IN RE CITY OF YANKTON

NPDES Appeal No. 93-2a

ORDER DENYING REVIEW

Decided July 1, 1994

Syllabus

U.S. EPA Region VIII appeals the Initial Decision of Administrative Law Judge Spencer T. Nissen ("Presiding Officer") deleting a pretreatment program requirement from a National Pollution Discharge Elimination System ("NPDES") permit for the City of Yankton's ("Yankton" or "the City") publicly owned treatment works ("POTW"). The Initial Decision was issued upon the conclusion of an evidentiary hearing conducted under the procedures set out at 40 C.F.R. §§ 124.71 through 124.90. The sole issue at the evidentiary hearing was whether the Region should have included the pretreatment program in the permit. The Region included a pretreatment program in the Yankton permit under the authority provided in 40 C.F.R. § 403.8(a). By its terms, § 403.8(a) provides that a Region may only require a pretreatment program at POTWs with less than 5 mgd if the Region finds a "circumstance," such as the nature or volume of industrial influent which warrants imposition of a POTW pretreatment program to prevent an occurrence of interference or pass through. 40 C.F.R. § 403.8(a). Here, following a one-day hearing, the Presiding officer determined that the pretreatment program must be deleted from the City's NPDES permit on the grounds that the Region had failed to make an affirmative case to support the condition under 40 C.F.R. § 124.85(a)(2). In particular, the Presiding Officer concluded that the Region had failed to establish a nexus between a "circumstance" that might result in an occurrence of interference or pass through and the need for a POTW pretreatment program. The Region has appealed. For the reasons set forth below, review of the Region's petition is denied.

Held: The Presiding Officer did not clearly err in interpreting § 403.8(a) to require the Region to show some nexus between the nature and character of the City's industrial influent and the role a City-run pretreatment program could play in preventing any interference or pass through from the industrial users. Having failed to present any evidence to show a nexus, the Presiding Officer correctly concluded that the Region had not supported the permit condition, in the first instance, and thus the permit condition must be deleted.

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

Opinion of the Board by Judge Firestone:

U.S. EPA Region VIII appeals the Initial Decision of Administrative Law Judge Spencer T. Nissen ("Presiding Officer") deleting a pretreatment program requirement from a National Pollution Discharge Elimination System ("NPDES") permit for the City of Yankton's ("Yankton"

or "the City") publicly owned treatment works ("POTW"). The Initial Decision was issued upon the conclusion of an evidentiary hearing conducted under the procedures set out at 40 C.F.R. §§ 124.71 through 124.90. The sole issue at the evidentiary hearing was whether the Region should have included the pretreatment program in the permit.

The Yankton POTW has a design flow of less than 5 million gallons a day[1] ("mgd") and receives and treats wastewater from both domestic residences and industrial facilities.[2] The industrial dischargers are subject to certain "pretreatment standards," which are designed to prevent the introduction into the POTW of substances that will interfere with the operation of the POTW ("interference") or of toxic chemicals that will pass through the POTW without adequate treatment ("pass through").[3] The Region included a pretreatment program in the Yankton permit under the authority provided in 40 C.F.R. § 403.8(a). By its terms, § 403.8(a) provides that a Region may only require a pretreatment program at POTWs with less than 5 mgd if the Region finds that such a program is warranted to prevent an occurrence of interference or pass through. 40 C.F.R. § 403.8(a).[4] Here, following a one-day hearing, the Presiding Officer ordered the Region to delete the pretreatment program from the City's NPDES permit on the grounds that the Region had failed to present evidence to show that a program was "warranted" to prevent such occurrences. The Region

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[1] As discussed *infra* there is some dispute between the Region and Yankton as to the POTW's precise capacity, but both agree it is below 5.0 mgd.

[2] POTWs are primarily designed to receive and treat wastewater discharges from domestic residences. Before POTWs can discharge into waters of the United States, the Clean Water Act requires that they provide "secondary treatment" to such waste water. CWA § 301(b)(1)(B), 33 U.S.C. § 1311; 40 C.F.R. § 133.102. The Clean Water Act also requires POTWs to achieve any effluent limitations necessary to ensure compliance with applicable State water quality standards. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

[3] Because POTWs are generally not designed to handle wastewater from industrial discharges, such discharges can cause three types of problems for POTWs: interference with the functioning of the POTW, pass through of untreated toxic pollutants, and contamination of POTW sludge. To prevent these problems, the Clean Water Act requires that industrial dischargers (non-domestic) comply with certain "pretreatment standards" before discharging into a POTW. Clean Water Act § 307(b), 33 U.S.C. § 1317(b). General pretreatment prohibitions are set out at 40 C.F.R. § 403.5(a). Specific pretreatment prohibitions for preventing interference are set out at 40 C.F.R. § 403.5(b). To prevent pass through of toxic chemicals, the Agency has also adopted regulations that are keyed to specific categories of industrial polluters ("categorical standards"). These categorical standards focus on the same list of thirty-four industries and sixty-five toxic pollutant categories that are the focus of the best available technology economically achievable ("BAT") standards and the new source performance standards under the Clean Water Act. The categorical standards are meant to be as stringent as the BAT standards that would apply if the industrial dischargers discharged directly into the waters of the United States rather than into POTWs.

[4] The terms "interference" and "pass through" are defined *infra* at n.7.

has appealed arguing that it did make the necessary showing. For the reasons set forth in the discussion below, we conclude that the Region has failed to carry its burden of showing that the Presiding Officer's decision was clearly erroneous or involves an exercise of discretion or an important policy matter that should be reviewed by the Environmental Appeals Board. Accordingly, review of the Region's petition is denied.

