IN RE J&L SPECIALTY PRODUCTS CORP.

NPDES Appeal No. 92-22

ORDER GRANTING REVIEW IN PART, DENYING REVIEW IN PART, AND REMANDING IN PART

Decided February 2, 1994

Syllabus

J&L Specialty Products Corporation ("J&L") seeks review of the denial of its evidentiary hearing request by U.S. EPA Region V on matters relating to the issuance of an Individual Control Strategy ("ICS") under Clean Water Act §304(l) and an NPDES permit under CWA §402 for J&L's stainless-steel finishing plant in Louisville, Ohio. Region V asserts that review should be granted only if the Region erroneously resolved the alleged factual issues raised in J&L's evidentiary hearing request.

J&L sought an evidentiary hearing on numerous factual and legal conclusions made by the Region in approving Ohio's listing of J&L on a list of facilities requiring an ICS and in issuing that ICS. J&L also sought an evidentiary hearing on facts it contends demonstrate entitlement to variances from the permit's effluent limitations for total dissolved solids ("TDS"), cyanide, and nitrite/nitrate, which were included in the permit pursuant to CWA §301(b)(1)(C). J&L further contends that its evidentiary hearing request raised the material factual question of whether State certification or a waiver thereof existed prior to the issuance of the final permit, and the legal issue that seeking State certification simultaneously with seeking public comment is contrary to applicable regulations.

J&L argues that it is entitled to an evidentiary hearing on the permit's effluent limitations for pH, which were imposed under CWA §301(b)(1)(C), because the technical problems with achieving the permit's limitation outweigh its benefits. Concerning the permit's effluent limitations for whole effluent toxicity ("WET") and biomonitoring requirements, J&L contends that these conditions are neither legally nor factually justified. Alternatively, J&L contends that if the permit can include WET limitations and biomonitoring requirements, then the permit's biomonitoring requirements are deficient in several respects: 1) the Region did not follow Ohio policy in formulating them; 2) the biomonitoring requirements should not operate concurrently with the permit's chemical-specific effluent limitations; and 3) the permit does not adequately describe the sampling stations. J&L also argues that the biomonitoring requirements are deficient because they require a full year of testing on the pimephales promelas (fathead minnow).

J&L also contends that its evidentiary hearing request should have been granted on whether the nitrite/nitrate effluent limitation lacks a legal and factual foundation because the State, prior to the issuance of the final permit, began the process to change the use designation component of the water quality standard upon which the effluent limitation is based. J&L argues that it is entitled to an evidentiary hearing on the permit's TDS effluent

limitations on the ground that the costs of compliance with that limitation exceed the benefits of compliance, and that it is entitled to a credit for the amount of TDS in its intake water. Concerning the permit's effluent limitations for cyanide, J&L maintains that the cyanide in its discharge originates from roadsalt, and therefore its evidentiary hearing request set forth a material factual issue as to whether J&L discharges cyanide as "discharge" is defined in CWA §502(12).

The permit contains effluent limitations in terms of concentration limitations and mass limitations. J&L contends that it is entitled to an evidentiary hearing on whether the mass limitations should be removed from the permit on the ground that J&L cannot continue its practice of groundwater recycling, on which the permit is based, and meet the mass limitations. J&L also contends that it is entitled to an evidentiary hearing on the permit's effluent limitations that are below the current limits of analytical detection. The permit requires monitoring for bis 2(ethylhexyl) phthalate. J&L contends it is entitled to an evidentiary hearing on this requirement because the EPA questioned the appropriateness of the aquatic life criteria adopted for this compound in light of recent tests showing no toxicity attributable to this compound.

J&L also seeks review of several legal determinations made by the Region in issuing this permit. Specifically, J&L contends that: 1) the Region lacked authority to issue the permit under 40 C.F.R. §123.44(h) because Ohio failed to comply with the requirements of §123.44; 2) the public notice of the draft permit was defective under 40 C.F.R. §124.8 because it failed to address arguments raised by J&L prior to permit issuance, and under §124.10 because it was not sent to all the parties specified in that regulation; 3) the draft permit failed to comply with 40 C.F.R. §124.9 because it was not based on the administrative record as evidenced by the Region's failure to mail to J&L a complete copy of the administrative record as J&L requested; 4) the Region's use of Ohio policies violated State and federal administrative procedures; 5) the wasteload allocations ("WLAs") used by the Region failed to comply with the public notice requirements of 40 C.F.R. §130.7(d); and 6) the permit unreasonably and unlawfully limits its upset provision to violation of technology-based effluent limitations.

Held: Under 40 C.F.R. §124.91, the analysis of whether a Region clearly erred in denying an evidentiary hearing request will not focus on the Region's resolution of the alleged factual dispute, but will focus on whether the evidentiary hearing request sets forth a material issue of fact relevant to the issuance of the permit, that is, an issue that would affect the outcome of the proceedings as to which there is evidence on the record that would reasonably support a finding by a preponderance of the evidence for either party.

After considering the process and timeframes contemplated by CWA §304(l), the discussion of the reviewability of §304(l) listing decisions in 55 Fed. Reg. 26,202 (June 27, 1990), and the facts and circumstances in this case, review is granted on the issue of whether §304(l) listing decisions are administratively reviewable.

The facts contained in J&L's evidentiary hearing request supporting its request for variances are not material to this permit because J&L is not legally entitled to variances from effluent limitations included in a permit under CWA §301(b)(1)(C). Even though an ICS is implicated in this case under CWA §304(l), the effluent limitations challenged by J&L were not included in the permit under CWA §302(a), and therefore the variance provisions in CWA §302(b) are not applicable.

J&L does not allege any facts to support its claim that State certification or a waiver thereof was not obtained. The process employed by the Region of simultaneously seeking State certification and public comment on the draft permit is authorized by the applicable regulations.

J&L's alleged factual issue about the costs and benefits of complying with the permit's pH effluent limitations is merely an argument that it is entitled to a variance from those limitations. Because the pH effluent limitations were established under CWA §301(b)(1)(C), no variance is available from the Region.

Although J&L's legal arguments against the permit's use of WET limitations and biomonitoring requirements are rejected, J&L's evidentiary hearing request did set forth a material factual issue, namely, whether J&L's effluent will cause, contribute to, or have the reasonable potential to cause or contribute to a violation of the State water quality standard for WET, and therefore whether such limitations and requirements can be imposed. J&L's alternative arguments that the permit's biomonitoring requirements are deficient are without merit. Because the Region agrees with J&L's concerns about testing on fathead minnows, and has expressed its intent to accommodate those concerns in a reasonable way, review of that issue is denied.

Although the Region did not err in denying the evidentiary hearing request on the permit's nitrite/nitrate effluent limitation, a remand of this permit condition is warranted because the applicable legal requirement, the State water quality standard, changed before the permit became final, that is, before administrative review of the permit was complete.

J&L's factual claims as to the costs and benefits of compliance with the permit's TDS effluent limitations are not material, and therefore not deserving of an evidentiary hearing, because J&L is not entitled to a variance from the TDS effluent limitation, which was included in the permit under CWA §301(b)(1)(C). J&L failed to show that the Region abused its discretion in denying J&L a credit for the TDS in J&L's intake water.

Concerning the permit's effluent limitation for cyanide, the parties disagree as to the type of activity contemplated by the term "discharge" as it is defined in CWA §502(12), a purely legal issue as to which further briefing would assist the Board in resolving whether J&L's evidentiary hearing request was erroneously denied. Therefore, review is granted on the issue of whether J&L discharges cyanide, as "discharge" is defined in CWA §502(12), assuming the facts are as presented in J&L's comments on the draft permit.

The Region did not err in denying J&L's evidentiary hearing request on the permit's mass limitations because J&L does not challenge the Region's factual basis for including mass limitations in the permit.

The Region did not err in denying the evidentiary hearing request on the effluent limitations below current analytical limits of detection because J&L did not clearly allege any factual issues that need to be considered in connection with those permit terms.

The Region did not err in denying the evidentiary hearing request on the permit's bis 2(ethylhexyl) phthalate monitoring requirements because J&L did not challenge the factual basis for imposing the requirements, and because the aquatic life criteria used have not definitively been refuted by Ohio or EPA.

The legal issues raised by J&L are without merit. Specifically: 1) the Region's issuance of the permit complied with both the Memorandum of Agreement between Region V and Ohio, and 40 C.F.R. §123.44, and Ohio's failure to comply with §123.44 does not affect the validity of the Region's actions in this case; 2) the public notice of the draft permit complied with 40 C.F.R. §124.8, which does not require detailed responses to arguments raised by a permittee prior to permit issuance. Absent any alleged harm to J&L from the failure to comply with 40 C.F.R. §124.10, such error is harmless; 3) the Region's oversight in responding to J&L's request for a copy of the administrative record does not demonstrate that the permit was not based on the administrative record as required by 40 C.F.R. §124.9, and further, J&L failed to allege any prejudice resulting from such oversight; 4) a Region may reasonably exercise its discretion, as it did here, to rely upon State policies in effect under

State law at the time of permit issuance; 5) under 40 C.F.R. §130.7(d), public notice of a WLA is required only if a State WLA is disapproved by the Region so that the Region must promulgate a State WLA, a situation that did not occur here; and 6) the permit's limitation of the availability of the upset defense to alleged violations of technology-based effluent limitations is consistent with 40 C.F.R. §122.41(n)(2), and J&L has failed to explain why the response to comments is clearly erroneous or otherwise warrants review.

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

Opinion of the Board by Judge Reich:

J&L Specialty Products Corporation ("J&L") seeks review of the denial of its evidentiary hearing request by U.S. EPA Region V on matters relating to the issuance of an Individual Control Strategy under Clean Water Act ("CWA") §304(l) and an NPDES permit under Clean Water Act §402 for J&L's stainless-steel finishing plant in Louisville, Ohio. At the request of the Environmental Appeals Board, Region V submitted a response to J&L's petition for review. Pursuant to leave granted by the Board, J&L also submitted a reply to the Region's response. For the reasons set forth below, we are granting review of two issues, identified herein, pertaining to whether the CWA §304(l) listing decisions challenged by J&L are administratively reviewable, and whether J&L discharges cyanide as the term "discharge" is defined at CWA §502(12). We also conclude that J&L is entitled to an evidentiary hearing on the issue of whether J&L's discharge causes or contributes to, or has the potential to cause or contribute to, a violation of Ohio's water quality standard for whole effluent toxicity, such that the Region has authority under 40 C.F.R. §124.44(d) to establish a water quality-based effluent limitation in J&L's permit for whole effluent toxicity. In addition, we are remanding the permit's effluent limitation for nitrite/nitrate so that the Region can reconsider the effluent limitation in light of a change in the applicable State water quality standard that occurred while these proceedings were pending. With respect to all other factual issues raised in J&L's petition for review, except for those on which the Board has reserved judgment pending resolution of the issue of whether the CWA §304(1) listing decisions challenged here are subject to administrative review, we conclude that the Region did not clearly err in denying J&L's request for an evidentiary hearing on those issues. With respect to all other legal and policy issues raised in J&L's petition for review, except for those on which the Board has reserved judgment pending resolution of the issue of whether the CWA §304(1) listing decisions challenged here are subject to administrative review, we conclude that J&L has not demonstrated that review of such issues is warranted under 40 C.F.R. §124.91.

I. *BACKGROUND*

J&L manufactures cold-rolled stainless-steel sheets from hot-rolled stainless-steel produced elsewhere, employing processes such as acid-pickling, rolling, slitting, grinding, annealing and tempering. Wastewaters generated by these processes are discharged through Outfall 003, which discharges directly into the East Branch Nimishillen Creek.[1] Although Ohio is authorized to issue NPDES permits and Individual Control Strategies, in this case, the Agency assumed the authority to issue these documents under CWA §§304(e) and 402(d), 33 U.S.C. §§1314(e) and 1342(d). While the Agency's NPDES and Individual Control Strategy ("ICS") proceedings are pending, this facility has been operating under a December 3, 1983 NPDES permit issued by the Ohio Environmental Protection Agency ("OEPA").[2]

As noted above, J&L seeks review of the denial of its evidentiary hearing request in connection with the NPDES permit issued to it by Region V under CWA §402 and the ICS issued to it by the Region under CWA §304(l). In this case, the NPDES permit proceedings under CWA §402 and the ICS proceedings under CWA §304(l) occurred simultaneously. An explanation of CWA §304(l), including its procedures and relationship to the NPDES program, provides context for the complicated procedural history of this matter.

A. Statutory Background

In 1987, Congress amended the Clean Water Act to deal with the problem of toxic pollutants. Congress enacted CWA §304(l), 33 U.S.C.

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[1] Flow from the East Branch Nimishillen Creek eventually reaches the Ohio River. Discharges into navigable waters of the United States by point sources must be permitted to be lawful. *See* Section 301 of the Clean Water Act, 33 U.S.C. §1311. The National Pollution Discharge Elimination System ("NPDES") is the principal permitting program of the Clean Water Act. 33 U.S.C. §1342.

The J&L facility has two outfalls in addition to Outfall 003. Outfall 001 discharges stormwater runoff and water-softener backwash into the East Branch Nimishillen Creek. Outfall 004 discharges cooling water, steam condensate, and some stormwater into Keim's Run, which eventually reaches the East Branch Nimishillen Creek.

[2] Although the December 3, 1983 permit expired on November 29, 1988, J&L continues to operate its facility under the terms of the expired permit pending a final determination on J&L's application for renewal of the permit. *See* 40 C.F.R. § 122.6.

§1314(l),[3] as part of its plan to identify and control "toxic hot spots." *See* 57 Fed. Reg. 33,051 (July 24, 1992). Section 304(l) requires States to prepare and submit for Agency approval three lists of water segments meeting the criteria provided in that section on or before February 4, 1989. At issue here is the list required by §304(l)(1)(B) (hereinafter "B List"). The B List "consists only of waters that are not expected to meet water quality standards, even after the application of the technology-based limitations, due entirely or substantially to toxic pollution from *point sources*." *Natural Resources Defense Council v. EPA*, 915 F.2d 1314, 1319 (9th Cir. 1990).[4] EPA has interpreted §304(l)(1)(B) as requiring a list of:

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[3] Section 304(l), in pertinent part, provides:

> (1) Not later than 2 years after February 4, 1987, each State shall submit to the Administrator for review, approval and implementation under this subsection —
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> (B) a list of all navigable waters in such State for which the State does not expect the applicable standard under section 1313 of this title will be achieved after the requirements of sections 1311(b), 1316, and 1317(b) of this title are met, due entirely or substantially to discharges from point sources of any toxic pollutants listed pursuant to section 1317(a) of this title;
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> (C) for each segment of the navigable waters included on such lists, a determination of the specific point sources discharging any such toxic pollutant which is believed to be preventing or impairing such water quality and the amount of each such toxic pollutant discharged by each such source; and
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> (D) for each such segment, an individual control strategy which the State determines will produce a reduction in the discharge of toxic pollutants from point sources identified by the State under this paragraph through the establishment of effluent limitations under section 1342 of this title and water quality standards under section 1313(c)(2)(B) of this title, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard as soon as possible, but not later than 3 years after the date of the establishment of such strategy.

[4] The B List is "the narrowest of the three lists." *Natural Resources Defense Council v. EPA*, 915 F.2d 1314, 1319 (9th Cir. 1990). The list required by §304(l)(1)(A)(i) "includes most of the waters on the B list plus waters expected not to meet water quality standards due to pollution attributable entirely or almost entirely to toxic pollution from *nonpoint* sources." *Id.* The list required by §304(l)(1)(A)(ii) is the broadest of the three, including "all the waters on the other two lists plus any waters which, after the implementation of technology-based controls, are not expected to meet the water quality goals of the [CWA]." *Id.*

> [A]ll waters which can not [sic] achieve or are not expected to achieve, either the numeric or narrative water quality criteria applicable to a priority pollutant due entirely or substantially to discharges from point sources on or before February 4, 1989 after application of BAT, pretreatment and new source performance standards.

