

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

In re:)
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)
Town of Hopedale, Board of)
Water & Sewer Commissioners) NPDES Appeal No. 00-04
)
Permit No. MA0102202)
)
)

ORDER DENYING REVIEW

I. INTRODUCTION

In a petition dated July 13, 2000, which was timely filed on July 18, 2000, the Town of Hopedale, Massachusetts, Board of Water and Sewer Commissioners ("Petitioner" or "Hopedale") seeks review of one of the limitations in a final National Pollutant Discharge Elimination System ("NPDES") permit¹ ("permit") issued by U.S. EPA Region I ("Region I"), regulating discharges from Hopedale's publicly owned treatment works ("POTW") to the Mill River. Petitioner contests the inclusion of a copper effluent

¹Under 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.

limitation in its final permit and requests that the limitation be removed from the permit, or in the alternative be made less stringent.²

In support of its position Petitioner raises the following four arguments: (1) the fact sheet accompanying the draft permit did not provide sufficient data to justify the inclusion of a copper limitation; thus, the Region's finding of "reasonable potential" for toxicity is unfounded;³ (2) the data used to estimate Mill River's stream flow are questionable; thus, the process of deriving the permit limitations is flawed;⁴ (3) the

²"We request a relaxed copper limitation, if the limitation cannot be eliminated in its entirety." Petition at 2.

³"The factual question at issue is that insufficient data to support the requirement for a copper limitation was included in the fact sheet which accompanied the public notice. Sufficient data are necessary to prove 'reasonable potential' for toxicity." Petition at 1. New data should be gathered "to prove that a reasonable potential exists for toxicity." Petition at 3.

⁴Petitioner argues that:

[F]actual errors were committed in determining stream flow which is essential in determining permit limitations. The fact sheet states[:] "Since there is not a stream flow gage in this area with 30Q10 flow values, we looked at the gage data from the Branch River in Forestdale, Rhode Island." This stream flow gage is several river miles distant from the outfall of the Hopedale Wastewater Treatment Plant (WWTP) on the Mill River. From this questionable data, a stream flow was estimated for the Mill River at the Hopedale
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discharge limitations should not have been based on metals bioavailability;⁵ and (4) the permit limitation cannot be achieved at the existing Wastewater Treatment Plant (WWTP) without undergoing major modifications, the cost of which will cause social and economic harm to the community.⁶

⁴(...continued)

WWTP. From this estimated stream flow, a dilution factor was estimated * * *. From the estimated dilution factor, the proposed permit limitations were derived. The process of deriving the permit limitations is flawed considering the substantial impact that a 5 part per billion effluent limitation on copper will have on the Hopedale WWTP.

Petition at 1.

⁵With regard to the approach used by Region I to express metals limits, Petitioner argues that:

[T]here is considerable national debate * * * on the bioavailability of metals in the effluent from a WWTP. The discharge limitations are based on the total recoverable amount of a metal, when in fact substantially less metal is actually bioavailable. Therefore, a copper limitation which has been set at the detection limit of the laboratory procedure is excessive for its intended goal.

Petition at 1.

⁶Petitioner states this final argument in support to its position as follows:

It is not in the best interest of the Town of Hopedale to consent to effluent limitations which cannot be consistently achieved at the existing WWTP, without major modifications to add advanced wastewater treatment processes. The cost of
(continued...)

In its response to Petitioner's claims, Region I requests that this Board dismiss the petition because Petitioner "did not comment on three [of the] purported deficiencies during the development of its permit even though these issues were reasonably ascertainable from the draft permit and fact sheet made available for public comment," and the only issue (referring to Hopedale's argument number four *supra*) that was timely raised in comments below lacks merit because "the [CWA] and ample precedent establish that technical feasibility is not the basis for removing" the contested copper limitation.⁷ Response at 1-2.