I. *BACKGROUND*

In 1989, the Region issued an NPDES permit to the City authorizing discharges from its POTW into the Missouri River. The permit, which contains secondary treatment requirements also included a pretreatment program as provided for in § 403.8(a).[5] As noted above, the sole issue in this case is whether the Region properly required a pretreatment program in the permit.[6] The resolution of this issue turns on the application of section 403.8(a), which provides in pertinent part as follows:

> *POTW's required to develop a pretreatment program.* * * * The Regional Administrator or Director may require that a

[5] A POTW administering a pretreatment program will have authority to, among other things: (1) Deny or condition new or increased contributions of pollutants or changes in the nature of the pollutants; (2) Require compliance with applicable pretreatment standards and requirements; (3) Control through permit, order, or similar means, the contribution to the POTW by each user; (4) Require each industrial user to develop a compliance schedule for the installation of technology to ensure compliance with pretreatment standards; (5) Carry out inspection, surveillance, and monitoring procedures necessary to determine, independent of information supplied by industrial users, compliance with pretreatment standards; and (6) Obtain remedies for noncompliance, including injunctive relief and penalties in at least the amount of $1000 a day for each violation. 40 C.F.R. § 403.8(f)(1). A POTW administering a pretreatment program must fulfill the following duties: (1) Identify and locate all possible industrial users; (2) Identify the character and volume of pollutants contributed to the POTW by the industrial users; (3) Notify industrial users of pretreatment regulations and categorical standards; (4) Analyze self-monitoring reports and other notices submitted by industrial users; (5) Randomly sample and analyze the effluent from industrial users and conduct surveillance to detect noncompliance; and (6) Publish annually a notice of industrial users in significant noncompliance. 40 C.F.R. § 403.8(f)(2). A POTW is also required to meet certain funding requirements to ensure that it has the resources to carry out its enforcement responsibilities. 40 C.F.R. § 403.8(f)(3). Finally, the POTW must develop "local limits" to implement the general discharge prohibitions in section 403.5(a) and the specific interference prohibitions in section 403.5(b). 40 C.F.R. § 403.8(f)(4).

[6] The Pretreatment program required in the City's permit requires the City to perform the following:

> a. Carry out inspection, surveillance, and monitoring procedures which will determine, independent of information supplied by the industrial user, whether the industrial user is in compliance with the pretreatment standards. At a minimum, all significant industrial users shall be sampled and inspected at least once per year;
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> b. Issue or renew all necessary industrial user control mechanisms within 90 days of its expiration date or within 90 days after the industry has been determined to be a significant industrial user;

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> POTW with a design flow of 5 mgd or less develop a POTW Pretreatment Program if he or she finds that the nature or volume of the industrial influent, treatment process upsets, violations of POTW effluent limitations, contamination of municipal sludge, or other circumstances warrant in order to prevent Interference with the POTW or Pass Through.

40 C.F.R. § 403.8(a). More specifically, since the parties agree that the POTW at issue here has a design flow of less than 5.0 mgd the authority to require the pretreatment program turns on whether any set of "circumstances" (whether or not specifically identified in section 403.8(a)) "warrant [a POTW Pretreatment Program] in order to prevent Interference with the POTW or Pass Through."[7]

> c. Require development, as necessary, of compliance schedules by each industrial user for the installation of control technologies to meet applicable pretreatment standards;
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> d. Maintain and update, as necessary, records identifying the nature and character of industrial user inputs;
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> e. Obtain appropriate remedies for noncompliance by any industrial user with any pretreatment standard and/or requirement;
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> f. Annually publish a list of industrial users that were determined to be in significant noncompliance during the previous year. The notice must be published before March 28 of the following year; and
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> g. Maintain an adequate revenue structure and staffing level for continued implementation of the Pretreatment Program.

Final Permit at 26.

[7] A "Pass Through" is defined as follows:

> The term *Pass Through* means a Discharge which exits the POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a discharge or discharges from other sources, is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation).

40 C.F.R. § 403.3(n). "Interference" is defined as follows:

The term *Interference* means a Discharge which, alone or in conjunction with a discharge or discharges from other sources, both:

> (1) Inhibits or disrupts the POTW, its treatment processes or operations, or its sludge processes, use or disposal; and
>
> (2) Therefore is a cause of a violation of any requirement of the POTWs NPDES permit (including an increase in the magnitude or duration of a violation) or of the prevention of sewage sludge use or disposal * * *.

40 C.F.R. § 403.3(i).

At the hearing, the Region argued that the "nature or volume of the industrial influent" were "circumstances" warranting a pretreatment program. With respect to the volume of the influent, the Region relied on undisputed evidence that there are more than 20 industrial facilities that will use the POTW. In addition, the Region relied upon statements in the City's permit application which suggested that the POTW had a design flow of 4.94 mgd, which is just short of the 5.0 mgd threshold at which a pretreatment program is mandatory if the POTW receives discharges from industrial users. With respect to the "nature" or character of the industrial influent, the Region cited the results of certain whole effluent toxicity ("WET") tests which indicated that the POTW might experience "pass through" problems.[8] In addition, the Region noted that Yankton had exceeded its NPDES permit limits in the past and that these violations were tied to industrial influent. Finally, the Region noted that one of the POTW's significant industrial users had previously violated certain categorical pretreatment requirements which the user was required to meet. The Region argued at the conclusion of the hearing that the fact that the design flow of 4.94 mgd is so close to the threshold 5.0 mgd standard combined with any of the other circumstances listed above was sufficient to warrant inclusion of a pretreatment program in Yankton's permit.

