IN THE MATTER OF BROWARD COUNTY, FLORIDA

NPDES Appeal No. 92–11

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided June 7, 1993

Syllabus

The Broward County Public Works Department seeks review of the denial of an evidentiary hearing request on certain provisions in an NPDES permit for the County's Northern Regional Wastewater Treatment Plant. The Plant discharges to the Atlantic Ocean 7,300 feet from shore. Broward's evidentiary hearing request listed five issues under the heading "[s]tatement of disputed issues of material fact." These issues generally concerned the permit's toxicity testing requirements and the limitation on total residual chlorine. The Regional Administrator denied the evidentiary hearing request on the grounds that Broward had failed to raise any material factual issues, was impermissibly attempting to challenge regulations, and had raised issues in its request that it failed to raise in its comments on the draft permit.

Held: The permit is remanded so that the Region may supplement the record on the following issues: 1) whether Broward's effluent is causing or contributing to, or has the reasonable potential to cause or contribute to, a violation of Florida's water quality criterion for total residual chlorine at Rule 17–302.560(13), F.A.C.; and 2) whether the test species specified in the permit are significant to the indigenous aquatic community and, if not, whether they will accurately predict how indigenous species would fare when exposed to Broward's effluent. If Broward is not satisfied with the Region's explanation on remand, Broward may renew its request for an evidentiary hearing on either or both of these issues. The Region shall evaluate this renewed request in accordance with the same regulatory provisions applicable to the original request. If the Region denies the request, Broward may again file an appeal with the Board. In addition, the Region is ordered on remand to modify the permit to allow Broward to conduct toxicity testing on effluent diluted to 30% full strength. With respect to the other issues raised in Broward's petition, review is denied.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich, in which Judge Firestone joined. Judge McCallum joined in the Board's opinion, except for Section II.E., for which he filed a concurring opinion, post, p. 20:

I. *BACKGROUND*

The Broward County Public Works Department (Broward) seeks review of U.S. EPA Region IV's denial of an evidentiary hearing request on certain provisions of a National Pollutant Discharge Elimination System (NPDES) permit for the County's Northern Regional Wastewater Treatment Plant, a publicly owned treatment facility.[1] The permit regulates the plant's discharge of sanitary wastewater into the Atlantic Ocean 7,300 feet from shore. In its petition for review, Broward appeals the Region's denial of its evidentiary hearing request on issues which, in pertinent part, relate to the permit's toxicity testing requirements and the permit's limitation on total residual chlorine (TRC). At the request of the Environmental Appeals Board, the Region filed a response to the petition for review.

The background to this proceeding is as follows. On March 13, 1990, Broward filed an NPDES permit renewal application with Region IV. The Region issued a draft permit on June 28, 1990, and, on the same date, requested that the Florida Department of Environmental Regulation (FDER) certify the draft permit in accordance with Section 401 of the Clean Water Act, 33 U.S.C.A. § 1341.[2] Broward submitted comments on the draft permit on July 24, 1990, objecting to the permit's limitations on total residual chlorine, the requirement that it conduct toxicity testing in 100% effluent, and

[1] Under the Clean Water Act, discharges into waters of the United States by point sources, like Broward's wastewater treatment plant, must have a permit in order to be lawful. 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System is the principal permitting program under the Clean Water Act. 33 U.S.C. § 1342.

[2] *See* Exh. 16 to Region's Response. Under CWA § 401(a)(1), the Agency may not issue a permit until the State either certifies that the permit complies with State water quality standards or waives certification. *See* 40 C.F.R. § 124.53. Where a State has certified a federally issued permit, any challenges to permit limitations and conditions attributable to State certification will not be considered by the Agency. *See* 40 C.F.R. § 124.55(e); *In re General Electric Company, Hookset, New Hampshire,* NPDES Appeal No. 91–13 (EAB, January 5, 1993). Where a State has waived certification, however, the Agency's application of State water quality standards is open to review for consistency with 40 C.F.R. § 122.44(d).

the time period for certain acute toxicity tests.[3] By letter dated September 19, 1990, the FDER waived certification and requested that the Region "issue a short-term permit, for a two to three year duration, so that it may be re-evaluated to incorporate any revised permit conditions which may result from State permit revisions and the SEFLOE II ocean outfall study."[4] The final permit decision was issued on September 26, 1990, with a permit expiration date of March 31, 1994.

On October 23, 1990, Broward filed its request for an evidentiary hearing.[5] In Paragraphs 6.A.–E. of the request, Broward identified and set forth the following five issues as "disputed issues of material fact":

A. The best available control technology, prevention of significant deterioration, certification of compliance with State water quality standards, or compliance with new source performance standards.

B. Whether the use of Class III water quality criteria is appropriate before the FDER has determined that a whole water quality effluent limitation is necessary.

C. Whether the biotoxicity test organisms designated for use in the acute toxicity test are species significant to the indigenous aquatic environment affected by the outfall.

D. Whether the testing methods for toxicity of the effluent employed are appropriate for determining toxicity of the deep ocean outfall environment.

