IN RE CITY OF HAVERHILL, WASTEWATER DIVISION

NPDES Appeal No. 92-29

ORDER DENYING REVIEW

Decided April 14, 1994

Syllabus

U.S. EPA Region I issued an NPDES permit to the City of Haverhill, Massachusetts for the City's POTW. The permit requires, in pertinent part, that "combined sewer overflows must not cause violations of State Water Quality Standards." The City requested an evidentiary hearing on whether the permit should provide a schedule of compliance that would give the City a reasonable amount of time to bring itself into compliance with State water quality standards in the event that combined sewer overflows are found to be causing violations of those standards. The Regional Administrator denied Haverhill's evidentiary hearing request, stating that EPA may not authorize violations of a State's water quality standards and citing the Agency's decision in *In re Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5 (Adm'r, April 16, 1990)(Order on Petition for Reconsideration). The City then filed a petition for review challenging the Regional Administrator's decision.

Held: The Regional Administrator correctly denied the evidentiary hearing request since, as a matter of law, the schedule of compliance sought by the City may not be included in the permit. There are two reasons for this. First, because the City in effect is challenging a permit condition that is "attributable to State certification," the Agency may not entertain the City's challenge. Second, even if the Agency could entertain such a challenge, the result would be the same, because the City has not pointed to a State statute or regulation that would authorize the schedule of compliance sought by the City. Accordingly, review of the City's petition is denied.

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

Opinion of the Board by Judge Firestone:

The City of Haverhill ("the City") appeals the decision of the Regional Administrator of U.S. EPA Region I denying the City's request for an evidentiary hearing in connection with the City's National Pollutant Discharge Elimination System ("NPDES") permit for its publicly owned treatment works ("POTW") in Haverhill, Massachusetts. The permit requires, in pertinent part, that "combined sewer overflows must not cause violations of State Water Quality Standards." Final Permit at 6, Exhibit A, Notice of Appeal and Petition for Review. In its

evidentiary hearing request, the City sought a schedule of compliance for bringing itself into compliance with State water quality standards in the event that combined sewer overflows are found to be causing violations of those standards. The Regional Administrator denied Haverhill's evidentiary hearing request, stating that EPA may not authorize violations of a State's water quality standards and citing the Agency's decision in *In re Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5 (Adm'r, April 16, 1990)(Order on Petition for Reconsideration).[1] For the reasons set forth below, we conclude that the Regional Administrator's decision was not clearly erroneous and does not involve any important policy issues that the Board should review. Accordingly, we are denying review of the petition.[2]

I. *BACKGROUND*

Under the final permit, the City is authorized, during wet weather, to discharge stormwater combined with wastewater from combined sewer outfalls. Final Permit at 6, Exhibit A, Notice of Appeal and Petition for Review. These discharges are called "combined sewer overflows."[3] To regulate these discharges, the final permit establishes effluent limitations, monitoring requirements and best management practices. As Best Practicable Control Technology Currently Available ("BPT"), Best Conventional Pollutant Control Technology ("BCT"), and Best Available Technology Economically Achievable ("BAT"), the final permit requires that "discharges shall receive treatment at a level * * * no more stringent than that required to meet water quality standards * * *." *Id.* The permit also requires that: "Combined Sewer Overflows must not cause violations of State Water Quality Standards." *Id.*

---

[1] Letter from Julie Belaga, Regional Administrator, to William J. Pauk, P.E., Superintendent (October 16, 1992), Exhibit C, Notice of Appeal and Petition for Review.

[2] The City's petition raised two other issues, relating to the definition of "wet weather" and to residual chlorine, but the Environmental Appeals Board dismissed those two issues without prejudice in response to a joint motion of the parties requesting such dismissal.

[3] A helpful description of "combined sewer overflows" can be found in the Massachusetts Water Quality Standards Implementation Policy for the Abatement of Pollution from Combined Sewer Overflows, as follows:

> Combined sewers are collection systems that convey both sanitary sewage and stormwater runoff. These collection systems are designed to convey dry weather flows, and those portions of wet weather flows, which do not exceed the capacity of the downstream interceptors or wastewater treatment facilities. Regulation devices allow excess flows to overflow to an adjacent waterbody; these are considered combined sewer overflows (CSO's).

Id. at 1, Exhibit E, Notice of Appeal and Petition for Review.

The CSO-related provisions described above were contained in the draft permit. In its letter certifying the draft permit, the State wrote that: "None of the conditions of the permit may be made less stringent without violating the requirements of the State Act and the Massachusetts Water Quality Standards."[4]

In its comments on the CSO-related provisions in the draft permit, the City wrote:

> The City requests that treatment not be required until it is determined that a violation of water quality standards is caused by Haverhill's combined sewer overflows. If a violation is so determined, then treatment should not be required until the City has been given sufficient time to study the problem and implement appropriate measures.