In response to the Region's contentions the City presented evidence at the hearing to the effect that (1) the POTW's actual flow capacity is only 3.18 mgd and therefore, the 4.94 mgd design flow as set forth in the permit application does not reflect the true capacity of the POTW, (2) the only possible cause of pass through as shown by the WET tests was of ammonia and that (3) a POTW pretreatment program would not address ammonia because the focus of the program would be on enforcement of categorical pretreatment standards and none of the industrial users are subject to a categorical standard for ammonia.

Upon the conclusion of the evidentiary hearing, the Presiding Officer determined that the Region had not met its burden under § 124.85(a)(2) of coming forward with evidence to show that a pretreatment program was justified under section 403.8(a). *Initial Decision* at 30; *see* note 15 *infra*. First, the Presiding Officer determined that the POTW's actual capacity is 3.18 mgd, well below the 5.0 mgd threshold.[9] Second, the Presiding Officer concluded that the only evidence suggesting the possibility of "inter-

[8] *See infra* n.9.

[9] Although the Presiding Officer states in his findings of fact that the "design flow" of the City's plant is 3.18 mgd, he based this finding on uncontradicted testimony to the effect that the "actual" capacity of the Yankton POTW is only 3.18 mgd. This in turn is based upon testimony regarding the equipment now in place at the POTW. Therefore, throughout this opinion we speak in terms of the "actual" capacity being 3.18, as opposed to the "design" flow being 3.18 mgd. *See Initial Decision* at 15.

ference" or "pass through" as contemplated by § 403.8(a) was of pass through and that this was based on a series of WET tests which indicated some toxicity in the POTW's effluent.[10] The Presiding Officer concluded, however, that any toxicity established by the WET tests was due to the presence of ammonia and that the pretreatment program would have a negligible effect on ammonia concentrations in the effluent, because none of the categorical industrial dischargers that would be the focus of the pretreatment program are significant sources of ammonia. Accordingly, the Presiding Officer concluded that the evidence did not show that the pretreatment program was "warrant[ed] in order to prevent Interference with the POTW or Pass Through," within the meaning of section 403.8(a). He concluded, therefore, that the Region had not carried its burden under 40 C.F.R. § 124.85(a)(2) of presenting an affirmative case in support of the challenged permit condition (*i.e.*, the pretreatment program). *Initial Decision* at 30.[11]

The Region appeals this holding, identifying four rulings by the Presiding Officer that it believes are clearly erroneous. First, it argues that the Presiding Officer clearly erred in finding that the POTW's actual capacity is only 3.18 mgd. The Region contends that the City represented in its permit application that the design flow is 4.94 mgd, and that none of the testimony at the hearing challenged this figure. Second, the Region argues that the Presiding Officer clearly erred in concluding that the toxicity of the POTW's effluent, as evidenced by its WET tests, is solely attributable to ammonia. The Region contends that at least two of those WET tests show that the toxicity is due not only to ammonia, but to some other toxicant. Third, the Region argues that the Presiding Officer clearly erred in concluding that the pretreatment program would not affect the ammonia concentration in the effluent.

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[10] As noted above, a pass through is defined as a discharge that causes (alone or in conjunction with other discharges) a violation of any requirement of the POTW's NPDES permit. 40 C.F.R. § 403.3(n). The City's NPDES permit provides that "[e]ffective October 1, 1992, there shall be no acute toxicity in the effluent * * *." To monitor for acute toxicity, the permit requires the City to perform periodic whole effluent toxicity ("WET") tests in which two species of organisms — the fathead minnow and Ceriodaphnia, an aquatic insect — are exposed to the POTW's effluent. Acute toxicity occurs when more than 50% of either species dies at any effluent concentration. Final Permit at 10. In accordance with the permit, the City began conducting WET tests in February of 1990, although the acute toxicity provision did not go into effect until October 1, 1992. Although the POTW failed several of the WET tests, these failed tests did not constitute pass throughs because they occurred before the permit's prohibition on acute toxicity became effective. Nevertheless, now that the prohibition against acute toxicity is in effect, the Region argues that the failed WET tests suggest the possibility of a pass through of toxicity and therefore justify the imposition of a pretreatment program.

[11] Under 40 C.F.R. § 124.85(a)(2), the Region has the burden at an evidentiary hearing of "going forward to present an affirmative case in support of" the challenged pretreatment program. *See* also note 15 *infra*.

The Region contends that industrial users are the source of ammonia in the effluent and that the pretreatment program, therefore, would affect the ammonia concentration. Finally, the Region argues that the Presiding Officer clearly erred in determining that the Region may only require a pretreatment program under § 403.8(a) if the Agency shows that a pass through or interference has in fact occurred. The Region contends that the Presiding Officer's construction of § 403.8(a) is erroneous and must be corrected.

II. *DISCUSSION*

There is no right of appeal from the Presiding Officer's decision. Instead, the Board will only grant review of that decision if the Region demonstrates that the Presiding Officer's legal or factual conclusions are clearly erroneous or involve exercises of discretion or important policy considerations that should be reviewed. *See, e.g., In re American Cyanamid Company*, NPDES Appeal No. 92-18, at 5 (EAB, Sept. 27, 1993). The Region has the burden of demonstrating that review should be granted. *See* 40 C.F.R. § 124.91(a). For the reasons set forth below, we conclude that the Region has not carried this burden.

