IN RE CITY OF FITCHBURG, MASSACHUSETTS (EAST AND WEST PLANTS)

NPDES Appeal Nos. 93-13, 93-14, 93-15 and 93-16

Consolidated

ORDER DENYING REVIEW

Decided February 7, 1994

Syllabus

This action consolidates petitions for review of the denial of evidentiary hearing requests for NPDES permits issued by EPA Region I to four municipal wastewater treatment plants in Massachusetts. Each of these permits establishes toxic metals limits which are the focus of the appeals. These limits implement the State of Massachusetts' water quality standards, which were themselves adopted from the so-called "Gold Book" criteria developed by EPA. Under State law, these criteria apply unless a site-specific limit is established. The Region denied all four of the hearing requests on the grounds that the permit conditions at issue were "attributable to State certification." On appeal, the municipalities challenge this assertion.

Held: The Region properly concluded that the effluent limits being challenged are attributable to State certification and thus that the evidentiary hearing requests must be denied. It has often been stated that challenges to permit limitations and conditions attributable to State certification must be pursued through applicable State procedures; they cannot be raised in an appeal of a Region's action. Permit conditions are attributable to State certification if the conditions "are necessary in order to comply with State law and cannot be made less stringent and still comply with State law" (quoting *In re General Electric Co., Hooksett, New Hampshire*, NPDES Appeal No. 91-13, at 4).

In this instance, all four certification letters make it clear that the permit conditions cannot be made less stringent, except through the development by the State at some future time of site-specific criteria. This constitutes a clear and unambiguous statement which satisfies the requirements for State certification under 40 C.F.R. § 124.53. Petitioners argue that even if the certification language itself is clear, subsequent State action created an ambiguity as to the State's intent. Where an ambiguity exists, the permit cannot be found to be attributable to State certification. *In re Boise Cascade Corp.*, NPDES Appeal No. 91-20, at 10-11 n.7. However, in *Boise Cascade* the ambiguity was found in the certification letters themselves; here, the letters themselves were unambiguous and the alleged ambiguity arose from State actions in entirely different permit proceedings. (In any event, the State has gone on record as reaffirming the intent behind the certification letters attributed to it by the Region.)

Since the permit conditions in all four NPDES permits were attributable to State certification, they cannot be reviewed in appeals of those permits and thus the evidentiary hearing requests were properly denied.

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

Opinion of the Board by Judge Reich:

The Board has before it petitions for review of four NPDES permits issued by U.S. EPA Region I to the City of Fitchburg East and West Plants (Permit Nos. MA 0100986 and 0101281), the Upper Blackstone Water Pollution Abatement District (Permit No. 0102369), and the Charles River Pollution Control District (Permit No. 0102598) for operation of wastewater treatment plants. These petitions were consolidated for review by Board order of December 9, 1993.

I. *BACKGROUND*

Each of the permits being appealed establishes toxic metals limits which are the focus of the appeals. According to the Region, these limits were adopted to give effect to the State of Massachusetts' water quality standards pursuant to the requirement of Section 301(b)(1)(C) of the Clean Water Act, 33 U.S.C. § 1311(b)(1)(C), that an NPDES permit contain such limitations as are "necessary to meet water quality standards * * * established pursuant to any State law or regulations * * *." *See also* 40 C.F.R. § 122.44(d) (regulations implementing this requirement). The State standards involved were adopted in 1990 when the State incorporated by reference into its Surface Water Quality Standards the so-called "Gold Book" criteria for certain toxic pollutants developed by EPA pursuant to CWA § 304(a), 33 U.S.C. § 1314(a).[1] Under State law, these criteria apply "unless a site specific limit is established." 314 C.M.R. § 4.05(e)(1).

In 1992, the Region issued the four permits that are the subject of this appeal. Since no site-specific limits had been established for any of the facilities, the Region included toxic metals limits based on the State-incorporated Gold Book criteria. The permits were certified by the State in accordance with CWA § 401, 33 U.S.C. § 1341, and 40 C.F.R. § 124.53.[2]

Requests for evidentiary hearings were filed for the four permits. These requests were all denied by the Regional Administrator on Oc-

[1] Region's Memorandum in Opposition at 2. *See* 314 C.M.R. § 4.05(e)(1).

[2] All four certification letters were from Brian Donahoe, Director, MADWPC, Massachusetts Department of Environmental Protection, to Edward McSweeney, Chief, Wastewater Management Branch, Region I. The City of Fitchburg West Plant certification was dated August 24, 1992, while the remaining three (City of Fitchburg East Plant, Upper Blackstone and Charles River) are all dated September 30, 1992.

tober 13, 1993. In each case, the denial was based on a determination that the permit conditions being challenged were "attributable to State certification."[3] These denials were appealed to the Board by the permittees pursuant to 40 C.F.R. § 124.91.[4]

In the two City of Fitchburg petitions for review (which are virtually identical), the City challenges the determination that the contested permit conditions are attributable to State certification. It relies on a June 3, 1993 letter sent by Arleen O'Donnell, Assistant Commissioner, Massachusetts Bureau of Resource Protection to Region I concerning a denial of an evidentiary hearing request in a different permit proceeding. This letter read in part:

> I was surprised to read the attached letter from EPA denying Simplex Time Recorder's request for an evidentiary hearing on the basis that the metals numbers in the permits are state requirements and thus EPA is "forced" to place them in the permit, with the attendant result of transferring these appeals to DEP for action.

