



(Slip Opinion)

NOTICE: This opinion is subject to formal revision before publication in the Environmental Administrative Decisions (E.A.D.). Readers are requested to notify the Environmental Appeals Board, U.S. Environmental Protection Agency, Washington, D.C. 20460, within fifteen (15) days of the issuance of this opinion, of any typographical or other formal errors, in order that corrections may be made before publication.

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

_____	)	
In re City of Manchester	)	
	)	
	)	
	)	NPDES Appeal No. 25-04
NPDES Permit No. NH0100447	)	
	)	
	)	
_____	)	

[Decided August 12, 2026]

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

***Before Environmental Appeals Judges Aaron P. Avila and Ammie
Roseman-Orr.***

IN RE CITY OF MANCHESTER

NPDES Appeal No. 25-04

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided August 12, 2026

Syllabus

Conservation Law Foundation, Inc. (“CLF”) filed a petition for review of a decision by U.S. Environmental Protection Agency Region 1 to renew a National Pollutant Discharge Elimination System (“NPDES”) permit issued to the City of Manchester, New Hampshire. The permit authorizes discharges from a wastewater treatment facility to the Merrimack River. The petition for review raises three issues: (1) whether changing the language of the permit’s benthic survey requirement without reopening the comment period was clear error or an abuse of discretion, (2) whether the Region’s failure to conduct an environmental justice analysis when making the permitting decision was clear error or otherwise warrants review, and (3) whether the Region’s failure to conduct an analysis to determine whether per- and polyfluoroalkyl substances (“PFAS”) are or may be discharged at a level that will cause, have a reasonable potential to cause, or contribute to an excursion of narrative water quality standards is clear error or otherwise warrants review.

Held: The Board denies the petition for review on the first and second issues and remands the permit to the Region on the third issue.

(A) The Board concludes that the Region did not abuse its discretion in declining to reopen the comment period and that CLF fails to demonstrate clear error or an abuse of discretion in the final permit decision on this issue. In evaluating whether a permit issuer has abused its discretion in declining to reopen the public comment period, the Board considers whether the challenged provision was a “logical outgrowth” of the permit process. The final permit language was a logical outgrowth in the evolution of the permit because the Region alerted the public in its statement of basis that the State may identify less stringent conditions that would be consistent with state standards, and the State’s draft certification made such suggestions. The record reflects that the Region adequately

explained its rationale for adding the revised language and did not clearly err in considering the cost of the benthic survey in deciding to change the requirement.

(B) CLF fails to demonstrate that the Region's decision not to conduct an environmental justice analysis is clearly erroneous or otherwise warrants review. CLF argues that the Region should have analyzed the permit's potential environmental justice impacts in accordance with an NPDES Program Policy. However, all four of the Executive Orders underlying the Program Policy have been revoked. The Program Policy does not establish mandatory requirements but instead offers guidance on the exercise of agency discretion. The Region adequately explained the basis for its decision not to conduct the environmental justice analysis set forth in the Program Policy.

(C) The record does not reflect the Region's considered judgment in evaluating whether effluent limits for PFAS are necessary to achieve compliance with New Hampshire's narrative water quality standards. NPDES regulations require that permits include limitations on pollutants that "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, including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1)(i). Under the regulations and Board precedent, the absence of an approved pollutant-specific numeric criteria is not an impediment to conducting a reasonable potential analysis. In contrast to that authority, the Region's response to comments repeatedly states that the Region could not conduct a reasonable potential analysis in the absence of approved numeric criteria for PFAS. The Region's concurrence with the State's reasonable potential analysis lacked a reasoned explanation of how the permit achieves compliance with the applicable water quality narrative criteria or designated uses. The Region's inclusion of whole effluent toxicity ("WET") limits in the permit did not alleviate the failure to conduct a reasonable potential analysis because the WET limits were included to satisfy a different portion of the regulations and the record does not explain how the WET limits achieve the narrative criteria or designated uses.

The Board remands the permitting decision to the Region to correct erroneous statements in the response to comments document, and to evaluate whether PFAS "are or may be discharged a level which will cause, have the reasonable potential to cause, or contribute to an excursion" of New Hampshire's narrative water quality standards, including the narrative criteria and designated use.

Before Environmental Appeals Judges Aaron P. Avila and Ammie Roseman-Orr.

Opinion of the Board by Judge Avila:

I. STATEMENT OF THE CASE

Conservation Law Foundation, Inc. (“CLF”) filed with the Environmental Appeals Board a petition for review of U.S. Environmental Protection Agency Region 1’s decision to renew a National Pollutant Discharge Elimination System (“NPDES”) permit issued to the City of Manchester, New Hampshire authorizing discharges from a wastewater treatment facility to the Merrimack River. CLF challenges three aspects of the Region’s permitting decision. First, CLF asserts that the Region erred in refusing to conduct an analysis of whether per- and polyfluoroalkyl substances (“PFAS”) in the facility’s discharge have a reasonable potential to cause or contribute to an exceedance of the State’s narrative water quality standards. Second, CLF asserts that the Region erred in establishing a benthic survey requirement by altering the requirement without reopening the public comment period and by failing to explain how the altered provision ensures compliance with water quality standards. Third, CLF asserts that the Region erred in failing to consider environmental justice concerns in accordance with a specific agency policy.

The Board denies the petition for review in part and remands in part. The Board denies review of the Region’s decision not to reopen public comment on the benthic survey condition because the final permit condition was a logical outgrowth of the draft permit and the Region adequately explained its decision on the record. The Board also denies review of the Region’s decision not to conduct an environmental justice analysis because CLF has failed to demonstrate clear error or that review is otherwise warranted. With respect to PFAS, the Board concludes that the Region clearly erred in stating that the Region could not conduct a reasonable potential analysis and has not adequately explained how the permit achieves narrative water quality standards. The Board remands the permit to the Region to revise its decision in accordance with this order.

II. LEGAL FRAMEWORK

The Clean Water Act (“CWA”) prohibits the discharge of any pollutant from a point source into waters of the United States, except in compliance with an NPDES permit or other specified provisions of the CWA. CWA §§ 301(a), 402(a), 502(7), (12), 33 U.S.C. §§ 1311, 1342, 1362(7), (12). EPA may issue an NPDES

permit for the discharge of pollutants, upon the condition that the discharge meets applicable requirements of the CWA. CWA § 402(a)(1), 33 U.S.C. § 1342(a)(1).

The CWA requires EPA to establish effluent limitations to restrict the quantities, rates, and concentrations of pollutants that may be discharged from point sources. CWA §§ 301(b)(1), 304, 502(11), 33 U.S.C. §§ 1311(b)(1), 1314, 1362(11). Effluent limitations include limitations based on available control technology, established on an industry-by-industry basis, known as “technology-based effluent limitations.” CWA § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A); 40 C.F.R. § 122.44(a)(1); *see In re Springfield Water & Sewer Comm’n*, 18 E.A.D. 430, 440 (EAB 2021). In addition, where technology-based effluent limitations are inadequate to ensure achievement of water quality standards, NPDES permits must include “any more stringent limitation” necessary to meet water quality standards, known as “water quality-based effluent limitations” (“WQBELs”). CWA §§ 301(b)(1)(C), 302(a), 33 U.S.C. §§ 1311(b)(1)(C), 1312(a); 40 C.F.R. § 122.44(d); *see Springfield*, 18 E.A.D. at 441.

Generally speaking, a state is responsible for developing (subject to EPA approval) water quality standards applicable to waters within the state. *See* CWA § 303(a), 33 U.S.C. § 1313(a). Water quality standards consist of three components: (1) the “designated uses” of the waters; (2) “water quality criteria,” which may include numeric or narrative criteria necessary to protect the designated uses; and (3) an “antidegradation policy” to protect existing uses and high-quality waters. CWA § 303(c)(2)(A), 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10-.12. Whenever a state adopts or revises a standard, the standard must be submitted to EPA for review. CWA § 303(c)(2), 33 U.S.C. § 1313(c)(2). If EPA approves the standard, it becomes the applicable standard for waters of that state. *Id.* § 303(c)(3), 33 U.S.C. § 1313(c)(3).

NPDES permits must contain requirements necessary to “[a]rchive water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.” 40 C.F.R. § 122.44(d)(1). Thus, NPDES permits must include effluent limitations to control all pollutants or parameters “which the [permit issuer] 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, including State narrative criteria for water quality.” *Id.* § 122.44(d)(1)(i).

Before EPA can issue an NPDES permit, the state in which the discharge originates must certify that the discharge will comply with applicable water quality

standards or waive such certification. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1); 40 C.F.R. § 124.53(a). If certification has not yet been requested at the time the Regional Administrator prepares a draft permit, the Regional Administrator must send the state a copy of the draft permit and request the state's certification. 40 C.F.R. § 124.53(c). The state must establish procedures for public notice of the certification request and may establish procedures for public hearings. CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). The state certification may include "a statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards." 40 C.F.R. § 124.53(e).