In order to facilitate our review we have broken our analysis into several sections. First, because this case turns on the application of section 403.8(a) to the circumstances at the Yankton POTW, we first consider in part A whether the Presiding Officer correctly interpreted the standard for requiring pretreatment programs for small POTWs under section 403.8(a). Next, in parts B, C and D below, we consider whether the Presiding Officer properly applied section 403.8(a) to the facts of this case. In particular, we examine in section B whether the Presiding Officer erred in considering evidence and making an independent determination regarding the actual capacity of the POTW, even though the City represented in its permit application that the design flow is 4.94 mgd. In section C, we consider whether the Presiding Officer clearly erred in concluding that the toxicity of the POTW's effluent, as evidenced by its WET tests, is solely attributable to ammonia. Finally, in section D we consider whether the Presiding Officer clearly erred in concluding that a pretreatment program would not prevent any pass through of ammonia.

A. *The Standard for Requiring a Pretreatment Program*

Under section 403.8(a), the Region may only require a POTW with a design flow of less than 5.0 mgd to implement a pretreatment program if "circumstances warrant in order to prevent Interference with the POTW or Pass Through." In its petition, the Region argues that the Presiding Officer misapplied this standard in his analysis of this case:

"The Initial Decision is tantamount to a holding that EPA must demonstrate pass through or interference *before* a pretreatment program can be mandated for a POTW with a design flow of 5 mgd or less." Notice of Appeal and Petition for Review at 6. The Region points out that it is authorized under section 403.8(a) to require a pretreatment program *to prevent* interference or pass through. "Given that EPA's pretreatment regulatory scheme is by design proactive rather than reactive, the Initial Decision jeopardizes EPA's authority under the General Pretreatment Regulations and has a severe chilling effect on EPA's exercise of this very important function." *Id.* For the reasons set forth below, however, we conclude that the Presiding Office applied the correct standard in his analysis of this case.

At the outset, we note that the Presiding Officer expressly rejected the argument (advanced by the City) that the Agency must demonstrate that an instance of pass through or interference has already occurred before it may require a pretreatment program. Initial Decision at 28, n.25.[12] Moreover, there is nothing in the Initial Decision to suggest that, despite his express rejection of the argument, the Presiding Officer effectively required such a showing. Instead, it is clear from the Initial Decision that the Presiding Officer not only rejected that erroneous standard, but also applied the correct standard and method of analysis under section 403.8(a).

While our research has revealed no case law discussing the application of section 403.8(a) to POTWs with design flows of less than 5.0 mgd, the language of the regulation itself suggests the proper analysis. The determination of whether "circumstances warrant [a POTW Pretreatment Program] in order to prevent Interference with the POTW or Pass Through" can be broken down into two distinct inquiries. The first inquiry is whether any of the "circumstances" demonstrated by the Region present a real possibility of interference or pass through. Section 403.8(a) gives the following examples of "circumstances" that

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[12] As the Presiding Officer stated at footnote 25:

> This is not to find or imply, as the City argues, that specific findings of violation are necessary in order to require implementation of a pretreatment program by a POTW the size of Yankton's. The City's argument in this respect lacks conviction, for it refers (Brief at 9) to findings of "(various violations or conditions)" which would warrant implementation of such a program. In any event, the argument is clearly erroneous, because, as indicated (ante at 27), the significance of the character or volume of influent to the POTW is a principal basis for overriding the exemption and "violation of effluent limitations" is one of a series of alternative findings, any one of which is sufficient to override the exemption.

should be considered when determining whether a pretreatment program is justified: the nature or volume of the industrial influent, treatment process upsets, violations of POTW effluent limitations, contamination of municipal sludge. The section also indicates that other unlisted circumstances may also warrant a pretreatment program. If the Region cannot establish any "circumstances" that present the possibility of an interference or pass through, then the analysis need go no further since there is nothing for the pretreatment program to "prevent."

If the Presiding Officer finds that the Region has established one or more circumstances suggesting the possibility of interference or pass through, he or she must then inquire whether there is some nexus between the pretreatment program and the possibility of interference or pass through; that is, the Region must establish that the condition or event that presents the possibility of interference or pass through is attributable to an industrial discharger that would be subject to the pretreatment program, and that the pretreatment program would, therefore, be reasonably calculated to prevent that condition or event from causing the interference or pass through. These two inquiries are necessarily fact specific and must be made on a case by case basis.

A review of the Presiding Officer's Initial Decision reveals that he essentially followed the pattern of analysis described above.[13] In his Initial Decision, the Presiding Officer's first considered whether any of the circumstances cited by the Region suggested the possibility of a pass through.[14] As noted above, the Presiding Officer concluded that the actual capacity of the facility was really 3.18 mgd, rather than the 4.94 mgd design flow identified in the permit application, and therefore the volume of influent may not be a "circumstance" warranting a pretreatment program. However, he also found that there was a possibility of a pass through as evidenced by the failed WET tests. Based on this evidence, the Presiding Officer concluded that there was a "circumstance" that could warrant a pretreatment program. Because the Region had established the possibility of a pass through, the Presiding Officer then turned to the second stage of the analysis discussed above to determine whether there is a nexus between the possibility of a pass through due to toxicity and implementation of a City-run pretreatment program.

Ultimately, the Presiding Officer concluded that the Region had not established a sufficient nexus. He determined that any toxicity

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[13] We note that this same analysis should be employed by the Region, in the first instance, when evaluating whether section 403.8(a) authorizes imposition of a pretreatment program.

