

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

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In re: )  
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Town of Maynard, Massachusetts ) NPDES Appeal No. 01-5  
Maynard Water Pollution )  
Control Facility )  
)  
Permit No. MA0101001 )  

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**ORDER DENYING REVIEW**

**I. INTRODUCTION**

The Town of Maynard, Massachusetts, Department of Public Works (the "Town") seeks review of the copper effluent limits imposed by a final National Pollutant Discharge Elimination System ("NPDES") permit<sup>1</sup> ("permit") issued by U.S. EPA Region I ("EPA New England"). The permit regulates discharges from the Town of Maynard's publicly owned treatment works ("POTW") to the Assabet River. In a petition dated January 18, 2001, and filed

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<sup>1</sup>Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources into waters of the United States must have a permit in order for the discharge to be lawful. See CWA § 301, 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. See CWA § 402, 33 U.S.C. § 1342.

with the Board on January 23, 2001, the Town requests that the copper limitation in the permit be stayed pending completion of the Comprehensive Wastewater Management Plan ("CWMP") for the region.<sup>2</sup>

In support of its position, the Town argues: (1) the copper testing data of the previous 18 months indicate that the POTW cannot achieve the copper limit imposed by the permit;<sup>3</sup> and (2) the copper limits for the region are being evaluated as a part of the CWMP, which is scheduled for completion in 2003. *Id.*

In its response to Petitioner's claims, EPA New England requests that this Board deny the petition because the Town "has not carried its burden to demonstrate that [EPA New England's] permit decision was based on clear error of law or fact or to raise important policy considerations meriting review." Response at 4-5. EPA New England argues that the Town does not challenge "the basis for establishing the limits or the calculation of the limits," *id.* at 5, rather "the Town's only dispute with the

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<sup>2</sup>"We feel the copper limit should be put on hold pending the findings of the CWMP." Petition at 1.

<sup>3</sup>"The data \* \* \* indicates \* \* \* [i]f the new permit limits were in effect during the last 18 months, the [POTW] would have been in violation [of the copper limit] 39% of the time. \* \* \* [T]his frequency of violation will continue under the new permit as well." Petition at 1.

copper limits is that it cannot comply with them \* \* \* ." *Id.* at 7. In addition, EPA New England notes that the petition may be dismissed as untimely, consistent with the Board's recent opinion in *In re Town of Exeter Municipal Wastewater Treatment Plant*, NPDES Appeal No. 00-21, slip op. at 2-5 (EAB, March 7, 2001). See Response at 3 n.4.<sup>4</sup>

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<sup>4</sup>Our review of the Board's files indicates that the Town's petition is not untimely. Under 40 C.F.R. § 124.19(a), a person must request review within 30 days of service of the notice of the Regional Administrator's action unless, as here, a later date is specified in that notice. EPA New England instructed in its notice of the final permit decision, "If you wish to contest any of the provisions of this permit, you may petition the Environmental Appeals Board, (EAB), within thirty days of receipt of this letter." Response Ex I. The certified mail return receipt accompanying the final permit decision sent to the Town shows that the final permit decision was received by the Town on December 22, 2000. *Id.* A calculation of the time frame under the instructions set forth by EPA New England indicates that the Board should have received the Town's petition for review no later than January 22, 2001, in order to be considered timely. According to a date stamp on the envelope transmitting the petition, the EPA Headquarters mailroom received the petition on January 22, 2001. Accordingly, the petition was timely filed. See *In re Kawaihae Cogeneration Proj.*, 7 E.A.D. 107, 123 (EAB 1997) (stating "the Board routinely accepts as timely any petitions that are received by EPA's mailroom within the filing deadline \* \* \* ."); *In re Beckman Prod. Services*, 5 E.A.D. 10, 15 n.6 (EAB 1994).

