BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)
	)
Charles River Pollution Control District	)
	)
Permit No. MA0102598	)
	)

PETITION FOR REVIEW OF CHARLES RIVER POLLUTION CONTROL DISTRICT FOR NPDES PERMIT ISSUED BY REGION 1

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I. INTRODUCTION

The Charles River Pollution Control District ("District") operates a regional wastewater treatment facility ("Facility") that serves about 13,700 ratepayers in the Towns of Franklin, Bellingham, Medway, and Millis in Norfolk County, Massachusetts (collectively, "Co-Permittees"). The District also receives and treats septage from several other towns. The Facility discharges into the Upper Charles River under a National Pollution Discharge Elimination System ("NPDES") permit. As originally built, the Facility had a design capacity of 4.54 million gallons per day ("MGD"). Beginning in 1995, the District underwent significant planning, permitting, and extensive upgrades consistent with an administrative consent order with the Massachusetts Department of Environmental Protection ("MassDEP"), and as of 2000 the Facility has an increased design capacity of 5.7 MGD. Because the District's member communities initially would not generate that amount of flow in the summer months, the Facility's NPDES permits in 2000 and in 2014 limited average monthly flow from the months of July to September to 4.5 MGD. Due to long anticipated increased growth and expanded sewer infrastructure in the member communities, the District now needs the ability to use the full 5.7 MGD design capacity year-round. Although the summer limit may have made sense 25 years ago, it lacks justification now given the Facility's current design flow, treatment capacity, and regional needs. Nonetheless, Region 1 of the Environmental Protection Agency ("EPA" or "Region") has issued a final permit to the District that perpetuates this outdated flow limitation.

The District, joined by the Co-Permittees, therefore request that the Environmental Appeals Board ("Board") accept this petition for review of the final permit for at least the following three reasons:

First, EPA regulations require effluent limits for publicly-owned treatment works ("POTW") like the Facility to be "calculated based on design flow." 40 C.F.R. § 122.45(b)(1). The Facility has a design flow of 5.7 MGD. By limiting the Facility's effluent flow to 4.5 MGD during the summer months, the Region has not complied with this regulation or the Board's prior precedent. Because an agency cannot contradict its own regulations, the summer flow limit is impermissible by law.

Second, the summer flow limit is irrational. The lower summer limit was meant to be temporary, and the Facility has long since been upgraded to support a higher year-round flow—at significant expense to the Commonwealth of Massachusetts and ratepayers—without increasing pollutant loads. There is thus no reason to maintain an artificially lower limit. Further, limiting flow in only a few months is practically infeasible because the District's member towns cannot materially limit their wastewater discharges in the summer months. This would waste 1.2 MGD of the Facility's capacity and restrict housing and other development in the member towns despite Massachusetts' desperate need and stated goals for additional housing. Although the Region provided general reasons for a flow limit in the draft permit and in its response to comments, these reasons do not apply to the lower summer flow limit.

Third, EPA acknowledged that the Facility can meet the pollutant limits already contained in the permit but committed clear error by claiming that the District needs to complete an antidegradation study with MassDEP "for pollutants that are not currently limited in the permit" before removing the lower summer limit. This is not reasoned decision-making because flow itself is not a pollutant, and the Region does not identify which non-permit pollutants it is concerned about. This reasoning also impermissibly ignores that the Region already evaluated

the impact of the discharge at 5.7 MGD on the river at the "worst case" 7Q10[1] river flow because that is the limit in the non-summer months. The Region also already conducted its "reasonable potential analysis" to assess the Facility discharge's impact on water quality using the higher design flow for some analytes but confusingly not for others, even though the "worst case" 7Q10 period occurs during the summer when the lower flow limit is in effect. MassDEP also already reviewed and approved a 5.7 MGD limit when it approved the Facility's upgrades in the 1990s. Indeed, the Region (and MassDEP) had proposed setting the Facility's year-round design flow at 5.7 MGD in the 2000 draft permit, before including the lower limit because of the Facility's inability to use 5.7 MGD in the summer until at least 2015. The Facility also consistently meets its whole effluent toxicity ("WET") tests, suggesting that there is no impact on aquatic life from the Facility's discharge and thus no need to further analyze other unspecified pollutants.

For these reasons and those discussed below, the District, joined by the Co-Permittees, requests that the Board remand the Permit to Region 1 with instructions to issue a new permit with only the year-round 5.7 MGD rolling average flow limit, removal of the monthly average flow of 4.5 MGD from July through September, and confirming changes to the effluent limits for total residual chlorine ("TRC") and chronic ("C-NOEC") whole effluent toxicity in part I.A.1 of the final permit, which are based on the challenged summer flow limit.

II. PERMIT CONDITIONS FOR REVIEW

Under 40 C.F.R. § 124.19(a), the District petitions for review of the conditions of Permit No. MA0102598 ("final permit"), which was issued on December 15, 2025. The final permit authorizes the District to discharge from its wastewater treatment plant at 66 Village Street,

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[1] This value is known as the 7Q10 because Massachusetts regulations require the dilution value for reasonable potential review to be based on the known or estimated lowest average flow for seven consecutive days with a recurrence interval of once in ten years.

Medway, Massachusetts into the Charles River. (Att. 1, Current Permit). The District, joined by the other Co-Permittees, contends that certain permit conditions are based on clearly erroneous findings of fact and conclusions of law.

Any contested permit conditions and any uncontested conditions that are not severable from contested conditions are stayed pending final agency action. 40 C.F.R. §§ 124.16(a)(2)(i), 124.60(b). Specifically, the average monthly effluent flow for the months of July through September are stayed. The effluent limits for TRC and C-NOEC in part I.A.1 of the final permit are also stayed because these limits are based on the challenged summer flow limit.