⁶(...continued)

such modifications would cause widespread social and economic harm to the community and would not result in any significant improved environmental impact. * * * The proposed discharge limitation for copper cannot be consistently met without the addition of unit processes to the WWTP which are specifically designed for metals removal, such as reverse osmosis.

Petition at 2-3.

⁷Even though Hopedale does not specifically categorize argument number four as raising an issue of technological feasibility, it can be construed as such, for it refers to the need to undergo major modifications in order for the POTW to achieve compliance. As thus framed, this issue is essentially the same as the one raised in Hopedale's comments on the draft permit which refer to the POTW's design constraints and its impossibility of removing copper. If we were to construe Hopedale's argument number four as raising a different issue than was raised in its comments on the draft permit, we would be
(continued...)

II. FACTUAL BACKGROUND

Petitioner operates a POTW in Hopedale, Massachusetts. On March 5, 1997, Petitioner applied for renewal of its existing NPDES permit.⁸ See Response Exhibit ("R Ex") G. Pursuant to 40 C.F.R. § 124.6,⁹ Region I began to prepare a draft permit for Hopedale's POTW. In an effort to expedite the process of completing the draft permit for public review, Region I provided Hopedale with a copy of a preliminary draft permit. Response at 5; R Ex I. Hopedale raised its concerns on the preliminary draft in a letter dated June 18, 1999, in which it made manifest its disagreement with the inclusion of a copper limitation, on the basis that the facility was not designed to remove copper and

⁷(...continued)

forced to conclude that the argument had not been raised in its comments on the draft permit and, therefore, under the applicable regulations (discussed *infra*), could not be entertained on appeal.

⁸The existing permit required monitoring of copper but it did not specify a discharge limitation. See Response at 3; Response Exhibit ("R Ex") D at 2.

⁹Section 124.6 authorizes the Regional Administrator to decide -- once an application is completed -- whether to prepare a draft permit or deny a permit application. 40 C.F.R. § 124.6 (2000).

that the proposed limitation was too stringent.¹⁰ See R Ex H at 1.

The draft permit was issued on June 30, 1999. See R Exs J & K. The draft permit incorporated a monthly average effluent limitation on copper of 5 micrograms per liter ("µg/l") and a maximum daily effluent limit of 7 µg/l. See Response at 5; R Ex B Draft Permit at 3-4. Because the copper limitation was new, the draft permit provided for a compliance schedule of one year from the effective date of the permit to allow time for Hopedale to come into compliance with the new limit. R Ex B Draft Permit at 4.

Hopedale submitted comments on the draft permit on July 22, 1999, addressing four points of concern.¹¹ See R Ex L. Region I addressed each one of Hopedale's comments in its response to public comments. See R Ex M.

¹⁰"We do not agree with the addition of discharge limitations for copper in Hopedale's water since the WWTF was not designed [sic] to remove this metal and the limitation is extremely low." R Ex H at 1.

¹¹Hopedale's first comment focused on fecal coliform and ammonia. The second comment raised the issue of Hopedale's alleged impossibility of meeting the proposed limitation on copper. The third and fourth comments dealt with the appropriateness of the test organism chosen for toxicity testing and the impact of changing from grab type sampling to composite sampling. R Ex L.

The Region proceeded with the preparation of the final permit and on September 1, 1999, issued the final NPDES permit decision. See R Ex A & O. The final permit decision maintained the limitation on copper and the compliance schedule. On October 14, 1999, Petitioner filed a timely request for Evidentiary Hearing with the Regional Administrator contesting the inclusion of the copper limitation in the final permit decision and raising the same arguments that are now raised on appeal. R Ex P. Pursuant to the applicable NPDES regulations,¹² Hopedale filed a timely appeal with this Board. For the reasons stated below, Petitioner's request for review is denied.