New Hampshire has adopted water quality standards in accordance with CWA section 303. New Hampshire has designated the Merrimack River as a Class B water, which is "acceptable for fishing, swimming and other recreational purposes and, after adequate treatment, for use as water supplies." N.H. Rev. Stat. Ann. § 485-A:8(II). All surface waters in New Hampshire, including the Merrimack River, are designated for "fish consumption" use. New Hampshire Department of Environmental Services, *2020/2022 Section 305(b) and 303(d) Consolidated Assessment and Listing Methodology* at 10 (Feb. 18, 2022) (A.R. G.3). New Hampshire regulations further define the "fish consumption" designated use as "meaning the surface water can support a population of fish free from toxicants and pathogens that could pose a human health risk to consumers." N.H. Code Admin. R., Env-Wq 1702.16(b). The State has also adopted narrative water quality criteria. The narrative criteria include requirements that "[a]ll surface waters shall be free from substances in kind or quantity that * * * [s]ettle to form harmful benthic deposits" and that "Class B waters shall contain no benthic deposits that have a detrimental impact on the benthic community, unless naturally occurring." *See id.* Env-Wq, 1703.03(c)(1), 1703.08(b). For toxic substances, the narrative criteria provide:

Unless naturally occurring * * * all surface waters shall be free from toxic substances or chemical constituents in concentrations or combinations that:

- (1) Injure or are inimical to plants, animals, humans, or aquatic life;
or
- (2) Persist in the environment or accumulate in aquatic organisms to levels that result in harmful concentrations in:
 - a. Edible portions of fish, shellfish, or other aquatic life; * * *.

Id. Env-Wq 1703.21(a). These water quality standards have been approved by EPA. *See* EPA Region 1’s Resp. to the Pet. for Rev. at 6-8 (Jan. 30, 2026) (“Reg.’s Resp. Br.”).

In addition to these approved narrative standards, New Hampshire has adopted numeric water quality criteria for certain PFAS chemicals, which have not yet been approved by EPA. New Hampshire adopted, by statute, maximum contaminant levels (“MCLs”)—the maximum permissible level of a contaminant in water delivered to a user of a public water system—for perfluorohexane sulfonic acid (PFHxS), perfluorononanoic acid (PFNA), perfluorooctane sulfonic acid (PFOS), and perfluorooctanoic acid (PFOA). N.H. Rev. Stat. Ann. §§ 485-A:8, 485:16-e. The New Hampshire Department of Environmental Services (“NHDES”) subsequently incorporated the MCLs into its surface water quality criteria for surface waters within twenty miles upstream of an active surface water intake for a public water system. N.H. Code Admin. R., Env-Wq 1703.21(b) & Table 1703-1, 1703.22(l) & Table 1703-2A. On April 18, 2025, NHDES submitted the amended water quality standards to EPA for approval. Letter from Rene J. Pelletier, Dir., Water Div., NHDES, to Mark Sanborn, Reg’l Adm’r, EPA Region 1, at 1 (Apr. 18, 2025) (A.R. F.3) (“April 2025 WQS Submission”). EPA has not approved the amended standards and therefore they are not applicable water quality standards for purposes of the CWA. 40 C.F.R. § 131.21(c)(2); Reg.’s Resp. Br. at 12.

III. *FACTUAL AND PROCEDURAL HISTORY*

The City of Manchester, New Hampshire operates the Manchester Wastewater Treatment Facility, which collects and treats domestic, commercial, and industrial wastewater from the City and three surrounding towns. Region 1, U.S. EPA, *Fact Sheet for Draft NPDES Permit No. NH0100447*, at 4, 13 (Apr. 10, 2024) (A.R. B.2) (“Fact Sheet”). The facility treats wastewater to remove solids and organic matter and disinfect the remaining wastewater. *Id.* at 14. The solids removed during the treatment process (sludge) are thickened and then primarily incinerated or occasionally shipped off-site for disposal. *Id.* at 15. The treated wastewater is discharged into the Merrimack River. *Id.* at 14, 16.

A. *The Draft Permit*

Discharges from the facility are authorized by an NPDES permit issued by the Region to the City. The City applied for reissuance of the permit in 2019. *Id.* at 4. On April 10, 2024, the Region issued a draft permit and public notice of an opportunity to comment on the draft permit. *Id.* at 1, 49; Region 1, U.S. EPA, *Draft NPDES Permit No. NH0100447* (Apr. 10, 2024) (A.R. B.1) (“Draft Permit”). The

draft permit contained narrative limitations addressing the effect of the discharge on the receiving water that corresponded to the State's narrative water quality criteria. Draft Permit at 11. These included the following requirements:

3. The discharge shall not cause a violation of the water quality standards of the receiving water.
4. The discharge shall be free from substances in kind or quantity that settle to form harmful benthic deposits; float as foam, debris, scum or other visible substances; produce odor, color, taste or turbidity that is not naturally occurring and would render the surface water unsuitable for its designated uses; result in the dominance of nuisance species; or interfere with recreational activities.

* * *

6. The discharge shall not result in toxic substances or chemical constituents in concentrations or combinations in the receiving water that injure or are inimical to plants, animals, humans or aquatic life; or persist in the environment or accumulate in aquatic organisms to levels that result in harmful concentrations in edible portions of fish, shellfish, other aquatic life, or wildlife that might consume aquatic life.
7. The discharge shall not result in benthic deposits that have a detrimental impact on the benthic community.

Id. The draft permit also required monitoring of influent, effluent, and sludge for certain PFAS chemicals, but did not include specific limitations on PFAS in the wastewater facility's discharges. *Id.* at 4-5, 9, attach. E.

CLF submitted comments on the draft permit. CLF, *Comments on the Draft NPDES Permit No. NH0100447* (June 10, 2024) (A.R. C.6) ("CLF 2024 Cmts."). In its comments, CLF argued that the Region should analyze the permit's potential environmental justice impacts in accordance with an NPDES Program Policy entitled "Addressing Environmental Justice and Equity in NPDES Permitting." CLF 2024 Cmts. at 12-13; U.S. EPA, *NPDES Program Policy Addressing Env't Justice and Equity in NPDES Permitting* (2024) (A.R. I.16) (the "Program Policy"). CLF also maintained that the Region was required to analyze whether PFAS discharges from the facility have a reasonable potential to cause or contribute to violations of state water quality standards, including the narrative criteria for toxics and the fish consumption designated use. CLF 2024 Cmts. at 17-18. CLF cited two sources of data on PFAS in the facility's effluent: a study identified as the

Battelle Study,¹ and data the facility compiled after voluntarily monitoring for four PFAS in the facility's effluent from 2019 through 2023. *Id.* at 3-5.

B. The Revised Draft Permit

After the close of the comment period, the Region issued a revised draft permit. Region 1, U.S. EPA, *Stmt. of Basis for Revised Draft NPDES Permit No. NH0100447*, at 2 (Dec. 18, 2024) (A.R. B.5) (“*Stmt. of Basis*”). In the revised draft permit, the Region removed the narrative provision prohibiting the discharge from causing a violation of water quality standards in the receiving water and similar narrative provisions, including the narrative limitations on toxicity and benthic deposits that had been included in the draft permit. *Stmt. of Basis* at 2; Region 1, U.S. EPA, *Revised Draft NPDES Permit No. NH0100447* (Dec. 18, 2024) (A.R. B.4) (“*Revised Draft Permit*”).² In lieu of those narrative limitations, the Region added more specific requirements such as a requirement to repeat whole effluent toxicity testing in certain circumstances, and requirements for the permittee to conduct a pollutant scan, a visual inspection of the receiving water, and a benthic survey. *Stmt. of Basis* at 4, 7; *Revised Draft Permit* at 4-5, 7, 10-13, 34-37. The benthic survey requirement stated:

During the third calendar quarter (*i.e.*, July through September) that begins at least 12 months after the effective date of the permit, the Permittee shall conduct a benthic survey once per permit term to assess impacts from the discharge on aquatic life in the benthic environment.

¹ While the Battelle Study was conducted at an undisclosed municipal wastewater treatment plant, CLF alleges that this was the City of Manchester facility and NHDES stated that “[t]he study is relevant in that it appears to involve the Manchester WWTF.” NHDES, *Resp. to Cmts. Water Quality Certification 2025-NH010044*, at 4 (May 13, 2025) (A.R. E.1).

² The Region later explained that these changes were in anticipation of a decision in the Supreme Court in *City & County of San Francisco v. EPA*, in which the Supreme Court considered the validity of narrative permit requirements such as those included in the Manchester permit which the Supreme Court characterized as “end-result” provisions. In *San Francisco*, the Supreme Court held that the CWA “does not authorize the EPA to include ‘end-result’ provisions in NPDES permits.” 604 U.S. 334, 355 (Mar. 4, 2025); *see* Region 1, U.S. EPA, *Resp. to Cmts. NPDES Permit No. NH0100447*, at 135-36 (Nov. 3, 2025) (A.R. A.2). At the time the revised draft permit was issued, the Supreme Court had heard oral argument in *San Francisco* but had not yet decided the case.

Revised Draft Permit at 12, 36.

CLF again submitted comments on the revised draft permit. CLF, *Cmts. on Revised Draft NPDES Permit No. NH0100447* (Jan. 30, 2025) (A.R. C.14) (“CLF 2025 Cmts.”). CLF reiterated that the Region must conduct an analysis of whether PFAS are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion of the narrative toxics criteria and the designated uses. *Id.* at 10. CLF further asserted that the Region should reinstate the narrative limitations removed from the revised draft permit because the additional monitoring and reporting requirements in the revised draft permit “do not ‘ensure compliance with applicable narrative water quality standards.’” *Id.* at 11.

