

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

_____)	
In re:)	
)	
Town of Hudson)	
Massachusetts)	
)	NPDES Appeal No. 01-03
)	
NPDES Permit No. MA 0101788)	
_____)	

ORDER DENYING PETITION FOR REVIEW

I. INTRODUCTION

In a petition dated January 11, 2001 ("Petition"), the Town of Hudson, Massachusetts ("Hudson") seeks review of a National Pollutant Discharge Elimination System ("NPDES") final permit decision made by U.S. EPA Region I ("Region") on December 14, 2000. The NPDES permit¹ ("Final Permit") authorized Hudson to continue to discharge wastewater to the Assabet River.

¹Under the Clean Water Act ("CWA"), discharges into waters of the United States by point sources such as Hudson's wastewater treatment facility must be authorized by a permit to be lawful. See CWA § 301, 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. 33 U.S.C. § 1342.

Hudson objects to the copper effluent limitations established in the Final Permit on the basis that it would be unable to meet the limitations on a consistent basis without prohibitively expensive process changes to its wastewater treatment plant. See Petition at 1-2.

II. FACTUAL AND PROCEDURAL BACKGROUND

Hudson owns and operates a wastewater treatment facility in Hudson, Massachusetts, which collects and treats domestic and industrial wastewater and septage, and discharges into the Assabet River.

On July 20, 2000, the Region issued for public comment a Fact Sheet and draft permit for Hudson's discharges. See Response Exhibits ("R Ex") A and C. The draft permit contained copper effluent limitations of 18 and 26 micrograms per liter ("µg/l") for monthly average and daily maximum, respectively. R Ex C at 3. According to the Fact Sheet, these copper effluent limitations were established because "[t]he past two years [discharge monitoring reports] have shown effluent copper levels

averaging 42 :g/l. Thus, there is a potential for instream water quality violations for copper[.]” R Ex A at 7.

Hudson submitted comments on the draft permit, in which, among other things, it raised the issue of its inability to meet the copper effluent limitations. See R Ex E at 1. On December 18, 2000, the Region issued the Final Permit, as well as its Response to Public Comments document. See R Ex B; G. The Final Permit contained the same copper effluent limitations as the draft permit. Compare R Ex C at 7 with R Ex B at 3. In its Response to Public Comments, the Region explained that the copper effluent limitations were “calculated based on water quality criteria for total copper and the available dilution to the effluent under estimated 7Q10 flow conditions.” R Ex G at 2.

Hudson filed a petition for review on January 19, 2001. The Region filed its response on March 13, 2001 (“Response”).

III. DISCUSSION

A. Standard of Review

The burden of demonstrating that review of the Regional Administrator's decision is warranted rests with the petitioner. See 40 C.F.R. § 124.19(a); see also *In re Massachusetts Correctional Institution - Bridgewater*, NPDES Appeal No. 00-9, at 8 (October 16, 2000); *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 10 (EAB, Feb. 23, 2001), 9 E.A.D. ____; *In re New England Plating Co.*, NPDES Appeal No. 007, slip op. at 7 (EAB, Mar. 29, 2001), 9 E.A.D. _____. A petitioner must state his or her objections to the permit and demonstrate that the permit condition(s) in question is based on "(1) A finding of fact or conclusion of law which is clearly erroneous, or (2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review." 40 C.F.R. § 124.19(a).

B. Technological Infeasibility

As previously stated, Hudson contests the copper effluent limitations established in the Permit because "without 'prohibitively expensive' process changes at the wastewater treatment plant * * * there [is] no practicable measures the Town

could implement which would result in compliance with the permit's effluent limitations for copper." Petition at 1-2. While Hudson does not specifically categorize this argument as raising an issue of technological feasibility, it can be construed as such, for it refers to the need to undergo major modifications in order for the wastewater treatment plant to achieve compliance.

Hudson does not challenge the Region's determination that its copper discharge has the reasonable potential to violate Massachusetts water quality standards. Nor does Hudson challenge the methodology used in calculating the permit limits.²

In setting NPDES permit limits, the Agency is required under CWA § 301(b)(1)(C) to set effluent 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

²Apparently discussions between the Region and Hudson have occurred concerning the flow limit, with the possibility of more stringent effluent limitations based on a lower dilution ratio. Response at 5 n.2. That issue is not before us.

reasonable potential to violate state water quality standards as to an individual pollutant, "the permit must contain effluent limits for that pollutant." 40 C.F.R. §122.44(d)(1)(iii). See also *In re Massachusetts Corr. Inst. - Bridgewater*, NPDES Appeal 00-9, at 9 (October 16, 2000); *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 Res. Control Bd.*, 426 U.S. 200, 219 (1976).

Because the Region determined that Hudson had a reasonable potential to violate the Massachusetts Water Quality Standards for copper, it was obligated by law to set limits on Hudson's discharges of this pollutant to prevent the facility from exceeding those standards.

In addition, it is settled law that cost and technological considerations are not a factor in setting water quality-based effluent limits. See, e.g. *In re Town of Hopedale*, NPDES Appeal No. 00-04, at 24 (EAB, Feb. 13, 2001) ("[T]he legal standard is that technological considerations are not a factor in setting water quality-based effluent limits"); *Bridgewater*, NPDES Appeal

00-9, at 9 (EAB, Oct. 16, 2000) ("Not only was it not error for the Region to set the permittee's copper discharge limit without regard to its technological capacity, the Region was obligated to do so by law"); *In re City of Fayetteville*, 2 E.A.D. 594, 600-01 (CJO 1988) ("The meaning of [CWA § 301(b)(1)(c)] is plain and straightforward. It requires unequivocal compliance with applicable water quality standards, and does not make any exceptions for cost or technological feasibility"); *In re Goodyear Aerospace Corp.*, 2 E.A.D. 919, 920 (CJO 1989) (holding that the Region has no discretion to alter water quality-based effluent limitations even if such limits are not technologically achievable); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999) (EPA obligated to "require that effluent control which is needed to implement existing water quality standards without regard to the limits of practicability"); *United States Steel Corp. v. Train*, 556 F.2d 822, 838 (7th Cir. 1977) (holding that States are free to set water quality standards that force technology).

Thus, the Region complied with the CWA § 1311(b)(1)(C) and 40 C.F.R. §122.44(d)(1)(iii) by setting Hudson's copper discharge limits without regard to Hudson's technological capacity and

costs.³

III. CONCLUSION

For the foregoing reasons, Hudson's petition for review is hereby denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 04/18/01

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

³The Region states in its Response that it "has a program in place in which the Region works with Publicly Owned Treatment Works to address in a reasonable manner the task of meeting permit limits for toxic metals in low dilution streams. The program is implemented through the issuance of Administrative Compliance Orders * * *. EPA is prepared to discuss with the Town issuance of a new Administrative Compliance Order which would establish a reasonable but expeditious schedule of activities for the Town to undertake in order to achieve compliance with the permit limits." Response at 6 n.3.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Review in the matter of the Town of Hudson, Massachusetts, NPDES Appeal No. 01-03, were sent to the following persons in the manner indicated:

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Dated: 04/18/01

_____/s/_____
Annette Duncan
Secretary