

THERE IS "REASONABLE POTENTIAL" TO SEE PFAS IN YOUR NEXT NPDES PERMIT

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On 12 August 2026, the US Environmental Protection Agency's (EPA) Environmental Appeals Board (EAB)¹ remanded EPA Region 1's (the Region) renewal of a National Pollutant Discharge Elimination System (NPDES) permit under the Clean Water Act for the City of Manchester, New Hampshire (the City) for discharges from a wastewater treatment facility, holding that the Region committed clear error in refusing to evaluate per- and polyfluoroalkyl substances (PFAS) discharges against applicable narrative water quality standards.² The Region had taken the position that it could not conduct a "reasonable potential" analysis for PFAS because EPA had not approved New Hampshire's proposed numeric PFAS criteria. The EAB rejected that rationale as inconsistent with EPA's own regulations and precedent, and remanded the permit to the Region. This decision has implications for NPDES permittees nationwide facing similar PFAS (or other emerging contaminant) issues where numeric standards are not yet adopted.

REASONABLE POTENTIAL

The Clean Water Act (Act) prohibits the discharge of pollutants from a point source into waters of the United States without a NPDES permit.³ The Act further requires NPDES permits to limit contaminant discharges as necessary to achieve applicable water quality standards.⁴ EPA's implementing regulation requires permits to include effluent limitations controlling any pollutant that the permit issuer determines "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."⁵ In addition to EPA-approved narrative criteria prohibiting toxic substances that injure aquatic life or humans, or that bioaccumulate in fish to harmful levels, New Hampshire adopted numeric water quality criteria for four PFAS chemicals based on maximum contaminant levels.⁶ As of the permit decision, however, EPA had not yet approved those numeric standards.

The Conservation Law Foundation, Inc. (CLF) challenged the renewal of a permit issued to the City and submitted data, including facility effluent monitoring results, showing PFAS present in the wastewater treatment facility's discharge. CLF argued that the Region was required to evaluate whether PFAS in the discharge had the reasonable potential to cause or contribute to an excursion of the narrative toxics criteria and the fish-consumption designated use. In its response to comments, the Region stated repeatedly that it could not conduct a reasonable potential analysis "because there is no standard to apply," reasoning that without EPA-approved numeric PFAS criteria, there was "necessarily no reasonable potential" for a violation.⁷ The Region issued the permit despite CLF's challenge, and CLF appealed.

THE EAB'S HOLDING

The EAB held that the Region's position directly contradicted 40 C.F.R. § 122.44(d)(1). If reasonable potential is identified, 40 C.F.R. § 122.44(d)(1)(vi) provides three methods for developing a water quality-based effluent limitation where the state has not established (or EPA has not approved) a water quality criterion for the specific pollutant: (1) using a calculated numeric criterion derived from a proposed state criterion or an explicit state policy or regulation interpreting the narrative criterion; (2) establishing a case-by-case limit using EPA water quality criteria, supplemented where necessary by other relevant information; or (3) establishing a limit based on an indicator parameter, provided the regulatory conditions are satisfied.⁸ Consistent with EAB precedent, the EAB concluded that the absence of an approved numeric criterion is not an impediment to conducting a reasonable potential analysis against narrative standards.⁹

The EAB also rejected two alternative rationales the Region used to support its decision. First, the Region argued it had effectively “concurred” with New Hampshire's own reasonable potential analysis, which had concluded (using the state's proposed, not-yet-approved numeric PFAS criteria) that the discharge did not present a reasonable potential to exceed those criteria. Importantly, the EAB found this concurrence inadequate because the state's analysis addressed only the numeric criteria, not the narrative toxics standard or the fish-consumption designated use, and the record did not explain how satisfying the numeric criteria would achieve the narrative standards. Second, the Region argued that its inclusion of whole effluent toxicity (WET) limits in the permit satisfied the narrative-criteria requirement. The EAB disagreed, explaining that WET limits address a separate regulatory provision, 40 C.F.R. § 122.44(d)(1)(v), aimed at aggregate toxicity of the effluent, and the record did not show WET testing addressed PFAS bioaccumulation in fish tissue relevant to the human health, fish-consumption designated use.

