IN RE BROWARD COUNTY, FLORIDA

NPDES Appeal No. 95-7

ORDER DENYING REVIEW

Decided August 27, 1996

Syllabus

The Broward County Public Works Department ("Broward") seeks review of U.S. EPA Region IV's denial of a request for an evidentiary hearing on certain conditions of Broward's NPDES permit. Broward's petition raises issues concerning the permit's limitation on the total residual chlorine (TRC) content of Broward's effluent, the permit's "reopener" clause, and the permit's toxicity testing requirement. Specifically, Broward argues that the permit should not contain a TRC limit for the following reasons: ongoing studies and the Florida Department of Environmental Protection's review of a mixing zone request for TRC may affect the need for a limit; there allegedly was no demonstration of "reasonable potential" for Broward's effluent to exceed Florida's water quality standard for TRC; and TRC allegedly will be addressed by in-pipe decay and by a mixing zone. Broward argues that the permit's TRC limit is flawed because it applies at the end of Broward's outfall pipe in the Atlantic Ocean (rather than at the edge of a mixing zone), and is based on the inappropriate extrapolation of data from another plant. Broward contends that the permit should include a "positive" reopener clause, because ongoing scientific studies may show in the future that conditions in the permit no longer apply or could be made less stringent. Finally, Broward challenges the species required by the permit for toxicity testing, and the purpose and 96-hour duration of the required toxicity test.

Held: The petition for review is denied. First, Broward has failed to raise a genuine issue concerning the Region's determination that Broward's effluent exceeds Florida's water quality criterion for TRC. Broward adduced no evidence to contradict the Region's conclusion that a TRC limit was required because of the exceedance. The preliminary TRC in-pipe decay data provided by Broward with its evidentiary hearing request do not raise a genuine issue concerning the Region's conclusion. While ongoing studies and the State's mixing zone review may at some future date provide a basis for permit modification, the Region had before it sufficient information from which it could conclude that the limit was necessary at this time. Broward has not obtained a permit from the State authorizing a mixing zone for TRC, and therefore the Board rejects Broward's argument that a TRC limit is unnecessary because TRC will be addressed by a mixing zone. Broward's comments on the draft permit did not raise any issue concerning the Region's extrapolation of data from another plant, and, in accordance with the rules governing permit issuance, Broward was barred from raising the issue in its evidentiary hearing request. As to the reopener clause, there is no statutory or regulatory support for including the "positive" reopener clause requested by Broward; Broward is free to seek modification of the permit under the governing regulations should ongoing studies show that modification may be warranted. Review of that issue is therefore denied. Finally, we agree with the Region that no hearing was required on the appropriateness of the species selected for toxicity testing, because Broward failed to raise that issue in its comments on the draft permit. The 96-hour test duration is mandated by Florida regulation, and therefore no genuine issue was raised by Broward concerning the Region's inclusion of that requirement in the permit.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

Before us is a petition filed by the Broward County Public Works Department ("Broward") seeking review of U.S. EPA Region IV's denial of a request for an evidentiary hearing on certain conditions of a National Pollutant Discharge Elimination System (NPDES) permit for Broward's Northern Regional Wastewater Treatment Plant.[1] The permit regulates the plant's discharge of sanitary wastewater into the Atlantic Ocean through a pipe with an outfall approximately 7,300 feet from the shore. Broward's petition raises issues concerning the permit's limit on the total residual chlorine (TRC) content of the effluent discharged by the plant, the lack of a "positive" reopener clause in the permit, and the permit's acute toxicity testing requirements. For the reasons set forth below, we conclude that Broward has not met its burden of showing that review of the Region's decision concerning the contested permit provisions is warranted, and the petition for review is hereby denied.

I. *BACKGROUND*

Some of the issues raised in the petition for review relate to an earlier permit proceeding in which Broward also sought review before the Board. *See In re Broward County, Florida*, 4 E.A.D. 705 (EAB 1993) (hereafter *"Broward I"*). The facts underlying the earlier proceeding and the current proceeding may be summarized briefly. On September 26, 1990, the Region issued a final decision establishing the conditions of Broward's NPDES permit. Among other things, the permit contained a limitation on TRC, a requirement that Broward conduct toxicity testing in 100% effluent (*i.e.*, undiluted effluent), and a designation of test species (mysid shrimp and inland silverside) to be used by Broward in effluent toxicity tests.

Pursuant to the rules governing issuance of NPDES permits, Broward requested that the Region hold an evidentiary hearing on several of the permit's conditions.[2] The Region denied Broward's

[1] The Clean Water Act prohibits discharges of pollutants into the waters of the United States by facilities like Broward's treatment plant, except in accordance with a permit issued under the NPDES program. *See* Clean Water Act § 301, 33 U.S.C. § 1311. The NPDES program is the principal permitting program under the Clean Water Act. *See id.* § 402, 33 U.S.C. § 1342.

[2] In accordance with 40 C.F.R. § 124.74, any interested person may submit a request to the Regional Administrator for an evidentiary hearing within 30 days following the service of notice of the final permit decision.

hearing request, and Broward petitioned the Board for review of that denial. In June 1993, the Board issued an order denying review in part and remanding in part. The Board concluded that the permit should be remanded to the Region so that the Region could supplement the administrative record on two issues:

> 1) [W]hether Broward's effluent is causing or contributing to, or has the reasonable potential to cause or contribute to, a violation of Florida's water quality criterion for total residual chlorine at [Fla. Admin. Code § 62-302.530(19)];[3] and 2) whether the test species specified in the permit are significant to the indigenous aquatic community and, if not, whether they will accurately predict how indigenous species would fare when exposed to Broward's effluent.[4] If Broward is not satisfied with the Region's explanation on remand, Broward would then be free to renew its request for an evidentiary hearing on either or both of these issues under 40 C.F.R. § 124.74.

Broward I, 4 E.A.D. at 721. In addition, the Board required the Region on remand to modify the permit to allow Broward to conduct toxicity testing on effluent diluted to 30%, rather than 100% full strength, consistent with Florida's toxicity standard for open ocean discharges. *Id.* (citing Fla. Admin. Code § 62-4.244(3)(c)).