The City also submitted comments on the revised draft permit. Region 1, U.S. EPA, *Resp. to Cmts. NPDES Permit No. NH0100447*, at 113 (Nov. 3, 2025) (A.R. A.2) (“Reg.’s Resp. to Cmts.”). Among other things, the City argued that the benthic survey requirement was “burdensome, impractical, and unnecessary.” *Id.* at 117. The City asserted that historic industrial contamination combined with the river’s high flow rates and sediment transport dynamics make it “impossible to isolate the effects of the City’s discharge of effluent” on the benthic environment. *Id.* at 118. The City further asserted that the River already supports the designated uses and that the costs of conducting a benthic survey in a large and complex water body would be overly burdensome. *Id.*

C. *The Water Quality Certification*

The Region requested that New Hampshire provide a water quality certification of the revised draft permit. Stmt. of Basis at 11. In its statement of basis supporting the revised draft permit, the Region noted that “the State may provide a statement of the extent to which any condition of the Revised Draft Permit can be made less stringent without violating the requirements of State law, including water quality standards.” *Id.* While the comment period on the revised draft permit was still open, NHDES solicited public comments on a draft water quality certification. NHDES, *Resp. to Cmts. Water Quality Certification 2025-NH010044*, at 1 (May 13, 2025) (A.R. E.1) (“NHDES Resp. to Cmts.”). The draft certification included a statement that the permit could be made less stringent without violating state water quality standards by requiring the City to conduct a benthic survey if notified by NHDES or EPA that “benthic deposits from the discharge are known or suspected to have a detrimental impact on downstream benthic communities.” *See id.* at 11.

CLF submitted comments on NHDES's draft water quality certification. NHDES Resp. to Cmts. at 1. CLF asserted that PFAS in the treatment plant effluent likely contributes to violations of the narrative toxics standard and the designated uses of the Merrimack River for fish consumption and aquatic life. *Id.* at 5. CLF also objected to the proposed language to trigger a benthic survey upon notice from NHDES or EPA. *Id.* at 8. CLF asserted that "[w]ithout an automatically-required benthic survey, [NHDES] and EPA cannot make the requisite identification of harmful benthic deposits, rendering the proposed revision valueless for ensuring water quality standard compliance." *Id.*

Following the close of the comment period, NHDES issued a water quality certification for the NPDES permit. NHDES, *Water Quality Certification for the Manchester WWTF Individual Permit*, at 1 (May 13, 2025) (A.R. D.2) ("Water Quality Cert."). The final water quality certification identified changes that could be made to the permit without violating water quality standards, including revising the benthic survey requirement to state:

If notified in writing by NHDES or EPA that benthic deposits from the discharge are known or suspected to have a detrimental impact on downstream benthic communities, the Permittee shall conduct a benthic survey within one year of the notification to assess those impacts on aquatic life in the benthic environment.

See id. at 4. In its response to comments on the draft certification, NHDES explained that the permit already included effluent limits for metals and total suspended solids, as well as other effluent limits and monitoring conditions, and that "NHDES has not received any evidence to date that the cumulative effect of all effluent limitations and monitoring requirements is not sufficiently protective of the benthic environment." NHDES Resp. to Cmts. at 9.

In response to CLF's comments regarding PFAS, NHDES evaluated whether the facility's discharge would cause, have a reasonable potential to cause, or contribute to an exceedance of the four PFAS water quality criteria adopted by the State. *Id.* at 6. According to NHDES, it "completed this evaluation using EPA's 'Reasonable Potential and Limits Calculations' methodology outlined in Appendix B of the fact sheet for the original draft permit." *Id.*³ NHDES concluded that based

³ While NHDES stated that it used EPA's methodology, NHDES also explained that it used a different method of calculating the Merrimack River's flow when it conducted the reasonable potential analysis. NHDES Resp. to Cmts. at 6.

on the effluent data provided by CLF, the discharge did not have a reasonable potential to cause or contribute to an exceedance of the four numeric criteria. *Id.*

D. The Final Permit

The Region issued the final permit on November 3, 2025. Region 1, U.S. EPA, *Final NPDES Permit No. NH0100447* (Nov. 3, 2025) (A.R. A.1) (“Final Permit”). Like the revised draft permit, the final permit included monitoring for PFAS but did not impose specific limitations on PFAS in the wastewater facility’s discharges. *See id.* at 4. The final permit, however, incorporated the language proposed in the water quality certification for benthic monitoring. *Id.* at 32. Specifically, the final permit required that:

If notified in writing by NHDES or EPA that benthic deposits from the discharge are known or suspected to have a detrimental impact on downstream benthic communities, the Permittee shall conduct a benthic survey within one year of the notification to assess potential impacts from the discharge on aquatic life in the benthic environment.

Id.

With the final permit, the Region issued a response to comments addressing comments on both the initial and revised draft permits. Reg.’s Resp. to Cmts. at 1-2. In response to the City’s comments on the benthic survey requirement, the Region explained that NHDES had included revised language in its water quality certification and justified the revised language by stating that “[b]ecause the permit includes effluent limitations on parameters such as total suspended solids and metals, it is already expected to be protective of the benthic community in the vicinity of the facility’s outfall and meet surface water quality standards, specifically those in Env-Wq 1703.03(c)(1)(a) and 1703.08.” *Id.* at 119 (quoting Water Quality Cert. at 4). The Region acknowledged the uncertainty regarding impacts to the benthic community from the discharge and the expense of conducting the survey. *Id.* The Region stated that it agreed with the City’s comment as well as NHDES that the requirement to conduct the survey should be reserved for facilities that are “‘known or suspected to have a detrimental impact’ on the benthic environment.” *Id.* (quoting Water Quality Cert. at 4).

In response to CLF’s comments about environmental justice, the Region explained that a series of Executive Orders issued in January 2025 revoked or abolished the Executive Orders on which the Program Policy was based. *Id.* at 72. The Region further stated that the permit protects water quality standards and includes PFAS monitoring consistent with EPA guidance, and that for these reasons

the Region was exercising its discretion to not conduct the requested environmental justice analysis. *Id.*

With respect to PFAS, the Region stated that EPA had not approved the water quality criteria adopted by the State. *Id.* at 75. The Region acknowledged the data provided by CLF but concluded that “because there is no standard to apply, even with the data referenced by the commenter, EPA is unable to conduct a reasonable potential analysis at this time.” *Id.* at 76, 89. The Region noted, however, that the State conducted a reasonable potential analysis as part of the water quality certification process and concluded that the discharge did not have a reasonable potential to cause or contribute to an exceedance of the four PFAS criteria adopted by the State, “but not EPA-approved.” *Id.* at 89. The Region then stated, “EPA concurs with NHDES’s analysis and conclusion which provides additional support that effluent limits for PFAS are not necessary in this permit to protect water quality standards at this time.” *Id.*

CLF filed a petition for review on December 3, 2025. Petition for Review by CLF (Dec. 3, 2025) (“CLF Pet.”). After the completion of briefing, the Board held oral argument on May 14, 2026. Also pending before the Board are the Region’s motions to strike attachments to CLF’s petition for review and reply brief, as well as the Region’s motion for leave to file a sur-reply and CLF’s opposition thereto, or, in the alternative, motion for leave to file its own sur-reply. CLF’s Objection to EPA Region 1’s Motion for Leave to File Sur-reply, or in the Alternative, Motion to File a Sur-reply (Apr. 20, 2026); EPA Region 1’s Motion for Leave to File Sur-reply (Apr. 3, 2026); EPA Region 1’s Motion to Strike Attachment 1 to Petitioner’s Reply (Apr. 3, 2026) (“Mot. to Strike Attach. 1”); EPA Region 1’s Motion to Strike (Jan. 30, 2026) (“Mot. to Strike Attach. 11”). We address the motions below within the analysis of the issues raised in the petition.

IV. PRINCIPLES GOVERNING BOARD REVIEW

The Board reviews NPDES permitting decisions in accordance with 40 C.F.R. § 124.19. *See, e.g., In re Ocean Era, Inc.*, 19 E.A.D. 231, 242 (EAB 2026). Under the regulation, “a petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner’s contentions for why the permit decision should be reviewed.” 40 C.F.R. § 124.19(a)(4)(i). The Board ordinarily will remand only if the petitioner demonstrates that the permitting decision is based on a clearly erroneous finding of fact or conclusion of law, or an exercise of discretion that the Board, in its discretion, should review. 40 C.F.R. § 124.19(a)(4)(i); *Ocean Era*, 19 E.A.D. at 243.

“When evaluating a challenged permit decision for clear error, the Board examines the administrative record that serves as the basis for the permit decision to determine whether the permit issuer exercised ‘considered judgment.’” *Ocean Era*, 19 E.A.D. at 243 (quoting *In re U.S. Dep’t of Energy*, 18 E.A.D. 797, 799 (EAB 2022)). “The permit issuer must articulate with reasonable clarity the reasons supporting its conclusion and the significance of the crucial facts it relied on when reaching its conclusion.” *Id.* (quoting *Dep’t of Energy*, 18 E.A.D. at 799-800). “As a whole, the record must demonstrate that the permit issuer ‘duly considered the issues raised in the comments’ and ultimately adopted an approach that ‘is rational in light of all information in the record.’” *Id.* (quoting *Dep’t of Energy*, 18 E.A.D. at 800).

V. ANALYSIS

The petition for review raises three issues, which we address in the following order. First, we consider whether CLF has demonstrated that changing the language of the benthic survey requirement without reopening the comment period was clear error or otherwise warrants review. CLF Pet. at 32-35. Second, we consider whether CLF has demonstrated that the Region’s failure to conduct an environmental justice analysis when making the permitting decision was clear error or otherwise warrants review. *Id.* at 38-42. Third, we address CLF’s assertion that the Region’s failure to conduct an analysis to determine whether PFAS are or may be discharged at a level that will cause, have a reasonable potential to cause, or contribute to an excursion of narrative water quality standards is clear error or otherwise warrants review. *Id.* at 17-18. For the reasons set forth below, we deny the petition for review on the first and second issues and remand the permit to the Region on the third issue.

