IN THE MATTER OF BOISE CASCADE CORPORATION

NPDES Appeal No. 91–20

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided January 15, 1993

Syllabus

Boise Cascade Corporation seeks review of the denial of its request for an evidentiary hearing on certain issues arising out of U.S. EPA Region VI's renewal of Boise's NPDES permit for Boise's DeRidder, Louisiana pulp and paper mill. Boise appeals the denial of issues pertaining to the pH effluent limit for outfall 001, the pH effluent limit for outfall 002, the permit's dissolved oxygen requirements, and the permit's quarterly chronic biomonitoring requirement.

Held: With respect to outfall 001, if a pH range of 5.0 to 9.0 represents BCT for the groundwood-chemi-mechanical and groundwood-thermo-mechanical point source subcategories and if discharges falling within those two subcategories now make up a substantially larger percentage of the effluent coming out of outfall 001 than they did when the previous permit was issued, the anti-backsliding rule does not prevent the Region from relaxing the stringency of the pH effluent limitation for outfall 001. Accordingly, the following material issues of fact are being remanded to the Region for an evidentiary hearing: (1) whether discharges at Boise's facility falling into the groundwood-chemi-mechanical and groundwood-thermo-mechanical subcategories now make up a substantially larger percentage of the effluent coming out of outfall 001 than they did when the previous permit was issued; (2) whether a pH range of 5.0 to 9.0 standard units represents BCT for the groundwood-chemi-mechanical and groundwood-thermo-mechanical subcategories; and (3) if the first two issues are resolved in favor of Boise, what pH limitation for outfall 001 would accurately reflect the differing BCT levels of discharges coming out of outfall 001. With respect to the pH effluent limitation for outfall 002, the Region erred when it denied an evidentiary hearing on the ground that substantiating data had not been submitted to the Region during the comment period. Under the rules governing the permitting process, a commenter need not submit evidence substantiating a comment unless the Regional Administrator specifically directs the petitioner to do so. With respect to the dissolved oxygen requirements in the permit, the following material issue of fact is remanded to the Region for an evidentiary hearing: whether there is a reasonable potential that discharges from the mill will cause or contribute to a violation of Louisiana's water quality standard for dissolved oxygen. Boise's evidentiary hearing request also raised the following legal issues that are being remanded because they are intertwined with the material issue of fact mentioned above relating to the permit's dissolved oxygen requirements: (1) whether Louisiana's dissolved oxygen standard authorizes the Region to require that Boise cease discharging whenever the dissolved

oxygen concentration in the receiving waters falls below 5.0 mg/l at any of the specified monitoring stations; and (2) whether 40 CFR §430.01(c) either authorizes or compels the Region to include in the permit's effluent limitation for dissolved oxygen the requirement that the mill not resume discharging until the dissolved oxygen concentration in the receiving waters has been above the specified minimum for 24 hours. As for the other issues raised in Boise's petition, review is denied.

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

Opinion of the Board by Judge Reich:

I. *BACKGROUND*

Boise Cascade Corporation ("Boise") seeks review of the denial of its request for an evidentiary hearing on certain issues arising out of U.S. EPA Region VI's renewal of Boise's National Pollutant Discharge Elimination System (NPDES) permit. The permit is for Boise's DeRidder, Louisiana pulp and paper mill, which discharges into Cypress Creek and Bayou Anacoco in segment number 110507 of the Sabine River Basin.[1] Boise appeals the denial of issues pertaining to the pH effluent limits for two outfalls at the facility, the permit's dissolved oxygen requirements, and the permit's quarterly chronic biomonitoring requirement. For the reasons set forth below, the Environmental Appeals Board is remanding several issues for an evidentiary hearing and denying review with respect to the rest.

The evidentiary hearing request under consideration was filed by Boise on April 20, 1991. On August 13, 1991, the Region responded to Boise's request, granting an evidentiary hearing for some of the issues, and denying a hearing for other issues. The Region's justification for denying a hearing with respect to some of the issues was that the issues had not been raised during the comment period even though they were reasonably ascertainable at that time. On September 12, 1991, Boise filed a petition for review with the Agency's Chief Judicial Officer, challenging the Regional Administrator's partial denial of its evidentiary hearing request.[2] On October 22, 1991,

[1] Under the Clean Water Act, discharges into waters of the United States by point sources, like Boise's pulp and paper mill, must be permitted 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] At that time, the Agency's Judicial Officers held delegated authority to decide NPDES permit appeals. Subsequently, effective on March 1, 1992, the position of Judicial Officer was abolished, and all cases pending before the Judicial Officers, including this case, were transferred to the Environmental Appeals Board. *See* 57 Fed. Reg. 5321 (Feb. 13, 1992).

however, the Region issued a supplemental response to Boise's evidentiary hearing request, reversing its position on many of the issues that had been denied because they had not been raised during the comment period. The Region conceded that such issues had been raised during the comment period. It therefore reconsidered the evidentiary hearing request on the merits, granting a hearing with respect to many of the issues and denying a hearing with respect to others. In light of these changes in the Region's position, Boise filed the amended petition for review that is now under consideration by this Board.