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[3] Pursuant to Clean Water Act § 301(b)(1)(C), the Region is required to include permit limitations that are necessary to ensure compliance with state water quality criteria. Florida's regulations establish a water quality criterion for TRC in Class III waters (defined *infra*, n.9) of 0.01 milligrams per liter (mg/l). Fla. Admin. Code § 62-302.560(13). The Board determined that in accordance with the Clean Water Act's implementing regulations, "[a] permit limitation is necessary if the subject discharge will cause or contribute to, or has the reasonable potential to cause or contribute to, an excursion above a State requirement." *Broward I* at 713 (citing 40 C.F.R. § 122.44(d)(1)). Because the administrative record was unclear as to whether the Region had ever made a factual determination that Broward's effluent presented such "reasonable potential," the permit condition was remanded. *Id.* at 713.

[4] Florida's toxicity standard for open ocean discharges provides that "the effluent when diluted to 30% full strength, shall not cause more than 50% mortality in 96 hours (96-hr. LC_{50}) in a species significant to the indigenous aquatic community." Fla. Admin. Code § 62-4.244(3)(c). "LC" refers to "lethal concentration." In denying Broward's evidentiary hearing request concerning the designation of test species, the Region concluded that Broward's challenge was only to the Region's legal authority to impose toxicity test procedures, and therefore that no evidentiary hearing was warranted. On appeal, the Board determined that Broward did in fact raise a challenge to the Region's selection of the test species specified in the permit, and the Board therefore ordered the Region on remand to fully explain its selection of test species. *Broward I* at 716.

The Board's order in *Broward I* was entered on June 7, 1993. Because the permit was to expire on March 31, 1994, it became subject to NPDES permit renewal requirements during the pendency of the remand proceedings. *See* 40 C.F.R. § 122.21(d) (NPDES permit renewal application for publicly-owned treatment works (POTW) must be submitted at least 180 days before expiration of permit). The Region processed Broward's renewal application in lieu of continuing the remand proceedings on the permit at issue in *Broward I.*

As a result of the permit renewal process, the Region prepared a draft permit in October 1994[5] and requested that the Florida Department of Environmental Protection (FDEP) certify the draft permit in accordance with Clean Water Act § 401, 33 U.S.C. § 1341.[6] In December 1994, FDEP requested a one-year extension of time for certification of the draft NPDES permit, and also advised the Region that Broward had not at that time applied for a "mixing zone" for the permit's TRC limit.[7] (As explained *infra*, note 18, Broward represents that it subsequently applied for a mixing zone from FDEP sometime in January 1995.) The Region treated the State's request for extension of time as a waiver of certification. *See* Region's Response to Petition for

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[5] A "revised" draft permit was issued for public comment in November 1994. The record does not indicate what differences there may have been between the October 1994 draft permit and the November 1994 "revised" draft permit. Because no party has mentioned the nature of the revisions or suggested that they are material to this appeal, we need not consider them.

[6] Under Clean Water Act § 401(a)(1), a Region may not issue a permit until the state either certifies that the permit complies with state water quality standards or waives certification. *See also* 40 C.F.R. § 124.53(a).

[7] One court has explained mixing zones in the broader context of NPDES permits as follows:

> A discharge permit under the Clean Water Act may include several types of requirements. One set concerns the technology used to limit pollution; another, pertinent here, requires that the amount of specified pollutants not exceed certain percentage levels. In theory, the percentage levels could be measured in the effluent itself * * * alternatively, it could be measured at the edge of a defined area of the receiving body of water after the pollutant has been diluted by that water. * * * Such a defined area is called a mixing zone * * * [and] "whether to establish such a mixing zone policy is a matter of state discretion."

Puerto Rico Sun Oil Co. v. U.S. EPA, 8 F.3d 73, 74 (1st Cir. 1993) (quoting *Mixing Zones — Water Quality Standards Criteria Summaries: A Compilation of State/Federal Criteria*, at 2 (EPA 1988)). Florida regulations provide that "[t]here shall be no mixing zone for any component of any discharge unless a [FDEP] permit containing a description of its boundaries has been issued for that component of the discharge." Fla. Admin. Code § 62-4.244(2).

Review at 6.[8] The Region issued its final permit decision on January 24, 1995. On February 28, 1995, Broward requested an evidentiary hearing on certain permit conditions. The Region denied Broward's request on July 3, 1995, and this appeal followed.

Broward raises three primary issues in its petition. First, Broward challenges the Region's imposition of a Class III[9] water quality standard limitation for TRC until the need for such a limitation is established on the basis of ongoing studies and the State has completed the mixing zone review that Broward contends it applied for in January 1995. Broward contends that a TRC limitation is inappropriate, because "neither the [S]tate nor EPA has sufficient information regarding [Broward's] facility to establish that this limitation is necessary to ensure compliance with Florida water quality criterion for TRC." *Id.* at 2-3. Broward argues that "there was no demonstration of reasonable potential" to exceed the Florida water quality criterion for TRC.[10] Broward also contends that a TRC limitation is unnecessary because TRC will be addressed by in-pipe TRC decay[11] and by a mixing zone

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[8] The amended fact sheet for the permit indicates that "[b]ased on FDEP's request [for extension of time to certify] and consistent with EPA's practice, a short-term permit is being issued." Amended Fact Sheet at 11. By its terms, the permit is effective on April 1, 1995, and expires on January 31, 1997. Permit at 1. Broward has not challenged the Region's response to the State's request for extension of time to certify, nor has Broward challenged the Region's assertion that the State waived certification. The record does not indicate any State objections to the Region's decision to issue the permit in the absence of State certification. In accordance with the Clean Water Act, if a state "fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) * * * the certification requirements of this subsection shall be waived * * *." 33 U.S.C. § 1341(a)(1). In accordance with EPA's regulations, the Region's letter to FDEP requesting certification stated that "the State will be deemed to have waived its right to certify unless that right is exercised within 60 days from the date of this letter or EPA finds that unusual circumstances require a longer time for certification." Request for Certification to FDEP at 2 (Oct. 11, 1994); *see* 40 C.F.R. § 124.53(c)(3). In light of the governing statute and regulation, and in view of the fact that Broward has raised no issues concerning waiver of certification, we find no error in the Region's decision to respond to FDEP's request by issuing a "short-term" permit and otherwise treating the request as a waiver of certification. Where a state has waived certification, the Region's reliance on state water quality standards in crafting permit conditions is open to review by the Board. *See Broward I* at 706 n.2.

