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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Borough of Naugatuck,)	Docket No. CWA-2-I-97-
1017)	
Connecticut)	
)	
Respondent)	

ORDER DENYING CERTIFICATION FOR INTERLOCUTORY APPEAL

The Respondent, the Borough of Naugatuck, Connecticut (the "Borough"), has requested certification for interlocutory appeal to the Environmental Appeals Board ("EAB"), pursuant to 40 CFR §22.29, of this court's Order of August 26, 1996. That Order granted the Complainant's motion for partial accelerated decision, finding the Borough liable for a series of violations of the Clean Water Act §301(a), 33 U.S.C. §1311(a), with respect to discharges of total residual chlorine ("TRC" or "chlorine") from the Borough's wastewater treatment plant from 1992 to 1996. The Order also denied Respondent's cross-motion for dismissal of the Complaint.

The Borough seeks certification of the issue of "whether the Borough received requisite notice of the Connecticut Department of Environmental Protection's ("CTDEP") intent to interpret the chlorine limit in its 1991 NPDES permit (and 1992 Order Modification) as an 'instantaneous maximum' limit." The decision, however, found that, whether or not the Borough received actual notice of the instantaneous limit, such a limit was stated in plain language on the face of the permit and was authorized by applicable state and federal law. The issue of whether the Borough had actual notice of the instantaneous limit is a factual issue reserved for hearing that could affect the Borough's culpability and the amount of the civil penalty. It is not however a defense to liability.

In this order, the analysis of the issue of "fair notice" of an agency's interpretation of a regulatory requirement will not be repeated. I will just note again the basic flaw in Respondent's position. The prerequisite for even addressing this issue is a lack of fair notice of the required conduct in the language of the applicable regulation or permit itself. See *In re CWM Chemical Services, Inc.*, 6 E.A.D. 1, 18 (EAB, May 15, 1995). In this case, the Borough cannot meet that

threshold requirement, since the language of the permit unequivocally establishes an instantaneous limit.

As noted above, a factual issue is raised concerning whether the Borough had actual notice of the instantaneous limit. On one hand, the permit language, the discharge monitoring reports, and correspondence with CTDEP indicate that the Borough had actual notice of the instantaneous nature of the effluent limit for TRC. On the other hand, the TRC limit was not specifically addressed in the permit fact sheet, and was not apparently enforced by CTDEP. Resolution of these factual matters could have the effect of reducing the proposed amount of the civil penalty. But on motions for accelerated decision, the legal issue is resolved in favor of the Region, as detailed in the Order. The permit established an instantaneous limit for TRC.

The EPA Rules of Practice, at 40 CFR §22.29(b), set forth the standards for certification of a ruling for an interlocutory appeal to the Environmental Appeals Board, as follows:

Availability of interlocutory appeal. The Presiding Officer may certify any ruling for appeal to the Environmental Appeals Board when (1) the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion, and (2) either (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective."

The decision here does not meet the standard for certification for an interlocutory appeal to the EAB.

While the issue of interpretation of the Borough's permit might be considered important, there are not substantial grounds for a difference of opinion. If the Borough's interpretation were adopted, it would require concluding that "not at any time" means "weekly or monthly average." There are not substantial grounds for giving these words a meaning contrary to their plain import. This is especially so in view of corroborating evidence in the record, such as the Borough's own discharge monitoring reports. Those reports stated chlorine concentrations as instantaneous grab sample results, and not as averages.

The legal analysis in the decision also reconciled the permit language establishing an instantaneous limit with the Connecticut rule stating that effluent limits for POTWs shall be stated as weekly or monthly averages. In order to be consistent with the CWA, that requirement must be read as subject to the proviso "unless impracticable." The instantaneous TRC limit was based on a wasteload allocation for the Naugatuck River that analyzed the maximum concentration of chlorine that the Borough's plant could discharge in order to avoid toxic effects on aquatic life. Instantaneous effluent limits are otherwise authorized under Connecticut law and were established for several parameters, including TRC, in the Borough's permit. There are not sufficient grounds for a different opinion to certify this issue for interlocutory appeal to the EAB.

An immediate appeal to the EAB on this issue would not be likely to materially advance the ultimate termination of this proceeding. The issue of the amount of the civil penalty remains open for determination at hearing. Review of the Order after issuance of the initial decision would be fully effective, as all issues could be reviewed at that time, upon any appeal by either party.

For these reasons, the Respondent's motion for certification for interlocutory appeal to the EAB of a portion of the Order of August 26, 1998 in this matter is DENIED.

Andrew S. Pearlstein
Administrative Law Judge

Dated: September 8, 1998
Washington, D.C.



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Last updated on March 24, 2014