IN RE CITY OF AMES, IOWA

NPDES Appeal No. 94-6

REMAND ORDER

Decided June 4, 1996

Syllabus

On April 4, 1996, the Environmental Appeals Board issued a decision concerning this appeal by the City of Ames, Iowa ("the City"). The City was appealing the denial by U.S. EPA Region VII of its evidentiary hearing request made in conjunction with a renewal of the City's NPDES permit for its waste water treatment plant. In that decision, the Board granted review of two issues relating to the City's request for a delayed compliance date for effluent limitations for two parameters, ammonia nitrogen and carbonaceous biochemical oxygen demand (5-day). In particular, the issues concerned Iowa's so-called "moratorium" provision, which has the effect of delaying the effective date for effluent limitations more stringent than those in a POTW's original NPDES permit by up to 12 years. The Board sought briefing on whether this provision could provide a legal basis for the Region to include a compliance schedule in a permit if the preconditions for such a schedule under Federal regulations are met. In its brief in response to the Board's April 4, 1996 decision, the Region cites (for the first time) other provisions of Iowa law, approved by EPA, that specifically authorize compliance schedules. The Region argues, however, that the City "already is fundamentally in compliance" with the new limits and therefore cannot be granted a compliance schedule under Federal regulation 40 C.F.R. § 122.47(a)(1), which requires compliance "as soon as possible." The City disputes that it can presently maintain compliance with the new, more stringent limits, particularly as the POTW's operating level increases toward design capacity.

Held: The Board cannot conclude as a matter of law that the City is not entitled to a compliance schedule. The matter is remanded to the Regional Administrator to reconsider, in light of this decision and the prior April 4, 1996 decision, whether the City is entitled to a compliance schedule as to either or both effluent limitations. If the City is not satisfied with the results of the reopened proceedings, it may submit a new evidentiary hearing request raising the issue.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Reich:

I. *BACKGROUND*

On April 4, 1996, the Environmental Appeals Board issued an Order Granting Review in Part and Remanding in Part in this matter. As fully described in that decision, this case involves an appeal by the

City of Ames, Iowa ("the City"), of a permit issued to it by U.S. EPA Region VII under the National Pollutant Discharge Elimination System ("NPDES") for the City of Ames waste water treatment plant (a publicly owned treatment works or "POTW"). Among the issues on appeal was the City's contention that it was entitled to a compliance schedule for ammonia nitrogen and carbonaceous biochemical oxygen demand (5-day) ("CBOD5"), allowing it to meet the effluent limitations for those parameters in 1998 rather than immediately upon permit issuance.

In support of its appeal, the City cited a provision of the Iowa Code, the so-called "moratorium" provision, which states:

> A publicly owned treatment works whose discharge meets the final effluent limitations which were contained in its discharge permit on the date that construction of the publicly owned treatment works was approved by the department shall not be required to meet more stringent effluent limitations for a period of ten years from the date the construction was completed and accepted but not longer than twelve years from the date that construction was approved by the department.

Iowa Code § 455B.173(2). Since the effluent limitations for ammonia nitrogen and CBOD5 in the permit at issue are more stringent than the effluent limitations for those two pollutant parameters contained in the City's original NPDES permit issued in 1986, the City argued that under Iowa Code § 455B.173(2), the State is precluded, until 1998, from requiring the City to comply with those more stringent effluent limitations. The City further contended that the Region would be similarly precluded, citing the decision of the EPA Administrator in *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172 (Adm'r 1990), *modification denied*, 4 E.A.D. 33 (EAB 1992), and the Tenth Amendment to the U.S. Constitution. *See In re City of Ames, Iowa*, 6 E.A.D. 374, 379-385 (EAB 1996).

In its April 4, 1996 decision, the Board discussed the legal framework under the Clean Water Act governing the establishment of compliance schedules. The Board made clear that the Region can include a schedule of compliance in the City's permit only if the State's water quality program authorized the inclusion of such a provision. As the Administrator stated in *Star-Kist*:

> [T]he only instance in which the permit may lawfully authorize a permittee to delay compliance after July 1,

> 1977, pursuant to a schedule of compliance, is when the water quality standard itself (or the State's implementing regulations) can be fairly construed as authorizing a schedule of compliance.

Star-Kist, 3 E.A.D. at 175.