[3] *See* Exh. D to Petition for Review. The contested requirements were included in the permit pursuant to the Agency's obligation to establish permit conditions necessary to comply with State water quality standards. *See* 40 C.F.R. § 122.44.

[4] Letter from C. Joseph Doker, Environmental Specialist, Division of Water Facilities, Florida Department of Environmental Regulation, to Roosevelt Childress, Chief, South Area Permits Unit, U.S. EPA Region IV (September 19, 1990) (Exh. 26 to Region's Response).

According to Broward, the Broward County Wastewater Management Division, in conjunction with other Southeast Florida communities and the National Oceanic and Atmospheric Administration, is currently involved in a sampling and monitoring program which will characterize the effluent and mixing properties of various open ocean outfalls, including the outfall for the Northern Regional Wastewater Treatment Plant. The study is referred to as SEFLOE II for the Southeast Florida Outfalls Experiment.

[5] Under 40 C.F.R. § 124.74, any interested person may submit a request to the Regional Administrator for an evidentiary hearing within 30 days following the service of notice of the Regional Administrator's final permit decision.

E. Whether the effluent discharged by the North Regional Wastewater Treatment Facility is toxic to the marine environment to which it is discharged.

Request for Evidentiary Hearing, at ¶ 6 (Exh. B to Petition for Review).[6] On May 27, 1992, the Region denied the hearing request on the grounds that the above-quoted "disputed issues" failed to raise any material issues of fact, that some of the issues had not been raised during the public comment period,[7] and that they constituted attacks on promulgated regulations. *See* Letter from Greer S. Tidwell, Regional Administrator, Region IV, to Director, Wastewater Management Division, Broward County Public Works Department, dated May 27, 1992 (hereinafter Denial of Hearing Request) (Exh. A to Petition for Review). Broward's Petition for Review followed.[8]

Broward raises the identical issues in its petition for review and contends that the Region's denial of its evidentiary hearing request on each of these issues was clearly erroneous. Petition for Review, at 1. In its response, the Region requests that we deny the petition for review. The Region relies solely on the argument that the above-quoted issues were not raised during the public comment period and were not stated with sufficient specificity.

II. *DISCUSSION*

Under the rules governing an NPDES proceeding, there is no appeal as of right from the Regional Administrator's decision. *In re Miners Advocacy Council,* NPDES Appeal No. 91–23, at 3 (EAB, May 29, 1992). Ordinarily a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important and should there-

[6] Paragraph 5 of the evidentiary hearing request, entitled "[s]tatement of how petitioners substantial interests are affected by the Agency's action," contains an expanded discussion of some of the issues listed in more general form in paragraph 6.

[7] Any person who wishes to contest any provision of a draft permit must "raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position" by the end of the comment period on the draft permit. 40 C.F.R. § 124.13; *see also* 40 C.F.R. § 124.76. In addition, to preserve an issue for appeal, a petitioner must state that issue with specificity in its evidentiary hearing request. 40 C.F.R. § 124.74.

[8] Under 40 C.F.R. § 124.91, within 30 days of the denial of a request for an evidentiary hearing, any requester may appeal any matter set forth in the denial by filing a notice of appeal and petition for review with the Environmental Appeals Board.

fore be reviewed by the Environmental Appeals Board.[9] *See, e.g., In re City of Jacksonville, District II Wastewater Treatment Plant,* NPDES Appeal No. 91–19 (EAB, August 4, 1992). The petitioner has the burden of demonstrating that review should be granted. *See* 40 C.F.R. § 124.91(a). In determining whether Broward has met this burden, each of the alleged disputed issues of material fact will be discussed in the order in which it appears in Paragraph 6 of Broward's evidentiary hearing request.

A. "The best available control technology, prevention of significant deterioration, certification of compliance with State water quality standards, or compliance new source performance standards."

Although Broward lists this as a disputed issue of material fact, it is impossible to determine what permit provisions are being contested and on exactly what grounds. As the Region states in its response, this "issue" is no more than an unintelligible collection of phrases[10] and, as such, it does not contain the degree of specificity required to support a petition for review. *See In re Sequoyah Fuels Corporation,* NPDES Appeal No. 91–12, at 4 (EAB, August 31, 1992) (disputed issues must be stated with specificity). Review is therefore denied on this issue.

B. "Whether the use of Class III water quality criteria is appropriate before the FDER has determined that a whole water quality effluent limitation is necessary."

The Region argues that this issue, as framed in paragraph 6.B. of Broward's evidentiary hearing request, was properly denied because the appropriateness of using Class III[11] water quality criteria was not raised during the public comment period, and, even if it had been raised, the issue was not stated with sufficient specificity to justify an evidentiary hearing. Region's Response at 5–7, 11. We disagree.

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[9] With respect to appeals under Part 124 regarding NPDES permits, Agency policy is that most permits should be finally adjudicated at the Regional level. 44 Fed. Reg. 32,887 (June 7, 1979). While the Board has broad power to review decisions in NPDES permit cases, the Agency intended this power to be exercised "only sparingly." *Id.*

[10] *See* Region's Response, at 12–13.