54 Fed. Reg. 23,880 (June 2, 1989). EPA has implemented this statutory requirement "by relying on the priority pollutants encompassed by the term 'toxic pollutants.'" *Id.* "Priority pollutants" are those listed in Appendix A to 40 C.F.R. Part 423, and are derived from the 65 classes of compounds identified as "toxic" under CWA §307(a)(1) and listed at 40 C.F.R. §401.15. Copper and nickel, two of the pollutants discharged by J&L, are listed as "priority pollutants," and therefore are "toxic pollutants."

For each water segment identified on a B List, the State is also required to identify the specific point sources discharging priority pollutants believed to be preventing or impairing water quality in that segment. CWA §304(l)(1)(C). In addition, the State is required to submit for approval an ICS for each listed water segment that will produce a reduction in the discharge of priority pollutants from the identified point sources sufficient to meet water quality standards for the priority pollutants as soon as possible but not later than three years after the establishment of the ICS. CWA §304(l)(1)(D). EPA defines an ICS as:

> [A] final NPDES permit with supporting documentation showing that effluent limitations are consistent with an approved wasteload allocation, or other documentation which shows that applicable water quality standards will be met not later than three years after the [ICS] is established. Where a State is unable to issue a final permit on or before February 4, 1989, an [ICS] may be a draft permit with an attached schedule (provided the State meets the schedule for issuing the final permit) indicating that the permit will be issued on or before February 4, 1990.

40 C.F.R. §123.46(c). Under §304(l), EPA must approve or disapprove an ICS by June 4, 1989. CWA §304(l)(2). If a State fails to comply with §304(l), or if the EPA disapproves an ICS, EPA must implement §304(l) by June 4, 1990. CWA §304(l)(3), 40 C.F.R. §§123.46(f), 130.10(d)(9). CWA §304(l) is not intended to change any of the water quality-based

limitations of the Clean Water Act, but only to hasten their implementation with respect to toxic pollutants. [5]

B. Factual Background

On May 27, 1988, J&L applied to OEPA for a renewal of its NPDES permit, and OEPA issued a draft permit on February 3, 1989. Around the same time, OEPA fulfilled its obligations under CWA §§304(l)(1)(A) and (B) by submitting to Region V lists of waters meeting the criteria detailed in that statute. OEPA included the East Branch Nimishillen Creek on the B List, and identified J&L as a point source of toxic pollutants to that waterbody under §304(l)(1)(C). *See* Fact Sheet Accompanying February 3, 1989 Draft Permit, at 6. Consequently, OEPA concluded that an ICS for J&L was required under §304(l)(1)(D). The February 3, 1989 draft permit, along with the fact sheet and risk assessment that accompanied it, comprised the ICS for J&L submitted to EPA for approval under CWA §304(l).

On April 27, 1989, Region V submitted to OEPA its comments on the draft permit.[6] Region V stated that it would not object to the issuance of the permit for J&L's facility, provided that certain changes were incorporated into the final permit. Soon thereafter, Region V published in the Federal Register notice of its intent to approve OEPA's decisions to include the East Branch Nimishillen Creek on the B List and to identify J&L as a point source of toxic pollutants to that waterbody under §304(l)(1)(C). In addition, the Federal Register notice provided that the Region intended to approve the ICS submitted by OEPA for J&L. *See* 54 Fed. Reg. 24,030 (June 5, 1989).

OEPA issued the NPDES permit for J&L on September 29, 1989, which J&L appealed to the Ohio Environmental Board of Review.[7] The permit failed to include the changes raised in the Region's comments

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[5] *Natural Resources Defense Council*, at 1319 ("The effect of the individual control strategy is simply to expedite the imposition of water quality-based limitations on polluters' — limitations which otherwise would have been imposed when the polluters NPDES permits expired."); *Westvaco Corp. v. EPA*, 899 F.2d 1383, 1385 (4th Cir. 1990) ("Section 304(l) did not change the basic requirements of the CWA; rather it simply established a mandatory schedule for the completion of a toxic pollutant subset of the water quality-related activities that the CWA already imposed.").

[6] *See* Letter from Kenneth A. Fenner, Chief, Water Quality Branch, U.S. EPA Region V, to John Sadzewicz, Division of Water Pollution Control, Ohio EPA (Apr. 27, 1989).

[7] *See* Request for Evidentiary Hearing, at 4.

on the draft permit,[8] and therefore, on November 20, 1989, Region V formally objected to the State permit, and assumed the authority to issue this NPDES permit under 40 C.F.R. §123.44.[9] On September 5, 1990, the Region published its final approval of OEPA's decisions to include the East Branch Nimishillen Creek on Ohio's B List, and to identify J&L as a point source of toxic pollutants, namely copper and nickel, to that waterbody under CWA §304(l)(1)(C). *See* 55 Fed. Reg. 36,309 (Sept. 5, 1990). [10] Thus, the Region approved OEPA's determination that an ICS is required for J&L under CWA §304(l)(1)(D). The Region, however, changed its mind about approving the ICS submitted by OEPA for J&L. *Id.* The State's failure to include in OEPA's final permit the conditions required by the Region, and a lack of action in the State permitting process [11] created concern in the Region "that delays in the permitting process were preventing implementation of the [ICS] for the J&L plant required by Section 304(l)." Response to Petition, at 3. Therefore, on November 30, 1990, Region V assumed authority to issue an ICS for the J&L facility pursuant to CWA §304(l)(3) and 40 C.F.R. §123.46(f). [12]

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[8] The Region states that "[a]pparently as the result of an oversight at [OEPA], some of the effluent limits and monitoring conditions required by Region V did not get included in the final State permit." Response to Petition, at 3.

[9] *See* Letter from Charles H. Sutfin, Director, Water Division, U.S. EPA Region V, to Dr. Richard Shank, Director, Ohio EPA (Nov. 20, 1989) ("With regard to J&L Specialty Products, Inc., * * *, please be advised that since considerable time has elapsed without the draft permit's being revised as necessary, authority to issue th[is] permit now lies with U.S. EPA."). Although the Region assumed authority to issue this NPDES permit on November 20, 1989, the Region allowed OEPA until January 15, 1990, to reissue a permit addressing the Region's concerns. It appears that Ohio could not issue such a permit because J&L filed an administrative appeal in Ohio challenging several conditions of the permit issued by OEPA. *See* Letter from John J. Morrison, Permits Section, Division of Water Pollution Control, OEPA, to Jane DeRose, U.S. EPA, Region V (Mar. 16, 1990).

[10] Initially, the Region proposed approval of OEPA's decision to include the East Branch Nimishillen Creek on the B List, and to identify J&L as a point source under §304(l)(1)(C), because of discharges of copper, nickel, zinc and chromium from two of J&L's outfalls. *See* 54 Fed. Reg. 24,033 (June 5, 1989); Letter from Kenneth A. Fenner, Chief, Water Quality Branch, U.S. EPA, Region V to M.A. Gipko, J&L Specialty Products Corp. at 1 (Jan. 11, 1990) ("Jan. 11, 1990 Letter"). In response to comments submitted by J&L on the proposed approval, the Region deleted one outfall and two chemicals (zinc and chromium) from its approval. *See* Jan. 11, 1990 Letter, at 1; 54 Fed. Reg. 36,311 (Sept. 5, 1990).

[11] *See* note 9, *supra.*

[12] *See* Letter from Valdas V. Adamkus, Regional Administrator, U.S. EPA Region V, to Dr. Richard Shank, Director, Ohio EPA (Nov. 30, 1990). This letter noted that on September 5, 1990, the Region published in the Federal Register its disapproval of the ICSs submitted for J&L and two other facilities in Ohio. The letter states that "[t]hrough the authority provided by 40 C.F.R. §123.46(f), U.S. EPA - Region V intends to issue an ICS for each of the facilities listed above. Please be advised that the exclusive authority to issue these ICSs passes to U.S. EPA - Region V effective on the date of this letter."

Pursuant to 40 C.F.R. §122.21, J&L submitted an NPDES permit application to Region V on November 20, 1990. Region V issued a draft NPDES permit for J&L on February 4, 1991,[13] citing its authority to issue NPDES permits under 40 C.F.R. §123.44 and its authority to issue ICSs under 40 C.F.R. §123.46(f).[14] The Region has characterized this draft permit as the ICS for J&L. *See* Response to Comments, at 21. J&L submitted extensive comments on the draft permit,[15] including comments on the Region's actions implementing CWA §304(l), to which the Region responded on May 11, 1992, when it issued the final permit.

On June 10, 1992, J&L requested an evidentiary hearing on numerous conditions in the final permit. J&L requested an evidentiary hearing on the factual basis for the Region's decision to approve OEPA's determination that the East Branch Nimishillen Creek was not expected to meet water quality standards on or before February 4, 1989, due entirely or substantially to toxic pollutants, namely copper and nickel, discharged by J&L, and therefore that an ICS is required for J&L. J&L also sought a hearing on the Region's denial of J&L's request for variances from several of the permit's effluent limitations. In addition, J&L sought a hearing on several alleged technical deficiencies in the permit requiring factual adjudication.[16] Lastly, J&L raised legal issues to be adjudicated in conjunction with the factual issues. Region V denied J&L's evidentiary hearing request on July 13, 1992, stating, without elaboration, that "the request does not set forth material issues of fact relevant to the [NPDES permit] for J&L Specialty Products, Louisville, Ohio facility."[17]

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[13] Except for its more stringent effluent limitation for nickel, the draft permit was identical to one prepared by OEPA and received by the Region in December 1990. There is nothing in the administrative record provided with this appeal explaining why in December 1990, after the Region assumed exclusive authority to issue the NPDES permit and the ICS, OEPA prepared and submitted a draft NPDES permit.

[14] *See* Letter from Dale Bryson, Director, Water Division, U.S. EPA, Region V, to M.A. Gipko, J&L Specialty Products Corp. (Feb. 4, 1991).

[15] *See* Letter from M.A. Gipko, J&L Specialty Products Corp., to Denise Steurer, Permits Section, Water Division, U.S. EPA Region V (Mar. 7, 1992).

[16] Specifically, these alleged technical deficiencies pertained to limits for pH, biomonitoring, limitations on nitrates/nitrites, limitations on total dissolved solids, limitations on cyanide, loading limitations, alternative limitations on naphthalene, tetrachloroethylene and free cyanide, and monitoring requirements for bis (2-ethylhexyl) phthalate.

[17] *See* Letter from Dale S. Bryson, Director, Water Division, U.S. EPA Region V, to David W. Burchmore, Squire, Sanders & Dempsey (July 13, 1992).

This appeal followed. In its petition for review, J&L asserts that the Region erroneously denied J&L's evidentiary hearing request, which J&L contends raised the following material issues of fact: 1) whether the Region had an adequate factual basis for requiring an ICS for J&L under CWA §304(l); 2) whether the technical feasibility and economic impact of the effluent limitations for certain pollutants justify variances from those limitations; and 3) whether the State of Ohio certified or waived certification of the permit. In addition, J&L contends that each of the issues identified in the "Technical Issues" portion of its request for evidentiary hearing raised a material issue of fact. J&L also seeks review of the legal issues raised in its evidentiary hearing request.

II. *ANALYSIS*

A. Standard of Review

Under the rules governing this proceeding, there is no review as a matter of right from the denial of an evidentiary hearing request. Ordinarily, a petition for review of a denial of an evidentiary hearing request is not granted unless the denial of the request is clearly erroneous or involves an exercise of discretion or policy that is important and therefore should be reviewed. 40 C.F.R. §124.91(a); *In re Town of Seabrook, N.H.*, NPDES Appeal Nos. 93-2, 93-3, at 3 (EAB, Sept. 28, 1993). "The Agency's longstanding policy is that NPDES permits should be finally adjudicated at the Regional level, and that the Board's power to review NPDES permit decisions should be exercised only 'sparingly.'" *Id.* (*citing* 44 Fed. Reg. 32,887 (June 7, 1979)). The petitioner has the burden of demonstrating that review should be granted. *Id.*

Preliminarily, we note that there is some dispute between the parties as to the proper standard of review in this matter. J&L maintains that the Region "is required to grant J&L's Hearing Request if any material issues of fact relating to the issuance of the Final Permit are raised therein." Petition for Review, at 2. In other words, J&L argues that under C.F.R. §124.91, the Board should determine merely whether J&L's evidentiary hearing request set forth a material issue of fact relevant to the issuance of the permit as required by 40 C.F.R. §124.75, and thus whether the Region clearly erred in concluding that the request did not set forth such an issue. The Region, however, argues that under 40 C.F.R. §124.91, "the question becomes, not whether there were disputed issues of fact, but whether the Region's resolution of such facts and application of those facts to the law was 'clearly erroneous.'" Response to Petition, at 5. In other words, the Region contends that review of its denial of an evidentiary hearing request that sets forth a material issue of fact in accordance with 40 C.F.R. §124.75 is appropriate only if the Region clearly erred in *resolving* such issues.

We disagree with the Region's interpretation of §124.91, which misstates the role of evidentiary hearings and is not supported by previous Agency decisions. Evidentiary hearings are intended to allow a neutral decisionmaker to resolve contested issues of fact material to the permit decision. Under 40 C.F.R. §124.75(a)(1), a Regional Administrator must grant an evidentiary hearing request that "sets forth material issues of fact relevant to the issuance of the permit." We have interpreted this regulation as requiring a Regional Administrator to grant an evidentiary hearing request that sets forth 1) a question of material fact, that is, one that might affect the outcome of the proceeding, 2) as to which there is a genuine issue or dispute between the parties. *In re Mayaguez Regional Sewage Treatment Plant*, NPDES Appeal No. 92-23, at 12-13 (EAB, Aug. 23, 1993). Under 40 C.F.R. §124.75(a)(1), an issue exists if there is sufficient evidence in the administrative record[18] that would reasonably support a finding by a preponderance of the evidence for *either* party. *Mayaguez*, at 13. In such circumstances, a presiding officer is needed to resolve the disputed issues of fact. Accordingly, under the clear error standard of 40 C.F.R. §124.91, the Agency has consistently remanded denials of evidentiary hearing requests that set forth such an issue. [19] The Region fails to cite, nor are we aware of, any authority for denying such an evidentiary hearing request on the ground that the although there was a material issue in dispute, petitioner failed to demonstrate that the Region's position on the factual issue in dispute was clearly erroneous. Indeed, accepting the Region's position would, in effect, rewrite the regulation requiring evidentiary hearings to resolve such disputes. Therefore, our assessment of whether a Region clearly erred in deny-

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[18] Except as limited by 40 C.F.R. §124.76, relating to proceedings where the public comment period was reopened pursuant to 40 C.F.R. §124.14(a), a party requesting an evidentiary hearing can provide data supporting his factual claims either during the public comment period on the draft permit, or with the evidentiary hearing request. *In re Boise Cascade Corp.*, NPDES Appeal No. 91-20, at 10 (EAB, Jan. 15, 1993).

