

No. 11-1474 (No. 11-1610) Consolidated

**United States Court of Appeals  
For the First Circuit**

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UPPER BLACKSTONE WATER POLLUTION ABATEMENT DISTRICT

Petitioner

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY

Respondent

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CONSERVATION LAW FOUNDATION, INC.

Petitioner

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY

Respondent

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Petitions for Review of Final Permit  
Issued by U.S. Environmental Protection Agency

Reply Brief of Appellant Conservation Law Foundation

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## INTRODUCTION

The Clean Water Act (CWA) contains an unequivocal substantive command that EPA must heed when setting permit limits for a facility that is, like the District's, indisputably a major cause of pollution-driven devastation in the waters receiving the facility's pollution discharge. EPA must set pollution limits at levels "necessary to *meet* water quality standards." 33 U.S.C. § 1311(b)(1)(C) (emphasis added). The pollution limits must be sufficiently stringent to "ensure compliance with the water quality requirements of all affected States." 40 C.F.R. § 122.4(d). EPA acted arbitrarily and capriciously when it set a nitrogen limit for the District's Permit without any relevant *technical* evidence in the record supporting a conclusion that the limit meets the applicable substantive statutory and regulatory standard. Rather the technical evidence in the record directly indicates that EPA chose a limit that will *not* ensure compliance with Rhode Island's water quality standards.

In its briefing to this Court, EPA seeks to hide the flaws in its decision behind the deferential standard of review generally applicable to technical CWA permitting determinations. Under this standard of review, however, EPA only earns the Court's deference if the record demonstrates that EPA actually made an independent technical determination to which the Court can defer and that EPA

based its determination on considerations that the CWA and its implementing regulations recognize as relevant to the analysis. The record here is devoid of any independent EPA technical determination based on relevant considerations. Rather, EPA adopted an analysis fatally tainted by irrelevant considerations—cost-sensitivity and compliance scheduling. EPA compounded this error by failing to comply with its own unambiguous regulation requiring it to calculate pollution limits based on a discharger’s permitted design flow.

The record reveals that EPA fell short of its duty to set a nitrogen pollution limit that will ensure compliance with applicable WQS when it chose a 5 mg/l nitrogen pollution limit. Its arbitrary and capricious decision is not entitled to deference because it is tainted by irrelevant considerations and runs counter to CWA regulations.

**I. EPA VIOLATED THE CWA AND ITS IMPLEMENTING REGULATIONS WHEN IT ISSUED THE DISTRICT’S PERMIT WITH A NITROGEN LIMIT THAT WILL NOT ENSURE COMPLIANCE WITH WATER QUALITY STANDARDS**

EPA and CLF agree that the CWA and its implementing regulations require the District’s permit to include any “more stringent limitation...necessary to meet water quality standards,” 33 U.S.C. § 1311(b)(1)(C). EPA must, therefore, impose conditions that “ensure compliance with the applicable water quality requirements

of all affected States.” *Arkansas v. Oklahoma*, 503 U.S. 91, 105 (1992) (citations and internal quotations omitted).

In its brief, EPA emphasizes that meeting its obligations for setting nutrient pollution limits under applicable EPA standards requires analysis of “available record materials from a *reasonably conservative standpoint*.” EPA Br. at 24 (emphasis added). EPA pays lip service to the need for a “protective approach” because “once begun, the cycle of eutrophication can be difficult to reverse due to the tendency of nutrients to be retained in sediment and from there reintroduced into the water body.” *Id.* Unfortunately, EPA failed to conduct a “conservative” analysis and thus chose not to pursue the “protective approach” compelled by the available record evidence.

In this matter, the “key”<sup>1</sup> technical report in the record is divided into distinct sections. *See* JA at 1339-41. The Report is divided into a detailed, multi-part, technical analysis (JA at 5280-5301), a standard/limitation setting analysis (JA at 5302-06), and a policy-based section discussing phased implementation of nitrogen controls (JA at 5306-5310). The technical evidence in the record,

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<sup>1</sup> EPA Response to Comments #E1 JA at 1222 (“A key report underlying the proposed permit limits is the December 2004 report, *Evaluation of Nitrogen Targets and WWTF Load Reductions for the Providence and Seekonk Rivers*, completed by RIDEM.”); EPA Fact Sheet JA at 1339 (“One key report, titled *Evaluation of Nitrogen Targets and WWTF Load Reductions for the Providence and Seekonk Rivers*, completed by the Rhode Island Department of Environmental Management (DEM) in December 2004, summarizes and references many of the studies and reports.”).

