IN RE CITY OF HOLLYWOOD, FLORIDA

NPDES Appeal No. 92-21

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

Decided March 21, 1994

Syllabus

The City of Hollywood, Florida challenges the following terms and conditions proposed for inclusion in a National Pollutant Discharge Elimination System permit for the City's Southern Regional Wastewater Treatment Plant:

— Effluent limitations for residual chlorine and pH based on the applicable surface water quality criteria of the State of Florida. The City objects to these limitations on the grounds that the City has requested from the State, but the permit does not reflect, a mixing zone for the pollutants in question.

— Effluent limitations for biochemical oxygen demand, suspended solids, and fecal coliform based on the applicable Florida surface water quality criteria. The City objects to these limitations on the grounds that EPA has misinterpreted the relevant provisions of Florida law.

— Percent removal requirements for biochemical oxygen demand and suspended solids based on the EPA Secondary Treatment regulation at 40 C.F.R. Part 133. The City claims that it is entitled to a waiver from these requirements.

The City also objects to various aspects of the biological testing provisions associated with the permit's limitation on whole effluent toxicity, including the permit's characterization of a single test failure as a violation and its requirement to test for toxicity using effluent samples that have not been diluted.

In addition, EPA Region IV has requested that we remand, for futher consideration in light of the City's objections: (1) certain proposed permit conditions and monitoring requirements based on the "Ocean Discharge Criteria" at 40 C.F.R. Part 125, Subpart M, and (2) the permit provisions designating test species for toxicity testing.

Held: The City's Petition for Review is granted with respect to the permit provision that requires the City to test its effluent for toxicity at full strength. The currently applicable Florida regulation would allow the City to test the effluent after dilution to 30% of its full strength, but Region IV argues that reliance on that regulation would constitute impermissible "backsliding" from the provisions of the City's previous (September 1985) NPDES permit. Review is granted to enable the Board to consider the applicability and effect of the Clean Water Act's anti-backsliding prohibition in the circumstances of this case.

The permit provisions that Region IV has agreed to reconsider are remanded to the Region for that purpose and, in addition, the Region is directed to determine on remand whether the City's request for a zone of mixing for pH and residual chlorine has been granted or denied by the State of Florida.

All other grounds for review advanced by the City are either rejected on their merits or found to have been waived.

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

Opinion of the Board by Judge McCallum:

The City of Hollywood, Florida appeals from the denial of an evidentiary hearing request submitted in connection with the reissuance of National Pollutant Discharge Elimination System (NPDES) Permit No. FL 0026255, governing operation of the City's Southern Regional Wastewater Treatment Plant. The facility in question is a publicly owned treatment works discharging municipal wastewater to the Atlantic Ocean. The City objects to the following terms and conditions included in the final permit issued to it by EPA Region IV on September 20, 1990:

1. The annual average effluent limitations for five-day biochemical oxygen demand (30.0 mg/l) and total suspended solids (30.0 mg/l);

2. The requirement that monthly average effluent concentrations for BOD_5 and suspended solids shall not exceed 15% of the respective influent concentrations;

3. The annual average effluent limitation for fecal coliform bacteria (200 colonies per 100 ml of effluent sample);

4. The requirement that the pH of the effluent shall not be less than 6.5;

5. The daily maximum effluent limitation for total residual chlorine (0.01 mg/l);

6. The imposition, based on the "Ocean Discharge Criteria" at 40 C.F.R. Part 125, Subpart M, section 125.123(d), of permit conditions and monitoring requirements for

the prevention of "unreasonable degradation of the marine environment"; and

7. The prohibition against failure of an acute toxicity test conducted according to a testing protocol specified in the permit.

DISCUSSION

Under the rules governing this proceeding, there is no appeal as of right from the Regional Administrator's decision.[1] A petition for review will ordinarily not be granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important and should therefore be reviewed by the Environmental Appeals Board. *See, e.g., In re American Cyanamid Company*, NPDES Appeal No. 92-18, at 5 (EAB, Sept. 27, 1993). The petitioner bears the burden of demonstrating that review should be granted. *See* 40 C.F.R. § 124.91(a). Guided by these standards, we shall address the City's objections seriatim.

Annual Average Limitations for BOD_5, Suspended Solids

The City argues that the Region's imposition of annual average effluent limitations for BOD_5 and total suspended solids is based on an incorrect interpretation of Florida water quality standards. Region IV responds by observing that the challenged annual average effluent limitations appeared in the draft permit issued for comment in June 1990, and that the City did not raise any objection to those limitations in its comments on the draft permit. The City has not disputed these contentions, and our own review indicates that the Region's description of the record is accurate. Accordingly, no objections to the annual average effluent limitations for BOD_5 and TSS were preserved for review as required by 40 C.F.R. § 124.13.[2] Review of these limitations must therefore be denied.

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[1] With respect to appeals under Part 124 regarding NPDES permits, Agency policy calls for most such permits to be finally adjudicated at the Regional level. *See* 44 Fed. Reg. 32,887 (June 7, 1979). Although the Board has broad authority to review decisions made in NPDES permit cases, the Agency intended the Board's power of review to be exercised "only sparingly." *Id.*

[2] Section 124.13 states that all persons seeking to contest any provision appearing in a draft permit "must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under § 124.10." *See also* 40 C.F.R. § 124.76 ("No issues shall be raised by any party [for resolution at an evidentiary hearing] that were not submitted to the administrative record required by § 124.18 unless good cause is shown for the failure to submit them.").

Percent Removal Requirements for BOD_5, Suspended Solids

The permit states that "[i]n addition to specified limits, the monthly average effluent BOD_5 and suspended solids concentrations shall not exceed 15% of the respective influent values." That prohibition comes directly from the Secondary Treatment regulation at 40 C.F.R. Part 133, and specifically from sections 133.102(a)(3) and (b)(3), which provide that for both BOD_5 and suspended solids, "the 30-day average percent removal shall not be less than 85 percent."

The City claims, however, that it is eligible for lower percent removal requirements pursuant to the provisions of 40 C.F.R. § 133.103(d), which states that the Regional Administrator "is authorized to substitute * * * a lower percent removal requirement" provided that the permittee demonstrates that three conditions are satisfied. The Region's authority to effect such a substitution under section 133.103(d) depends upon a "satisfactory" demonstration by the permittee that:

> (1) The treatment works is consistently meeting, or will consistently meet,[3] its permit effluent concentration limits but its percent removal requirements cannot be met due to less concentrated influent wastewater, (2) to meet the percent removal requirements, the treatment works would have to achieve significantly more stringent limitations than would otherwise be required by the concentration-based standards, and (3) the less concentrated influent wastewater is not the result of excessive [infiltration and inflow].