[14] The Region did not argue, and the record does not contain any evidence suggesting, that there is a significant possibility of interference with the operation of the POTW.

evidenced by the WET tests was solely attributable to the presence of ammonia in the effluent. He found, however, that a City-run pretreatment program would have little effect on the presence of ammonia in the effluent because none of the categorical industrial users that would be subject to the pretreatment program was a significant source of ammonia, and although one non-categorical user did appear to be a source of ammonia, the Region did not suggest that a pretreatment program would cover that source's ammonia discharge. Hence, the Presiding Officer concluded that the Region had failed to establish that the pretreatment program would have any effect on the possibility of a pass through of toxicity due to ammonia. He concluded, therefore, that the Region had not carried its burden of presenting an affirmative case to support imposition of a pretreatment program under § 403.8(a). More specifically, the Presiding Officer concluded that the Region had therefore failed to meet its "burden of going forward to present an affirmative case in support of" the challenged condition as required under 40 C.F.R. § 124.85(a)(2). *Initial Decision* at 30.[15]

We conclude that the method of analysis used and the standard applied by the Presiding Officer with respect to § 403.8(a) was correct and we deny review of this issue. We, therefore, conclude that in order

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[15] When a permittee challenges a particular condition of an NPDES permit at an evidentiary hearing, as is being done here, the Agency "has the burden of going forward to present an affirmative case in support of" the challenged condition. 40 C.F.R. § 124.85(a)(2). At the conclusion of the Agency's case on the challenged condition, the permittee "shall have the burden of going forward to present an affirmative case * * * on the challenged requirement." 40 C.F.R. § 124.85(a)(3). If both sides present an affirmative case for their respective positions, the Presiding Officer then weighs the evidence, using a preponderance of the evidence standard. *In re Mayaguez Regional Sewage Treatment Plant, Puerto Rico Aqueduct and Sewer Authority*, NPDES Appeal No. 92-23, at 13, n.18 (EAB, August 23, 1993) (the standard of proof at an evidentiary hearing is a preponderance of the evidence); *In re City of Fayetteville, Arkansas*, NPDES Appeal No. 88-1, at 7 (CJO, Dec. 22, 1988). If the evidence is in equipoise, the permittee must lose, since the ultimate burden of persuasion on whether the permit should be issued without the challenged condition always rests with the permittee. *See* 40 C.F.R. § 124.85(a)(1); 44 Fed. Reg. 32886 ("The permit applicant always bears the burden of persuading the Agency that a permit authorizing pollutants to be discharged should be issued and not denied. This burden does not shift."). *See also* 44 Fed. Reg. 32886 (June 7, 1979) (at evidentiary hearing, burden of persuasion on challenged permit condition always rests with permittee).

Here, however, the Presiding Officer ultimately concluded that the Agency did not carry its *initial burden* of presenting an affirmative case in support of the pretreatment program because the Region failed to introduce any evidence to show a *nexus* between a "circumstance" that might result in a pass through and implementation of a City-run program. Thus, despite holding a full hearing, the Presiding Officer ultimately concluded that the Region had failed to present a case to support the permit condition, in the first instance, as required under 40 C.F.R. § 124.85(a)(2). In such circumstances, the contested permit condition is unsupported and should be removed from the permit. *See, e.g.*, § 124.8(b)(3) (the Agency must be able to legally and factually support each permit condition). Or put another way, if the Agency does not present evidence to support a permit condition, then the permit holder is presumed to have met its ultimate burden with regard to the condition.

to prevail on this appeal, the Region must show that it presented facts that demonstrate a "circumstance" that could lead to interference or pass through, as well as specific facts to show that imposition of a City-run pretreatment program would reasonably *prevent* such interference or pass through. We now turn to the Region's proof.

B. *Design Flow*

The Region challenges the Presiding Officer's conclusion that the actual flow capacity of the POTW is 3.18 mgd, arguing that the Board should rely on the 4.94 mgd "design" flow number instead. Although both of these numbers are below the 5.0 mgd threshold set out in section 403.8(a), the size of the flow is important because it figured so prominently in the Region's decision to include a pretreatment program in Yankton's permit. The Regional official who made the decision to require the pretreatment program at issue here testified at the hearing that his decision was dictated in large part by his belief that the design flow of the POTW was very close to the threshold of 5.0 mgd. Transcript at 15, 17, 23 (Testimony of Mr. Fischer). The Regional official apparently reasoned that the closeness of the POTW's design flow to the 5.0 mgd threshold made it more likely that an instance of interference or pass through would occur. Section 403.8(a) itself provides some support for this reasoning: one of the "circumstances" to be considered under section 403.8(a) when determining whether a pretreatment program is warranted is the "volume of the industrial influent," which is determined partly by the design flow of the POTW.

At the hearing, Yankton's consulting engineer submitted written testimony indicating that the actual capacity of certain components of the POTW, the primary clarifiers, is 3.18 mgd, and in oral testimony, he testified that:

> There are components of the Yankton plant that are not designed for 4.94 million gallons per day. For example, the primary clarifiers are in normal accepted design practices only designed for approximately 3—I think its 3.2 million gallons per day. There are a couple of other components of that—the aeration basins are probably only designed for 2 and a half million gallons per day.

Transcript at 75-76 (Testimony of Mr. Weber). The engineer also testified at the hearing that "it would just be a very costly project to actually bring all of the components up to the 5 million gallons per day level." Transcript at 74 (Testimony of Mr. Weber). He also testified that the average flow at the POTW is now 1.7 mgd and that in the year 2010 it will only be 2.55 mgd. Transcript at 68 (Testimony of Mr. Weber).

Although the latter testimony does not bear directly on the potential *design* flow of the facility, it does tend to undercut the Region's assumption that the actual capacity of the POTW is so close to 5.0 mgd that it should be treated as if it essentially equals the threshold of 5.0 mgd. Based on the City's testimony, the Presiding Officer concluded that the actual capacity of the POTW was 3.18 mgd.