II. *DISCUSSION*

Under the rules governing this proceeding, there is no appeal as of right from the denial of an evidentiary hearing request. Ordinarily a petition for review is not granted unless the denial is clearly erroneous or involves an exercise of discretion or policy that is important and, therefore, should be reviewed. *See* 40 CFR § 124.91(a); *In re Puerto Rico Sun Oil Company, Inc.*, NPDES Appeal No. 92–20, slip op. at 5 (EAB, Oct. 23, 1992); *In re Miami-Dade Water and Sewer Authority Department*, NPDES Appeal No. 91–14, slip op. at 5 (EAB, July 27, 1992). The petitioner has the burden of demonstrating that review should be granted. *Id.*

A. *The pH Limits for Outfall 001*

The effluent flowing out of outfall 001 is composed of discharges from the following five point source subcategories within the Pulp, Paper, and Paperboard Point Source Category (40 CFR Part 430): unbleached kraft (subpart A), paperboard from wastepaper (subpart E), BCT bleached kraft (subpart H), groundwood-chemi-mechanical (subpart L), and groundwood-thermo-mechanical (subpart M). For the unbleached kraft and paperboard from wastepaper subcategories, the Agency has promulgated national effluent guidelines that establish a pH range of 6.0 to 9.0 as achievable by application of the best conventional pollutant control technology ("BCT"). 40 CFR §§ 430.13, 430.53. For the BCT bleached kraft subcategory, national effluent guidelines establish a pH range of 5.0 to 9.0 as BCT. 40 CFR § 430.83. The Agency has not yet promulgated national effluent guidelines setting pH levels representing BCT for the groundwood-chemi-mechanical, and groundwood-thermo-mechanical subcategories. *See* §§ 430.123, 430.133. In the absence of guidelines establishing pH levels as BCT for those two categories, the Region was required to determine BCT limitations on a case-by-case basis based on the permit writer's best professional judgment (BPJ). 40 CFR § 125.3(c)(2).

Part I, section A of the NPDES permit imposes pH effluent limits of 6.0 to 9.0 standard units at outfall 001. Boise contends that the pH effluent limits for outfall 001 should be 5.0 to 9.0 standard units, a less stringent standard, or in the alternative that the low end of the pH range should be set somewhere between 5.0 to 6.0 standard units, depending on the relative proportion of the effluent attributable to the various subcategories. Boise asserts that while the effluent coming out of outfall 001 still contains discharges from production processes for which a pH range of 6.0 to 9.0 represents BCT, a much larger proportion of the effluent is now composed of discharges from production processes falling into the groundwood-chemi-mechanical and groundwood-thermo-mechanical subcategories than was the case when the previous permit was issued. Boise argues that, for those two subcategories, a pH range of 5.0 to 9.0 represents BCT. In support of its position, Boise notes that for those two subcategories, the Agency has promulgated national effluent guidelines setting a pH range of 5.0 to 9.0 as achievable by application of the "best practicable control technology currently available" ("BPT"). 40 CFR §§430.122, 430.132. Boise then asserts that BCT and BPT for a given pollutant and a given production process are usually identical. Boise argues, therefore, that until EPA establishes national effluent guidelines establishing pH levels representing BCT for those two processes, BCT should be deemed to be identical to BPT, in this case 5.0 to 9.0. Boise concludes that because a larger part of the effluent coming out of outfall 001 is now attributable to production processes for which a pH range of 5.0 to 9.0 standard units represents BCT, the lower end of the pH range for outfall 001 should be set either at 5.0 or, in the alternative, at a production-proportioned level somewhere between 5.0 and 6.0 standard units.

The Region responds that Boise's previous permit contained pH limits of 6.0 to 9.0 standard units and that the Agency's "anti-backsliding" rule precludes the Region from replacing the old standard with a less stringent new standard. That policy provides as follows:

> *Reissued permits.* (1) Except as provided in paragraph (l)(2) of this section when a permit is renewed or reissued, interim effluent limitations, standards or conditions must be at least as stringent as the final effluent limitations, standards, or conditions in the previous permit (unless the circumstances on which the previous permit was based have materially and substantially changed since the time the permit was issued and would constitute cause for permit

> modification or revocation and reissuance under § 122.62).