A. Petitioner Has Not Demonstrated That the Change to the Benthic Survey Requirement Is Clearly Erroneous or Otherwise Warrants Review

CLF objects to the Region’s decision to change the permit condition requiring the City to perform a benthic survey of the Merrimack River. The revised draft permit required a survey once during the permit term, while the final permit requires a survey upon written notification from NHDES or EPA of detrimental impacts to the downstream benthic community. CLF objects to the changed provision on both procedural and substantive grounds. CLF Pet. at 32-33. CLF first argues that the change warrants remand as a procedural matter because the Region clearly erred by altering the requirement without reopening the comment period. CLF then argues on the merits that the final permit requirement does not ensure compliance with the CWA and the Region failed to justify the change. The Board concludes that the Region did not abuse its discretion in declining to reopen

the comment period and that CLF fails to demonstrate clear error or an abuse of discretion in the final permit decision on this issue.

1. *The Region Did Not Clearly Err or Abuse its Discretion in Declining to Reopen the Comment Period*

In issuing an NPDES permit, the Region must provide notice of a draft permit and an opportunity for the public to comment on the draft permit. 40 C.F.R. § 124.10(a)(1)(ii), (b)(1). The regulations recognize that comments on the draft permit may result in changes to the final permit terms. *See id.* § 124.17(a)(1) (requiring response to comment to specify any provisions of the draft permit that have been changed in the final permit). Thus, “[a] final permit need not be identical to the corresponding draft permit and, indeed ‘[t]hat would be antithetical to the whole concept of notice and comment.’” *In re D.C. Water & Sewer Auth.*, 13 E.A.D. 714, 758-59 (EAB 2008), *pet. for review dismissed for lack of juris.*, No. 08-1251 (D.C. Cir. Dec. 12, 2008) (quoting *NRDC v. EPA*, 279 F.3d 1180, 1186 (9th Cir. 2002)).

Whether to provide notice of changes and an additional opportunity to comment is within the permit issuer’s discretion. *D.C. Water*, 13 E.A.D. at 759; *In re Dominion Energy Brayton Point, L.L.C.*, 13 E.A.D. 407, 416 n.10 (EAB 2007), *pet. for review vol. dismissed*, No. 07-2059 (4th Cir. Jan. 4, 2008). Pursuant to 40 C.F.R. § 124.14(b), the Regional Administrator “may” reopen the comment period “if any data information or arguments submitted during the public comment period * * * appear to raise substantial new questions.” Because the decision whether to reopen is discretionary, the Board reviews for abuse of discretion and gives the Region substantial deference. *In re Springfield Water and Sewer Comm’n*, 18 E.A.D. 430, 451 (EAB 2021); *In re Town of Concord*, 16 E.A.D. 514, 531 (EAB 2014); *Dominion*, 13 E.A.D. at 416.

In evaluating whether a permit issuer has abused its discretion in deciding not to reopen the public comment period on a draft permit, the Board has considered whether the challenged provision was a “logical outgrowth” of the permit process. Where the final permit is a “logical outgrowth,” the permit issuer need not reopen the comment period. *Springfield*, 18 E.A.D. at 450; *D.C. Water*, 13 E.A.D. at 759. The “essential inquiry” in determining whether a changed provision in a final permit qualifies as a logical outgrowth, “is whether interested parties reasonably could have anticipated the final permit condition from the draft permit.” *Springfield*, 18 E.A.D. at 451. This inquiry is “fact-based and case-specific,” requiring the Board to examine how the permit condition evolved and the permit issuer’s explanation for the change. *Id.*

In this matter, CLF argues that the final permit was not a logical outgrowth of the draft permit because the parties could not have reasonably anticipated that the Region would replace the once-per-permit term benthic survey requirement with the new language triggering a survey upon written notice from NHDES or EPA. CLF Pet. at 32. We disagree. In the statement of basis for the revised draft permit, the Region noted that it had requested state certification of the permit and explained that “the State may provide a statement of the extent to which any condition of the Revised Draft Permit can be made less stringent without violating the requirements of State law, including water quality standards.” Stmt. of Basis at 11. NHDES identified the benthic survey requirement as such a provision. Water Quality Cert. at 4. The City submitted comments on the revised draft permit asserting that the automatic once-per-permit term benthic survey requirement was “burdensome, impractical, and unnecessary.” Reg.’s Resp. to Cmts. at 117.⁴ While the comment period on the revised draft permit was open, NHDES issued a draft water quality certification that included the proposed triggering provision for the benthic survey requirement. NHDES Resp. to Cmts. at 1, 8. CLF commented on the draft water quality certification, including the proposed triggering provision. *Id.* at 8. Because the Region alerted the public in its statement of basis that the State may identify less stringent conditions that would be consistent with state standards, and the State’s draft certification made such suggestions, CLF could have reasonably anticipated that the Region would adopt the triggering language in

⁴ CLF argues that the Region cannot rely on the City’s comments on the draft permit to demonstrate that the final permit was a logical outgrowth of the draft, citing the Board’s decision in *D.C. Water*. CLF’s Reply Br. in Support of Pet. for Review at 13 (Mar. 16, 2026) (citing *D.C. Water*, 13 E.A.D. at 759). *D.C. Water*, however, is inapposite. In *D.C. Water*, EPA Region 3 significantly changed its interpretation of the CWA and agency policy. *D.C. Water*, 13 E.A.D. at 761. The Region initially took the position that the permit at issue was required to achieve compliance with water quality standards both during implementation of a long-term control plan and after the plan was implemented. *Id.* The Region subsequently determined that compliance during the interim period was not required and eliminated the provision requiring compliance during the interim period. *Id.* The Board held that the new language was not a logical outgrowth, noting that the “Region appears to have done a complete about-face with respect to its interpretation of the requirements.” *Id.* at 762. Here, by contrast, the Region notified parties that NHDES could identify less stringent provisions, NHDES notified the public of its intent to do so, and ultimately the Region adopted those provisions.

the final permit. Thus, the triggering language was a logical outgrowth in the evolution of the final permit.⁵

The Board concludes that the Region did not clearly err or abuse its discretion in declining to reopen the comment period.

2. The Region Did Not Clearly Err or Abuse its Discretion by Adding the Triggering Language to the Benthic Survey Requirement

We turn next to CLF's arguments on the merits of the benthic survey issue. CLF argues that the Region failed to adequately explain how changing the permit's benthic survey requirement from automatic to being triggered by notice from NHDES or EPA achieves water quality standards related to the benthic environment. CLF Pet. at 33. CLF also argues that the Region clearly erred in considering the cost of the benthic survey. *Id.* at 34. CLF has not demonstrated clear error or an abuse of discretion with respect to either claim.

CLF's only objection to the benthic survey provision on appeal to the Board is the change from the revised draft to the final permit that requires a benthic survey upon notice from NHDES or EPA, instead of once per permit term. *Id.* at 33; Oral Arg. Tr. at 33. The Region adequately explained on the record its rationale for adding the triggering language. The City's comment on the proposed automatic benthic survey requirement called into question its utility, given historic contamination and the large, dynamic nature of the River. Reg.'s Resp. to Cmts. at 117-18. In response to the City's comment, the Region "acknowledge[d] that there is uncertainty regarding the potential impacts to the benthic community from

⁵ The Board has identified additional factors that a permit issuer may consider in deciding whether to reopen the comment period. *See Springfield*, 18 E.A.D. at 451 (citing *Dominion*, 13 E.A.D. at 416 n.10); *In re Town of Concord*, 16 E.A.D. 514, 532 (EAB 2014); *In re City of Palmdale*, 15 E.A.D. 700, 715 (EAB 2012). Most of these factors are subsumed in the analysis of whether the final permit is a logical outgrowth of the public comment process. *See Springfield*, 18 E.A.D. at 451 (identifying factors including whether the permit conditions were changed, whether new permit conditions were developed in response to comments, and whether the record adequately explains the permit issuer's reasoning). To the extent the factors are not subsumed in the logical outgrowth analysis, none of these factors demonstrate an abuse of discretion here. *See, e.g., Springfield*, 18 E.A.D. at 454 (considering whether further delay in permit proceedings was warranted); *City of Palmdale*, 15 E.A.D. 715 (same); *see also* Reg.'s Resp. Br. at 36 (noting that the instant permit has been administratively continued since 2020 and has already been subject to public notice twice).

this discharge.” *Id.* at 119. The Region also acknowledged that benthic surveys, especially in large rivers, are expensive. *Id.* The Region explained that it “agrees with the comment as well as with NHDES that the requirement to conduct such an expensive benthic survey should be reserved for WWTFs that are ‘known or suspected to have a detrimental impact’ on the benthic environment.” *Id.*⁶

CLF argues that uncertainty regarding the impact of the discharge on the benthic environment requires the automatic benthic survey condition. CLF Pet. at 33. The Region responds that this uncertainty does not mandate a specific result. Reg.’s Resp. Br. at 38. We agree with the Region. The Region has “broad authority” to establish monitoring requirements. *Springfield*, 18 E.A.D. at 484. “[T]he Board generally defers to the Region’s technical determinations on matters such as the amount of monitoring required to protect receiving waters.” *Id.* Here, CLF has not presented any data indicating that the discharge has an adverse effect on the benthic community. The benthic survey requirement, whether in its original form or as modified in the final permit, does not limit the discharge of any pollutant into the Merrimack River. Instead, the condition requires collection and identification of benthic macroinvertebrates upstream and downstream of the discharge. Final Permit at 32. The Region’s decision to require such a survey only upon obtaining some evidence of an adverse impact was reasonable under the circumstances and explained in the response to comments. Reg.’s Resp. to Cmts. at 119.