The Region challenges this finding, arguing that the City represented in its permit application and evidentiary hearing request that its design flow is 4.94 mgd. Notice of Appeal and Petition for Review at 5. The Region also contends that "the propriety of the 4.94 mgd design flow included in Yankton's NPDES permit was neither challenged nor disputed at the hearing." *Id.* Although it is not clear from the Region's petition, the implication of the Region's argument is that the City is somehow bound by the representation in its permit application such that it could not show at the hearing that the actual capacity is much less and, therefore, the flow was not a "circumstance" warranting inclusion of a pretreatment program. If that is the Region's position, we disagree.

The purpose of the evidentiary hearing conducted in this case was to examine the factual basis for the Region's determination that a pretreatment plan was warranted for the City's POTW. A crucial part of that factual basis was the Region's assumption that the 4.94 mgd figure was very close to the threshold of 5.0 mgd. Transcript at 15, 17, 23 (Testimony of Mr. Fischer). Thus, the issue of actual flow capacity was central to the inquiry being conducted by the Presiding Officer. The fact that the 4.94 figure was provided by the City itself in its permit application certainly has some probative value on the issue, since the City is in a position to know the design flow of the POTW, but it does not answer the question presented under § 403.8(a) of whether the volume of influent from industrial users is a "circumstance" potentially warranting imposition of a City-run pretreatment program within the meaning of § 403.8(a).

The Region argues that "the propriety of the 4.94 mgd design flow included in Yankton's NPDES permit was neither challenged nor disputed at the hearing." Notice of Appeal and Petition for Review at 5. Two implications flow from this argument. One is that the Region did not have fair warning that the actual capacity was at issue and therefore did not present any evidence on the issue. The other is that no evidence was presented at the hearing that could form the basis of the Presiding Officer's conclusion. We disagree on both counts.

In a sense, the Region is correct that the City did not directly challenge the 4.94 figure at the hearing. The City's consulting engi-

neer, Mr. Weber, took no position on whether 4.94 represents the official "design flow" of the POTW within the meaning of section 403.8(a). Mr. Weber merely testified that certain components of the POTW have an actual capacity of only 3.18 mgd, and that it would be very expensive to raise the capacity of those components to 5.0 mgd. He also testified that the current actual flow is well below the 5.0 mgd and the actual flow by the year 2000 will not be much closer to the threshold. The import of this testimony is that, even if 4.94 mgd represents the official "design flow" of the POTW for purposes of determining whether the POTW meets the 5.0 threshold under section 403.8(a), the *actual* flow in all probability will not come close to that level. In such circumstances, the Region's assumption that Yankton would be actually treating large volumes of industrial waste similar to larger POTWs and thus, by implication, would be facing potential pass throughs like the larger POTWs is not supported by the facts. Therefore, although Mr. Weber did not take a position on the official "design flow" of the POTW for purposes of section 403.8(a), his testimony certainly provides a factual basis for the Presiding Officer's conclusion that the actual flow capacity was 3.18 mgd, and, therefore, the Region's reliance on the 4.94 mgd figure as a "circumstance" supporting imposition of a pretreatment program on the City was not valid.

Moreover, the Region cannot be heard to complain that it did not have fair warning that the actual design capacity was at issue during the hearing. Mr. Weber's testimony relates directly to the issue, and based on pre-hearing exchanges and Mr. Weber's written testimony, the Region knew that such testimony would be given at the hearing. Yet it neither objected to the introduction of this testimony at the hearing, nor attempted to rebut the testimony.

In view of the foregoing considerations, we conclude that the Region has not carried its burden of showing that the Presiding Officer erred when he considered the issue of the actual capacity as a "circumstance" warranting a pretreatment program or in finding that the actual capacity of the facility was 3.18 mgd. The City's witness, Mr. Weber, offered credible testimony that the actual capacity of the POTW is 3.18 mgd, and the Presiding Officer properly considered such testimony. At the hearing, the Region made no attempt to rebut this testimony. Nor does the Region challenge on appeal the accuracy of the Presiding Officer's conclusion that the actual capacity of the POTW is 3.18 mgd, except to point out that, while Mr. Weber's written testimony gives the number 3.18 mgd, his oral testimony gives the number 3.2 mgd. Notice of Appeal and Petition for Review at 5, n.2. The fact that the City stated in its permit application that its design flow was 4.94 mgd certainly has some probative value on the question, but the Presiding Officer did

not clearly err in concluding that the actual capacity is far less and that the Region's assumption that a 4.94 mgd design flow is a "circumstance" potentially warranting a City-run pretreatment program was not supported. Accordingly, we are denying review of this issue. Importantly, we wish to note that even if we were to accept the Region's argument that Yankton has a 4.94 mgd capacity, it would not alter the outcome of this case, because the Region never presented any evidence to show a nexus between a 4.94 mgd volume and the potential for interference or pass through from the industrial users that may be contributing to that volume.[16]

C. *The Possibility of a Pass Through of a Toxicant Other Than Ammonia*

Although the Presiding Officer concluded that Yankton's design flow was not a circumstance warranting consideration of a pretreatment program, the Presiding Officer found that another "circumstance" did exist based upon the results of a series of WET tests conducted on the POTW's effluent. The Presiding Officer found that the WET tests suggested a possible pass through of toxicity in the City's effluent. The Presiding Officer concluded that the toxicity evidenced by the WET tests was solely attributable to the presence of ammonia in the effluent. On appeal, the Region challenges the Presiding Officer's finding that the WET tests suggest only the presence of ammonia. The Region argues that the WET tests show that other toxicants may be present. The Region apparently believes that if toxicants other than ammonia are found in the effluent, then a pretreatment program to address these other toxicants would be appropriate. For the reasons explained below, we conclude that the Region has not carried its burden of demonstrating that the Presiding Officer's conclusion that ammonia is the sole toxicant of concern is clearly erroneous.