In its comments on the draft permit, the City urged that the percent removal requirements for BOD_5 and suspended solids[4] be deleted outright, pending the City's completion of the demonstration required by section 133.103(d). The City stated that it intended to commence

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[3] A demonstration that the facility "will consistently meet" its effluent concentration limits is sufficient in the case of a new facility. *See* 50 Fed. Reg. 23,382, 23,383 (June 3, 1985).

[4] Strictly speaking, Region IV is correct in pointing out that the City's comments requested an adjustment pursuant to section 133.103(d) only with respect to BOD_5, and that suspended solids were not mentioned in connection with that request. Nonetheless, the Region's response to comments addressed the City's eligibility for an adjustment to the percent removal requirements both for BOD_5 and for suspended solids, which suggests that the Region may have understood the City's request for an adjustment to apply to both. The objective underlying the requirements of 40 C.F.R. § 124.13 has, in any event, been satisfied, and we will treat the City's objection to the 85% removal requirement for suspended solids as having been properly preserved for review. *See In re Broward County, Florida*, NPDES Appeal No. 92-11, at 11 (EAB, June 7, 1993) ("The purpose behind [section 124.13] 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 * * *.").

such a demonstration within six months after submitting its comments, *i.e.*, by the end of January 1991, but the City cited no legal basis for deletion of the percent removal requirements during the pendency of the proposed demonstration. Accordingly, when it issued the final permit in September 1990, the Region noted that the City had not yet provided any data to support a claim under section 133.103(d) for adjustment or waiver of the prescribed 85% removal requirements for BOD_5 and suspended solids, and that the requirements would therefore be retained in the final permit. The Region further stated, however, that "EPA will entertain any future permit modification request to waive such requirements if/when the City submits the supporting documentation required by the regulations."

Nothing in the record before us indicates that the City has ever submitted to the Region any evidence that might justify relaxation of the 85% removal requirements under section 133.103(d). Nor does the City contend that it has done so. Nor, indeed, does the City affirmatively contend that such evidence exists. Instead, in its evidentiary hearing request (dated October 26, 1990) the City merely restated its belief that "the City ultimately will be entitled to a waiver or adjustment of the percent removal requirement pursuant to 40 C.F.R. § 133.103(d)," and in its Petition for Review (dated August 6, 1992) the City relies solely on the conclusory assertion that "Hollywood is entitled to a waiver or adjustment of the percent removal requirement, due to low concentration influent, pursuant to 40 CFR § 133.103(d)."[5] The Region continues to respond that in the absence of any supporting data, it is in no position to consider relaxation of the percent removal requirements prescribed by regulation.[6]

The Region is plainly correct. The City cites no evidence to substantiate its claim of entitlement to a "waiver or adjustment" of the percent removal requirements, and the Region need not await the development of such evidence indefinitely before finalizing the City's permit. Because the City cites no facts at all in support of its claim, it

[5] The City does not explain what circumstances, if any, might account for the transition from its earlier assertion that "the City *ultimately will be entitled* to a waiver or adjustment," to its more recent assertion that "Hollywood *is* entitled to a waiver." Nowhere does the City assert that it has actually demonstrated its alleged entitlement to a waiver or adjustment in the manner contemplated by section 133.103(d).

[6] The Region also suggests that, according to Florida law, any relaxation of permit conditions derived from secondary treatment standards requires explicit State approval, in the case of a domestic wastewater facility discharging to open ocean waters. Response to Petition for Review, at 17 (citing Fla. Admin. Code rule 17-600.420(1)(b)(2)). We need not address this issue of State law, because the City's claim of eligibility for relaxation of the percent removal requirements in its permit is clearly deficient as a matter of federal law.

has necessarily identified no issue of "material" fact that is appropriate for resolution at an evidentiary hearing.[7] The Region correctly advised the City that, if and when evidence of the "low concentration" of the City's influent is forthcoming, waiver or adjustment of the permit's percent removal requirements may be considered in the context of a request for modification of the permit. *See* 40 C.F.R. § 122.62(a)(2) (providing for modifications based on "new information" that was not available at the time of permit issuance). No more is required of the Region. To date, the City has not made a properly supported claim of eligibility, under section 133.103(d), for an adjustment to the percent removal requirements for BOD_5 and suspended solids. We therefore deny the City's request for review of those requirements insofar as the request is based on the provisions of section 133.103(d).

In a further challenge to the percent removal requirements for BOD_5 and TSS, the City also argues that the inclusion of such requirements as "immediately applicable" permit conditions is "inconsistent with Region IV's knowledge of and conduct regarding Hollywood's program to fully evaluate and reduce sources of infiltration and inflow ('I/I')." The "program" to which the City refers is presumably an effort to achieve compliance with the percent removal requirements of the Secondary Treatment regulation, by improving infiltration and inflow conditions. *See* 54 Fed. Reg. 4224, 4224 (Jan. 27, 1989) ("The percent removal requirement was established to encourage municipalities to correct excessive infiltration and inflow (I/I) in their sewer systems and to prevent intentional dilution of the wastewater."). In other words, we understand the City to be saying that it is trying to achieve compliance with the percent removal requirements (or to demonstrate its eligibility for relaxation of those requirements), and that Region IV knows that it is trying to achieve compliance, but that compliance is not yet readily achievable.

Those contentions are not material to the propriety of the Region's incorporation of secondary treatment standards, including percent removal requirements for BOD_5 and suspended solids, into the City's permit. Absent grounds for relaxation of the percent removal requirements under section 133.103—which have not been shown to exist—the Region has no discretion not to include the percent removal re-

[7] *See In re Mayaguez Regional Sewage Treatment Plant*, NPDES Appeal No. 92-23, at 10 (EAB, Aug. 23, 1993) ("Under the regulations, a party requesting an evidentiary hearing must raise a material issue of fact relevant to the issuance of the permit.").

quirements as "immediately applicable" permit conditions.[8] We therefore deny the City's request for review of those requirements insofar as it is based on the City's alleged efforts to reduce infiltration and inflow.

Fecal Coliform Limitations

The City's opposition to the permit limitations sought to be imposed upon its discharges of fecal coliform bacteria has followed a rather haphazard course. The City's comments on these limits when they appeared in the draft permit identified one and only one objection: that the permit should be "modified to state that the fecal coliform limits shall be determined based on samples collected at the edge of an appropriately determined mixing zone." Comments and Objections to EPA's Proposed Permit (July 27, 1990), at 2. When the City filed a request for an evidentiary hearing, an additional objection was raised: that the Region had misapplied Florida law by imposing an annual average limitation, because applicable State regulations require only a monthly limitation. Evidentiary Hearing Request, at 6-7 ("The City contests the inclusion of an annual average concentration limitation for fecal coliform. * * * * [T]he Florida standard is a monthly geometric mean, not an annual average."). Finally, in its Petition for Review, the City abandons its contention that compliance with fecal coliform limits should be measured at the edge of a mixing zone; the petition states only that the Region erred by imposing an annual average limitation because Florida law, properly construed, requires nothing more than a monthly average limitation. Petition for Review, at 5-6.