CLF also argues that the Region erred in considering the cost of the benthic survey. CLF Pet. at 34. In response, the Region asserts that it may consider costs with respect to monitoring requirements and that the benthic survey is a monitoring requirement. Reg.’s Resp. Br. at 39-40. The Region is correct. The NPDES Permit Writers’ Manual lists the cost of monitoring as a factor that may be considered in determining the appropriate monitoring frequency. *See* Office of Water, U.S. EPA,

⁶ To the extent CLF asserts that the response to comments fails to explain how the final permit achieves water quality standards, the Region explained that effluent limits in the permit, not the benthic monitoring requirement, were expected to achieve these standards. Reg.’s Resp. to Cmts. at 119. In response to the City’s comment on the benthic survey requirement, the Region stated “Because the permit includes effluent limitations on parameters such as total suspended solids and metals, it is already expected to be protective of the benthic community in the vicinity of the facility’s outfall and meet surface water quality standards, specifically those in Env-Wq 1703.03(c)(1)(a) and 1703.08.” *Id.* at 119 (quoting Water Quality Cert. at 4). CLF does not challenge the adequacy of the Region’s effluent limits for total suspended solids and metals.

NPDES Permit Writers' Manual § 8.1.3, at 8-5 (Sept. 2010) (A.R. I.5) (“Permit Writer’s Manual”). The benthic survey is a monitoring requirement that does not limit the discharge of any pollutant. Thus, the Region did not clearly err in considering the cost of the benthic survey.

For the reasons explained above, the Board concludes that CLF has not demonstrated that the Region clearly erred or abused its discretion in adding the language to the final permit triggering a benthic survey upon notice from EPA or NHDES. We deny review of this issue.

B. Petitioner Has Not Demonstrated That the Region’s Decision Not to Conduct an Environmental Justice Analysis Is Clearly Erroneous or Otherwise Warrants Review

CLF alleges that the Region’s decision not to conduct an environmental justice analysis constitutes clear error, abuse of discretion, and an important policy consideration warranting review. CLF Pet. at 35-46. CLF argues that the Region (1) provided an ambiguous response to CLF’s comments on environmental justice, (2) incorrectly concluded that the Program Policy was revoked, and (3) refused to conduct an environmental justice analysis on grounds that were inconsistent with the Program Policy. *Id.* We conclude that the Region acted within its discretion by declining to conduct an environmental justice review recommended by a non-mandatory policy based on now-revoked Executive Orders.

The Program Policy begins by citing four Executive Orders that directed agencies to make achieving environmental justice part of their missions. Program Policy at 1 (citing Exec. Order No. 14096, 88 Fed. Reg. 25,251 (Apr. 21, 2023); Exec. Order No. 14008, 86 Fed. Reg. 7619 (Feb. 1, 2021); Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 25, 2021); Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994)). All four of the Executive Orders underlying the Program Policy have been revoked. Exec. Order No. 14173, 90 Fed. Reg. 8633, 8634 (Jan. 31, 2025); Exec. Order No. 14154, 90 Fed. Reg. 8353, 8355 (Jan. 29, 2025); Exec. Order No. 14148, 90 Fed. Reg. 8237, 8237-38 (Jan. 28, 2025).

Even prior to the revocation of the environmental justice Executive Orders, the Board recognized that the environmental justice Executive Orders had to be implemented in accordance with existing law. *In re Deseret Generation & Transmission Coop.*, 19 E.A.D. 67, 80-81 (EAB 2024); *In re Muskegon Dev. Co.*, 18 E.A.D. 88, 106 (EAB 2020). “When reviewing environmental justice claims in the permitting context, the Board considers what discretion the agency has in the context of the particular permitting scheme and whether the permit issuer has explained how it exercised that discretion.” *Deseret*, 19 E.A.D. at 81. The

principles and practices in the Program Policy are framed as recommended actions permit writers may take when issuing NPDES permits. Program Policy at 2-6.⁷ Thus, the Program Policy does not establish mandatory requirements that must be followed whenever a Region is issuing an NPDES permit. Instead, the Program Policy offers guidance on the exercise of agency discretion within the framework of the CWA and NPDES regulations.

CLF first asserts that the Region's response to comments was ambiguous because it discussed the revocation of the Executive Orders on which the Program Policy was based, while also stating that the Region had discretion to conduct the environmental justice analysis. CLF Pet. at 38. The Region's statements, however, are not contradictory. It was reasonable for the Region to consider the revocation of the Executive Orders underlying the Policy in deciding whether to follow the Policy in a particular matter. Likewise, it was reasonable, based on both Board precedent and the language of the policy itself, for the Region to state that it had discretion in determining whether to conduct the analysis recommended by the policy. We do not find the Region's response to be ambiguous.

CLF next argues that the Program Policy remains in effect despite the revocation of the underlying Executive Orders. The status of the Program Policy is not at issue in this case or necessary to our decision. The Region argues that while the policy has been rescinded as a factual matter, its "approach was reasonable regardless of the status of the [Program Policy]." Reg.'s Resp. Br. at 17, 42.⁸ The Region states that it learned the Program Policy was rescinded after the

⁷ The Program Policy "provides Principles and Recommended Practices for addressing environmental justice in the EPA's National Pollutant Discharge Elimination System permit program." Program Policy at 1. The Policy "outlines how the EPA's NPDES program aims to use existing *Clean Water Act* authorities and discretion, and encourages, where appropriate, the use of other applicable federal laws, including federal civil rights laws, to help mitigate potential adverse and disproportionate effects of a permitting action." *Id.* The Policy identifies seven principles for addressing environmental justice and equity in NPDES permits, and seven "recommended practices" for incorporating those principles into the permitting process. *Id.* at 2-6. The principles include identifying environmental justice concerns related to the permit, encouraging participation by affected communities, enhancing public involvement in the permitting process, and conducting a "fit for purpose" environmental justice analysis. *Id.* at 2-4.

⁸ We note that the Region has not identified any document in the record or elsewhere rescinding the Program Policy and has cited only the absence of the Program Policy on the agency's guidance document website as evidence of its rescission. Reg.'s

permit was issued and that the rescission of the Program Policy was not part of the Region's permit decision. CLF Pet. at 17 n.2. Because the Region is not relying on the rescission of the Program Policy as the basis for its exercises of discretion, we need not address CLF's arguments that the Program Policy either remains in effect or was improperly revoked or that the status of the Policy constitutes an important policy consideration.

Finally, CLF argues that the Region erred and abused its discretion by declining to conduct an environmental justice analysis on grounds that were inconsistent with the Program Policy. We disagree. The Region explained that it did not conduct the analysis because (1) the permit fully protects water quality standards and does not allow increased water quality impacts, (2) the PFAS monitoring requirements are consistent with other permits, and (3) incinerator emissions are regulated under a separate state permit, *and* (4) the Executive Orders underlying the Program Policy had been revoked. Reg.'s Resp. to Cmts. at 72. The Region's explanation is consistent with Board precedent providing that any environmental justice review must take place within the context of existing law, which in this case requires achievement of water quality standards. *See* CWA § 301(b)(1)(C), 33 U.S.C. §§ 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1); *Deseret*, 19 E.A.D. at 80-81.⁹ Further, as noted above, the language of the Program Policy is not mandatory. *See* Program Policy at 2-6. Nothing in the Program Policy requires the Region to conduct the requested analysis and CLF fails to demonstrate that the Region's decision was arbitrary where the Region followed EPA's guidance and strategic plan for addressing PFAS in wastewater. *See* Reg.'s Resp. to Cmts. at 72. Finally, with respect to incinerator emissions, the Region appropriately identified those concerns as being outside the scope of this CWA NPDES permit. *See Deseret*, 19 E.A.D. at 94 (noting that "[t]he Board has declined to review environmental justice concerns that fall outside the scope of a permitting decision."). Accordingly, the Region adequately explained the basis for its decision not to conduct the environmental justice analysis set forth in the Program Policy.

Resp. Br. at 17 n.2. While this would raise concerns if the Region were relying on the rescission of the Program Policy, the Region is not doing so here.

⁹ To the extent CLF argues that the permit does not achieve compliance with water quality standards, that argument is based on arguments that CLF makes with respect to PFAS, which we address below.

CLF has not demonstrated that the Region clearly erred in declining to conduct an environmental justice analysis or that the Region's decision otherwise warrants review. We deny review of this issue.

C. The Record Does Not Reflect the Region's Considered Judgment in Evaluating Whether Limits on PFAS Discharges Are Necessary to Achieve Water Quality Standards

CLF raises several arguments as to why the Region clearly erred or abused its discretion in concluding that the permit did not require limits on PFAS to achieve water quality standards. To evaluate CLF's claims, we first set forth the process for implementing the regulatory requirement that NPDES permits include requirements necessary to achieve water quality standards. We then address CLF's arguments and conclude that the Region clearly erred in stating the Region could not conduct a reasonable potential analysis without approved numeric PFAS criteria, and the Region has not adequately explained how the permit achieves compliance with the narrative water quality criteria and designated uses.

1. The Regulations Establish a Process for Evaluating the Need for WQBELs in the Absence of Numeric Water Quality Criteria

EPA regulations require that NPDES permits "achieve water quality standards * * * including State narrative criteria for water quality." 40 C.F.R. § 122.44(d)(1). To implement this requirement, the regulation sets forth how the permit issuer determines whether effluent limitations are needed. Specifically, "[l]imitations must control all pollutants or pollutant parameters * * * which the Director 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, including State narrative criteria for water quality." *Id.* § 122.44(d)(1)(i).

