IN RE FLORIDA PULP AND PAPER ASSOCIATION & BUCKEYE FLORIDA, L.P.

NPDES Appeal Nos. 94-4 & 94-5

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided May 17, 1995

Syllabus

Buckeye Florida, L.P. and the Florida Pulp and Paper Association ("FPPA") seek review of the partial denial of their evidentiary hearing requests on certain issues relating to the renewal of an NPDES permit by U.S. EPA Region IV for Buckeye's pulp mill in Perry, Florida. The renewed permit regulates the discharge of effluent from the facility into the Fenholloway River. Buckeye has appealed the denial of its evidentiary hearing request on the following three issues: 1) Whether the Region had the legal authority to require sampling and analysis of sludge; 2) Whether there is an accepted, validated protocol for analyzing ambient crab tissue, and, if not, whether the Region improperly required Buckeye to prepare a plan of study for such analysis; and 3) Whether the Region improperly imposed an Individual Control Strategy ("ICS") under CWA § 304(l) and, assuming the Region did impose an ICS, whether the Region misapplied section 304(l) in establishing the schedule of compliance. FPPA seeks review on two issues. These are: 1) Whether the Region has improperly imposed an ICS; and 2) Whether the species of organisms proposed for use in chronic toxicity tests are representative of species inhabiting waters affected by the discharge.

Held: The issue of whether the species of organisms proposed for use in chronic toxicity tests are representative of species inhabiting waters affected by the discharge is remanded so that an evidentiary hearing can be conducted. In its comments on the draft permit, FPPA stated that the proposed species *may not* be representative of species affected by Buckeye's discharge. In its denial of FPPA's hearing request on this issue, the Region stated that the issue was not raised with sufficient specificity. However, because the issue was sufficiently well-defined to elicit a substantive response from the Region, and because another commenter raised the same issue (and also elicited a substantive response), we reject the Region's assertion that the issue was not raised with sufficient specificity. The issue of whether a permit's designated test species are suitable surrogates for indigenous species is a genuine issue of material fact which, if adequately raised, requires an evidentiary hearing. With respect to the other issues raised in the petitions filed by Buckeye and FPPA, review is denied. The first two issues raised by Buckeye were not raised in its comments on the draft permit and thus were not preserved for hearing. With regard to the third issue relating to the permit's three-year compliance schedule, the Board concludes: 1) the Region did not, nor could it have, imposed an ICS, and 2) the issue relative to how a compliance schedule should be established under section 304(l) is therefore not a material issue relevant to issuance of the permit. FPPA's request for a hearing on the § 304(l) issue was appropriately denied by the Region since, as a matter of law, the Board concludes

that the Region did not (and indeed could not) impose an ICS on the Buckeye facility because the statutory prerequisites for imposing an ICS were not met as to that facility.

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

Opinion of the Board by Judge Reich:

I. *BACKGROUND*

Buckeye Florida, L.P. and the Florida Pulp and Paper Association ("FPPA") have each filed a petition seeking review of U.S. EPA Region IV's partial denial of their evidentiary hearing requests on certain provisions of a renewed National Pollutant Discharge Elimination System (NPDES) permit[1] for Buckeye's pulp mill in Perry, Florida, known as the "Foley Mill." Buckeye[2] operates an industrial wastewater treatment system at the facility which includes, among other things, a primary clarifier, sludge pumps, a sludge storage lagoon, and two aerated lagoons. The renewed permit regulates the discharge of effluent from the facility into the Fenholloway River. At the request of the Environmental Appeals Board, the Region filed a response to each of the petitions for review.

The facility's existing NPDES permit became effective on July 1, 1984, with an expiration date of June 30, 1989. On June 24, 1991, the Region prepared a draft permit renewal on which both petitioners submitted comments. By letter dated August 5, 1991, the State of Florida waived certification of the draft permit based on the understanding that the final permit would reflect the use of 100% effluent for conducting chronic toxicity tests.[3] *See* Region IV's *Fact Sheet Amendment Based on Comments Received: July 11, 1991 - September 26, 1991*, at 1, 3 (June 26, 1992) (Exh. 2 to Region's *Brief in*

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[1] Under the Clean Water Act, discharges into waters of the United States by point sources, like the Foley Mill, must have a permit in order to be lawful. 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System is the principal permitting program under the Clean Water Act. 33 U.S.C. § 1342.

[2] The evidentiary hearing request which is the subject of Buckeye's petition was actually submitted by the Procter & Gamble Cellulose Company, the former owner of the Foley Mill. On March 16, 1993, after the request was filed, Buckeye Florida, Limited Partnership purchased the Foley Mill from Procter & Gamble. Buckeye then notified the Region that it wished to be substituted for Procter & Gamble on the hearing request and indicated its intent to raise each of the issues raised by Procter and Gamble in the hearing request. As Buckeye has stepped into the shoes of Procter & Gamble, the remainder of this decision refers only to Buckeye, even though certain of the actions were actually taken by Procter & Gamble.