40 CFR § 122.44(l)(1). Section 122.62, mentioned in the provision quoted above, provides that the following constitutes cause for modification of a permit:

> There are material and substantial alterations or additions to the permitted facility or activity (including a change or changes in their permittee's sludge use or disposal practice) which occurred after permit issuance which justify the application of permit conditions that are different or absent in the existing permit.

40 CFR § 122.62(a)(1).

Boise contends that the anti-backsliding policy should not be applied in this case because a larger percentage of the effluent is now made up of discharges from production processes for which a pH range of 5.0 to 9.0 standard units represents BCT. Boise argues that this change in the composition of the effluent is a material and substantial alteration to the permitted activity and therefore falls within the exception to the anti-backsliding rule.[3]

Boise's argument hinges on the following two assertions: (1) a pH range of 5.0 to 9.0 standard units represents BCT for the groundwood-chemi-mechanical and groundwood-thermo-mechanical subcategories, and (2) discharges in those two subcategories now make up a substantially larger proportion of the effluent coming out of outfall 001 than they did when the previous permit was issued. These two assertions raise issues of fact.[4] An evidentiary hearing,

[3] Boise does not actually invoke 40 CFR § 122.62(a)(1), but cites instead 40 CFR § 122.44(l)(2)(i)(A), which has language similar to that in 40 CFR § 122.62(a)(1) but which does not appear to be applicable to Boise. Application of the provision cited by Boise is triggered by the publication of national effluent guidelines for the chemical and subcategory in question after the previous permit was issued. In this case, no national effluent guidelines relating to pH in the pertinent subcategories were published after the issuance of the previous permit.

[4] Boise suggests that the first issue should be resolved in its favor as a matter of law. Boise takes the position that the Region may presume that a pH range of 5.0 to 9.0 standard units represents BCT for the groundwood-chemi-mechanical and groundwood-thermo-mechanical subcategories because the national effluent guidelines establish a pH range of 5.0 to 9.0 standard units as achievable by application of the best practicable control technology currently available (BPT) for those two subcategories. Boise argues that if national effluent guidelines have established BPT

however, is only appropriate for *material* issues of fact. 40 CFR § 124.75(a)(1). To determine whether these issues are material issues of fact, the following threshold issue must be resolved: assuming, as Boise contends, that a pH range of 5.0 to 9.0 represents BCT for the groundwood-chemi-mechanical and groundwood-thermo-mechanical subcategories, and assuming that discharges in those two subcategories now make up a substantially larger percentage of the effluent coming out of outfall 001 than they did when the previous permit was issued, does the anti-backsliding rule still preclude the Region as a matter of law from altering the effluent limitations for pH at outfall 001?

For the following reasons, we believe that if discharges from processes for which a pH range of 5.0 to 9.0 standard units represents BCT now make up a significantly larger percentage of the effluent coming out of outfall 001, then relaxing the pH limits for that outfall would not violate the anti-backsliding prohibition. When the Agency imposes technology-based effluent limitations, it must apply any national effluent guidelines applicable to the production processes involved. 40 CFR § 125.3(c)(1). Thus, if the discharge from a particular outfall is attributable to a production process for which national effluent guidelines set a pH range of 6.0 to 9.0 as BCT, and if the facility stops that production process and starts a different production process falling into a different point source subcategory for which national effluent guidelines set a pH range of 5.0 to 9.0 as BCT, then clearly a substantial alteration in the permitted activity has taken place for purposes of the modification provisions at Section 122.62. The reason is that, if the discharge from the outfall had been attributable to the second production process when the permit was first issued, the Region would have been required to impose

---

but not BCT for a given pollutant in a given subcategory, then until guidelines are published establishing BCT, the Agency may presume that BCT is equal to BPT when making a best professional judgment determination. We disagree. While BCT and BPT for a given pollutant in a given subcategory are frequently set at the same level, they cannot be presumed equal in all cases. This conclusion is supported by the regulations governing best professional judgment determinations at 40 CFR § 125.3(d), which set out factors that must be considered by the Region when it determines the appropriate BCT and BPT levels for a given pollutant in a given subcategory. The factors to be considered in a BPT determination and the factors to be considered in a BCT determination overlap to a great extent, but there are important differences in the factors that could result in differing BCT and BPT levels. In particular, the cost/benefit analysis to be performed in a BPT determination is different from the cost/benefit analysis that must be performed in a BCT determination. *Compare* 40 CFR § 125.3(d)(1)(i) (for BPT requirements) *with* 40 CFR § 125.3(d)(2)(i) and (ii) (for BCT requirements). *See American Paper Institute* v. *Environmental Protection Agency,* 660 F.2d 954, 957, 960 n.14, 963 (4th Cir. 1981) (BCT is at least equal to BPT, but in some cases is more stringent than BPT).