[11] All surface waters of the State have been classified according to designated uses. Class III waters are those designated for "Recreation, Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife." Rule 17–302.400(1), F.A.C.

While this issue is stated in general terms, the focus of Broward's objection is the permit's limitation on total residual chlorine (TRC), which is based on the State's water quality criterion for TRC in Class III waters. As such, this issue was intended as a short-hand reference to the more detailed discussion in paragraph 5.A. of the evidentiary hearing request pertaining to the permit's TRC limitation. While the structure of the evidentiary hearing request is confusing, it contains several paragraphs which, when read together, make clear that paragraph 5.A. is actually a more particularized statement of the Class III water quality criteria issue quoted above.[12] Indeed, the Region itself appeared to reach this same conclusion in its denial of the hearing request. That is, the Region stated that "although it is not clearly stated in the evidentiary hearing request, the Regional Administrator interprets the challenge [to the permit's use of Class III water quality criteria] as addressing the monitoring and effluent requirements for TRC set out in the permit." *See* Attachment to Regional Administrator's Decision on Broward County's Request for an Evidentiary Hearing, at 1 (Exh. A to Petition for Review) (hereinafter "Attachment to Denial"). We believe that any lack of specificity in the statement in paragraph 6.B. is thus remedied by the more specific discussion in paragraph 5.A.

Having concluded that the issue involves an objection to the necessity for the permit's TRC limitation, we similarly conclude that, contrary to the Region's assertion, this issue was raised in Broward's comments on the draft permit.[13] Thus, the issue of whether the

[12] This conclusion is also reinforced by Broward's statement in paragraph 7.A. of the hearing request, which reads, in part:

> [Broward] believes the Agency is not correct in its application of 40 CFR Section 122.44 (d.)(1.)(iv.) to the Broward County permit, thereby requiring the use of a FDER Class III Water Quality Criteria for TRC. The facts which warrant reversal or modification of the Agency's action are stated in section 5.A. of this document * * *.

[13] In its comments on the draft permit, Broward stated:

> The Wastewater Management Division requests that the maximum total chlorine residual concentration be eliminated from the NPDES permit and replaced with a statement specifying "discharge must meet Florida Administrative Code Chapter 17–6, 17–4 requirements of open ocean discharges for class 3 water quality bacteriological criteria at the edge of a 200-meter mixing zone." The sampling and monitoring program (SEFLOE II) which will assess this initial dilution, mixing zone characteristics, and fecal coliform level of the discharge will clarify completely the fecal coliform/chlorine residual requirements for the NPDES permit. We believe it inappropriate to place this in the NPDES permit until these issues are resolved scientifically.

permit's TRC limits are necessary to comply with the applicable State requirement was preserved for review. We now turn to the merits of this issue.[14]

The final permit states that by January 1, 1994, "the final daily maximum concentration for TRC shall not exceed .01 mg/l * * *." Permit Condition 9.b., at I–3. As previously noted, this requirement mirrors Florida's water quality criterion for TRC in Class III waters. *See* Rule 17–302.560(13), F.A.C. (stating that, except within zones of mixing, total residual chlorine "shall not exceed 0.01 milligrams per liter.").[15]

In paragraph 5.A. of the hearing request, Broward objected to the permit's TRC limitation in permit conditions I.A.9.a. and b.[16] This paragraph stated, in part:

> The water quality based criteria for total chlorine residual listed in the FAC is .01 mg/l. The Agency also listed in the comments that the reason for inclusion of the TRC limit in our NPDES Permit is authorized and required by 40 CFR Section 122.44(D)(1)(iv). This reference from 40 CFR, * * * states that if the permitting authority determines the outfall has reasonable potential to cause in-stream excursion above any numerical criteria for

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Comments on Draft Permit, at 1 (Exh. D to Petition for Review).

[14] The petition also raises the question of whether monitoring for TRC is appropriate "in-the-pipe" or at the "end-of-pipe." Petition for Review, at 3. Because this issue was not raised in Broward's comments on the draft permit or in the evidentiary hearing request, we deny review of this issue as not having been preserved for review.

[15] Permit Condition 9.b. states that the permit's TRC limitation does not provide for a zone of mixing in the receiving water.

[16] These conditions provide as follows:

> 9.a. The interim daily maximum total residual chlorine (TRC) concentration shall not exceed 0.2 mg/l and shall be effective through December 31, 1993.
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> 9.b. The final daily maximum concentration for TRC shall not exceed 0.01 mg/l and shall be achieved by January 1, 1994. This limit is included to prevent toxic effects from chlorine in the receiving water. This limit does not provide for a zone of mixing for TRC in the receiving water. The permittee may apply for a mixing zone for TRC from the Florida Department of Environmental Regulation (FDER) if the permittee determines such to be a benefit. If a mixing zone for TRC is granted by the FDER and concurred in by EPA, the permittee may apply for a modification of the above limit from EPA.