The Board in its April 4, 1996 decision then went on to state that "[a]ny schedule of compliance included in the permit must comply with the requirements in the Clean Water Act or its implementing regulations defining and governing such provisions. To the extent Iowa's moratorium statute mandates a schedule of compliance that conflicts with these requirements, the Region would not be required to give effect to the moratorium statute." *City of Ames* at 382 n.11. The Board rejected the City's argument that the Tenth Amendment compelled a different result. *Id.*

Because the compliance schedule issue had been framed in terms of the applicability and effect of the moratorium statute, the Board then examined that statute within the framework articulated in *Star-Kist*. The Board noted that:

> The moratorium statute appears to contemplate *more* relief than would be authorized under Federal law, and thus may not be given full effect by EPA to the extent that the relief it provides goes beyond that permissible under Federal law. However, it may nonetheless be a sufficient expression of State intent to authorize whatever relief is permissible under Federal law.

City of Ames at 382. (footnote omitted). Therefore, the Board granted review of this issue and required the parties to brief it. In addition, since it appeared that the Region had never approved the moratorium statute, the parties were also required to brief the issue of whether the Region is precluded from giving effect to the moratorium statute because the statute was apparently never approved by EPA. *Id.* at 384.

On May 20, 1996, the Region submitted its brief on these two issues. The essence of the Region's brief was succinctly stated as follows:

> [T]he Board need not decide either issue. The Board need not reach the first issue because Iowa law and implementing regulations — wholly independent of

> the ten-year moratorium statute — explicitly authorize schedules of compliance to meet water quality standards. The Board need not reach the second issue because the provisions of State law authorizing schedules of compliance were approved by EPA.

Brief of Environmental Protection Agency in Response to Order of April 4, 1996, at 2. In explaining why these regulations had not been previously discussed in submissions to the Board, the Region stated that it "did not address these other provisions of state law in its earlier brief because the City relied on the ten-year moratorium statute — both in the State administrative proceedings and the proceedings before Region VII — to completely excuse compliance with the water quality standards in issue." *Id.* at 2 n.3.

The existence of the provisions explicitly authorizing compliance schedules under Iowa law,[1] which the Board had no reason to suppose existed based on the parties' earlier briefs, effectively moots the issues as to which the Board granted review, *i.e.*, whether the moratorium statute is of a character that could lay the necessary groundwork for authorizing a schedule of compliance and whether the Region is precluded from giving effect to the moratorium statute because it was apparently never approved by EPA. *City of Ames* at 382. However, this does not totally moot the appeal. The Board expressly reserved judgment on other issues in the City's petition pending resolution of the outcome of the moratorium issue. *See City of Ames* at 391 n.26. One issue for which the denial of an evidentiary hearing is being appealed is whether the immediate imposition of the daily maximum limits creates a risk of fines and penalties. Petition at 5. In a similar vein, the City also raises in its appeal the issue of whether the immediate imposition of the daily maximum limits would force the City to operate at a level below design capacity, thus depriving it of the full benefit of its economic investment.

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[1] Iowa Code § 455B.174(4)(a), which provides authority to the director of the Iowa Department of Natural Resources to issue permits to POTWs, states that "[t]he permits shall contain conditions and schedules of compliance as necessary to meet the requirements of this part of this division, the federal Water Pollution Control Act and the federal Safe Drinking Water Act." More detailed provisions relating to schedules of compliance in NPDES permits are set forth at Iowa Administrative Code § 567-64.7(4). These include a requirement that with respect to any discharge not in compliance with an applicable effluent limitation, the permittee be required to take "specific steps to achieve compliance," such steps to be achieved in "the shortest, reasonable period of time." IAC § 567-64.7(4)(*a*). The predecessors of these provisions, with language authorizing schedules of compliance identical to the current provisions, were part of the Iowa NPDES program as approved by EPA on August 10, 1978. *See* Brief of Environmental Protection Agency in Response to Order of April 4, 1996, at 4-5.

Petition at 4.[2] These issues are not framed in terms of the moratorium statute. However, because these issues related to the City's request for a compliance schedule, and the Board believed that the compliance schedule issue was dependent upon the issues relating to the moratorium statute for which it had granted review, the Board reserved decision on these issues. *See City of Ames* at 382, 391 n.26. While the moratorium-related issues may now be moot, the issues relating to the alleged need for a compliance schedule are not. Thus, the Board will now address the issues relating to the City's alleged entitlement to a compliance schedule in light of the Iowa statute specifically relating to compliance schedules and applicable Federal regulations.

