IN THE MATTER OF AMERICAN CYANAMID COMPANY ET AL.

NPDES Appeal Nos. 92–18 and 92–8

ORDER DENYING REVIEW

Decided September 27, 1993

Syllabus

Two Florida dischargers challenge the effluent toxicity limitations and biological testing requirements included in their National Pollutant Discharge Elimination System permits by EPA Region IV. Those permit conditions were imposed for the purpose of ensuring compliance with the State of Florida's whole effluent toxicity criterion for mixing zones, Fla. Admin. Code rule 17–4.244(3)(a), which states that "the maximum concentration of wastes in the mixing zone shall not exceed the amount lethal to 50% of the test organisms (96-hr. LC_{50}) for a species significant to the indigenous aquatic community."

Both permittees express their general willingness to perform toxicity testing in accordance with Florida law, but they contend that such testing does not always yield accurate, reliable results. They therefore maintain that Region IV erred when it adopted permit language stating that any single failed toxicity test shall constitute an enforceable violation of the permit. The permittees further contend that the Florida Department of Environmental Regulation (FDER) does not include similar language in its own wastewater discharge permits, and that the FDER's practice demonstrates that Region IV's permit language does not correctly reflect the requirements of Florida law. In addition, petitioner American Cyanamid Company argues that the challenged permit language is inconsistent with certain biomonitoring provisions that appear in its own FDER wastewater permit and with Section 403.021(11) of the Florida Statutes, which directs the Florida Department of Environmental Regulation to "recognize the statistical variability inherent in sampling and testing procedures that are used to express water quality standards."

Held: The Region did not clearly err by adopting permit provisions that prohibit any single toxicity test failure and that characterize any such failure as a permit violation. Those provisions are wholly consistent with the plain language of rule 17–4.244(3)(a), which the Region is bound to implement in these NPDES permits and the wisdom of which the Board has no license to second-guess. Moreover, in the absence of any objection or expression of disapproval from the FDER, to which both of these draft permits were submitted for certification, the Region properly rejected as immaterial the contention that FDER's permit writers have not included similar "single excursion" provisions in permits issued to these or other dischargers. Finally, neither the Florida statute nor the FDER permit provisions cited by petitioner American Cyanamid justify an interpretation of rule 17–4.244(3)(a) that is at variance

with, and more lenient than, the plain meaning of the rule. The petitions for review are therefore denied.

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

Opinion of the Board by Judge Firestone:

I. *BACKGROUND*

We have consolidated, for decision only, two separate petitions for review challenging, on similar grounds, the provisions of two National Pollutant Discharge Elimination System (NPDES) permits for industrial dischargers located in the State of Florida. In Appeal No. 92–18, American Cyanamid Company (Cyanamid) objects to an effluent toxicity limitation and biomonitoring requirement included in a November 1, 1988 NPDES permit for Cyanamid's acrylic fiber production plant in Santa Rosa County, Florida. In Appeal No. 92–8, Jefferson Smurfit Corporation (Jefferson) objects to the substantially identical toxicity limitation and biomonitoring requirement in an October 1, 1990 NPDES permit for its Jacksonville, Florida paperboard mill. The permit provisions in question are designed to implement Fla. Admin. Code rule 17–4.244(3)(a), which restricts the discharge of toxic effluent into Florida waters.[1] The regulation expresses that restriction in terms of a specific testing procedure: "[T]he maximum concentration of wastes in the mixing zone shall not exceed the amount lethal to 50% of the test organisms in 96 hours (96-hr. LC_{50}) for a species significant to the indigenous aquatic community."[2]

The prohibition set forth in rule 17–4.244(3)(a) is incorporated into the Cyanamid permit in the form of an effluent toxicity limitation and an associated biomonitoring requirement, as follows:

> The effluent (100%) collected at outfall 001 shall not be lethal to more than 50% of the appropriate test organisms. The testing for this requirement must conform with Part V of this permit. *Lethality to more than 50% of the test organisms in a test of 96 hours*

[1] As the issuer of NPDES permits for discharges originating in Florida, EPA is charged with including in those permits such requirements as are necessary to ensure compliance with applicable Florida law and regulations. *See* 33 U.S.C. § 1311(b)(1)(C); 40 CFR § 122.44(d).

[2] This language formerly appeared at Fla. Admin. Code rule 17–4.244(4), which is the paragraph cited in the American Cyanamid permit and in the briefs submitted in connection with Cyanamid's appeal.

> *duration will constitute a violation of Florida Administrative Code Section 17–4.244(4)(a) and the terms of this permit.* [Cyanamid Permit § I.A.6 (emphasis added).]
>
> The permittee shall conduct 96-hour static renewal toxicity tests using the Mysid shrimp (*Mysidopsis bahia*) and the Fathead minnow (*Pimephales promelas*). Tests shall be conducted once per quarter for the entire term of the permit using samples of final effluent. * * * *If lethality (less than 50% survival of test organisms in 100% effluent) is found in any test of final effluent, this will constitute a violation of this permit. The permittee will then be subject to the enforcement provisions of the Clean Water Act.* [Cyanamid Permit §§ V.1–V.2 (emphasis added).]