III. FACTUAL AND STATUTORY BACKGROUND

The District provides the following relevant factual, statutory, and regulatory background to assist the Board's review:

A. Factual Background

i. *The District and Facility History*

The District was formed in 1973 by the Massachusetts legislature initially to serve the Towns of Franklin and Medway. Since the 1980s, it has also served the Towns of Millis and Bellingham. The District owns and operates a regional wastewater treatment Facility and an interceptor system for this purpose. The Facility serves about 7,800 ratepayers in Franklin, 2,950 ratepayers in Medway, 1,250 ratepayers in Bellingham, and 1,720 ratepayers in Millis. Each town owns and operates its own sewer system, which transports sewage to the Facility. The District also receives and treats septage from the Towns of Dover, Holliston, Norfolk, Sharon, Sherborn, Weston, and Wrentham. The Facility discharges treated effluent to the Charles River.

The Facility was originally brought online in 1979 with a design flow of 4.54 MGD. The Facility was later expanded and upgraded in 2000 to achieve an increased design flow of 5.7 MGD, based on the anticipated needs of the growing population of the region. These upgrades

were funded in part by grants issued by MassDEP through the Massachusetts Clean Water State Revolving Fund ("SRF") program. As confirmed in the Fact Sheet, the Facility's "annual average daily flow reported in the 2019 application was 4.8 MGD and the median for the last 5 years has been 4.9 MGD."

ii. *The District Permitting History*

The applicable permitting history begins in 1995 when MassDEP issued an administrative consent order requiring the District to "submit an evaluation of future flow projections to the facility and a schedule for expanding and upgrading the [Facility] to treat projected future flows (including future septage treatment)." (Att. 2, 1995 MassDEP Administrative Consent Order, at 4). At the time, the Facility had a permitted average monthly flow of 4.54 MGD, which was in line with the Facility's then-design capacity. To comply with the consent order, in 1995, the District's consultant CDM (now CDM Smith) prepared a Phase 1A facilities plan. (*See* Att. 3, 1996 MassDEP Letter (referencing the plan)). The plan concluded that the Facility's design capacity should be increased to 5.7 MGD to meet projected growth in the region over the next 20 years. (*Id.*) Further, this design flow increase should be accomplished without increasing mass loading. (*Id.*) MassDEP, in an April 1996 response letter, "concur[red] with CDM's comments and the proposed upgrade of the facility to 5.7 MGD with the design criteria based on the current NPDES permit wasteload limits." (*Id.*)

Based on MassDEP's approval, the District moved forward with the design of the Facility upgrade, which would also improve treatment to maintain compliance with preexisting permit requirements. The substantial cost of the upgrade was needed to allow for continued growth in the member communities and justified by the above understanding that the Facility could increase flow with increased treatment and efficiency to maintain permitted waste load limits.

In April 1997, the Massachusetts Secretary of Environmental Affairs issued a determination under the Massachusetts Environmental Policy Act for the proposed upgrades. (Att. 4, 1997 EOEA ENF Certificate). The Secretary noted that the upgrades were needed under the MassDEP consent order and were "required because the treatment plant has exceeded 80 percent of its design flow." (*Id.* at 2.) He found that "the treatment process improvements proposed as part of this project will clearly improve the effluent quality from this facility." (*Id.* at 3.) The Secretary further found that "the project can be implemented without significant adverse impacts . . . ." (*Id.*)[2]

For the 2000 draft permit, the Region (and MassDEP) proposed setting the flow limit and dependent reasonable potential calculations using a year-round limit of 5.7 MGD. The District, in its comments, requested that EPA use a lower flow limit "during the term of the next permit . . . because of the zero probability over the next four years that flows will occur at the design capacity" during the summer months. (Att. 5, Comments and Response to Public Comment for 2000 Permit). The comments also made clear that the Facility would not be at its design capacity until 2015. (*Id.*) EPA agreed to the District's request and limited the average monthly flow rate from July through September to 4.5 MGD and 5.7 MGD for the rest of the year. (*Id.*) The

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[2] The District provided this permitting background in a letter to EPA and MassDEP on September 4, 2025 to respond to questions posed by MassDEP during its review of the draft permit and comments received. (Att. 12, District Supplemental Comment Letter). Because EPA and MassDEP requested this information from the District and considered it in their decision, it is included in the record because "the record must include all documents and materials that the agency 'directly or indirectly considered.'" *Maritel, Inc. v. Collins*, 422 F.Supp.2d 188, 196 (D.D.C. 2006) (quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739 (10th Cir. 1993)). The Board may also consider the information in this supplemental letter because it is "'background information . . . to determine whether the agency considered all of the relevant factors'" in its decision. *Safe Haven Home Care, Inc.*, 130 F.4th 305, 324 (2d Cir. 2025) (quoting *Am. Wildlands v. Kemphthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008)).

seasonal flow limit in the 2000 permit was meant to be temporary, cognizant of the fact that the member communities did not need more flow until about 2015.

For the 2008 draft permit, the Region maintained the 4.5 MGD summer flow limit. (Att. 6, Fact Sheet for 2008 Permit). In the Fact Sheet, the Region justified this limit by stating: "Because the monthly average flows typically remain below 4.5 MGD during the critical July through September period, EPA and MassDEP have retained the seasonal flow limits in this draft permit." (*Id.*) The District did not comment on the summer flow limit because additional flow capacity was not needed at that time. The Region kept the 4.5 MGD summer flow limit in the final 2014 permit. (Att. 7, 2014 Permit).

iii. *2024 Draft Permit*

The District timely filed a renewal application in 2019 for its NPDES permit. (Att. 8, District Renewal Application). In its application, the District raised the issue of the summer flow limit and requested an opportunity to discuss its removal. (*Id.*) This was because the member communities now needed to use the Facility's full 5.7 MGD capacity year-round, as was long projected and planned.