For the reasons that follow, we conclude that the City's objection to the imposition of an annual average fecal coliform limitation was not properly preserved for review.

The uncertainty surrounding the proposed annual average fecal coliform limitation (≤200 colonies per 100 ml) arises from an ambiguity in the pertinent Florida regulations. Neither party disputes the applicability of Fla. Admin. Code rule 17-302.560(5)—the State's "bacteriological quality" criterion for surface waters that are classified by Florida as Class III waters—which provides that "fecal coliform bacteria shall not exceed a monthly average of 200 per 100 ml of sample, nor exceed 400 per 100 ml of sample in 10 percent of the samples, nor

[8] A schedule of compliance, suggested by the City in its evidentiary hearing request, cannot be utilized in a permit to defer compliance "beyond the applicable statutory deadline under the [Clean Water Act]." 40 C.F.R. § 122.47(a). Under the Act, no publicly owned treatment works may receive an extension of the deadline for compliance with secondary treatment standards beyond July 1, 1988. CWA § 301(i), 33 U.S.C. § 1311(i). Whether a schedule of compliance is appropriate as an enforcement matter is a separate question that we leave to the Region.

exceed 800 per 100 ml on any one day." The parties disagree, however, over the applicability of Fla. Admin. Code rule 17-600.440, which purports to establish "[d]isinfection criteria * * * for *all* [domestic wastewater] facilities." *Id.* § 17-600.440(3) (emphasis added). If applicable, that rule would require the City's treatment plant to accomplish what the Florida regulations call "Basic Disinfection," by satisfying the monthly average limitation and daily maximum that are quoted above and, in addition, an *annual* average fecal coliform limitation providing that "[t]he arithmetic mean of the monthly fecal coliform values * * * collected during an annual period * * * shall not exceed 200 per 100 ml of * * * effluent sample." *Id.* § 17-600.440(4)(c)(1). Confusion over the applicability of the annual average limitation arises in this case because a third regulation, Fla. Admin. Code rule 17-600.520(2), states that effluent being discharged to open ocean waters must be "disinfected to the extent necessary to achieve Class III microbiological standards"—suggesting, arguably, that the "basic disinfection" requirement does not apply to open ocean discharges. In other words, it is unclear whether the Class III fecal coliform standards are meant to apply in addition to (as the Region argues) or in lieu of the "basic disinfection" requirements in a case involving a domestic wastewater facility discharging to open ocean waters.

We need not attempt to resolve that uncertainty because the City, in its comments on the draft permit, never hinted at any concern over the validity of the annual average fecal coliform limitation. The City does not suggest that "good cause" exists for its failure to raise the issue during the comment period, and no such cause is apparent. The Fact Sheet accompanying the draft permit listed a proposed annual average limitation for fecal coliform bacteria in addition to a monthly average limitation and daily maximum, and expressly stated that the proposed fecal coliform limitations were adopted on the basis of Florida's "basic disinfection" requirement. Nonetheless, the City's comments included no challenge to the fecal coliform limitations themselves, but only claimed that the City should be allowed to sample its effluent for fecal coliform at the edge of a mixing zone.[9] Accordingly, the City failed to preserve any objection to the validity of the permit's

[9] The City asserts that its comments on the draft permit "clearly contest the applicability of the fecal coliform limits," and that its challenge to the annual average limitation is merely a "refinement" or "enhancement" of an objection that originally appeared in its comments on the draft permit. Reply Brief in Support of Petition for Review (March 23, 1993), at 2-3. We have carefully reviewed the City's comments, but we have found nothing to support those assertions.

fecal coliform limitations as required by 40 C.F.R. § 124.13, and the City's request for review of those limitations must be denied.[10]

Minimum pH Restriction

The City's September 1985 NPDES permit included an acidity limitation, derived from the Secondary Treatment regulation at 40 C.F.R. § 133.102(c), providing that "[t]he pH of the effluent shall not be less than 6.0 standard units." In the draft renewal permit circulated for public comment on or about June 28, 1990, Region IV proposed to raise the minimum permissible pH for the City's effluent from 6.0 standard units to 6.5. The accompanying Fact Sheet explained that the proposed pH limitation was based on State law, and cited the provision of the Florida surface water quality standards that now appears at Fla. Admin. Code rule 17-302.560(21). That rule provides that in Class III surface waters, the pH may not "be lowered to less than 6 units in predominately fresh waters, or less than 6.5 units in predominately marine waters."

In its comments on the draft permit, the City maintained that its compliance with Florida pH limits for Class III surface waters should be measured at the edge of a mixing zone.[11] The City therefore urged that the existing minimum pH limitation of 6.0 standard units be retained pending action by the Florida Department of Environmental Regulation on the City's request for a mixing zone (which the City had filed four days earlier). In response, Region IV indicated that it would not foreclose the possibility of incorporating a mixing zone for pH if the FDER should later conclude that the City is entitled to one. In the meantime, however,

> EPA believes that the requirements at FAC 17-302.560(21) (August 2, 1990) are applicable and will not revise the proposed limits of 6.5-8.5 standard units at this time. EPA will entertain any future request to modify these limits if/when the City receives a specific mixing zone for pH from the State.

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[10] If we were required to address the validity of the annual average fecal coliform limitation, we would in any event uphold the imposition of that limitation as a reasonable interpretation of the Florida regulations quoted in the text. The limitation was presented to the Florida Department of Environmental Regulation when the Region requested certification of the draft permit, but the State waived certification by letter dated September 19, 1990. Under those circumstances, the Region's interpretation of State law must be upheld if reasonable. *See In re American Cyanamid Co.*, NPDES Appeal No. 92-18, at 14 (EAB, Sept. 27, 1993); *In re J&L Specialty Products Corp.*, NPDES Appeal No. 92-22, at 37 (EAB, Feb. 2, 1994). The City has not demonstrated that Region IV's decision to impose an annual average fecal coliform limitation reflects an unreasonable interpretation of State law.

[11] As the City pointed out in its comments, the introductory paragraph of Fla. Admin. Code rule 17-302.560 states that "[t]he following criteria are to be applied except within zones of mixing."

Region IV Response to Comments, at 3.

It is apparently undisputed that only the State of Florida may grant the mixing zone requested by the City. According to Fla. Admin. Code rule 17-4.244(2), mixing zones require the specific approval of the Florida Department of Environmental Regulation:

> There shall be no mixing zone for any component of any discharge unless a Department permit containing a description of its boundaries has been issued for that component of the discharge.

The City identifies no independent source of legal authority that would enable Region IV to relax the requirements of State law in the immediate vicinity of the City's point of discharge.

