IN THE MATTER OF GENERAL ELECTRIC COMPANY, HOOKSETT, NEW HAMPSHIRE

NPDES Appeal No. 91–13

ORDER DENYING REVIEW

Decided January 5, 1993

Syllabus

General Electric Company (GE) seeks review of U.S. EPA Region I's denial of an evidentiary hearing request on certain conditions in an NPDES permit for GE's manufacturing facility in Hooksett, New Hampshire. The facility's effluent consists of air conditioning condensate and storm water. The permit imposes pH effluent limitations for both effluent streams and toxicity testing requirements for the air conditioning condensate. GE objects to the absence of a permit provision allowing the use of mixing zones or dilution when determining the pH limitations. GE also contends that the toxicity testing requirements are unnecessary. In its letter certifying the draft permit, the State adopted the NPDES permit as the State permit under State law.

Held: By simultaneously certifying the federal permit and stating that this permit would be adopted as the State permit, the State of New Hampshire clearly indicated that nothing less than what was written in the permit would satisfy State law and that the permit could not be made less stringent and still comply with State law. Thus, the permit conditions to which GE objects are attributable to State certification within the meaning of 40 C.F.R. § 124.55(e), and therefore are not subject to challenge in a federal evidentiary hearing. Review is therefore denied.

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

Opinion of the Board by Judge McCallum:

General Electric Company (GE) seeks review of the denial of an evidentiary hearing request on certain issues relating to an NPDES permit issued by U.S. EPA Region I for GE's manufacturing facility in Hooksett, New Hampshire. As requested by the Agency's Chief Judicial Officer,[1] the Region filed a response to GE's petition

[1] At that time, the Agency's Judicial Officers had 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,

for review. Because we conclude that the disputed permit terms are attributable to State certification, review is denied.

I. *BACKGROUND*

GE's Hooksett, New Hampshire facility is used for the manufacture of aircraft engine hardware for military and commercial applications. It discharges approximately 2,000 gallons per day of air conditioning condensate through outfall discharges 001 and 002 and storm water through outfall discharges 004 to 007 into Peters Brook. The Region issued a draft permit on August 23, 1990. The State of New Hampshire, Department of Environmental Services, Water Supply & Pollution Control Division (Pollution Control Division), certified the draft permit on September 27, 1990. On September 28, 1990, the Region issued a final NPDES permit governing discharges at the above-mentioned outfalls.

The permit imposes pH effluent limitations on both the storm water and air conditioning condensate discharges as well as whole effluent toxicity (WET) testing requirements on the air conditioning condensate. The WET testing requirements were set to ensure compliance with the State's narrative standard[2] governing the presence of pollutants in toxic quantities in the State's waters. *See* Exhibit 12 to Region I's Response to Petition for Review (Response to Comment XXI, citing 40 CFR § 122.44(d)(1)(v)). The pH limitations, without any allowance for a mixing zone or dilution, were set to ensure compliance with the State's water quality standards for pH. *Id.* (Response to Comment XXII). In its request for an evidentiary hearing (dated October 29, 1990), GE argued that the Region erred in establishing pH effluent limits identical to water quality standards and

including this case, were transferred to the Environmental Appeals Board. 57 Fed. Reg. 5321 (Feb. 13, 1992).

[2]The New Hampshire Water Quality Standards, promulgated by the Department of Environmental Services, Water Supply and Pollution Control Division, provide, in part:

> Unless naturally occurring * * * all classes of waters shall be free from toxic pollutants or chemical constituents in concentrations or combinations that:
>
> a. Injure or are inimical to plants, animals, humans, or aquatic life; and
>
> b. Persist in the environment or accumulate in aquatic organisms to levels that result in harmful concentrations in edible portions of fish, shellfish, other aquatic life, or wildlife which may consume aquatic life.

N.H. Code Admin. R., Env-Ws 432.02(4).

in not permitting the application of a mixing zone or the use of dilution when the discharges enter Peters Brook. In addition, GE argued that the permit's inclusion of WET testing requirements for the air conditioning discharge was unnecessary. On May 17, 1991, the Region denied GE's request for an evidentiary hearing on the propriety of these requirements. This appeal followed.

II. *DISCUSSION*

Under the rules governing an NPDES proceeding, there is no appeal as of right from the Regional Administrator's decision. *In re Miners Advocacy Council,* NPDES Appeal No. 91–23, slip op. at 3 (EAB, May 29, 1992). Ordinarily a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important and should therefore be reviewed by the Environmental Appeals Board.[3] *See, e.g., In re IT Corporation (Ascension Parish, Louisiana),* NPDES Appeal No. 83–2 (CJO, July 21, 1983); 44 Fed. Reg. 32887 (June 7, 1979) (Preamble to 40 C.F.R. Part 124). The petitioner has the burden of demonstrating that review should be granted. *See* 40 C.F.R. § 124.91(a).

Section 401 of the Clean Water Act (CWA) authorizes States to certify that any effluent limitations or monitoring requirements in a federal NPDES permit will comply with the Act "and with any other appropriate requirement of State law set forth in such certification." CWA § 401(d). Any such limitation or requirement shall then "become a condition on any Federal license or permit subject to the provisions of this section." *Id.* Challenges to permit limitations and conditions attributable to State certification will not be considered by the Agency. Rather, such challenges must be made through applicable State procedures. *See* 40 C.F.R. § 124.55(e). It is well established that the Agency may not "look behind" a State certification issued pursuant to section 401 of the Clean Water Act, 33 U.S.C.A. § 1341, for the purpose of relaxing a requirement of that certification. *In re Lone Star Steel Company,* NPDES Appeal No. 91–5, at 3–4 (CJO, Nov. 24, 1991); *In re Ina Road Water Pollution Control Facility, Pima County, Arizona,* NPDES Appeal No. 84–12 (CJO, Nov. 6, 1985); *see also In re City of Denison,* NPDES Appeal No. 91–

[3] With respect to appeals under Part 124 regarding NPDES permits, Agency policy is that most permits should be finally adjudicated at the Regional level. 44 Fed. Reg. 32887 (June 7, 1979). While the Board has broad power to review decisions in NPDES permit cases, the Agency intended this power to be exercised "only sparingly." *Id.*; *see* 57 Fed. Reg. 5320, 5336 (Feb. 13, 1992).