EPA published its 2024 draft permit for NPDES Permit No. MA0102598 ("Draft Permit") on December 10, 2024. (Att. 9, 2024 Draft Permit). Despite the District's request, the Draft Permit limited monthly average flow to 4.5 MGD from July through September, while allowing a 12-month rolling average flow of up to 5.7 MGD—the Facility's design capacity—for the rest of the year. (*Id.* at 3.)

In justifying a flow limit in general, Section 2.3 of the Draft Permit's Fact Sheet states that a NPDES permit may include limits to effluent flow "as a reasonable and important worst-case condition in its reasonable potential and WQBEL [water quality based effluent limitation] calculations to ensure compliance with WQSs [water quality standards] under CWA

§ 301(b)(1)(C)." (Att. 9, Fact Sheet at 10). It also said that flow limits encouraged infiltration and inflow ("I&I") reductions into sewer collection systems. (*Id.* at 11.) The Region later clarified in the final permit's Response to Comments that these justifications for flow limits do not apply to the lower summer limit. (*See* Att. 10, Response to Comments for Final Permit, at 4–5). Effluent pollutant limits for chronic TRC, acute TRC, and C-NOEC in the Draft Permit were calculated based on a 4.5 MGD flow limit year-round. (Att. 9, Fact Sheet at 22 and 31). Confusingly, the Region assessed the need for effluent limitations for metals, ammonia and phosphorus by determining whether the Facility's discharge had the "reasonable potential"[3] to violate the river's water quality standards using the Facility's 5.7 MGD design flow based on the river's low flow 7Q10 conditions, despite this low flow period occurring when the lower 4.5 MGD limit was in effect. (*Id.* at Fact Sheet, Appendix B).

iv. *Comments Submitted by the District and Co-Permittees*

The District submitted comments on several provisions of the Draft Permit. (Att. 11, District Comment Letter on 2024 Draft Permit). The comments requested removal of the 4.5 MGD limit for the summer months, noting that this limit had been outdated and that EPA's justifications for a flow limit did not apply to the summer limit. (*Id.* at 2.) Specifically, the District noted that the alleged justifications for the 4.5 MGD summer limit in Section 2.3 of the Draft Permit's Fact Sheet served to better justify a year-round 5.7 MGD limit. (*Id.*) The District also noted that the permitted flow of a wastewater treatment facility should match the design

[3] Under 40 C.F.R. § 122.44(d)(1)(i), "[l]imitations must control all pollutants or pollutant parameters . . . which [EPA] determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard . . . ."

flow of the Facility, but that the Draft Permit's 4.5 MGD summer limit was substantially lower than the Facility's design flow of 5.7 MGD. (*Id.* at 3.)

The District's comments also raised concerns with the dilution factor EPA used for its reasonable potential analysis. (*Id.* at 4–5.) The District explained that if EPA agreed that effluent flow of 5.7 MGD should apply year-round, then the dilution factor would need to be recalculated for certain analytes accordingly (to 1.34, rather than the Draft Permit's proposed 1.43). (*Id.*) In the alternative, if EPA did not agree, the District noted that the permit should use 4.5 MGD to calculate effluent limits for all analytes year-round, because the river's low flow 7Q10 period occurred in the summer when the lower 4.5 MGD flow limit was in effect. (*Id.*)

The District also commented on certain specific effluent contaminant limits and other permit conditions. Namely, the District requested the recalculation of ammonia limits, the removal of a numeric TKN (Total Kjeldahl Nitrogen) limit, the removal of an ambient phosphorus monitoring requirement, the reduction in required sampling frequency of suspected PFAS sources (and clarification that said sampling must be conducted by any Significant Industrial Users for PFAS analytes as part of the District's IPP program), the removal of Adaptive Planning provisions, and the removal of alternative permit conditions discussed in Section 5.7 of the Draft Permit Fact Sheet.[4] (*Id.* at 5–9.)

The other Co-Permittees also submitted comments on the summer flow limit. (*See* Att. 10). They noted, among other things, the substantial cost the towns incurred to make the Facility upgrades, the need for the full 5.7 MGD capacity to support projected housing growth, and their efforts to remove I&I from entering the sewer collection systems.

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[4] As noted above, the District also provided a supplemental letter in September 2025 providing additional background on the Facility's NPDES permitting history.

v. *The Final Permit (2025)*

Region 1 issued the 2025 final permit on December 15, 2025. (Att. 1). In the Region's responses to the District's comments, EPA agreed that its justifications in Section 2.3 of the Draft Permit's Fact Sheet supported a 5.7 MGD limit, rather than a 4.5 MGD limit. (Att. 10 at 5). EPA also agreed that its I&I concerns related to effluent flow did not support a seasonal 4.5 MGD limit. EPA acknowledged "that effluent limits (especially those pollutant-specific limits calculated based on effluent flow) should be based on the design flow of a facility." (*Id.* at 6.)

