

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

_____)	
In re:)	
)	
City of Rochester, Division of Public Works)	
)	NPDES Appeal No. 23-_____
NPDES Permit No. NH0100668)	
)	
_____)	

**PETITION FOR REVIEW OF
CITY OF ROCHESTER WASTEWATER TREATMENT FACILITY
NPDES PERMIT ISSUED BY REGION 1**

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I. INTRODUCTION

Pursuant to 40 C.F.R. § 124.19(a), the City of Rochester, New Hampshire (the “City” or “Rochester”), through its undersigned representatives, respectfully submits this Petition for Review (“Petition”) of the National Pollutant Discharge Elimination System (“NPDES”) Permit No. NH0100668 (the “Permit,”) dated March 20, 2023, issued by the Environmental Protection Agency (“EPA”), Region 1 (“Region”). *See* Attachment 1, 2023 Permit, including Petitioner’s comments and the Region’s responses thereto.

As more fully noted in the Issues Presented and Argument sections below, certain conditions and effluent limits set forth in the Permit are based on one or more findings of fact or conclusions of law which are clearly erroneous, involve an abuse of discretion, or implicate important policy considerations. The Permit imposes new conditions and limits that are overly burdensome, not required by law, exceed the Region’s authority, or are based on clearly erroneous findings of fact or conclusions of law, or both. Additionally, several of the Region’s responses in the record fail to meaningfully acknowledge or address significant comments and concerns raised by the Petitioner, as required by 40 C.F.R. § 124.17(a)(2). *In re San Jacinto River Authority*, 14 E.A.D. 688, 92 (EAB 2010); and *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 585-86 (EAB 2004). The Region also failed to provide the Petitioner with fair notice of its new compliance obligations in certain material respects. *In re D.C. Water and Sewer Auth.*, 13 E.A.D 714, *34-35 (citing *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04, slip op. at 28-29 (EAB, Sept. 27, 2006); *In re Amoco Oil Co.*, 4 E.A.D. 954, 981 (EAB 1993). The City of Rochester is accordingly compelled to contest the Permit and its various conditions and limits and respectfully requests the Environmental Appeals Board (“EAB”) to grant review of this petition.

II. THRESHOLD PROCEDURAL REQUIREMENTS

Petitioner satisfies the threshold requirements for filing a petition for review under 40 C.F.R. part 124, to wit:

A. Petitioner has standing to petition for review because it submitted comments on the draft permit transmitted to the Petitioner. *See* 40 C.F.R. § 124.19(a). *See* Attachment 1.

B. The issues raised by the Petitioner in its petition were all raised during the public comment period as noted in citations below. Therefore, they were preserved for review. Also, certain other arguments are included below that could not have been reasonably ascertained at the time the Petitioner submitted comments on the Draft Permit because the issues were first raised by the Region in the Response to Comments, or because additional information supporting the City's position has been developed since then.

C. The Petition is timely filed. 40 C.F.R. §§ 124.19(a)(3) and 20. The Final Permit and letter notice of the issuance of the Final Permit (Permit) are dated March 20, 2023.

However, the Petitioner received actual notice of the Permit via electronic mail from the Region on March 21, 2023. This Petition is filed on or before April 19, 2023 within thirty (30) days after the Regional Administrator served notice of the Final Permit. The Petition for Review complies with the Board's Practice Manual.

III. FACTUAL AND STATUTORY BACKGROUND

The City of Rochester, New Hampshire (Rochester) owns and operates a wastewater treatment facility (WWTF) which discharges treated effluent to the Cocheco River. The Cocheco River is within the Great Bay watershed in southeastern New Hampshire, which forms the Piscataqua River at the confluence of the Cocheco and Salmon Falls Rivers. Currently Rochester's WWTF operates under an NPDES permit that was issued July 23, 1997, which has

been administratively continued since its initial expiration more than twenty years ago, in July of 2002.