The NPDES Permit Writers' Manual provides guidance to permit issuers on how to identify pollutants that may cause or contribute to excursion of water quality standards, including narrative criteria. Pollutants of concern may include "any pollutants identified as present in the effluent through effluent monitoring" or pollutants otherwise expected to be present in the discharge. Permit Writers' Manual § 6.2.1.4-.5, at 6-15. If a pollutant is expected to be present in the discharge but there is no monitoring data available, "the permit writer must either postpone a quantitative analysis of the need for WQBELs and generate, or require the discharger to generate, effluent monitoring data, or base a determination of the need for WQBELs on other information, such as the effluent characteristics of a similar discharge." *Id.* § 6.2.1.5. For other pollutants of concern, the permit issuer may

proceed directly to developing a WQBEL or conduct a reasonable potential analysis to determine whether a WQBEL is needed. 40 C.F.R. § 122.44(d)(1)(i); Permit Writers' Manual § 6.2.1, at 6-13.

When a reasonable potential is identified, subparagraphs (iii) through (vii) of the regulation govern how the permit issuer establishes WQBELs in different scenarios. 40 C.F.R. § 122.44(d)(1)(iii)-(vii); *see In re Upper Blackstone Water Pollution Abatement Dist.*, 14 E.A.D. 577, 594 (EAB 2010), *pet. for review denied*, 690 F.3d 9 (1st Cir. 2012), *cert. denied*, 569 U.S. 972 (2013). As relevant here, paragraph (vi) provides three options for developing WQBELs in situations where the state has not established (or as in this case, EPA has not approved) a water quality criterion for a specific chemical pollutant that is present in the discharge in a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above a narrative standard. 40 C.F.R. § 122.44(d)(1)(vi); *see also* Fact Sheet at 6. The first option is to establish limits using a “calculated numeric criterion for the pollutant which the permitting authority demonstrates will attain and maintain applicable narrative water quality criteria and will fully protect the designated use.” *Id.* § 122.44(d)(1)(vi)(A). The calculated criterion may be derived from “a proposed State criterion, or an explicit State policy or regulation interpreting its narrative water quality criterion, supplemented with other relevant information.” *Id.* The second option is to establish effluent limits “on a case-by-case basis” using EPA water quality criteria supplemented, if necessary, by other relevant information. *Id.* § 122.44(d)(1)(vi)(B). The third option is to establish effluent limits based on an indicator parameter, provided specified criteria are met. *Id.* § 122.44(d)(1)(vi)(C).

In issuing these regulations, EPA emphasized that NPDES permits need to achieve narrative, as well as numeric, water quality criteria. Final Rule: National Pollutant Discharge Elimination System; Surface Water Toxics Control Program, 54 Fed. Reg. 23868, 23872 (Jun. 2, 1989) (“Today’s regulations emphasize that narrative standards have the same force and effect as other state water quality standards.”). EPA explained that subparagraph (vi), “addresses the situation in which a state has not adopted a numeric water quality criterion for a * * * pollutant that is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes to an excursion above an applicable narrative water quality criterion.” *Id.* at 23875. When the permitting authority does not have a numeric criterion to use, “[p]aragraph (d)(1)(vi) describes three options available to the permitting authority for using narrative criteria as the basis for establishing effluent limits.” *Id.*

Indeed, the Board has upheld a WQBEL based on a reasonable potential to exceed narrative criteria. *Upper Blackstone*, 14 E.A.D. at 595. In *Upper Blackstone*, the Region established an effluent limit for total nitrogen to achieve compliance with a narrative criterion prohibiting nutrients in concentrations that cause eutrophication. *Id.* The Board found that uncertainty regarding the precise contribution of the permittee's contribution was not sufficient to demonstrate clear error or abuse of discretion in the Region's determination that the discharge had a reasonable potential to cause or contribute to an excursion of the narrative standard. *Id.* at 601. Thus, the regulations and Board precedent indicate that the absence of an approved pollutant-specific numeric criteria is not an impediment to conducting a reasonable potential analysis.¹⁰

In sum, where a pollutant of concern has been identified as present in the discharge through monitoring, the permit issuer must either establish a WQBEL or conduct a reasonable potential analysis to determine whether a WQBEL is necessary. If there is not a numeric water quality criterion for the pollutant of concern, but the pollutant may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any narrative water quality criteria, the permit issuer must use one of the methods in 40 C.F.R. § 122.44(d)(1)(vi) to establish a WQBEL.

2. *The Region's Response to Comments Erroneously States That the Region Could Not Conduct a Reasonable Potential Analysis Without Approved Numeric PFAS Criteria*

Contrary to the regulations, the Region's response to comments repeatedly states that the Region could not conduct a reasonable potential analysis in the absence of approved numeric criteria for PFAS. Reg.'s Resp. to Cmts. at 75-76, 80-85, 88-89. The Region identified PFAS as potential pollutants of concern in the fact sheet on the draft permit. *See* Fact Sheet at 33-35. The fact sheet stated that PFAS "may lead to adverse human health and environmental effects" and that consistent with agency guidance, the draft permit would require monitoring for PFAS chemicals. *Id.* at 34. In comments on the draft permit, CLF raised the issue

¹⁰ Both the Region and the City argue that *Upper Blackstone* is inapplicable because in that case, there was clear evidence that discharges of nitrogen and phosphorus were causing violations of the water quality standards. Reg.'s Resp. Br. at 26-27; Resp. of the City of Manchester, New Hampshire to CLF's Pet. for Review at 17-18 (Jan. 30, 2026) ("City's Resp. Br."). Here, they argue, there is not clear evidence of adverse effects. Reg.'s Resp. at 26-27; City's Resp. Br. at 17-18. Their arguments, however, pre-suppose the results of the reasonable potential analysis.

of whether PFAS chemicals in the discharge contribute to an excursion of narrative criteria and designated uses. CLF 2024 Cmts. at 21. CLF cited evidence of PFAS in the facility's effluent, including the Battelle study and a summary of the results of the City's PFAS monitoring from 2019 to 2023. *Id.* at 20-21. Rather than considering whether this data was sufficient to conduct a reasonable potential analysis or conducting such an analysis, the Region took the position that it could not conduct the analysis because EPA had not approved the State's numeric criteria for PFAS. Reg.'s Resp. to Cmts. at 76-89.

The response to CLF's comments was not merely "inartful" as the Region argues. Reg.'s Resp. Br. at 27. Rather, the Region repeatedly ignored the approved narrative criteria and designated uses and relied on the lack of approved numeric PFAS criteria in declining to evaluate PFAS data or whether WQBELs for PFAS were needed. For example, in response to the Battelle study and the City's PFAS monitoring data, the Region stated, "This data does not result in any changes to the draft permit because, as described next, there are neither technology-based requirements *nor state water quality standards* for PFAS contaminants." Reg.'s Resp. to Cmts. at 76 (emphasis added). The Region went on to explain that although the State had adopted numeric water quality criteria for four PFAS chemicals, those criteria had not yet been approved by EPA and "NPDES permits are written to ensure compliance with EPA-approved water quality standards." *Id.* at 80-81. The Region then stated, "Because there is no state water quality criterion for PFAS at this time, there is necessarily no reasonable potential for the Permittee's discharge to cause or contribute to a violation of it." *Id.* at 81.

In response to comments that PFAS would contribute to an excursion of the narrative criteria and designated uses, the Region continued to rely on the absence of approved numeric criteria. The Region recognized that "where a state does not have a numeric criterion for a specific pollutant, state narrative criteria can, if appropriate, be the basis for limiting the discharge of that pollutant" and that New Hampshire had narrative criteria for toxics. *Id.* Rather than evaluating the impact of PFAS on those criteria, the Region again stated that the State had updated the table accompanying the narrative criteria with numeric criteria for four PFAS, but those had not yet been approved by EPA. *Id.* The Region concluded that "[g]iven that there are no [EPA-approved numeric] surface water quality criteria for PFAS, EPA has no way to determine whether a given level of PFAS causes or contributes to a violation of the narrative standards for toxics." *Id.* at 83. Similarly, with respect to the fish consumption designated use, the Region stated "again that although the state has adopted [water quality standards] for four PFAS chemicals, EPA has not approved those standards." *Id.* at 85.

In response to CLF's comment requesting a reasonable potential analysis for PFAS, the Region stated that it could not do so without numeric criteria:

To conduct a reasonable potential analysis, a permit writer needs an applicable water quality standard. As described in Responses 51-53, there is currently no EPA-approved state [water quality standards] for PFAS. Therefore, because there is no standard to apply, even with the data referenced by the commenter, EPA is unable to conduct a reasonable potential analysis at this time.

Id. at 89. These statements directly contradict the regulatory requirement to include conditions in the permit necessary to achieve water quality standards *including a state's narrative water quality criteria*. 40 C.F.R. § 122.44(d)(1). New Hampshire has applicable EPA-approved water quality standards—the fish consumption designated use and the narrative criteria for toxicity. *See* N.H. Code Admin. R., Env-Wq 1702.16(b), 1703.21(a). When a specific pollutant is or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above these narrative criteria, a WQBEL is required to control that pollutant. 40 C.F.R. § 122.44(d)(1)(i), (vi). Moreover, the language of 40 C.F.R. § 122.44(d)(1)(vi) explains how to evaluate the need for WQBELs when there is not yet an approved numeric criterion for the specific pollutant.¹¹ Rather than conducting a reasonable potential analysis using one of the methods set forth in the regulation, the Region erroneously stated in its response to comments document that it could not conduct the analysis at all. Indeed, the Region acknowledged at oral argument that “[t]he fact that there’s not a numeric standard does not mean that we don’t analyze the narrative standards.” Oral Arg. Tr. at 61. The erroneous

¹¹ The City argues that none of the methods listed in 40 C.F.R. § 122.44(d)(1)(vi)(A)-(C) are available. The City is incorrect. The argument that “the State does not have approved standards or policies interpreting narrative water quality criteria for PFAS” overlooks a key phrase of the regulation. City’s Resp. Br. at 17. Specifically, sub-paragraph (vi)(A) provides for use of a calculated numeric criterion “derived using a *proposed State criterion*, or an explicit State policy or regulation interpreting its narrative water quality criterion.” 40 C.F.R. § 122.44(d)(1)(vi)(A) (emphasis added). The argument that PFAS is not listed as a pollutant published under section 304(a) fails to recognize that EPA has published recommended aquatic life criteria for PFOA and PFOS pursuant to CWA section 304(a). *See* City’s Response Br. at 17; Final Recommended Aquatic Life Criteria and Benchmarks for Select PFAS, 89 Fed. Reg. 81077 (Oct. 7, 2024).

statements of the law in the response to comments constitute clear error on the part of the Region.