Nonetheless, the final permit limited flow to 4.5 MGD for the summer months, despite the District's comments requesting that this limit be raised to the Facility's 5.7 MGD design capacity and the flow limit for every other month. (Att. 1 at 3). In response to the District's comments, EPA acknowledged that the Facility's design capacity justified a 5.7 MGD flow limit, rather than a 4.5 MGD flow limit, but argued that increasing the flow limit from the 2014 permit would not be authorized. (*See* Att. 10 at 5). EPA acknowledged that "pollutants that are currently limited in the permit" could be addressed through "the same or slightly adjusted limits" as the District described in its comments. (*Id.* at 6.) But the Region argued that MassDEP must first complete an antidegradation analysis for "pollutants that are not currently limited in the permit" before removing the lower summer flow limit. (*Id.*) The Region did not specify which pollutants it was referring to.

The final permit also did not recalculate the dilution factor for the reasonable potential analysis of certain analytes, as the District requested. Region 1 continued the inconsistent approach of using 4.5 MGD for certain analytes (TRC and C-NOEC) and 5.7 MGD for others (e.g., ammonia). The Region refused to recalculate the dilution factor for ammonia using the 4.5 MGD limit during the river's low flow 7Q10 period because it "would be contrary to 40 C.F.R. § 122.45(b)(1), which states that 'permit effluent limitations *** shall be calculated based on

design flow.'" (Att. 10 at 4). This is the same regulation that the Region refused to apply when it set the summer limit at 4.5 MGD.

B. The Clean Water Act and Effluent Flow Limits

Congress passed the Clean Water Act ("CWA") in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). CWA jurisdiction exists over navigable surface waters, meaning "the waters of the United States, including territorial seas." *Id.* at § 1362(7). The NPDES permitting program is authorized under § 1342 and implemented by the regulations at 40 C.F.R. § 122, and it allows EPA to issue permits for facilities that discharge pollutants from point sources into waters of the United States.

The Board has previously found that effluent flow limits may be imposed as conditions in NPDES permits under section 402(a) of the CWA. *See* 33 U.S.C. § 1342(a); *In re City of Lowell*, 18 E.A.D. 115, 156 (EAB 2020). This provision allows EPA to impose NPDES permit conditions that "assure compliance with the requirements of" other effluent limitations. *Id.* (quoting 33 U.S.C. § 1342(a)). Thus, effluent flow itself is not a pollutant regulated by the CWA, but EPA is within its authority to limit it. EPA imposes effluent flow limits in its NPDES permits to ensure that a permittee's "reasonable potential determinations and pollutant effluent limits assure compliance with . . . water quality standards." *In re City of Lowell*, 18 E.A.D. at 158. Flow limits are based on the design capacity of a treatment facility: that is, they are established to ensure that facilities do not discharge more effluent than they are designed to handle. *Id.* at 156. Indeed, under 40 C.F.R. § 122.45(b)(1), "permit effluent limitations, standards, or prohibitions shall be calculated based on design flow." The Draft Permit explains further that "EPA practice is to use effluent flow as a reasonable and important worst-case condition in its reasonable potential and WQBEL calculations to ensure compliance with WQSs under CWA § 301(b)(1)(C)." (Att. 9, Fact Sheet at 10). In this way, "[r]egulating the quantity

of pollutants in the discharge through a restriction on the quantity of wastewater effluent is consistent with the overall structure and purposes of the CWA" and "is within EPA's authority to condition a permit to carry out the objectives and satisfy the requirements of the CWA." (*Id.*)

IV. STANDARD OF REVIEW

The Board may grant review of a permit decision when the petitioner shows that the decision was based on: "(A) A finding of fact or conclusion of law that is clearly erroneous, or (B) An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review." 40 C.F.R. § 124.19(a)(4)(A),(B); *accord In re Broward County, Florida*, 4 E.A.D. 705, 721 (EAB 1993); *In re ArcelorMittal Cleveland Inc.*, 15 E.A.D. 611, 613 (EAB 2012).

In assessing clear error, the Board examines the administrative record that serves "as the basis for the permit to determine whether the permit issuer exercised his or her 'considered judgment.'" *In re: Town of Newmarket*, 16 E.A.D. 182, 186 (EAB 2013). When "the administrative record is unclear" as to the factual basis for a determination by the Region in issuing a permit condition, the Board must remand the petition. *In re Broward County, Fla.*, 4 E.A.D. at 721; *In re U.S. Dep't of Energy and Triad Nat'l Sec., L.L.C.*, 18 E.A.D. 797, 813–14 (EAB 2022) (remand is warranted if the Region's rationale is unclear and the Board cannot determine the basis for the Region's decision).

When an agency exercises discretion, it must "cogently explain why it has exercised its discretion in a given manner." *In re Town of Newmarket, N.H.*, 16 E.A.D. at 187 (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48 (1983)); *see also Ash Grove Cement Co.*, 7 E.A.D. 387, 397 (EAB 1997) ("acts of discretion must be adequately explained and justified."). The requirement that the agency must explain its decision

"is satisfied when the agency's explanation is clear enough that its 'path may reasonably be discerned.'" *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)); *In re Gen. Elec. Co.*, 18 E.A.D. 575, 620–21 (EAB 2022) (confirming that the Board is guided by Supreme Court decisions such as *Encino Motorcars, LLC*).

An agency action may not be arbitrary and capricious. 5 U.S.C. § 706(2)(A); *Ohio v. E.P.A.*, 603 U.S. 279, 292 (2024). An action is arbitrary and capricious if:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43; *see also Dept. of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1 (2020) (vacating agency rescission of program as arbitrary and capricious for failure to adequately explain the basis). If such deficiencies are present, "[t]he reviewing court should not attempt itself to make up for such deficiencies; [it] may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation omitted); *accord Encino Motorcars, LLC*, 579 U.S. at 224.