This result was certainly not what we anticipated when we discussed with EPA, some time ago, what the process would be if, in fact, we agreed to put the Gold Book limits in the NPDES permits. You may recall that, at the time, we had argued against using the Gold Book limits and instead argued to impose stringent pollution prevention goals and timelines for site-specific analyses, but that option was rejected for a variety of reasons. DEP understood that EPA would handle the predictable appeals to the Gold Book limits.

The letter further indicated that, in the future, the State would be deleting from its certifications under CWA § 401 the statement that

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[3] Exhibit 1 to East Fitchburg Notice of Appeal; Exhibit 1 to West Fitchburg Notice of Appeal; Exhibit A to Upper Blackstone Notice of Appeal; and Exhibit A to Charles River Notice of Appeal. The Region cites as support for its denial, 40 C.F.R. § 124.55(e), which provides:

> Review and appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures in this part.

[4] The evidentiary hearing requests for the East Fitchburg and West Fitchburg plants also raised issues relative to the permits' whole effluent toxicity limits, effluent limits for flows above 16 million gallons per day, and local pretreatment limits. The Region's denials based on State certification covered these limits as well. The City does not separately discuss these limits in its Petition for Review but states that its arguments relative to the metals limits carry over to cover these limits as well. East Fitchburg Petition for Review at 3-4.

"none of the permit conditions may be made less stringent without violating Massachusetts Water Quality Standards." The letter also suggested a meeting to establish a process for addressing site-specific protocols. [5]

The City argues that this letter shows that DEP did not mean by its certifications that the metals limits could not be made less stringent without violating state water quality limits. The City states that this interpretation of the State's action was confirmed by verbal communications and certain subsequently issued statements and documents.[6] The City also asserts that, at the very least, the June 3, 1993 letter creates an ambiguity about the State's intentions. The City argues further that where a State's certification is ambiguous, permit limits cannot be said to be attributable to State certification, citing *In re Boise Cascade Corp.*, NPDES Appeal No. 91-20, at 10-11 n.7 (EAB, Jan. 15, 1993). Finally, the City asserts that the actions of the Regional Administrator "made no sense" in light of the State's intentions and efforts to develop a protocol to revise the applicable limits. Therefore, in the City's view, the Regional Administrator's denial without explaining his actions was arbitrary and capricious, as the Court of Appeals for the First Circuit found in arguably similar circumstances in *Puerto Rico Sun Oil Company v. U.S. EPA*, 8 F.3d 73 (1st Cir. 1993).[7]

In the Upper Blackstone petition, the permittee similarly seeks to have the Region's decision overturned because a "fair reading" of the State's certification shows the challenged metals limits are not attributable to State certification. Upper Blackstone cites the June 3, 1993 O'Donnell letter as support for this statement. Upper Blackstone Notice of Appeal at 15. The petition further states that:

> Policy considerations, including EPA's most recent policy pronouncements, require EPA Region I to issue a Renewal Permit that addresses the real, site-specific issues raised by UBWPAD's discharge, rather than avoiding those issues.

Id. at 3, citing *Puerto Rico Sun Oil, supra*, for support.

The Charles River petition was filed by the same attorneys as the Upper Blackstone petition and makes a virtually identical legal argument.

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[5] Exhibit 4 to East Fitchburg Petition for Review.

[6] East Fitchburg Petition for Review at 3-4.

[7] *Id.* at 5-6.

II. *DISCUSSION*

Under the rules governing an NPDES proceeding, there is no appeal as of right from the Regional Administrator's decision. *In re General Electric Company, Hooksett, New Hampshire (G.E. Hooksett)*, NPDES Appeal No. 91-13, at 3 (EAB, Jan. 5, 1993); *In re Broward County, Florida*, NPDES Appeal No. 92-11, at 5 (EAB, June 7, 1993). 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.[8] *See, e.g., In re City of Jacksonville, District II Wastewater Treatment Plant*, NPDES Appeal No. 91-19 (EAB, Aug. 4, 1992). The petitioner has the burden of demonstrating that review should be granted. *See* 40 C.F.R. § 124.91(a).

At issue here is whether the Regional Administrator, in his denial of the evidentiary hearing requests, properly based his denial on a finding that the contested permit conditions were attributable to State certification. As has been often stated:

> 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.