[3] The Region included such a provision in the final permit.

Opposition to [Buckeye's] Petition for Review ("Region's Buckeye Response")).[4] A public hearing was held on September 19, 1991, at which additional comments were received. The Region responded to comments in an attachment to the above-cited fact sheet amendment ("Response to Comments"). A final renewal permit was issued on June 26, 1992. In late July of 1992, both FPPA and Buckeye submitted evidentiary hearing requests.[5] In response to the Region's request for additional information on certain issues, Buckeye submitted a revised request for an evidentiary hearing dated November 24, 1992. On June 30, 1994, the Region granted in part and denied in part both requests.[6] The present appeals followed.

For the reasons stated below, the petition for review filed by Buckeye is denied. The petition filed by FPPA is denied in part and granted in part.

II. *DISCUSSION*

Under the rules governing an NPDES proceeding, there is no appeal as of right from the Regional Administrator's decision. *In re J & L Specialty Products Corporation*, 5 E.A.D. 31, 41 (EAB 1994). Ordinarily a petition for review is not 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.[7] *See, e.g., In re Town of Seabrook, N.H.*, 4 E.A.D. 806 (EAB 1993). The petitioner has the

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[4] Under CWA § 401(a)(1), the Agency may not issue a permit until the State either certifies that the permit complies with State water quality standards or waives certification. 40 C.F.R. § 124.53. Where a State has certified a federally issued permit, any challenges to permit limitations and conditions attributable to State certification will not be considered by the Agency. *See* 40 C.F.R. § 124.55(e); *In re General Electric Company, Hookset, New Hampshire*, 4 E.A.D. 468 (EAB 1993). Where a State has waived certification, however, the Agency's application of State water quality standards is open to review for consistency with 40 C.F.R. § 122.44(d) (Water quality standards and State requirements).

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

[6] On the same date the Region granted a request for an evidentiary hearing filed by a citizen's group known as Help Our Polluted Environment or "HOPE."

[7] With respect to appeals under Part 124 regarding NPDES permits, Agency policy is that most permits should be finally adjudicated at the Regional level. 44 Fed. Reg. 32,887 (June 7, 1979). While the Board has broad power to review decisions in NPDES permit cases, the Agency intended this power to be exercised "only sparingly." *Id. See In re J & L Specialty Products Corporation*, 5 E.A.D. 31, 41 (EAB 1994); *In re Broward County, Florida*, 4 E.A.D. 705, 709 n.9 (EAB 1993).

burden of demonstrating that review should be granted. *See* 40 C.F.R. § 124.91(a). In determining whether petitioners have met this burden, we first address the issues raised in Buckeye's petition and then those raised by FPPA.

A. *Buckeye Petition*

In its petition, Buckeye objects to the Region's denial of Buckeye's evidentiary hearing request with regard to the following issues:[8]

> 1) Whether EPA has the legal authority to require sampling and analysis of sludge. Whether sampling of sludge is necessary for determining compliance with effluent limits and whether imposition of such sampling is authorized by the CWA and 40 C.F.R. Part 122;
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> 2) Whether there is an accepted, validated protocol for analyzing ambient crab tissue for dioxin and, if not, whether it is unreasonable, arbitrary, capricious unsupported by substantial evidence or an abuse of the administrator's discretion, to require Buckeye to prepare and implement a plan of study for such analysis; and
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> 3) Whether the Clean Water Act requires EPA to include a compliance deadline no later than October 1, 1995 for dioxin effluent limits.

These will be discussed in turn below.

1. *Sludge Sampling*

Part VI. Section A. of the final NPDES permit requires that Buckeye monitor once per quarter the influent, effluent, and primary sludge from its wastewater treatment facility for 17 isomers of polychlorinated dibenzo-p-dioxins and polychlorinated dibenzofurans. In issue 8(h) of its evidentiary hearing request, Buckeye contested the Region's legal authority to require sampling of influent or sludge. *See* Buckeye's *Revised Request for Evidentiary Hearing* at 13 (Exh. E to Buckeye's Petition for Review). Buckeye essentially repeated this assertion later in its hearing request (issue 10(n)). Issue 10(n) states:

[8] Buckeye raised several additional issues in its petition on which the Region subsequently agreed to grant an evidentiary hearing. We therefore do not address those issues in this decision.