[9] Florida's surface waters are classified according to designated uses. "Class III" waters are those designated for recreation, and propagation and maintenance of fish and wildlife. Fla. Admin. Code § 62-302.400(1); *Broward I* at 709 n. 11.

[10] *See supra* n.3.

[11] "In-pipe TRC decay" refers to the reduction in the volume of TRC present in the effluent due to the reaction of chlorine (which is added to the effluent at the plant as a disinfectant) with bacteria and other organic material as the effluent passes through the outfall pipe. *See* Evidentiary Hearing Request at 3.

that is pending for TRC. Petition for Review at 2. As to the specifics of the limitation, Broward argues that it is defective in that it is applicable at the "end of the pipe"[12] (rather than at the edge of a mixing zone) and is based on an inappropriate extrapolation of outfall chlorine characteristics from a plant in Boca Raton to Broward's outfall.

Broward's second issue for review relates to the permit's "reopener" clause. That clause states that the permit shall be modified, or alternatively revoked and reissued, to comply with any applicable effluent standard or limitation issued or approved under the Clean Water Act, if such standard or limitation "[c]ontains different conditions or is otherwise more stringent than any condition in the permit;" or "[c]ontrols any pollutant or disposal method not addressed in the permit." Permit Part III.B. The reopener clause states further that the permit shall also be "modified or revoked at any time if, on the basis of new data or information, the Regional Administrator determines that continued discharges may cause unreasonable degradation of the marine environment." *Id.* Broward contends that this clause is only a "negative" reopener, and that the Region erred by failing to include a "positive" reopener clause in the permit that would allow permit modification when "research or new scientific discoveries demonstrat[e] that the effluent standards or limitations are either no longer applicable or are more stringent than necessary to protect the environment." Petition for Review at 5-6. Broward argues that the Region's apparent policy of only including "negative" reopener clauses in permits is an important policy issue that warrants review by the Board, particularly in light of EPA's participation in the Southeast Florida Outfalls Experiment II study ("SEFLOE II"), which is engaged in research to characterize the effluent and mixing properties of various open ocean outfalls, including Broward's outfall. *Id.* at 6; *see Broward I* at 707 n.4 (describing SEFLOE II).

As its final issue, Broward contends that "biomonitoring of the effluent for potential toxicity using the bioassay test should be *moni-*

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[12] Permit Part I.9.A. provides that:

> The daily maximum concentration for total residual chlorine (TRC) shall not exceed 0.01 mg/l. This limit is included to prevent state water quality standards from being exceeded. This limit does not provide for a zone of mixing from TRC in the receiving water. The permittee may apply for a mixing zone for TRC from the FDEP if the permittee determines such to be a benefit. If a mixing zone for TRC is granted by FDEP and concurred in by EPA, the permittee may apply for a modification of the above limit from the permit issuing authority.

toring only" (as opposed to a test failure constituting a permit violation) "because the testing species and protocols are inappropriate for open ocean conditions." Petition for Review at 7.[13] Specifically, Broward claims that the 96-hour acute static-renewal multi-concentration toxicity tests required by the permit, using as test species the mysid shrimp (*Mysidopsis bahia*) and the tidewater silverside (*Menidia peninsulae*), are not valid tests for Broward's effluent "because both the proposed test species and the test duration are inappropriate." *Id.*

II. *DISCUSSION*

A. *Standard of Review*

Under the rules that govern this proceeding, there is no appeal as of right from a Region's decision to deny an evidentiary hearing request. *See, e.g., In re City of Fort Worth*, 6 E.A.D. 401 (EAB 1996); *Broward I* at 708. Ordinarily, a petition for review is not granted unless the Region's decision is clearly erroneous or involves an exercise of discretion or policy that is important and should therefore be reviewed by the Board. *Id.* The Agency's longstanding policy is that NPDES permits should be finally adjudicated at the Regional level, and that the power to review NPDES permit decisions should be exercised only "sparingly." *Id.* The petitioner has the burden of demonstrating that review should be granted. *See id.*; 40 C.F.R. § 124.91(a).

Further, the standard by which an evidentiary hearing request is judged is well-settled. A Region shall grant an evidentiary hearing request if a requester has set forth "material issues of fact relevant to the issuance of the permit." *Id.* § 124.75(a)(1). The Board has explained that this standard is analogous to the federal summary judgment standard set forth in Fed. R. Civ. P. 56, and therefore, to support an evidentiary hearing request, the requester must show that there is a genuine issue of material fact concerning the Region's permit deci-

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[13] Permit Part IV.1.a. provides that:

> The permittee shall conduct 96-hour acute static-renewal multi-concentration toxicity tests using the mysid shrimp (*Mysidopsis bahia*) and the tidewater silverside (*Menidia peninsulae*). * * * All tests shall be conducted on a control (0%) and the following dilution concentrations at a minimum: 100.0%, 50.0%, 30.0%, 12.5%, and 6.25%.