pH levels of 5.0 to 9.0 for the outfall. This analysis would also apply in a case where BCT levels for one or both of the production processes are based on the permit writer's best professional judgment. *See* 40 CFR § 125.03(c)(2) (where no national effluent guidelines apply, must set technology-based effluent limitations on a case-by-case basis applying specified factors). By the same reasoning, it is also true that when the constituent discharges making up the effluent coming out of a particular outfall each have different BCT limits for pH and there has been a significant change in the relative proportions of those discharges since the previous permit was issued, a material and substantial alteration of the permitted activity occurs, justifying modification under Section 122.62(a)(2) and triggering the exception to the anti-backsliding rule.[5] In that event, the Region would not only be free to alter the effluent limitation under the exception to the anti-backsliding rule, but also would be required to do so because the reasons justifying a modification under Section 122.62(a)(2) would also justify an adjustment of the limitation when the permit is renewed.

Thus, assuming a pH range of 5.0 to 9.0 represents BCT for the groundwood-chemi-mechanical and groundwood-thermo-mechanical subcategories and assuming discharges falling within those two subcategories now make up a substantially larger percentage of the effluent flowing from outfall 001, then an appropriate adjustment to the pH limits for outfall 001 is not barred by the anti-backsliding rule and is in fact required. We conclude, therefore, that the two factual issues identified above are material issues of fact not precluded from consideration under the anti-backsliding rule, which should be resolved at an evidentiary hearing. If both of these factual issues are resolved in Boise's favor, a third factual issue must be resolved at the evidentiary hearing, as follows: what alteration of the pH limitation would be appropriate given the change in the composition of the effluent since the previous permit was issued?

[5] Boise argues in its amended petition that the anti-backsliding rule does not apply in this case because the "Mill's groundwood-chemi-mechanical and groundwood-thermo-mechanical production has increased substantially." In context, we have read this statement to mean that discharges from those two processes now make up a substantially larger percentage of the effluent coming out of outfall 001. If we have misread Boise's argument, *i.e.*, if production from those two subcategories constitutes essentially the same percentage of the total effluent coming out of outfall 001 as it did when the first permit was issued, then Boise's argument must be rejected. A simple increase in the total effluent coming out of outfall 001 without a change in the relative proportions of the constituent discharges would not constitute a material and substantial alteration of the permitted activity justifying an exception to the anti-backsliding rule, at least with respect to the pH limitation for outfall 001.

We are remanding these three issues of fact to the Regional Administrator so that an evidentiary hearing on them may be scheduled.

B. *The pH Limits for Outfall 002*

Part I, Section A, of the permit imposes pH effluent limits of 6.0 to 9.0 standard units at outfall 002. These limits were established on the basis of the permit writer's best professional judgment as to the pH levels representing BCT. The effluent coming out of outfall 002 apparently does not fall within a particular point source category. The Fact Sheet states only that "Outfall 002 represents noncontact cooling water and stormwater runoff from the mill." (AR 00152.)

Boise's argument concerning the pH limitations for outfall 002 breaks down into two distinct issues. First, Boise argues that in making the best professional judgment determination concerning the pH limits that represent BCT for the outfall, the Region did not consider the site-specific factors set out in 40 CFR §§ 125.3(c)(2), 125.3(d)(2), as it was required to do, but instead simply imposed limitations that it had imposed on other, similarly situated industrial facilities. This issue was not raised during the comment period even though it was reasonably ascertainable at that time. Boise's Comments on Draft Permit, at 14 (AR 00316). Accordingly, it was not preserved for an evidentiary hearing request. *See* 40 CFR § 124.76 (obligation to raise issues during public comment period if reasonably ascertainable). Review of this issue is therefore denied.