> whole effluent toxicity, then the permit must contain effluent limits for whole effluent toxicity.

Broward argued that neither the State nor the Region had sufficient information to establish that a TRC limitation was necessary to prevent a violation of the State requirement. Thus, according to Broward, the Region should remove any TRC limitations pending the completion of the SEFLOE II sampling and monitoring program that is currently being conducted. Request for Evidentiary Hearing, at ¶ 5.A. (Exh. B to Petition for Review).

In its denial of Broward's evidentiary hearing request, the Region stated, in part:

> In raising issues regarding TRC monitoring requirements and discharge limitations, Broward County challenges EPA's authority to impose effluent limitations in permits. These purely legal issues of authority are resolved by the Clean Water Act, 33 U.S.C. § 301(b)(1)(C), and EPA regulations at 40 C.F.R. § 122.44, which require that the permit contain effluent limitations which are at least as stringent as state water quality standards. The TRC limit included in the permit is proscribed [sic] by the State of Florida in F.A.C. § 17–302.560(13).

Attachment to Denial, at 2. In its response to the petition for review, the Region states that "EPA's response to the comment [on the draft permit] explained that the TRC limit is required under the Florida Administrative Code (FAC) and EPA regulations at 40 C.F.R. § 122.44." Response to Petition, at 6.

Contrary to the Region's assertions, we do not read Broward's petition as challenging the Region's authority to impose effluent limitations in permits if the factual predicate for regulation is met. Rather, we read the petition and evidentiary hearing request as challenging the Region's factual basis for concluding that the permit's TRC limitation is necessary to ensure compliance with Florida's water quality criterion for TRC, and thus for concluding that the limitation is therefore "required and authorized by 40 CFR § 122.44(d)(i)(iv)." [17]

[17] *See* Region's Response to Comments, at 3 (Exh. E to Petition for Review). 40 C.F.R. § 122.44(d)(1)(iv) provides that a permit must contain toxicity limits where the permitting authority determines that a discharge has "the reasonable potential to cause, or contribute to an in-stream excursion above the numeric criterion for whole effluent toxicity * * *."

Under CWA § 301(b)(1)(C), the Region is required to include those permit limitations which are necessary to ensure compliance with State requirements. This section is implemented by 40 C.F.R. § 122.44(d). Section 122.44(d)(1) requires that a permit include those limitations necessary to ensure compliance with water quality standards and other State requirements. A permit limitation is necessary if the subject discharge will cause or contribute to, or has the reasonable potential to cause or contribute to, an excursion above a State requirement. *See* 40 C.F.R. § 122.44(d)(1). Thus, under the CWA and its implementing regulations, the Region may include the challenged TRC limitation in the permit only if it determines as a factual matter that Broward's discharge causes or contributes to, or has the reasonable potential to cause or contribute to, a violation of the applicable State requirement. *See Miami-Dade Water and Sewer Authority Department,* NPDES Appeal No. 91–14, at 10 (EAB, July 27, 1992).

The administrative record is unclear as to whether the Region ever made the factual determination that Broward's effluent presents such a potential. Because the Region concluded that Broward was challenging the Region's legal authority to include such a limitation, the denial of the evidentiary hearing request does not discuss the factual basis for this determination; nor is it contained elsewhere in the administrative record on appeal. Due to the Region's misperception of the nature of Broward's challenge, we cannot determine from the current record whether a material issue of fact exists.

Accordingly, this permit condition is remanded. On remand, the Region must properly respond to the issue raised by Broward. The Region must provide a detailed explanation of the factual basis for concluding that Broward's effluent has the reasonable potential for causing or contributing to a violation of Rule 17–302.560(13), F.A.C., thus requiring regulation in accordance with 40 C.F.R. § 122.44(d)(1). If Broward is not satisfied with this explanation, it may renew its request for an evidentiary hearing following the procedures of 40 C.F.R. § 124.74. If the request is denied, Broward may file an appeal of the denial with the Board under 40 C.F.R. § 124.91. Because the current record is incomplete, we reach no conclusion at this time on whether or not an evidentiary hearing is required.[18]

[18] In its denial of Broward's evidentiary hearing request, the Region also asserted that it was required to incorporate TRC limits in order to comply with 40 C.F.R. § 122.44(l) (stating, in pertinent part, that when renewing or reissuing permits, "interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit * * *."). The Region did not raise this argument in its response to Broward's comments on

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C. "Whether the biotoxicity test organisms designated for use in the acute toxicity test are species significant to the indigenous aquatic environment affected by the outfall."

Florida's toxicity standard for open ocean discharges provides, in part, that "the effluent when diluted to 30% full strength, shall not cause more than 50% mortality in 96 hours (96-hr.LC_{50}) in a species significant to the indigenous aquatic community." Rule 17–4.244(3)(c), F.A.C. Broward argues that contrary to this toxicity standard, the test species specified in Part IV of the permit (Mysid shrimp and inland silverside) "ha[ve] no relationship to the environment where effluent is discharged." Petition for Review, at 5. In its response, the Region argues that because Broward failed to raise this argument during the public comment period, it is not entitled to an evidentiary hearing. Region's Response, at 8–9.