¹²On May 15, 2000, the U.S. Environmental Protection Agency published "Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two." See 65 Fed. Reg. 30,886 (May 15, 2000). The rules, effective July 14, 2000, revised the procedures for decisionmaking with respect to NPDES permits. 40 C.F.R. pt. 124. Section 124.21(3), as amended by 65 Fed. Reg. 30,886, 30,911, provides that for "any NPDES permit decision for which a request for evidentiary hearing was filed on or prior to June 13, 2000 but was neither granted nor denied prior to that date, the Regional Administrator shall no later than July 14, 2000 notify the requester that the request for evidentiary hearing is being returned without prejudice. * * * The requester may file an appeal with the Board, * * * no later than August 13, 2000." 40 C.F.R. § 124.21(3) (2000). On June 30, 2000, Region I returned Hopedale's request for an evidentiary hearing as required by the amendments. Hopedale's appeal was timely received by this Board on July 18, 2000.

III. DISCUSSION

Ordinarily, in appeals under 40 C.F.R. § 124.19(a), the Board will not grant review unless it appears from the petition that the condition in question is based on a clearly erroneous finding of fact or conclusion of law or involves an exercise of discretion or an important policy consideration that the Board should review in its discretion.¹³ 40 C.F.R. § 124.19(a) (2000).

¹³Prior to the amendments to streamline the NPDES regulations, the rules governing petitions for review of NPDES permitting decisions were set out in 40 C.F.R. § 124.91. These rules did not provide for an appeal directly to the Board. Instead a person seeking review of an NPDES permitting decision was required to first request an evidentiary hearing before the Regional Administrator. The outcome of the request for an evidentiary hearing or the outcome of an evidentiary hearing (if the request was granted) was then appealable to the Board. However, under those rules there was no review as a matter of right from the Regional Administrator's decision or the denial of an evidentiary hearing. See *In re City of Port St. Joe*, 7 E.A.D. 275, 282 (EAB 1997); *In re Florida Pulp & Paper Ass'n*, 6 E.A.D. 49, 51 (EAB 1995); *In re J & L Specialty Prods. Corp.*, 5 E.A.D. 31, 41 (EAB 1994). Petitions for review of NPDES permits are now regulated by 40 C.F.R. § 124.19 as amended by 65 Fed Reg. 30,886, 30,911 (May 15, 2000). Even though the regulations governing NPDES appeals changed in the sense that the evidentiary hearing provisions have been eliminated, the standard of review has not changed. The standard of review under 40 C.F.R. § 124.91 was similar to that under 40 C.F.R. § 124.19. For instance, under section 124.91 a petition for review was not granted unless the Regional Administrator's denial or Administrative Law Judge decision was clearly erroneous or involved an exercise of discretion or important policy that merited review by the Board. This same principle applies under section 124.19. See 40 C.F.R. (continued...)

While the Board has broad power to review decisions under section 124.19, the Agency intended this power to be exercised "only sparingly." 45 Fed. Reg. 33,412 (May 19, 1980); *In re Rohm and Haas Co.*, RCRA Appeal No. 98-2, slip op. at 7 (EAB, Oct. 5, 2000), 9 E.A.D. ___; *In re AES Puerto Rico L.P.*, PSD Appeal Nos. 98-29 to 31, slip op. at 7 (EAB, May 27, 1999), 8 E.A.D. ___, *aff'd sub nom. Sur Contra La Contaminación v. EPA*, 202 F.3d 443 (1st Cir. 2000). Agency policy favors final adjudication of most permits at the Regional level. *Id.* On appeal to the Board, the petitioner bears the burden of demonstrating that review is warranted. *AES Puerto Rico L.P.*, slip op. at 7, 8 E.A.D. ___; *In re Hawaii Elec. Light Co.*, PDS Appeal Nos. 97-15 through 97-23, slip op. at 8 (EAB Nov. 25, 1998), 8 E.A.D. ___; *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997).