As noted above, the WET tests performed by the City expose two species of organisms—the fathead minnow and Ceriodaphnia, an aquatic insect—to the POTW's effluent to detect toxicity.[17] The evidence presented at the hearing suggests that the POTW tends to fail its WET tests unless CO2 is added to the effluent samples. City's Exhibit

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[16] However, as noted *infra* at note 23, should Yankton change its current plans and add features to the POTW to accommodate an increase in industrial flow, this would certainly be a "change" in conditions that might rise to the level of a "circumstance" that in turn might warrant consideration of a pretreatment program at a later date.

[17] *See supra* n.9.

D (Written Testimony of Mr. Jonas).[18] The laboratory that performed the WET tests after September of 1990 reported that there was sufficient ammonia in the samples to account for the toxicity that is observed when CO2 is not added. City's Exhibit D (Written Testimony of Mr. Jonas). Although the relationship between ammonia and CO2 is not altogether clear from the record, it appears that ammonia causes an elevation of pH levels in the effluent, *producing toxicity,* and CO2 prevents this elevation of pH levels. Transcript at 51-52 (Testimony of Mr. McCormick); Transcript at 65-66 (Testimony of Mr. Weber). At any rate, what is clear is that witnesses from both sides testified that the fact that the POTW passes its WET tests when CO2 is added suggests that ammonia is the primary if not sole cause of the toxicity in the effluent. Transcript at 66 (Testimony of Mr. Weber); Transcript at 53 (Testimony of Mr. McCormick) ("In the last set of test results [in which CO2 was added], it would be my opinion that the effluent toxicity was primarily attributable to ammonia."). Based on the experience with CO2, the laboratory that performed the tests in which CO2 was added confirmed that there was no evidence of toxicants other than ammonia. *Id.*

The Region argues, however, that the toxicity evidenced by two of the earlier WET tests (conducted before the POTW began adding CO2 to the tests), is attributable at least in part to a toxicant other than ammonia. The Region points out that in the WET tests conducted in February and September of 1990, the minnows passed (*i.e.*, 50% or more survived), while the insects failed the test (*i.e.*, more than 50% died). [19] Witnesses for both sides testified that if ammonia were the only toxicant in the sample, the minnows would be the only species to die or the first to die. Transcript at 53 (Testimony of Mr. McCormick); Transcript at 94 (Testimony of Mr. Jonas). This suggests that some other toxicant must have killed the insects, while sparing the minnows. The Region, however, did not offer any evidence as to what this other toxicant might be, and the Region's witnesses admitted that they

[18] Before October of 1990, the POTW conducted four such tests. The results were mixed. In the first such test, in February 1990, both species failed (*i.e.*, more than 50% died). City's Exhibit D (Written Testimony of Mr. Jonas). In June, both species passed, but these results are not deemed representative because the ammonia in the effluent had been substantially diluted by rainwater. In August, both species failed, and in September, the insects failed, while the minnows passed. *Id.* In the next four administrations of the test starting in October of 1990 (October 1990, November 1990, January 1991, and April 1991), two different methods were used to conduct the test: the old method which had been used in earlier tests, and a new method in which CO2 was added to the effluent. (Written Testimony of Mr. Jonas) In all four administrations of the test, both species failed using the old method, but then passed when CO2 was added to the effluent. *Id.* In June of 1991, the City received permission from EPA to use CO2 in all its WET tests and has passed all its tests since then. *Id.*

[19] The written testimony of the Mr. Jonas, however, indicates that both species failed the February 1990 administration of the WET test. City's Exhibit D (Written Testimony of Mr. Jonas).

did not have such evidence and had not even attempted to gather such evidence. Transcript at 18 (Testimony of Mr. Fischer); Transcript at 49-50 (Testimony of Mr. McCormick).

In sum, the WET tests in which CO2 was added support the conclusion that ammonia is the primary if not the sole cause of toxicity in the effluent. Against this evidence, the Region pointed to the WET tests in which the minnows lived and the insects died, suggesting that such toxicity is caused in part by a toxicant other than ammonia, although the Region admitted at the hearing that it did not even attempt to investigate the POTW's influent to determine what that toxicant might be. The Presiding Officer gave more weight to the City's evidence and concluded that ammonia is the sole cause of the toxicity evidenced by the WET tests. In view of the conflicting evidence, the question is certainly not free from doubt, but we cannot conclude that the Presiding Officer was clearly erroneous. Moreover, the Region having failed to present any evidence to suggest what other toxicant may be the cause of the WET test violations, clearly failed to show any nexus between the industrial users and the benefits of a pretreatment program. Thus, even if we were to conclude that the WET tests showed the presence of another toxicant, it would not alter our decision, because the Region did not present any evidence to show what those toxicants might be or how pass through of such toxicants would be prevented through a City-run pretreatment program. Accordingly, review of this issue is denied.

D. *The Effect of the Pretreatment Program on the Ammonia Problem*

Of all of the "circumstances" cited by the Region in support of the pretreatment program, only the presence of ammonia in the effluent was found to present the possibility of a pass through. To establish that a pretreatment program is warranted under section 403.8(a), however, the Region must do more than show the possibility of a pass through. As discussed in section A above, the Region must also establish that there is some nexus between the possibility of a pass through and the pretreatment program. Here, given the Region's focus on industrial dischargers, the Region must show that industrial dischargers are responsible for the ammonia and that the pretreatment program is reasonably calculated to "prevent" the ammonia from causing a pass through.