In accordance with Fla. Admin. Code § 62-4.244(3)(c), the permit provides that mortality of more than 50% in 96 hours (96-hr. LC_{50}) in 30% effluent will cause a violation of Fla. Admin. Code § 62-4.244(3)(c) and the permit. Permit Part I.A.7.

sion. *In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 780 (EAB 1993), *aff'd sub nom. Puerto Rico Aqueduct and Sewer Auth. v. U.S. EPA*, 35 F.3d 600 (1st Cir. 1994). This standard has two elements. First, the requester must show that the factual issue raised is "material"; *i.e.*, the issue, under the applicable law, might affect the outcome of the proceeding. Second, the issue must be "genuine"; the party requesting an evidentiary hearing must present sufficient probative evidence from which a reasonable decision maker could find in that party's favor, by a preponderance of the evidence. If, on the other hand, the evidence, viewed in a light most favorable to the requester, is such that no reasonable decision maker could find in the requester's favor, then it is appropriate for the Region to deny an evidentiary hearing request. *See id.*

In considering whether Broward has met its burden of showing that the Region erred in denying its evidentiary hearing request, we will address the issues raised in the order in which they appear in Broward's petition for review.

B. *Appropriateness of Including a TRC Limitation*

The Region denied Broward's evidentiary hearing request concerning the permit's TRC limitation on several grounds. With respect to Broward's claim that the imposition of a TRC limitation was inappropriate, the Region concluded that Broward's request did not raise a material fact issue within the meaning of 40 C.F.R. § 124.75(a)(1). *See* Region's Letter Denying Evidentiary Hearing Request at 2 (hereafter "Denial Letter"). The Region noted that "[t]he information as outlined on the fact sheet indicates that the TRC discharge from this facility exceeds the State's TRC water quality standard." *Id.* The Region also noted that the State of Florida had not granted a mixing zone for TRC. *Id.* The Region rejected Broward's argument concerning in-pipe TRC decay on the ground that it had not been submitted to the administrative record during the public comment period on the draft permit, and therefore could not be raised by Broward in its evidentiary hearing request. *Id.* at 3-4 (citing 40 C.F.R. § 124.76).[14] Alternatively, the Region concluded that the in-pipe TRC decay issue did not raise a genuine and material fact issue. *Id.* at 4. As to Broward's claim that

[14] The regulations governing issuance of NPDES permits provide that "all reasonably ascertainable issues" must be raised by the close of the public comment period on a draft permit. 40 C.F.R. § 124.13. Further, in an evidentiary hearing request submitted under 40 C.F.R. § 124.74, "[n]o issues shall be raised * * * that were not submitted to the administrative record * * * as part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them." 40 C.F.R. § 124.76.

the data from the Boca Raton outfall were improperly extrapolated to Broward's outfall, the Region also concluded that the issue had not been submitted to the administrative record during the public comment period on the draft permit, and that in any event it failed to raise a genuine and material fact issue. *Id.* at 3.

As to the first ground, Broward contends on appeal that the Region's approach "completely ignores the basic, fundamental requirement that there be a determination of a reasonable potential to cause or contribute to, an excursion above the State requirement. Simply stated, 'there was no demonstration of reasonable potential.'" Petition for Review at 3. Broward argues further that "[t]he issue of whether EPA has made a scientifically supportable determination of reasonable potential is by itself an issue of material fact." *Id.* In response, the Region points out that the permit's fact sheet explains the basis for the permit's TRC limit, and sets forth the Region's specific finding that "'EPA finds that the Broward daily average 3.5 [milligrams per liter (mg/l)] TRC treatment plant discharge exceeds the Florida 0.01 mg/l TRC criterion at the end of the pipe and that a 0.01 mg/l TRC limit is required by 40 C.F.R. § 122.44(d)(1)(iii).'" Region's Response to Petition for Review at 4 (quoting Fact Sheet at 7).

The issue of whether the Region's determination of "reasonable potential" is factually supported is material to the permit proceeding in that it could affect the outcome. *See Broward I* at 712-13. The applicable regulation provides that a permit "must contain" effluent limitations for pollutants such as TRC whenever the permitting authority determines that a discharge of the pollutant "causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State water quality standard" for the pollutant. 40 C.F.R. § 122.44(d)(1)(iii). In this instance, unlike *Broward I*, it is clear that the Region has made the requisite determination of "reasonable potential." Our review of the permit's fact sheet reveals that the Region made a specific factual finding concerning the reasonable potential of Broward's effluent to cause an exceedance of Florida's water quality criterion for TRC, based on available data. The Region explained in the fact sheet that:

> Based on the EAB decision in [*Broward I*], the fact sheet is also being supplemented to show that the Broward County discharge causes, contributes to, or has reasonable potential to cause or contribute to a violation of the Florida total residual chlorine (TRC) criterion of 0.01 mg/l at Fla. Admin. Code § 17-302.530(19). * * * [Broward's expired FDEP] Temporary

> Operating Permit * * * contained no specific mixing zone for TRC. Although Broward County intends to apply to FDEP for a TRC mixing zone, EPA is unaware of any subsequent FDEP permitting action which granted such a mixing zone to the permittee. Therefore, the 0.01 mg/l TRC criterion must be applied at the end of the pipe.

Fact Sheet at 5. The Region therefore complied with the Board's directive in *Broward I* that it make a factual determination on the record concerning "reasonable potential." *See Broward I* at 721. The issue becomes whether Broward has adduced evidence to show that a *genuine* fact issue exists with respect to whether the existing data support its determination.

As explained in the fact sheet, the Region relied on data submitted by Broward showing that the daily average TRC level of Broward's effluent at the treatment plant was 3.5 mg/l from July 1993 to June 1994. The Region also looked to data from the City of Boca Raton, "the only other ocean outfall where [in-pipe TRC decay] analysis" had been conducted. *Id.* at 6. Based on specific studies of in-pipe TRC decay at the Boca Raton facility, as well as dilution modeling studies, Boca Raton's FDEP permit provided for a 1.0 mg/l 24-hour average TRC permit limit (at the treatment plant) and a 17-meter mixing zone to achieve the Florida TRC water quality criterion of 0.01 mg/l. The Region noted that:

> [T]he [Boca Raton] chlorine decay studies found an average 0.13 mg/l and a maximum 0.2 mg/l TRC concentration at the outfall terminus, but a 0.25 mg/l value was assumed for design purposes to ensure a margin of safety. Based on the dilution modeling studies, a 25:1 dilution was used to assess the TRC concentration that would be found at the edge of the mixing zone.
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> [The chlorine decay and dilution] studies indicated that a 1.0 mg/l "treatment plant" 24-hr average TRC permit limit would result in an outfall terminus TRC concentration of 0.25 mg/l, which would be diluted 25:1 to achieve the 0.01 mg/l Florida TRC criterion at the edge of the mixing zone.