"Whether sampling of treatment plant influent and sludge is necessary for determining compliance with effluent limitations and whether imposition of such sampling is authorized by the Clean Water Act and 40 C.F.R. Part 122." *Id.* at 33 (issue 10(n)). In elaborating on this assertion, Buckeye stated as follows:

> EPA is without authority to require the above-referenced sampling unless determining compliance with effluent limitations is otherwise impracticable. [Buckeye] asserts that compliance with its permit's effluent limitations can be assessed without sampling of its wastewater treatment plant influent or sludge and, therefore, that such requirements are unauthorized as described above.

Id.

The Region granted a hearing only with regard to the sampling requirement for influent. That is, the Region granted a hearing on the issue of whether EPA has the legal authority to require sampling and analysis of influent to the wastewater treatment plant. With regard to the sludge sampling requirement, the Region denied Buckeye's hearing request on the grounds that this issue was not raised during the public comment period and Buckeye had not established good cause for failing to raise the issue. *See Regional Administrator's Decision on Proctor & Gamble's Request for an Evidentiary Hearing* ("Response to Buckeye's Hearing Request") at 4 and Enclosure at 3. (Exh. A to Buckeye's Petition for Review).

Under 40 C.F.R. § 124.13, any person who believes that a permit condition is inappropriate must raise "all reasonably ascertainable issues and * * * all reasonably available arguments supporting [the person's] position by the close of the public comment period." In order to contest a final permit condition in an evidentiary hearing, that condition must first be identified during the comment period. 40 C.F.R. § 124.76. *See In re Goodyear Tire & Rubber Company*, 4 E.A.D. 670, 681-682 (EAB 1993). As the Board has previously stated, adherence to this requirement 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. *See In re Essex County (N.J.) Resource Recovery Facility*, 5 E.A.D. 218, 224 (EAB 1994); *In re Broward County, Florida*, 4 E.A.D. 705, 714 (EAB 1993); *In re Sequoyah Fuels Corporation*, 4 E.A.D. 215, 218 (EAB 1992). The permit issuer can then make any appropriate revisions to the permit or provide an explanation of why no such revisions are

necessary. The regulations provide for a "good cause" exception to this rule where a party "could not reasonably have ascertained the issue * * * within the required time * * * or reasonably anticipated the relevance or materiality of the information sought to be introduced." 40 C.F.R. § 124.76. *See In re Goodyear Tire & Rubber Company*, *supra*, at 682.

In its Petition for Review, Buckeye contends that, contrary to the Region's assertion, the issue of whether the permit properly includes a sludge monitoring requirement was raised in Buckeye's comments submitted on August 9, 1991. The comments cited by Buckeye read as follows:

> [Buckeye] believes that the requirements for testing of various isomers and cogeners of chlorinated dibenzodioxins and dibenzofurans are unnecessary and inappropriate. Extensive testing of pulp mill effluents * * * has demonstrated that 2,3,7,8-TCDD is responsible for the vast majority of the toxic equivalents found in bleached pulp mill discharges, and the reduction of 2,3,7,8-TCDD at some mills has resulted in similar levels of reduction in other isomers and cogeners. Thus, the additional isomer-specific analyses are not necessary.

Buckeye's August 9, 1991 Comments at 17 (Exh. C to Buckeye's Petition for Review). While this comment raises a general objection to the need for the permit's dioxin testing, the objection is based on Buckeye's assertion that the proposed testing requirements for various isomers and cogeners of chlorinated dibenzodioxins and dibenzofurans are unnecessary because the levels of these compounds can be adequately accounted for by monitoring of 2,3,7,8-TCDD (which is also required by the permit). There is no suggestion in these comments that sludge monitoring or analysis, by itself, would be unlawful.

In fact, Buckeye's comment goes on to state:

> In addition, there is no need to sample influent to the wastewater treatment plant, since the only two avenues for discharge of dioxin are through the effluent from the wastewater treatment plant or through sludge disposal, and both these vectors are required to be analyzed separately. (It should also be noted that the [permit's] reference to the "primary sludge after dewatering" is a bit inaccurate; the mill's wastewater treatment system has no mechanical dewatering of primary sludge, so we

> suggest that this be changed to "primary sludge after filtration," to indicate that the sample will have to be filtered in the laboratory to obtain a representative sample of semi-solid sludge material.)