The record indicates that on July 26, 1990 (just before the City's July 30 submission of its comments on the draft permit), the City submitted a request to the Florida DER generally requesting "a mixing zone for [the City's] open ocean effluent dispersal system." Subsequently, on October 26, 1990 (the same day on which the City submitted its request to Region IV for an evidentiary hearing), the City supplemented its request to the State regulators by specifically seeking a mixing zone applicable to acute toxicity, chronic and apparent toxicity, total residual chlorine, fecal coliform, pH, dissolved oxygen, and ammonia. Nothing in the record indicates what action, in any, the Department of Environmental Regulation may have taken in response to the City's request. Therefore, we agree with the Region's conclusion that on the existing record, there is no legal basis for measuring compliance with any of the permit limitations at the edge of a mixing zone. *See* Response to Petition for Review, at 31 ("According to Hollywood's evidentiary hearing request, it has applied for a zone of mixing; however, until such a zone is approved by the State, the effluent limit [for minimum permissible pH] must remain the same.").

Nonetheless, because the permit must be remanded for other reasons, we direct the Region to ascertain on remand whether the State has or has not granted the City's request for a mixing zone.[12] If a mixing zone has been granted for pH as of the date of the Region's decision on remand, the Region shall then conduct such further proceedings as are necessary to determine whether and in what form to

[12] We emphasize that the Region is not to undertake any fact-finding concerning the appropriateness (or proper dimensions) of a mixing zone for pH or for any other pollutant or pollutant parameter. Those determinations are for the State of Florida to make.

incorporate the State's mixing zone analysis into the permit. *Cf. In re J&L Specialty Products Corp.*, NPDES Appeal No. 92-22, at 42 (EPA may, in its discretion, reexamine a valid permit condition in light of "changed legal requirements" that take effect before the permit has become final Agency action). If, however, the State has not yet acted on the City's mixing zone request for pH as of the date of the Region's decision on remand—or if the State has denied the request—then the Region shall issue a decision so finding[13]; upon issuance of that decision, the pH limitations in the City's September 1990 NPDES permit will become final and enforceable without further Agency action.[14]

Total Residual Chlorine

The permit seeks to impose a daily maximum concentration limit of 0.01 mg/l for total residual chlorine (TRC). That proposed limitation is derived from the Florida surface water quality criteria for Class III waters, which expressly state (at rule 17-302.560(10)) that the TRC concentration "shall not exceed 0.01 milligrams per liter."

In its comments on the draft permit, the City stated that it would encounter "significant monitoring difficulties" if a TRC limitation were to be imposed, and asserted vaguely that "[t]he City feels TRC is inappropriate as a permit condition and * * * should be deleted." In the alternative, the City urged that compliance with the proposed TRC limitation be measured at the edge of a mixing zone, for which it had recently submitted a request to the State Department of Environmental

[13] We recognize the possibility that, if the FDER has not yet acted on the City's mixing zone request for pH as of the date of the Region's decision on remand, a later FDER decision granting that request could arguably raise an issue of compliance with the Clean Water Act's prohibition against "backsliding" from the water quality-based provisions of an NPDES permit. *See* CWA § 402(o), 33 U.S.C. § 1342(o). In order to ensure that the State's intentions with respect to this issue can be implemented without raising this possible concern, it would obviously be desirable for the State to act definitively on the City's mixing zone request for pH as soon as possible.

[14] Neither of the City's other objections to the minimum pH limitation provides an adequate basis for review. (1) The assertion that the proposed pH limitation is "inconsistent with efficient and effective operation of the facility" is not material to the Region's permit decision, because Florida law requires the imposition of the limitation without regard to its impact upon operational efficiency. (2) The objection that a pH limitation of 6.5 standard units is not "necessary" to ensure compliance with any applicable water quality standard was not preserved for review, because it was not raised in the City's comments on the draft permit. *See* 40 C.F.R. § 124.13. (The City's assertion, in its reply brief, that the "initial comments specifically object to * * * the necessity for that [minimum pH] limit" is simply false.) Moreover, even if the City had timely raised the objection, it forfeited any opportunity for an evidentiary hearing by failing to provide the supporting documents or information required by 40 C.F.R. § 124.74(b)(1). The record includes Discharge Monitoring Reports showing numerous instances in which the City's effluent pH fell below the 6.5 standard units prescribed by Florida law; the City points to no contrary evidence in the record.

Regulation. In its response to the City's comments, Region IV declined to revise the proposed TRC limitation because the Department of Environmental Regulation had not granted the City's request for a mixing zone for total residual chlorine.

As we observed in connection with the permit's proposed pH limits, the record indicates that the City submitted a mixing zone request to the FDER on July 26, 1990, and supplemented or renewed that request on October 26, 1990. Nothing in the record indicates what action, if any, the FDER may have taken in response to the City's request. Therefore, we must agree with the Region's conclusion that on the existing record, there is no legal basis for measuring compliance with any of the permit limitations at the edge of a mixing zone. *See* Response to Petition for Review, at 34 (the challenged TRC limitation "must be imposed without consideration for mixing because the State has not designated a TRC mixing zone for the Petitioner").

Because the permit must be remanded for other reasons, however, we will direct the Region to ascertain on remand whether the State has or has not granted the City's request for a mixing zone. If a mixing zone has been granted for TRC as of the date of the Region's decision on remand, the Region shall then conduct such further proceedings as are necessary to determine whether and in what form to incorporate the State's mixing zone analysis into the permit. If the State has not yet acted on the City's mixing zone request for TRC as of the date of the Region's decision on remand—or if the State has denied the request—then the Region shall issue a decision so finding; upon issuance of that decision, the TRC limitation in the City's September 1990 NPDES permit will become final and enforceable without further Agency action.[15]

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[15] Neither of the City's other objections to the TRC limitation provides an adequate basis for review. (1) The City urges the Region to refrain from imposing a TRC limitation during the pendency of the second phase of the Southeast Florida Outfalls Experiment (or "SEFLOE II"), an ongoing study that the City predicts will justify a "mixing zone for regulatory compliance monitoring." *See Broward County*, NPDES Appeal No. 92-11, at 3 n.4 (reporting a description of the SEFLOE studies by another participating jurisdiction). The City, however, cites no legal authority that would enable Region IV to disregard an otherwise applicable requirement of State law based on a mere possibility that the State might, at some future time (and on the basis of evidence yet to be developed), allow compliance to be measured at the edge of a mixing zone. (2) The City's contention that a TRC effluent limitation is not "necessary" to ensure compliance with the State's TRC criterion for Class III surface waters (Fla. Admin. Code rule 17-302.560(10)) was not preserved for review, because it was not raised in the City's comments on the draft permit as required by 40 C.F.R. § 124.13.

