

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

In re:)
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Massachusetts Correctional)
Institution - Bridgewater) NPDES Appeal No. 00-9
)
)
NPDES Permit No. MA 0102237)

ORDER DISMISSING PETITION FOR REVIEW

In a two-page letter dated July 26, 2000 ("Petition"), the Bridgewater Correctional Complex ("Bridgewater") seeks review of the National Pollutant Discharge Elimination System ("NPDES") permit,¹ issued to it by U.S. EPA Region I ("Region") on September 28, 1998. Specifically, Bridgewater objects to the copper effluent limits set in its final permit, on the basis that "the limit of eleven (11) micrograms per liter daily maximum and eight (8) micrograms per liter monthly average is unrealistic at best." Petition at 1. Bridgewater requests that "the limit be revised to reflect more realistically the influent level of copper reduced by an amount consistent with natural reduction achieved during periods of good operation at this facility." *Id.* at 1-2.

¹Under the Clean Water Act ("CWA"), discharges into waters of the United States by point sources such as Bridgewater's wastewater treatment facility must be authorized by a permit in order to be lawful. 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. 33 U.S.C. § 1342.

As requested by the Board, the Region filed a response dated September 27, 2000. Respondent's Memorandum in Opposition to Petition for Review ("Response"). Because we conclude that the disputed permit condition is required under CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), and 40 C.F.R. § 122.44(d)(1)(iii), review is denied.

I. BACKGROUND

In August 1998, the Region prepared a draft NPDES permit for Bridgewater's facility. In the fact sheet attached to the draft permit, the Region set forth the bases of the effluent limitations and monitoring requirements set in the draft Bridgewater permit. See Response, Attachment B. The Region explained that the effluent limits for Bridgewater's facility were based on state certification requirements under CWA § 401(a)(1) and State water quality standards.² *Id.*

The CWA's statutory scheme operates to set effluent limits on two different bases. The first basis for effluent limitations is technology-based, i.e., limits are set to reflect the specified level of pollutant-reducing technology required by the

²CWA § 401(a)(1) requires that every NPDES permit contain effluent limitations in accordance with the CWA and with the water quality standards of the State in which the facility is located. See 33 U.S.C. §1341(a).

CWA for that type of facility. *Id.* § 1311(b)(1)(A) and (B). The second basis requires a permit to contain "any more stringent limitation" necessary to meet, *inter alia*, any State or Federal water quality standard or treatment standard.³ 1311(b)(1)(C). The Region cited the CWA's water quality provisions as the basis for its inclusion of limits on toxic pollutants, and attached the calculations it used to establish effluent limits for chlorine, ammonia, and whole effluent testing ("WET") in the Bridgewater draft permit. Relevant to the case presently before the Board was the absence from the draft permit of an effluent limitation for copper, which is also a toxic pollutant.

The Massachusetts Department of Environmental Protection ("MA DEP") submitted comments on the draft permit on September 15, 1998. See Response, Attachment C. Among other comments, MA DEP requested that the final permit include testing for copper. *Id.* MA DEP did not request an effluent limitation for copper,

³CWA § 302(a) requires that where discharges of pollutants, even with the application of technology-based effluent limitations, would interfere with a level of water quality that "shall assure protection of public health, public water supplies," aquatic life, and safe recreation, then effluent limitations "shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality." 33 U.S.C. § 1312(a).

only monitoring. *Id.*

In its Response to Comments, the Region stated that:

Upon review of monitoring data, EPA has determined that there is a reasonable [sic] potential to exceed instream criteria for copper. Accordingf [sic], EPA will limit the discharge of copper, in addition to monitoring of copper as required by the State. Effluent limits have been based on the acute and chronic ambient water quality criteria and the dilution factor.

See *id.*, Attachment D. On September 30, 1998, the Region issued the final permit for the Bridgewater facility, which contained an effluent limitation on copper of 8 micrograms per liter ("ug/l") average per month and an 11 ug/l maximum daily limit.

On November 6, 1998, Bridgewater requested an Evidentiary Hearing on the copper limit in its final permit. On June 30, 2000, the Region returned Bridgewater's Request for Formal Hearing without prejudice to leave to file an appeal with the Environmental Appeals Board under changes made to the NPDES permit appeals process effective June 14, 2000.⁴ See 40 C.F.R.

⁴Procedures for issuing, modifying, revoking, or terminating permits are governed generally by 40 C.F.R. pt. 124. Prior to June 14, 2000, subpart E of part 124 established an evidentiary hearing process for NPDES permits. Section 124.74 required that any person challenging a final NPDES permit submit a request to the Regional Administrator for an evidentiary hearing within 30 days of service of the notice. 40 C.F.R. § 124.74(a) (1999). Only after a decision or denial of request for an evidentiary hearing was it possible to appeal an NPDES permit to the

§ 124.21(c)(3), 65 Fed. Reg. 30,886-30,918 (May 15, 2000).
Bridgewater's Petition was filed with the Board on August 8, 2000.