**II. FACTUAL BACKGROUND**

The Town is a municipality in Massachusetts. Response at 2. The Town owns and operates the POTW, which collects and treats domestic and industrial wastewater and septage. *Id.* The POTW is a 1.45 million gallon per day (mgd) secondary wastewater treatment facility located in the Town and serves approximately 9,700 people. *Id.* Treated wastewater is discharged into the Assabet River. *Id.* The discharge is authorized by and subject to the conditions of NPDES permit number MA0101001. *Id.*

On July 20, 2000, EPA New England issued for public comment a fact sheet and draft NPDES permit for the Town's discharges. *Id.* at 3. The draft permit incorporated a monthly average effluent limitation on copper of 37 micrograms per liter ("µg/l") and a maximum daily effluent limit of 53 µg/l. See Response Ex C at 2 (Draft Permit); Response Ex F at 1 (Town's Comments). The public comment period closed on August 18, 2000. *Id.* at n.2. The Town commented on several provisions of the draft permit, including those pertaining to copper limits, by letters dated April 27, 2000, and May 2, 2000.<sup>5</sup> On December 7, 2000, the

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<sup>5</sup>EPA New England agreed to treat these letters as comments on the draft permit. Response at 3 n.3.

Massachusetts Department of Environmental Protection provided a state certification of the permit pursuant to section 401 of the CWA, 33 U.S.C. § 1341. Response at 3.

EPA New England mailed the final NPDES permit decision and a response to comments document on December 21, 2000. *Id.* The final permit decision maintained the limitation on copper. Response Ex B at 2. The permit had an effective date of February 21, 2001. Response at 3. Instructions accompanying the permit explained that persons wishing to contest the permit may petition the Board "within 30 days of receipt of this letter." Response Ex I. The Town received the permit by certified mail on December 22, 2000. *Id.*

This appeal was filed on January 22, 2001. *See supra* note 4. For the reasons stated below, the Town's request for review is denied.

### **III. DISCUSSION**

#### **A. Standard of Review**

The burden of demonstrating that review of the Regional Administrator's decision is warranted rests with the petitioner. *See* 40 C.F.R. § 124.19(a) (2000); *see also In re Town of Hudson*

*Massachusetts*, NPDES Appeal No. 01-03, slip op. at 4 (EAB April 18, 2001) (citing *In re Massachusetts Correctional Institution - Bridgewater*, NPDES Appeal No. 00-9, slip op. at 8 (EAB Oct. 16, 2000); *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 10 (EAB, Feb. 23, 2001), 9 E.A.D. \_\_\_; and *In re New England Plating Co.*, NPDES Appeal No. 007, slip op. at 7 (EAB, Mar. 29, 2001), 9 E.A.D. \_\_\_). A petitioner must state his or her objections to the permit and demonstrate that the permit conditions in question are based on "(1) A finding of fact or conclusion of law which is clearly erroneous, or (2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review." 40 C.F.R. § 124.19(a) (2000).

**B. Technological Infeasibility**

The *gravamen* of the Town's petition is the copper effluent limitations established by the permit. The Town contests the copper limits primarily because the POTW "has no process to remove copper from the sewage." Petition at 1. While the Town does not specifically categorize this argument as raising an issue of technological feasibility, it can be construed as such,

for it demonstrates the need to modify the wastewater treatment plant in order to achieve compliance.

Furthermore, the Town does not challenge the Region's determination that its copper discharge has the reasonable potential to violate Massachusetts water quality standards, or the methodology used in calculating the permit limits. See Response at 5.

In setting NPDES permit limits, the Agency is required under CWA § 301(b)(1)(C) to set effluent limitations necessary to meet water quality standards, even if those limits are more stringent than those required under technology-based effluent limits.<sup>6</sup> 33 U.S.C. § 1311(b)(1)(C). Regulations pertaining to this provision make it clear that whenever EPA determines that a facility has a reasonable potential to violate state water quality standards<sup>7</sup> as

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<sup>6</sup>EPA New England's fact sheet for the draft permit indicates that EPA New England decided that the inclusion of a "bit more stringent" limit on copper was appropriate based on data showing average effluent copper levels of 23 µg/l, revised dilution levels and water quality criteria. See Response Ex A (Fact Sheet) at 7. In addition, in its response to public comments EPA New England further explained that "the draft copper limits have been established as final permit limits and are based on water quality criteria." Response Ex H (Response to Comments) at 4.