Finally, an agency is bound by its own regulations while they are in effect, and a court may set aside an agency action that "fails to 'comply with its own regulations.'" *Nat'l Env't Dev. Ass'n's Clean Air Project v. E.P.A.*, 752 F.3d 999, 1009 (D.C. Cir. 2014) (quoting *Environmentel, LLC v. FCC*, 661 F.3d 80, 85 (D.C. Cir. 2011)). Even in the absence of binding regulations, under the so-called "change in position doctrine," agencies may not change their other existing policies or guidance to regulated entities unless they "provide a reasoned explanation for the change, display awareness that they are changing position, and consider

serious reliance interests." *F.D.A. v. Wages and White Lion Inv., L.L.C.*, 604 U.S. 542, 568 (2025) (citations and internal quotations omitted); *In re Gen. Elec. Co.*, 18 E.A.D. at 621.

V. THRESHOLD PROCEDURAL REQUIREMENTS

The District satisfies the threshold requirements for filing a petition for review under 40 C.F.R. § 124.19, because:

1. The District is a permittee to the final permit and participated in the public comment period on the Draft Permit. *See* 40 C.F.R. § 124.19(a)(2);
2. The issues raised in this petition were raised during the public comment period or in a timely fashion based on new data or EPA claims made during the issuance process, and therefore were preserved for review. *See id.*;
3. The District filed the petition for review within 30 days after the Regional Administrator served notice of issuance of the final permit decision. *See* 40 C.F.R. § 124.19(a)(3); and
4. EPA served notice of the final permit on December 15, 2025, and the deadline for filing the petition for review is January 14, 2026. *See* 40 C.F.R. § 124.20.

The Co-Permittees, which join in this appeal, may petition for review for similar reasons. They submitted comments during the comment period, and they are co-permittees of the permit. Even if the summer flow limit does not directly apply to them as co-permittees, they are substantially affected because the summer flow limit inhibits their ability to plan for and use the Facility's 5.7 MGD available capacity.

VI. ARGUMENT

As detailed below, the lower 4.5 MGD summer flow limit should be removed from the final permit and a 12-month rolling average limit of 5.7 MGD applied instead because (1) EPA

regulations and Board precedent require effluent limits to be based on design flow; (2) the summer limit is irrational and impractical now that the member communities have met the long anticipated growth and need to use the additional flow; and (3) the Region committed clear error in requiring an antidegradation study "for pollutants that are not currently limited in the permit."

A. EPA regulations require flow limits to be set at the Facility's design capacity.

The 4.5 MGD summer flow limit violates EPA regulations because it is lower than the Facility's design capacity. 40 C.F.R. § 122.45(b)(1), which regulates how the provisions of NPDES permits shall be calculated, provides that "[i]n the case of POTWs, permit effluent limitations, standards, or prohibitions shall be calculated based on design flow." Flow limits are based on the design capacity of a wastewater treatment facility, because this ensures that the facility is not overloaded and "preserves the integrity of . . . reasonable potential calculations and [a] permit's pollutant effluent limits." *In re City of Lowell*, 18 E.A.D. at 156. Here, the summer limit of 4.5 MGD does not match the facility's design flow of 5.7 MGD, and thus directly contravenes this regulation. (*See* Att. 11 at 2). The Board should thus set aside the 4.5 MGD flow limit because, by imposing it, EPA "fails to 'comply with its own regulations.'" *Nat'l Env't Dev. Ass'n's Clean Air Project.*, 752 F.3d at 1009 (a reviewing court can set aside an agency action as arbitrary and capricious if the decision contradicts the agency's regulations); *Venetian Casino Resort, L.L.C. v. E.E.O.C.*, 530 F.3d 925, 935 (D.C. Cir. 2008) (quoting *INS v. Yang*, 519 U.S. 26, 32 (1996) ("[A]n irrational departure from [a governing] policy . . . constitute[s] action that must be overturned as 'arbitrary, capricious, or an abuse of discretion' . . . .")).

EPA's decision to impose this limit also violates the change-in-position doctrine. Under this doctrine, agencies may not change their other existing policies or guidance to regulated entities unless they "provide a reasoned explanation for the change, display awareness that they are changing position, and consider serious reliance interests." *F.D.A. v. Wages and White Lion*

Inv., L.L.C., 604 U.S. at 568 (citations and internal quotations omitted).; *In re Gen. Elec. Co.*, 18 E.A.D. at 621. EPA has almost uniformly calculated effluent flow limits based on design flow in other permits. *In re City of Lowell*, 18 E.A.D. at 127 (explaining the provisions of a 2019 NPDES permit applying a 32 MGD effluent flow limit year-round). By changing this practice now in the final permit, EPA must thus comply with the change-in-position doctrine. *Wages and White Lion Inv., L.L.C.*, 604 U.S. at 568. Here, EPA does not. EPA provides no *reasoned* explanation for its change, and the reasons it does provide lack merit. EPA also neglected to consider reliance interests. The District relied on the approvals it received for the upgraded facility and that the District's NPDES permits would allow it to use its added 1.2 MGD capacity (as 40 C.F.R. § 122.45(b)(1) requires). Yet EPA ignores this and does not even address this reliance in its responses to the District's comments. If EPA's failure to comply with its own regulations should prove insufficient for the Board to remove the lower summer limit, then the change-in-position doctrine serves as an independent and sufficient basis to do so.

EPA admits in its response to comments that it "agrees that effluent limits (especially those pollutant-specific limits calculated based on effluent flow) should be based on the design flow of a facility." (*See* Att. 10 at 6). Indeed, it relied on this same regulation when it declined to use the lower flow limit when assessing the dilution factor for the ammonia limit, even though "worst case" 7Q10 conditions would occur when the summer limit was in effect. (*Id.* at 8–9).