discussed in detail in CLF’s opening brief, reveals that total elimination of nitrogen discharges from wastewater treatment facilities (WWTF), like the one at issue here, represents the “best possible condition” for achieving WQS in Narragansett Bay and its tributaries. JA at 5303. The “key” technical report also concludes that a nitrogen pollution limit of 3 mg/l might ensure compliance with applicable WQS because it is “arguably quite similar to the no-WWTF case.” *Id.*<sup>2</sup> Thus, with regard to *standard setting*, the key report is clear and unambiguous:

The present regulations [Rhode Island water quality standards] coupled with the analysis presented above indicate that, among other reduction actions, WWTF nitrogen contributions must be reduced to the limit of technology [3 mg/l] in the Providence and Seekonk Rivers.

JA at 5302. By contrast, the standard-setting portion of the RIDEM Report concludes that pollution levels that a 5 mg/l discharge will produce “would *not* be acceptable water quality goals for the area.” JA at 5303 (emphasis added).

EPA responds that its selection of a weaker limit is justified by “uncertainty” in the record evidence. Yet EPA’s brief fails to document any other relevant

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<sup>2</sup> Though “arguably” more consistent with ensuring compliance with the CWA’s standard than the “unacceptable” 5 mg/l limit EPA selected, the conclusion in the RIDEM report that 3 mg/l might be acceptable assumes loading—or discharges—at “90% Design Flow.” JA at 5303 Table 6. As explained, in CLF’s opening brief and *infra* at p. 17, EPA regulations expressly require EPA to calculate pollution limits based on a facility’s permitted design flow rather than some assumed fraction thereof. Thus, even a 3 mg/l limit may not be conservative enough to ensure compliance with applicable WQS when 100% design flows are analyzed, as they must be under CWA permitting regulations.

analysis, data, or modeling outside of the policy-based “phased implementation” section of the RIDEM Report that supports the weaker limit EPA chose. There is no relevant, independent EPA-generated technical analysis to which this Court can defer as it conducts the “searching and careful inquiry into the record” required under the APA standard of review applicable here. *See Dubois v. U.S. Dept. of Agriculture*, 102 F.3d 1273, 1284-85 (1st Cir. 1996) (recognizing that “arbitrary and capricious” review of agency action under CWA “is not a rubber stamp” but “thorough, probing, in-depth review”) (internal citations and quotations omitted).

Moreover, as is discussed more fully below, EPA tainted its analysis with impermissible policy-based considerations of cost and timing when it adopted the analysis in the “phased implementation” section of the RIDEM Report. The taint of these irrelevant, non-technical considerations and the conflict they created with the strictly technical conclusion of the RIDEM Report, renders EPA’s decision arbitrary and capricious. *Id.* (stating that this Court will set aside agency action as arbitrary and capricious when “the agency has relied on factors which Congress has not intended it to consider” (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983))). Discounting EPA’s analysis of irrelevant factors and its violation of CWA limitation-setting regulations, the Court is left with an EPA permitting decision on nitrogen that “runs counter to the evidence before the agency.” *Id.*

A. EPA's Decision is Tainted By Reliance on Irrelevant Factors of Cost and Timing

1. *EPA may not consider costs of compliance when setting the type of water quality-based effluent limitation at issue*

Throughout the course of its permit review in this matter, EPA has recognized that the CWA § 301(b)(1)(C) and implementing regulations requires EPA to develop water quality-based effluent limitations (WQBELs) that will ensure compliance with water quality standards applicable to degraded waters in Rhode Island and Massachusetts. In this process, the CWA does not allow EPA to consider costs or technical infeasibility of achieving WQBELs in permits; the agency's task is only to figure out what permit limit is required to meet water quality standards. *See* 33 U.S.C. § 1311(b)(1)(C) (requiring "any more stringent limitation, including those necessary to meet water quality standards."). As EPA emphasized on the record below:

We recognize that improvements to meet the new limits will increase costs. Cost considerations or technological feasibility, however, are not permissible factors in **setting** water quality based effluent limits. *United States Steel Corp. v. Train*, 556 F. 2d 822, 838 (7th Cir. 1977); *see also In re City of Moscow*, 10 E.A.D. 135, 168 (EAB 2001). Such factors can be taken into account, however, in establishing a compliance schedule.