Before we make any determination on the merits of the petition we need to first determine whether the Petitioner has

¹³(...continued)
 § 124.19(a)(1)-(2). Likewise, other principles such as exercising the power of review only sparingly, the burden of demonstrating that the petition warrants review, and that most permits should be adjudicated at the Regional level, are still applicable to petitions for review of NPDES permitting decisions under section 124.19. Compare 44 Fed. Reg. 32,887 (June 7, 1979) (Preamble to section 124.101 former section 124.91) with 45 Fed. Reg. 33,412 (May 19, 1980) (Preamble to section 124.19).

complied with the applicable procedural requirements of 40 C.F.R. part 124.

A. *Threshold Requirements*

Standing to appeal a final permit determination is limited under section 124.19 to those persons "who filed comments on [the] draft permit or participated in the public hearing." Any person who failed to comment or participate in the public hearing on the draft permit can appeal, "only to the extent of the changes from the draft to the final permit decision." 40 C.F.R. § 124.19(a); see *City of Phoenix, Arizona Squaw Peak & Deer Valley Water Treatment Plants*, NPDES Appeal No. 99-2, slip op. at 14 (EAB, Nov. 1, 2000), 9 E.A.D. ___. Those persons seeking review must also demonstrate to the Board "that any issues being raised were raised during the public comment period to the extent required by these regulations * * *." 40 C.F.R. § 124.19(a). The Board has consistently declined to review issues or arguments in petitions that fail to satisfy this basic requirement. *City of Phoenix*, slip op. at 15, 9 E.A.D. ___. See, e.g., *In re*

Rockgen Energy Center, PSD Appeal No. 99-1, slip op. at 7-8 (EAB, Aug. 25, 1999) 8 E.A.D. ___.

Participation during the comment period must be consonant with the requirements set forth in section 124.13. See *City of Phoenix*, slip op. at 15, 9 E.A.D. ___ ("In construing the requirements of section 124.19, the Board has done so in conjunction with section 124.13"). Under 40 C.F.R. § 124.13, "[a]ll persons, including applicants, who believe any condition of a draft permit is inappropriate * * * must raise *all reasonably ascertainable issues* and submit *all reasonably available arguments* supporting their position by the close of the public comment period * * *." 40 C.F.R. § 124.13 (2000) (emphasis added); see *In re Florida Pulp & Paper Ass'n*, 6 E.A.D. 49, 53 (EAB 1995). Accordingly, only those issues and arguments raised during the comment period can form the basis for an appeal before the Board (except to the extent that issues or arguments were not reasonably ascertainable). See, e.g., *In re Jett Black, Inc.*, UIC Appeal Nos. 98-3 & 98-5, slip. op. at 8 & nn.18, 23 (EAB, May 27, 1999), 8 E.A.D. ___ (finding that reasonably ascertainable arguments not raised during the public comment period were not preserved for appeal). Adherence to these

requirements is necessary to ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final, thereby promoting the Agency's longstanding policy that most permit issues should be resolved at the Regional level and providing some finality to the process. *Florida Pulp*, 6 E.A.D. at 53; *In re Sutter Power Plant*, PSD Appeal Nos. 99-6 & 99-73, slip op. at 9 (EAB, Dec. 2, 1999), 8 E.A.D. __.

In the instant case, Petitioner submitted timely comments on the draft permit. Its comments focused on several issues, but only one of them was related to removal or relaxation of the copper limitation. See R Ex L. Hopedale stated in its comments that "[t]he proposed limitation on copper of 5 parts per billion will be difficult, if not impossible, to achieve, considering that the plant was never designed to remove copper. The current practice of reporting [monitoring] copper would be more appropriate." R Ex L. No other comments or arguments -- from Hopedale or other parties -- in support of Hopedale's position with respect to copper were received by Region I during the comment period. In sum, Petitioner's only contention during the comment period regarding the inclusion of the copper limitation

pertained to the facility's alleged inability to remove copper from its wastewaters in light of the facility's design constraints, a contention which we construe as a technological infeasibility argument.¹⁴

In the Petition, however, Hopedale raises four arguments in support of its position that the copper limitation is inappropriate and therefore should be eliminated or in the alternative made less stringent.¹⁵ The first three arguments are unrelated to Hopedale's technological infeasibility comments; instead, they concern matters that were not raised during the comment period by any party although they were reasonably ascertainable and thus could have been raised below.