G.E. Hooksett, supra, at 4 (footnote omitted). *See also In re City of Denison*, NPDES Appeal No. 91-6, at 8 (EAB, Dec. 8, 1992); *In re Lone Star Steel Company*, NPDES Appeal No. 91-5, at 3-4 (CJO, Nov. 24, 1991); *Roosevelt Campobello International Park Commission v. United States Environmental Protection Agency*, 684 F.2d 1041, 1056 (1st Cir. 1982) ("[T]he 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.").

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[8] With respect to appeals regarding NPDES permits, Agency policy is that most permits should be finally adjudicated at the Regional level. 44 Fed. Reg. 32,887 (June 7, 1979). While the Board has broad power to review decisions in NPDES permit cases, the Agency intended this power to be exercised "only sparingly." *Id.*

As we indicated in *G.E. Hooksett*:

> 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.

G.E. Hooksett, supra, at 4, citing 40 C.F.R. § 124.53(e)(1) and (e)(3).

In all four of the certifications involved in these appeals, the State's language is clear and unambiguous that the conditions of the permit could not be made less stringent (except through subsequent development of site specific criteria).[9] Each certification letter, on its face, clearly satisfies the requirements for State certification under 40 C.F.R. § 124.53.

Petitioners argue that notwithstanding the apparently clear language of the certifications, the June 3, 1993 O'Donnell letter and subsequent actions by the State create at least an ambiguity as to the State's intent. Where an ambiguity exists, the permit terms cannot be found to be attributable to State certification. *In re Boise Cascade Corp., supra*, at 10-11 n.7. However, petitioners reliance on *Boise Cascade* is misplaced. In that instance, there was ambiguity "in the certification letters." No such ambiguity is found here.

In any event, even if the Board were to look behind an unambiguous certification letter, to the extent there was an uncertainty as to the State's intentions, as the petitioners state for the first time on appeal, the State's position is clarified by the recent Declaration of Arleen O'Donnell which is dated December 21, 1993, and attached to the Region's Memorandum in Opposition. Ms. O'Donnell is the Assistant Commissioner for the Bureau of Resource Protection of the Massachusetts Department of Environmental Protection. She is also the person who signed the June 3, 1993 letter cited by petitioners. Ms. O'Donnell's December 21, 1993 Declaration states in part:

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[9] The certification for the City of Fitchburg West Plant reads as follows: "[t]he Division hereby certifies the referenced permit. None of the conditions of the permit may be made less stringent without violating the requirements of the State Act and the Massachusetts Water Quality Standards." The certifications for the City of Fitchburg East Plant, Upper Blackstone, and Charles River all state that "[n]one of the conditions of the permit may be made less stringent, unless demonstrated through the development of site specific criteria, without violating the requirements of the State Act and the Massachusetts Water Quality Standards." Interestingly, these three certifications all state that "[w]hile best available information obtained from studies conducted by EPA and the Division indicate that site specific limits may be appropriate for the metals cited, the effluent limits contained herein *shall remain in effect until and unless* site-specific limits are established." (Emphasis added.)

> [T]he DEP certified each of these permits pursuant to section 401(a) of the federal Clean Water Act. * * * These certification letters remain in effect as to these specific permits and have not in any way been superseded or changed.
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> Each of the four certification letters contains the statement that "none of the conditions of the permit may be made less stringent" without violating the requirements of the State Clean Waters Act and the Massachusetts Water Quality Standards. This means that none of the terms of any of these permits may be made less stringent without the concurrence of the State.
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> As indicated in a number of the certification letters, the DEP hopes that site-specific metals limits can be established for each of these treatment facilities. The DEP remains prepared to work with the permittees and the EPA to explore possible future amendments to the permits limits. For the interim, however, as also made clear by these certification letters, the DEP has certified metals limits based on the Massachusetts Surface Water Quality Standards' incorporation by reference of the "Gold Book Limits," published by the EPA pursuant to section 304(a) of the federal Clean Water Act.
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> For certain permits issued later than the four above-referenced permits, the DEP has utilized certification letters which delete the statement that "none of the permit conditions may be made less stringent" without violating the State Clean Water Act and the Massachusetts Water Quality Standards. However, the use of different certification letter language for other permits in no way changes the language or effect of the certification letters actually used for the four above-referenced permits.

This Declaration irrefutably confirms both the State's intention and current position. [10] It also shows that the action of the Regional Administrator in relying on those certifications was not arbitrary and capricious. [11]

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[10] The Region cites as further support of its position the fact that the State has adopted these permits as State permits. Adoption of the permit by the State was a clarifying factor in *G.E. Hooksett*. *See G.E. Hooksett* at 5. However, we do not find it necessary to look to that factor here given the clarity of the certification letters themselves.

[11] The Region also gives a plausible rationale for its decision to issue the permits without waiting for the completion of site specific work. This discussion is contained in Part IV of the Memorandum in Opposition.

III. *CONCLUSION*

The Regional Administrator properly denied the request for an evidentiary hearing in each of these appeals since in each case the contested permit conditions were attributable to State certification. The petitions for review are accordingly denied.

So ordered.