The rule 17–4.244(3)(a) prohibition appears in a similar form in the Jefferson permit:

> *Lethality to more than 50% of any test species in 100% effluent in a test of 96 hours duration or less will constitute a violation of FAC Section 17–4.244(3)(a) and the terms of this permit.* The testing for this requirement must conform with Part V of this permit. [Jefferson Permit § I.7 (emphasis added).]
>
> The permittee shall conduct 48-hour acute static toxicity tests using the daphnid (*Ceriodaphnia dubia*) and 96-hour acute static-renewal toxicity tests using the inland silverside (*Menidia beryllina*). * * * If * * * 100% mortality occurs prior to the end of the test, and control mortality is less than 10% at that time, that test (including the control) shall be terminated with the conclusion that the sample demonstrates unacceptable acute toxicity. [Jefferson Permit §§ V.1.a-V.2.b.] [3]

[3] The Jefferson permit also requires additional toxicity testing in the event that a "routine" test yields unacceptable results:

> The toxicity tests specified above shall be conducted once every two months until 6 valid bimonthly tests have been completed, and once every 6 months thereafter for the duration of the permit, unless notified otherwise by EPA. These tests are referred to as "routine" tests. * * * If unacceptable acute toxicity (greater than

Cyanamid and Jefferson objected to the inclusion of the italicized permit provisions when their draft permits were distributed for comment. The challenged provisions were nonetheless included in the final permits issued to Cyanamid and to Jefferson in September 1988 and July 1990, respectively. In November 1988, Cyanamid requested an evidentiary hearing to contest the effluent toxicity and biomonitoring provisions of its permit that are quoted above. Cyanamid objected, specifically, "that a single toxicity test result in which more than 50% of the organisms die is unlawfully, unreasonably, and capriciously defined as a permit violation." Cyanamid Evidentiary Hearing Request, at 5. Similarly, Jefferson filed a "Request for Reconsideration and Hearing" with Region IV in August 1990, stating that Jefferson "objects specifically to the language [in the permit indicating] * * * that greater than 50% mortality in any single test with any single species conclusively establishes that the mill's effluent is toxic and that the permit and Florida rules are violated." Jefferson Evidentiary Hearing Request, at 1.

The Regional Administrator for Region IV denied Jefferson's evidentiary hearing request in April 1992 and denied Cyanamid's request in June 1992 after concluding, in both instances, that the permittees' challenges raised only legal issues. Both permittees filed timely petitions for review.[4] Shortly after the petitions were filed, this Board, in *Miami-Dade Water and Sewer Authority Department,* NPDES Appeal No. 91–14 (EAB, July 27, 1992) and *City of Jacksonville, District II Wastewater Treatment Plant,* NPDES Appeal No. 91–19 (EAB, August 4, 1992), upheld effluent toxicity and biomonitoring provisions materially indistinguishable from those in the Cyanamid and Jefferson permits (including language characteriz-

> 50% lethality of either test species within the specified time) is found in a "routine" test, the permittee shall conduct three additional acute toxicity tests on the specie(s) indicating unacceptable toxicity. * * * The first [additional] test shall begin within two weeks of the end of the "routine" tests, and [the additional tests] shall be conducted weekly thereafter until three additional, valid tests are completed. The additional tests will be used to determine if the toxicity found in the "routine" test is still present. [Jefferson Permit §§ V.2.a, V.3.a.]

As we discuss further below, while a single exceedance may constitute a violation of Florida law and of the permit, it appears that additional testing is to be performed before remedial or corrective actions will be required. *See infra* note 10.

[4] 40 CFR § 124.74(b)(1) (Note) provides that an evidentiary hearing request is the appropriate vehicle for challenging NPDES permit provisions even where the challenge raises only legal issues. In such a case, "because no factual issues were raised, the Regional Administrator would be required to deny the request. However, on review of the denial the Environmental Appeals Board is authorized by § 124.91 to review policy or legal conclusions of the Regional Administrator."

ing a single toxicity test failure as an enforceable violation) as valid and appropriate means of implementing Florida's whole effluent toxicity standards. Cyanamid asks us to reevaluate the analysis set forth in *Miami-Dade* and *City of Jacksonville* in light of certain Florida legislation not addressed in those opinions, and to remand this matter for an evidentiary hearing on the merits of the contested provisions. Jefferson, on the other hand, has neither challenged nor sought to distinguish our two intervening decisions.