The second issue raised by Boise in connection with outfall 002 is whether the effluent limitation for pH should be reduced to 5.0 to 9.0 because some of the water coming out of outfall 002 is acidic storm water that drains into the facility from off-site. Boise argues that 40 CFR § 122.45(g) allows the Region, under specified circumstances, to adjust effluent limitations to account for pollutants in the intake water. In its response to the petition for review, the Region states that an evidentiary hearing was denied because substantiating data were not provided during the comment period. *See* Response to Comments, at 17 (AR 00249); Region's Response to Petition, at 4.[6] Boise correctly points out, however, that it was not required to submit evidence during the comment period. Under the

[6]The Region, in denying an evidentiary hearing on this issue, stated that "Boise Cascade has not submitted any data to validate the existence of acidic off-site drainage contributions to Outfall 002, in support of its proposed 5.0 to 9.0 standard units." Region's Response to Boise's Evidentiary Hearing Request, at 3 (AR 00049). While this statement, by itself, is ambiguous as to whether the failure to submit validating data relates to the comment period or the permit application itself, the response to the petition focuses on the comment period.

rules governing the permitting process, the petitioner need not submit evidence substantiating a comment unless the Regional Administrator specifically directs the petitioner to do so. 40 CFR § 124.13 ("Commenters shall make supporting materials not already included in the administrative record available to EPA *as directed by the Regional Administrator.*") (emphasis added); 49 Fed. Reg. 38,042 (September 26, 1984) ("Generally supporting information would not be required to be submitted during the comment period"). In this case, there is nothing in the administrative record to suggest that the Regional Administrator directed the petitioner to submit information during the comment period. It is clear, then, that the petitioner did enough during the comment period to preserve the issue for an evidentiary hearing request. The Region erred, therefore, when it denied an evidentiary hearing on the ground that substantiating data had not been submitted to the Region during the comment period. We recognize that there may in fact be an alternative, proper basis for denying an evidentiary hearing on this issue. On the other hand, there may be data in the record to support the conclusion that Boise has raised a material issue of fact that should be resolved at an evidentiary hearing. Based on the record before us, however, we are not in a position to make such a determination, and in any event, such a determination should be made in the first instance by the Regional Administrator. We hold only that the Region's stated justification for denying an evidentiary hearing on this issue—that substantiating information was not presented during the comment period—is an improper basis for denying an evidentiary hearing request. Accordingly, we are remanding this issue to the Regional Administrator. On remand, the Regional Administrator should reconsider Boise's request in light of the foregoing discussion.

C. *Dissolved Oxygen Concentrations*

Part II, section G, of the NPDES permit requires discharges from the mill to cease whenever dissolved oxygen measured at any of the monitoring stations falls below 5.0 mg/l. The permit condition also provides that once the mill has ceased operations because dissolved oxygen has dropped below the limit, the mill is prohibited from recommencing discharges until 24 hours after dissolved oxygen measured at all of the monitoring stations has risen to at least 5.0 mg/l. Part II, section H, of the permit requires Boise to monitor the receiving stream for dissolved oxygen at specified locations upstream and downstream of the mill. These permit conditions were

included in the permit because the Region believed they were necessary to satisfy the following Louisiana water quality standard:[7]

> 3. Dissolved Oxygen
>
> The following dissolved oxygen (DO) values represent minimum criteria for the type of water specified. Naturally occurring variations below the criterion specified may occur for short periods. These variations reflect such natural phenomena as the reduction in photosynthetic activity and oxygen production by plants during hours of darkness. However, no waste discharge or human activity shall lower the DO concentration below the specified minimum.
> * * *
>
> a. Fresh Water
>
> For a diversified population of warm-water biota including sport fish, the DO concentration shall be at or above 5 mg/l.

[7] The requirements in the permit relating to dissolved oxygen were in the draft permit sent to the State of Louisiana for certification pursuant to Clean Water Act § 401(a), 33 U.S.C. § 1341(a) and 40 CFR § 124.53(a). With the exception of one limitation not relevant here, the State of Louisiana indicated in three certification letters to the Region that it was "reasonable to expect that the discharge will comply with applicable provisions of Section 301, 302, 303, 306 & 307 of the Water Pollution Control Act as amended." (AR 00223–28.) However, despite these certification letters, the requirements in the permit relating to dissolved oxygen cannot be said to be "attributable to State certification" within the meaning of 40 CFR § 124.55(e). That section provides that if a permit requirement is "attributable to State certification," any challenge to it must be brought in State court and may not be brought in a permit appeal before the Board. While the certification letters in this case indicate that the dissolved oxygen requirements in the permit will meet Louisiana water quality standards, the letters leave open the possibility that the requirements can be made less stringent and still comply with Louisiana's water quality standard. Because of this ambiguity in the certification letters, the dissolved oxygen requirements cannot be said to be "attributable to State certification." *See In re General Electric Company, Hooksett, New Hampshire,* NPDES Appeal No. 91–13, at 471 (EAB, January 5, 1993) (a permit requirement is not "attributable to State certification" unless the certification letter communicates the idea that the permit requirement cannot be made less stringent and still comply with the State water quality standard); 44 Fed. Reg. 32,880 (June 7, 1979)(a State certification letter stating merely that a particular permit condition will not violate a State water quality standard is ambiguous in that it still leaves open the possibility that the condition could be made less stringent and still comply with the water quality standard).