Fact Sheet at 6. Based on the foregoing, the Region concluded that "the TRC discharged from the [Boca Raton] treatment plant is reduced by approximately *a factor of 4-8* at the outfall terminus" (*i.e.*, from the

permitted limit of 1.0 mg/l 24-hour average at the treatment plant to a range of 0.13 mg/l to 0.25 mg/l at the outfall terminus following chlorine decay). Fact Sheet at 6 (emphasis in original). However, because Broward's data showed that it discharged a daily average TRC concentration of 3.5 mg/l at the treatment plant, the discharge "would have to be reduced by *a factor of approximately 350* to meet an outfall terminus concentration of 0.01 mg/l, a reduction significantly greater than that found at Boca Raton." Fact Sheet at 7 (emphasis in original). Because Broward presented no specific chlorine decay data for the terminus of its outfall (let alone data reflecting TRC reduction by a factor of 350), and further because there was no mixing zone for TRC pending before FDEP, EPA concluded that the Broward daily average 3.5 mg/l TRC discharge exceeded the Florida 0.01 mg/l TRC criterion at the end of the pipe, and that a 0.01 mg/l end-of-the-pipe TRC limit was required to be included in the permit by 40 C.F.R. § 122.44(d)(1)(iii). *Id.*

In its comments on the draft permit, Broward offered no facts sufficient to rebut the facts and conclusions set forth in the fact sheet.[15] Although Broward argued that a TRC limitation was unnecessary because TRC will be addressed in part by in-pipe decay, and presented "preliminary" TRC decay data in its evidentiary hearing request (based on samples gathered during February 1995), the preliminary data show that even at the furthermost sampling station (at the beach) for which data were collected, the TRC content of its effluent greatly exceeded Florida's TRC water quality criterion of 0.01 mg/l (ranging from 0.65 mg/l to 1.25 mg/l). *See* Evidentiary Hearing Request at 3-4. Moreover, there were no data (preliminary or otherwise) concerning the TRC content of the effluent at the outfall terminus. The Region rejected Broward's preliminary data[16] and, for the reasons that follow, so do we. First, according to the Region the data were not submitted to the administrative record in time for consideration by the Region. Second, even if good cause exists to consider the data, the data are preliminary and do not raise an issue of material fact sufficient to hold a hearing. Specifically, the TRC decay data do not purport to illustrate TRC levels at the outfall terminus, nor do they provide a reasoned basis for contradicting the Region's reliance on the facts and conclusions set forth in the fact sheet. Therefore, the data do not raise a gen-

[15] Broward did argue in its evidentiary hearing request that a reduction of TRC of 350 to 1 was "quite feasible", but that reduction was dependent upon a mixing zone. Evidentiary Hearing Request at 2.

[16] *See* Denial Letter at 3-4.

uine issue concerning the Region's conclusion that Broward's effluent exceeds the Florida water quality criterion for TRC.

It is clear that "[i]n NPDES proceedings, the party proposing permit provisions different from those which are contained in the permit obviously has the burden of going forward with evidence in support of such alternative provisions." *In re 170 Alaska Placer Mines*, 1 E.A.D. 616, 624 (Adm'r 1980); *see also* 40 C.F.R. § 124.74(c)(5) (party seeking hearing on contested permit condition must provide "suggested revised or alternative permit conditions"). Broward's "revised" or "alternative" permit provision in this instance is one that lacks any limit for TRC. As explained above, Broward failed to provide evidence in support of not including any provision in the permit limiting the discharge of TRC. While ongoing studies and the potential for the grant of a mixing zone by FDEP could potentially provide a basis for modifying the permit in the future, the Region had before it at the time of permit issuance sufficient information, unrebutted by Broward, from which the Region could conclude that a TRC limitation was necessary. Thus, no evidentiary hearing on this issue was warranted.[17]

We must also reject Broward's argument that a TRC limitation was unnecessary because TRC will be addressed by a mixing zone. The record shows that, as of the time of the Region's decision, Broward had not obtained a permit from FDEP authorizing a mixing zone for TRC. In response to EPA's October 11, 1994 request that FDEP certify the draft NPDES permit and confirm whether Broward had applied for a mixing zone, FDEP stated that "[t]he applicant has not applied to the Department for a mixing zone for TRC." Letter to Region IV from FDEP, December 30, 1994. Because Broward has not received mixing zone authorization from the State, there was no basis for the Region to delete its proposed TRC limit based on the possible future approval of a mixing zone by the State.[18]

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[17] In its petition for review, Broward contends that the relevance of the TRC data provided by Broward to Region IV (which showed that the TRC level exceeded Florida's water quality criterion) is "highly questionable since TRC is currently a non-regulated parameter. TRC is routinely maintained at a high level to ensure compliance with fecal coliform limits which are in the current permit." Petition for Review at 4. Although Broward's intent in raising this point is unclear since it seems to support the Region's conclusion that a permit limit for TRC was necessary, we note that the record does not show that this point was raised either during the public comment period on the draft permit or in Broward's evidentiary hearing request, and it may not be considered for the first time in this appeal. *See Broward I* at 711 n. 14.