Under 40 C.F.R. Part 124, in order to contest a final permit determination in an evidentiary hearing or to preserve an issue for review by the Board, "all reasonably ascertainable issues" must be raised by the close of the comment period. *See* 40 C.F.R. § 124.13. In addition, 40 C.F.R. § 124.76 provides that "[n]o issues shall be raised by any party that were not submitted to the administrative record * * * as part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them." The purpose behind this requirement is to alert the Region to potential problems with the draft permit and to ensure that it has an opportunity to address these problems before the permit becomes final, thereby promoting the longstanding policy that most permit issues should be resolved at the Regional level. *See In re Sequoyah Fuels Corporation,* NPDES Appeal No. 91–12, at 4 (EAB, August 31, 1992); *In re NPC Services, Inc.,* NPDES Appeal No. 91–4, at 2 (CJO, May 30, 1991). Although these regulations make clear that, in order to preserve an issue, it must have been raised by someone during the comment period, the person filing the petition for review does not necessarily have to be the one who raised the issue.[19]

In the present case, the Region is correct that Broward did not raise the issue of whether or not the test species designated in the permit were appropriate in its comments on the draft permit. How-

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the draft permit, however, nor is the argument raised again in the Region's response to the petition for review. Because the Region appears to have abandoned this argument on appeal, and because there is insufficient information in the record on appeal from which the Board can reach an informed decision, we do not reach this issue.

[19] In order to file an appeal with the Board under 40 C.F.R. § 124.91, however, a petitioner must either be a party or have filed a request for an evidentiary hearing.

ever, this issue was raised by another commentor (Project ReefKeeper)[20] and the Region had an opportunity to respond.[21] The regulatory requirement has therefore been met.

Because the Region believed that this issue was not properly before the Board, the Region's Response does not address the merits of Broward's argument. The Region does address the merits of this argument, however, in its denial of Broward's request for an evidentiary hearing. There, the Region stated:

> This is a purely legal issue which is not entitled to an evidentiary hearing pursuant to 40 C.F.R. §§ 124.74 and 124.75. In raising this issue, Broward challenges EPA's authority to impose test procedures to determine toxicity. The whole effluent toxicity monitoring requirements and effluent limitations included in the permit are prescribed by the State of Florida in F.A.C. § 17–3.021(1). "FDER legal and bioassay personnel have interpreted this as meaning that any recognized organism can be used for bioassay testing as long as that organism is known to be sensitive to toxic substances that can be expected to impact the indigenous community." Final Report Of The Bioassay Task Force: Review And Recommendations Of The Florida Department Of Environmental Regulation's Toxicity Testing Program

[20] *See* Letter from Alexander Stone, Director, Project ReefKeeper, to Diane Barrett, Public Notice Coordinator, Office of Public Affairs, Region IV (July 24, 1990) (Exh. 19 to Region IV's Response). This letter states in pertinent part as follows:

> The proposed permit indicates specific organisms to be tested. These two organisms are generally hearty creatures in the wild and are not necessarily representative of the marine ecosystem in this sensitive geographical area. To accurately assess the acute toxicity of the wastes discharged into the delicate reef systems off Florida's coastline, additional species should be tested. Also incorporated into the testing program should be species of commercial and recreational value, and the important primary producers which play a critical role in the food chain. Including such test species would reveal the true impact effluent discharge has been having on these marine resources.

[21] On page 6 of its Response to Comments, the Region states:

> EPA believes that the two required test species are representative of this area. The commentor has provided no evidence to the contrary. Alternate test species for which testing protocols have been developed are listed in EPA 600/4–85–013, Table 1. However, EPA has chosen the two test species specified in the permit for all similar discharges in Florida.

> (August, 1985). As set out in the response to comments on the draft permit, the test species designated in the permit are recognized sensitive ones as required by EPA and Florida regulations.
>
> As discussed above, EPA is obligated to apply state water quality standards in order to ensure compliance with Section 301(b)(1)(C) of the Clean Water Act. * * * Challenges to existing regulations such as these are not appropriate for consideration in evidentiary hearings.

Attachment to Denial, at 3 (Exh. A to Petition for Review).