In addition to the requirements imposed by the Permit subject to this Petition, the City of Rochester is also complying with the requirements of a recently issued General Nitrogen Permit. On November 24, 2020, the Region issued the NPDES Great Bay Total Nitrogen General Permit NHG58A000 (“Nitrogen GP”) which covers discharges from thirteen wastewater treatment facilities located in twelve communities that discharge treated wastewater containing nitrogen within the Great Bay watershed. Rochester is one of those communities. The GP provisions include effluent limitations and extensive study, monitoring and reporting requirements. In order to comply with the effluent limitations in the Nitrogen GP, Rochester has entered into an Administrative Order on Consent with the Region, effective March 8, 2021 that grants Rochester an interim TN effluent limit until October 31, 2025. During this interim period, Rochester has committed to implement significant additional projects in order to meet the nitrogen effluent limitation of 198 lbs/day set forth in the Nitrogen GP. Those projects are described in detail in Rochester’s Public Comments included as Attachment 2, in Region 1’s Response to Comments and in the administrative record for the final permit maintained by Region 1. See 40 C.F.R. § 124.18(b)(1),(4).

Rochester includes reference to these ongoing compliance activities under the Nitrogen GP in support of the request for a compliance schedule for the numerous new Final Permit conditions, as well as the staffing challenges faced by Rochester and other municipal operators of WWTFs. The burden of complying with these ongoing Nitrogen GP permit obligations impacts the ability of Rochester to comply with additional Final Permit obligations, further supporting an extended schedule for compliance, as requested in the public comments.

Rochester specifically requested that the Region amend the time for compliance or issue a compliance schedule for the following Final Permit conditions:

1. Implementation of Total Phosphorus effluent limitations –Permit Part 1.A.1, Fact Sheet, Pages 5 (Part 2.2), 6 (Part 2.2.1, 2.2.2, 2.2.3), 7 (Part 2.2.4), 8 (Part 2.2.4)
2. Capacity Management Operations and Management (CMOM) – Staffing, Part 1.C.1
3. CMOM – Preventative Maintenance – Part 1.C.2
4. CMOM – Infiltration and Inflow – Part 1.C.3.
5. CMOM – Collection System Mapping – Part 1.C.4
6. CMOM – Operation and Maintenance Plans – Part 1.C.5
7. CMOM – Annual Reporting Requirement – Part 1.C.6.
8. Alternative Power Source – Part 1.D.
9. Infiltration and Inflow (I/I) – Part 5.6
10. Industrial Pre-Treatment – Part 1.A.9
11. Industrial Users and Pretreatment Program Development – Part 1.E.1.
12. Industrial Users Pretreatment Program Reporting – Part 1.E.6
13. SSO Notification – Part 1.B.2

In each and every case, the Region denied Rochester’s request for amended times for compliance or request for a compliance schedule. The Region’s denials will cause the City to be in immediate non-compliance upon the effective date of this permit. The Region’s suggestion that the City should seek an administrative order with the Enforcement Division is grounded in the assertion that the City should have anticipated compliance with new permit conditions when the draft permit was issued approximately one year ago. In effect, the Region argues that Rochester should have considered the draft permit’s conditions as a foregone conclusion, prior to Rochester’s own opportunity to comment upon those conditions. Such a view necessarily dismisses the comment and response period as a means of addressing concerns with permit conditions, rendering such public comment period a nullity, and is not only unreasonable but arbitrary and capricious.

Rochester objects to the inclusion of the new WWTF average monthly phosphorus effluent limitations of 0.12 mg/L from April 1 through October 31 annually because it is both

unreasonable and unnecessary. Rochester incorporates herein its objections and technical response to the Region's inclusion of the total phosphorus (TP) limits in the Final Permit as set forth in the Attachments I and II. Rochester's arguments on this issue are set forth in Section IV below.

IV. ARGUMENT

A. Standard of Review

Pursuant to 40 C.F.R. § 124.19(a), the Board should grant review of the Region's decision on an NPDES Permit when the Petitioner establishes that the permit conditions in question are: 1) based on a clearly erroneous finding of fact or conclusion of law, or 2) involves an exercise of discretion on important policy considerations that the Board determines warrants review. When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit to determine whether the permit issuer exercised "considered judgment." *In re Steel Dynamics, Inc.*, 8 E.A.D. 165, 191, 224-225 (EAB 2000).