Id. at 18. Thus, while objecting to the sampling requirement for influent to the wastewater treatment facility, Buckeye's comment suggests that it recognized that at least some sludge testing might be appropriate. Buckeye's concern was that the testing of influent was unnecessary because the permit already required the testing of sludge and effluent. There is no suggestion that any sludge testing requirements would be improper. In fact, Buckeye suggested that the reference to "primary sludge after dewatering" in the disputed portion of the draft permit be changed to "primary sludge after filtration," which further indicates that Buckeye was not challenging the permit's inclusion of all sludge testing requirements.[9]

In these circumstances, Buckeye did not preserve for review its objections to the lawfulness of the permit's sludge testing requirement. Moreover, Buckeye does not assert that the Board should consider its objections to the sludge testing requirement under the "good cause" exception mentioned above. For these reasons, the Region's decision to deny an evidentiary hearing on the permit's sludge testing requirements will not be reviewed by the Board.[10]

2. *Crab Analysis Protocol*

Issue 10(m) of Buckeye's evidentiary hearing request states as follows:

> Whether there is an accepted, validated protocol for analyzing ambient crab tissue for 2,3,7,8-TCDD and, if

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[9] In its petition, Buckeye asserts that its statement in this regard was not intended as a concession of the appropriateness of the permit's sludge testing requirements. Rather, Buckeye asserts that this statement was proffered "in support of limiting the provision as an alternative" to its general objection to sludge testing. However, nothing in Buckeye's comment concerning the change in the permit's language (from "primary sludge after dewatering" to "primary sludge after filtration") suggests that it was intended merely as an alternative argument. We also note that the wording in the final permit reflected Buckeye's comment in this regard.

[10] Buckeye's petition also asserts that the Region erroneously failed to stay the sludge and effluent monitoring and sampling requirements of Part VI. Section A. of the final permit even though the Region granted Buckeye's request for an evidentiary hearing on this permit condition. As the Region states in its response, however, the evidentiary hearing request was granted only with regard to the sampling requirements for influent. *See* Region's Buckeye Response at 18. Thus, we find no error in the Region's decision to limit a stay of this permit condition to those requirements applicable to influent to the facility.

> not, whether it is unreasonable, arbitrary, capricious, unsupported by substantial evidence, or an abuse of the Administrator's discretion to require [Buckeye] to prepare and implement a plan of study for such analysis.

Buckeye's Evidentiary Hearing Request at 32. This issue pertains to Part VI. Section B.1. of the final permit which requires that Buckeye develop "a Plan of Study (POS) to annually assess the levels of all chloro-dibenzo dioxins and furans in ambient fish and shellfish (crab) tissue in the Fenholloway River at the confluence with the Gulf of Mexico." The Region denied the hearing request on the grounds that the issue was reasonably ascertainable but was not raised during the comment period. *See* Response to Buckeye's Hearing Request, Enclosure at 15-16.

In its petition for review, Buckeye asserts that it raised this issue in comments on the draft permit submitted on July 8, 1991, in which Buckeye raised a general objection to the plan of study requirement. Buckeye Petition for Review at 7. In particular, Buckeye's petition states as follows:

> Referencing [in Buckeye's July 8, 1991 comments] the fact that a Use Attainability Analysis addressing the same concerns as the Plan of Study was currently being prepared in cooperation with the state of Florida, Buckeye made a general objection to the Plan of Study requirement "because it contains excessively detailed requirements which may or may not be appropriate for the study plan which is being developed. The draft permit should merely state the goals of the study and require that a plan be developed in conjunction with and approved by EPA and Florida [Department of Environmental Regulation]."

Id. at 7-8. What Buckeye fails to mention is that the permit provision to which it was objecting in its July 8, 1991 comments was Part I. Section B. of the June 24, 1991, draft permit.[11] As stated above, how-

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[11] Part I. Section B. of the draft permit stated, in part:

> *SPECIAL CONDITIONS*
> The Permittee shall develop a Plan of Study (POS) to assess the impacts of the effluent discharge on the tidal riverine and estuarine portions of the Fenholloway River.
> Continued

ever, the provision on which it sought an evidentiary hearing was the provision requiring Buckeye to develop a plan of study to assess dioxin levels in fish and crab tissue. Although Part I. Section B. of the June 24, 1991, draft permit also contained a plan of study requirement, it did not contain the crab analysis requirement on which Buckeye sought an evidentiary hearing. That condition was contained in Part VI. Section C. of the June 24, 1991 draft permit.[12] Moreover, in the section of Buckeye's July 8, 1991 comments addressing its objections to Part VI of the draft permit, Buckeye did not object to the crab analysis requirement. *See* July 8, 1991 Comments at 5-6. We therefore agree with the Region that "[a]s Buckeye raised no concern regarding protocol for crab tissue sampling and analysis in its comments," the Region properly denied the evidentiary hearing request. Region's Buckeye Response at 16.[13]