Letter from James G. Ward to Region I (June 8, 1990), Attachment B, Respondent's Memorandum in Opposition to Petition for Review. In its response to comments, the Region stated that it was unable to give an "implementation schedule" for achieving BPT, BCT, and BAT because the statutory deadline for achieving those levels had passed, but it offered to deal with the implementation schedule in "an Administrative Order that may be issued after the issuance of the permit." Region's Response to Comments at 3, Exhibit A, Notice of Appeal and Petition for Review.

In its request for an evidentiary hearing, the City repeated its request for a schedule of compliance, asking that the following language be inserted into the permit:

> If after review of twelve (12) months monitoring data, violation of the state water quality standards are determined to be caused by the Permittee's Combined Sewer Overflows, the Permittee shall be given a reasonable amount of time to plan, design and implement system modification.

---

[4] Letter from Brian Donahoe, Director, Division of Water Pollution Control, Massachusetts Department of Environmental Protection, to Edward K. McSweeney, Chief, Wastewater Management, U.S. EPA Region I (September 20, 1990), Attachment C, Respondent's Memorandum in Opposition to Petition for Review.

Request for Formal Evidentiary Hearing and for Permit Modification at 11, Exhibit B, Notice of Appeal and Petition for Review. The Regional Administrator denied the request, giving as a basis for denial the following explanation:

> Section 301(b)(1)(C) of the Clean Water Act, 33 U.S.C. § 1311(b)(1)(C), imposes a 1977 deadline by which all discharges must effluent limits necessary to achieve water quality standards. The Clean Water Act does not allow EPA to authorize unlawful discharges of pollutants by establishing compliance schedules in permits. *See In the Matter of Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5, Order on Petition for Reconsideration (April 16, 1990) at 5 (Attachment 3).

Letter from Julie Belaga, Regional Administrator, to William J. Pauk, P.E., Superintendent (October 16, 1992), Exhibit C, Notice of Appeal and Petition for Review. This appeal followed.

II. *DISCUSSION*

Under the rules governing this proceeding, there is no appeal as of right from the Regional Administrator's decision.[5] 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 Environmental Appeals Board. *See, e.g., In re American Cyanamid Company,* NPDES Appeal No. 92-18, at 5 (EAB, Sept. 27, 1993). The petitioner has the burden of demonstrating that review should be granted. *See* 40 CFR § 124.91(a).

As noted above, the Regional Administrator denied the City's evidentiary hearing request on the grounds that, as a matter of law, the schedule of compliance sought by the City may not be included in the permit because it would impermissibly authorize the violation of State water quality standards. Before us now is the issue of whether the Regional Administrator's legal conclusion regarding the illegality of the requested schedule of compliance is clearly erroneous. For the reasons set forth below, we hold that the Regional Administrator's conclusion is not clearly erroneous and that, under the standard articu-

[5] With respect to appeals under Part 124 regarding NPDES permits, Agency policy calls for most such permits to be finally adjudicated at the Regional level. *See* 44 Fed. Reg. 32,887 (June 7, 1979). Although the Board has broad authority to review decisions made in NPDES permit cases, the Agency intended that this power of review be exercised "only sparingly." *Id.*; *In re City of Hollywood, Florida*, NPDES Appeal No. 92-21, at 3, n.1 (EAB, March 21, 1994).

lated in *Star-Kist*, the Regional Administrator did not have a legal basis for providing a schedule of compliance in the City's permit. We also hold that the evidentiary hearing request should have been denied for another, more fundamental legal reason as well. We address this latter reason first.

By seeking to add the proposed language, the City is in effect seeking to make the existing permit less stringent, particularly the permit condition requiring the City to comply with State water quality standards. In its letter certifying the draft permit, however, the State wrote that: "None of the conditions of the permit may be made less stringent without violating the requirements of the State Act and the Massachusetts Water Quality Standards."[6] The condition requiring the City to comply with State water quality standards, therefore, is "attributable to State certification," within the meaning of 40 CFR § 124.55(e). Under that section, the Agency may not entertain a challenge to a permit condition that is "attributable to State certification." Such a challenge may only be raised in the appropriate State forum. *See In re General Electric Company, Hooksett, New Hampshire*, NPDES Appeal No. 91-13, at 5 (EAB, January 5, 1993) (a permit requirement is "attributable to State certification" when the State certification letter communicates the idea that the permit requirement cannot be made less stringent and still comply with State water quality standards). Accordingly, the Agency may not entertain the City's challenge.

But even if the Agency could entertain this challenge, the result would be the same, because the Regional Administrator properly concluded that the schedule of compliance sought by the City would impermissibly authorize discharges that do not meet the State's water quality standards. It is well established that "[t]he Clean Water Act does not authorize EPA to establish schedules of compliance in the permit that would sanction pollutant discharges that do not meet applicable state water quality standards." *In re Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5, at 5 (Adm'r, April 16, 1990) (Order on Petition for Reconsideration).[7] The only recognized exception to this rule is "when the water quality standard itself (or the State's implementing regulations) can be fairly construed as authorizing a schedule of compliance." *Id.* The City argues that the State's regulations and policy statement on combined sewer overflows "can be fairly construed as autho-

---

[6] *See supra* n.4.