EPA's rationale for deviating from its general practice is unavailing. EPA asserts that the 4.5 MGD summer limit "is based on the previous flow limit" from the prior NPDES permits. (*Id.*) It is not reasoned decision-making to impose a requirement solely because that is what it decided before under different circumstances. *See Nippon Steel Corp. v. U.S.*, 732 F. Supp. 3d 1353, 1368 (Ct. Int'l Trade 2024) (citing *Qingdao Sea-Line Trading Co., Ltd. v. U.S.*, 766 F.3d

1378, 1387 (Fed. Cir. 2014)) ("When the facts change, [an agency] cannot rest on its laurels and repeat the answers of yesterday. It must instead explain how the new facts did or did not affect its analysis."). NPDES permits must comply with regulatory requirements each time they are issued. The lower summer flow limit does not.

B. The seasonal limit is irrational because it is impractical and artificially lowers the Facility's permitted effluent flow below design capacity without justification.

EPA's decision to limit the Facility's flow to 4.5 MGD from July to September is arbitrary and capricious, and thus cannot stand. *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (prohibiting arbitrary and capricious agency decision-making); 5 U.S.C. § 706(2). When this limit was imposed in the 2000 NPDES permit, it made sense because there was "zero probability" that the District could use the flow increase in the summer months. (*See* Att. 11 at 2). But the member communities have now realized the long-anticipated growth, and they need access to the increased flow capacity. By continuing to impose this outdated limit, EPA arbitrarily ignores the Facility's capabilities, the member communities' needs, and the permitting history through which EPA and MassDEP already reviewed and approved this flow.

The summer flow limit is also practically infeasible. The member towns cannot materially limit usage in the summer months. This means that by imposing a 4.5 MGD flow from July through September, the final permit effectively imposes a 4.5 MGD flow limit year-round. Such a limit will place an unintended restriction on future development in the region, amid an ongoing housing crisis in the Commonwealth. Wasting 1.2 MGD of the Facility's available capacity is also wasting the ability of the member towns to support more housing development. In fact, the 1.2 MGD capacity partially was the result of SRF funding in 2000 for the Facility's upgrades, which were intended to support the growing wastewater needs of the area. (*See* Att. 4) (detailing how the District upgraded its facility to 5.7 MGD design capacity

under the 1995 MassDEP consent order). Limiting the Facility to 4.5 MGD would effectively render that funding and those upgrades useless. It is unreasonable for EPA to stifle development by artificially lowering the Facility's capabilities with the summer limit regardless, but it is especially so in light of these practical consequences.

EPA's general justifications supporting a flow limit despite the Facility's capacity are also unavailing as to the summer flow limit. Section 2.3 states that it is "EPA practice [] to use effluent flow as a reasonable and important worst-case condition in its reasonable potential and WQBEL calculations to ensure compliance with WQSs under CWA § 301(b)(1)(C)." (Att. 9, Fact Sheet at 10). Section 2.3 also relies on 40 C.F.R. § 122.41(e), which requires a permittee to "at all times properly operate and maintain all facilities and systems of treatment and control . . . which are installed or used by the permittee to achieve compliance with the conditions of [its] permit." (*Id.* at 11); *In re City of Lowell*, 18 E.A.D. at 156. But these justifications do not apply to a lower summer limit for the Facility. The Facility's capacity is 5.7 MGD (and has been for the past 25 years), and thus a summer limit of 4.5 MGD cannot represent a "worst-case condition." (*See* Att. 9, Fact Sheet at 10). A limit of 4.5 MGD bears no relationship to the operations and maintenance of the "facilities and systems of treatment and control" that are necessary "to achieve compliance with the conditions of the permit" (namely, the limited effluent pollutants rather than effluent flow itself). *See* 40 C.F.R. § 122.41(e). The Facility can treat 5.7 MGD of flow and is permitted to do so for most of the year. Thus, it would be irrational to suggest that 4.5 MGD reflects the highest flow that the Facility can be expected to treat.

EPA admits in its response to comments that Section 2.3 of the Draft Permit's Fact Sheet only applies to the 5.7 MGD limit. (*See* Att. 10 at 5 ("EPA agrees with the commenter that these justifications support the 5.7 MGD limit (based on the design capacity of the facility) and not the

4.5 MGD limit")). This includes the Region's claims that the effluent flow limit is meant "to minimize or prevent infiltration and inflow [I&I] that may result in unauthorized discharges and compromise proper operation and maintenance of the facility." (*See* Att. 9, Fact Sheet at 11). In its response to comments, the Region stated that its I&I rationale was "intended to apply only to the 5.7 MGD design flow," and thus this rationale, too, fails to support the 4.5 MGD summer limit. (*See* Att. 10 at 5).

C. No antidegradation study is required.

Having conceded that the general reasons for a flow limit do not apply to the 4.5 MGD summer limit, the Region's sole proffered rationale is that an antidegradation study is needed. (*See* Att. 10 at 6). This is incorrect.

As a starting point, flow itself is not a pollutant. *Va. Dept. of Trans. v. EPA*, No. 1:12-CV-775, 2013 WL 53741, at *5 (E.D. Va. Jan. 3, 2013) (finding that "EPA is not authorized to regulate [stormwater flow] via TMDL because it is not a pollutant"); *see also In re City of Lowell*, 18 E.A.D. at 155 (discussing the application of *Va. Dept. of Trans.* to wastewater effluent flow limits). Therefore, EPA's insistence on an antidegradation study cannot rest solely on an increase in the flow limit. It must rely on an actual pollutant.