As noted above, Florida's toxicity standard for open ocean discharges requires that the permittee determine the effect of its discharges on "species significant to the indigenous aquatic community." Contrary to the Region's assertion, Broward's challenge is not to the Agency's legal authority to impose test procedures to determine toxicity, but to the Region's selection of the particular test species identified in the permit. The Region must therefore provide a detailed explanation of the basis for selecting the test species specified in the permit. The Region must explain why it believes the test species selected are "significant to the indigenous aquatic community," or, if this is not the case, why the use of these species will adequately predict how indigenous species would fare when exposed to Broward's effluent.[22] The record on appeal does not contain an adequate explanation in this regard. We are therefore unable to determine at this time whether Broward's objection to the selected test species raises a material issue of fact warranting an evidentiary hearing. Accordingly, on remand, the Region must supplement the record with this information.[23] If Broward is not satisfied with the explanation on

[22] As we stated in *Miami-Dade, supra,* at 17, although Florida's toxicity standard requires that the effluent's effect on indigenous species be determined, it does not specifically require that testing be done on those species directly. "It is conceivable * * * that the effluent's effect on indigenous species may be ascertained by measuring the effluent's effect on non-indigenous species." If the test species designated in the permit are not indigenous to the aquatic community, the Region must establish that these species can serve as suitable surrogates for determining the effluent's lethal effect on indigenous species. *Id.*

[23] This supplemental information should include further explanation of why the Region believes it selected an FDER-recognized species and the significance of such a designation in terms of whether, as a matter of law, it eliminates the need for an evidentiary hearing.

remand, it may renew its request for an evidentiary hearing and, if the request is denied, file an appeal with the Board.

D. "Whether the testing methods for toxicity of the effluent employed are appropriate for determining toxicity of the deep ocean outfall environment."

In its denial of Broward's request for an evidentiary hearing on the above-quoted issue, the Region stated that the issue was neither factually nor legally specific and therefore did not merit an evidentiary hearing. See Attachment to Denial, at 2.[24] While we agree that this language lacks specificity, Broward expanded on this issue in paragraph 5.B. of the hearing request. Specifically, Broward argued that, as an open ocean discharger, it was subject to FAC 17–4.244(3)(c). Florida's toxicity regulation for open ocean discharges states, in part:

> For open ocean discharges, the effluent, when diluted to 30% full strength, shall not cause more than 50% mortality in 96 hours (96-hr. LC_{50}) in a species significant to the indigenous aquatic community. Rapid dilution shall be ensured by the use of multiport diffusers, or a single port outfall designed (by a professional engineer registered in Florida) to achieve a minimum of 20:1 dilution of the effluent prior to reaching the surface.

Rule 17–4.244(3)(c), F.A.C. As Broward reads it, this regulation allows for the use of 30% dilution for the purpose of toxicity testing, while the permit requires that the toxicity tests be performed using 100% effluent.[25] That this was the issue Broward was intending to raise tends to be confirmed by the Region in its denial of Broward's hearing request, where the Regional Administrator stated that "although it is not clearly stated in the evidentiary hearing request, I interpret the challenge as addressing the requirement set out in the permit that Broward County use concentrations of 100% effluent in the acute toxicity testing to evaluate whole effluent toxicity." Thus,

[24] The Region makes the same argument in its response to the petition for review. See Region's Response, at 12.

[25] Permit Condition I.A.12. provides:

> Lethality to more than 50% of any test species in 100% effluent in a test of 96 hours duration or less will constitute a violation of Florida Administrative Code (FAC) Section 17–4.244(3)(a) (April 4, 1989) and the terms of this permit. The testing for this requirement must conform with Part IV of this permit.

we conclude that the above-quoted issue, in combination with the additional detail provided in paragraph 5.B. of the hearing request, was stated in sufficient detail to survive an objection based upon lack of specificity.

With regard to the merits of the issue, the Regional Administrator concluded that the permit's toxicity testing requirements were governed by the State of Florida in F.A.C. § 17–4.244(3)(a),[26] which the Regional Administrator evidently construed as not making specific allowance for conducting the toxicity testing in diluted effluent. Thus, "[u]nder the Clean Water Act, 33 U.S.C. §301(b)(1)(C), and EPA regulations at 40 C.F.R. § 122.44, the permit must contain effluent limitations which are at least as stringent as state water quality standards." Attachment to Denial, at 2. The Regional Administrator also stated that:

> Broward County's challenge that Florida regulations at F.A.C. § 17–4.244(3)(c) require monitoring in 30% effluent for open ocean discharges is misleading. Florida regulations allow the less stringent monitoring requirements only when the single port outfall ensures rapid dilution, defined as "a minimum of 20:1 dilution of the effluent prior to reaching the surface." Id. As Broward County has presented no evidence that it ensures rapid dilution, less stringent monitoring requirements are inappropriate at this time.

Id. at 3. We disagree.

There appear to be at least two errors in the Region's analysis. First, the section of the Florida regulations relied upon by the Regional Administrator to require toxicity testing in 100% effluent, F.A.C. § 17–4.244(3)(a), specifically refers to an exception in F.A.C. § 17–4.244(3)(c) for open ocean discharges. The Region has not properly accounted for the exception. Second, there is nothing in the language of the foregoing regulation to support the Region's assertion that Broward must first demonstrate that the outfall ensures rapid

[26] F.A.C. § 17–4.244(3)(a) provides, in part:

> [T]he maximum concentration of wastes in the mixing zone shall not exceed the amount lethal to 50% of the test organisms in 96 hours (96 hr. LC_{50}) for a species significant to the indigenous aquatic community, *except as provided in paragraphs (b) or (c) below.*

(Emphasis added.)

dilution. While we agree that rapid dilution is indeed a requirement for open ocean discharges, nothing in the above-quoted standard or in the record on appeal indicates that it is a condition precedent to monitoring effluent at 30% full strength. Rather, the rule indicates that this standard applies to any open ocean discharger. If there is some other basis for imposing such a condition precedent, the Region has not identified it. Accordingly, the permit is remanded and the Region is ordered to revise the disputed permit conditions to accurately reflect the language of Rule 17–4.244(3)(c).[27]

E. "Whether the effluent discharged by the North Regional Wastewater Treatment Facility is toxic to the marine environment to which it is discharged."