In its first argument, Hopedale questions the "reasonable potential" determination made by Region I pursuant to 40 C.F.R. § 122.44(d)(1)(iii)¹⁶ by alleging that the fact sheet accompanying the draft permit did not provide sufficient data to

¹⁴See *supra* note 7.

¹⁵See *supra* notes 2-6.

¹⁶Section 122.44(d)(1)(iii) requires the permitting authority to make a determination on the discharge's reasonable potential to cause or contribute to an in-stream excursion above the state's water quality standards. 40 C.F.R. § 122.44(d)(1)(iii).

justify the inclusion of a copper limitation.¹⁷ The record before us shows that this argument was reasonably available during the comment period. The fact sheet¹⁸ submitted with the draft permit and available for public comments specifies that metals limits, including copper, were established because previous monitoring showed that metals in Hopedale's effluents have a reasonable potential to cause or contribute to an in-stream excursion above the applicable water quality standards. R Ex B Fact Sheet at 5. The fact sheet provides the monitoring data used by the Region's permit writer to form this "reasonable potential" determination. R Ex B Attach. B to Fact Sheet. If Hopedale had doubts about the rationale applied by Region I to come to a "reasonable potential" determination, the time to have raised those doubts was during the comment period. Because this argument was reasonably available during the comment period and

¹⁷*Supra* note 3.

¹⁸According to 40 C.F.R. § 124.8, fact sheets accompanying draft permits must briefly set forth the principal facts and the significant factual, legal, methodological and policy questions considered in preparing the draft permit. In addition to the general requirements of section 124.8, NPDES fact sheets must also comply with the requirements in section 124.56, which provide in pertinent part that fact sheets shall contain "any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions or standards." 40 C.F.R. § 124.56(a) (2000).

was not raised, it cannot be raised for the first time on appeal.¹⁹ See *In re Britton Constr. Co.*, CWA Appeal Nos. 97-5 & 97-8, slip. op. at 23 (EAB, Mar. 30, 1999), 8 E.A.D. ___ (holding that arguments raised for the first time on appeal are deemed waived); *In re Woodcrest Mfg., Inc.*, 7 E.A.D. 757, 764 (EAB 1998), *aff'd*, No. 3:98-CV-0446-AS (N.D. Ind. Dec. 14, 1999).

¹⁹While reviewing the record we noticed that the fact sheet does not have the methodology used by the permit writer to calculate the 5 µg/l monthly average effluent limit at issue here. Region I recognizes this omission in its Response. See Response at 5 n.2. Section 124.56(a) requires NPDES fact sheets to contain "any calculation or other necessary explanation of the derivation of specific effluent limitations." 40 C.F.R. § 124.56(a) (2000). The fact sheet only shows the calculations to obtain the 7 µg/l daily maximum effluent limit on copper. By neglecting to include its calculations of the 5 µg/l monthly average limit on copper, Region I appears to have failed to meet the requirements of section 124.56(a). The Petitioner, however, has not alleged that the Region failed to show the calculations used to obtain the monthly average limitation for copper, although it is specifically challenging the 5 µg/l limitation. Hopedale's first argument on appeal -- insufficient data to support the requirement for a copper limitation -- cannot be read as encompassing the issue we just described. First, Hopedale raises the "insufficient data" argument in a different context. The "insufficient data" argument is raised to undermine Region I's determination that Hopedale's copper discharges have a "reasonable potential" to violate Massachusetts water quality standards. Secondly, even if we construe Hopedale's first argument as encompassing this issue, it is raised on appeal for the first time and therefore it is not preserved for review. Furthermore, Hopedale's only focus of concern during the comment period was the design constraints of the POTW with regard to copper removal and not this particular omission. See R Ex L.