Buckeye further states that even if its objection to the crab analysis requirement was not raised in its comments, Buckeye could properly raise the issue because the Region made changes to the relevant permit provision after the close of the comment period. Buckeye's Petition at 8. According to Buckeye, this constitutes "good cause" for failing to raise the issue earlier. The change cited by Buckeye, however, a shortening of the time period allowed for submitting the Plan of Study, is not relevant to the objection raised by Buckeye in its evidentiary hearing request. Buckeye sought a hearing on whether, given the alleged lack of an accepted protocol for analyzing ambient crab tissue, the plan of study requirement in Part VI. Section B. of the permit was inappropriate. As the Region correctly notes, there is no discernable connection between the change in the time period for submitting the Plan of Study and the question of whether or not a crab analysis should be required at all. This latter issue clearly was reasonably ascertainable based on the draft permit during the comment

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This section does not appear in the final permit. However, the final permit still requires that Buckeye develop and implement a POS to "evaluate the impact of the discharged effluent on the fresh water, estuarine and near shore areas of the Fenholloway River * * *." *See* Final Permit, Part I. Section A.7.

[12] The identical provision is contained in Part VI. Section B.1. of the final permit.

[13] We note that a party seeking an evidentiary hearing must state all disputed legal and factual issues with specificity. 40 C.F.R. § 124.76(b)(1); *In re Sequoyah Fuels Corporation*, 4 E.A.D. 215, 218 (EAB 1992). This allows the Region to make an informed decision on the evidentiary hearing request and for meaningful review of the Region's determination by the Board. *See In re Broward County, Florida*, 4 E.A.D. 705, 720 (EAB 1993). Buckeye's general objection to the permit's POS requirement as quoted above, even if had been directed to the proper study, would not have been sufficient to put the Region on notice that Buckeye was objecting to the permit's requirements related to crab tissue analysis.

period. We therefore reject Buckeye's assertion that this change constitutes good cause for failing to raise the issue earlier.

Finally, Buckeye asserts that good cause exists for failing to raise the issue during the comment period because "new information regarding ambient crab tissue dioxin levels has become available since the close of the comment period." Buckeye Petition at 8. In particular, Buckeye states that after the close of the comment period, it began implementing, and is now close to completing, a Use Attainability Analysis conducted in cooperation with EPA and the Florida Department of Environmental Regulation ("FDER"). *Id.* at 8-9. Buckeye states that, as part of this study, a crab sampling analysis was conducted at the mouth of the Fenholloway River and that this study failed to detect dioxin in the two crab tissue samples tested. *Id.* at 9. Even if Buckeye's statements in this regard were accepted as true, however, Buckeye has failed to explain, nor can we discern, how it shows that the issue of whether the alleged absence of an accepted protocol for analyzing crab tissue for dioxin made the study requirement inappropriate was not reasonably ascertainable by the close of the comment period.

Under these circumstances, we conclude that Buckeye neither raised the issue in its comments nor has established that this issue was not reasonably ascertainable by the close of the comment period. Review is therefore denied.

3. *Compliance Deadline*

In its evidentiary hearing request, Buckeye sought a hearing on whether the Agency was required under the Clean Water Act to include a compliance deadline of October 1, 1995, for the permit's dioxin effluent limitations. Buckeye Evidentiary Hearing Request at 9. In elaborating on this question in its petition, Buckeye states:

> Buckeye asserts that EPA has chosen October 1, 1995 as a compliance deadline (a date exactly three years after the effective date of the permit) because of the statutory mandate that "individual control strategies" must be achieved within three years of establishment pursuant to CWA Section 304(l)(1)(D).[14] By raising this

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[14] Under CWA § 304(l), States must prepare and submit for Agency approval three lists of water segments meeting criteria provided in that section on or before February 4, 1989. Section 304(l)(1)(D) (emphasis added) provides, in pertinent part, as follows:

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> issue, Buckeye wishes to refute the notion that EPA is bound by the strictures of Section 304(l) in setting this compliance deadline and that, even if the Agency is so bound, the date chosen is erroneous because "establishment" of an individual control strategy does not occur on the stated effective date of a permit if the permit does not become final and its effectiveness is stayed by administrative appeal.

Buckeye Petition at 9.[15] Thus, it is clear from the petition (as it was from the evidentiary hearing request) that Buckeye is not challenging

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> (1) Not later than 2 years after February 4, 1987, each State shall submit to the Administrator for review, approval, and implementation under this subsection —
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> * * * * * * *
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> (D) for each such segment, an individual control strategy which the State determines will produce a reduction in the discharge of toxic pollutants from point sources identified by the State under this paragraph through the establishment of effluent limitations under section 1342 of this title and water quality standards under section 1313(c)(2)(B) of this title, which reduction is sufficient, in combination with existing controls on point and nonpoint sources of pollution, to achieve the applicable water quality standard *as soon as possible, but not later than 3 years after the date of the establishment of such strategy.*