[18] In a letter to U.S. EPA Region IV, Broward represents that it applied to FDEP for a mixing zone sometime in January 1995. Letter from Broward County Public Works Department,

Continued

With respect to Broward's claim that the Region erred in relying on data from the Boca Raton facility in establishing the 0.01 mg/l TRC limit actually imposed in the permit, we agree with the Region that Broward failed to raise this issue anywhere in its comments on the draft permit, and therefore was barred from raising it in its evidentiary hearing request. As we have explained, "in order to contest a final permit determination in an evidentiary hearing or to preserve an issue for review by the Board, 'all reasonably ascertainable issues' must be raised by the close of the comment period." *Broward I* at 714 (quoting 40 C.F.R. § 124.13). Further, "'[n]o issues shall be raised by any party that were not submitted to the administrative record * * * as part of the preparation of and comment on a draft permit unless good cause is shown for

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Wastewater Management Division, to Water Permits and Enforcement Branch, U.S. EPA Region IV (Aug. 2, 1996). Broward's letter indicates that FDEP's Point Source Evaluation Section (PSES) has "approved" the use of mixing zones for TRC. *Id.* Broward attached to its letter a PSES memorandum dated September 28, 1995, which states that the PSES "recommends" a mixing zone for TRC of 502,000 square meters. *Id.* Broward's letter requests that the Region modify the permit at issue in this appeal to "reflect FDEP's approval of pH and TRC mixing zones." *Id.* However, it is undisputed that Broward has not received any permit from FDEP that incorporates such a mixing zone for TRC. Pursuant to Florida's regulations, "*[t]here shall be no mixing zone* for any component of any discharge unless a [FDEP] permit containing a description of its boundaries *has been issued* for that component of the discharge." Fla. Admin. Code § 62-4.244(2) (emphasis added). Accordingly, unless and until FDEP takes final action on Broward's mixing zone application and issues a permit containing such a mixing zone, the PSES recommendation has no bearing on this permit. Because it is clear that no FDEP permit containing a mixing zone has been issued, this case is readily distinguishable from another case in which a remand was deemed appropriate where it was unclear whether the state had granted a request for a mixing zone. *See In re City of Hollywood, Florida*, 5 E.A.D. 157, 166-67 (EAB 1994) (because permit remanded for other reasons, Region instructed to also ascertain whether mixing zone had been granted). It is also distinguishable from *Puerto Rico Sun Oil Co. v. U.S. EPA*, 8 F.3d 73 (1st Cir. 1993), where the Region renewed a permit but did not carry forward a mixing zone provision contained in the earlier permit, because the Commonwealth had certified the permit with no mixing zone. The Commonwealth had requested that the Region stay issuance of the permit and treat the certification as not final pending the Commonwealth's reconsideration of the discharger's mixing zone request in light of recently-revised regulations. *See Puerto Rico Sun Oil*, 8 F.3d at 75-76. The court remanded the Board's decision that upheld issuance of the permit. *Id.* at 81. In contrast, in this case the State of Florida never received a mixing zone request from Broward until well after issuance of the draft permit, the State waived certification of Broward's permit (*see supra* n.8), and the State has not as yet issued a permit granting a mixing zone for TRC to Broward or requested that EPA defer action on the permit because of Broward's mixing zone request. Because these facts are so distinguishable, *Puerto Rico Sun* has no bearing on this decision. *See Caribbean Petroleum Corp. v. U.S. EPA*, 28 F.3d 232, 235 (1st Cir. 1994) (distinguishing facts of *Puerto Rico Sun* from case where EPA properly issued permit after certification, even though that certification was under reconsideration by Commonwealth, in part because Commonwealth had not issued new certification, nor stayed its original certification, and terms of certification incorporated in permit were consistent with discharger's previous permit conditions).

We note further that the permit does give Broward the right to seek a modification of the TRC limit in the event that FDEP ultimately grants its request for a mixing zone for TRC. *See* Permit Part I.9.a.

the failure to submit them.'" *Id.* (quoting 40 C.F.R. § 124.76).[19] "The purpose behind this requirement is to alert the Region to potential problems with the draft permit and to ensure that it has an opportunity to address these problems before the permit becomes final, thereby promoting the longstanding policy that most permit issues should be resolved at the Regional level." *Id.* Broward has made no attempt to establish "good cause" for its failure to raise any issues concerning the Boca Raton data during the comment period.[20] Accordingly, Broward's petition for review of that issue must be denied.

C. *Inclusion of "Positive" Reopener Clause in Permit*

Broward contends that the Region erred by failing to include a "positive" reopener clause in the permit that would expressly allow modification of the permit if scientific studies such as SEFLOE II show that the permit is overly stringent. This contention raises purely legal, rather than factual, issues, and therefore the Region properly denied Broward's evidentiary hearing request. In accordance with 40 C.F.R. § 124.91(a)(1), however, the Board is authorized to entertain challenges to a Region's policy or legal conclusions. In this instance, we are not persuaded that the Region erred by declining to include the requested clause in the permit.

In its petition for review, Broward has identified no statutory or regulatory support for its claim that the permit should contain the requested "positive" reopener clause, nor have we independently identified any such requirement. The Region asserts that the permit's reopener clause (quoted *supra* Part I) "tracks the existing regulatory requirements and is the standard language for all NPDES permits issued to POTWs in Florida by EPA." Region's Response to Petition for Review at 8.[21] The Region argues that the requested "positive" reopen-

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[19] An issue can be preserved so long as it was raised by someone, not necessarily the petitioner, during the public comment period, *see Broward I* at 714, but in this case there has been no showing that any other commenter raised this issue during the public comment period.

[20] In any event, our review of Broward's evidentiary hearing request shows that the gravamen of its complaint rests not on any articulated error on the Region's part in considering the Boca Raton outfall TRC characteristics, but in failing to also consider allegedly available outfall TRC characteristic data from a study conducted by the City of Hollywood, Florida. *See* Broward's Evidentiary Hearing Request at 2-4. Broward has not pursued the alleged relevance of the City of Hollywood data in this appeal, and we therefore need not consider it.