To the extent that the permit conditions in question are water quality-based requirements, the Region must satisfy the requirement that the discharge from the WWTF "will cause, have the reasonable potential to cause, or contribute to an excursion above any state water quality standard." 40 C.F.R. § 124.44(d)(i).

B. The Region's imposition of a Total Phosphorus (TP) seasonal effluent limit of 0.12 mg/l is clearly erroneous and an abuse of discretion.

The City of Rochester challenges the Region's imposition of a total phosphorus effluent discharge limit of 0.12 mg/l on a seasonal basis from April 1 through October 31, including the Region's claims of phosphorus-related impairments in the Cocheco River, its failure to recognize the characteristics unique to the Cocheco River that aid in the assimilation of phosphorus, the

inappropriateness of applying the 7Q10 streamflow in permitting nutrients, and the Region's rejection of the City's proposed alternative approach that would follow New Hampshire's revised science-based process.

1. The Region's reliance on claimed phosphorus-related impairments in the Cocheco River to determine the Total Phosphorus (TP) effluent limit were arbitrary and contrary to NHDES and EPA policy.

In its Draft Permit, the Region made various claims of phosphorus-related effects or impairments of the Cocheco River. *See, e.g.*, Attachment I at Draft Permit Fact Sheet, pages 25-31. In response, the City asserted that the Region's observations do not demonstrate nutrient impairment, but rather, were either unrelated to established assessment protocols or are highly subjective statements without basis in any objective or measurable goal. *See* Attachment I, Comment 2, at *76. For example, the Region refers to "elevated levels of macrophytes" without quantifying what level of aquatic macrophyte abundance would demonstrate a relationship between external nutrient loads and macrophyte abundance, ignoring the fact that macrophyte abundances are similar upstream and downstream of the discharge.¹ The Region also cites the Cocheco River as having high densities of variable milfoil, a non-native plant that has become established in many water bodies throughout the state. *See* Attachment I, Response to Comment 33. NHDES also cited the Cocheco River as having high densities as of 2000, but most of the water bodies in New Hampshire with abundant milfoil are lakes with low nutrient concentrations. *See* Attachment 2, Section 2(1)(b) at 28. NHDES does not list external nutrient load reductions as a method for controlling variable milfoil, because as a rooted macrophyte,

¹ See Attachment 2, Section 2(1)(b) at 28, Attachment 2, Exhibit A at 49, the lack of practical nutrient control options for invasive rooted macrophytes is also emphasized by the fact that submergent and emergent vegetation is also abundant upstream of the Rochester WWTP outfall, despite much lower phosphorus concentrations.

milfoil can obtain nutrients from the sediment, and are consequently limited by space and light rather than nutrient concentrations within the water itself. *See Id.* at 28.

Furthermore, the Region's reliance on dissolved oxygen levels as evidence for further reductions in total phosphorus concentrations fails to account for the fact that the Region's dissolved oxygen measurements were taken from a depth in excess of two meters. *See Id.* at Fact Sheet, page 28. Dissolved oxygen measurements taken from a depth are typically lower than surface measurements. Accordingly, dissolved oxygen measurements below 5 mg/L at depth are not necessarily indicative of cultural eutrophication, but rather are usually indicative of natural processes in lakes and impoundments that result in less reaeration compared to near surface water. *See Attachment II, Section 2:1(d), at 27.*

Rochester argues in response that there was instead affirmative evidence that supported a lack of phosphorus impairments, and that this information supported the appropriateness of an alternative method for determining phosphorus limits. In the final Permit, the Region rejected that evidence entirely on the basis that all it needed to determine was that there was a "reasonable potential to cause or contribute to an excursion above the narrative numeric criteria set forth in state water quality standards." Attachment I, Response to Comment 33. However, the Region used its subjective misinterpretations of nutrient effects in part to justify the overly stringent phosphorus limit.