[15] Contrary to Buckeye's characterization of EPA's interpretation, the applicable regulations provide that either a draft or a final NPDES permit may constitute an ICS. 40 C.F.R. § 123.46(c). In addition, final NPDES permits can constitute an ICS even if they are not yet effective. As explained in the preamble to the § 304(l) implementation rules:

> An NPDES permit usually becomes effective 30 days after a final decision to issue or modify the NPDES permit unless an evidentiary hearing is requested under 40 C.F.R. § 124.74. Evidentiary hearings can delay the effective date of the conditions challenged in the permit. Because these potential delays could jeopardize the ability of the EPA and the States to meet the deadlines in section 304(l), and because a final permit reflects the final decision of the permitting authority with respect to the permit, EPA will accept a final (but not necessarily effective) NPDES permit as an ICS.

54 Fed. Reg. 23,888 (June 2, 1989). Thus, Buckeye's interpretation that the establishment of an ICS can occur only on the date an NPDES permit implementing the requirements of § 304(l) becomes effective is incorrect.

the Region's authority to establish a compliance date.[16] Rather, it raises two related issues: 1) whether the Region improperly imposed an ICS under section 304(l), and 2) if the Region did impose an ICS, whether the Region misapplied section 304(l) in establishing the compliance date.

The Region denied Buckeye's request for a hearing regarding the October 1, 1995 compliance date, stating that Buckeye had failed to raise the issue during the comment period and thus could not raise it in an evidentiary hearing. *See* Buckeye Response at 10-12; 40 C.F.R. §§ 124.13 and 124.76. In its petition for review, Buckeye, citing to comments submitted by itself as well as FPPA, argues that the issue was indeed raised during the comment period. In particular, Buckeye cites to its August 9, 1991 comments asserting that the Region should delay imposing any new dioxin limitations until an ongoing State water-quality standards setting process is complete. Buckeye noted in these comments that section 304(l) does not apply in the present case and, thus, the permit need not "be issued in the immediate future." Buckeye's August 9, 1991 Comments at 9. Buckeye has also cited to comments submitted by FPPA in response to the draft permit in which FPPA asserted that by imposing a permit condition related to dioxin, EPA has in essence proposed an ICS even though the facility is not subject to the provisions of CWA § 304(l). *See* FPPA August 9, 1991 Comments at 4-6, 7-9 (Appendix 2 to FPPA Petition).

While we agree with the Region that none of the comments cited by Buckeye raise any specific objection to the permit's three-year compliance schedule *per se*, FPPA raised the issue of whether the Region improperly imposed an ICS.[17] Buckeye has asserted (both in its evidentiary hearing request and in its petition for review) that the permit's

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[16] As the Board has previously stated, in issuing NPDES permits the Agency has the authority to include schedules of compliance for meeting water quality-based effluent limitations where the State's water quality standard itself, or the implementing regulations, "can be fairly construed as authorizing a schedule of compliance." *In re J & L Specialty Products Corp.*, 5 E.A.D. 333, 344 (EAB 1994) (quoting *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175 (Order on Petition for Reconsideration, Adm'r, April 16, 1990), *modif. den.* (Order Denying Modification Request, EAB, May 26, 1992); *In re City of Haverhill, Wastewater Division*, 5 E.A.D. 211, 215 (EAB 1994). As the Region has stated in its response to the petition filed by FPPA (p.10), the imposition of a schedule of compliance for dioxin and toxicity limitations is authorized by the State of Florida. *See* Florida Administrative Code, Rule 17-4.160(10) (authorizing a "reasonable time" for compliance).

[17] Although, as stated above, the regulations make clear that, in order to preserve an issue for review, it must have been raised by someone during the comment period, the person filing the petition for review does not necessarily have to be the one who raised the issue. *See In re Broward County, Florida*, 4 E.A.D. 705, 714 (EAB 1993).

three-year compliance schedule was the result of the Region's erroneous determination in this regard. Under the circumstances, we conclude that this issue was adequately raised during the comment period.

As discussed later in this decision, we conclude, as a legal matter, that the final permit cannot be an ICS because Buckeye's facility does not meet the statutory prerequisites for the imposition of an ICS pursuant to CWA § 304(l). Thus, no evidentiary hearing is necessary on this issue. In addition, because the permit is not, nor could it be, an ICS, the issue of how to apply section 304(l) in imposing a compliance schedule is not a material issue relevant to issuance of the final permit in that it would not affect the outcome of the present dispute. 40 C.F.R. § 124.75(a)(1) (hearing request must set forth "material issues of fact relevant to the issuance of the permit."); *In re J & L Specialty Products Corporation*, 5 E.A.D. 31, 42 (EAB 1994) (an issue is material where it might affect the outcome of the proceeding); *In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993). The Region's denial of an evidentiary hearing on this issue is therefore affirmed.