According to the Region, this issue fails to articulate any discernible factual or legal issue and therefore does not merit an evidentiary hearing.

Under 40 C.F.R. § 124.74(b)(1), a request for an evidentiary hearing must state each legal or factual question alleged to be at issue and its relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated. *See Sequoyah Fuels Corporation, supra* at 4. The request must also include:

> *Specific references to the contested permit conditions,* as well as suggested revised or alternative permit conditions (including permit denials) which, in the judgment of the requester, would be required to implement the purposes and policies of the CWA.

40 C.F.R. § 124.74(c)(5) (*emphasis added.*) The need to identify the specific permit conditions at issue is further reenforced by 40 C.F.R. § 124.74(d), which requires the Regional Administrator, in granting a hearing, to:

> *[I]dentify the permit conditions which have been contested by the requester* and for which the evidentiary hearing has been granted. Permit conditions which are not contested or for which the Regional Adminis-

[27] Although 40 C.F.R. § 124.91 contemplates that additional briefing typically will be submitted upon a grant of a petition for review, a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues addressed on remand. *Cf. In re Beazer East, Inc. and Koppers Industries, Inc.,* RCRA Appeal No. 91–25, at 15 (EAB, March 18, 1993).

> trator has denied the hearing request shall not be affected by, or considered at, the evidentiary hearing. The Regional Administrator shall specify these conditions in writing in accordance with § 124.60(c).

(Emphasis added.)

The requirement for specificity in articulating the legal or factual question at issue is essential to allow for an informed decision by the Regional Administrator, and meaningful review of the Regional Administrator's decision by the Board.[28] The discussion of the above-quoted issue in the evidentiary hearing request makes no reference to any particular permit provision(s) to which Broward objects.

Thus, Broward's evidentiary hearing request is clearly deficient in failing to cite the permit provisions being challenged. We recognize that two of the permit provisions previously discussed, permit conditions 9 (TRC limitations) and 12 (relative to whole effluent toxicity) clearly relate to the toxicity issue. In its petition for review on this issue,[29] Broward seems to be alluding to these provisions by generally referencing the alleged misapplication of state water quality standards and flawed toxicity testing requirements (testing interval, methodology, and species).[30]

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[28] As the Board recently stated in discussing a permittee's obligation to identify the specific permit conditions at issue in appeals under § 124.19, "[i]t is not this Board's obligation to search through the permit for the specific permit conditions that fall into [permittee's] general categories of objections. In *re LCP-Chemicals,* RCRA Appeal No. 92–25, at 5. (EAB, May 5, 1993). Similarly, it is not the obligation of the Regional Administrator or the Board to scrutinize the permit for those conditions which might be implicated by a general comment in an evidentiary hearing request.

[29] We note that the lack of requisite specificity in the evidentiary hearing request cannot be cured by providing greater specificity, for the first time, on appeal.

[30] The reference to the "testing interval" may relate to Broward's argument in paragraph 5.C. of its evidentiary hearing request. In paragraph 5.C., Broward argued that Permit Condition IV.1.a. is overly conservative. Specifically, Broward objected to the use of a 96-hour toxicity test. According to Broward "[t]he outfall from the North Regional Wastewater Treatment Plant is located in 107 ft. of water in an open ocean environment which discharges to the fringe of the Gulfstream current. Even with the most conservative safety factor incorporated, it would be extremely unlikely that any indigenous ocean species would stay in 100% of our effluent or even 30% of our effluent for 96 hours in the open ocean." Assuming this is the issue Broward intended to reference, it fails to convince us that review is warranted. The 96-hour exposure period is specified in Florida's toxicity regulation for ocean discharges. *See* F.A.C. § 17–4.244(3)(c), quoted at p. 14–15 *supra.* The actual dilution taking place in the receiving waters is irrelevant to this requirement. *See Miami-Dade, supra,* at 15.

To the extent that Broward may have intended the general statement in paragraph 6.E. to refer to the more specific objections to conditions 9 and 12 identified elsewhere in paragraph 6, we have already addressed those objections. However, to the extent that Broward intended this statement as a generalized objection to other portions of the permit, this objection was not stated with sufficient specificity to warrant review.[31] For this reason, the evidentiary hearing request was properly denied.