2. It is Arbitrary and Capricious for the Region to Rely on the Technically-Inappropriate 7Q10 Streamflow

The 7Q10 streamflow approach that the Region relied upon in setting a total phosphorus limit of 0.12 mg/L was specifically derived for toxics permitting and its use for phosphorus represents a failure to adapt the toxics-based procedures to nutrients. The 7Q10 represents an extremely low and rare streamflow condition. Its use is highly conservative even for toxics, but

completely inappropriate for nutrients. The implicit concept—that a one-in-ten-year exceedance of a 7-day average nutrient concentration would cause impairments—does not reflect the temporal, spatial, and mechanistic aspects of how water bodies respond to nutrient inputs. The 10-year frequency is rarer than the 1-in-3 year exceedance frequency that is allowed even for toxics. Similarly, the 7-day duration is shorter than the time scale at which eutrophication-related problems manifest themselves in streams, which can conservatively be stated as 30 days. Basing nutrient limits on very rare hydrologic conditions (7Q10 flows) will result in unnecessarily low limits.

3. The Region’s application of the Gold Book standard as a water quality criteria for phosphorus is Clearly Erroneous and Inappropriate

New Hampshire does not have a numeric criteria for phosphorus, and instead uses a narrative criterion requiring that phosphorus contained in an effluent shall not impair a water body’s designated uses.² In the absence of numeric criteria for phosphorus, the Region’s applied USEPA’s Quality Criteria for Water 1986 (Gold Book).

The Gold Book discusses the need to regulate phosphorus for eutrophication in some situations but specifically states that “a total phosphorus criterion to control nuisance aquatic growths is not presented.” Gold Book, at *29. Therefore, the Region’s position that the Gold Book nutrient criteria is applicable in this instance, in accordance with 40 C.F.R. § 122.44(d), is plainly in error. While the Gold Book suggests TP criteria of 0.10 mg/l may be appropriate for some streams, the Gold Book observes that “there may be waterways wherein higher concentrations or loadings of total phosphorus do not produce eutrophy [...]”. Gold Book, at

² (Env-Wq 1703.14(b) provides that “Class B waters shall contain no phosphorus or nitrogen in such concentrations that would impair any existing or designated uses, unless naturally occurring.”)

*248. Such conditions are influenced by natural confounding factors such as “naturally occurring phenomena [which] may limit the development of plant nuisances”, “natural silts or colors which reduce the penetration of sunlight needed for plant photosynthesis”, “morphometric features of steep banks, great depth, and substantial flows [which] contribute to a history of no plant problems”, and “nutrient[s] other than phosphorus [...] limiting plant growth”. *Id.* at *249. The Gold Book specifically indicates the need to consider such site-specific factors in setting nutrient limitations for phosphorus. The phosphorus discussion ends with a reiteration that “no national criterion is presented for phosphate phosphorus for the control of eutrophication.” *Id.*

Developing a TP criterion would require a site-specific study including the collection and interpretation of additional data. The Region has undertaken no such site-specific study in this instance to demonstrate that 0.12 mg/L is the appropriate limit to prevent cultural eutrophication in the Cocheco River³. Moreover, the Region rejected the City’s good faith proposal to perform such a study and use the results to derive a scientifically defensible limit within the upcoming permit term. *See* Attachment I, Response to Comment 2.

4. The Region’s Failure to Take into Account Specific Characteristics that Aid in the Assimilation of Phosphorus in the Cocheco River was Arbitrary and Capricious.

For the reasons set forth in Brown and Caldwell’s technical comments—*see generally* Attachment 2—incorporated herein, as well as Comments 2, 31, 32, and 33 the Region’s reasonable potential analysis does not take into account specific characteristics of the Cocheco’s assimilation of phosphorus and is therefore arbitrary and capricious. More than four miles of the Cocheco River is relatively narrow and has abundant shading from a riparian corridor that consists of relatively tall and dense tree cover. Attachment I, Comment 35. In addition, the

³ NH regulations also requires a demonstration of the impacts of the phosphorus discharge on the potential use impairment in the River. No such specific analyses was presented in this case.