[7] A request for modification of the Administrator's *Star-Kist* decision was denied by the Environmental Appeals Board. *In re Star-Kist Caribe, Inc.*, NPDES Appeal No. 88-5 (EAB, May 26, 1992) (Order Denying Modification Request).

rizing a schedule of compliance" in this case. For the following reasons, however, we conclude that the regulations and policy statement relied on by the City do not pass muster under *Star-Kist.*

The City relies first on 314 C.M.R. § 3.10(10), a subsection of the Massachusetts Surface Water Discharge Permit Rules, which provides as follows:

> A permit may, when appropriate, specify a schedule leading to compliance with the State and Federal Acts and regulations adopted thereunder. Any such schedule shall require compliance as soon as possible, but not later than the applicable statutory deadline under Section 301(b) of the Federal Act, unless modified in accordance with the provisions of Subsections 301(i) or (k) of the Federal Act.

314 C.M.R. § 3.10(10)(a), Attachment F, Respondent's Memorandum in Opposition to Petition for Review. The "applicable statutory deadline" in this case is found at Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), which provides that State water quality standards must be achieved by July 1, 1977. The July 1, 1977 deadline for achieving State water quality standards could have been extended until July 1, 1988, under Clean Water Act § 301(i), 33 U.S.C. § 1311(i) (governing time extensions for publicly owned treatment works), if the City had complied with the requirements of that section; however, there is nothing in the record to suggest that it did comply with the requirements of that section, and even if it had, its extension would have lasted only until July 1, 1988. Thus, the Massachusetts regulation quoted above does not authorize the schedule of compliance sought by the City in this case.[8]

The City also relies on a Massachusetts policy statement, which, according to the City, "contemplate[s] that a step-by-step, phased approach be undertaken to identify CSO water quality impacts and alternatives in managing CSO problems." Notice of Appeal and Petition for Review at 9. The Massachusetts policy statement provides that: "Abatement plans may involve phased work plans with the most cost effective control, or control

[8] Petitioner also cites 314 C.M.R. § 4.03 of the Massachusetts Surface Water Quality Standards, which addresses, among other things, the calculation of effluent limitations, mixing zones, and the designation of "partial use" subcategories. The regulation, however, does not address schedules of compliance either directly or indirectly. *See* Attachment G, Respondent's Memorandum in Opposition to Petition.

providing the most benefit, given the highest priority." Massachusetts Water Quality Standards Implementation Policy for the Abatement of Pollution at 1, Exhibit E, Notice of Appeal and Petition for Review. Because the policy statement refers to "phased work plans," the City believes it authorizes schedules of compliance.

Under *Star-Kist*, schedules of compliance in permits are only allowed where the State clearly authorizes such schedules through statute or regulation. *Star-Kist*, *supra*, at 5. The policy statement relied on by the City fails this test on two counts. First, the City has not carried its burden of demonstrating that the policy statement has the same legal force as a statute or regulation. Second, the policy statement cannot fairly be read as authorizing schedules of compliance in permits. The policy merely provides that in attempting to abate further violations of water quality standards, a facility may start by implementing the most cost effective or promising controls first. That is a far cry from authorizing a delay in compliance with water quality standards.

In sum, neither the regulations nor the policy statement cited by the City authorize the schedule of compliance sought by the City. To include such a schedule in the City's permit, therefore, would "sanction pollutant discharges that do not meet applicable state water quality standards," something the Region does not have authority to do. *Star-Kist*, *supra*, at 5.[9]

III. *CONCLUSION*

For all the foregoing reasons, we conclude that the Regional Administrator did not err in denying the City's evidentiary hearing request. First, because the City is in effect challenging a permit condition that is "attributable to State certification," the Agency may not entertain the City's challenge. Second, even if the Agency could entertain such a challenge, the result would be the same, because the City has not pointed to a State statute or regulation that would authorize the schedule of compliance sought by the City. Accordingly, review of the City's petition is hereby denied.

So ordered.

---

[9] This holding does not prevent Massachusetts or the Region from ultimately providing for such a schedule in an administrative order or consent decree as a matter of enforcement discretion. *See In re City of Hollywood, Florida*, NPDES Appeal No. 92-21, at 8 n.8 (EAB, March 21, 1994). Indeed, the Region correctly noted that the City's compliance problems could be dealt with through the enforcement process. Region's Response to Comments at 3, Exhibit A, Notice of Appeal and Petition for Review. The Region will, of course, want to consider any such enforcement response in light of new policy initiatives respecting CSO's, which the Agency announced on April 11, 1994. *See* Combined Sewer Overflow Control Policy (April 1994) (to be published in the Federal Register).