Ocean Discharge Criteria

The City contests the inclusion of certain conditions and monitoring requirements based on the "Ocean Discharge Criteria" at 40 C.F.R. Part 125, Subpart M.[16] Promulgated under the authority of Clean Water Act section 403 (33 U.S.C. § 1343), the Subpart M regulations govern the issuance of NPDES permits for point source discharges "into the territorial sea, the waters of the contiguous zone, or the oceans." The conditions and monitoring requirements sought to be imposed here are those that, according to section 125.123(c), must be included in an NPDES permit for an ocean discharger whenever the permit issuer has "insufficient information to determine prior to permit issuance that there will be no unreasonable degradation of the marine environment" as a result of the permitted discharge.

The City cites two grounds for its opposition to these permit provisions. First, the City notes that the ocean "dumping" permit program administered by EPA pursuant to the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1445 ("MPRSA"), does not apply to point source discharges that are regulated under the Clean Water Act. *See* MPRSA § 3(f), 33 U.S.C. § 1402(f). We fail to see the relevance of that observation, because the contested permit provisions do not purport to apply MPRSA requirements to the City's point source

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[16] Specifically, the permit provisions in question are those described in 40 C.F.R. § 125.123(d), which states:

> All permits which authorize the discharge of pollutants pursuant to paragraph (c) of this section shall:
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> (1) Require that a discharge of pollutants will: (i) Following dilution as measured at the boundary of the mixing zone not exceed the limiting permissible concentration for the liquid and suspended particulate phases of the waste material as described in § 227.27(a)(2) and (3), § 227.27(b), and § 227.27(c) of the Ocean Dumping Criteria; and (ii) not exceed the limiting permissible concentration for the solid phase of the waste material or cause an accumulation of toxic materials in the human food chain as described in § 227.27(b) and (d) of the Ocean Dumping Criteria;
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> (2) Specify a monitoring program, which is sufficient to assess the impact of the discharge on water, sediment, and biological quality including, where appropriate, analysis of the bioaccumulative and/or persistent impact on aquatic life of the discharge;
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> (3) Contain any other conditions, such as performance of liquid or suspended particulate phase bioaccumulation tests, seasonal restrictions on dis-
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> Continued

discharges.[17] The City's request for review must be denied insofar as it is based on the exclusion of point source discharges from regulation under the MPRSA.

As its second basis for opposing the permit provisions derived from Part 125, the City disputes the Region's conclusion that the Region had insufficient information, at the time of permit issuance, to support a determination that no unreasonable degradation of the marine environment would result from the City's discharge. In response, the Region asks that we "remand the Ocean Dumping issue * * * for further consideration." Accordingly, Permit sections I.A.10.(a), I.A.10.(b), and I.A.11 are remanded to Region IV for further proceedings in relation to the determination required to be made pursuant to 40 C.F.R. § 125.123.

Whole Effluent Toxicity

Finally, the City raises numerous objections to the permit's proposed whole effluent toxicity limitation and the associated biological testing requirement. This set of objections relates primarily to the following permit provisions:

> Lethality to more than 50% of any test species in 100% effluent in a test of 96 hours duration or less will constitute a violation of Florida Administrative Code (FAC) Section 17-4.244(3)(a) (April 4, 1989) and the terms of this permit. The testing for this requirement must conform with Part IV of this permit. [Permit § I.A.12]
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> The permittee shall conduct 48-hour acute static toxicity tests using the mysid shrimp (*Mysidopsis bahia*) and

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> charge, process modifications, dispersion of pollutants, or schedule of compliance for existing discharges, which are determined to be necessary because of local environmental conditions; and
>
> (4) Contain the following clause: In addition to any other grounds specified herein, 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.

[17] The EPA regulations implementing Clean Water Act § 403 do, however, incorporate by reference a definition (for the term "limiting permissible concentration") that appears in the Agency's MPRSA ocean dumping permit regulations. *See* 40 C.F.R. § 125.124(d)(1) (incorporating definition from 40 C.F.R. § 227.27). That instance of cross-referencing between the two distinct regulatory programs may help to explain the City's mistaken reliance, in this Clean Water Act permit proceeding, on an argument relating solely to the MPRSA.

> 96-hour acute static-renewal toxicity tests using the inland silverside (*Menidia beryllina*). All tests will be conducted on four separate grab samples collected at evenly-spaced (6-hr) intervals over a 24-hour period and used in four separate tests in order to catch any peaks of toxicity and to account for daily variations in effluent quality. [Permit § IV.1.a (italics in original)]
>
> *All* [toxicity] tests shall be conducted using a control (0% effluent) and one test concentration of 100% effluent. For those tests conducted prior to the effective date of the total residual chlorine limit, samples of 100% effluent which have been artificially dechlorinated must be used. For those tests conducted after this date, sample of 100% final effluent must be used. [Permit § IV.4 (emphasis in original)]

Provisions similar to these have previously been challenged before the Board in proceedings involving other Florida dischargers, and consequently several of the objections raised by the City have already been addressed at some length in one or more of the Board's opinions in *Miami-Dade Water and Sewer Authority Department*, NPDES Appeal No. 91-14 (July 27, 1992); *City of Jacksonville, District II Wastewater Treatment Plant*, NPDES Appeal No. 91-19 (Aug. 4, 1992); *Broward County, Florida*, NPDES Appeal No. 92-11 (June 7, 1993); and *American Cyanamid Co.*, NPDES Appeal No. 92-18 (Sept. 27, 1993).

1. The City first contends that the Region erred by seeking to characterize a single toxicity test failure as a permit violation, because "there is substantial variability among tests, such that less than 50% survival in a single test may not be statistically significant or indicative of actual effluent toxicity." That contention must be rejected. The permit condition in question is based on a State-law restriction, Fla. Admin. Code rule 17-4.244(3)(c), providing that "[t]he effluent when diluted to 30% full strength, shall not cause more than 50% mortality in 96 hours (96 hour LC_{50}) in a species significant to the indigenous aquatic community." We have previously held that this regulation, according to the plain meaning of its terms, prohibits any wastewater discharge that fails the toxicity test specified in the regulation. *Miami-Dade*, *supra*, at 12. EPA must therefore incorporate such a prohibition into the NPDES permits that it issues to Florida ocean dischargers, without looking behind the Florida standard to examine whether the prescribed toxicity testing reliably identifies instances of "actual effluent toxicity." As we recently explained, the Florida effluent toxicity standards do not simply "prohibit effluent 'lethality' or 'toxicity,' while leaving to the

permit issuer the task of defining those terms"; rather, the standards "provide[] that wastewater discharges shall not fail a 96-hour toxicity test by killing more than 50% of the test organisms." *American Cyanamid, supra*, at 8 (construing Fla. Admin. Code rule 17-4.244(3)(a)). The alleged "variability among tests" therefore does not provide grounds for review of the permit provisions challenged here:

> The range of variability of toxicity testing was obviously acceptable to the State of Florida, and that is what is determinative. Under CWA § 301(b)(1)(C), the Region is required to incorporate limitations into the permit as necessary to implement the State standard, without reviewing the scientific basis for the standard.