Cocheco River has naturally high levels of dissolved humic substances and TOC that impart a darkened color to the water that further increases the light limitation on algal growth. *Id.* The light limitations imposed by the combination of shade and natural color do not prevent algal growth; rather, they limit algal growth rates to moderate levels, such that phosphorus can be assimilated without causing nuisance levels of periphyton. *Id.* The Region's Response 2 and Response 33 failed to consider these characteristics when developing the low phosphorus limit in the Final Permit.

The Region's Response 2 acknowledges that there are alternative technical approaches when considering site specific facts and circumstances for permitting for nutrients; but in this case ignores those site-specific facts in choosing the low phosphorus limit based upon the Gold Book and 7Q10 standards. The Region's Response 2 states that it is relying upon its "proven approach" consistent with cited precedent. In other words, contrary to the Gold Book caution, the Region is applying the same rote formulaic approach to developing a phosphorus limit that it has used in other diverse waterbodies, without any consideration of the specific characteristics of the Cocheco River. As noted above in Section 3, the Gold Book specifically indicates the need to consider site-specific factors in setting nutrient limitations for phosphorus.

The City's Comments and technical responses proposed a scientifically defensible method and schedule for considering the river-specific characteristics and deriving a protective phosphorus limit. Furthermore, the Region's Responses 2 and 33 rely upon discrete observations at two downstream impoundments that do not justify findings of cultural eutrophication and the overly stringent 0.12 mg/L limit. Given the Region's failure to consider the unique assimilative conditions of the Cocheco River, the low phosphorus effluent limit in the Final Permit and finding of reasonable potential were arbitrary and capricious.

5. The Region's Failure to Incorporate a Schedule of Compliance to the Newly-Imposed Phosphorus Limit was Arbitrary and Capricious.

The Rochester WWTF is not designed for phosphorus removal and has only limited phosphorus data. A significant amount of phosphorus data collected is necessary to determine what level of TP reduction is routinely achieved by the WWTF. Following data collection, an assessment of the plant's potential capacity to remove phosphorus must be conducted along with process modeling to determine what operational/capital upgrades are needed to achieve required reduction. Once those upgrades have been identified, the plant improvements must be designed and constructed. If a TP limit is imposed on the WWTF, it will take several years to design, construct and implement the treatment technology to meet such limit. Thus, a compliance schedule is needed to provide the time to implement those TP controls.

C. The Region's Unexplained Imposition of a Lower Ammonia Nitrogen Limit was Not Based on a Sufficient Factual Basis.

For the reasons set forth in the City's technical comments (Attachment II), incorporated herein, Rochester objects to these lower Ammonia Nitrogen limits in Part I.A.1. There is no reasonable potential that the existing limits would cause exceedance of acute criteria because the Region has set the average monthly limit to the chronic waste load allocation (WLA) without considering effluent variability. Rochester also asserted that the Region's reliance upon the data in table B-3 of the fact sheet is an error and does not support a finding of reasonable potential. Rochester asserts that the existing winter monthly limit of 7.7 mg/L is protective, and the appropriate summer monthly limit should be 2.8 mg/L instead of 2.0 mg/L. The Region's failure to consider the technical arguments and alleged errors asserted by Rochester and reliance on flawed analysis render the imposed reduction of ammonia limits arbitrary and capricious.

D. The Region Imposed Whole Effluent Toxicity (WET) Testing Without Any Reference to Particularized Need Therefor.

The Region's Response No. 9 relies on the broad authority to issue permit conditions, rather than any reference to any particularized risk or need. Response No. 9 denies Rochester's request to remove WET testing despite no reasonable potential for metals toxicity and a lack of water quality standards for hardness and TOC. Rochester further asserts and incorporates herein the arguments set forth in Rochester's Comment 9 and technical comments. *See* Attachment I, at Comment 9, and *generally*, Attachment II. In the absence of some particularized risk or need for this testing, imposing a requirement to conduct the same was arbitrary and capricious.