[19] *E.g.*, *In re Rubicon Inc.*, NPDES Appeal No. 85-10, at 9 (CJO, May 9, 1988) (remand order noted that full evidentiary hearing not required "when there are no disputed facts"); *In re Georgia-Pacific Corp.*, NPDES Appeal No. 84-2, at 3 n.4 (CJO, Apr. 29, 1985) (this remand order "does not consider the merits of [petitioner's objections]; the only decision made today is that [petitioner] has raised a factual issue which may be aired in an evidentiary hearing."); *see also In re Miami-Dade Water and Sewer Authority Dept.*, NPDES Appeal No. 91-14 (EAB, July 27, 1992) (remand for evidentiary hearing to be held); *In re Champion International Corp.*, NPDES Appeal No. 85-3 (JO, June 2, 1986) (same); *In re Great Lakes Chemical Corp.*, NPDES Appeal No. 84-8 (CJO, Sept. 3, 1985) (same). *Cf. In re Blytheville Sewer Commission*, NPDES Appeal No. 85-21, at 1 (JO, Aug. 1, 1986) (remand denied, noting that "[a] hearing must be conducted on the terms of the permit only where there is a dispute about relevant facts"); *In re City of Fayetteville, Ark.*, NPDES Appeal No. 86-1, at 6 (JO, May 23, 1986) (evidentiary hearing request properly denied where "no real factual dispute exists about the question").

ing an evidentiary hearing request is limited to determining whether the request sets forth an issue of fact material to the permit decision, and if so, whether the record evidence on that issue would reasonably support a finding by a preponderance of the evidence for either party. Unless a Region's position in the factual dispute is supported by an overwhelming amount of evidence in the administrative record such that a reasonable decisionmaker could not resolve the issue in favor of the party requesting an evidentiary hearing,[20] we will not be concerned with the Region's resolution of such an issue, a matter to be decided in the first instance in an evidentiary hearing.

B. Section 304(l) Decision

Under the statutory scheme detailed above, an ICS is required only for those point sources identified under CWA §304(l)(1)(C) because of their discharges of toxic pollutants into water segments on the B List, that is, water segments that are not expected to meet the applicable water quality standards for such toxic pollutants before February 4, 1989, due entirely or substantially to point source discharges. Here, the Region approved OEPA's conclusion that the East Branch Nimishillen Creek belonged on Ohio's B List because it was not expected to meet Ohio's water quality standards for copper and nickel on or before February 4, 1989, due entirely or substantially to point source discharges. In addition, the Region approved OEPA's identification of J&L under §304(l)(1)(C) as a point source of the copper and nickel impairing the East Branch Nimishillen Creek. *See* 55 Fed. Reg. 36,309 (Sept. 5, 1990). By approving the OEPA's listing decisions, the Region also approved OEPA's conclusion under §304(l)(1)(D) that an ICS is required for J&L. Thus, underlying the Region's approval of the need for an ICS in this case is the factual conclusion that the East Branch Nimishillen Creek was not expected to meet the water quality standards for copper and nickel on or before February 4, 1989, due entirely or substantially to J&L's discharges of copper and nickel.

J&L disagreed with the Region's conclusion, and sought an evidentiary hearing on the factual question of whether the East Branch Nimishillen Creek was not expected to meet water quality standards for copper and nickel on or before February 4, 1989, due entirely or substantially to discharges of copper and nickel by J&L. The Region denied J&L's evidentiary hearing request, and J&L now seeks review of this denial.

[20] In such circumstances, the Region would not clearly err in denying the evidentiary hearing request because there would be no genuine issue as defined in *In re Mayaguez Regional Sewage Treatment Plant*, NPDES Appeal No. 92-23 (EAB, Aug. 23, 1993), to warrant a hearing.

In this appeal, J&L contends that its evidentiary hearing request raised a material question of fact pertaining to the Region's approval of OEPA's determination that an ICS is required for J&L; specifically, J&L contends that the Region's approval of OEPA's listing decisions was without a factual basis. J&L also seeks review of numerous legal issues pertaining to the procedures used to implement §304(l) in this case. In sum, J&L contends that the alleged factual and legal deficiencies invalidate the Region's approval of OEPA's §304(l) listing decisions. J&L asserts that as a result of these erroneous listing decisions it has been harmed, complaining that "[t]he ultimate result of [the East Branch Nimishillen Creek's] inclusion on the Section 304(l) [B] list is that J&L was placed in a category of toxic pollution sources * * * upon which are imposed separate, tighter deadlines than the rest of the regulated community." Comments, at 72. The permit at issue in this appeal requires J&L to achieve compliance with the effluent limitation for nickel on the effective date of the permit, and for copper on February 5, 1994, three years from the date of the draft permit.[21]

J&L contends that it is entitled to administrative review of the 304(l) listing decisions in the context of the challenge to its NPDES permit. Relying upon 55 Fed. Reg. 26,202 (June 27, 1990), J&L asserts that "the decision to list a waterbody, the decision to list a facility, and the decision to issue an ICS are only appealable when the ICS is issued." Comments, at 59. The Federal Register Notice relied upon by J&L is entitled "Notice of final agency interpretation," and is intended "to clarify when EPA believes that decisions made by it under section 304(l) of the CWA are final agency actions for purposes of *judicial* review." 55 Fed. Reg. at 26,202 (emphasis added). The Federal Register Notice does not explicitly discuss *administrative* review of Agency actions implementing §304(l). Nevertheless, in light of the Federal Register Notice, J&L apparently believes that these NPDES permit proceedings are the appropriate forum for challenging Regional actions implementing §304(l), and, consequently, that such Regional actions are subject to administrative review in connection with an appeal of an NPDES permit determination implementing the ICS requirement of §304(l).

The Region does not explicitly question whether J&L is entitled to administrative review of the Region's approval of OEPA's listing decisions. Instead, the Region merely notes that "a Section 304(l) listing decision becomes subject to judicial review in federal court upon final

[21] Although J&L does not specifically refer to any particular deadlines in the NPDES permit, J&L does contend that the three-year compliance period authorized by §304(l)(1)(D) does not commence upon the issuance of the draft permit, as the Region maintains, but upon the effective date of the NPDES permit serving as the ICS. *See* Comments, at 72.

Agency action 'promulgating' the ICS." Response to Petition, at 15. The Region asserts that this NPDES permit is the ICS for J&L. *Id.*

Considering the process and timeframes contemplated in CWA §304(l), the discussion as to the reviewability of listing decisions in the Federal Register Notice, and the facts and circumstances of this case as it currently stands before us, we have concluded that the question of administrative reviewability of the Region's §304(l) listing decisions presents important legal and policy considerations that warrant review by this Board. Although not explicitly raised by the parties, the Board believes it necessary and appropriate to examine this issue since it relates to the jurisdiction of the Board to consider the factual and legal issues raised on appeal.

Further briefing on this issue would assist the Board in considering this jurisdictional question, and subsequently those issues raised by J&L's petition for review of the legal and factual determinations made by the Region in implementing §304(l) in this case. Thus, the Board hereby grants review and directs the parties to file supplemental briefs addressing the following questions:

(1) Are the listing decisions made by Region V in this case subject to administrative, as opposed to judicial review? If so, when and in what forum should administrative review occur?

(2) If listing decisions are subject to administrative review, under what circumstances, if any, can a listing decision be reviewed apart from any challenge to an ICS decision, that is, an NPDES permit decision implementing §304(l)? When challenging a listing decision, is it necessary to demonstrate that a permit condition would have been different had the listing decision not been made as it was?

In accordance with 40 C.F.R. §124.91(g), J&L, as the petitioner in this matter, shall file its supplemental brief within 21 days from this order. The Region shall file its supplemental brief within 21 days of service of J&L's supplemental brief. Should it choose to file one, J&L's supplemental reply brief will be due 14 days from service of the Region's supplemental brief.

C. Variance Issue

The NPDES permit issued to J&L establishes effluent limitations for discharges of, *inter alia*, total dissolved solids ("TDS"), cyanide, and nitrite/nitrate from Outfall 003. *See* Permit Part I.C.1. As explained in the fact sheet accompanying the draft permit, these effluent limitations are based on the wasteload allocations ("WLAs") for point sources on the Nimishillen Creek Basin prepared by OEPA in 1990. *See* Fact Sheet, at 9. [22] WLAs are required for "water quality limited segments," that is, water segments that, due to multiple dischargers, do not meet applicable water quality standards after the application of technology-based effluent limitations. CWA §303(d); 40 C.F.R. §130.2(j). A WLA is "[t]he portion of a receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution." 40 C.F.R. §130.2(h). The "loading capacity" is "the greatest amount of loading that a water can receive without violating water quality standards." 40 C.F.R. §130.2(f). Thus, when technology-based effluent limitations are insufficient to achieve compliance with water quality standards, such that water-quality based effluent limitations are required under CWA §301(b)(1)(C), it is appropriate to look to a WLA to determine an appropriate water-quality based effluent limitation. [23]

The final permit also provides that at each outfall, pH shall not be less than 6.5 S.U. (standard units) nor greater than 9.0 S.U. *See* Permit Parts I.A.3, B.2, C.2, D.2 and E.3. The Region explained that these limitations are required by the Ohio water quality standards, which require that pH in the East Branch Nimishillen Creek be in the range of 6.5 to 9.0 S.U. at all times. *See* Response to Comments, at 2; Fact Sheet, at 8-10. In addition, the permit contains whole effluent toxicity ("WET") requirements for Outfall 003; beginning 56 months from the effective date of the permit, the permit allows 1.0 acute toxicity units and 1.5 chronic toxicity units. *See* Permit Part I.D.1. According to the Region, these numerical limitations are imposed because a 1988 toxic-

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[22] The Fact Sheet also indicates that the effluent limitations for TDS are based upon best professional judgment ("BPJ"). *See* Fact Sheet, at 7. No explanation is provided for this discrepancy. Our review of the record indicates that the language of the Fact Sheet referencing BPJ repeats verbatim the rationale for the TDS effluent limitations in the draft permit issued by OEPA in February, 1989. *See* Fact Sheet Accompanying February 3, 1989 Draft Permit, at 7. When OEPA issued the draft permit, however, the WLA for J&L did not include TDS. *See* OEPA WLA Report, 1988. TDS was not added to J&L's WLA until 1990, *see* OEPA WLA Report, September 1990, and it is the 1990 WLA that provides the basis for the TDS effluent limitations in the final permit.

[23] Under 40 C.F.R. §122.44(d)(1)(vii), water quality-based effluent limitations must be consistent with duly promulgated WLAs. Therefore, if the record indicates that an effluent limitation is derived from a WLA, it represents the Region's determination that a water-quality based effluent limitation for that pollutant is required under §301(b)(1)(C).

ity test showed that effluent from Outfall 003 violated the WET limits of Ohio's water quality standards. *See* Response to Comments, at 4; Fact Sheet, at 8. In other words, the Region determined that the WET effluent limitations are necessary for compliance with Ohio's water quality standards.

These same effluent limitations were in the draft permit. In its comments on the draft permit, J&L contended that it is entitled to variances from these limitations under CWA §302(b)(2)(A) and (B), 33 U.S.C. §1312(b)(2)(A) and (B).[24] *See* Comments, at 9-10. Specifically, for each of the above-detailed effluent limitations, J&L provided a factual basis for its position that it is entitled to variances under the standards of §302(b)(2)(A) and (B). *See* Comments, at 11, 28, 29, 39, 46.

The Region denied J&L's request for variances from these effluent limitations on the ground that §302(b) authorizes variances only from effluent limitations promulgated under §302(a). According to the Region, none of the effluent limitations at issue were promulgated pursuant to §302(a); instead, they were established under

§301(b)(1)(C), which requires effluent limitations necessary to assure compliance with approved State water quality standards. *See* Response to Comments, at 1. Therefore, the Region reasoned, §302(b) does not authorize consideration of the variances requested by J&L. *Id.* The Region also noted that it is not authorized under the CWA to modify effluent limitations necessary to meet State water quality standards included in a permit pursuant to §301, and that any such variance must first be granted by the State, which may then provide cause for modifying the permit. *See* Response to Comments, at 3, 7, 8, 10, 13.

J&L requested an evidentiary hearing on the denial of its request for variances, arguing that the effluent limitations were promulgated under §302(a) because they were promulgated as part of an ICS pursuant to §304(l). *See* Request for Evidentiary Hearing, at 6. J&L relied

[24] Section 302(b)(2)(A) provides, in part, that "[t]he Administrator, with the concurrence of the State, may issue a permit which modifies the effluent limitations required by subsection (a) of this section for pollutants other than toxic pollutants if the applicant demonstrates * * * [that] there is no reasonable relationship between the economic and social costs and benefits to be obtained * * * from achieving such limitation." This provision, by its express terms, does not apply to toxic pollutants. Section 302(b)(2)(B) authorizes the Administrator to issue a permit, with the concurrence of the State, that modifies effluent limitations required by §302(a) for toxic pollutants if the applicant demonstrates that "such modified requirements (1) will represent the maximum degree of control within the economic capability of the * * * source, and (ii) will result in reasonable further progress beyond the requirements of [technology-based effluent limitations] toward the requirements of [§302(a)]."

upon that portion of §302(a) which provides that effluent limitations shall be established to assure attainment of the water quality goals stated in §302(a) whenever, "as identified under [§304(l)]," a point source's discharges interfere with such goals. J&L also argued that it requested variances under §302(b) based on the maximum use of technology within J&L's economic capability, and that variances based upon these factors are also authorized under §301(c). Lastly, J&L argued that Ohio water quality standards require, prior to imposing water quality-based effluent limitations, that the permitting authority consider the social and economic impact of the limitation. In sum, J&L's request for an evidentiary hearing on this issue advanced several legal theories J&L contends entitle it to a hearing on the technical and economic feasibility of the effluent limitations for TDS, cyanide, nitrite/nitrate, pH, and WET contained in the permit.

The Region summarily denied J&L's evidentiary hearing request on the ground that it did not set forth material issues of fact relevant to the permit. On appeal, J&L asserts that its evidentiary hearing request should not have been denied because it raised the factual issue of the technical feasibility and economic reasonableness of the effluent limitations, and that the Region improperly failed to make such factual determinations in establishing the effluent limitations and denying J&L's variance request. *See* Petition for Review, at 2-3.

The economic reasonableness and technological feasibility of effluent limitations are factual inquiries, on which J&L contends it is entitled to an evidentiary hearing. Whether J&L's request for an evidentiary hearing was erroneously denied depends upon whether the facts are material. *In re Boise Cascade Corp.*, NPDES Appeal No. 91-20, at 6 (EAB, Jan. 15, 1993). The facts alleged by J&L are material only if they would affect the outcome of the proceeding[25] that is, only if the Region is authorized under the CWA to grant variances from the contested effluent limitations. We conclude that the Region is not so authorized, and therefore the facts are not material and the Region did not erroneously deny J&L's evidentiary hearing request on this issue.

CWA §301(b)(1)(C) requires that discharges subject to NPDES permits meet effluent limitations necessary to insure compliance with water quality standards promulgated by a State and approved by EPA. *See* 40 C.F.R. §122.44(d)(1)(i). There is no doubt that the contested effluent limitations were imposed under this authority. As explained

[25] *Mayaguez*, at 12 ("A factual dispute is material where, under the governing law, it might affect the outcome of the proceeding.").

above, the record for this permit clearly indicates that each of the effluent limitations for which J&L seeks a variance was included in the permit so that the discharge would achieve compliance with Ohio's water quality standards. Because the contested effluent limitations are included in the permit pursuant to §301(b)(1)(C), no variance from these limitations is available under the provisions of the CWA. *In re Goodyear Aerospace Corp.*, NPDES Appeal No. 87-1, at 3 (CJO, Sept. 26, 1989) ("EPA has steadfastly construed the [CWA] as barring it from relaxing or modifying such limitations [required by §301(b)(1)(C)] in a way that would undermine strict compliance with a state's water quality standards."). Such a variance could, by allowing an increase in the amount of pollutants discharged, produce a violation of applicable water quality standards.[26] In effect, such variances would amount to an amendment of a State water quality standard, which should be made in the first instance by the State.[27] Therefore, as the Region points out, J&L should address its request for variances to OEPA. If the variances are granted, J&L may then seek a modification of its NPDES permit under 40 C.F.R. §122.62(a)(3).[28]

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[26] For example, a variance from the effluent limitations implementing the WLAs for TDS, cyanide, and nitrite/nitrate for J&L would increase the amount of those pollutants in J&L's discharge, possibly causing the loading capacity of the receiving waters to exceed the water quality standards for those pollutants.