The EAB remanded the permit for the Region to evaluate whether PFAS are or may be discharged at levels that cause, have the reasonable potential to cause, or contribute to an excursion of New Hampshire's narrative standards or fish-consumption designated use. Notably, the EAB did not require the Region to impose PFAS effluent limits on remand—only to build an adequately reasoned record demonstrating compliance with 40 C.F.R. § 122.44(d)(1).

WHY THIS MATTERS NATIONALLY

In rejecting the position that the absence of an EPA-approved pollutant-specific numeric criterion, standing alone, excuses a permitting authority from evaluating reasonable potential under applicable narrative criteria and designated uses, the EAB's decision creates nationwide impacts for future NPDES regulation and interpretation.

Permittees, EPA regions, and state permitting authorities should expect that:

THE ABSENCE OF A NUMERIC CRITERION DOES NOT END THE INQUIRY

Where information identifies a pollutant of concern, permitting authorities must either establish a water quality-based effluent limitation or conduct a reasonable-potential analysis. If reasonable potential exists under an applicable narrative criterion or designated use, the issuer must establish an appropriate limitation using one of the methods in 40 C.F.R. § 122.44(d)(1)(vi).

Existing Monitoring Data May Trigger Additional Analysis

Existing effluent monitoring data for PFAS (whether from voluntary monitoring, permit conditions, or third-party studies) may now compel a documented reasonable potential analysis where it previously did not.

State Certification and WET Testing Are Not Automatic Substitutes for a PFAS-Specific Analysis

Reliance on a state's section 401 water quality certification or on WET testing will not necessarily satisfy EPA's independent obligation to address narrative criteria and designated uses—particularly where bioaccumulative, human health exposure pathways such as fish consumption are implicated.

Use of a Proposed or State-Adopted Numeric Criterion Requires Explanation

A permitting authority may use numeric criterion to interpret a narrative standard, but the administrative record must explain why the selected criterion protects the applicable narrative criteria and designated uses.

Permits That Include PFAS Monitoring but Provide Little Analysis of Water Quality Impacts May Face Challenges

Environmental organizations and other permit challengers are likely to invoke the decision where monitoring or other record evidence identifies PFAS in a discharge, but the permitting record contains little or no analysis of narrative criteria, designated uses, or reasonable potential.

The Reasoning Extends Beyond PFAS

The EAB's analysis may apply to other emerging contaminants for which EPA-approved pollutant-specific numeric criteria do not yet exist when monitoring or other information identifies the contaminant as a pollutant of concern and applicable narrative criteria or designated uses require evaluation.

Permittees with pending EAB appeals, upcoming permit renewals, or PFAS monitoring data in the administrative record should reassess exposure in light of this precedent and should expect more rigorous review and documentation of PFAS-related reasonable potential determinations going forward.

Please contact the firm's Environment, Land, and Natural Resources team to discuss the potential implications of this decision for your specific NPDES permit.

FOOTNOTES

¹ The EAB is an impartial appellate tribunal established by regulation to hear administrative appeals under environmental statutes that EPA administers.

² *In re City of Manchester*, Docket No. NH0100447(EAB 2026) (available at [https://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/A1BED5733C80AA6685258E510055D3A1/\\$File/City%20of%20Manchester%20Order%20Denying%20Review%20in%20Part%20and%20Remanding%20in%20Part,%20Issued%202026.08.12.pdf](https://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/A1BED5733C80AA6685258E510055D3A1/$File/City%20of%20Manchester%20Order%20Denying%20Review%20in%20Part%20and%20Remanding%20in%20Part,%20Issued%202026.08.12.pdf)).

³ 33 U.S.C. § 1251(a).

⁴ See 33 U.S.C. § 1342; *Arkansas v. Oklahoma*, 503 U.S. 91, 92 (1992).

⁵ 40 C.F.R. § 122.44(d)(1)(i).

⁶ N.H. Rev. Stat. Ann. § 485:16-e (2020); N.H. Code Admin. R. Env-Dw 705.06, tbl. 705-7.

⁷ *In re City of Manchester*, at p. 12.

⁸ 40 C.F.R. § 122.44(d)(1)(vi)(A)-(C).

⁹ *In re City of Manchester*, at p. 23.

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