E. The Region failed to respond to the comments regarding the imposition of maximum daily (summer/winter) CBOD limits.

Incorporating its comments set forth in Comment 13, Rochester asserts that the Region failed to respond adequately to the request to remove the maximum daily CBOD limits in addition to average monthly and weekly limits for both summer and winter seasons. The Region's Response 13 includes an analysis of why the water quality based effluent limitations (WQBELs) are necessary which include the maximum daily limits. As cited in Comment 13, 40 C.F.R. § 122.45(d)(2) specifically states that for continuous discharges all permit effluent limitations shall, unless impracticable, be stated as average weekly and monthly discharge limitations for POTWs, such as the WWTF operated by Rochester. *See* 40 C.F.R. § 122.45(d)(2).

The region's Response 13 erroneously claims that Rochester failed to provide sufficient analysis as to why the exceptions to the anti-backsliding analysis should apply; however, the Region makes a finding in Response 14 that the application of these limits for COD and TSS were based on a mistake of both a technical and legal nature, thus covered by an exception to

Section 402(o)(2)(D). The Region accepts this analysis for amending the TSS limits and revision to application of the average weekly and monthly discharge limits, but inconsistently denies the same exception for the CBOD limits. The Region's failure to apply the finding of an error to the CBOD limit in Response 14, failure to apply the anti-backsliding exception, and failure to amend the permit conditions for CBOD limits to be consistent with its own regulations is arbitrary and capricious.

F. The Region's finding of downstream impairment of pH in the Cocheco is plainly erroneous and, to the extent it relies on insufficient data, arbitrary and capricious.

The Region's Response 12 denies Rochester's request for a modified pH range of 6.0 to 9.0. Instead, the Region imposed the 6.5 to 8.0 range as set forth in the draft and Final Permit on the bases that (1) the dilution factor from Rochester's discharge creates a downstream impairment, (2) and that the lower pH (acknowledged by the Region) in upstream segments of the Cocheco are not naturally occurring, despite presenting no data or analysis to support the conclusion that the dilution factor is causing a downstream impairment. *See* Attachment I, Response 12. ("[I]t is likely that the pH in the receiving water is significantly altered by the Permittee's discharge. . . [because] in general, as dilution decreases, the impact of effluent on river pH increases."). Rochester disputes the Region's finding that the upstream lower pH range is not a naturally occurring condition, notwithstanding any referenced impairment listing. Moreover, the Region provides no factual data to support its hypothesis that given the low dilution factor from the WWTF it is significantly impacting the pH in the receiving water downstream. *See id.* The Region does not respond to the potential impacts on pH resulting from the implementation of the nitrification/denitrification at the WWTF⁴.

⁴ The denitrification process produces alkalinity increasing the pH which is buffered by the sewage because of the nitrification process that produces acidity. The combined simultaneous nitrification denitrification process, which is

The Region's finding that the downstream segment is significantly impacted by the WWTF discharges is not based upon a discernible factual basis and is therefore arbitrary and capricious. Notwithstanding this challenge, Rochester reserves the right to conduct a pH demonstration study and request a modification of the Final Permit pH range given the anticipated impacts of implementation of the nitrification/denitrification at the WWTF.

G. The Permit's General Water Quality Standards Compliance Language Is Impermissibly Broad

Permit Part I.A.2 requires that "the discharge shall not cause a violation of the water quality standards of the receiving water." This provision is arbitrary and capricious, inasmuch as the Region has failed to provide Rochester with fair notice of the conduct that is proscribed. The Permit fact sheet provides no factual basis for this general prohibition, nor does the permit or fact sheet clearly state how Rochester must operate its facility to ensure which limits the discharges must meet to comply with this general prohibition, despite the specific applicable water quality-based effluent limitations set forth in the permit.

The Region's Response 10 does not adequately address Rochester's objections. First, it emphasizes its authorization under the NPDES program to fashion both specific and numeric permit limitations. This misses the point. Rochester does not object to properly developed and expressed narrative requirements such as those addressing proper facilities operations and maintenance. Rather, the brief, generic Permit language ignores the factors and variables that necessarily must contribute to any determination that a permitted wastewater discharge may cause an instream "violation" of water quality standards. Those include thirteen considerations of effluent concentration and volume, duration and frequency of any criteria exceedances as

currently operating at the WWTF, should generally cancel each process out resulting in a constant pH value, but may vary depending on fluctuating flow volumes. Therefore, Rochester requested a wider pH range to account for the natural swings in the treatment process and given the lower natural pH in the upstream flow.

compared with the duration and frequency that underlie the standards themselves, and other factors. It is, as the Region concedes, its own responsibility to evaluate data and determine during the permit process what pollutant parameters should have numeric limits, and at what numeric values. *See* Attachment I, Response 10. Those determinations are the essence of the permit process. It is fundamentally unfair for the Region to also try to cover any omissions it may have made with the generic language, to which Rochester objects. The Region's Response does not adequately address these matters.