La. Admin. Code 33:IX.1113.C.3.

DO limits may not be included in the permit unless such limits are "necessary" to ensure compliance with Louisiana's water quality standard, *i.e.,* unless discharges from the mill have a reasonable potential for causing or contributing to a violation of that standard. 33 U.S.C. § 1311(b)(1)(C); 40 CFR § 122.44(d)(1)(iii). In its evidentiary hearing request, Boise raised the following two issues:

> (1) Does the evidence show that dischargers other than the DeRidder Mill or natural conditions or both are responsible for reductions in instream dissolved oxygen concentrations in Bayou Anacoco?
>
> (2) Does the evidence show that discharges from the DeRidder Mill do not necessarily have a significant effect on instream dissolved oxygen concentrations in Bayou Anacoco?

Request for an Evidentiary Hearing, at 34 (AR 00034). Boise's evidentiary hearing request on these two issues raises the issue of the effect of its discharges. We read this as essentially raising the issue of whether discharges from its mill have a reasonable potential for causing or contributing to a violation of Louisiana's DO standard. Presumably, the Region has determined that Boise's discharges do present such a potential, but the factual basis for the Region's determination is not apparent in the administrative record before us. The Fact Sheet merely states that "[t]he proposed permit contains requirements as necessary to comply with the dissolved oxygen (D.O.) standard of 5.0 mg/l for this receiving water" (AR 00149). The response to comments similarly states that the permit requirement "is required in accordance with the current State water quality standards and the water quality management plan, pursuant to 40 CFR 122.44(d)" (AR 00247). Neither document provides enough factual information to allow us to conclude as a matter of law that the mill's discharges present a reasonable potential for violating Louisiana's standards. We conclude, therefore, that whether Boise's discharges will cause or contribute to, or have a reasonable potential for causing or contributing to, a violation of Louisiana's water quality standard is a material issue of fact. *See Miami-Dade Water and Sewer Authority Department,* NPDES Appeal No. 91–14, at 11 (EAB, July 27, 1992) (whether Miami-Dade's effluent causes, has the reasonable potential for causing, or contributes to a violation of Florida's toxicity standard is a material issue of fact). Accordingly, we are remanding the issue

so that the Regional Administrator may schedule an evidentiary hearing on the issue.

In its evidentiary hearing request, Boise also challenged the permit's dissolved oxygen requirement on the ground that it does not reflect the fact that the receiving stream at issue here is subject to natural, daily fluctuations of instream dissolved oxygen concentrations below 5.0 mg/l. Boise points out that under the Louisiana standard, "naturally occurring variations below the criterion specified may occur for short periods." La. Admin. Code 33:IX.1113.C.3. Boise argues that the permit's requirement that the mill cease discharging from outfall 001 whenever the DO concentration at any of the monitoring stations falls below 5.0 mg/l is inappropriate in light of the sentence quoted above. In response, the Region cites the following sentence from the Louisiana dissolved oxygen standard as authority for the challenged effluent limitations: "However, no waste discharge or human activity shall lower the DO concentration below the specified minimum." *Id.* To resolve this issue requires an interpretation of how these two sentences quoted by the parties relate to each other, which is a legal issue. Nevertheless, we are remanding the issue for an evidentiary hearing for two reasons. First, the issue will be mooted if the Administrative Law Judge determines that the mill's effluent has no reasonable potential for causing or contributing to a violation of Louisiana's standard. Second, because the legal issue of how to reconcile the two sentences of the Louisiana standard is interlaced with the factual issue of whether the mill's effluent has a reasonable potential for violating the Louisiana standard, the legal issue may be decided by the Administrative Law Judge along with the factual issue. *See* 40 CFR § 124.74(b)(1); *In re 446 Alaska Placer Mines More or Less,* NPDES Appeal No. 84–13 (CJO, April 2, 1985).[8]

Another issue raised by Boise relating to the permit's DO effluent limitation is whether the 24-hour provision in the permit is reasonable. That provision requires that even after the DO concentration in the receiving waters has risen above the specified minimum, the mill must still wait 24 hours before resuming discharging from outfall 001. Boise sought an evidentiary hearing on whether this 24-hour period is necessary to ensure compliance with Louisiana's water quality standard. In its response to Boise's evidentiary hearing request,

[8] It is possible, of course, that the Board may be faced with the issue later in an appeal of the Administrative Law Judge's decision on the issue. In that event, the parties are directed to include in their appellate briefs a full discussion of the relationship between the two sentences of the Louisiana regulation relied on by the parties.

the Region explains that the 24-hour requirement is compelled by 40 CFR § 430.01(c), which contains a definition of "non-continuous discharger," as follows:

> [A] mill which is prohibited by the NPDES authority from discharging pollutants during specific periods of time for reasons other than treatment plant upset control, such periods being at least 24 hours in duration. * * *

The Region explains that:

> Since the facility has been classified as a "non-continuous discharger" subject to annual average effluent limitations, it must be prohibited by the NPDES authority from discharging pollutants during specific periods of time, such periods being at least *24 hours* in duration.