3. *The Region's Concurrence with New Hampshire's Reasonable Potential Analysis Does Not Explain How the Permit Achieves the Narrative Criteria*

Perhaps recognizing the error discussed above, the Region on appeal focuses on a paragraph in the response to comments in which the Region "notes that the state, as part of its 401 certification process, conducted a reasonable potential analysis using recently state-adopted (but not EPA-approved) PFAS MCLs." Reg.'s Resp. to Cmts. at 89. On appeal, the Region purports that it concurred with the State's reasonable potential analysis and relies on that analysis for its own determination that PFAS limits in the permit were not necessary to meet the New Hampshire narrative water quality criteria. For the reasons explained below, we disagree.

Under 40 C.F.R. § 122.44(d)(1)(i), the Regional Administrator is responsible for determining whether a pollutant has a reasonable potential to cause or contribute to an excursion of water quality standards. *See* 40 C.F.R. § 122.2 (defining "Director" as the Regional Administrator where there is not an approved State NPDES program). The Region's obligation to ensure that the permit achieves water quality standards is independent of the State's water quality certification. *In re City of Moscow*, 10 E.A.D. 135, 151 (EAB 2001). While the Region cannot relax requirements imposed by the state certification, the Board has recognized the Region's authority to impose more stringent standards. *In re Teck Cominco Alaska Inc.*, 11 E.A.D. 457, 489 (EAB 2004). "When the Region reasonably believes that a state water quality standard requires a more stringent permit limitation than that specified by the state, the Region has an independent duty under section 301(b)(1)(C) of the CWA to include more stringent permit limitations." *Moscow*, 10 E.A.D. at 151; *see Teck Cominco*, 11 E.A.D. at 489.¹² The Region "may not rely exclusively on the State certification to satisfy the Region's duty * * * where there is a body of information in the record drawing the certification into question." *Teck Cominco*, 11 E.A.D. at 90; *see also In re Gov't of D.C. Municipal Separate Storm Sewer Sys.*, 10 E.A.D. 323, 341-43 (EAB 2002) (remanding in part because

¹² The Region acknowledged this independent duty in its response to comments and at oral argument. Reg.'s Resp. to Cmts. at 116; Oral Arg. Tr. at 48.

the Region relied exclusively on the section 401 certification to conclude that the requirements of the permit would achieve water quality standards).

Here, the NHDES certification only addresses whether there was a reasonable potential for the discharge to contribute to an excursion of the four numeric PFAS criteria. In comments on NHDES's draft certification, CLF submitted a summary of the City's monitoring data documenting PFAS chemicals in the facility's effluent. NHDES Resp. to Cmts. at 5-6. In response to those comments, NHDES conducted an analysis of whether, based on the summary data, PFAS in the effluent could contribute to an excursion of the numeric PFAS criteria in the Merrimack River. *Id.* NHDES concluded that the discharge would not have a reasonable potential to cause or contribute to an excursion of the numeric PFAS criteria. *Id.* at 6.¹³ NHDES did not, however, address whether PFAS would contribute to an excursion of the narrative criteria for toxicity or the fish consumption designated use. *Id.*

The Region stated that it concurred with NHDES but did not explain how the Region determined that the permit achieves compliance with the narrative criteria and designated uses. The Region asserts on appeal that "the State and the Region have determined that the proposed PFAS criteria that were used in the reasonable potential analysis are most consistent with the state's intent evinced in the narrative toxics standard" and that the "numeric toxics criteria are also an inherently useful proxy for the narrative designated use standard." Reg.'s Resp. Br. at 28. But these interpretations of the narrative standards do not appear in the

¹³ CLF appealed NHDES's water quality certification to the New Hampshire Water Counsel and attaches the Notice of Appeal to its reply brief. *See* CLF's Reply Br. in Support of Pet. for Review at 8 & n.5 (Mar. 16, 2026). The Region moves to strike the Notice of Appeal. Mot. to Strike attach. 1, at 2. We deny the motion to strike as moot because we do not rely on the Notice of Appeal in our decision to remand.

We observe, however, that it appears the Board could take official notice of the fact that the certification has been appealed and that certain arguments have been made in the appeal. The Board may take official notice of "relevant information that is publicly available and incontrovertible." *In re Gen. Elec. Co.*, 18 E.A.D. 575, 609 (EAB 2022), *pet. for review denied sub nom. Housatonic River Initiative v. EPA*, 75 F.4th 248 (1st Cir. 2023). The Notice of Appeal is publicly available and its existence is incontrovertible. *See* Notice of Appeal, Docket No. 25-18 WC (June 12, 2025), *available at* <https://www4.des.state.nh.us/Legal/index.html?jump=Appeals/Water%20Council> (publicly available version of the Notice of Appeal filed as Attachment 1 to CLF's reply brief).

record.¹⁴ Neither the NHDES response to comments nor the Region's response to comments reflect a determination that the numeric PFAS criteria are sufficient to achieve the narrative criteria for toxicity or the fish consumption designated use. *See* NHDES Resp. to Cmts. at 5-6; Reg.'s Resp. to Cmts. at 89; *Anacostia Riverkeeper, Inc. v. Wheeler*, 404 F. Supp. 3d 160, 186-87 (D.D.C. 2019) (holding that EPA could not assume, in context of setting total maximum daily load for impaired water body, that attainment of numeric criteria was sufficient to achieve designated uses).¹⁵

Moreover, the Region questioned the use of the MCLs as the fish ingestion criteria in its own comments on the draft state water quality standards. Letter from Katie Lamoureux, Chief, Water Quality and Wetlands Protection Section, EPA Region 1 to Ken Edwardson, Senior Scientist, NHDES (Nov. 22, 2024) (included as part of Exhibit 5 to the April 2025 WQS Submission). In comments on the draft standards, the Region noted that EPA's MCLs and MCL goals were more stringent than those proposed by NHDES. *Id.* at 4. The Region further explained that the MCLs were not intended to be used as fish ingestion criteria, stating that, "[w]hile MCLs and MCLGs under the Safe Drinking Water Act may address drinking water ingestion, they are not derived to protect human health with respect to fish ingestion." *Id.* The Region requested justification of the scientific rationale for the criteria and how the criteria are protective of the designated use. *Id.* The Region's position on appeal that the numeric PFAS criteria achieve the narrative standards and designated use contradicts the Region's own comments on the State's draft

¹⁴ In addition, it is not clear from the record what the Region reviewed in order to concur in the state's analysis and conclusion. The Region points only to NHDES's response to comments on the certification, which asserts that NHDES used the methodology in Appendix B of the Fact Sheet and that the results of the analysis are "summarized" in Table 1 of NHDES's response to comments. NHDES Resp. to Cmts. at 6. It is unclear whether the Region reviewed the State's underlying analysis or whether it concurred with the assumptions used in the State's analysis, such as the flow parameter used by the State, which was different than the flow parameter the Region used. *See* Reg.'s Resp. to Cmts. at 89; *compare* NHDES Resp. to Cmts. at 6 *with* Fact Sheet app. B.

¹⁵ At oral argument, the City noted that the NHDES response to comments states that the MCLs are parameters for the human health water and fish ingestion criteria. Oral Arg. Tr. at 82; NHDES Resp. to Cmts. at 5. But the record does not explain how NHDES determined that the MCLs achieve the designated use or whether the Region agreed. As discussed below, the Region's comments on the proposed water quality standards suggest it did not. Without further explanation in the record, we are unable to accept the City's argument.

standards. While, as the Region points out, it could use proposed State criteria to interpret the narrative standards under 40 C.F.R. § 122.44(d)(1)(vi)(A), the Region failed to explain in the record that it was doing so, why it chose that option rather than one of the other options in § 122.44(d)(1)(vi), or why the proposed State criteria were adequate in light of its comments on the draft criteria. *Compare* Reg.'s Resp. Br. at 28 *with* Reg.'s Resp. to Cmts. at 89.

In evaluating whether the Region's decision was clearly erroneous, we consider whether the record demonstrates that the Region exercised considered judgment and articulated with reasonable clarity the reasons for its decision. *Ocean Era*, 19 E.A.D. at 243. Here, the Region's concurrence with the State's reasonable potential analysis lacked a reasoned explanation of how the permit achieves compliance with the narrative criteria or designated uses. *See In re Amoco Oil Co.*, 4 E.A.D. 954, 980 (EAB 1993) (mere concurrence with state's request to add permit condition failed to adequately explain why condition was necessary). As such, the record does not reflect the Region's considered judgment in evaluating whether PFAS limits are necessary to achieve compliance with narrative water quality standards. CLF has therefore demonstrated clear error.

4. *The Region's Inclusion of Whole Effluent Toxicity Limits Does Not Alleviate the Failure to Conduct a Reasonable Potential Analysis*

The Region argues that CLF's PFAS argument fails because the Region included a whole effluent toxicity ("WET") limit to ensure compliance with the narrative criteria for toxicity. Region's Resp. at 19. We disagree. Like the Region's concurrence with the State's reasonable potential analysis, the Region's reliance on the WET limits was offered by the Region as an alternative basis for its determination that PFAS in the permittee's discharge would not violate New Hampshire's narrative water quality criterion. Reg.'s Resp. to Cmts. at 81-82. The WET limits, however, were included to satisfy the requirements of a different portion of the regulation.