[27] Consequently, we reject J&L's argument that the Region was required to consider the technological and economic feasibility of these effluent limitations because the Ohio water quality standards authorize variances based on these factors. Under §303 of the CWA, promulgation of water quality standards, including procedures for implementation, is left to the States subject to EPA approval. *See* 40 C.F.R. Part 131. We agree with the Region's statement that "[a]pproval of the procedures by which a State may grant variances from its water quality standards does not, however, bind U.S. EPA to implement those procedures or * * * grant or approve water quality variances which the State has not had the opportunity to consider or has denied." *See* Response to Petition, at 10. The fact that Ohio water quality standards may allow variances from effluent limitations in light of technical and economic factors, and the existence of State procedures for considering such variance requests, does not imply, as J&L suggests, that the Region has the authority to undermine the State's water quality standards by considering a variance request that the State has not yet considered. Nor does it imply that the State would have granted J&L's variance requests in this case. Indeed, the effluent limitations for which J&L seeks variances, like other effluent limitations challenged here by J&L, are the same as those contained in the permit prepared by OEPA and received by the Region in December 1990, (*see* note 13, *supra*), thus suggesting that Ohio would not have granted the requested variances.

[28] J&L is currently using this procedure, asking Region V to modify the nitrate/nitrite effluent limitations challenged in this proceeding based on a change in Ohio's use designation, a component of the water quality standard, for Nimishillen Creek. *See* Reply, at 6.

We reject J&L's contention that the Region is authorized under CWA §301(c)[29] to consider J&L's requested variances. Section 301(c) authorizes variances from technology-based effluent limitations. Because J&L seeks variances from water quality-based effluent limitations, §301(c) is not applicable here.

We also find no merit to J&L's contention that §302(b) authorizes a variance from the contested water quality-based effluent limitations in this case. By its terms, §302(b) authorizes variances only for effluent limitations established under §302(a). In essence, J&L argues that because this NPDES permit is also an ICS required by §304(l), the effluent limitations were promulgated under §302(a), which authorizes water quality-based effluent limitations whenever "as identified under section [304(l)]" discharges are interfering with the attainment of the goals stated in §302(a). We disagree with J&L's interpretation of §302(a).

Section 302(a) provides:

> Whenever, in the judgment of the Administrator, or as identified under section [304(l)] of this title, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section [301(b)(2)] of this title [best available technology ("BAT")], would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public health, public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations * * * for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

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[29] Section 301(c) provides:

> The Administrator may modify the requirements of subsection(b)(2)(A) of this section * * * upon a showing * * * that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

Subsection (b)(2)(A) of section 301 requires the application of best available technology.

The "as identified under section [304(l)]" language relied upon by J&L was added to §302(a) by the 1987 amendments to the Clean Water Act. Prior to those amendments, the Agency interpreted §302(a) as having very limited applicability:

> Its practical value is limited since its basic purpose—ensuring compliance with the water quality goals of the Act, principally the "fishable, swimmable" goals—is most readily facilitated through application of state water quality standards, either directly by the states or indirectly by EPA pursuant to §301(b)(1)(C), as was done in this case. * * * As stated by EPA's General Counsel, "sections 302 and 301(b)(1)(C) can easily be reconciled if section 302 is recognized as simply an alternative way to improve water quality, applicable to those situations where technology-based standards are inadequate and no water quality standards are in place calling for 'fishable, swimmable' water." Memorandum from Robert M. Perry, General Counsel, to John E. Daniel, Chief of Staff, entitled "Interpretation of Section 301(b)(1)(C) of the Clean Water Act" (Feb. 23, 1982).

Goodyear Aerospace Corp., at 4 n.2. Thus, §§301(b)(1)(C) and 302(a) are similar in that they both require water quality-based effluent limitations when BAT is insufficient to attain a desired end. However, they are very different in that §301(b)(1)(C) requires the effluent limitation to implement a State water quality standard, and §302(a) requires the effluent limitation to implement stated goals of the CWA when both the technology-based limitations and State water quality process have failed to achieve those goals. Water quality-based effluent limitations established under §301(b)(1)(C) are not the same as those promulgated under §302(a). *Goodyear Aerospace Corp., supra* (hearing provision of §302(a) is not applicable to effluent limitations required by §301(b)(1)(C)); *In re Travenol Laboratories, Inc.*, NPDES Appeal No. 87-7 (CJO, Apr. 2, 1990) (same).

The 1987 amendments do not require a change in this interpretation of §302(a). The legislative history of the amendments makes clear that *even as amended* §302(a) applies only when compliance with effluent limitations required by §301(b)(1)(C) (the State water quality standard process) is not achieving the CWA's stated water quality goals. As stated in a report accompanying an early version of the amendments:

> Ordinarily, State water quality standards established or revised under section 303 designate the uses specified

> in section 101(a)(2) of the Act, and if implemented through adequate criteria, wasteload allocations, and effluent limitations in permits, will protect this level of water quality addressed by section 302(a). The Administrator is to use the authority of section 302(a), however, where compliance with the best available technology requirements or the State water quality standards process are not attaining this level of water quality, due to point sources.

Sen. Rep. No. 98-233, 98th Cong., 1st Sess., Sept. 21, 1983, p. 19.

Moreover, the legislative history reveals that as originally proposed, §302(a)'s reference to §304(l) was intended to allow effluent limitations to be promulgated under §302(a) for water segments identified under a provision currently contained in §304(l)(1)(A)(ii), requiring states to identify waterbodies where technology-based effluent limitations will not achieve the water quality goals stated in §302(a). *See* Conference Report, H.R. Rep. No. 99-1004, 99th Cong., 2d Sess., Oct. 15, 1986, p.126.[30] Section 304(l)(1)(A)(ii) was not the basis for the placement of the East Branch Nimishillen Creek on Ohio's §304(l) list.[31] Therefore, we are not persuaded that the reference to §304(l) in §302(a) alters the distinctions between the authorities granted by §302(a) and §301(b)(1)(C). We conclude that effluent limitations established under §301(b)(1)(C) do not become effluent limitations established under §302(a) merely because they are part of an ICS required by §304(l). Accordingly, because §302(b) authorizes a variance only from effluent limitations established under §302(a), and the effluent limitations at issue here were established under §301(b)(1)(C), we conclude that J&L is not entitled to a variance under §302(b). Because the Region has no authority to grant a variance from the effluent limitations at issue, the facts alleged by J&L (technical feasibility and economic reasonableness of the contested effluent limitations) are not material to this permit, and the Region therefore properly denied the evidentiary hearing request on this issue.

D. State Certification

In its petition for review, J&L contends that its evidentiary hearing request raised the material factual question of whether State certifica-

[30] The provision currently contained in CWA §304(l)(1)(A)(ii) was originally proposed as "§305(c)(1)(B)." The report accompanying the final legislation maintained a reference to §305(c)(1)(B), even though the section numbers changed.

[31] The East Branch Nimishillen Creek was on Ohio's §304(l) list pursuant to §304(l)(1)(B). *See* 55 Fed. Reg. 36,309 (Sept. 5, 1990).

tion or a waiver thereof existed prior to the issuance of the final permit. *See* Petition for Review, at 4. Under CWA §401(a), 33 U.S.C. §1341(a), an NPDES permit cannot be issued until the State certifies, or waives its right to certify, that the permitted discharge will comply with, *inter alia*, all applicable State water quality standards. *See also* 40 C.F.R. §124.55. The procedures for obtaining a State certification are set forth in 40 C.F.R. §124.53(c), which provides that if a certification has not been received at the time the draft permit is prepared, as in this case, the Region shall send the State a copy of the draft permit, a statement that the permit cannot be issued until the State grants or denies certification under 40 C.F.R. §124.55, and a statement that the State will be deemed to have waived its right to certify unless the right is exercised within a specified reasonable time period of no more than sixty days from the date the draft permit is mailed.

We conclude that J&L has not met its burden of demonstrating a genuine issue as to this material fact. It has been held that "[t]he existence of such a certification is a matter of fact appropriately established by presentation of appropriate documentary evidence in a fact-finding hearing." Decision of the General Counsel No. 13 (May 19, 1975) (*cited in E. I. DuPont de Nemours & Co.*, NPDES Appeal No. 78-2 (JO, Mar. 16, 1978)). Here, however, J&L's evidentiary hearing request does not allege any specific facts supporting its claim that the required certification or waiver was not obtained.[32] The evidentiary hearing request merely concludes that "U.S. EPA is without authority to issue this permit, because the State of Ohio has neither granted nor waived certification as required by CWA §401(a)(1)." Request for Evidentiary Hearing, at 34. In making this statement, J&L seems to ignore the fact that certification could have been deemed waived by the expiration of the time period allowed for certification, without the State either granting or specifically waiving certification. In any event, this bald assertion alone does not demonstrate an issue of fact that should be resolved through an evidentiary hearing. *See Town of Seabrook*, at 5 n.3. In this case, the fact sheet accompanying the draft permit provided:

> [T]his permit cannot be issued or denied by the U.S. EPA until Ohio EPA has granted or denied certification under 40 C.F.R. §124.55, or waived its right to certify. The Ohio EPA will be deemed to have waived its right to certify unless that right is exercised within thirty (30)

[32] J&L's petition for review asserts that the factual issue pertaining to the existence of the State certification was raised on page 4 of its evidentiary hearing request, but that page alleges facts occurring between October 27, 1989, and December 18, 1990, well before the draft permit was issued and sent to OEPA for review on February 4, 1991.

> days from the date this draft is mailed to Ohio EPA, unless the U.S. EPA finds circumstances requiring a longer period.

Fact Sheet, at 2. The final permit was issued on May 11, 1992, more than ninety days after the draft permit was publicly noted, and there is nothing in the record provided in this appeal that shows Ohio attempted to file a certification in that period. These facts support the Region's conclusion that Ohio waived its right to certify the draft permit in this case. *See* Response to Petition, at 18. J&L has failed to allege any facts that would refute these facts, and thereby has failed to show that there is a genuine issue as to whether Ohio either certified or waived its right to certify the permit in this case. Accordingly, the Region did not clearly err in denying the evidentiary hearing request on this ground.

J&L also seeks review of a legal issue raised in its evidentiary hearing request pertaining to the certification requirement. J&L's evidentiary hearing request contends that "Region V's procedure of seeking state certification simultaneously with seeking J&L's comments was contrary to the requirements of 40 C.F.R. §124 [sic] and deprived J&L of its rights under federal and state law." Request for Evidentiary Hearing, at 34. J&L contends that a State is required to certify, or waive certification of, a draft permit prior to the public notice of the draft permit so that the draft permit can, if necessary, be revised to meet State requirements, and so that the public can be informed of those State requirements before it comments on the draft permit. *See* Comments, at 79. In other words, J&L claims that for public comment on the draft permit to be meaningful, the draft permit *must* reflect either a previous State certification or a waiver thereof. According to J&L:

> Federal regulations state that the proper sequence for seeking state certification under Section 401 of the CWA and comments on a publicly-noticed Draft Permit consist of: (1) the issuance of a Draft Permit to the state, (2) the receipt of certification or waiver, (3) revision of the Draft Permit to reflect state certification, and (4) public notice of the Draft Permit, as so revised. *See* 40 C.F.R. §124.6(d)(4)(v) (draft permit includes conditions certified by a State agency), 124.53(b) (permit applications without state certification shall be forwarded to the State agency for certification), 124.53(c) (procedure where a certification has not been received (as it should have) by the time the draft permit is prepared by U.S. EPA),

> 124.53(e)(2) (procedure where the State certifies a draft permit instead of, as preferred, a permit application).

Comments, at 79.

While the applicable regulations would allow for the process J&L proposes, they also expressly contemplate the action taken here. As J&L recognizes, 40 C.F.R. §§124.53(c) and (e) specifically allow the State to provide its certification after a draft permit has been prepared. Draft permits must be subject to public notice under 40 C.F.R. §124.10, and there is nothing in that section that requires the public notice to follow the State certification process, as J&L contends. When these regulations are read together, they allow the process used by the Region in this case, that is, the process of simultaneously seeking State certification and public comment. Because the process employed by the Region in this case comports with the applicable regulations,[33] J&L has failed to demonstrate that review of this legal issue is warranted under 40 C.F.R. §124.91.

E. "Technical Issues"

J&L's petition for review asserts that the "entirety of Part III of J&L's [evidentiary hearing request], entitled 'Technical Issues Requiring Factual Determination' * * * involves material factual issues," and therefore the Region erroneously denied J&L's hearing request. Petition for Review, at 4. Each issue raised in the "Technical Issues" portion of J&L's evidentiary hearing request is discussed below.

1. *Limits for pH*

As noted above, the effluent limitations in J&L's permit allow a maximum pH of 9.0 S.U. According to the Region, the 9.0 effluent limitation is mandated by Ohio's water quality standards for the East Branch Nimishillen Creek. *See* Response to Comments, at 2; Fact Sheet, at 8-10. In the "Technical Issues" portion of its evidentiary hearing request, J&L challenges the pH effluent limitation. J&L argues that it should be allowed a maximum of 10.0, not 9.0, for pH. To support its claim that it is entitled to an effluent limitation for pH more lenient than that allowed by the State water quality standards, J&L provides evidence that the technological problems with achieving the 9.0 efflu-

[33] The validity of applicable regulations cannot be challenged in these proceedings. *Georgia Pacific Corp.*, at 2-3. *See also In re Ford Motor Company*, RCRA Appeal No. 90-9, at 8 n.2 (Admin. Oct. 2, 1991) ("Section 124.19, which governs this appeal [and is similar to §40 C.F.R. §124.91] is not intended to provide a forum for entertaining challenges to the validity of the applicable regulations.").

ent limitation exceed its benefits,[34] and that the pH of the receiving water downstream from J&L is not appreciably affected by J&L's discharge. *See* Comments, at 11-13.

With respect to the effluent limitation for pH, the "Technical Issues" portion of J&L's evidentiary hearing request merely provides the factual data J&L contends justify an effluent limitation more relaxed than that required under the State water quality standards. In other words, J&L contends that based on these facts, it is entitled to a variance from the State water quality standards for pH in the East Branch Nimishillen Creek. We have already rejected J&L's claim that the Region is legally authorized to consider a request for a variance from the pH effluent limitation in this case, which was imposed under CWA §301(b)(1)(C). Any variance from such an effluent limitation, which in essence is a variance from a State water quality standard, should be granted in the first instance by the State. Because J&L is not legally entitled to Regional consideration of its variance request, the facts alleged by J&L to support its request are not material to this permit determination and do not warrant an evidentiary hearing.[35]

2. *WET Effluent Limitations and Biomonitoring Provisions*

As mentioned above, the permit contains limitations on the amount of whole effluent toxicity, or WET, attributable to the discharge from Outfall 003. Whole effluent toxicity "means the aggregate toxic effect of an effluent measured directly by a toxicity test." 40 C.F.R. §122.2. A toxicity test is a test measuring the degree of response of an exposed test organism to an effluent. *See* 54 Fed. Reg. 23,871 (June 2, 1989). Specifically, the permit requires that beginning 56 months from the

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[34] Specifically, J&L claims that it is currently achieving the lowest pH that it can, which is 9.4, while controlling the metals in its discharge. According to J&L, in order to lower its pH below 9.4, it would have to increase the metals in its discharge, or the amount of TDS. J&L contends that an increase in these other pollutants is a "social cost" that exceeds the benefits to be obtained from the permit's effluent limitation for pH. *See* Comments, at 11-14.