Miami-Dade, at 12. The City's request for review of the whole effluent toxicity limitation and biomonitoring provisions of its permit based on the alleged "variability among tests" is, accordingly, denied.

2. The City next contends that the Region has never made a threshold factual determination that inclusion of a whole effluent toxicity limitation is "necessary" to ensure compliance with Florida's whole effluent toxicity standard for open ocean discharges. In other words, the City contends that the Region has never made a determination (as required by 40 C.F.R. § 122.44(d)(1)) that there exists a "reasonable potential" that the City's discharge would, in the absence of a WET limitation, cause or contribute to a violation of the Florida toxicity standard. The Region responds that the City failed to raise any such objection when it submitted its comments on the draft permit (although the issue was then "reasonably ascertainable") and thus failed to preserve the issue for review, and that, in any event, a finding of "reasonable potential" was made and is documented in the administrative record.

We agree with the Region that this issue was "reasonably ascertainable" when the City submitted its comments on the draft permit, and that the City's comments included no challenge to the factual basis for the Region's conclusion that a whole effluent toxicity limitation was necessary to ensure compliance with Florida law. When the Region circulated the draft permit for comment, it stated in the accompanying Fact Sheet that "[a]cute toxicity tests conducted by FDER and by the permittee have indicated the presence of acute toxicity"; that "toxicity testing requirements and limits * * * have been included to ensure that the effluent from Outfall 001 conforms with" Florida's whole

effluent toxicity standards[18]; and that "[t]he inclusion of a whole effluent toxicity limit in the permit is also authorized and required by 40 CFR § 122.44(d)(1)(iv)."[19] Under those circumstances, by failing to challenge the factual basis for the Region's proposed inclusion of a WET limitation in its comments on the draft permit, the City waived any entitlement to an evidentiary hearing to contest the Region's finding of "necessity" for the limitation. The City's request for review of that finding is therefore denied.

3. The City next argues generally that "[a] compliance determination based on a single exceedance of the LC_{50} is inconsistent with Florida law. *See, e.g.*, Rule 17-6.180(1)(b), FAC." Although the City makes no effort to describe the Florida regulation on which it seeks to rely, or to explain how the regulation might support an objection to the permit's contested "single exceedance" provision, we assume that the City is attempting to make the same argument with respect to rule 17-6.180(1)(b) that was made by the petitioner in *Miami-Dade*. Our analysis of the objection in *Miami-Dade* (at page 13) is controlling here:

> [The City] argues that the single failed test provision in the permit is inconsistent with Rule 17-6.180(1)(b), F.A.C., which provides that a domestic wastewater facility's compliance with certain treatment standards is determined by reference to the arithmetic mean of pollutant values over time and not just a single measurement. We fail to see [the City's] point in citing this provision. For our purposes, the provision is only important because it illustrates that, when Florida wants to base compliance determinations on the arithmetic mean of pollutant values over time, it knows

[18] In the Fact Sheet, Region IV mistakenly cited Fla. Admin. Code rule 17-4.244(3)(a) — which regulates the toxicity of discharges other than open ocean discharges — when it should properly have cited rule 17-4.244(3)(c). That error does not, however, alter our conclusion that the Fact Sheet gave adequate notice of the *factual* basis for the proposed inclusion of a WET limitation and, hence, that any issue concerning the "necessity" for such a limitation was readily ascertainable to a reader of the draft permit and accompanying materials.

[19] The reference to Section 122.44(d)(1)(iv) should certainly have prompted the City to consider whether it had any basis for objecting that its discharge did not, in fact, threaten to cause or contribute to a violation of Florida law in the absence of a WET limitation. Section 122.44(d)(1)(iv) states that "[w]hen the permitting authority determines * * * that a discharge causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity." By invoking section 122.44(d)(1)(iv), and by stating that existing test data "have indicated the presence of acute toxicity," Region IV unmistakably conveyed its own conclusion that, as the NPDES permitting authority for this discharge, it had made the determination of necessity for a WET limitation that is described in section 122.44(d)(1)(iv).

> how to do so and does so explicitly. Thus, when a Florida standard does not mention the arithmetic mean of pollutant values over time, it can be assumed that Florida did not want compliance to be [determined] based on the arithmetic mean of pollutant values over time. We conclude therefore, that Rule 17-6.180(1)(b), F.A.C. sheds little light on the issue before us and to the extent it provides any guidance, it contradicts rather than supports [the City's] position.

4. The City next argues that, as a matter of "EPA policy and practice, * * * biomonitoring is to be used for purposes of assessing the need for additional treatment or a waste load allocation, not as the limitation itself." The permit provisions in question are, however, based on requirements set forth in State-law regulations, and those regulations do not support the City's position. EPA policy and practice are also contrary to the City's position; the approach to whole effluent toxicity testing that the City advocates was squarely rejected during the EPA rulemaking proceedings enacting the various subparagraphs of 40 C.F.R. § 122.44(d)(1):

> Some commenters said EPA should use whole effluent toxicity testing only as a trigger for further investigation into the cause of the toxicity, and should not use whole effluent toxicity as an enforceable effluent limit. EPA cannot incorporate these suggestions. EPA requires whole effluent toxicity limits where necessary to meet water quality standards. EPA does not believe that a whole effluent toxicity trigger alone is fully effective because it does not, by itself, restrict the quantity, rate, or concentration of pollutants in an effluent. Whole effluent toxicity limitations are enforceable in the same way as any other effluent limitation in an NPDES permit. Section 309 of the CWA provides that any single violation of an effluent limitation can be subject to an enforcement action, and section 309 applies to whole effluent toxicity limits in the same way as any other effluent limitation.

54 Fed. Reg. 23,868, 23,875 (June 2, 1989). We made a similar point in addressing a virtually identical objection in *Miami-Dade* (at page 12):

> [The City] believes that * * * toxicity testing should only be used as a screening device for assessing the need for additional treatment or a waste load allocation, not as the limitation itself. * * * * [But] Florida's toxicity standard for open ocean discharges, Rule 17-4.244(3)(c),

> F.A.C., provides that no effluent shall be permitted to fail the toxicity test specified in the standard. Nothing in the language of the standard suggests that a particular effluent may fail the test one or more times without violating the standard. If the standard contemplated a series of toxicity tests, it would have been written differently.

The City's challenge to the incorporation of an enforceable whole effluent toxicity limitation, based on an alleged inconsistency with EPA policy and practice, must be rejected.