Hopedale's second argument on appeal is that the data used to estimate Mill River's stream flow are questionable; therefore, the process of deriving the permit limitations is flawed.²⁰ Hopedale bases its "use of questionable data" contention on the fact that Region I used flow data from the gauge located at the Branch River in Forestdale, Rhode Island to derive some of the permit limitations.²¹ Hopedale basically implies that the copper limitation was derived from the Branch River's flow data.²² The record shows that this argument was reasonably available during the comment period. For instance, the fact sheet contains the data and assumptions used by the permit writer to calculate the copper limitation. There is no mention of Branch River flow data being used to establish the permit's copper limitation, and Hopedale has not directed our attention to any such data being used for that purpose.²³ More important to the issue at hand, if

²⁰*Supra* note 4.

²¹*Id.*

²²*Id.*

²³As explained by Region I in its Response, Hopedale is misconstruing the use given to the Branch River's flow data. The actual statement made by Region I in the fact sheet is that:

Since there is not a stream flow gage in this area with 30Q10 flow values, we looked at gage data from the
(continued...)

Hopedale was concerned about the calculations and data used to estimate Mill River's stream flow and its impact on the derivation of an effluent limitation for copper, the time to have raised that concern was the comment period.

Hopedale's third argument is that "there is considerable national debate * * * on the bioavailability of metals in the effluent from a WWTP," and thus the effluent limitations should not have been based on the total recoverable amount of metals.²⁴ This argument was not raised below, and because Hopedale has not asserted that this issue was not reasonably available during the

²³(...continued)

Branch River in Forestdale, Rhode Island. At this gage, the 7Q10 is 13.5 cfs and the cold season 30Q10 is 48.8 cfs. * * * The ratio of 30Q10 to 7Q10 for this gage is 3.6. Applying this ratio to the 7Q10 from the Mill River of 0.7 cfs, we obtained an estimated winter period 30Q10 flow of 2.5 cfs, or 1.63 MGD. Therefore, the 30Q10 dilution factor is 3.8. Based on this dilution factor, the *winter ammonia limit* has been established at 11 mg/l or 3.8 times the instream criterion of 3.0 mg/l.

R Ex B Fact Sheet at 4 (emphasis added). As can be readily seen from the foregoing, the Branch River data were used to calculate ammonia limits and not copper limits as suggested by Hopedale. See *id.* The fact sheet also shows that the permit writer used a 7Q10 flow of 0.45 million gallons per day ("mgd"), which, converted to cubic feet per second ("cfs") equals 0.7, to calculate metals limitations and not 13.5 cfs (Branch River's 7Q10) as Hopedale implies. See R Ex A Attach. B to Fact Sheet.

²⁴*Supra* note 5.

comment period, it cannot be raised now.²⁵ If Hopedale was not satisfied with the "total recoverable metals" approach, which is required by the regulations,²⁶ its obligation was to bring this issue to the Region's attention during the comment period.²⁷

Moreover, to the extent that Hopedale's argument is intended as a challenge to the validity of section 122.45(c),²⁸ we will not entertain it. A permit appeal proceeding is not the appropriate

²⁵An argument not raised during the comment period may nonetheless be raised on appeal if it was not reasonably available during the comment period. 40 C.F.R. § 124.13 (2000).

²⁶Section 122.45(c) requires that all permit effluent limitations for metals be expressed in terms of "total recoverable metal", and that is precisely what Region I did. 40 C.F.R. § 122.45(c).