Bridgewater's Petition does not challenge the Region's method for determining Bridgewater's copper limit, nor does it challenge the Region's determination that Bridgewater's discharge has a reasonable potential to violate Massachusetts Water Quality Standards. Petition at 1. In fact, Bridgewater states in its Petition that "[t]his limit, no doubt, was based upon calculations using the 7Q10 flow for the discharge stream of this facility * * *, a valid method for determining pollutant limits." *Id.* Bridgewater's only challenge to the final permit is that, since the limit does not reflect the presence of copper in the facility's influent and piping or the facility's lack of control

Environmental Appeals Board. *Id.* § 124.91. On May 15, 2000, EPA promulgated substantial changes to the permit review process. See 65 Fed. Reg. 30,887 (May 15, 2000). Included in these changes was the elimination of the formal evidentiary hearing procedures for NPDES permit. *Id.* at 30,896. Under current procedures, persons appealing an NPDES permit condition may now file a petition directly with the EAB within 30 days after the issuance of a final NPDES permit. 65 Fed. Reg. at 30,911 (2000)(to be codified at 40 C.F.R. § 124.19(a)).

technology for copper reduction, the actual discharge limit should be raised to reflect "more realistically the influent level of copper reduced by an amount consistent with natural reduction achieved during periods of good operation * * *." *Id.* As support for its request, Bridgewater points out that quarterly whole effluent toxicity ("WET") tests -- which measure the overall toxicity of the facility's effluent -- indicate that there is no effect on aquatic life from the facility's discharge, and that "a limit nearer to 30 micrograms per liter [for copper] would be more reasonable."⁵ *Id.* at 2.

The Region points out in its Response that its decision to establish copper effluent limits in Bridgewater's permit was based on its finding that the facility had "a 'reasonable potential to exceed instream criteria for copper,'" and that pursuant to CWA § 301(b)(1)(C), it is "required to include in NPDES permits any limitations 'necessary to meet' [Massachusetts Surface Water Quality Standards]." Response at 2. In response to Bridgewater's assertion that its WET tests demonstrate that

⁵We do not view Bridgewater's point about WET test results as a separate argument as to why its copper limits should be relaxed. Rather, we view Petitioner's point as further support for its argument that its copper limit should be raised due to Petitioner's lack of treatment technology; i.e., that no harm will result from raising the limit.

its discharge for copper is not harmful, the Region explains that while it may have discretion not to place WET testing requirements in a permit, it has no discretion with regard to water quality-based individual pollutant parameter limitations, which must be included by law once the finding of a reasonable potential to violate a water quality standard is made.⁶ *Id.* at 5. The Region concludes that since it is required under 40 C.F.R. § 122.44(d)(1)(iii) to set individual pollutant limits whenever it concludes that a facility's discharge has a reasonable potential to exceed the water quality criteria for that individual pollutant, and since Bridgewater has not challenged the Region's determination that Bridgewater's discharge has the reasonable potential to exceed the Massachusetts Water Quality Standards for copper, Bridgewater's Petition should be denied. *Id.*

II. DISCUSSION

Under the rules governing an NPDES permit proceeding, there

⁶Additionally, the Region explains that toxicity testing has limitations in terms of demonstrating the effects of certain pollutants upon the aquatic life of the receiving waters, and it is for this reason that EPA, rather than relying entirely on toxicity testing, has adopted a multi-pronged approach to determining whether and to what extent a given pollutant should be regulated. Response at 6.

is no appeal as of right from the Regional Administrator's decision. *In re City of Port St. Joe*, 7 E.A.D. 275, 282 (EAB 1997); *In re Florida Pulp and Paper Ass'n*, 6 E.A.D. 49, 51 (EAB 1995). Ordinarily, a petition for review is not granted unless the Region's decision is clearly erroneous or involves an exercise of discretion or policy that is important and should therefore be reviewed by the Board. 40 C.F.R. § 124.19(a).

"While the Board has broad power to review decisions in NPDES permit cases, the Agency intended this power to be exercised 'only sparingly.'" 44 Fed. Reg. 32,887 (June 7, 1979); *City of Port St. Joe*, at 282. Agency policy favors final adjudication of most permits at the Regional level. *Id.*; see also *In re J & L Specialty Products Corp.*, 5 E.A.D. 31, 41 (EAB 1994); *In re Broward County*, 4 E.A.D. 705, 708-09 (EAB 1993). Furthermore, on appeal to the Board, a petitioner has the burden of demonstrating that review should be granted. 40 C.F.R. § 124.19(a); see also *City of Port St. Joe*, 7 E.A.D. at 283; *In re Ketchikan Pulp Co.*, 6 E.A.D. 675, 679 (EAB 1996).