5. The City argues that it would be "arbitrary and capricious" to impose an effluent toxicity limitation and toxicity testing requirement before the completion of the SEFLOE II study. Once again, however, the City fails to identify any legal justification for disregarding currently applicable provisions of State law.[20] Because what the City proposes is inconsistent with EPA's obligation under Clean Water Act § 301(b)(1)(C), the City's request for excision of the permit's effluent toxicity limitation and toxicity testing provisions pending the outcome of the SEFLOE II study must be rejected.

6. The City next argues that, even assuming that the proposed effluent toxicity limitation and toxicity testing provisions are indeed compelled by applicable Florida water quality standards, the permit provisions should nonetheless be deleted because EPA erred when it approved the Florida standards pursuant to Clean Water Act § 303(c), 33 U.S.C. § 1313(c). This is not the proper forum for such a challenge.

The scope of this proceeding is defined in relevant part by 40 C.F.R. § 122.44, which provides that "each NPDES permit shall include conditions" meeting certain specified requirements, including requirements "necessary to * * * [a]chieve water quality standards established under section 303 of the CWA * * *." 40 C.F.R. § 122.44(d)(1). Because there is no dispute that the water quality standard being challenged by

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[20] As we observed in *Miami-Dade*, SEFLOE data concerning the effluent dilution that occurs at the various Southeast Florida ocean outfalls "has no bearing on the applicability of Florida's toxicity standard":

> That standard [*i.e.*, Fla. Admin. Code rule 17-4.244(3)(c)] * * * applies to the effluent at exactly 30% full strength without regard to the actual dilution that would take place in the receiving waters. As such, data on actual dilution are irrelevant to a determination of compliance.

Miami-Dade, NPDES Appeal No. 91-14, at 14.

the City was "established under section 303 of the CWA," threshold issues pertaining to whether the Agency may have erred in approving the standard in the first instance are necessarily beyond our jurisdiction. Our jurisdiction is limited to reviewing whether the Region, as permit issuer, included a condition in the permit that properly implements the standard. "The only recognized avenue for challenge to the substance of EPA's actions taken with respect to state submissions [under CWA § 303] is a suit for judicial review under the Administrative Procedure Act." *Scott v. City of Hammond, Indiana*, 741 F.2d 992, 995 (7th Cir. 1984). *See also U.S. Steel Corp. v. Train*, 556 F.2d 822, 835 (7th Cir. 1977) (EPA "had no authority to consider challenges to the validity of * * * state water quality standards" in the context of a permit proceeding).[21] The City's request for review on the grounds of erroneous EPA approval of the Florida water quality standards is denied.

7. The City next argues that Region IV erred by failing to adopt a "tiered approach to biomonitoring" under which the City would, during an unspecified initial period, be required only to "collect limited data (screening) to project the likelihood of acutely toxic discharges." This argument merely restates the contention that Region IV did not properly determine, as a threshold matter, that there is a "reasonable potential" for the City's discharge to cause or contribute to a violation of Florida's whole effluent toxicity standard in the absence of the permit's toxicity limitation and biomonitoring requirement. As we have already concluded, *supra* pp. 19-20, the City failed to raise any such issue in its comments on the draft permit and therefore failed to preserve the issue for review by the Board.

8. The City objects to the Region's designation of the mysid shrimp and the inland silverside minnow as test species for purposes of the required effluent toxicity testing, on the ground that those species are not indigenous to the aquatic community affected by the City's discharge (and would not adequately predict how indigenous species would fare when exposed to the discharge).[22] The Region apparently concedes that its choice of test species is not adequately supported in the existing record,

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[21] For an example of an Administrative Procedure Act challenge to EPA action under Clean Water Act section 303(c), see *Natural Resources Defense Council, Inc. v. EPA*, 37 Env't Rep. Cas. (BNA) 1953 (4th Cir. 1993).

[22] We have held that, although Florida's toxicity standard requires that the effluent's effect on indigenous species be determined, the standard does not specifically require that toxicity testing be performed directly on such indigenous species. If, however, the test species designated in the permit are not indigenous to the affected community, then the Region must establish that the designated species can serve as suitable surrogates for determining the effluent's toxicity to indigenous species. *Broward County*, at 14 n.22; *Miami-Dade*, at 17.

and requests that this issue be remanded for further consideration. Accordingly, on remand, the Region must supplement the record with information sufficient to enable us to determine whether the City's objection to the selected test species raises a material issue of fact warranting an evidentiary hearing. If the City is not satisfied with the explanation on remand, it may renew its request for an evidentiary hearing and, if the request is denied, file an appeal with the Board.

9. The City objects to the requirement that its effluent be tested for toxicity at full strength, advocating instead that the effluent be diluted before testing so as to "accurately represent[] ambient conditions at the point that aquatic species are exposed to the effluent." In response, Region IV cites Fla. Admin. Code rule 17-4.244(3)(a) for the proposition that testing of the effluent at full strength is required by Florida law. We disagree with each party's position.

As we observed in *Broward County* and *Miami-Dade*, open ocean dischargers are governed by Florida's rule 17-4.244(3)(c), which creates an exception to the general State-law requirement for toxicity testing in 100% effluent and provides, instead, for dilution of the effluent to exactly 30% for the purpose of toxicity testing. Thus, the City is not entitled to the evidentiary hearing that it seeks in order to demonstrate that the toxicity test prescribed in the permit does not reflect the "actual dilution" that takes place when its effluent mixes with the receiving waters: "[I]f a sample of the effluent at 30% full strength over 96 hours is lethal to the specified percentage of test organisms, a violation occurs, regardless of how diluted the Facility's effluent actually becomes once it has mixed with the receiving waters." *Miami-Dade*, at 15. At the same time, however, the Region's imposition of a requirement to test in 100% effluent is incompatible with the plain language of rule 17-4.244(3)(c), calling for dilution to 30%.[23]

The requirement to test the City's effluent at full strength is therefore only justifiable, if at all, on the basis of the statutory prohibition against "backsliding" set forth in section 402(o) of the Clean Water Act, 33 U.S.C. § 1342(o). That provision states, in relevant part:

> In the case of effluent limitations established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e) of this title, a permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in

[23] As we stated in *Broward County*, nothing in the language of rule 17-4.244(3)(c) convinces us that proof of "rapid dilution" of the effluent is a condition precedent to monitoring the effluent's toxicity at 30% of its full strength. *See Broward County*, at 16.

> the previous permit except in compliance with section 1313(d)(4) of this title.