Rochester also commented that the Permit provision deprives it of the Permit Shield mandated by the Clean Water Act. *See* Attachment I, Comment 10. This again is not appropriately addressed by the Region. *See* Attachment I, Response 10. In circular fashion, the Region refers to the generic requirement itself as one of the Permit provisions with which there must be compliance for the protections to apply. *Id.* The statute provides that "Compliance with a permit . . . shall be deemed compliance" with the various relevant requirements of the Act. 33 U.S.C. § 1342(k). Those protections are rendered meaningless if the Region is able to cover its otherwise more specific permit obligations and decisions in the unlimited broad manner by which the Region asserts authority.

Finally, the Region attempts to defend its actions by claiming that Rochester's invocation of due process was not specific enough. *Id.* In fact, considered in its proper context, Rochester objected on both substantive and procedural grounds. The restrictions imposed by the challenged provision impose substantive obligations (if they were capable of determination) on the permittee. The Act's Permit Shield offers procedural protection for permittees, providing clarity that their compliance with determinable, specified numeric and other defined permit provisions is a defense to allegations of violations of the CWA. In addition, Rochester incorporated by

reference the briefs in the City of San Francisco's appeal of this same permit condition which is pending before the federal Court of Appeals for the Ninth Circuit. *See* Attachment I, Comment 10. That briefing also includes an extensive due process argument. Accordingly, the general water quality standards compliance language is contrary to law.

H. The Region's Failure to Provide a Reasonable Opportunity to Comment on Its Expanded Sampling Obligations for PFAS Chemicals is Erroneous, Arbitrary, and Capricious.

The City raised specific concerns and objections to the proposed additional testing analysis for PFAS analytes, specifically, Perflourohexanesulfonic acid (PFHxS), Perflourononanoic acid (PFNA), Perflourooctanesulfonic acid (PFOS), Perflourooctanoic acid (PFOA) in the Permit and the Permit Fact Sheet. *See* Attachment I, Comment 11. The City requested either reduction or elimination of this additional sampling as overly burdensome and unnecessary. The City also objected to the requirement for PFAS sludge sampling because its sludge is disposed of at the Waste Management Turnkey Landfill, which serves a municipal landfill function pursuant to 40 C.F.R. §§ 257.2 and 258.2. *Id.* The Region erroneously failed to respond to Rochester's objection to sample its WWTF sludge. *See* Attachment I, Response 11.

Finally, without notice or opportunity to comment, the Region erroneously and arbitrarily *increased* the sampling protocol in the Final Permit to include sampling for 40 PFAS analytes. The City had no opportunity whatsoever to comment on this significantly expanded sampling protocol.

I. The Region's refusal to provide time to implement the significant new requirements in the Permit was arbitrary and capricious.

The Final Permit requires development and implementation of many significant new obligations imposed upon the WWTF operations with specific - and tight - deadlines for compliance, including the development of a Capacity Management Operations and Management

(CMOM) – Staffing, Part 1.C.1; CMOM – Preventative Maintenance – Part 1.C.2; CMOM – Infiltration and Inflow – Part 1.C.3; CMOM – Collection System Mapping – Part 1.C.4; CMOM – Operation and Maintenance Plans – Part 1.C.5; CMOM – Annual Reporting Requirement – Part 1.C.6; Alternative Power Source – Part 1.D.; Infiltration and Inflow (I/I) – Part 5.6; Industrial Pre-Treatment – Part 1.A.9; Industrial Users and Pretreatment Program Development – Part 1.E.1; Industrial Users Pretreatment Program Reporting – Part 1.E.6; and SSO Notification – Part 1.B.2. Rochester requested amendments to each individual obligation to allow the time to hire staff and consultants (as necessary) given staffing challenges, and implement these duties in light of the additional upgrades that may be necessary should the effluent limit for total phosphorus be implemented. *See* Rochester Comments 2, 3, 5, 12, 13, and 14.