III. *CONCLUSION*

The permit is remanded. On remand, the Region must supplement the record with regard to the following two issues: 1) whether Broward's effluent is causing or contributing to, or has the reasonable potential to cause or contribute to, a violation of Florida's water quality criterion for total residual chlorine at Rule 17–302.560(13), F.A.C.; and 2) whether the test species specified in the permit are significant to the indigenous aquatic community and, if not, whether they will accurately predict how indigenous species would fare when exposed to Broward's effluent. If Broward is not satisfied with the Region's explanation on remand, Broward would then be free to renew its request for an evidentiary hearing on either or both of these issues under 40 C.F.R. § 124.74. The Region shall evaluate any such request in accordance with the same regulatory provisions applicable to the original request. If the request is denied, Broward may again file an appeal with the Board pursuant to 40 C.F.R. § 124.91.

In addition, on remand, the Region must modify the permit to allow Broward to conduct toxicity testing on effluent diluted to 30% rather than 100% full strength, pursuant to Florida's toxicity standard for open ocean discharges (Rule 17–4.244(3)(c), F.A.C.). With respect to the other issues raised in Broward's petition, review is hereby denied.

So ordered.

Concurring Opinion by Judge McCallum:

In its request for an evidentiary hearing, Broward specified the following issue for adjudication at the hearing: "[w]hether the effluent

[31] As can be seen from this Board's discussion of the issues raised in paragraphs 6.B. and 6.D., we have attempted to give meaning to those issues whenever possible by carefully scrutinizing the evidentiary hearing request as a whole. However, we decline to go beyond that into sheer speculation.

discharged by the North Regional Wastewater Treatment Facility is toxic to the marine environment to which it is discharged?" The Regional Administrator rejected this issue and denied the evidentiary hearing request because Broward failed to articulate any discernible factual or legal issue. This rationale will surely strike some as being anomalous since there is such a clear nexus between the issue raised and two of the provisions in Broward's permit, both of which are specifically devoted to protecting the marine environment from the possible toxic effects of Broward's effluent: one is paragraph 9, which restricts the total amount of residual chlorine in the facility's effluent, and the other is paragraph 12, which is a limitation on the toxicity of the facility's whole effluent without regard to the specific pollutants that make up the effluent. I write in part to address this apparent anomaly and in part because I use a somewhat different approach than the Board in deciding to deny review in this instance. The fact that Broward did not make specific reference to the two permit provisions in raising the issue is something that I regard as a mere technicality, which the Board can and should overlook in appropriate circumstances.[32]

Whether the facility's effluent is toxic to the marine environment is a straightforward factual issue, notwithstanding the Region's assertion to the contrary. The Region is plainly wrong to contend otherwise. The correct basis for dismissing Broward's toxicity issue has more to do with relevancy than with any lack of specificity or any alleged failure to articulate a discernible factual or legal issue. Fundamentally, the question of whether Broward's effluent is toxic to the marine environment has no bearing on the two permit provisions described above. They are derived from state water quality standards, which Region IV included in the permit pursuant to CWA § 301(b)(1)(C). Although these permit provisions are intended to protect the marine environment from toxic effluent, their legal status overshadows any factual inquiry raised by Broward. Specifically, these permit provisions embody requirements prescribed by state water quality standards, which, if the requirements are met, are deemed sufficient as a matter of law to protect the marine environment. Thus, for purposes of this permit determination, the only legitimate question is whether the two permit provisions are necessary

[32] Other portions of Broward's request for an evidentiary hearing, as well as its petition for review, have placed these two provisions in issue; therefore, simply because the evidentiary hearing request did not mention the toxicity issue in the same breath as paragraphs 9 and 12 of the permit is not a compelling basis for ignoring the obvious.

in the first instance,[33] and if they are, whether in crafting them the Region has correctly interpreted and applied the applicable state water quality standards. Broward's toxicity issue is not formulated to ask these questions.[34] Therefore, the issue falls outside the scope of, and is irrelevant to, the Region's permit determination.

Review of the issue is therefore properly denied.

[33] As provided in 40 C.F.R. § 122.44(d)(1), a permit limitation is "necessary" if the subject discharge will cause or contribute to, or has the reasonable potential to cause or contribute to, an excursion above a State requirement.

[34] Broward has had more success in the formulation of its other issues. For instance, as a result of Broward's petition for review and the issues raised therein, the Board has remanded paragraph 9 of the permit to the Region with directions to explain why the limitation on total residual chlorine is "necessary" to ensure compliance with State requirements in accordance with CWA § 301(b)(1)(C). *See* Part II.B., above. The Board took this action because it determined that the Region may have erred in concluding that CWA § 301(b)(1)(C) requires this permit provision to be in the permit. Consequently, until the proceedings on remand are completed, we will not know whether the limitation is in fact necessary and, therefore, whether it is required pursuant to CWA § 301(b)(1)(C). Also, in regard to paragraph 12 of the permit, the Board concluded that the Region's efforts to implement Rule 17–4.244(3) F.A.C. were misdirected in several respects. *See* Part II.D., above. The Region had erroneously mandated testing of undiluted effluent, rather than effluent diluted to 30% of full strength. This aspect of the Region's permit determination has also been remanded.