EPA Response to Comments #F1 JA at 1227 (emphasis in original). The Environmental Appeals Board (EAB) has repeatedly affirmed this rule. *In re City of Attleboro, MA Wastewater Treatment Plant*, NPDES Appeal No. 08-08, slip op.

at 46-47 (EAB Sept. 15, 2009), 14 E.A.D. \_\_\_, (collecting cases and stating that “[t]he Board has often emphasized that the legal standard is that cost and technological considerations are not factors in setting water quality-based effluent limits. Rather, section 301(b)(1)(C) of the CWA requires unequivocal compliance with applicable water quality standards, and does not recognize an exception for cost or technological infeasibility.)” Thus, EPA was not free to adopt a policy-based analysis tainted with cost considerations when developing the nitrogen limitation in the District’s permit.

2. *EPA lacks the authority to pursue phased implementation of a limitation necessary to comply with Rhode Island water quality standards*

In addition to recognizing the clear cost-blind mandate applicable to water quality-based standard setting in National Pollutant Discharge Elimination permits, EPA has also recognized that, unless a State’s water quality regulations allow for implementation of controls to meet permit limits over time, EPA is without authority to include a schedule of compliance in a permit. *In re Star-Kist Caribe, Inc., NPDES Appeal No. 88-5*, 3 E.A.D. 172, slip op. at 2 (Apr. 16, 1990) (holding that “the only instance in which the permit may lawfully authorize a permittee to delay compliance after July 1, 1977, pursuant to a schedule of compliance, is when the water quality standard itself (or the State’s implementing regulations) can be fairly construed as authorizing a schedule of compliance.”). Thus, if state regulations allow for phased implementation through a schedule of compliance in a

permit, EPA would enjoy discretion to allow for such “phased implementation” over time through successive permit conditions. Such discretion that a state regulation or standard may afford could take into account issues such as cost and financing of treatment systems and sequencing of upgrades through a binding, phased implementation schedule.<sup>3</sup> However, the converse is also true; without state regulations authorizing phased implementation, EPA does not enjoy any discretion to allow for phased implementation over time through *permitting* decisions.<sup>4</sup>

In this case, the Rhode Island Water Quality regulations that govern EPA’s standard setting and permitting decision do not include authority that would allow compliance scheduling in the District’s Permit. As EPA’s response to comments states:

Compliance schedules to meet water quality based effluent limits may be included in permits only when the state’s water quality standards clearly authorize such schedules and where the limits are established to meet a

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<sup>3</sup> In response to a comment by the District that there was no “defensible evidence” that the new nitrogen limit would improve water quality, that studies were being done on the “cost of [total nitrogen] compliance [in order] to better understand the financial impact of plant upgrades,” and that District ratepayers should know about anticipated improvement and operation costs (\$203.7 million), EPA noted that it “cannot set water quality-based effluent limits based on the cost of treatment.” EPA Response to Comments Comment #F6 JA at 1231-32; Response #F6 JA at 1236.

<sup>4</sup> Where immediate compliance with a permit limit that is necessary to meet water quality standards is practically impossible, EPA may nonetheless be able to allow for a schedule of compliance through exercise of its enforcement discretion via an administrative enforcement order. *See* 33 U.S.C. § 1319(a)(3) (authorizing EPA Administrator to require compliance with a permit limit through the use of a compliance order).

water quality standard that is either newly adopted, revised or interpreted after July 1, 1977. As noted in the Fact Sheet supporting the draft permit, EPA recognizes that it is unlikely that UBWPAD will be able to comply immediately with the water quality based effluent limits proposed for total nitrogen and phosphorus. With regard to nitrogen, the limits on total nitrogen are necessary to ensure compliance with the Rhode Island Water Quality Standards, not Massachusetts Water Quality Standards. Rhode Island has not included provisions in its Water Quality Regulations for surface waters allowing for schedules in permits.

EPA Response to Comments #E2 JA at 1224. EPA therefore concluded that it lacked a legal basis for including a compliance schedule in the permit and declined to do so. In adopting the 5 mg/l standard in the permit EPA nonetheless erroneously relies on record analysis of scientific uncertainty as a basis for considering a phased implementation scheduling approach to implementing controls at wastewater treatment plants. Its standard-setting decision is thus tainted by reliance on a factor Congress intended it not to consider.