[35] We note that the Region has displayed some sensitivity to J&L's concerns about its ability to comply with the permit's effluent limitation for pH. The Region stated that it will not require compliance with the pH limit upon the effective date of the permit, but "in response to comments provided by J&L prior to the public notice period, [the Region] agreed to delay the effective date of the maximum pH effluent limitation" until February 5, 1994, almost twenty months after the permit's June 11, 1992 effective date. Response to Comments, at 3. In the interim, the permit allows J&L to conduct an instream alkalinity study. *See* Permit Part I.F.1.e. If the study shows no instream impact from a maximum pH limit in the range of 9.0 to 10.0, J&L may seek a permit modification to incorporate a higher pH effluent limitation. It is not clear to us from the record in this proceeding how the alkalinity study provision relates to the State water quality standard process, and to whom the modification request must be directed. (We note that a copy of the study must be submitted to the State under Permit Part I.F.2.) However, these issues have not been raised in these proceedings and are not now before us.

effective date of the permit, J&L's discharge from Outfall 003 must comply with a limitation of 1.0 acute toxicity units and a limitation of 1.5 chronic toxicity units. Permit Part I.D.1.

The permit uses two approaches to achieve the applicable water quality standards: a chemical- or pollutant-specific approach, and a whole effluent toxicity approach. The permit's WET limitations are the last effluent limitations to become effective under the permit's phased approach. Prior to the date when the WET limitations become operative, J&L must meet chemical- and pollutant-specific effluent limitations, some of which are operative upon the effective date of the permit, and some of which become operative on February 5, 1994, almost twenty months after the permit's effective date of June 11, 1992. Permit Parts I.B.1 and I.C.1.

The permit also requires J&L, within three months of the permit's effective date, to begin a biomonitoring program to determine the toxicity of the effluent discharged at Outfall 003. J&L is to test bimonthly the toxicity of this effluent on two species, ceriodaphnia, and pimephales promelas. J&L is required to submit the data obtained by the tests to OEPA for review, and OEPA will evaluate the data to determine if a toxic reduction evaluation ("TRE") is required. The permit explains that the "purpose of a TRE program is to identify sources of acute toxicity, develop recommendations to reduce acute and chronic toxicity, and implement those recommendations to reduce acute and chronic toxicity, and implement those recommendations that the permittee believes will enable it to achieve compliance with [the] final [WET] effluent limitations * * *." Permit Part II.E.6. If required, the TRE is to be completed within three years, but no later than 56 months from the effective date of the permit.

a. *Can WET Effluent Limitations and Biomonitoring Requirements Be Imposed in this Permit?*

J&L raises legal and factual reasons it believes preclude the imposition of WET effluent limitations and biomonitoring requirements in this permit. As a matter of law, J&L argues that WET limitations cannot be in this permit because toxicity testing has not been sufficiently developed to be used for enforcing such limits. In J&L's opinion, "[u]ntil U.S. EPA adequately validates its currently unreliable, insufficiently developed testing procedures and publishes those methods, along with their performance characteristics, in 40 C.F.R. Part 136, the application of those test methods in the regulatory process is inappropriate." Request for Evidentiary Hearing, at 19.

J&L's contention lacks merit. Since 1984, the Agency has maintained that "toxicity testing is sufficiently refined to be used in setting effluent limitations * * *." 49 Fed. Reg. 38,009 (Sept. 26, 1984). There is nothing in the CWA requiring the formal promulgation of toxicity testing procedures before WET effluent limitations can be imposed. *See* 54 Fed. Reg. 23,874 (June 2, 1989). J&L has wholly failed to demonstrate why the testing methods or procedures required by its permit are unreliable, other than to allege that the procedures do not appear in 40 C.F.R. Part 136. However, there is nothing in the CWA or Part 136 that compels the conclusion that only those procedures published in Part 136 are reliable. *Id.* Therefore, J&L has failed to demonstrate that its WET limits are unwarranted due to unreliable testing procedures.[36]

J&L also contends that:

> It was unreasonable and unlawful for U.S. EPA and Ohio EPA to subject J&L to whole effluent numerical toxicity limits upon mere notice when J&L may not be able to achieve compliance without a reasonable time for design and construction. * * * Because J&L will not be able to predict the need for additional control measures to meet the final Whole Effluent Toxicity limits until the results of the Biomonitoring Program are known, there would not be a reasonable amount of time remaining before the November 5, 1994 deadline in the permit to design and construct the necessary system.

Request for Evidentiary Hearing, at 35-36. We are not sure what J&L means when it contends that it is subject to numerical whole effluent toxicity limits "upon mere notice." We also are not sure where J&L found the November 5, 1994 deadline, as the permit indicates that J&L has 56 months from the permit's planned effective date, which was June 11, 1992, to comply with the WET limits. Because of this 56 month grace period, J&L's suggestion that it does not have a reasonable amount of time to meet the WET limits is purely speculative.

We turn now to J&L's factual claims. Under CWA §301(b)(1)(C) and 40 C.F.R. §122.44(d), the Region is authorized to establish a water quality-

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[36] *See also In re Kaiser Aluminum & Chemical Co.*, NPDES Appeal No. 85-22, at 3-4 (JO, Aug. 13, 1986)("Neither procedural due process, the Administrative Procedure Act nor the Clean Water Act's §304(h) require * * * that every form of testing be formally promulgated before it can be used in a permit.").

based effluent limitation in this NPDES permit for WET only if the discharge will cause, contribute to, or have the reasonable potential to cause or contribute to, an excursion above the State water quality standard for WET. *In re Miami-Dade Water and Sewer Authority Dept.*, NPDES Appeal No. 91-14, at 10 (EAB, July 27, 1992). The Region concluded that J&L's discharge met this requirement based on an April 1988 bioassay test which indicated that J&L violated the WET limits of Ohio's water quality standards. *See* Fact Sheet, at 8-9; Response to Comments, at 4. The Region also relied upon stream surveys conducted by OEPA in 1985-86. *Id.* Based upon its opinion that WET limitations are inappropriate without monitoring and TRE requirements, and based upon recommendations in Ohio's "Toxics Strategy," the Region decided to require bimonthly biomonitoring to test the toxicity of J&L's effluent. *See* Fact Sheet, at 9; Response to Comments, at 6. Thus, the Region linked its determination that biomonitoring is required to its determination that WET effluent limitations are required. J&L requested an evidentiary hearing on the Region's factual basis for imposing the WET limits and the biomonitoring requirements, objecting to the validity and representativeness of the Region's data. For the reasons set forth below, we conclude that the Region clearly erred in denying the request on this issue.

Whether a discharge causes, contributes to, or has the reasonable potential to cause or contribute to a violation of a State toxicity water quality standard is a material question of fact because it is a prerequisite to the Agency's authority to impose a water quality-based effluent limitation for whole effluent toxicity. *Miami Dade*, at 11. Our inquiry, then, is whether J&L's evidentiary hearing request set forth a *genuine issue* as to this material question of fact; in other words, whether J&L presented "sufficient probative evidence from which a reasonable decisionmaker could find" in J&L's favor that its effluent does not cause, contribute to, or have the reasonable potential to cause or contribute to a violation of Ohio's water quality standard for WET. *Mayaguez*, at 13.

It is not the Board's function at this stage of the proceedings to determine the merits of J&L's arguments and thus resolve any factual dispute, but rather to determine only if there is a genuine dispute as to a material fact. Therefore, our role is to view the evidence in a light most favorable to J&L, [37] and to decide whether in that light the evidence demonstrates a genuine dispute. We conclude that it does.

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[37] We have explained that the standards for addressing summary judgment motions under Rule 56 of the Federal Rules of Civil Procedure are useful in addressing requests for evidentiary hearings. *Mayaguez*, at 11. In summary judgment determinations, the evidence is to be viewed in favor of the non-moving party, that is, the party desiring a hearing. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 225, 255 (1986); *Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

J&L has shown a genuine issue as to this factual question by directly challenging the test results and studies relied upon by the Region in making its factual determination that J&L's effluent causes or contributes to a violation of Ohio's water quality standard for WET. For example, the Region relied upon the April 1988 bioassay test as an indication that J&L's effluent violated the WET limits in the Ohio water quality standards. *See* Fact Sheet, at 8-9; *See* Response to Comments, at 4. J&L, however, contends that the April 1988 bioassay test results are invalid because of a chromium excursion on the date of the test, and provides evidence of such an excursion. *See* Comments, at 17-19. In contrast, the Region believes that the bioassay test is valid, explaining that "[t]here is no clear demonstration that chromium was the cause of the toxicity and, more importantly, there is no assurance that recurrent or periodic operational conditions do not exist which may cause continued toxicity." Response to Comments, at 4. Thus, J&L and the Region genuinely disagree as to whether a documented chromium excursion invalidates the 1988 bioassay test that demonstrated the toxicity of J&L's effluent. The Region also relied upon "biological stream surveys" conducted in 1985-1986 to conclude that J&L's effluent had toxic impacts on the East Branch Nimishillen Creek. *See* Fact Sheet, at 8-9; Response to Comments, at 4. J&L contends that these surveys, which were conducted in 1985 and 1986, are unreliable for the Region's purposes because they do not reflect the relocation of a publicly owned treatment plant from upstream to downstream of J&L in 1987. According to J&L, the impact of its discharge downstream must be evaluated with consideration of the downstream treatment plant discharge. *See* Comments, at 19. Thus, J&L and the Region also genuinely disagree as to whether the 1985-1986 stream surveys are reliable indicators of J&L's impact on the water quality in the East Branch Nimishillen Creek at the time of permit issuance in light of the relocation of the POTW.

J&L has also shown a genuine issue as to this material fact by pointing to other evidence it contends shows that the Region's determination was wrong. Specifically, J&L contends that data other than that relied upon by the Region show that J&L's discharge does not cause or contribute to "documented toxic impacts" in the East Branch Nimishillen Creek, as the Region claims. *See* Fact Sheet, at 8. According to J&L, its 1990 Form 2-C[38] shows that potentially toxic pollutants

[38] EPA Form 2-C, an application for an NPDES permit, is formally entitled "Application for Permit to Discharge Wastewater Existing Manufacturing, Commercial, Mining and Silvicultural Operations." It requires information concerning outfall location, flows and sources of pollution and treatment technologies, production, improvements, intake and effluent characteristics, potential discharges not covered by analysis, and biological toxicity testing data. *See generally* 40 C.F.R. §122.21(g).

copper, cadmium and silver were not, as the Region claims, routinely detected at levels above the chronic criteria for such pollutants. J&L also contends that its 1990 copper and nickel study shows that copper and nickel are not discharged at levels that would lead to toxicity. Lastly, J&L contends that Ohio's 1988 Report on Water Quality Based Effluent Limits for J&L Specialty Steel ("1988 WQBEL Report") reveals that the water quality in the East Branch Nimishillen Creek at the point of J&L's discharge is better than that downstream, and that the aquatic life criteria were not exceeded by J&L's effluent or the downstream water. The 1988 WQBEL Report relies upon, *inter alia*, information relied upon by the Region, namely, the 1988 bioassay test results and the 1985-86 stream surveys. *See* Comments, at 21. Plainly, the parties have differing opinions as to the validity and interpretation of the data relied upon by the Region in making its factual conclusion. We repeat that we do not conclude that J&L's contentions are correct, only that they raise material issues of fact as to whether its discharges causes or contributes to, or has the potential to cause or contribute to, a violation of Ohio's water quality standard for WET. This is not an instance where the Region can or has pointed to other data supporting its conclusion such that we can conclude as a matter of law that there is no genuine dispute. *See Boise Cascade Corp.*, at 12. Accordingly, the issue of whether J&L's discharge causes or contributes to, or has the reasonable potential to cause or contribute to, a violation of Ohio's WET water quality standard is remanded for an evidentiary hearing. As noted above, the Region linked its determination to require biomonitoring to its determination to require WET limitations. If the evidentiary hearing process demonstrates no factual need for WET limitations, the Region must revise the biomonitoring provisions of the permit accordingly, unless it establishes a need for those requirements on another basis, such as CWA §308(a).[39]

b. Are the Biomonitoring Requirements Deficient?

J&L alternatively argues that if WET limits and biomonitoring can be included in the permit, it believes that the permit's biomonitoring requirements are substantively deficient in a number of respects. None of these arguments raise issues of fact appropriate for an evidentiary hearing, and thus these issues can be considered here. Each of these arguments is addressed below. We conclude that J&L has not met its

[39] CWA §308(a) allows the Region to require biomonitoring in order to "aid enforcement, to develop permit limitations and effluent standards, and to generate whatever information it needs to carry out its statutory responsibilities." *In re Simpson Paper Company*, NPDES Appeal No. 87-14, at 14 (CJO, March 26, 1991). The Region did not cite CWA §308(a) as a basis for its biomonitoring requirements.

burden of demonstrating that any of these issues warrants review of the permit's biomonitoring requirements.

J&L contends that the biomonitoring requirements should consist solely of monitoring, with no opportunity for OEPA to review the resulting data to see if a TRE is needed, and no obligation on J&L to conduct a TRE.[40] J&L argues that such a biomonitoring program is all that would be required for this discharge under an April 1989 Ohio policy entitled "Policy for Implementing Chemical Specific Water Quality Based Effluent Limits and Whole Effluent Toxicity Controls in NPDES Permits." We are not persuaded that the State policy cited by J&L controls the Region's determination of what permit conditions are necessary to ensure attainment of the State water quality standards for WET, even though that policy may be helpful to the Region in making that determination. The Region is granted the discretion to determine what conditions are necessary to implement a State water quality standard, and a State is allowed to agree or disagree with that determination through the certification process. *See* 40 C.F.R. §124.53. Where, as here, the State waives certification so that the Region is left to exercise its own judgment in establishing permit conditions to implement the State water quality standards, the Region's judgment will be upheld as long as it is reasonable. *American Cyanamid Co. and Jefferson Smurfit Corp.*, NPDES Appeal Nos. 92-18, 92-8, at 14 (EAB, Sept. 27, 1993) (when State waives certification of draft permit, Region is left to exercise its own judgment in implementing State water quality standards through permit conditions, and judgment will be upheld if it is a reasonable interpretation of State requirements). J&L has failed to demonstrate that the Region's decision to impose data review and TRE requirements in the permit is an unreasonable exercise of discretion, and therefore review of those conditions is denied. Indeed, as noted elsewhere in this opinion in connection with other issues, the permit conditions challenged by J&L, the biomonitoring requirements, are substantially identical to the ones contained in the December 1990 permit prepared by OEPA and submitted to the Region.[41]

J&L also contends that the biomonitoring requirements should not operate concurrently with the chemical-specific effluent limits in the permit. J&L contends that the biomonitoring requirements should not commence until February 5, 1994, the latest date the permit provides for J&L to come into compliance with the chemical-specific effluent

[40] J&L also argues that biomonitoring should not include numeric WET limits. The WET limits, however, are not part of the biomonitoring requirements. Instead, biomonitoring is the means to measure attainment of the WET limits.

[41] *See* note 13, *supra*.

limits. J&L is concerned that if it must commence biomonitoring right away, any demonstrated toxicity may be attributable to pollutants it is allowed to discharge before February 5, 1994.

This argument also fails to persuade us. Since 1984, it has been EPA's policy to use an integrated strategy of both chemical-specific and whole effluent toxicity limitations to address toxicity. *See* 49 Fed. Reg. 9016 (Mar. 9, 1984). The policy recognizes that it may be difficult to set water quality-based effluent limits for some toxic pollutants because of complex chemical interactions that affect the fate and ultimate impact of the toxic pollutants in the receiving water. *Id.* at 9017. In other words, chemical-specific limits alone may not address the extent to which an entire discharge may impact aquatic life. *See* U.S. EPA Office of Water, *Training Manual for NPDES Permit Writers*, at 40 (May 1987) ("Training Manual"). Therefore, in many instances, particularly where the effluent is complex or where the combined effects of the pollutants are of concern, it is desirable to use both chemical-specific and whole effluent toxicity limits to regulate the toxicity of the discharge. *See* 49 Fed. Reg. 9018 (Mar. 9, 1984). Here, such an integrated approach seems justified given the apparent chemical complexity of J&L's effluent, which contains ammonia-N, nitrite-N, nitrite-nitrate, cadmium, chromium, copper, cyanide, lead, nickel, silver, tetrachloroethylene, naphthalene and bis(2-ethylhexyl) phthalate.

