# IN THE MATTER OF CITY OF JACKSONVILLE, DISTRICT II WASTEWATER TREATMENT PLANT

NPDES Appeal No. 91–19

***ORDER DENYING REVIEW***

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Decided August 4, 1992

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Syllabus

The City of Jacksonville (Florida) seeks review of U.S. EPA Region IV's denial of an evidentiary hearing request on the biomonitoring conditions in a proposed final NPDES permit for the City's District II Wastewater Treatment Plant, a publicly owned treatment works. The biomonitoring conditions were included in the permit to ensure compliance with Florida's narrative whole effluent toxicity standard at Rule 17–302.500, F.A.C. and with Florida's numerical whole effluent toxicity standard for mixing zones at Rule 17–4.244(3)(a). The permit provides that any excursion of the effluent over the permit's whole effluent toxicity limits will constitute an enforceable violation of the permit. The City seeks review of the denial of its request for an evidentiary hearing on the propriety of this "single excursion" requirement.

Held: The City's evidentiary hearing request did not raise a genuine issue of material fact. The Regional Administrator, therefore, properly denied an evidentiary hearing request on the issue. In addition, we conclude that, as a matter of law, the Region properly included the "single excursion" requirement in the permit. Review of the City's petition is therefore denied.

***Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich. Environmental Appeals Judge Nancy B. Firestone did not participate in this Decision.***

***Opinion of the Board by Judge McCallum:***

The City of Jacksonville (the "City") seeks review of U.S. EPA Region IV's denial of an evidentiary hearing request on certain provisions in a proposed final NPDES permit for the City's District II Wastewater Treatment Plant, a publicly owned treatment works (POTW). The permit contains biomonitoring conditions that set whole effluent toxicity limits and require the petitioner to conduct periodic tests in which two aquatic species are exposed to the facility's discharge to detect acute toxicity. The biomonitoring conditions were included in the permit to ensure compliance with Florida's narrative

whole effluent toxicity standard at Rule 17–302.500, F.A.C. and with Florida's numerical whole effluent toxicity standard at Rule 17–4.244(3)(a). The permit provides that any excursion of the effluent beyond the whole effluent toxicity limits will constitute an enforceable violation of the permit. The City now seeks review of the denial of its request for an evidentiary hearing on the propriety of this "single excursion" requirement. As requested by the Agency's Chief Judicial Officer, the Region filed a response to the City's petition for review.[1] For the reasons set forth below, we conclude that the City's evidentiary hearing request did not raise a genuine issue of material fact and that the Regional Administrator, therefore, properly denied an evidentiary hearing request on the issue. In addition, we conclude that, as a matter of law, the Region properly included the "single excursion" requirement in the permit. Review of the City's petition is therefore denied.

## I. *BACKGROUND*

The POTW whose permit is at issue is a 10.0 MGD conventional mix wastewater treatment facility with discharge of reclaimed water to the St. John's River. On July 31, 1989, the Region issued a draft permit for the facility, which provided that "biomonitoring requirements for this facility are being reserved pending a meeting between the permittee and EPA." On August 21, 1989, a revised permit was issued containing the permit conditions at issue in this appeal. On September 21, 1989, the City commented on the revised language, objecting to the biomonitoring provisions and stating as follows:

> The City cannot accept any provision in which a single violation of a biomonitoring test will constituent [sic] a violation of the NPDES permit. Therefore, the City strongly objects to any such inclusion.

Letter dated September 21, 1989, from Charles L. Logue, City of Jacksonville, to Diane Brown, Environmental Protection Agency (Petition for Review, Exhibit 6).

On September 25, 1989, the State of Florida issued its certification of the revised permit, including the biomonitoring provisions

[1] At that time, the Agency's Judicial Officers held delegated authority to decide NPDES permit appeals. Subsequently, effective on March 1, 1992, the position of Judicial Officer was abolished, and all cases pending before the Judicial Officers, including this case, were transferred to the Environmental Appeals Board. *See* 57 Fed. Reg. 5321 (Feb. 13, 1992).

for outfall 001 of the POTW. In the certification letter, the State makes the following statement:

> The Department has the following more stringent limitations at outfall 001 than the draft NPDES permit. The State permit requires that the Total Residual Chlorine limit of 0.01 mg/l be achieved by March 14, 1991.