Response to Request for Evidentiary Hearing, at 3 (AR 00049) (emphasis in the original). The Region's argument that 40 CFR § 430.01(c) authorizes (or possibly even compels) the 24-hour requirement raises the legal issue of how to interpret Section 430.01(c). Whether it raises any material issue of fact is not clear from the Region's argument. The Region asserts that the facility *has been* classified as a "non-continuous discharger" but it is not clear from the administrative record that this is the case. We are nevertheless remanding this issue for an evidentiary hearing. This is because the issue will be mooted if the Administrative Law Judge determines that the mill's effluent has no reasonable potential for causing or contributing to a violation of Louisiana's water quality standard for dissolved oxygen. In addition, the legal issue of how to interpret Section 430.01(c) is sufficiently intertwined with the factual issue of whether the mill's effluent has the potential for causing a violation of Louisiana's standard that the legal issue may be decided by the Administrative Law Judge along with the factual issue.[9]

[9] The Board may also be faced with this issue again if the Administrative Law Judge's decision on the issue is appealed. In that event, the parties are directed to include in their appellate briefs a full discussion of whether the 24-hour requirement is either required or authorized by Section 430.01(c).

D. *Chronic Biomonitoring*

Part I, Section A, and Part II, Section Q, of the permit require quarterly chronic biomonitoring of the mill's effluent. In its evidentiary hearing request, Boise raised the following four issues related to these two parts of the permit:

> (1) Are the Permit's requirements for quarterly chronic biomonitoring in Parts I.A. and II.Q. unauthorized or otherwise unlawful because they have not been properly promulgated as rules or because rules authorizing the imposition of such requirements on a case-by-case basis have not been promulgated?
>
> (2) Does the evidence show that there is no reasonable potential for chronic toxicity of the type that would be revealed by the chronic biomonitoring required in Parts I.A. and II.Q. of the Permit?
>
> * * *
>
> (5) Are the requirements in Parts I.A. and II.Q. of the Permit for quarterly chronic biomonitoring inappropriate or unlawful under 33 U.S.C. § 1318(a) * * *?
>
> (6) Are the requirements in Parts I.A. and II.Q. of the Permit for quarterly chronic biomonitoring unreasonable, arbitrary and capricious, or otherwise an abuse of discretion?

Request for an Evidentiary Hearing, at 26–27 (AR 00026–27).

Initially, the Regional Administrator denied an evidentiary hearing with respect to all of the issues on the ground that they had not been raised during the comment period. Response to Evidentiary Hearing Request, at 4 (AR 00050). However, in a supplemental response to the evidentiary hearing request, the Region reversed itself and concluded that the issues had been raised during the public comment period. It then granted an evidentiary hearing on the issue of whether the requirement for quarterly chronic biomonitoring is reasonable, but denied an evidentiary hearing on the issue of whether

the Agency is authorized to require biomonitoring in an NPDES permit. In denying an evidentiary hearing on the latter issue, the Region explained that biomonitoring is authorized by Clean Water Act § 308, 33 U.S.C. § 1318 and by 40 CFR § 122.48(a). The Region also explained that biomonitoring is necessary to achieve Louisiana's narrative criterion for toxic substances and that it was therefore required under Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) and 40 CFR § 122.44(d)(1). Supplemental Response to Evidentiary Hearing Request, at 2 (AR 00326).[10]

On appeal, Boise states that it does not dispute that EPA has authority to impose reasonable biomonitoring requirements and that EPA could impose the biomonitoring at issue if those requirements were in fact necessary to achieve Louisiana's narrative criterion for toxic substances. Boise states that the real issue is whether the biomonitoring requirements in the permit "are reasonable or necessary to achieve Louisiana's narrative criterion for toxic substances." Amended Notice of Appeal and Petition for Review, at 11.