In each case, the Region re-asserted in the Final Permit the original deadlines for compliance from the draft permit, and advised Rochester to seek an administrative order to obtain alternative compliance deadlines. An administrative order is inadequate and unnecessarily burdensome. Such an order could subject Rochester to third-party challenges for failure to comply, and related costs of defense of any such action in addition to administrative penalties. Rather than imposing the original compliance timeframes as set forth above, the Region should incorporate a compliance schedule into the Final Permit as proposed by the City in Comments 2, 3, 5, 12, 13 and 14, to provide Rochester the flexibility to implement the upgrades and additional permit obligations that will be necessary to achieve compliance. The Region's failure to provide a compliance schedule or amended time for compliance constitutes clear error. The Final Permit should be remanded for inclusion of a compliance schedule.

V. STAY OF CONTESTED AND NON-SEVERABLE CONDITIONS

In accordance with EPA regulations, the effect of the limits and conditions contested herein must be stayed, along with any uncontested conditions that are not severable from those contested. See, 40 C.F.R. §§124.16(a) and 124.60(b). The Petitioner is contesting major provisions of the Permit, i.e., Parts I.A., I.B, I.C., I.D., and I.E. Given the encompassing and interdependent relationship of these provisions to all remaining non-contested provisions, the proper effect is to extend the stay to the Permit in its entirety. In which case, and until such time as the Board reviews and resolves the contested provisions or remands the Permit to the Region for modification, the Petitioner should be directed to comply with the terms and conditions of the Facility's former NPDES permit, i.e., those terms/conditions of its continued 1997 permit.

VI. CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, the City of Rochester, New Hampshire respectfully seeks review by the EAB of the terms and provisions of the final NPDES Permit challenged by Rochester as set forth herein. After such review, the City of Rochester requests:

- A. the opportunity to present oral argument in this proceeding and a briefing schedule for this appeal to assist the EAB in resolving the issues in dispute;
- B. a remand to EPA Region I with an order to issue an amended NPDES Permit that conforms to the EAB's findings on the terms and provisions appealed by Rochester; and
- C. such other relief that may be appropriate under these circumstances.

s/ James J. Steinkrauss
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STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this petition for review, including all relevant portions and exclusive of attachments, contains less than 14,000 words.

/s/ James J. Steinkrauss _____
James J. Steinkrauss

Dated: April 19, 2023.

LIST OF ATTACHMENTS

ATTACHMENT 1 – FINAL NPDES Permit No. NH010668

Final NPDES Permit No. NH010668 1-22
Attachment A to the Final NPDES Permit 23-30
Attachment B to the Final NPDES Permit 31-37
Attachment C to the Final NPDES Permit 38-46
Attachment D to the Final NPDES Permit 47-49
Attachment E to the Final NPDES Permit 50-51
NPDES Permit Part II – Standard Conditions 52-72
EPA Response to Comments 73-162
Draft NPDES Permit No. NH010668 163-231
Draft NPDES Permit Fact Sheet 232-307
Email Service of Permit from EPA to Rochester308

ATTACHMENT 2 – City of Rochester Public Comments

City of Rochester Public Comments 1-24
Public Comments – Attachment 1 – Technical Comments 25-235
Public Comments – Attachment 2 – Total Phosphorus Treatment Cost Estimate
..... 231-236
Public Comments – Attachment 3 – City of Rochester EPA Financial Capability
Assessment 237-307
Public Comments – Attachment 4 – Revised Site Location Map 308-309

CERTIFICATE OF SERVICE

I, James J. Steinkrauss, hereby certify that on this 19th day of April 2023, I served a copy of the foregoing Petition for Review, Statement of Compliance with Word Limitations on the parties identified below by U.S. first-class mail, postage pre-aid:

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Dated on the 19th day of April, 2023.

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