II. *DISCUSSION*

The precise issue before the Board is not whether the City is entitled to a compliance schedule but rather whether the Regional Administrator properly denied the City's request for an evidentiary hearing on this issue. *City of Ames* at 375.[3] More particularly, as previously discussed, the City requested an evidentiary hearing on the factual issue of the City's ability to comply with the newly imposed effluent limits without a substantial reduction of the facility's operating capacity. The Regional Administrator denied the request for an evidentiary hearing as being immaterial. Under 40 C.F.R. § 124.75(a), an evidentiary hearing request must set forth "material issues of fact relevant to the issuance of the permit." As the Board stated in *In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993) "[a] factual dispute is material where, under the governing law, it might affect the outcome of the proceeding."

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[2] The factual issue of the City's ability to comply immediately was raised in the City's evidentiary hearing request, in which the City stated:

> Petitioner's Publicly Owned treatment works is able to meet the newly imposed effluent limits only by operating at a volume that is significantly less than the intended capacity for which the EPA approved construction permit was issued.
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> * * * * * * *
>
> This issue of fact is relevant to the pertinent decision as a determinant of the practicability of meeting the more stringent standards without a reasonable compliance schedule over which to amortize the public investment in treatment capacity.

Request for Evidentiary Hearing at 2.

[3] 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.

The Region argues on appeal that the City is not entitled to a compliance schedule because any compliance schedule would contravene Federal regulations, specifically 40 C.F.R. § 122.47(a)(1), which provides as follows:

> *Time for compliance.* Any schedules of compliance under this section shall require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA.

The Region argues that "the City already is fundamentally in compliance with the new and more stringent limits * * *." Region's Response to Petition at 18. This demonstrates, in the Region's view, that compliance is already "possible" within the meaning of section 122.47(a)(1). The Region argues further that any compliance schedule allowing additional time would not "require compliance as soon as possible," within the meaning of that section. Thus the Region would have us conclude that as a matter of law the City is not entitled to a compliance schedule and no hearing is required.

The City, disputing the Region's assertion respecting the compliance status of the facility, argues that there is "an immediate risk of non-compliance" with the permit's "one-day maximum" limits for ammonia nitrogen and CBOD5, a risk that increases as the POTW's operating level increases towards design capacity. Even at reduced capacity, the City "did experience two days of violation with the [proposed] 'maximum day' ammonia limitation." Petition at 5.[4]

In addressing these contentions in our previous decision, we stated as follows:

> Based on the arguments presented on appeal, we cannot conclude as a matter of law that the City is now "fundamentally in compliance" with the permit's effluent limitations for ammonia nitrogen and CBOD5 and that no compliance schedule can be included in the permit for one or both of those limitations. Rather,

[4] In its previous decision, the Board remanded to the Region the issue of whether it would be practicable to state the effluent limitations for ammonia nitrogen and CBOD5 as weekly and monthly averages. If it would be practicable, then the Region would have to remove the daily maximum limits from the permit. *City of Ames* at 19. Since the City's arguments as to its inability to comply immediately seem focused on its alleged inability to meet the daily maximum limits, it may well be that the compliance schedule issue would become moot if on remand the daily maximum limits were deleted from the permit.

> whether the City is able to comply with those limitations at this time is an issue of fact that should be decided in the first instance at the Regional level.

City of Ames at 385.

Nothing the Region has said in response to our previous decision changes our view of this matter. Under 40 C.F.R. §§ 124.74 and 124.75, the City is entitled to an evidentiary hearing on any material factual dispute. Since the issue of whether the City is entitled to a compliance schedule directly affects the permit's terms, factual issues having to do with the City's ability to comply immediately are clearly material (*i.e.*, could affect the outcome of the proceeding). Thus, we are remanding this issue to the Regional Administrator. On remand, the Regional Administrator is directed to reconsider the issue of whether the City is entitled to a compliance schedule as to either or both effluent limitations. If the City is not satisfied with the results of the reopened proceedings, it may submit a new evidentiary hearing request raising the issue.[5]

III. *CONCLUSION*

This matter is remanded to the Regional Administrator for further proceedings consistent with this decision.

So ordered.

[5] As previously noted, resolution of this issue may depend on how the Region addresses the issue of the daily maximum limits, remanded in our April 4 decision. *See supra* n.4.