuation (localized placement) needs to be studied more intimately within the Middle Snake River system to ascertain more directly the applicable coefficients for each segment." *Id.*

Such language is unambiguous: the chart shows loss and attenuation. More specifically, the column labeled "% Loss/Attenuation" reflects the estimated percent of loss and attenuation for a particular river segment. Moreover, as the Region stated in the response to comments, "[n]owhere in the 2005 TMDL Modification is [phosphorus] 'loss and attenuation' identified as a requirement or target for further phosphorus reductions[,]" as the City claims. Modified Permit RTC at 2 (EPA Ex. 9, A.R. 102). Given this language in an approved TMDL, the Region essentially interpreted the final sentence in TMDL Modification Section 8 as a typographical error and reasonably concluded that the relevant TMDL model assumed attenuation. The final sentence in TMDL Modification Section 8, while inconsistent with the rest of the section, does

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[7] "The output for [phosphorus] is the percentage of [phosphorus] exported from the segment downstream to the next segment." TMDL Modification at 34 (EPA Ex. 17, A.R. 61).

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not alone demonstrate that the Region's TMDL interpretation is unreasonable.[8] The City disagrees with the Region's interpretation of the TMDL but has not shown that the Region's response to comments was inadequate, or that the Region's interpretation was unreasonable.

Finally, to the extent that the City's arguments challenge the underlying TMDL, EPA's 2005 approval of the TMDL Modification is a final agency action that is not reviewable in the course of this administrative proceeding under 40 C.F.R. part 124. Rather, the appropriate forum for such review is in federal district court pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* *In re City of Moscow, Idaho*, 10 EAB 135, 158-161 (EAB 2001) (discussing EAB's lack of authority to review underlying TMDLs).

The administrative record reflects that the Region conducted a thorough analysis of whether to retain the provisions at issue and adequately responded to the City's comments. The Region then reasonably determined not to include water quality trading provisions for phosphorus. The City fails to demonstrate that the Region's conclusion, which is based on the plain meaning of the words "loss" and "attenuation" and the context in which the terms arise, is clearly erroneous. Accordingly, the EAB should deny review of the Modified Permit.

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[8] The final sentence provides, in relevant part: "For the present, the [phosphorus] . . . export and attenuation models are the same as used in the Upper Snake Rock TMDL." TMDL Modification at 34 (EPA Ex. 17, A.R. 61). The City commented that the sentence "confirms that the 2005 Upper Snake Rock TMDL Modification does nothing to change the [phosphorus] export and attenuation data contained in the 2000 Upper Snake Rock TMDL." City Comments to Permit Modification at 3 (EPA Ex. 13, A.R. 107). The City now challenges the adequacy of the Region's response that the sentence "is confusing, but nonetheless the discussions in the response to comments above identify clear and specific language in the 2005 TMDL Modification that make it clear that attenuation was taken into account in establishing [WLA] in the 2005 TMDL Modification." Modifed Permit RTC at 5 (responding to comment 4) (EPA Ex. 9, A.R. 102); *see* Second Petition at 8-9.

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2. Region 10 is Not Required to Incorporate of Water Quality Trading in the Modified Permit.

The City alleges that EPA policy documents required the Region to incorporate water quality trading for phosphorus in the Modified Permit, and the arguments on this point are essentially identical to those the City made in its petition for review of the Permit. *Compare* Second Petition at 9-11 with First Petition at 8-12. However, during the public comment period on the draft permit modification, the City did not submit a comment regarding this issue. *See* City Comments to Draft Permit Modification (EPA Ex. 13, A.R. 107). The only other commenter to the proposed permit modification, ICL, also did not address this issue. *See* ICL Comments to Draft Permit Modification (EPA Ex. 14, A.R. 106). Because the issue of whether EPA's policy documents required incorporation of water quality trading for phosphorus in the Modified Permit was not raised during the public comment period and because the City has failed to explain why this issue was not reasonably ascertainable during the public comment period, the City did not properly preserve this issue for review, and the EAB should deny review of the Modified Permit. 40 C.F.R. § 124.13; *see, e.g.*, *City of Moscow*, 10 E.A.D. at 141.

Even if the EAB were to reach the merits of the City's arguments, the City fails to demonstrate that the Region was required to incorporate such provisions for phosphorus in the Modified Permit. For the same reasons articulated in Part IV.B of this response brief, above, EPA's water quality trading policy documents do not mandate inclusion of water quality trading provisions in NPDES permits, and the Region did not err when it did not authorize water quality trading for phosphorus in the Modified Permit.

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V. CONCLUSION

The City fails to demonstrate that the Region committed clear error and fails to raise any important policy considerations. Accordingly, for the foregoing reasons, the Region respectfully requests that the EAB dismiss the City's petitions for review and deny review of the Permit and Modified Permit.

DATED: September 30, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing EPA Region 10's Response Brief and accompanying List of EPA Exhibits and Exhibits in the matter *City of Twin Falls Wastewater Treatment Plant*, NPDES Appeal Nos. 09-12 & 10-08 have been electronically filed with the Environmental Appeals Board and were served by U.S. First Class Mail this day upon the following:

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