Petition for Review, Exhibit 7. The certification letter states that the permit, with the addition described in the quotation above, will be in compliance with State requirements.

On September 27, 1989, the Region issued the final permit, with the challenged biomonitoring language. On November 1, 1989, the City filed a request for an evidentiary hearing. Among the issues raised in the request was the following:

> Whether it is appropriate to impose the permit limitation of toxicity testing and the single failure as a violation subject to full enforcement in light of the recognized variability in toxicity testing.

Petition for Review, Exhibit 9. The evidentiary hearing request was denied in its entirety, and the City appealed only the denial of the "single excursion" issue.

## II. *DISCUSSION*

Under the rules governing this proceeding, there is no appeal as of right from the Regional Administrator's decision. 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 therefore be reviewed by the Administrator. *See, e.g., IT Corporation (Ascension Parish Louisiana),* NPDES Appeal No. 83–2 (July 21, 1983); 44 Fed. Reg. 32887 (June 7, 1979) (Preamble to 40 CFR Part 124). The petitioner has the burden of demonstrating that review should be granted. *See* 40 CFR § 124.91(a).

Florida has a narrative whole effluent toxicity standard, which provides as follows:

> All surface waters of the State shall at all places and at all times be free from:

> (1) * * * discharges which, alone or in combination with other substances or in combination with other components of discharges * * *:
>
> * * * * * * *
>
> (d) Are acutely toxic * * *[2]

Rule 17–302.500, F.A.C. (formerly Rule 17–3.051, F.A.C.). Florida also has a numerical whole effluent toxicity standard applicable to mixing zones,[3] which provides as follows:

> (a) Waters within mixing zones shall not be degraded below the minimum standards prescribed for all waters at all times in Rule 17–3.051, F.A.C. In determining compliance with the provisions of 17–3.051(1), F.A.C., the average concentration of the wastes in the mixing zone shall be measured or computed using scientific techniques approved by the Department; provided that, the 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. LC50) for a species significant to the

[2] Acute toxicity is defined in the Florida Administrative Code as follows:

> (1) "Acute Toxicity" shall mean the presence of one or more substances or characteristics or components of substances in amounts which:
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> (a) are greater than one-third (⅓) of the amount lethal to 50% of the test organisms in 96 hours (96-hr LC50) where the 96-hr LC50 is the lowest value which has been determined for a species significant to the indigenous aquatic community; or
>
> (b) may reasonably be expected, based upon evaluation by generally accepted scientific methods, to produce effects equal to those of the concentration of the substance specified in (a) above.

Rule 17–302.200, F.A.C.

[3] Paragraph (1)(a) of Rule 17–4.244, F.A.C., describes mixing zones as follows:

> The Department may allow the water quality adjacent to a point of discharge to be degraded to the extent that only the minimum conditions described in subsection 17–3.051(1), Florida Administrative Code, apply within a limited, defined region known as the mixing zone. Under the circumstances defined elsewhere in this section, a mixing zone may be allowed to provide an opportunity for mixing and thus to reduce the costs of treatment. However, no mixing zone or combination of mixing zones shall be allowed to significantly impair any of the designated uses of the receiving body of water.

> indigenous aquatic community, except as provided in paragraph (b) or (c) below.

Rule 17–4.244(3)(a), F.A.C.

Under CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), an NPDES permit for a POTW is required to contain, in addition to secondary treatment requirements, any more stringent limitations necessary to ensure compliance with State water quality standards. In this case, the Region concluded that permit limitations would be necessary to ensure compliance with the above-quoted Florida water quality standards because, out of ten biomonitoring tests conducted on the effluent of the City's facility from October of 1985 to March of 1988, six tests demonstrated toxicity in the effluent. Region's Response to Petition for Review, at 3–4.[4] To ensure compliance with the above-quoted Florida standards, therefore, the Region devised the following limitations, or test procedures, for inclusion in the permit:

> The effluent (100%) shall not be lethal to more than 50% of appropriate test organisms. The testing for this requirement must conform with Part IV of this permit. *Lethality to more than 50% of the test organisms in a test of 48 hours duration will constitute a violation of Florida Administrative Code Section 17–4.244(4) and the terms of this permit.*

Permit, Part I(A)(9) (emphasis added).[5]

> *If lethality (less than 50% survival of test organisms in 100% effluent) is found in any test of final effluent, this will constitute a violation of this permit.* The permittee will then be subject to the enforcement provisions of the Clean Water Act. In the event a violation of toxicity limits results in an enforcement action, any different or more stringent monitoring requirements imposed in that enforcement action shall apply in lieu of the requirements of this permit

[4] The City does not dispute the Region's conclusion that some permit limitation is necessary to ensure compliance with Rule 17–4.244(3)(a).