As noted by the Region in the response to comments document, effluent limitations may be based on a parameter-specific approach or a WET testing approach. *Id.* at 82 (citing Permit Writer's Manual § 6.1.3 at 6-11 to 6-12).¹⁶ WET

¹⁶ WET represents the aggregate toxic effect of effluent as measured by exposing test species to the effluent and determining its toxicity. *See* 40 C.F.R. § 122.2; Fact Sheet at 31-32. WET testing evaluates the acute and chronic toxic effects of the effluent on the species. Fact Sheet at 32. Acute toxicity is measured by the concentration of effluent that is lethal to 50% of the test organisms, or the LC₅₀. *Id.* Chronic toxicity is measured by the

testing is conducted “to ensure that the additivity, antagonism, synergism and persistence of pollutants in the discharge do not cause toxicity, even when the pollutants are present at low concentrations in the effluent.” Fact Sheet at 31. The WET approach is useful in circumstances where it might be infeasible to identify and regulate all of the toxic pollutants in the effluent. Reg.’s Resp. to Cmts. at 82 (citing NPDES Permit Writer’s Manual 6-11 to 6-12); *see also* Fact Sheet at 31-32 (explaining that the WET requirements in the permit “will assure that the Facility does not discharge combinations of pollutants into the receiving water in amounts that would be toxic to aquatic life or human health”).

The provision identifying what the permit issuer is required to include in permits to ensure the permit meets water quality standards, 40 C.F.R. § 122.44(d)(1), contains separate provisions for determining when WET limits are required and when chemical-specific effluent limits are required. Under subparagraph (v), the permit issuer must include WET limits if the permit issuer determines that the discharge as a whole causes, has a reasonable potential to cause, or contributes to an excursion of a narrative criterion:

[W]hen the permitting authority determines, using the procedures in paragraph (d)(1)(ii) of this section, toxicity testing data, or other information, that *a discharge* causes, has the reasonable potential to cause, or contributes to an in-stream excursion above a narrative criterion within an applicable State water quality standard, the permit must contain effluent limits for whole effluent toxicity.

40 C.F.R. § 122.44(d)(1)(v) (emphasis added). Here, the Region concluded in the fact sheet on the draft permit that “[b]ecause of the source variability and contribution of toxic constituents in domestic and industrial sources, reasonable potential may exist for this discharge to cause or contribute to an exceedance of the ‘no toxics in toxic amounts’ narrative water quality standard.” Fact Sheet at 32. The Region then explained that it would continue the WET limits from the facility’s 2015 permit. *Id.* The WET limits, thus, address the requirements of subparagraph (v).

As discussed above in Part V.C.1, however, subparagraph (vi) requires an evaluation of whether a “*specific chemical pollutant* * * * is present in an effluent at a concentration that causes, has the reasonable potential to cause, or contributes

highest concentration that causes no observed chronic effect on the test species, or C-NOEC. *Id.* The permit requires an LC₅₀ greater than or equal to 100% (an undiluted sample) and a C-NOEC greater than or equal to an 8.5% concentration. Final Permit at 4.

to an excursion above a *narrative* criterion.” *Id.* § 122.44(d)(1)(vi) (emphasis added). The Region has not demonstrated that the WET limit also meets the requirements of subparagraph (vi).

With respect to evaluation of the specific effects of PFAS, CLF asserts that the WET limits do not account for bioaccumulation of PFAS in fish and the potential harm to human health from fish consumption. CLF’s Reply Br. in Support of Pet. for Review at 10 (Mar. 16, 2026) (“Reply Br.”). The Region asserts that this argument is untimely because it was raised in CLF’s reply brief. EPA Region 1’s Sur-Reply at 5-6 (Apr. 3, 2026) (“Reg.’s Sur-Reply”).¹⁷ We find the Region’s argument unpersuasive. CLF raised concerns about bioaccumulation of PFAS in its comments on the draft permit and in the petition for review. CLF 2024 Cmts. at 9-10; CLF Pet. at 26. In response to comments on the narrative criteria for toxicity, the Region relied heavily on the fact that the State’s numeric PFAS criteria had not been approved. Reg.’s Resp. to Cmts. at 80-81. The Region noted in its final paragraph of the response that “[i]n any event, as described in the Fact Sheet, EPA has chosen a [WET] approach to ensure the permittee’s discharge does not violate this narrative water quality criterion.” Reg.’s Resp. to Cmts. at 81. The petition understandably focused on the Region’s primary rationale for not conducting a reasonable potential analysis for PFAS—that the numeric PFAS criteria had not been approved. CLF Pet. at 19. The petition, however, also argued that the Region failed to consider “whether [WET] testing ensures Env-Wq 1703.21(a) compliance for PFAS.” *Id.* at 19. The Region’s position on appeal shifted to focus on the alternative argument in the response to comments—that the WET limits ensured compliance with the narrative criteria for toxicity. Reg.’s Resp. Br. at 25; Reg.’s Resp. to Cmts. at 81. CLF’s reply simply addressed the Region’s shifting rationale with a more thorough explanation of why the WET limits were inadequate. Reply Br. at 10-11.

Other than challenging the timeliness of CLF’s argument, the Region does not explain how the WET limit achieves the narrative criteria or designated uses. *See* Reg.’s Sur-Reply at 5-6. The designated use requires that the Merrimack River “can support a population of fish free from toxicants and pathogens that could pose a human health risk to consumers.” N.H. Code Admin. R., Env-Wq 1702.16(b).

¹⁷ The Board grants the Region’s Motion for Leave to File Sur-reply and CLF’s Motion in the alternative to File a Sur-reply. While we do not agree with the Region’s allegation that CLF raised a new argument regarding bioaccumulation, we find that consideration of the sur-replies has assisted the Board in resolving the issues in dispute. *See Ocean Era, Inc.*, 19 E.A.D. at 244.

The narrative criteria for toxicity require that the River be free from toxic substances that persist in the environment “or accumulate in aquatic organisms” to levels harmful to humans or wildlife consuming those organisms. N.H. Code Admin. R., Env-Wq 1702.21(a). As explained by the Region, WET testing “is conducted to ensure that the additivity, antagonism, synergism and persistence of the pollutants in the discharge do not cause toxicity.” Fact Sheet at 31. The record does not explain how the WET limits will prevent PFAS from “accumulate[ing] in aquatic organisms” to levels that might result in harm to human health or wildlife. N.H. Code Admin. R., Env-Wq 1702.21(a).

In sum, the record does not reflect the Region’s considered judgment in evaluating whether effluent limits for PFAS are necessary to achieve compliance with New Hampshire’s narrative water quality standards. The failure to do so constitutes clear error and the permit must be remanded. The Board does not conclude that the Region must include effluent limitations for PFAS in the permit. The Region, however, must provide a clear record of how the permit complies with the requirements of 40 C.F.R. § 122.44(d)(1)(vi) with respect to PFAS.¹⁸

VI. CONCLUSION

For the reasons discussed above, we deny the petition for review with respect to the benthic survey requirement and the Region’s decision not to conduct an environmental justice analysis. We remand the permitting decision to the Region to correct the erroneous statements in the response to comments document,

¹⁸ The Region’s motion to strike Attachment 11 to CLF’s petition for review is denied as moot. *See, e.g., In re Powertech (USA) Inc.*, 19 E.A.D. 23, 30, 47 n.24 (EAB 2024) (denying all pending motions, including motion to strike, as moot). Attachment 11 to CLF’s petition for review is a memorandum describing the results of sampling for PFAS in surface water, sediment, and fish in the Merrimack River downstream of the facility. Memorandum from Eastern Research Group, Inc. to Conservation Law Foundation (Oct. 23, 2025). The sampling described in Attachment 11 occurred after the close of the comment period and the memorandum is dated October 23, 2025, eleven days before the permit was issued. *Id.* at 1. The Board observes that Attachment 11 does not appear to have been submitted to the Region before the permit was issued and therefore could not have been considered by the permit issuer. *See In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 519 (EAB 2006) (declining to supplement the record with documents received by the permit issuer after permit issuance). In any event, the Board does not rely on Attachment 11 in its decision to remand the permitting decision. Accordingly, the Region’s motion to strike Attachment 11 is denied as moot.

and to evaluate whether PFAS “are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion” of New Hampshire’s water quality standards, including the narrative criteria for toxicity and the fish consumption designated use. 40 C.F.R. § 122.44(d)(1)(i). On remand, the Region must revise the record as necessary and may further explain its decision, revise its conclusion, or take a combination of those actions.

So ordered.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Denying Review in Part and Remanding in Part* in the matter of City of Manchester, NPDES Appeal No. 25-04, were sent to the following persons on August 12, 2026 in the manner indicated:

By E-mail:

Kristen Scherb
U.S. Environmental Protection Agency
Office of Regional Counsel, Region 1
scherb.kristen@epa.gov

Kassandra Kometani
U.S. Environmental Protection Agency
Office of Regional Counsel, Region 1
kometani.kassandra@epa.gov

Lindsey Short
U.S. Environmental Protection Agency
Office of Regional Counsel, Region 1
short.lindsey@epa.gov

Gregory H. Smith
McLane Middleton, Professional
Association
greg.smith@mclane.com

Adam M. Dumville
McLane Middleton, Professional
Association
adam.dumville@mclane.com

Thomas F. Irwin
Conservation Law Foundation, Inc.
tirwin@clf.org

Jillian Aicher
Conservation Law Foundation, Inc.
jaicher@clf.org

Tommie Madison
Clerk of the Board