B. *FPPA Petition*

FPPA objects to the Region's denial of its evidentiary hearing request with regard to the following two issues:[18]

> (1) whether the permit constitutes an individual control strategy ("ICS"); whether EPA can legally impose an ICS on Buckeye through this NPDES permit; and whether EPA can base such an ICS on fish sample data (paragraph 9.d and Sections 10.D and 10.E. of FPPA's evidentiary hearing request);
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> (2) whether the species of organisms proposed for use in chronic toxicity tests are representative of species inhabiting waters affected (paragraph 9.h. of FPPA's evidentiary hearing request).

FPPA's *Notice of Appeal and Petition for Review* ("FPPA Petition") at 2-3. These will be discussed in turn below.

1. *ICS Issue*

In its evidentiary hearing request, FPPA contested the permit limitations related to dioxin and chronic toxicity. In particular, FPPA stat-

[18] The FPPA raised two additional issues in its petition on which the Region subsequently agreed to grant an evidentiary hearing. We therefore do not address these issues in this decision.

ed, *inter alia*, that by including these permit limitations the Region had, in effect, imposed an ICS even though the statutory prerequisites for imposing an ICS have not been met. FPPA argued that these conditions should therefore be removed from the permit. *See* FPPA Evidentiary Hearing Request at 7, 10-11. In its denial of FPPA's evidentiary hearing request, the Region stated that the permit did not constitute an ICS, and that, in any case, the permit limitations to which FPPA objected (dioxin and chronic toxicity limitations) were consistent with Section 301(b)(1)(C) of the Clean Water Act. *See Regional Administrator's Decision on FPPA's Request for an Evidentiary Hearing* ("Response to FPPA's Hearing Request"), Enclosure at 2-3 (Appendix 6 to FPPA Petition). The Region therefore concluded that FPPA's concerns regarding the Region's legal authority to impose an ICS were "immaterial to consideration of whether a present permit contains limitations necessary to meet water quality standards." *Id.* at 3.[19]

In its petition for review, FPPA renews its assertion that it is entitled to an evidentiary hearing on whether the Region improperly imposed an ICS on Buckeye's facility. FPPA points to the permit's three-year compliance deadline for meeting the dioxin and chronic whole effluent toxicity requirements as evidence that the permit constitutes an ICS.[20] FPPA also notes that the fact sheet accompanying the draft permit stated that the basis for the permit's three-year schedule of compliance for meeting the water quality-based dioxin limits was section 304(l) of the Act. *See* Appendix 1 to FPPA Petition. For the following reasons, we agree with the Region that FPPA has failed to raise a material issue requiring an evidentiary hearing.

Based on our review of the record on appeal, it is clear that the present permit is not, nor could it be, an ICS because the facility does not meet the statutory prerequisites for imposing an ICS. That is, the Fenholloway River, into which Buckeye discharges its effluent, is not a listed water segment under CWA § 304(l)(1)(A) or (B), nor has the Foley Mill been identified as a point source pursuant to CWA § 304(l)(1)(C). Thus, the facility legally cannot be subject to the requirements of section 304(l). *See* CWA § 304(l)(1)(D) (requiring an

[19] We note that the Region granted FPPA's request for a hearing on the appropriateness of the permit's dioxin limitations as well as the data used to support the imposition of these limitations. *See* Response to FPPA's Hearing Request, Enclosure at 1-2. The Region also granted a hearing on the legal issue of whether the Region has the authority to establish numeric standards for dioxin. *Id.* at 7.

[20] As stated above, Section 304(l) of the Clean Water Act states that when imposing an ICS, applicable water quality standards must be met not later than three years after imposition of the ICS.

individual control strategy for identified point sources in listed water segments). Moreover, as the Region made clear in denying the evidentiary hearing request, the permit "did not impose an [ICS] in this case."[21] Response to FPPA's Hearing Request, Enclosure at 8. Thus, as a legal matter, we find no error in the Region's decision to deny an evidentiary hearing on the issue of whether this permit constituted an ICS.[22]

2. *Indigenous Species*

In its request for an evidentiary hearing, FPPA stated, in pertinent part, as follows:

> The species of organisms proposed for use in the chronic toxicity test may not be representative of species that inhabit the waters affected by the discharge from [Buckeye's] plant, or even of comparable waters such as the Econfina River which are not affected by discharge from [Buckeye's] mill. FDER rules require use of species "significant to the indigenous aquatic community" in measuring chronic toxicity (Rule 17-302.200(3)(a), Fla. Admin. Code).