Further, all of the individual pollutants limited by the final permit either would not change if the summer limit were lifted or, in two instances, could easily be adjusted. The final permit already uses the 5.7 MGD design capacity to calculate reasonable potential. (*See* Att. 9, Fact Sheet at Appendix B). The load limits for total suspended solids, CBOD (carbonaceous biochemical oxygen demand), and ammonia would not increase because the loading calculations for these pollutants were calculated on the historic capacity (4.54 MGD), not the design capacity of 5.7 MGD. In other words, raising the *current* flow limit to 5.7 MGD will not affect those pollutant limits because that will not change the *historic* loading capacity. The Upper Charles

River has had a total maximum daily load limit ("TMDL") for nutrients since 2011. (*Id.* at 28.) The Facility will remain within its nutrient allocation even without the lower summer flow limit. (*Id.*) Also, WQBELs for copper, ammonia, and phosphorus would also not change, because Appendix B of the Draft Permit Fact Sheet already uses 5.7 MGD to calculate these. (*Id.* at Appendix B.) It is illogical to suggest that raising the flow of the facility to 5.7 MGD would cause antidegradation concerns, when EPA and MassDEP have already set pollutant limits with a flow of 5.7 MGD in mind. The only two effluent pollutant limits that would be changed are those for TRC and C-NOEC, because they are calculated based off a dilution factor that depends on permitted plant flow (in other words, they are based on 4.5 MGD in the summer months). (*See* Att. 11 at 4–5 (explaining how these limits would be changed with a corrected year-round flow limit)). It is confusing—at best—that the Region would use 4.5 MGD for some analytes (TRC and C-NOEC) and 5.7 MGD for others (e.g., ammonia).

EPA acknowledges in its response to comments that "[f]or pollutants that are currently limited in the permit, maintaining the same or slightly adjusted limits . . . could ensure that these pollutants do not increase and comply with antidegradation requirements." (*See* Att. 10 at 6).

To escape the logical conclusion that an antidegradation study is not required, EPA raised a new argument in its response to comments: that raising the summer limit might allow an increase in "pollutants that are not currently limited in the permit."[5] (*Id.*) This argument is clear error for at least two reasons.

First, this argument is impermissibly vague and lacks the specificity needed to support reasoned decision-making. *See Encino Motorcars, LLC*, 579 U.S. at 221 (providing that an

[5] Under 40 C.F.R. § 124.19(a)(2), a petitioner for review by the Board may raise an issue that EPA addressed in its response to comments document, if the petitioner provides a citation to the comment and response and explains why the response was clearly erroneous or warrants review.

agency's action "cannot carry the force of law" when its explanation is not "clear enough that its 'path may reasonably be discerned'"); *Ohio*, 603 U.S. at 292–94 (finding EPA's action arbitrary and capricious where it failed to produce a specific explanation for a logical inconsistency in its reasoning). EPA does not explain which "not currently limited" pollutants it is referring to. EPA also does not explain how these pollutants (if any) would be of concern only in the summer months that are not already accounted for in the 5.7 MGD limit for the rest of the year. That is, EPA fails to explain why it is unconcerned with these undisclosed pollutants during the rest of the year, when flow is permitted under the final permit at 5.7 MGD.[6] It is arbitrary and capricious, and thus impermissible, for EPA to justify this permit limit based on an unknown, unidentified set of pollutants that unexplainedly require special concern in the summer months. *See Encino Motorcars, LLC*, 579 U.S. at 221.

Second, EPA and MassDEP are incorrect in their joint assertion that "the District has yet to provide information necessary to analyze and justify an increase of treated wastewater effluent flow from the Facility." (*See* Att. 10 at 6).[7] The District need not "justify" a permitted effluent flow of 5.7 MGD at all. 5.7 MGD is the design flow of the Facility, which the permitted flow is supposed to be under EPA's own regulations. *See* 40 C.F.R. § 122.45(b)(1). Indeed, MassDEP through the SRF program partially funded these upgrades. (*See* Att. 11 at 2). To require the District to justify why it seeks to follow EPA's own regulations is erroneous.

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[6] For example, there might be a greater concern for nutrients like phosphorus during the summer. But phosphorus is already accounted for in the final permit, and EPA has stated that "maintaining the same or slightly adjusted limit" for pollutants already limited in the permit would be acceptable for removing the 4.5 MGD summer limit.

[7] As of the filing date, MassDEP has not yet issued a new parallel permit under the state Clean Waters Act.

Regardless, the record already has ample evidence to analyze whatever additional pollutants that EPA claims need to be considered. EPA already permits all of these unidentified, additional pollutants to be discharged from the Facility at a flow rate of 5.7 MGD for the rest of the year, and it fails to justify why they require a lower flow rate during the summer. (*See* Att. 1 at 3 (allowing 5.7 MGD effluent frow from October through June)).