²⁷Hopedale does not explain the significance of the alleged national debate and what approach should have been used by the Region to set the copper limitations. The Region in its Response makes a distinction between expressing the copper limit in terms of dissolved copper rather than total recoverable copper. Response at 10-11. If, as suggested by Region I, what Hopedale wanted was to have the limits expressed in terms of dissolved metals, the time to have raised this issue was during the comment period. Although the draft permit presented the copper limitation in terms of total copper instead of dissolved copper, the fact sheet shows how metals limits, including the one for copper, were calculated and converted from dissolved metal criteria to total metal. See R Ex B Draft Permit at 3; R Ex B Attach. A to Fact Sheet. Thus, the dissolved metal figures were available for review during the comment period. Clearly this issue was reasonably ascertainable during the comment period and Hopedale failed to raise it then.

²⁸See *supra* note 26.

forum in which to challenge either the validity of Agency regulations or the policy judgments that underlie them. *In re City of Port St. Joe*, 7 E.A.D. 275, 286-87 (EAB 1997); *accord In re Suckla Farms, Inc.*, 4 E.A.D. 686, 699 (EAB 1993); *In re Ford Motor Co.*, 3 E.A.D. 677, 682 n.2 (Adm'r 1991).

Because the regulations governing permit appeals require that all reasonably available arguments in support of a contention on the draft permit be raised during the comment period, and the arguments now raised on appeal were reasonably available from the draft permit and fact sheet, we will not entertain any of Hopedale's first three arguments in our analysis of the merits of this appeal. See 40 C.F.R. § 124.13.

On the other hand, Hopedale's fourth argument was indeed raised below. Since this is the only argument preserved for review, we will now proceed to determine whether the Region clearly erred in its determination to include a copper limitation of 5 µg/l in Hopedale's final permit.

B. *Region I Did Not Err in Including a Limitation on Copper*

As previously explained, the burden of demonstrating that review is warranted is on the petitioner. The regulations governing permit appeals require that the petitioner show that the condition in question is based on a finding of fact or conclusion of law that is clearly erroneous or an exercise of discretion or an important policy consideration that the Board should in its discretion review. 40 C.F.R. § 124.19(a). For the reasons set forth below we conclude that Hopedale has failed to show that the Region has committed clear error or an abuse of discretion in setting the copper discharge limitation in the permit.

The fact sheet shows that Region I decided that the inclusion of a limit on copper was appropriate based on the results of monitoring data obtained during 1997 and 1998 that showed copper in Hopedale's discharges ranged from 8 to 39 µg/l, clearly violating the water quality criteria for toxic pollutants, including copper, established for the receiving water body.²⁹ See R Ex B Attach. B to Fact Sheet. In its response to

²⁹According to Region I, the applicable water quality
(continued...)

public comments Region I elaborated by explaining that "the limit [on copper] will remain as it is based on instream water quality criteria. Similar limits have been drafted for the Northbridge POTW and the Upper Blackstone WPAD due to limited dilution available to these discharges." R Ex M at 2.

The CWA requires NPDES permits to contain limitations necessary to meet water quality standards set by states and approved by EPA.³⁰ See CWA §§ 301(b)(1)(c) and 402(a)(2), 33 U.S.C. §§ 1311(b)(1)(c) and 1342(a)(2). Massachusetts has an EPA-approved water quality standard that references EPA's recommended water quality criteria for toxic pollutants.³¹ See

²⁹(...continued)
criteria for the Mill River establish that, after applicable adjustments for water hardness, the copper concentration should not be greater than 9 µg/l to protect against sublethal effects on aquatic organisms, and no greater than 13 µg/l to protect against acutely toxic effects on aquatic organisms. Response at 4; See National Recommended Water Quality Criteria; Republication, 63 Fed. Reg. 68,354, 68,357 (Dec. 10, 1998).

³⁰The 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 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).

³¹Massachusetts' surface water quality standards for toxic
(continued...)