The Presiding Officer found that the pretreatment program would not prevent the possibility of a pass through due to ammonia, largely because the ammonia was not coming from the categorical industrial dischargers that would be primary focus of the pretreatment program.

Initial Decision at 29. The Presiding Officer also noted that: "EPA has not contended that a pretreatment program for the City of Yankton would alleviate ammonia concentrations." Initial Decision at 23.

The Region challenges this holding, arguing that:

> Based on general knowledge of the industries that discharge to Yankton's POTW, Petitioner argued at hearing that it is highly likely, and indeed probable, that industry rather than domestic sewage is the source of the ammonia passing through Yankton's POTW to its effluent. Yankton was unable to rebut Petitioner's claim.

Notice of Appeal and Petition for Review at 4.

In its appeal brief, however, the Region does not point to any testimony in the hearing transcript to support its argument on this issue, and from all that appears, there is nothing in the transcript that supports the Region's view. The Region did not present any evidence as required by § 403.8(a), to show a nexus between the presence of ammonia in the effluent and the implementation of a pretreatment program.[20] Moreover, the Region apparently did not even attempt to investigate the POTW's influent to establish such a nexus. One of the Region's witnesses admitted: "I have not seen specific data showing ammonia discharges from industrial users." Transcript at 46. (Testimony of Mr. McCormick). Even in its appeal brief, the Region acknowledges in a footnote that "EPA has no information on the ammonia concentration of Yankton's influent." Notice of Appeal and Petition for Review at 4, n.1.

The record does suggest that some of Yankton's food processing plants, particularly a meat packing plant, may be contributing to the ammonia problem. Transcript at 97-98 (Testimony of Mr. Jonas); Transcript at 66 (Testimony of Mr. Weber). The meat packing plant, however, is not a categorical user (*see* Initial Decision at 15, n.13), and the uncontradicted testimony at the hearing supports the conclusion that a pretreatment program would not be an effective method of dealing

[20] One of the Region's two witnesses did testify that the toxicity evidenced by the WET tests was reason enough to warrant a pretreatment program. Transcript at 48 (Testimony of Mr. McCormick). The basis for his opinion, however, was not that the WET tests indicate a problem with ammonia, but that they "indicate that something other than ammonia is at least contributing to the toxicity of their effluent." Transcript at 48. As discussed above, however, the witness never identified what the other toxicants might be or how a pretreatment program might address any pass through concern.

with ammonia contributions from the meat packing plant.[21] The evidence also indicates that the meat packing plant although not subject to a categorical standard is already pretreating its discharge and that the POTW is presently working with it to further improve the quality of its discharge. Transcript at 103-104 (Testimony of Mr. Jonas).[22]

In sum, the Region has failed to establish any identifiable nexus between the presence of ammonia or any other toxicant for that matter, in the POTW's effluent and the potential benefit of requiring the City to implement a pretreatment program. At the hearing, the Region failed to present *any* evidence connecting any toxicant to any categorical users that would be the primary focus of the pretreatment program, and conceded that it did not even have such information. In view of the foregoing considerations, we cannot conclude that the Presiding Officer clearly erred in concluding that the Region did not come forward with evidence to show that a pretreatment program is "warrant[ed] in order to prevent Interference with the POTW or Pass Through," within the meaning of section 403.8(a) and as required under § 124.85(a)(2). Accordingly, review of this issue is denied.

III. *CONCLUSION*

For all the foregoing reasons, we conclude that: (1) The Presiding Officer did not clearly err in his interpretation and application of the standard for requiring pretreatment programs for small POTWs under section 403.8(a); (2) The Presiding Officer did not clearly err in finding that the actual capacity of the POTW was 3.18 mgd; (3) The Presiding Officer did not clearly err in finding that the sole cause of the toxicity evidenced by the WET tests was ammonia; and (4) The Presiding Officer did not clearly err in finding that a pretreatment program would have little effect on ammonia concentrations in the effluent. We conclude, therefore, that the Region has failed to carry its burden of dem-

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[21] The City's consulting engineer expressed doubt as to whether a food packing plant would be able to further reduce its ammonia discharges with a City-run pretreatment program:

> I don't know practically how the packing house could do that without providing a very sophisticated treatment plant, because ammonia normally can only be treated by a process called maturation, and that requires secondary treatment normally. There are other methods which are available, but I wouldn't suspect that they would be very economical.

Transcript at 74 (Testimony of Mr. Weber).

[22] While a City-run pretreatment program may be able to address noncategorical discharges, the Region never introduced any evidence to suggest that a pretreatment program was necessary to secure greater ammonia reductions from any industrial users.

onstrating any clearly erroneous factual or legal conclusions or exercises of discretion or important policy considerations that warrant review. Accordingly, review of the Region's petition is hereby denied.[23]

So ordered.

[23] We wish to emphasize that the inquiry under section 403.8(a) is necessarily fact specific. The determination of whether a pretreatment program is warranted must be based on the particular circumstances of the POTW under consideration. We do not believe the 2-prong test established by this decision should be construed as imposing an extraordinary burden on a Region seeking to impose a pretreatment program condition on a small POTW. To the contrary, so long as there is some evidence to show that the Agency has examined the specific POTW's industrial influent and has some evidence to show that a City-run pretreatment program could help to prevent any potential interference or pass through, the Agency's burden could be satisfied. In this connection, we also wish to emphasize that if the Region obtains new information indicating, for example, that industrial users may be contributing to any potential interference or pass through problems, the Region may seek to modify the permit to require the City to implement a pretreatment program. *See* 40 C.F.R. § 403.8(e).