*3. The record reveals EPA's reliance on analysis tainted by cost and compliance scheduling considerations*

In its brief, EPA expressly acknowledges that it relied on the “Phased Implementation” section of the RIDEM report—a section that is in turn expressly driven by irrelevant considerations of cost and compliance scheduling—for its adoption of 5 mg/l as a nitrogen limit. EPA Br. at 74 (excerpting from RIDEM report section titled “Phased Implementation of Nitrogen Controls” JA at 5306). Consistent with the distinction the CWA requires EPA to draw between standard setting and implementation scheduling, the RIDEM Report’s “phased

implementation” section references “some uncertainty” in the technical record to conclude that “evaluation of *phased implementation* is indicated.” JA at 5306 (emphasis added). This “key” report further elaborates that “[f]or the reasons noted above, RIDEM has evaluated *implementation costs*, analysis of performance of available technology, and estimates of water quality improvement to developed [sic] a phased plan for implementation of WWTF improvements which maximizes the DO levels relative to *implementation cost*.” *Id.* (emphasis added).

By relying on the balancing approach in the policy-based section of the RIDEM Report excerpted above, EPA has fatally tainted its selection of a 5 mg/l nitrogen limit by considering irrelevant cost-benefit, phasing analyses. *Dubois*, 102 F.3d at 1284-85 (recognizing that the Court will set aside agency action where an agency decision relies on factors that Congress did not intend the agency to consider). Though the strictly technical analysis in the RIDEM Report found that a limit of 5 mg/l would not meet water quality standards, its policy-based analysis ultimately considered a phased-in reduction schedule with initial implementation of the “unacceptable” 5 mg/l limit based on a comparison of implementation costs to incremental water quality benefit—not compliance with water quality standards. *See* JA at 5306-5310. RIDEM stated that, “based on a comparison of technology, costs and reductions in the nutrient loading factors for the Providence and Seekonk River Systems, RIDEM has established a phased reduction strategy.” JA at 5309.

To reach this recommendation, RIDEM did a “comparison of the cost to water quality benefits” for nitrogen reduction alternatives. JA at 5307. It found that certain WWTF reductions (including 5 mg/l for the District) would “maximize the water quality improvements relative to costs.” *Id.* This cost-benefit analysis led RIDEM to recommend a limit of 5 mg/l for the District and three other facilities, and a limit of 8 mg/l for six other facilities. *Id.* Reliance on this tainted, externally-conducted analysis led EPA to conclude, mistakenly, that the 5 mg/l nitrogen limit it chose is “consistent with achieving water quality standards,” JA at 1211, even though the “uncertainties in extrapolating the physical model may ultimately mean that additional nitrogen reductions are needed.” JA at 1235.

On the record below and in its brief, EPA seeks to bolster the legitimacy of the 5 mg/l it chose for the District’s permit—notwithstanding its lack of technical basis—by noting its consistency with Rhode Island’s recommendation for other facilities discharging pollution into the watershed. *E.g.*, EPA Br. at 62; EPA Response to Comments #F18A JA at 1255 (“Rhode Island has recommended that similar limits be placed on certain Massachusetts facilities that are impacting the Bay.”). EPA stated that “[i]n arriving at its decision to impose a nitrogen effluent limit of 5 mg/l on the UBWPAD facility, EPA regarded Rhode Island’s position as additional evidence that the limit was reasonable and sufficiently stringent to comply with the CWA.” *Id.* The excerpts from the RIDEM Report discussed above

make clear, however, that RIDEM's permitting approach is driven by policy concerns—costs and phased implementation—that Congress intended EPA to disregard when setting the WQBEL at issue here. *United States Steel Corp.*, 556 F.2d at 838 (holding that cost is not a relevant consideration when setting water quality-based effluent limitations under the CWA); *Star-Kist Caribe, Inc.*, 3 E.A.D. 172, slip op. at 2 (recognizing that CWA prohibits EPA from using compliance schedules in setting water quality-based effluent limitations unless authorized by the underlying state water quality standards). Rather than record evidence of independent EPA technical analysis to which the Court can defer, EPA's attempt at bootstrapping underscores the arbitrary and capricious nature of the scientifically “unacceptable” 5 mg/l limit EPA chose.