Region IV argues that it cannot, consistent with the quoted anti-backsliding provision, allow the City to test its effluent for toxicity after dilution to 30%, because the City's previous (September 1985) permit called for testing the effluent at full strength.[24]

Because the Region has relied principally on Fla. Admin. Code rule 17-4.244(3)(a) for the proposed full-strength testing requirement, the parties have not thoroughly addressed the effect of the above-quoted statutory prohibition against backsliding in the circumstances of the present case. It appears clear, however, that application of the statutory prohibition in the manner suggested by Region IV would conflict with the result (*i.e.*, effluent toxicity testing for open ocean dischargers in 30%, rather than 100%, effluent) that the Florida regulatory authorities intended to achieve when they enacted rule 17-4.244(3)(c). Given the importance of the issue and the possibility that a conflict may exist between the results contemplated by federal law and by State law, we will grant the City's Petition for Review with respect to the 100% effluent testing requirement. We expect to address the question whether the statutory anti-backsliding prohibition precludes Region IV from adopting a permit provision that would require the City to test its effluent for toxicity after dilution to 30% of its full strength, notwithstanding the enactment (subsequent to the issuance of the City's previous NPDES permit) of Florida rule 17-4.244(3)(c), with its express provision for such dilution. Briefs on that issue shall be filed by both parties in accordance with 40 C.F.R. § 124.91(g), and should include the parties' analysis of the following subsidiary questions: (a) whether the effluent toxicity limitation proposed for inclusion in the City's 1990 permit is "comparable" to that in the City's 1985 permit; (b) whether the effluent toxicity limitation in the City's 1985 permit was "established on the basis of section 1311(b)(1)(C) or section 1313(d) or (e)" of Title 33 U.S.C.; (c) whether testing the City's effluent for toxicity at 30% of its full strength would render the new toxicity limitation "less stringent" than the limitation in the 1985 per-

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[24] Actually, Region IV bases its argument on the anti-backsliding provision contained in the Agency's NPDES permitting regulations, 40 C.F.R. § 122.44(*l*). We have previously observed, however, that the statutory prohibition against backsliding from water quality-based permit limitations does not have any counterpart in the Agency's regulations. It therefore appears that the Region's backsliding concerns would more properly be framed in terms of the statute itself. *See In re City & County of San Francisco*, NPDES Appeal No. 91-18, at 26 n.49 (EAB, March 24, 1993) (quoting *Draft Interim Guidance on Implementation of Section 402(o) Anti-Backsliding Rules for Water Quality-Based Permits*, at 2 (EPA Office of Water, Sept. 29, 1989)).

mit; and (d) whether any exception to the prohibition against backsliding would apply in the circumstances of this case.

10. The City next contends that the toxicity testing provisions of the permit will not properly simulate "actual conditions in the receiving water," because the test methodology contemplates exposure of the test organisms to a constant concentration of potential toxicants over time (an "Eulerian exposure") whereas marine organisms in the receiving water are actually exposed to a non-constant, declining concentration of potential toxicants over time (a "LaGrangian exposure"). We rejected an identical argument in *Miami-Dade*, *see id.* at 14-15, and we reject the argument here, too. Depending on the applicability and effect of the anti-backsliding prohibition, the City will be required to test its effluent either at full strength (based on the provisions of the previous permit) or at exactly 30% of its full strength (based on the current Florida standard for open ocean dischargers). Neither of those possible sources for the final testing requirement (*i.e.*, neither the current Florida regulations nor the toxicity testing requirements of the previous permit) provides that the effluent concentration may be varied over time, whether or not such variations are believed to occur in the receiving water. Thus, regardless of the actual dilution that may take place over time as the City's effluent mixes with the receiving water, Region IV did not err by prescribing a test in which organisms are exposed to an effluent concentration that remains constant.

11. Lastly, the City objects to the fact that, according to the permit's toxicity testing provisions, each test will actually consist of four separate tests utilizing four separate "grab" samples taken at six-hour intervals over a twenty-four hour period. The permit itself articulates a rationale for the grab sampling requirement: "in order to catch any peaks of toxicity and to account for daily variations in effluent quality." Permit § IV.1.a. The City contends, however, that testing of a single "composite" sample would more closely reflect actual conditions in the receiving water.[25]

The Region's imposition of a grab sampling requirement is not clearly erroneous. Nothing in the applicable Florida standards suggests that, as

[25] The City's challenge to the grab sampling requirement is set forth in a single sentence in its Petition for Review: "The requirement to separately test from separate grab samples, as opposed to composite sampling, is unduly conservative, does not reflect actual conditions, and exacerbates other identified inadequacies in the methodology." Petition for Review, at 12. Although it is not entirely clear from the record, we assume that the City's reference to "composite sampling" means that the City wishes to combine individual effluent samples taken at regular intervals over a 24-hour period, and then to perform a single toxicity test utilizing the resulting combined or composite sample.

the City implies (*see* Evidentiary Hearing Request, at 18), peaks of toxicity may be disregarded so long as mixing conditions in the ocean environment reduce the likelihood that marine organisms will undergo "prolonged exposure" to toxic conditions. On the contrary, we think it clear that Florida rule 17-4.244(3)(c) limits the permissible waste concentration for an ocean discharger's effluent at any point in time—and not, as the City's argument would suggest, the average of several waste concentrations measured at intervals over a twenty-four hour period.[26] A violation therefore occurs if the prescribed limit, defined in terms of the 96-hour LC_{50}, is exceeded at any point in time. The Region's concern with identifying "peaks of toxicity" that would violate State water quality standards is well founded, and the City's challenge to the proposed grab sampling requirement must, accordingly, be rejected.

CONCLUSION

For the reasons set forth herein, the Board grants review of the proposed permit provision that would have the City measure the toxicity of its effluent at full strength, in order to determine whether the inclusion of that provision is required by the Clean Water Act's prohibition against "backsliding" from the water quality-based effluent limitations of a previous permit.

In addition, we remand the following permit provisions to Region IV for further proceedings consistent with the discussion herein[27]: (1) the provisions fixing the minimum permissible pH for the City's effluent at 6.5 standard units, (2) the provisions establishing an effluent limitation for total residual chlorine, (3) the provisions incorporated from section 125.123(d) of the NPDES Ocean Discharge Criteria, 40 C.F.R. § 125.123(d), and (4) the provisions designating the mysid shrimp and the inland silverside as test species for purposes of the whole effluent toxicity testing required to be performed by the City.

The Petition for Review is denied in all other respects.

So ordered.

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[26] Rule 17-4.244(3)(c) is simply a variation, specifically applicable to ocean dischargers, of the generally applicable standard for *maximum* permissible toxicity established in paragraph (3)(a) of rule 17-4.244: "[T]he maximum concentration of wastes in the mixing zone shall not exceed * * * [the 96-hour LC_{50}] * * *, except as provided in paragraphs (b) or (c) below."

[27] Although 40 C.F.R. § 124.91 contemplates that further briefing will ordinarily be invited when the Board determines that review is warranted, "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*, RCRA Appeal No. 92-21, at 34 n.38 (EAB, Nov. 23, 1993).