The District also already provides EPA and MassDEP with whole effluent toxicity (WET) results. (*See* Att. 9 at Appendix A). These tests, among other things, analyze the effect the District's effluent has on living organisms, assessing impacts on survival, growth, and reproduction. In other words, these tests are a "backstop" to ensure the discharges do not contain unknown materials harmful to aquatic life. The tests are conducted quarterly, including during the summer and the other seasons when the flow limit is 5.7 MGD. As shown in the Fact Sheet, the District has had no WET violations during the 5-year review period the Region used for its reasonable potential analysis (May 2019 – April 2024):

Figure 1
WET testing results (from Fact Sheet)

WET Effluent

Parameter	LC50 Acute Ceriodaphnia	LC50 Acute Pimephales	C-NOEC Chronic Ceriodaphnia	Noel Statre 7Day Chronic Pimephales
	Daily Min	Daily Min	Daily Min	Daily Min
Units	%	%	%	%
Effluent Limit	100	100	63	63
Minimum	100	100	63	80
Maximum	100	100	100	100
Median	100	100	100	100
No. of Violations	0	0	0	0
7/31/2019	100	100	100	100
10/31/2019	100	100	100	100
1/31/2020	100	100	100	100
4/30/2020	100	100	100	100
7/31/2020	100	100	100	100
10/31/2020	100	100	100	100
1/31/2021	100	100	100	80
4/30/2021	100	100	100	100
7/31/2021	100	100	100	100
10/31/2021	100	100	100	100
1/31/2022	100	100	100	100
4/30/2022	100	100	100	100
7/31/2022	100	100	100	100
10/31/2022	100	100	63	100
1/31/2023	100	100	100	100
4/30/2023	100	100	100	100
7/31/2023	100	100	100	100
10/31/2023	100	100	100	100
1/31/2024	100	100	100	100
4/30/2024	100	100	100	100

The results are the same for the period July 2024 through October 2025, as shown in Attachment 13 (Summary of District WET Results from May 2024 through December 2025.) This lack of effect on aquatic organisms is further proof that no antidegradation study is necessary or appropriate to remove the summer 4.5 MGD flow limit.[8]

[8] The WET testing requirement also requires the District to concurrently sample for hardness, ammonia, metals, and total organic carbon, all of which EPA assessed as part of its permit review.

As a final point, it bears emphasizing that EPA and MassDEP (and the Secretary of Environmental Affairs) already considered the effects of 5.7 MGD flow on the receiving water and approved it. When the Facility approached its prior design capacity in the 1990s, MassDEP ordered the District to project future flow needs and submit a schedule for making facility upgrades. (Att. 2). The District complied and proposed making upgrades to the Facility to increase design capacity to 5.7 MGD without increasing mass loading. (*See* Att. 3). MassDEP, in its 1996 response letter, "concur[red] with [the District's] comments and the proposed upgrade of the facility to 5.7 MGD with the design criteria based on the current NPDES permit waste load limits." (*Id.* at 1).

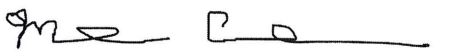
The Secretary of Environmental Affairs agreed in his 1997 MEPA determination. He found that "the treatment process improvements proposed as part of this project will clearly improve the effluent quality from this facility." (*See* Att. 4 at 3). The Secretary further found that "the project can be implemented without significant adverse impacts . . . ." (*Id.*)

Having made these determinations, the Region and MassDEP proposed setting the flow limit and dependent reasonable potential calculations using a 5.7 MGD 12-month rolling average for the 2000 permit. The agencies did not require further antidegradation review because the Facility would remain within mass loading limits and the work had already been done. In other words, MassDEP, the Secretary, and the Region already considered the impacts on the river at 5.7 MGD year-round from pollutants with and without limits in the applicable NPDES permit. The Region ultimately temporarily lowered the flow limit in the summer months, but that does not change the reviews done and approvals given, as well as the District's reliance on those decisions. EPA may not change its mind now.

VII. CONCLUSION

For these reasons, the District, joined by the Co-Permittees, respectfully seeks Board review of the terms and conditions of the District's final NPDES permit regarding the permit's 4.5 MGD limit on average monthly effluent flow for the months of July through September and effluent limits for TRC and C-NOEC in part I.A.1. After such review, the District requests a remand of the permit to Region 1 with an order to issue an amended NPDES permit that limits average monthly effluent flow to 5.7 MGD on a 12-month rolling average, removes the 4.5 MGD summer limit, and sets its effluent limits for TRC and C-NOEC in accordance with a recalculated dilution factor based on flow of 5.7 MGD.

Respectfully submitted,



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Dated: January 13, 2026

Joined By:

Town of Franklin, MA
Town of Bellingham, MA
Town of Medway, MA and
Town of Millis, MA

REQUEST FOR ORAL ARGUMENT

Petitioner, the Co-Permittees, respectfully request oral argument before the Environmental Appeals Board on its petition for review of NPDES Permit No. MA0102598 because it believes oral argument will be of assistance to the Board.

STATEMENT OF COMPLIANCE WITH THE WORD/PAGE LIMITATION

In accordance with 40 C.F.R. § 124.19(d)(1)(iv) & (d)(3), I hereby certify that this Petition does not exceed 14,000 words. Not including the transmittal letter, caption, table of contents, table of authorities, figures, signature block, table of attachments, statement of compliance with the word limitation, and certification of service, this Petition contains 7,704 words.

Matthew J. Connolly

TABLE OF ATTACHMENTS

1. Final Permit (December 15, 2025)
2. 1995 MassDEP Administrative Consent Order (July 1995)
3. 1996 MassDEP Letter (April 26, 1996)
4. 1997 EOEA ENF Certificate (April 9, 1997)
5. Comments and Response to Public Comment for 2000 Permit (August 2000)
6. Fact Sheet for 2008 Permit (2008)
7. 2014 Permit (July 23, 2014)
8. District Renewal Application (April 29, 2019)
9. 2024 Draft Permit (2024)
10. Response to Comments for Final Permit (December 15, 2025)
11. District Comment Letter on 2024 Draft Permit (January 30, 2025)
12. District Supplemental Comment Letter (September 4, 2025)
13. Summary of District WET Results (July 2024 - October 2025)

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2026 a copy of the foregoing Petition for Review was served on Respondent identified below by U.S. first-class mail and email:

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