It is true that immediate biomonitoring may show toxicity attributable to pollutants that the permit does not limit until February 5, 1994. Contrary to J&L, however, we view this possibility as a justification for requiring biomonitoring to commence before the chemical-specific effluent limitations are effective. The permit provides that the purpose of the biomonitoring and TRE requirements is to identify sources of toxicity and to develop recommendations to reduce toxicity. By immediate biomonitoring, J&L can, as the Region noted, "integrate the implementation of WET controls with other site-specific information involving chemical-specific treatment." Response to Comments, at 5. Otherwise, if J&L does not conduct biomonitoring until after the chemical-specific effluent limitations are effective, J&L may find it needs to go back and make further adjustments to some or all of the chemicals discharged in order to meet the WET limits. We agree with the Region that in this case the interests of the CWA are better served if the WET goals are considered when developing a strategy to meet the chemical-specific effluent limits, and that the plan contemplated by the permit will enhance the likelihood that J&L will attain the WET limits by the deadline in the permit.

In support of its argument that the chemical-specific effluent limitations and the biomonitoring requirements should not be implemented simultaneously, J&L notes that 40 C.F.R. §122.44(d)(1)(v) does not require the use of both WET and chemical-specific effluent limitations. That regulation provides that "[l]imits on whole effluent toxicity are not necessary where the permitting authority demonstrates in the fact sheet or statement of basis of the NPDES permit * * * that chemical-specific limits for the effluent are sufficient to attain and maintain applicable numeric and narrative State water quality standards." J&L asserts that "there is no reason to believe that, based on the information in the Fact Sheet, chemical-specific limits for J&L's effluent will not be sufficient to attain and maintain Ohio's water quality standards." Request for Evidentiary Hearing, at 17-18. We do not believe that the cited regulation requires the relief J&L seeks. It is not at all clear that the regulatory language J&L relies upon applies here, where the Region has used §122.44(d)(1)(*iv*), not (*v*), as a basis for imposing WET limits. *See* Response to Comments, at 5; 54 Fed. Reg. 23,874 (June 2, 1989) (exception does not apply to WET limits established under §122.44(d)(1)((iv)). In addition, the regulation merely allows the Region to exercise its discretion not to require WET limits if the Region determines that the chemical-specific limitations will attain and maintain the applicable water quality standards. Such a determination can be made, for example, based upon toxicity testing. *See* 54 Fed. Reg. 23,874 (June 2, 1989). It cannot be premised, as J&L suggests, on the mere compliance with CWA §301(b)(1)(C)'s obligation to include in a permit those effluent limitations that are necessary to meet water quality standards; otherwise, the exception would become the rule.

J&L also contends that the biomonitoring requirements should not include a full year of testing on the pimephales promelas (fathead minnow). *See* Request for Evidentiary Hearing, at 19. To support its claim, J&L relies upon the same 1988 bioassay test the Region relied upon in making its determination as to the toxicity of J&L's effluent. J&L points to the Region's statement that the results of that test indicated that J&L's effluent did not exhibit toxicity to fathead minnows. *See* Fact Sheet, at 4. J&L suggests that it be required to conduct only two toxicity tests on fathead minnows, with the 1988 bioassay test serving as one of the two.

The Region agrees that after two tests of J&L's effluent, it will consider a request for a modification to eliminate the permit requirement to test toxicity to fathead minnows for a full year. The Region also agrees that the 1988 bioassay test results can be considered in determining the effluent's toxicity to fathead minnows, but disagrees

that the 1988 bioassay test can be used as one of the two tests supporting a modification request. *See* Response to Comments, at 7.

We find the Region's approach a reasonable response to J&L's concerns.[42] Elsewhere in these proceedings, J&L has vigorously attacked the validity of the 1988 bioassay test. J&L cannot argue that the 1988 bioassay test is invalid whenever the Region wants to rely upon it, but valid if J&L wants to rely upon it. Because the Region has stated its intent to accommodate substantially J&L's concerns about the requirement to test toxicity to fathead minnows for a full year, we conclude that review of this requirement is not warranted.

Lastly, J&L contends that the biomonitoring program in the permit is inadequate because it does not sufficiently describe one of the sampling stations. The permit provides for four sampling stations: two points at overflows from lagoons immediately prior to their discharge into the East Branch Nimishillen Creek, one at the end-of-the-pipe discharging into Keim's Run, and one point "upstream" of Outfall 003 "outside the zone of effluent and receiving water interaction." Permit Part II.A. This last spot is implicated in the permit as the spot at which J&L is to obtain dilution and control water under the permit's toxicity testing protocols. Permit Part II.E.2. J&L contends that the permit's description of the last sampling station is "inadequate, since J&L's Outfall 003 does not discharge directly to the Creek, but rather to a point on land several hundred feet away." Request for Evidentiary Hearing, at 20.

Even though Outfall 003 may not directly discharge to the East Branch Nimishillen Creek, the effluent from Outfall 003 obviously reaches the Creek at some point, or else an NPDES permit for the outfall would not be required. The permit requires J&L to collect dilution and control water at a point on the Creek upstream from that point or zone where J&L's effluent from Outfall 003 and the receiving water interact, or meet. J&L has not explained why this requirement cannot be met. Accordingly, J&L has not demonstrated that review of this permit provision is warranted.

3. *Nitrite/nitrate*

As noted above, the permit contains numerical effluent limitations on nitrite/nitrate reflecting a wasteload allocation implementing Ohio's water quality standard for the East Branch Nimishillen Creek. At the

[42] *See also Simpson Paper Company*, (Region's use of biomonitoring authorized by CWA §308(a) is subject only to a reasonableness standard).

time of permit issuance, the water quality standard designated the use of the East Branch Nimishillen Creek as "Agricultural Water Supply."[43] In its evidentiary hearing request, J&L contends that the nitrate/nitrite effluent limitation lacks a factual (and legal) foundation because on April 9, 1992, more than one month before the final permit was issued, OEPA initiated the process for deleting the "Agricultural Water Supply" use from the water quality standard for the East Branch Nimishillen Creek. Request for Evidentiary Hearing, at 21-22.

Initially, we note that the Region did not err in deciding that J&L is not entitled to an evidentiary hearing on this matter. J&L concedes that the deletion of the "Agricultural Water Supply" use designation did not become effective until July 1, 1992, after the final permit was issued, and after J&L requested an evidentiary hearing. There is nothing to suggest that the Region knew on July 13, 1992, when it denied J&L's evidentiary hearing request, that the water quality standard had changed. *See* Reply, at 6. The Region appropriately relied on the water quality standard as it existed on the date of permit issuance, and not on a proposed amendment to the water quality standard that had not yet become final and effective under State law. CWA §301(b)(1)(C) (requiring NPDES permits to contain effluent limitations necessary to meet water quality standards "*established* pursuant to any state law") (emphasis added); *In re Homestake Mining Co.*, NPDES Appeal No. 84-5, at 7 (CJO, May 19, 1986) (permit properly reflected existing regulations and not proposed changes to the regulations).

Nevertheless, our analysis does not end here. Under the applicable regulations, an NPDES permit does not become a final Agency action until administrative review of the permit is complete. 40 C.F.R. §124.91(f). On administrative review, the Agency has the discretion to remand permit conditions for reconsideration in light of legal requirements that change before the permit becomes final agency action. *In re GSX Services of South Carolina, Inc.*, RCRA Appeal No. 89-22, at 17 (EAB, Dec. 29, 1992) (remand for reconsideration in light of newly promulgated rules). While the Region may not have been aware of the change in the "Agricultural Water Supply" designation when it denied J&L's evidentiary hearing request, we are now aware that such a change has been accomplished. *See* Reply, at 6. Indeed, J&L has filed a permit modification request with the Region based on this change. *Id.* Accordingly, we believe it is appropriate to remand this permit condition, the effluent limitations for nitrite/nitrate, for reconsideration by

[43] According to J&L, the "Agricultural Water Supply" use designation requires regulation of nitrates/nitrites in J&L's discharge, and the deletion of this use designation eliminates the need, under Ohio's water quality standards, to regulate those pollutants. *See* Comments, at 32-33.

the Region. In the interests of efficiency, the Region should reconsider this permit condition simultaneously with its consideration of J&L's modification request. In any event, on remand, the Region should "reevaluate the disputed conditions in light of [the] new [water quality standard] and, where appropriate, modify the permit accordingly", and in accordance with the permit modification procedures provided in 40 C.F.R §124.5. *GSX Services*, at 17.

4. *TDS*

J&L's evidentiary hearing request raises two alleged material issues of fact concerning the permit's effluent limitations for TDS. First, J&L contends that it would have to stop recycling groundwater to achieve the TDS effluent limitations, and the economic and social costs of achieving compliance by eliminating groundwater recycling outweigh the benefits of compliance. Request for Evidentiary Hearing, at 23. Because J&L is not entitled to a variance from the TDS effluent limitations that the Region included in the permit pursuant to CWA §301(b)(1)(C), as explained above, the factual questions pertaining to the economic and social costs of compliance are not material, and therefore the Region did not clearly err in denying the evidentiary hearing request on this issue.

Second, J&L contends that a large percentage of the TDS in its effluent is attributable to its intake water. J&L contends that it is entitled to a credit for the pollutants in its intake water under 40 C.F.R. §122.45(g), and therefore the Region erroneously failed to consider this fact in establishing TDS effluent limitations. Request for Evidentiary Hearing, at 24.

The Region, in its response to comments, notes that 40 C.F.R. §122.45(g) provides for credits, or "net allowances," for pollutants present in intake water only with respect to technology-based effluent limitations. The regulations do not address water quality-based effluent limitations such as J&L's TDS effluent limitation. Instead, the decision to allow credits for intake water pollutants when establishing water quality-based effluent limitations is discretionary.[44] According to Region V, "Ohio EPA's policy has been to not allow credit for pollutants in intake water in these latter situations." Response to Comments, at 10. Because of the Ohio policy, Region V declined to consider giving J&L credit for the TDS present in its intake water. *Id.* In any event, the Region noted, J&L failed to meet the requirements of §122.45(g) for obtaining a credit. *Id.*

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[44] *See* 49 Fed. Reg. 38,027 (Sept. 26, 1984) ("in setting water quality based permit limitations, a permit writer may take into account the presence of intake water pollutants, as appropriate").

The factual question raised in J&L's evidentiary hearing request, the amount of TDS in its intake water, is material only if J&L is entitled to a credit for the amount of TDS in its intake water. Region V declined to exercise its discretion to allow such credits, deeming it inappropriate to take into account the presence of TDS in J&L's intake water in light of an OEPA policy not to allow credits in this situation. J&L's evidentiary hearing request and petition for review thoroughly fail to address the Region's reliance on the OEPA policy, and absent any indication as to how the Region may have erred in exercising its discretion by relying on this policy, we conclude that the Region's reliance on Ohio's policy is a sufficient basis for denying J&L a credit for TDS in its intake water.[45] Because J&L has failed to show that it is entitled to a credit for pollutants in its intake water, the factual question as to the amount of TDS in J&L's intake water is not material, and the Region did not clearly err in denying an evidentiary hearing request on this ground.

5. *Cyanide*

In its evidentiary hearing request, J&L contends that its industrial process is not the source of the cyanide in its effluent. J&L contends that the cyanide comes from roadsalt and merely passes through J&L's stormwater sewers on its way to the East Branch Nimishillen Creek. Consequently, J&L contends that it does not "add" cyanide to the receiving waters, and the Region is without authority to impose an effluent limitation on the cyanide in J&L's effluent. *See* Request for Evidentiary Hearing, at 24.

The Region's position, as stated in its response to comments, is that the source of the cyanide is irrelevant, and that as long as cyanide is being discharged by J&L, the Region can regulate it. Specifically, the Region states:

> Sections 301(a) and 402(a)(1) of the CWA, 33 U.S.C. §§1311(a) and 1341(a) [sic], prohibit the discharge of pollutants except pursuant to an NPDES permit. Section 502(12) of the CWA, 33 U.S.C. §1362(12), defines "discharge of pollutants" as "an addition of any pollutant to navigable waters from any point source." There is no qualification in the statutory language regarding the source of the pollutants being discharged.

[45] We note that apparently OEPA formulated the draft permit publicly noted by Region V. *See* Draft Permit for J&L Steel, prepared by OEPA and received by the Region on Dec. 10, 1990. The permit submitted by OEPA contained the effluent limitations adopted in the final permit, suggesting that OEPA would not have given J&L credit for the pollutants in its intake water.

Response to Comments, at 12 (emphasis added).

The factual question raised by J&L is whether the cyanide in its discharge is generated offsite and is merely passing through J&L's facility, or is generated by J&L's activities. J&L argues that this inquiry is material because EPA's authority to impose effluent limitations under the CWA definition of "discharge" extends only to pollutants "added" to the receiving waters. The Region contends that the question is not material, because it is authorized to impose effluent limitations on any pollutant coming out of J&L's pipe, regardless of its source.

Based on the pleadings before us, we cannot determine if the factual question raised by J&L is material to this permit decision. We agree with the parties that the materiality of this factual inquiry depends upon a resolution of whether J&L discharges cyanide within the meaning of the term "discharge" as defined in CWA §502(12), 33 U.S.C §1362(12). What activity is contemplated by the term "discharge" as it is defined in CWA §502(12) is a legal issue on which the parties disagree. However, neither party provides any explanation or legal authority to support its interpretation of §502(12). Such a discussion would obviously assist the Board in resolving the issue presented for review, namely, whether J&L's evidentiary hearing request on the permit's effluent limitation for cyanide sets forth a material issue of fact such that it was clear error for the Region to deny it. Accordingly, under 40 C.F.R. §124.91, the Board hereby grants review of whether J&L discharges cyanide in light of the definition of "discharge" contained in CWA §502(12), assuming the facts are as presented in J&L's comments on the draft permit. The parties are directed to address this issue in the supplemental briefs they have been directed to file under part B of this discussion, *supra.*

J&L also argues that even if the Region has the authority to regulate the cyanide, J&L should have been given an effluent limitation for cyanide that allows credit for the amount of cyanide in J&L's intake water pursuant to 40 C.F.R. §122.45(g). J&L's argument is no different than its argument that it is entitled to a credit for the amount of TDS in its intake water, an argument we have already rejected. J&L also argues that if the Region has the authority to regulate the cyanide in J&L's effluent, the effluent limitation should represent "the maximum degree of control within J&L's economic capability * * * that will result in reasonable further progress" under CWA §301(c). Request for Evidentiary Hearing, at 25. We have already rejected J&L's contention that it is entitled to a variance under §301(c) from the cyanide limitation, *see* Part E, *supra.* J&L has not provided any other arguments or reasons for re-opening the determination of the effluent limitation for

cyanide. Thus, on further review, the only matter to be explored is the issue for which review has been granted relative to the nature of the term "discharge" as applied to the facts as alleged by J&L.

6. *Mass Limitations*

J&L's permit imposes effluent limitations in terms of concentration limitations and mass limitations based on a flow rate of 1.9 million gallons per day ("MGD").[46] In its evidentiary hearing request, J&L maintains that its current practice of recycling groundwater, which is assumed in the 1.9 MGD flow rate, causes concentrations of pollutants to increase, and therefore it must reduce or eliminate its recycling in order to meet the permit's concentration limitations. According to J&L, reducing or eliminating recycling of groundwater, however, will impede J&L's ability to meet the mass limitations, and therefore, J&L argues, the mass limitations should be removed from the permit. *See* Request for Evidentiary Hearing, at 25-26. In other words, J&L argues that the mass limitations should be deleted from the permit because J&L cannot continue to recycle its groundwater and meet both the mass and concentration limits.