The EAB's conclusions do not alter this analysis. First, the EAB asserted that CLF had “ignore[d] the [Report's] ultimate recommendation that the District's limit be set at 5.0 mg/l.” *In re Upper Blackstone Water Pollution Abatement District*, NPDES Appeal 08-11, 2010 WL 2363514, (May 28, 2010), slip op. at 22-23. As explained in the foregoing paragraphs, EPA cannot lawfully consider the report's “ultimate recommendation” in setting a WQBEL because it is based upon an improper cost-benefit analysis—not a scientific finding that a 5 mg/l limit would actually meet water quality standards. Second, the EAB overestimated the “uncertainty” in the record and mischaracterized it as “conflict.” *See id.* at 60. For

the reasons explained above, the “uncertainty” in the record is not sufficient to justify a relaxed nitrogen limit under the applicable standard requiring EPA to impose conditions that “ensure” compliance with water quality standards, 40 C.F.R. § 122.4(d).

Further, there is no “conflict” in the record. Rather, the key record document—while acknowledging some uncertainty—made scientific conclusions that a limit of 3 mg/l *might* ensure compliance with WQS and that a 5 mg/l limit would *not*. Even in the distinct policy-based section focused on phased implementation of controls, the key report again reiterates that “limit of technology is required but will not fully meet existing water quality standards,” (JA at 5306) and “MERL tank experiments suggest that LOT [limit of technology or 3 mg/l] is required to meet water quality standards.” JA at 5309. Disregarding irrelevant considerations, as EPA should have done, the only genuine conflict in the record is whether 3 mg/l is *stringent enough* to ensure compliance with WQS.

In this matter, the EAB acknowledged that the Region’s rationale was shaky, stating that the Region “could have chosen words that would have been more clear and specific in its meaning,” and encouraging the Region “to choose clear and direct wording to express whether a permit’s conditions ensure compliance with applicable water quality standards.” *Upper Blackstone*, 2010 WL 2363514, slip op. at 56, n.39 (referring to the Region’s description of how reliance on the Rhode

Island approach supported a limit of 5 mg/l).<sup>5</sup> The EAB correctly faulted the Region for failing to explain adequately its reliance upon the RIDEM Report to support its permitting decision. But in an overabundance of deference, the EAB fell short of fulfilling its review function when it ratified EPA's decision to ignore the scientific conclusion of the RIDEM Report in favor of the Report's policy, cost-benefit-based recommendation.

B. The Record Does Not Support a Conclusion that 5 mg/l Nitrogen Pollution Limit Will Ensure Compliance With Water Quality Standards

Where, as is the case here, an agency's explanation for its actions runs counter to the evidence before it, a reviewing court must set aside the agency action as arbitrary and capricious. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 44 (1983) (explaining the arbitrary and capricious standard of review). In its Response to CLF's comments, EPA attempts to justify the insufficient total nitrogen limit included in the Permit by characterizing the RIDEM Report as only "suggesting" that a nitrogen limit based on the limit of technology may be necessary. EPA Response to Comments Response #A10 JA at 1210. This selective *post hoc* characterization ignores the

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<sup>5</sup> Despite its stated concerns, the EAB nevertheless found that the Region's response was "adequately clear" and that the Region had determined "based on the record before it" that a 5 mg/l limit would comply with water quality standards. *Upper Blackstone* 2010 WL 2363514, slip op. at 56.

RIDEM Report's statement that even a limit of 3 mg/l, let alone the Permit's 67% higher 5 mg/l limit, would not comply with water quality standards. JA at 5303.

Rather than pointing to affirmative evidence that the Permit's 5 mg/l limit will "ensure" compliance with water quality standards or eliminate the District's contribution to ongoing water quality violations, EPA merely notes that there are uncertainties associated with the methodology used in reaching the RIDEM Report's conclusions. The Region bases its decision not to impose the more stringent limit entirely on these "uncertainties."<sup>6</sup> While there may indeed be some "uncertainties" regarding the Report's methodology, EPA fails to cite any conflicting science supporting the proposition that the limit it chose is adequate to help cure the eutrophication-related impairments in the Blackstone River or Narragansett Bay. EPA is only able to note that, "the uncertainties in extrapolating the physical model may ultimately mean that additional nitrogen reductions are needed, but there is no realistic likelihood that water quality standards could be met with a less stringent nitrogen limit than 5.0 mg/l." EPA Response to Comments Response #F6 JA at 1235.