<sup>7</sup>The term water quality standards is defined in 40 C.F.R. § 131.3(i) as "provisions of State or Federal law which consist of a designated use or uses for the waters of the United States (continued...)"

to an individual pollutant, "the permit must contain effluent limits for that pollutant." 40 C.F.R. §122.44(d)(1)(iii). See also *In re Town of Hudson Massachusetts*, NPDES Appeal No. 01-03, slip op. at 7 (EAB April 18, 2001) (citing *In re Massachusetts Corr. Inst. - Bridgewater*, NPDES Appeal 00-9, at 9 (October 16, 2000); *In re Broward County, Florida*, 6 E.A.D. 535, 543 (EAB 1996); *In re City of Ames, Iowa*, 6 E.A.D. 374, 379-380 (EAB 1996); *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 219 (1976)). Massachusetts has an EPA-approved water quality standard that references EPA's recommended water quality criteria for toxic pollutants. See 314 C.M.R. § 4.05(5)(e). Because EPA New England determined that the Town had a reasonable potential to violate the Massachusetts Water Quality Standards for copper, it was obligated by law to set limits on the Town's discharges of this pollutant to prevent the facility from exceeding those standards.

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<sup>7</sup>(...continued)

and water quality criteria for such waters based upon such uses." Water quality criteria "are elements of State water quality standards, expressed as constituent concentrations, levels or narrative statements" aimed to attain and maintain each designated use. 40 C.F.R. § 131.3(b).



In addition, it is settled law that cost and technological considerations are not a factor in setting water quality-based effluent limits. See, e.g. *In re Town of Hopedale*, NPDES Appeal No. 00-04, slip op. at 24 (EAB, Feb. 13, 2001) (“[T]he legal standard is that technological considerations are not a factor in setting water quality-based effluent limits”); *Bridgewater*, NPDES Appeal 00-9, slip op. at 9 (EAB, Oct. 16, 2000) (“Not only was it not error for the Region to set the permittee’s copper discharge limit without regard to its technological capacity, the Region was obligated to do so by law”); *In re City of Fayetteville*, 2 E.A.D. 594, 600-01 (CJO 1988) (“The meaning of [CWA § 301(b)(1)(c)] is plain and straightforward. It requires unequivocal compliance with applicable water quality standards, and does not make any exceptions for cost or technological feasibility”); *In re Goodyear Aerospace Corp.*, 2 E.A.D. 919, 920 (CJO 1989) (holding that the Region has no discretion to alter water quality-based effluent limitations even if such limits are not technologically achievable); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9<sup>th</sup> Cir. 1999) (EPA obligated to “require that effluent control which is needed to implement

existing water quality standards without regard to the limits of practicability"); *United States Steel Corp. v. Train*, 556 F.2d 822, 838 (7<sup>th</sup> Cir. 1977) (holding that States are free to set water quality standards that force technology).

Thus, EPA New England complied with the CWA § 1311(b)(1)(C) and 40 C.F.R. §122.44(d)(1)(iii) by imposing copper discharge limits without regard to the Town's technological capacity and costs.<sup>8</sup> Applying the same rationale we used in *Massachusetts Correctional Inst.-Bridgewater*, we conclude that not only was EPA New England not in error to set the Town's copper discharge limit without regard to its technological capacity, but the Region was obligated to do so by law.

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<sup>8</sup>The Region states in its Response that it "has a program in place in which the Region works with Publicly Owned Treatment Works to address in a reasonable manner the task of meeting permit limits for toxic metals in low dilution streams. The program is implemented through the issuance of Administrative Compliance Orders \* \* \*. EPA is prepared to discuss with the Town issuance of a new Administrative Compliance Order which would establish a reasonable but expeditious schedule of activities for the Town to undertake in order to achieve compliance with the permit limits." Response at 7 n.5.

**IV. CONCLUSION**

For the foregoing reasons, the Town's petition for review is hereby denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 05/18/01

By: \_\_\_\_\_/s/\_\_\_\_\_  
Kathie A. Stein  
Environmental Appeals Judge

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order Denying Review in the matter of Town of Maynard Water Pollution Control Facility, NPDES Appeal No. 01-5, were sent to the following persons in the manner indicated:

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Dated: 05/18/01

\_\_\_\_\_/s/\_\_\_\_\_  
Annette Duncan  
Secretary