[5] The quotation accompanying this footnote refers to Rule 17–4.244(4), F.A.C. Since the draft permit was sent out for public comment, Rule 17–4.244 has been amended, so that the provision cited in the permit now appears in slightly amended form at Rule 17–4.244(3)(a), F.A.C., which is the Florida provision the parties have referred to in their briefs. Thus, the permit's reference to Rule 17–4.244(4) appears to be in error.

> condition for whatever period of time is specified by EPA in the enforcement action.

Permit, Part IV(2) (emphasis added).

Despite the fact that the toxicity testing procedures in the above quoted provisions differ in certain obvious respects from the toxicity standard itself (for example, the duration of the permit procedure is set at 48 hours, whereas the standard calls for a 96-hour duration), the City nowhere claims that the testing procedures in the permit do not appropriately implement the Florida toxicity standard. Rather, the City says that the "single excursion" requirement is inappropriate because there is "variability in the test results." Petition for Review, at 7.[6] It is not clear, however, what the City means by "variability in the test results," since the City also expressly acknowledges that it is not "challenging the reliability of the toxicity testing procedures." *Id.* It is difficult to see why variability of test results would be a problem if the reliability of the testing procedures is unaffected.[7] At any rate, what is clear is that the City believes that a determination of non-compliance should only be made on the basis of more than one failed toxicity test. That position must be rejected as a matter of law. Rule 17–4.244(3)(a), F.A.C. provides that the maximum concentration of wastes in the mixing zone shall not fail the toxicity test specified in the standard. Nothing in the language of the standard suggests that a particular waste concentration may fail an otherwise applicable toxicity test one or more times without violating the standard. The City has not offered any reasonable basis for reading such an exception into the Florida standard. This conclusion is no less reasonable in light of the City's assertions about the variability of test results. The State of Florida obviously believed that toxicity testing has an acceptable range of variability, and that is what is determinative. Under CWA § 301(b)(1)(C), the Region is without authority to inquire into the scientific basis of a State's water quality

[6] The City contends that "other water quality parameter limitations included in an NPDES permit are stated in tiered increments which reflect the inherent variability [of those parameters]." Petition for Review, at 6. The City, however, neither explains what it means by "tiered increments," nor specifically identifies the other limitations to which it refers, nor explains why the biomonitoring conditions in the permit should be treated in a similar fashion.

[7] EPA's Technical Support Document for Water Quality-Based Toxics Control, at 11 (March 1991) acknowledges that "toxicity test procedures exhibit variability," but it nevertheless concludes that toxicity testing, when performed properly, is reliable enough to evaluate compliance with a permit. The Technical Support Document cites studies in support of this conclusion.

standard. *See In re Miami-Dade Water and Sewer Authority Department,* NPDES Appeal No. 91–14, at 12 (EAB, July 27, 1992).

The City also argues that the "single excursion" requirement is inappropriate because of variability in the toxicity of the effluent. We assume that, by variability in the toxicity of the effluent, the City means that at one time the effluent might be acutely toxic and at another time it might not be. Assuming that the City is right, we fail to see the significance of such variability. Both of the Florida toxicity standards under review here provide that surface waters of the State shall be free from acutely toxic discharges "at all times." Rule 17–302.500, F.A.C. (formerly 17–3.051, F.A.C.) and Rule 17–4.244(3)(a), F.A.C. To determine compliance with Florida's toxicity standards, therefore, the only relevant question (assuming the test is performed properly) is whether the concentration of wastes in the mixing zone exceeded the amount lethal to 50% of the test organisms in 96 hours for a species significant to the indigenous aquatic community. If the concentration did exceed that amount even for a short time, then a violation of the toxicity standards occurred. It is irrelevant that the toxicity of the effluent, in a later test, might not exceed that amount. As the Region points out:

> It is not possible to verify results with a subsequent biomonitoring test whether a new sample or a split sample which has been stored (and therefore contains fewer volatiles) is used. For this reason, any additional monitoring merely establishes continuing compliance status, not verification of the original violation.