We conclude that the Region properly denied the request for an evidentiary hearing on this matter, which does not involve a question of material fact. Generally, mass limitations are required in an NPDES permit. 40 C.F.R. §122.45(f)(1). Moreover, permits may limit pollutants by both mass and other units of measurement, such as concentration, and may require compliance with both. 40 C.F.R. §122.45(f)(2). Here, the Region concluded that both mass and concentration limits are needed because of the low dilution in the East Branch Nimishillen Creek. *See* Response to Comments, at 13. This approach is consistent with the one recommended in the U.S. EPA Office of Water, *Technical*

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[46] We have described the difference between concentration and mass limitations:

> Concentration limitations and mass limitations have distinct and separate regulatory and environmental functions. * * * Concentration limitations not only limit, in general, the concentration of pollutants in effluent discharged into the receiving waters, but they also provide an important limit on the discharge of pollutants during volumes of low flow when high concentration levels would not otherwise be limited by mass limitations. * * * Mass limitations, on the other hand, limit the total mass of pollutants that are discharged into the receiving waters, and, importantly, discourage permittees from diluting effluent to meet concentration limitations.

In re City & County of San Francisco (Oceanside Wastewater Treatment Facility & Southwest Ocean Outfall), NPDES Appeal No. 91-18, at n.15 (EAB, Mar. 24, 1993) (citations omitted).

Support Document for Water Quality Based Toxics Control, at 110-111 (Mar. 1991) ("Technical Support Document"). J&L does not in any way challenge the Region's factual assessment of the dilution in the East Branch Nimishillen Creek, or the Region's reliance upon the low dilution as a basis for its decision to impose both mass and concentration limitations. Instead, J&L, in arguing that the mass limitations should be deleted from the permit, contends only that it cannot continue its current groundwater recycling practice and meet both mass and concentration limitations. This contention is not material to the permit determination being challenged; J&L's ability to continue its groundwater recycling practice does not affect the Region's decision to require mass limitations, which are required under 40 C.F.R. §122.45(f)(1).[47] There are exceptions to §122.45(f)(1), but J&L does not argue that any of them apply to the facts of this case. Thus, we conclude that J&L's evidentiary hearing request does not set forth a material issue of fact relevant to the decision to impose mass limitations in the permit, and thus the Region did not err in denying the request.[48]

7. *Numerical Limits Below Limits of Analytical Detection*

Both the draft and final permits contain effluent limitations for tetrachloroethylene, naphthalene and cyanide. There is no dispute that these limitations are below the current analytical detection limits.[49] In response to J&L's comments on the draft permit, the Region agreed that J&L had a valid concern about compliance with these effluent limitations. Accordingly, the Region changed the permit so that the effluent limitations in the final permit read "See Part II, OTHER REQUIREMENTS, for conditions pertaining to permit limits below U.S. EPA approved method detection limits." Response to Comments, at 14. In addition, Part II, Paragraph G of the permit was revised to read:

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[47] In contrast, the contention that J&L may have to stop groundwater recycling may provide a basis for dropping the concentration limitations from the permit. *See* Training Manual, at 27. J&L, however, does not make such an argument. Instead, J&L represents that it will have to reduce groundwater recycling (a contention that the Region disputes, *see* Response to Comments, at 13) which in turn will impede its ability to meet mass limitations, and therefore the permit's mass limitations should be eliminated.

[48] We note that even if J&L's concerns about its ability to continue recycling groundwater materialize, the Region explained that "should J&L increase effluent flows as a result of changes in its operations or water conservation practices, J&L is required * * * to notify U.S. EPA of such change. Cause may then exist under 40 C.F.R. §122.62(a)(1) and (2) to modify permit limitations." Response to Comments, at 13.

[49] A detection limit is defined in 40 C.F.R. §136.2(f) as "the minimum concentration of [a substance] that can be measured and reported with a 99% confidence that the [substance] concentration is greater than zero as determined by" the procedures set forth in Appendix B to Part 136.

> The following pollutants are limited at levels which are or may be less than levels which can accurately be measured by currently available analytical methods. For purposes of determining compliance with the permit limitations, monitoring results shall be compared to the following compliance levels.
>
> | Pollutant | Compliance Level |
> |---|---|
> | Tetrachloroethylene | 5.0 ug/L |
> | Naphthalene | 5.0 ug/L |
> | Free Cyanide | 25.0 ug/L |
>
> Results less than these compliance levels shall be reported as zero ("0") on Discharge Monitoring Reports, and shall be deemed by U.S. EPA and Ohio EPA as compliance with the limitations. Results greater than or equal to the compliance levels shall be reported on Discharge Monitoring Reports and appropriate State reports as the concentration measured, and shall be utilized to complete and report mass-based limitations.

The compliance levels included in the final permit by this language represent the current levels of analytical detectability.

J&L's evidentiary hearing request on this issue is confusing; it notes that the Region changed the permit as a result of J&L's comments, but then repeats most of its comments on the provisions of the draft permit. In sum, J&L suggests that the effluent limitations below the current analytical detection limits should be eliminated or made consistent with the compliance limitations set forth in Part II.G of the permit. *See* Request for Evidentiary Hearing, at 27-28.[50]

We conclude that the Region did not clearly err in denying J&L's evidentiary hearing request on this matter, because it is not at all clear from J&L's submissions that any factual issues need to be resolved in

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[50] J&L's evidentiary hearing request also contends that monitoring requirements for these pollutants should be deleted as an unnecessary and additional expense, or, if monitoring is to be required, the final effluent limitation should be set at the "scientifically defensible level of practical quantitation," and that the permit should allow time to confirm results and develop a plan to prevent future violations. Request for Evidentiary Hearing, at 28. These issues were not raised in J&L's comments on the draft permit, nor was good cause shown for J&L's failure to raise them. Therefore the Region did not clearly err in denying J&L's evidentiary hearing request on these issues. *See* 40 C.F.R. §124.76; *Alma Plantation, Ltd.*, NPDES Appeal No. 92-27 (EAB, Dec. 16, 1992).

connection with these limitations. Moreover, the concerns expressed in J&L's evidentiary hearing request seem misplaced in light of the Region's addition to the final permit of compliance levels reflecting the current analytical detection limits. As the Region noted in its response to J&L's comments, even if a new and improved analytical detection method is adopted, it would not affect the compliance levels which are firmly established in the final permit. Such levels can only be changed by permit modification proceedings. *See* Response to Comments, at 15. Finally, as the Region notes, *id.* at 14, it is required under CWA §301 to impose applicable technology-based limitations or establish effluent limitations necessary to attain State water quality standards. When an effluent limitation required by CWA §301 is less than the current level of analytical detectability, a separate compliance level based on the current level of analytical detectability allows the Region to comply with CWA §301 and provides the permittee with a firm and fair measure of what is required for compliance with the permit.[51] For these reasons, the Region did not err in denying J&L's evidentiary hearing request on this provision.

8. *Bis 2(ethylhexyl) Phthalate*

The permit requires J&L to conduct quarterly monitoring for bis 2(ethylhexyl) phthalate. According to the Region, this condition is necessary to assure attainment of the Ohio water quality standards for the East Branch Nimishillen Creek because recent State reports showed that J&L discharged between ten and fifty percent of the WLA value for this pollutant. *See* Fact Sheet, at 8-9.

J&L contends that the monitoring requirement is unwarranted because even though Ohio has adopted aquatic life criteria for this pollutant, EPA has questioned the appropriateness of these criteria in light of recent tests showing no toxicity attributable to this compound, citing 55 Fed. Reg. 19,986-19,992 (May 14, 1990). The criteria are part of OEPA's water quality standard for the East Branch Nimishillen Creek. *See* 40 C.F.R. §130.3. According to J&L, under Ohio law, once the scientific basis for the water quality standard has been found to no longer exist, the standard is unlawful. *See* Request for Evidentiary Hearing, at 29. Thus, J&L contends, the water quality standard for this pollutant is unlawful because it lacks a scientific basis as evidenced by the toxicity tests relied upon by EPA in questioning whether aquatic life criteria are required for this pollutant, and it cannot be used as a basis for imposing an effluent limitation.

[51] This approach is recommended by the Technical Support Document, at 111.

We conclude that the Region did not clearly err in denying J&L's evidentiary hearing request on this issue. J&L does not contest the factual necessity for the monitoring requirement, but instead questions whether the Ohio water quality standard should be applied. As discussed above, the applicability of the Ohio water quality standard is not a matter within the Region's discretion; if a valid water quality standard is in place at the time of permit issuance, the Region cannot issue a permit conflicting with that water quality standard. CWA §301(b)(1)(C); 40 C.F.R. §122.44(d)(1)(i). Even if Ohio law provides that a water quality standard is unlawful once its scientific basis disappears, it is for OEPA or Ohio courts to declare the Ohio water quality standard invalid, not for EPA. Further, even if EPA could make such a determination, there has been no showing that the aquatic life criteria for this pollutant established by Ohio lacks a scientific basis. J&L cites only a *tentative* determination by EPA *questioning* the appropriateness of these criteria in light of recent tests showing no toxicity attributable to this compound. *See* 55 Fed. Reg. 19,991 (May 14, 1990).[52] In short, J&L's basis for seeking an evidentiary hearing on this question is without merit, and the Region did not clearly err in denying the request.

F. Legal Issues

J&L's evidentiary hearing request raised numerous legal issues, which it now asks this Board to review. Some of those legal issues have already been discussed in connection with the factual matters raised in J&L's evidentiary hearing request. However, the following six legal issues remain to be addressed: 1) whether the Region lacked legal authority to issue the permit under 40 C.F.R. §123.44(h); 2) whether the public notice of the draft permit was defective under 40 C.F.R. §§124.8 and 124.10; 3) whether the draft permit was defective under 40 C.F.R. §124.9; 4) whether the Region's use of OEPA policies violated State and federal administrative procedures; 5) whether the wasteload allocation used by the Region failed to comply with the public notice requirements of 40 C.F.R. §130.7(d); and 6) whether the limitation of the upset provision in Part III.B.4 of the permit was unreasonable and unlawful. Each of these contentions is addressed below.

1. *Authority to Issue Permit*

A State authorized to issue NPDES permits does so in accordance with, among other things, a Memorandum of Agreement ("MOA") between the State and the Region under 40 C.F.R. §123.24. The MOA

[52] Moreover, even if EPA did reject the appropriateness of aquatic life criteria for this pollutant, a State does not have to accept EPA's determination. 40 C.F.R §131.11(2)(b)(iii) (in establishing criteria, States may use EPA guidance or "other scientifically defensible methods").

must allow the Region the opportunity to comment upon or object to a proposed permit. 40 C.F.R. §123.44(a)(1). A "proposed permit" is one prepared after the close of the public comment period on a draft permit, and which is submitted to the Region for review prior to being issued in final form by the State. 40 C.F.R. §122.2. In the MOA, however, the State and the Region may agree that the Region can review draft permits rather than proposed permits. 40 C.F.R. §123.44(j). A "draft permit" represents a tentative decision to issue a permit, and is prepared prior to the public comment period. 40 C.F.R. §§122.2, 124.6, 124.10. If the MOA provides for Regional review of draft permits, a State is not obligated to submit a proposed permit for further review unless "the State proposes to issue a permit which differs from the draft permit reviewed by the Regional Administrator, the Regional Administrator has objected to the draft permit, or there is significant public comment." 40 C.F.R. §123.44(j). If the Region objects to a permit submitted for its review, and the "State does not resubmit a permit revised to meet the Regional Administrator's objection within 90 days of receipt of the objection, the Regional Administrator may issue the permit * * *." 40 C.F.R. §123.44(h)(1).[53] Further, the "[e]xclusive authority to issue the permit passes to EPA when the times set out in this paragraph expire." 40 C.F.R.§123.44(h)(3).

In this case, OEPA prepared a draft permit under 40 C.F.R. §124.6 that it made available for public comment under §124.10 on February 3, 1989. On March 3, 1989, the Region informed OEPA that it was completing its review of the draft permit under 40 C.F.R. §123.44(a)(1).[54] On April 27, 1989, Region V commented on the draft permit, explaining that it would not object to the issuance of the permit provided that certain conditions were added to the final permit. In other words, the Region objected to the draft permit as it was written. Upon receipt of the Region's comments, OEPA did not revise the permit to incorporate the Region's conditions and resubmit the permit to the Region for review. Instead, OEPA issued a final permit on September 29, 1989, that did not address the Region's concerns. On November 20, 1989, Region V notified OEPA that it objected to the issuance of the final permit for J&L, and informed OEPA that its failure to resubmit the permit to the Region constituted noncompliance with 40 C.F.R. §123.44(j), and therefore the Region considered the September 29, 1989 permit to be "moot," or invalid. The Region also informed OEPA

[53] The Region may issue a permit under §123.44(h)(1) upon the expiration of the 90 day period only if the Region did not conduct a public hearing on its objection to the State permit under §123.44(e). No such hearing was held in this case.

[54] *See* Letter from Almo H. Manzardo, Chief, Permits Section, U.S. EPA Region V, to John Sadzewicz, Division of Water Pollution Control, OEPA (Mar. 3, 1989).

that the authority to issue the permit passed to the Region upon OEPA's failure to revise the draft permit after a "considerable" amount of time. *See* note 9, *supra.*

J&L contends that the Region did not have authority under §123.44 to issue this permit. J&L's reasoning is as follows. J&L maintains that the MOA between OEPA and the Region does not provide for Regional review of "draft" permits. Thus, according to J&L, under the MOA and 40 C.F.R. §123.44, the Region was required to review a "proposed" permit prepared by OEPA. J&L argues that in this case, the Region never reviewed a "proposed" permit as it is defined in 40 C.F.R. §122.2, but rather reviewed only the "draft" permit issued on February 3, 1989. Because OEPA "never tendered a proposed permit to Region V for Region V's review," Request for Evidentiary Hearing, at 31, J&L maintains that the Region "never exercised its formal review powers" under §123.44, and therefore the "conditions precedent for the issuance of a permit by U.S. EPA to J&L, * * * have never been satisfied." Comments, at 51. Further, J&L argues that even if the MOA did allow Regional review of draft permits, under §123.44(j), OEPA was still required to submit a revised permit to the Region for review prior to issuing a final permit, and OEPA's failure to comply with this requirement effectively denied the Region the regulatory prerequisite for assuming authority to issue this permit. *See* Request for Evidentiary Hearing, at 31.

In sum, J&L seeks to take advantage of Ohio's failure to follow the prescribed procedures for issuing this permit. However, the key question is not what Ohio may or may not have done but the validity of the Region's actions. In this instance, contrary to J&L's assertions, the Region did not violate the procedures set forth in the MOA for issuing this permit. As the Region noted in its response to J&L's comments, Part V.A of the MOA between the Region and OEPA requires OEPA to submit permits to the Region for review "[a]t the time of public notice." Although the MOA literally refers to such permits as "proposed" permits, the Region maintains that such a label is a misnomer because it is inconsistent with the regulation that defines a "proposed" permit as one prepared *after* the close of the public comment period.[55] We agree. The MOA plainly contemplates that OEPA will submit permits to the

[55] We note that even though the Region provided its interpretation of the MOA in its response to J&L's comments on the draft permit, J&L's evidentiary hearing request and petition for review wholly fail to address the Region's explanation, and therefore fail to demonstrate why the Region's explanation is erroneous or warrants review. *See In re LCP Chemicals - New York*, RCRA Appeal No. 92-25, at 4 (EAB, May 5, 1993) (to satisfy a standard comparable to that in 40 C.F.R. §124.91, "it is not enough for a petitioner to rely on previous statements of its objections, such as comments on a draft permit; a petitioner must demonstrate why the Region's response to those objections * * * is clearly erroneous or otherwise warrants review.").