FPPA Evidentiary Hearing Request at 8 (Appendix 4 to FPPA Petition).[23] FPPA raised the identical issue in its August 9, 1991 comments on the draft permit. *See* FPPA August 9, 1991 Comments at 3 (Issue 9.h.). The Region denied FPPA's evidentiary hearing request on the ground that the issue was not raised with sufficient specificity. *See* Response to FPPA's Hearing Request, Enclosure at 6-7. In particular, the Region stated that "FPPA's general assertion that [the] organisms

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[21] As Buckeye has pointed out, the Region does indeed state in the fact sheet accompanying the draft permit that the basis for the permit's three-year schedule of compliance was section 304(l) of the Clean Water Act. The Region provides no explanation for this statement nor can we discern any reason why the Region would have made such a statement. In any case, as we conclude that the permit cannot be an ICS, as even the Region agrees, the Region's apparently erroneous statement in this regard does not affect our determination. (Obviously, for that reason, the Region cannot rely on section 304(l) in supporting the permit's compliance schedule.)

[22] In addition, as the Board has previously stated, section 304(l) does not change any substantive water quality-based requirements of the Clean Water Act. Rather, it may only hasten the implementation of these requirements with respect to toxic pollutants. *In re J & L Specialty Products Corp.*, 5 E.A.D. 31, 37-38 (EAB 1994). Thus, FPPA's assertions relating to whether the permit constitutes an ICS are not relevant to the Region's legal authority to impose substantive dioxin or chronic toxicity limitations.

[23] Part V. Section 1.a. of the permit requires that applicable tests be conducted on the daphnid (Ceriodaphnia dubia) and the Fathead Minnow (Pimephales promelas).

may not be representative of species in waters affected by the discharge is not sufficient to warrant an evidentiary hearing on this issue." *Id.* at 7 (emphasis in original). For the following reasons, this issue is remanded to the Region so that an evidentiary hearing can be scheduled.

Because the Region believes that this issue was not properly raised in the evidentiary hearing request, the Region's response does not address the merits of FPPA's argument. The merits of FPPA's argument were addressed, however, in the Region's response to FPPA's comments on the draft permit. There, the Region stated:

> The use of standard laboratory species in toxicity tests is consistent with EPA's *Technical Support Document*, various EPA toxicity test protocols, and EPA's May 5, 1986 Regional policy. The final recommendation of the August, 1985 FDER Bioassay Task Force final report (pg.7) regarding this issue was that "standard monocultures of known health and sensitivity must be used in testing."

Response to Comments at 26. The Region also stated that the use of indigenous species is not practical because of: (1) the absence of sensitive organisms in the receiving water due to previous exposure to the effluent or other pollutants; (2) the difficulty in collecting and handling organisms of the desired age and condition (free from disease) from the receiving water; (3) the lack of extensive quality control and range-of-sensitivity information for such species; and (4) the lack of information on the diet of such indigenous organisms. *Id.* at 26-27. Thus, although FPPA's concerns regarding the appropriateness of the species selected for toxicity testing could have been expressed with more specificity, the issue was clearly raised and sufficiently well-defined to elicit a substantive response from the Region. Moreover, as the Region's response to comments indicates, the issue was also raised by another commenter. In particular, the Region's response to comments states that "[o]ne commenter questioned the ecological relevance of the bio-assay test. He further stated that the fathead minnow does not survive naturally in the Fenholloway River." Response to Comments at 49. The Region gave essentially the same response to this comment as it gave to FPPA's comment.

We find that the issue of whether the species designated in the permit for use in toxicity testing were representative of species in the receiving waters was raised by FPPA and another commenter during the comment period. We reject the Region's argument that the issue

was not raised with sufficient specificity. The Region was clearly on notice that concerns existed in this regard, and indeed felt compelled to respond to these concerns in its response to comments. As this Board has previously stated, the issue of whether a permit's designated test species are suitable surrogates for indigenous species is a genuine issue of material fact which, if adequately raised, requires an evidentiary hearing. *See In re Miami-Dade Water and Sewer Authority Department*, 4 E.A.D. 133, 147 (EAB 1992). Accordingly, we are remanding this issue so that the Region can conduct an evidentiary hearing.

III. *CONCLUSION*

We are remanding the issue of whether the species designated in the permit for toxicity testing are representative of indigenous species to the Region for an evidentiary hearing.[24] With respect to the other issues raised in the petitions filed by Buckeye and FPPA, review is hereby denied.

So ordered.

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[24] Although 40 C.F.R. § 124.91 contemplates that further briefing will ordinarily be required upon a grant of a petition for review, "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 J & L Specialty Products Corp.*, 5 E.A.D. 31, 83 n.65 (EAB 1994) (*quoting In re Amoco Oil Company Mandan, North Dakota Refinery*, 4 E.A.D. 954, 982 n.38 (EAB 1993).