[21] The reopener clause apparently stems from 40 C.F.R. § 122.44(b)(1) (requiring permit modification when toxic effluent standards or prohibitions are promulgated that are more stringent than those applied in the permit) and 40 C.F.R. § 125.123(d)(4) (for open ocean discharges, mandating a permit clause that states that the permit shall be modified or revoked if the director determines that continued discharges may cause unreasonable degradation of the marine environment). *See* Permit Part III.B.

er clause amounts to nothing more than an attempt to circumvent the Clean Water Act's "anti-backsliding" requirements, which provide that a renewed or reissued permit must contain standards or conditions at least as stringent as the standards or conditions contained in the previous permit, unless the permit falls within certain statutory exceptions. *See* Clean Water Act § 402(o)(2), 33 U.S.C. § 1341(o)(2); 40 C.F.R. § 122.44(l). The Region points out that Broward is free to request a permit modification pursuant to 40 C.F.R. § 122.62, should circumstances justifying such a request arise. That regulation allows a permittee to request modification, and authorizes the Region to modify a permit upon a determination that one of the enumerated causes for modification exists. *See* 40 C.F.R. § 122.62. Among other reasons, a permit may be modified if new information that was unavailable at the time of permit issuance "would have justified the application of different permit conditions at the time of issuance." *Id.* § 122.62(a)(2).

Because nothing in the permit alters or abrogates Broward's ability to pursue modification of its permit if it believes that scientific studies justify different permit conditions,[22] it was not error for the Region to refuse to include the reopener clause requested by Broward.[23] Review on the basis of this issue must therefore be denied.

D. *Toxicity Testing Requirements*

Broward's petition for review challenges both the test species identified in the permit for biotoxicity testing and the 96-hour test duration mandated in the permit. Broward further contends that toxicity testing should be required only for purposes of monitoring (as opposed to potentially leading to a violation of the permit) because, in Broward's view, "the testing species and protocols are inappropriate for open ocean conditions." Petition for Review at 7. The Region rejected Broward's evidentiary hearing request with respect to the appropriateness of the test species on the ground that Broward failed to comment on that issue during the public comment period. Denial Letter at 5-6. As to Broward's challenge to the 96-hour test duration,

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[22] In order to obtain a less-stringent permit condition, Broward would presumably have to demonstrate that its request falls within a recognized exception to the anti-backsliding requirements.

[23] The Region contends that the permit's reopener clause satisfies Broward's request, because, in accordance with 40 C.F.R. § 125.123(d)(4), the clause states that "this permit shall be modified or revoked at any time if, on the basis of any new data, the director determines that continued discharges may cause unreasonable degradation of the marine environment." Because this language appears to address only a circumstance in which *more* stringent permit conditions are necessary, we disagree that it responds to Broward's request.

the Region concluded that a 96-hour test duration was mandated by Fla. Admin. Code § 62-4.244(3)(c), and therefore no material fact issue existed with respect to the permit's testing requirements. *Id.* at 7. Broward contends that it did raise issues concerning the biotoxicity test organisms in its comments on the draft permit.[24]

We visited these issues previously in *Broward I*, in which we remanded Broward's permit so that the Region could explain why it believes that the test species it selects (in this instance, mysid shrimp and tidewater silverside) are "significant to the indigenous aquatic community," Fla. Admin. Code § 17-4.244(3)(c), or, if they are not indigenous species, "why the use of these species will adequately predict how indigenous species would fare when exposed to Broward's effluent." *Broward I* at 716.[25] Following the Board's decision in *Broward I*, the Region supplemented the fact sheet for Broward's permit "to show that the toxicity test species ([mysid shrimp and tidewater silverside]) are significant to the indigenous aquatic community." Fact Sheet at 4.[26] The fact sheet explained that:

> The species tidewater silverside *Menidia peninsulae* is resident and indigenous to South Florida, including the Atlantic Ocean in the vicinity of the Broward County discharge. EPA reaches this conclusion based on the following reference: *Methods for Measuring the Acute*

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[24] Broward also seems to argue that the Region rejected its challenge to the 96-hour toxicity test duration on the ground that the issue had not been preserved for evidentiary hearing, but our review of the Denial Letter does not show that the Region denied the hearing request on that basis.

[25] We observed in *Broward I* that:

> [A]lthough Florida's toxicity standard requires that the effluent's effect on indigenous species be determined, it does not specifically require that testing be done on those species directly. "It is conceivable * * * that the effluent's effect on indigenous species may be ascertained by measuring the effluent's effect on non-indigenous species." If the test species designated in the permit are not indigenous to the aquatic community, the Region must establish that these species can serve as suitable surrogates for determining the effluent's lethal effect on indigenous species.

Broward I at 716 n. 22 (quoting *In re Miami-Dade Water and Sewer Auth. Dept.*, 4 E.A.D. 133, 147 (EAB 1992)).

[26] The Region apparently elected to specify the tidewater silverside as one of the test species instead of the inland silverside, which was one of the species at issue in *Broward I*. *See Broward I* at 714.

> *Toxicity of Effluents to Freshwater and Marine Organisms*, EPA/600/4-90/027F, Appendix A, Figure 3 (pg. 250). The genus *Menidia* is resident and indigenous to the Atlantic Ocean in the vicinity of this discharge based on [two additional specified scientific references].
>
> The mysid shrimp is resident and indigenous to South Florida. EPA reaches this conclusion based on [three specified scientific references].

Id. at 4-5.

Broward's comment on the Region's conclusion that mysid shrimp and tidewater silverside are "resident and indigenous" to the area consisted solely of the following terse sentence: "The permit should indicate that the [mysid shrimp and tidewater silverside] are nonindigenous to the open ocean environment to which this outfall discharges." Broward's Comments on Draft Permit at ¶ 12. Broward provided the Region with no explanation of the basis for its comment, which is bereft of meaning in the face of the Region's explicit (and referenced) conclusion to the contrary. As noted earlier, even a conclusion that a species is "nonindigenous" would not necessarily defeat the Region's selection of such species, if a showing is made that the nonindigenous species are suitable surrogates. *See supra* note 25. Broward's comment makes no attempt to justify or support its conclusory claim that the proposed species are nonindigenous, let alone to explain why, if the species are nonindigenous, they are also not suitable surrogate species for toxicity testing.