Because Bridgewater does not challenge either the Region's determination that its copper discharge has the reasonable potential to violate Massachusetts Water Quality Standards or the

methodology used to calculate the permit limits, the sole issue before the Board is whether the Region erred in its inclusion of copper effluent limitations in Bridgewater's permit without adjusting these limits to take into account the technological capacity of its facility to meet them.

In setting permit limits, EPA is required under CWA § 301(b)(1)(C) to set permit limitations necessary to meet water quality standards, even if those limits are more stringent than those required under technology-based effluent limits. 33 U.S.C. § 1311(b)(1)(C). Regulations pertaining to this provision make it clear that whenever EPA determines that a facility has a reasonable potential to violate State water quality standards as to an individual pollutant that "the permit must contain effluent limits for that pollutant." 40 C.F.R. § 122.44(d)(1)(iii). See also *In re Broward County, Florida*, 6 E.A.D. 535, 543 (EAB 1996); *In re City of Ames, Iowa*, 6 E.A.D. 374, 379-380 (EAB 1996); *EPA v. California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 219 (1976). Because the Region determined that Bridgewater had a reasonable potential to violate the Massachusetts Water Quality Standard for copper, it was obligated to set limits on Bridgewater's copper discharge that would prevent the facility

from exceeding that standard.⁷

Additionally, it is well-settled law that technological considerations are not a factor in setting water quality-based effluent limits. *See, e.g., In re J&L Specialty Products Corp.*, 5 E.A.D. 31, 48 (EAB 1994)(Region not authorized under CWA to grant variances from water quality-based limitations because of lack of technical feasibility); *In re Goodyear Aerospace Corp.*, 2 E.A.D. 919, 920 (CJO 1989)(Region has no discretion to alter water quality-based effluent limitations even if such limits are not technologically achievable); *United States Steel Corp. v. Train* 556 F.2d 822, 838 (7th Cir. 1977)(states are free to set water quality standards that force technology); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999)(EPA obligated to set water quality standards without regard to

⁷Whether or not Bridgewater's WET tests indicate compliance with Massachusetts Water Quality Standards for toxicity is essentially irrelevant. The law clearly requires the Region to set effluent limitations for any individual pollutant that "has the reasonable potential to cause" a water quality violation. 40 C.F.R. § 122.44(d)(1)(iii). As we have already established, Petitioner does not challenge the Region's determination of the potential for such a violation. In addition, as the Region points out, while WET tests measure the overall toxicity of a discharge, there are limitations to the test that may not account for all of the potential harms that may be caused by the facility's copper discharge. *See* Response at 6, Attachment F.

practicability); 426 U.S. 200, 219, *Cf. Union Electric Co. v. EPA*, 427 U.S. 246, 264 (1976) (Clean Air Act Amendments of 1970 were "technology forcing" and "[w]here Congress intended the Administrator to be concerned about economic and technological infeasibility, it expressly so provided.") In *City of Fayetteville*, 2 E.A.D. 594 (CJO 1988), the Chief Judicial Officer stated that the meaning of the language of section 1311(b)(1)(C) was "plain and straightforward. It requires unequivocal compliance with applicable water quality standards, and does not make any exceptions for cost or technological feasibility." *Id.* at 600-601. Thus, not only was it not error for the Region to set Bridgewater's copper discharge limit without regard to its technological capacity, the Region was obligated to do so by law. Bridgewater's request to set a higher limit due to technological limitations is therefore without legal support.

III. CONCLUSION

In sum, we find that Bridgewater has failed to show that the Region has committed clear error or an abuse of discretion in setting the copper discharge limitations in the permit. Bridgewater's petition for review is therefore denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 10/16/00

By: _____ /s/
Edward E. Reich
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Petition for Review in the matter of Massachusetts Correctional Institution - Bridgewater, NPDES Appeal No. 00-9, were sent to the following persons in the manner indicated:

By U.S. Mail:

Jeffry Fowley
Senior Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, New England, Region
1 Congress Street, Suite 1100 (RAA)
Boston, MA 02114-2023

Leo DuBois, Plant Manager
Water Pollution Control Facility
MCI-Bridgewater Correctional Complex
15 Administration Road
Bridgewater, MA 02324

Linda M. Murphy, Director
Office of Ecosystem Protection
U.S. EPA, Region I
1 Congress Street, Suite 1100
Boston, MA 02114-2023

Date: 10/16/00

_____/s/_____
Annette Duncan
Secretary