Region's Response at 13. Under 40 CFR § 122.41(a), one violation of any condition of a permit, including whole effluent toxicity limitations, constitutes a violation of the permit and is subject to enforcement.[8]

Finally, the City argues that the State of Florida has interpreted its toxicity standards as being less stringent than the Region has interpreted them to be. In support of this assertion, the City cites a letter dated March 3, 1989, from the Northeast District (the "Dis-

[8] 40 CFR § 122.41(a) provides as follows:

> *Duty to Comply.* The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or denial of a permit renewal application.

trict") of the Florida Department of Environmental Regulation (the "Department") to Patrick T. Karney, P.E., of the City's Water Services Division. The letter reads in pertinent part as follows:

> This will respond to your March 2 request for information about the District policy on bioassays.
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> The District does not consider the first failed bioassay a violation, but does require that a second bioassay be done within a reasonable period of time.
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> A second, confirming failed bioassay is considered an enforceable violation. The facility is then required to do a toxic study to identify the toxics, and develop strategies for removal or treatment of the agents prior to discharge.

Petition for Review, Exhibit 2.

We are not persuaded that the position expressed in the foregoing letter represents the State's interpretation of its toxicity standards. First, we note that the letter refers to "the District policy," suggesting that the letter does not necessarily reflect the position of the entire Florida Department of Environmental Regulation. Second, we note that in the letter, the District refers to its position as a "policy," and not as an "interpretation" of the Florida toxicity standards. In fact, the letter does not even mention or cite those standards. Thus, there is nothing in the letter to suggest that the District believes its "policy" is dictated by the language of the regulations. In light of these considerations, we are of the view that the position expressed in the District's letter reflects an exercise of prosecutorial discretion rather than an interpretation dictated by the language of Florida's toxicity standards. For a reason not identified in the letter, the District has chosen as a matter of prosecutorial discretion not to view the first failed bioassay as a violation. Unlike the District, however, the Region has no discretion to relax the requirements of a State water quality standard when it writes a permit. *See* CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

Even if the position expressed in the letter cited by the City had also been expressed in the State's certification letter, the result would be the same. The Region's duty under CWA § 401 to defer to considerations of State law is intended to prevent EPA from *relaxing* any requirements, limitations, or conditions imposed by State law. *See In re Pratt & Whitney Aircraft Group, United Technologies*

*Corporation,* NPDES Appeal No. 81–2, at 15–22 (March 18, 1983). When the Region reasonably believes that a state water quality standard requires a more stringent permit limitation than specified by the State, the Region has an independent duty under CWA § 301(b)(1)(C) to include the more stringent permit limitation. *Id; see also In re Ina Road Water Pollution Control Facility,* NPDES Appeal No. 81–2 (November 6, 1985). In this case, we agree with the Region's conclusion that the "single excursion" requirement of the permit is necessary to ensure compliance with Florida's toxicity standards. We conclude, therefore, that despite the letter cited by the City, the Region has an obligation under CWA § 301(b)(1)(C) to include the "single excursion" requirement in the permit.[9]

For all the foregoing reasons, we conclude that the resolution of the issue raised in the City's evidentiary hearing request turns on the interpretation of a statute and is therefore a legal issue involving no genuine issues of material fact. We conclude, therefore, that the Regional Administrator properly denied an evidentiary hearing request on the issue. *See* 40 CFR § 124.74(b)(1) (Regional Administrator required to deny evidentiary request that contains legal issues but no factual issues). We also conclude as a matter of law that the "single excursion" requirement in the permit is dictated by the language of Rule 17–4.244(3)(a). Accordingly, review of the City's petition is hereby denied.

So ordered.

[9] If the Department believes that the Florida toxicity provisions at issue here are too stringent, it should take whatever steps are necessary and appropriate to have the provisions amended.