In apparent recognition of the patent defects in its comment, Broward attempted to articulate its position on the permit's toxicity test species for the first time in its evidentiary hearing request. The evidentiary hearing request sets forth Broward's claim that the test species are "inappropriate" because "the natural range of the proposed test organisms does not encompass the subject outfall area." Evidentiary Hearing Request at 5. As support for its claim, Broward cited the same studies cited by the Region in the fact sheet, despite the fact that its comment pointed out no defects in these studies or the Region's reliance on them. *See id.* at 5-6. Broward argued in its hearing request that the test species "typically live[] well inshore of the open ocean," and that the variation in salinity between the inshore and ocean waters can affect mortality. *Id.* at 6. Broward also argued that the 96-hour test duration required in the permit did not reflect the actual exposure of marine organisms to Broward's effluent due to

rapid effluent dilution in ocean waters, and that "[t]he imposition of the test in the permit is inherently inequitable as compared with exposure opportunities in more sensitive freshwater." *Id.*

We agree with the Region that the unsupported comment provided by Broward on the draft permit in response to the Region's clear finding that the proposed test species are indigenous was inadequate to preserve the technical issues Broward later raised in its evidentiary hearing request several months later. As explained earlier, the purpose of requiring "all reasonably ascertainable issues" and "all reasonably available arguments" to be submitted to the administrative record during the public comment period is to "alert the Region to potential problems with the draft permit and to ensure that it has an opportunity to address these problems before the permit becomes final * * *." *Broward I* at 714; 40 C.F.R. §§ 124.13, 124.76. Even if Broward's comment could be fairly read as expressing a cognizable objection to the Region's selection of test species, it afforded the Region no opportunity whatsoever to consider and respond to any specific concerns. The Region had already explained its conclusion that the test species were "resident and indigenous," and identified the scientific support for its conclusion, and a conclusory allegation to the contrary provided no rational basis for the Region to reconsider its conclusion or alter the permit's conditions. As one court has explained:

> [C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made * * *; *it must show why the mistake was of possible significance in the results.*

Adams v. U.S. EPA, 38 F.3d 43, 51 (1st Cir. 1994) (quoting *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553 (1978)) (emphasis added). Absent a showing of good cause for failing to articulate its specific objections during the public comment period (objections that were plainly available to Broward during the public comment period since it purports to rely on the same studies cited by the Region in the fact sheet), we cannot conclude that the Region erred in denying Broward's evidentiary hearing request.

The history of this particular permit proceeding lends force to our conclusion that Broward squandered its opportunity to raise the issue it now asks the Board to review. In *Broward I* the Board noted that Broward did not raise the issue of whether or not the test species des-

ignated in the permit were appropriate in its comments on the draft permit. *Broward I* at 714. Broward was rescued from procedural default in that appeal due to a fortuitous comment on test species that had been provided by another commenter. *Id.* at 714-715.[27] The Board remanded the permit specifically to allow the Region to respond to Broward's objection by explaining its basis for selecting the test species identified in the permit. *Id.* at 716. Broward was therefore on notice *as of June 1993* that the Region would be providing an explanation for the selection of test species. When the draft permit renewal was issued for public comment in November 1994, Broward was given yet another opportunity to contest the Region's selection of test species and provide the Region with any available arguments as to why the Region's explanation of the basis for its selection was in error. Having eschewed this last opportunity to make its case to the Region, Broward cannot now be heard to complain of the result.

As to Broward's contention that the Region erred by denying its evidentiary hearing request on the issue of the appropriateness of the 96-hour testing duration and whether toxicity testing should be for monitoring only (as opposed to potentially leading to a violation of the permit), we agree with the Region that no material fact issue was raised because the permit's testing requirements are prescribed by Florida law and are required to be incorporated in the permit by the Clean Water Act and regulations governing issuance of NPDES permits. As noted earlier, pursuant to Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), the Region is required to include permit limitations that are necessary to ensure compliance with state water quality criteria. The NPDES regulations provide that when the Region determines that a discharge causes, or has the reasonable potential to cause, an excursion above state water quality standards, the permit must contain effluent limits for whole effluent toxicity (WET). *See* 40 C.F.R. § 122.44(d)(1)(v). Florida's WET regulation states, in part, that:

> For open ocean discharges, the effluent, when diluted to 30% full strength, shall not cause more than 50% mortality in 96 hours (96-hr. LC_{50}) in a species significant to the indigenous community.

Fla. Admin. Code § 62-4.244(3)(c).

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[27] We note that rather than contending (as does Broward) that the test species identified in the *Broward I* proceeding were overly sensitive, that commenter suggested that the identified organisms were "generally hearty [sic] creatures in the wild" and that other, more sensitive, species should also be subject to acute toxicity testing. *Broward I* at 715 n. 20.

We expressly rejected Broward's identical challenge on the same issue in *Broward I*:

> [Broward's argument] fails to convince us that review is warranted. The 96-hour exposure period is specified in Florida's toxicity regulation for ocean discharges. * * * *The actual dilution taking place in the receiving waters is irrelevant to this requirement.*

Broward I at 720 n.30 (emphasis added) (citing *In re Miami-Dade Sewer Auth. Dept.*, 4 E.A.D. 133, 144 (EAB 1992)). Further, we expressly upheld the use of Florida's WET test as an effluent limit in *Miami-Dade Water and Sewer Auth. Dept.*, 4 E.A.D. at 138-40. Broward has not persuaded us that a different conclusion can or should be reached here. Accordingly, Broward's petition for review of this issue must be denied.

III. *CONCLUSION*

For the foregoing reasons, we conclude that the Region correctly denied Broward's evidentiary hearing request on the issue of the permit's TRC limitation, because Broward did not raise a material issue of fact relevant to the issuance of the permit, within the meaning of 40 C.F.R. § 124.75(a)(1). The Region correctly denied Broward's evidentiary hearing request concerning the Region's use of data from the Boca Raton outfall, because Broward failed to comment on that issue during the public comment period on the draft permit. The Region did not err, as a matter of law or policy, in declining to include a "positive" reopener clause in the permit. Finally, the Region correctly denied Broward's evidentiary hearing request with respect to the permit's toxicity testing requirements, because the issue of the appropriateness of the test species was not preserved for hearing and the Region was required by law to include the WET test prescribed by Florida in the permit.

So ordered.