314 C.M.R. § 4.05(5)(e). Copper is one of the pollutants covered by the toxic criteria adopted by Massachusetts.³² The regulations pertaining to water quality standards also require the permitting authority to make a determination on whether the discharge "causes, has the reasonable potential to cause, or contributes to an in-stream excursion above the allowable ambient concentration of a State numeric criteria within a State water quality standard for an individual pollutant." 40 C.F.R. § 122.44(d)(1)(iii). When such a finding is made, the permit must contain effluent limits for that pollutant. *Id.*

In *In re Massachusetts Correctional Institution-Bridgewater*, an NPDES appeal with a similar fact pattern, we denied review on the grounds that under section 301(b)(1)(C) of the CWA³³ EPA is required to set permit limitations necessary to meet State water quality standards, even if those limits are more stringent than

³¹(...continued)
pollutants refer to EPA's national recommended water quality criteria for those pollutants not listed in the applicable Massachusetts regulations. 314 C.M.R. § 4.05(5)(e); National Recommended Water Quality Criteria; Republication, 63 Fed. Reg. at 68,354.

³²See National Recommended Water Quality Criteria; Republication, 63 Fed. Reg. at 68,357.

³³33 U.S.C. § 1311(b)(1)(C).

those required under technology-based effluent limits. *In re Massachusetts Correctional Inst.-Bridgewater*, NPDES Appeal No. 00-9, at 9 (EAB, Oct. 16, 2000). We also emphasized that the 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 as to an individual pollutant, "the permit must contain effluent limits for that pollutant." 40 C.F.R. § 122.44(d)(1)(iii); see *Massachusetts Correctional Inst.-Bridgewater* at 9; see also *In re Broward County*, 6 E.A.D. 535, 543 (EAB 1996); *In re City of Ames*, 6 E.A.D. 374, 379-80 (EAB 1996). Thus, because the Region determined that Hopedale's discharges have a reasonable potential to violate the Massachusetts water quality criteria for copper,³⁴ it was obligated to set limits on Hopedale's discharges to prevent the facility from exceeding those criteria, and thus ensure compliance with the Massachusetts water quality standards.

Hopedale alleges that the copper limitation in the permit cannot be achieved at the existing WWTP without undergoing major

³⁴Even though Hopedale is challenging Region I's "reasonable potential" finding, we already explained that this challenge merits no review because it is raised on appeal for the first time and was reasonably available during the comment period.

modifications, an argument we are construing as an issue of technological feasibility. In this regard the legal standard is that technological considerations are not a factor in setting water quality-based effluent limits. *Massachusetts Correctional Inst.-Bridgewater* at 10; see, e.g., *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999) (EPA obligated to "require that level of 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 (7th Cir. 1977) (holding that even if permittee's assertion about the impossibility of achieving compliance with the present technology was true, it does not follow that the contested effluent limitations were invalid); *In re J&L Specialty Prods. Corp.*, 5 E.A.D. 31, 48-9 (EAB 1994) (Region not authorized under CWA to grant variances from water quality-based limitations because of lack of technical feasibility); *In re Goodyear Aerospace Corp.*, 2 E.A.D. 919, 920 (CJO 1989) (Region has no discretion to alter water quality-based effluent limitations even if such limits are not technologically achievable). In *City of Fayetteville*, 2 E.A.D. 594 (CJO 1988), the Chief Judicial Officer stated that the meaning of the

language of section 301(b)(1)(C)³⁵ was "plain and straightforward. It requires unequivocal compliance with applicable water quality standards, and does not make any exceptions for cost or technological feasibility." *Id.* at 600-01.

Applying the same rationale we used in *Massachusetts Correctional Inst.-Bridgewater*, we conclude that not only was Region I not in error to set Hopedale's copper discharge limit without regard to its technological capacity, but the Region was obligated to do so by law.

IV. CONCLUSION

For all the foregoing reasons Hopedale's petition for review is hereby denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 02/13/2001

By: _____ /s/

Ronald McCallum
Environmental Appeals Judge

³⁵CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Town of Hopedale, Board of Water & Sewer Commissioners, NPDES Appeal No. 00-4, were sent to the following persons in the manner indicated:

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_____/s/
Annette Duncan
Secretary