Region for review at the time of public notice, and thus *prior* to the close of the public comment period. By allowing review of OEPA's permits prior to the close of the public comment period, the MOA allows the Region to review "draft" permits as they are defined by regulation. J&L's argument focuses only on the label assigned by the MOA to the permit to be reviewed, and wholly ignores the timing of the review, a factor we find dispositive on the question of whether the MOA allowed the Region to review draft permits. We conclude, therefore, that the Region's review of the draft permit OEPA made available for public comment on February 3, 1989, was consistent with the MOA.

J&L is apparently correct that the State did violate the procedures set forth in §123.44(h)(1) for issuing this permit. Once the Region objected to OEPA's draft permit, as the Region did on April 27, 1989, under Part V.A of the MOA and §123.44(j), OEPA was required to resubmit the permit to the Region for review. Under §123.44(h)(1), the revised permit was to be submitted within 90 days of OEPA's receipt of the Region's objections. OEPA, however, never resubmitted the permit within that time period. The question raised by J&L is what is the consequence of this error? J&L contends that the State's failure to follow the prescribed procedures somehow invalidates the permit because it denied the Region a prerequisite for its authority to issue the permit under §123.44, namely, a revised permit for review. The problem with J&L's argument is that it overlooks §123.44(h)(3). This section expressly provides a consequence for the type of procedural error committed by the State in this case: upon a State's failure to resubmit a revised permit to the Region within the 90 day period provided in §123.44(h)(1), exclusive authority to issue the permit passes to the Region. Therefore, in this case, OEPA's failure to submit a revised permit to the Region within the time period allowed by the MOA and §123.44(h)(1) vested the authority to issue the permit in the Region by operation of §123.44(h)(3).[56] Consequently, we conclude that J&L's assertions that the Region lacked authority to issue this permit under 40 C.F.R. §123.44 are unfounded.

2. *Public Notice of Draft Permit*

J&L contends that the public notice of the draft permit was defective because the fact sheet accompanying the draft permit failed to

[56] Absent any indication in the record provided with this appeal that OEPA's receipt of the Region's April 27, 1989 objections to the draft permit was delayed, we can reasonably conclude that OEPA's period to resubmit the permit expired before September 29, 1989, the date OEPA issued the final permit. Thus, the authority to issue the permit passed to the Region before OEPA issued the final permit, and the Region correctly concluded that the September 29, 1989 permit was invalid because the State lacked the authority to issue it.

address significant factual, legal and policy questions J&L posed to the Region in a January 3, 1991 letter prior to the issuance of the draft permit. [57] J&L contends that this deficiency in the fact sheet violates 40 C.F.R. §124.8(a). J&L also contends that the fact sheet is deficient because it failed to discuss the variances requested by J&L in its January 3, 1991 letter, in violation of 40 C.F.R. §124.8(b)(5). *See* Request for Evidentiary Hearing, at 33. J&L contends that it was prejudiced by the allegedly defective public notice, explaining that had the Region responded in the fact sheet to all of the legal, factual and policy questions raised in J&L's January 3, 1991 letter, J&L's comments would have been more meaningful instead of being, as J&L described them, anticipated responses to the Region's unarticulated positions. *See* Comments, at 73.

We find no merit in this claim. Under 40 C.F.R. §124.8(a), a fact sheet must "*briefly* set forth the *principal* facts and the *significant* factual, legal, methodological and policy questions considered in preparing the draft permit." (Emphasis added). The regulation does not, as J&L contends, oblige the Region to set forth in *detail* its response to every factual, legal or policy argument raised by a prospective permittee prior to the issuance of a draft permit. Instead, the regulation requires only a brief description of principal facts and significant legal or policy considerations underlying the tentative decision to issue the permit so that parties wishing to comment on the draft permit are adequately informed of the information and reasoning used by the Region in drafting the permit.

In this case, the fact sheet was a ten-page document explaining the factual data relied upon by the Region, and the Region's legal or policy basis for imposing the permit conditions, including its basis for each of the effluent limitations.[58] This fact sheet informed J&L (and any other prospective commenters) of the basis for the Region's factual and legal decisions in a manner sufficient for J&L to prepare meaningful comments on the draft permit. Indeed, J&L submitted 100 pages of comments on the draft permit that challenged substantial portions of the fact sheet, thus indicating that the fact sheet fulfilled its regulatory purpose in these proceedings. We also note that throughout these

[57] According to J&L, the fact sheet failed to address legal issues pertaining to the Region's authority to issue the permit, and the legal issues raised in J&L's State appeal of the NPDES permit issued by OEPA. Other issues J&L contends were not addressed include the use of the 1988 bioassay test, evidence concerning pH, and the quality of the intake water with respect to nitrates/nitrites, TDS, and cyanide. *See* Comments, at 74.

[58] By explaining in the fact sheet that the effluent limitations for which J&L sought variances were required by the applicable State water quality standards, the Region, in effect, explained why J&L's requested variances were denied. *See* Part C, *supra.*

proceedings, J&L has repeated the arguments set forth in its comments on the draft permit, even after it had the opportunity to review the Region's more detailed response to those comments, further suggesting that J&L was not denied the opportunity to provide meaningful comments merely because the Region's detailed analysis was not provided with the public notice of the draft permit. For these reasons, we find that the fact sheet used in this case did not result in any prejudice to J&L, and therefore review of this issue is not warranted.

J&L also contends that the public notice of the draft permit was defective because it was not mailed to all the parties specified in 40 C.F.R. §124.10(c). *See* Request for Evidentiary Hearing, at 33. Specifically, J&L contends that the notice was not mailed to: Federal and State agencies with jurisdiction over fish, shellfish, and wildlife resources, as required by §124.10(c)(1)(iii); the U.S. Army Corps of Engineers, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service, as required by §124.10(c)(1)(iv); and the Ohio Department of Natural Resources, a person potentially affected by the permit under §124.10(c)(4). *See* Comments, at 75-76. Assuming that these alleged technical violations of §124.10 occurred, as J&L maintains, J&L fails to explain how it has been harmed by the Region's error, for example, by discussing how the error relates to any condition of the permit, or how the permit may have been different had the notice been mailed to such parties. Absent any alleged harm to J&L, we fail to see how J&L would have standing to complain about someone else allegedly not being mailed notice of the draft permit. Under these circumstances, we do not feel compelled to remand this entire permit to start all over again at the public notice phase, as J&L suggests. *See* Comments, at 73. Because J&L has failed to demonstrate how the Region's alleged technical violations of §124.10 affected these proceedings, or that it was in any way prejudiced by these alleged violations, we conclude that such violations, even if they occurred, were harmless, and do not invalidate the permit issuance.

3. *Compliance With 40 C.F.R. §124.9*

J&L argues that the draft permit was defective because it was not based on the administrative record as required by 40 C.F.R. §124.9. *See* Request for Evidentiary Hearing, at 33. J&L bases its contention on the fact that in response to its request for a copy of the administrative record for the draft permit, the Region sent it a package of documents that failed to include some documents either referred to in the fact sheet or that J&L contends belong in the "supporting file for the draft permit" as required by §124.9(b)(4) and (5). J&L asserts that it was prejudiced by this error, which J&L contends denied it the opportunity

to provide meaningful comments on the draft permit, and that the absence of such documents from the administrative record suggests that such documents were not reviewed by the Region in preparing the draft permit. *See* Comments, at 77-78.

We find J&L's arguments unpersuasive for several reasons. First, J&L has not demonstrated that the draft permit was not based upon the administrative record as required by §124.9(a). The Region's oversight or error in responding to J&L's request for a copy of the administrative record, alone, does not necessarily mean that the administrative record was incomplete, or that the Region failed to review everything in the administrative record prior to drafting the permit. We note that §124.9(c) does not require everything that is part of the administrative record to be physically included in the administrative record.[59] There has been no showing that this exception does not apply to any or all of the documents J&L claims are missing from the administrative record. Further, J&L does not allege that anything other than an oversight is involved here; for example, J&L does not allege that upon receiving what it claims is an incomplete administrative record it notified the Region of the error, and the Region refused to make the missing documents available. Simply stated, J&L is reading too much into the Region's oversight.

Second, J&L has failed to demonstrate any prejudice resulting from the Region's oversight. Again, J&L has failed to allege how the permit or these permit proceedings would be different if the Region had not omitted some documents from the copy of the administrative record sent to J&L. J&L admits that it may have had copies of some of the documents, which we believe likely, given that some of the documents were generated by J&L,[60] or copied to J&L.[61] Moreover, J&L's comments on the draft permit indicate that it was fully aware of the substance of the documents that it contends were missing from the

[59] Section 124.9(c) provides that material readily available at the Region or "published material that is generally available" need not be physically included in the administrative record as long as it is referred to in the fact sheet.

[60] For example, J&L contends that its November 29, 1990 letter transmitting its 1990 Form 2-C permit application, and its 1981 Form 2-C, were not included in the administrative record. *See* Comments, at 77-78.

[61] J&L contends that the "Authority to Issue Permit Under Section 402 of CWA" was not in the administrative record. *See* Comments, at 77. Assuming J&L is referring to the Region's November 20, 1989 letter assuming authority to issue this NPDES permit, *see* note 9, *supra*, this letter was copied to "R.A. Ferarri, J&L Specialty Products Corp." J&L also contends that the "Authority to Issue Permit Under Section 304(l) of CWA" was not in the administrative record. *See* Comments, at 77. Assuming J&L is referring to the Region's November 30, 1990 letter assuming authority to issue the ICS for J&L, *see* note 12, *supra*, this letter was copied to "J&L Specialty Products, Inc."

administrative record, and that it was fully aware of the Region's use of these documents in drafting the permit.[62] The NPDES regulations contemplate making the administrative record available and open for public inspection, not mailing it in its entirety to interested persons. *See* 40 C.F.R. §124.10(d)(vi). Thus, we conclude that J&L has not demonstrated that any alleged violation of §124.9 resulted in any prejudice to J&L, and accordingly, we do not believe the permit is legally defective.[63]

4. *Use of OEPA Policies*

In its evidentiary hearing request, J&L asserts that the Region erroneously relied upon policies and guidance documents originated by OEPA that are actually rules not promulgated in accordance with Ohio's Administrative Procedure Act, O.R.C. §§119.01-119.13. J&L also argues that because these documents were relied upon by Region V in issuing the permit, Region V violated the federal rulemaking procedures in the Administrative Procedure Act, 5 U.S.C. §553. The policies and guidance documents, as described in J&L's comments on the draft permit, pertain to the formulation of water quality-based effluent limitations and biomonitoring/WET provisions. *See* Comments, at 80-93.

The policies and guidelines at issue are creations of the State of Ohio, and subject therefore only to the Ohio Administrative Procedure Act. It is entirely reasonable for the Region, in the exercise of its discretion, to give credence to State policy and guidance documents in effect under State law at the time of permit issuance. In doing so, the Agency need not look behind the policy or guidance document to see if it is subject to a substantive or procedural attack under State law. The validity of a State policy or guidance document under State law is a matter exclusively reserved to the State. If the invalidity of any OEPA policy or guidance document used in the formulation of this permit is officially established under Ohio law, and J&L believes that such invalidity supports an argument for a change to the permit, J&L may seek an appropriate modification of its permit.

5. *Wasteload Allocation*

In its evidentiary hearing request, J&L contends that in preparing this permit, the Region unlawfully used a September 1990 WLA that

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[62] For example, J&L contends that the following documents are missing from the administrative record: April 1988 bioassay test, "Degraded Instream Conditions of East Branch Nimishillen Creek," "Violations of Standards in Segment of East Branch Nimishillen Creek Documented," "Biological Community Indices," and "Field Survey Reports of 1985, 1986." *See* Comments, at 76-77.

[63] *See Mayaguez*, at 20 n. 24 (cost of traveling to Regional office to examine administrative record was not demonstrated to have hindered exercise of rights).

had not been made available for public comment as required by 40 C.F.R. §130.7(d). *See* Request for Evidentiary Hearing, at 35. We agree with the Region, however, that §130.7(d) does not require public notice of the WLA used by the Region in this case. Under §130.7(d), States must prepare WLAs and submit them to the Agency for approval. If a Region disapproves a WLA, the Region must then establish the WLA it believes necessary to implement State water quality standards. Only then, when the Region must establish a WLA, must the Region give public notice and seek comment on the WLA proposed by the Region.[64] In this case, the Region asserts that it approved the September 1990 WLA submitted by OEPA, and therefore public comment on the WLA was not required under 40 C.F.R. §130.7(d). J&L does not refute this assertion. Accordingly, J&L has not demonstrated that public notice of the WLA used by the Region was required.

6. *Upset Provision*

Permit Part III.B.4 provides that an "upset" is an affirmative defense to an action brought for a violation of the permit's technology-based effluent limitations. An "upset" is an "exceptional incident in which there is unintentional and temporary noncompliance with *technology*-based permit effluent limitations because of factors beyond the reasonable control of the permittee." 40 C.F.R. §122.41(n)(1) (emphasis added).

J&L contends, without elaboration, that the permit unreasonably and unlawfully limited the availability of the "upset" defense to alleged violations of technology-based effluent limitations. *See* Request for Evidentiary Hearing, at 36. In other words, J&L contends that the "upset" defense should be available for alleged violations of water quality-based effluent limitations. *See* Comments, at 100.

J&L raised this issue in its comments on the draft permit, to which the Region responded that the permit is consistent with 40 C.F.R. §122.41(n)(2), which by its express terms limits the availability of the

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[64] Section 130.7(d) provides:

> If the Regional Administrator disapproves such listing and loadings, he shall, not later than 30 days after the date of such disapproval, identify such waters in such State and establish such loads for such waters as determined necessary to implement applicable [water quality standards]. The Regional Administrator shall promptly issue a public notice seeking comment on *such* listing and loadings.

(Emphasis added.).

"upset" defense to alleged violations of technology-based effluent limitations. *See* Response to Comments, at 25. J&L has wholly failed to reply to the Region's analysis by explaining how or why it is legally entitled to use the "upset" defense when violations of water quality-based effluent limitations are alleged. Thus, J&L has failed to demonstrate why review of this condition is warranted under 40 C.F.R. §124.91. *See In re LCP Chemicals - New York*, RCRA Appeal No. 92-25, at 4 (EAB, May 5, 1993) (to satisfy a standard comparable to that in §124.91, "it is not enough for a petitioner to rely on previous statements of its objections, such as comments on a draft permit; a petitioner must demonstrate why the Region's response to those objections * * * is clearly erroneous or otherwise warrants review.").

III. *CONCLUSION*

For the reasons set forth above, review is granted of the issues identified herein pertaining to whether the CWA §304(l) listing decisions challenged by J&L are administratively reviewable, and whether J&L discharges cyanide to the East Branch Nimishillen Creek as "discharge" is defined in CWA §502(12). The conditions of the NPDES permit issued to J&L pertaining to WET and nitrite/nitrate are remanded to Region V.[65] On remand, the Region must conduct an evidentiary hearing on whether J&L's discharge causes or contributes to, or has the reasonable potential to cause or contribute to, a violation of Ohio's water quality standard for WET, such that the Region has authority under 40 C.F.R. §124.44(d) to establish a water quality-based effluent limitation in J&L's NPDES permit for WET. In addition, on remand, the Region must reconsider the permit's effluent limitations for nitrite/nitrate in light of the deletion of "Agricultural Water Supply" from the applicable water quality standard, and, if necessary, modify the permit in accordance with the procedures set forth in Part 124. With respect to all other issues raised in J&L's petition for review, except for those on which the Board has reserved judgment on pending resolution of the issue of whether the CWA §304(l) listing decisions challenged here are subject to administrative review, review is hereby denied.

So ordered.

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[65] Although 40 C.F.R. §124.91 contemplates that further briefing will ordinarily be required 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 [to be] addressed on remand." *In re Amoco Oil Company Mandan, North Dakota Refinery*, RCRA Appeal No. 92-21. at 34 n. 38 (EAB, Nov. 23, 1993).