We are of the view that the Region has already granted the evidentiary hearing that Boise seeks. The Region has granted a hearing on "whether the requirement for quarterly chronic biomonitoring is reasonable." Region's Supplemental Response to Boise's Evidentiary Hearing Request, at 2 (AR 00326). While this grant of review does not use the word "necessary" in framing the issue, in our view an evidentiary hearing on whether the biomonitoring requirements are "reasonable" is essentially an inquiry into whether the requirements are "necessary" to ensure compliance with the State water quality standard (*i.e.*, whether the mill's effluent has a reasonable potential for causing or contributing to a violation of a state water quality standard).[11] For this reason, we believe that the supplemental response to Boise's evidentiary hearing request is best read as granting the evidentiary hearing that Boise seeks. Accordingly, in the evidentiary hearing on whether the biomonitoring requirements are reasonable, the Region is directed to allow Boise to introduce evidence

[10] The biomonitoring requirements in the permit are not "attributable to State certification" within the meaning of 40 CFR § 124.55(e), for the same reasons that the permit requirements relating to dissolved oxygen are not "attributable to State certification." *See* footnote 7 *supra*. In addition, the biomonitoring requirements were altered in certain respects after the Region had received Louisiana's certification letters. *Compare* Proposed Permit (AR 00185) *with* Final Permit (AR 00269).

[11] *See Miami-Dade Water and Sewer Authority Department,* NPDES Appeal No. 91–14, at 10 (EAB, July 27, 1992) (a permit condition is deemed "necessary" to ensure compliance with a water quality standard if the subject discharge "will cause, ha[s] the reasonable potential to cause, or contribute to an excursion above any State water quality standard * * *").

on whether the disputed biomonitoring requirements are necessary to meet Louisiana's narrative toxicity standard.[12] In view of our conclusion that the Region has already granted what Boise seeks, we see no reason to grant review of this issue.

III. *CONCLUSION*

In sum, the following issues are remanded to the Region for an evidentiary hearing: (1) whether discharges at Boise's facility falling into the groundwood-chemi-mechanical and groundwood-thermo-mechanical subcategories now make up a substantially larger percentage of the effluent coming out of outfall 001 than they did when the previous permit was issued; (2) whether pH limits of 5.0 to 9.0 standard units represent BCT for the groundwood-chemi-mechanical and groundwood-thermo-mechanical subcategories; (3) if the first two issues are resolved in favor of Boise, what pH limitation for outfall 001 would accurately reflect the differing BCT levels of discharges coming out of outfall 001; (4) whether there is a reasonable potential that discharges from the Mill will cause or contribute to a violation of Louisiana's water quality standard for dissolved oxygen; (5) whether Louisiana's dissolved oxygen standard authorizes the Region to require that Boise cease discharging whenever the DO concentration in the receiving waters falls below 5.0 mg/l at any of the specified monitoring stations; (6) whether 40 CFR § 430.01(c) either authorizes or compels the Region to include the 24-hour requirement in the permit's effluent limitation for dissolved oxygen. In addition, the Region shall determine whether, in light of this opinion,

[12] In all probability, Boise's confusion about the scope of the Region's grant of an evidentiary hearing on the biomonitoring requirements can be traced to another part of the Region's Supplemental Response to Boise's Evidentiary Hearing Request, in which the Region explains why it denied an evidentiary hearing on whether the biomonitoring requirements are "unlawful or not supported by the evidence or sound policy." In that discussion, the Region explains that the Agency is authorized to impose biomonitoring conditions under Clean Water Act § 308, 33 U.S.C. § 1318 and 40 CFR § 122.48(a). The Region also states that under 40 CFR § 122.44(d)(1), the Agency is required to include conditions in the permit as necessary to achieve the States' water quality standards as established under Clean Water Act § 303, 33 U.S.C. § 1313. In light of these statutory and regulatory mandates, the Region concludes that the biomonitoring requirements are "not only legal, but appropriate and necessary." Region's Supplemental Response to Boise's Evidentiary Hearing Request, at 2 (AR 00326). Despite the Region's use of the word "necessary" in its conclusion, we believe the Region did not mean to take a position on the *factual* issue of whether the biomonitoring requirements are "necessary" to ensure compliance with Louisiana's narrative toxicity standard, since this issue would be within the scope of the hearing granted. In all probability, when the Region concluded that the biomonitoring requirements are "necessary," it was expressing its position on the *legal* issue of whether the Region has authority to impose biomonitoring requirements *if* they are in fact necessary to ensure compliance with a State's narrative toxicity standard.

an evidentiary hearing should be granted on the issue of whether the pH limitation for outfall 002 should be changed to take into account the pH of the stormwater flowing into the facility from off-site. As for the other issues raised in Boise's amended petition, review is denied.

So ordered.