6, slip op. at 8 (EAB, December 8, 1992); *In re Puerto Rico Sun Oil Company,* NPDES Appeal No. 92–20, slip op. at 14 (EAB, Oct. 23, 1992); Decision of the General Counsel No. 58 (March 29, 1977). In such circumstances, the person seeking a relaxation of the requirement must look to the State for relief. *Roosevelt Campobello International Park Commission* v. *United States Environmental Protection Agency,* 684 F.2d 1041, 1056 (1st Cir. 1982) ("the proper forum to review the appropriateness of a state's certification is the state court and * * * [F]ederal courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification."). Permit conditions are "attributable to State certification" when, *inter alia,* the State indicates (in writing) that these conditions are necessary in order to comply with State law and cannot be made less stringent and still comply with State law. 40 C.F.R. § 124.53(e)(1) & (3).[4]

When EPA Region I requested the New Hampshire authorities to certify the draft permit, the Pollution Control Division responded, in a letter dated September 11, 1990, with a list of various changes to both the fact sheet and the permit itself and stated that "[b]efore we certify this permit, all of [these] issues must be resolved." *See* Exhibit 10 to Region I's Response to Petition for Review. The issues addressed in the letter encompassed the matters under consideration in this appeal. *Id.* The certification came a few days later in a one-page letter dated September 27, 1990, in which the Director of the Division, apparently satisfied with the Region's revisions to the draft permit, stated in pertinent part as follows:

> After appropriate staff review, State Certification is hereby granted for the proposed permit pursuant to section 401 of the Clean Water Act. Upon final issuance, the Division also adopts the NPDES permit as a state permit pursuant to RSA 485–A:13,I(a).

Although this certification does not explicitly say that the permit conditions are necessary or that they cannot be made less stringent, we are confident that the words employed by the Director were intended to communicate these exact ideas. By simultaneously certifying the permit and stating that the federal permit would be adopted as the State permit, the Director clearly indicated that nothing less

[4] Section 124.53(e) also contains a paragraph (2) that requires the State to specify those conditions more stringent than those in the draft permit which the State finds necessary to comply with the applicable provisions of the CWA and appropriate requirements of State law. In the present case, however, the State's certification letter does not indicate that any conditions in the draft permit must be made more stringent.

than what was written in the permit would satisfy State requirements. In other words, the permit's conditions and limitations were necessary and could not be made less stringent and still satisfy State law.[5] The requirements of the federal regulation have therefore been satisfied. *See In re Lone Star Steel Company,* NPDES Appeal No. 91–5, at 5–6 (CJO, Nov. 24, 1991). Accordingly, GE's objections to the permit—the absence of a provision allowing for the use of dilution or mixing zones and the requirements for WET testing[6]—are "attributable to State certification" within the meaning of 40 C.F.R.

[5] This conclusion is further confirmed by the fact that the Pollution Control Division's staff indicated that the permit's conditions relating to the WET testing and pH issues were integral to the protection of water quality. For example,

> 1. In referring to the WET testing requirement, the Pollution Control Division's September 11, 1990 comment letter, *supra,* which preceded the September 27, 1990 certification letter, states that the permit's "toxicity limit * * * will ensure that the water quality standards are met."
>
> 2. In referring to the pH issues, the same letter directs the Region to make certain modifications to the pH provisions of the draft permit, to bring them into conformity with the language of the New Hampshire water quality standards (specifically, the pH range for Class B waters), and remarks that the modifications are needed "[t]o be consistent with other New Hampshire permits * * *."

[6] The Region denied GE's evidentiary hearing request on the WET testing issue because the request raised a legal question rather than a material question of fact suitable for a hearing. *See* 40 C.F.R. § 124.74(b)(1) (Note) (requiring the Regional Administrator to deny requests for evidentiary hearings that raise legal issues only); *In re Ina Road Water Pollution Control Facility, Pima County, Arizona, supra,* at note 1. We sustain the Region's denial since the Region correctly concluded that GE's request did not raise an issue suitable for an evidentiary hearing; in so doing, however, we note that we arrive at this conclusion by a slightly different route than the Region. In denying the evidentiary hearing request, the Region did not rely on the State's certification with regard to the permit's WET testing requirements, nor did the Region rely on the certification in responding to GE's petition for review of these requirements. As discussed above, however, because the WET testing requirements were added to the permit to ensure that GE's effluent meets State water quality standards, and because the State's certification letter indicates that the permit, as written, is necessary in order to comply with State law, we conclude that the permit's WET testing provisions are also "attributable to State certification." Thus, if GE wishes to challenge these provisions, it must do so through applicable State procedures.

§ 124.55(e) and may not be reviewed in this forum. Review is therefore denied.[7]

So ordered.

[7] The Region also objected to review of the disputed permit conditions on other grounds. Specifically, the Region argued that GE failed to raise the issue of whether mixing zones should be considered in establishing pH limits for storm water in its comments on the draft permit. Region's Response at 8. The Region also argued that petitioner failed to propose alternative limits for pH and therefore failed to comply with the requirements of 40 C.F.R. §§ 124.73–124.76. *Id.* at 9. Because we conclude that the disputed conditions are attributable to State certification, however, we do not reach these issues.