EPA's own analysis undermines its attempt to resort to alleged uncertainties in the RIDEM Report as a basis for including insufficient nitrogen limits in the

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<sup>6</sup> In its Response to Comments, the Region says "Despite the severe nitrogen-related impairments in the receiving waters, EPA opted not to impose a limit based on more stringent loading scenarios at this time in order to account for uncertainties associated with the physical model." JA at 1254.

Permit. In fact, EPA *supports* the RIDEM Report by explaining that uncertainties associated with the analysis were taken into account in the methodology. The Region itself noted in its Response to Comments #F18B that:

It is not necessary that there be a complete understanding of all factors that influence one response variable (dissolved oxygen) before cultural eutrophication can be addressed. This is especially true where water quality impairment—cultural eutrophication—is severe and where the cause of such impairment—excessive nitrogen loading—is known, as evidenced by numerous studies [citing the RIDEM Report].

JA at 1257.

Region 1 attempts to justify the inadequate nitrogen limit in the Permit by alleging that because the RIDEM Report “cannot completely simulate” the response to nitrogen loadings in a complex, natural setting such as the Upper Narragansett Bay, the Report “may” overestimate that response. However, as the Region acknowledges in its Response to Comments #F6, the same uncertainties could just as well cause the RIDEM Report to *underestimate* the response in the receiving waters. JA at 1235 (“The uncertainties in extrapolating the physical model may ultimately mean that additional nitrogen reductions are needed. . . .”). When viewed as a whole, the record below does not support EPA’s decision to choose the weaker nitrogen limit.

C. EPA’s Limitation-Setting Analysis Rests on a Violation of its own Permitting Regulations

In its brief and on the record below, EPA’s defense expressly relies on the assumption that the District will discharge at levels well below its permitted design flow of 56 mgd. EPA’s brief explains that the agency’s approach includes “elements that enhance protectiveness” such as the assumption that “as a practical matter” actual pollution loadings will be less than modeled scenarios “for the foreseeable future, as treatment plant flows remain well below the facility’s design flow of 56 mgd (i.e., 34–43 mgd) and have been steady in recent years. JA at 1254–55.” EPA Br. at 33–34. EPA thus makes no effort to dispute that it calculated the permit limit without basing the limit on the District’s design flow. As discussed in CLF’s opening brief, CWA regulations expressly prohibit EPA from doing so. 40 C.F.R. § 122.45(b)(1) (“POTW [publicly owned treatment work] effluent limitations . . . shall be calculated based on design flow.”); *id.* § 122.4(a) (no permit may be issued when “the conditions of the permit do not provide for compliance with...regulations promulgated under CWA.”).

Given EPA’s admission, restated in its briefing, that it did not calculate the District’s limitation based on design flow, the issue presented to this Court is straightforward. There can be no argument that the regulation is ambiguous or that its application is complicated. *In re City of Moscow, Idaho*, NPDES Appeal 00–10, 10 E.A.D. 135, 2001 WL 988721 at 6–7 (July 27, 2001) (holding that 40 C.F.R. § 122.45(b)(1) unambiguously requires EPA to calculate effluent limitations for

municipal sewage treatment plants based on the actual design flow of a facility as it exists at the time of permit issuance). EPA's record statements on the issue are also unambiguous. EPA's briefing thus opens the door to challenge on this point by defending the permit by reference to this analytical element that allegedly enhances the "protectiveness" of the weaker nitrogen limit EPA chose. *See* EPA Br. at 33-34. Under the controlling APA standard, the Court should vacate EPA's decision as "not in accordance with law." 5 U.S.C. § 706(2)(A).

### **CONCLUSION**

EPA's own brief lays out, in stark terms, the dire fate of the polluted waters into which the District is one of the dominant dischargers. Despite this backdrop, the record reveals that EPA's choice of the 5 mg/l nitrogen limit in the District's permit does not satisfy the Clean Water Act and its implementing regulations because it will not ensure compliance with water quality standards in those polluted waters. In setting the limitation, EPA did not conduct any relevant technical analysis of its own to which this Court can defer. Rather, it adopted the analysis and permitting decisions of a sister agency; an analysis tainted by reliance on factors that Congress did not intend EPA to consider in the permit limitation-setting process. In direct violation of its own regulations, EPA compounded its error by calculating the nitrogen limit based on an assumption that the District will discharge at levels below the facility's design flow. The Court should overturn

EPA's selection of an impermissibly weak nitrogen limit as arbitrary, capricious, and contrary to the clear requirements of the Clean Water Act.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of December 2011, by

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