II. *DISCUSSION*

Under the rules governing this proceeding, there is no appeal as of right from the Regional Administrator's decision. A petition for review will ordinarily not be 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. *See, e.g., In re Broward County, Florida,* NPDES Appeal No. 92–11, at 5 (EAB, June 7, 1993). The petitioner bears the burden of demonstrating that review should be granted.

As noted above,[5] section 301(b)(1)(C) of the Clean Water Act, 33 U.S.C. § 1311(b)(1)(C), requires EPA to include in its NPDES permits such limitations as are "necessary" to ensure compliance with applicable State water quality regulations. More specifically, 40 CFR § 122.44(d) provides (with exceptions not here relevant) that whenever there exists a "reasonable potential" that a discharge might cause or contribute to an excursion over an applicable narrative water quality criterion or numeric whole effluent toxicity criterion, the NPDES permit for that discharge "*must contain* effluent limits for whole effluent toxicity." *Id.* §§ 122.44(d)(1) (iv) and (v) (emphasis added). Neither of the present petitioners has challenged the factual basis for Region IV's determination that a whole effluent toxicity limitation was "necessary" to ensure compliance with rule 17–4.244(3)(a), and it is therefore undisputed that the Region was statutorily required to include such a limitation in the NPDES permits for these facilities. The question before us is (as we phrased it in *Miami-Dade, supra*) whether the permit provisions adopted by Region IV "faithfully implement" rule 17–4.244(3)(a).

[5] *See supra* note 1.

A. *The Cyanamid Appeal*

Substantial portions of the toxicity testing provisions in Cyanamid's permit are uncontested. For example, the criterion established in the permit for determining toxicity is the 96-hour LC_{50}, which is indisputably the selfsame criterion found in rule 17–4.244(3)(a). The method established in the permit for compliance assessment is also unchallenged insofar as it calls for (i) quarterly tests, (ii) of 96 hours' duration, in which (iii) shrimp and minnows are exposed to (iv) a sample of 100% effluent. Cyanamid's only objection is to the statements in the permit indicating that any single toxicity test failure "will constitute a violation of this permit," and that the permittee will then be "subject to the enforcement provisions of the Clean Water Act." Cyanamid objects to these statements for two reasons.

Cyanamid first argues that the statements in the permit do not accurately reflect the prohibition set forth in the Florida regulation because, according to Cyanamid, "failure of a single test does not necessarily establish the lethality or toxicity of the wastewater effluent." Cyanamid Petition for Review, at 3. Cyanamid claims that a single failure of the prescribed toxicity test does not justify a finding of lethality or toxicity because the test "is not sufficiently accurate, reproducible, or reliable" to support such a finding; "the test," in other words, "cannot properly be applied as an effluent limitation." *Id.* Second, Cyanamid contends that even if the statements in the NPDES permit are faithful to the literal language of rule 17–4.244(3)(a), the statements nonetheless "contravene the State of Florida's prevailing interpretation" of the rule as requiring more than one failed toxicity test to establish a violation. The latter interpretation, according to Cyanamid, is expressed in a February 10, 1987 wastewater discharge permit issued for the Santa Rosa plant by the Florida Department of Environmental Regulation (FDER), and is the only interpretation consistent with Section 403.021(11) of the Florida Statutes, which directs the FDER to "recognize the statistical variability inherent in sampling and testing procedures that are used to express water quality standards." Cyanamid Petition for Review, at 1–2; Cyanamid Reply Brief in Support of Petition for Review (March 11, 1993), at 3.

1. *Test reliability*

Cyanamid's first objection—that toxicity testing "cannot properly be applied as an effluent limitation" because a test failure "does not necessarily establish the lethality or toxicity of the wastewater

effluent"—is indistinguishable from an argument that we rejected in *Miami-Dade.*

There, a municipal discharger challenged an NPDES permit provision incorporating Florida's whole effluent toxicity standard for open ocean discharges, Fla. Admin. Code rule 17–4.244(3)(c), which provides that a sample of 30% effluent "shall not cause more than 50% mortality in 96 hours (96-hr. LC_{50}) in a species significant to the indigenous aquatic community." The challenged permit provision in *Miami-Dade* incorporated the State's toxicity standard in terms identical to those in the Cyanamid permit:

> If lethality (less than 50% survival of test organisms in 30% effluent) is found in any test of final effluent, this will constitute a violation of this permit. The permittee will then be subject to the enforcement provisions of the Clean Water Act.

Miami-Dade, at 6. Like Cyanamid, the *Miami-Dade* permittee argued that toxicity testing is so inherently imprecise that failure of a test does not necessarily mean that the tested effluent was toxic. *See id.* at 12 ("Miami-Dade believes that toxicity tests exhibit substantial variability and that a result of less than 50% survival in a single test may not be * * * indicative of actual effluent toxicity. * * * Miami-Dade believes that, because of its variability, toxicity testing should only be used as a screening device for assessing the need for additional treatment or a waste load allocation, not as the limitation itself.").

We held that the permit properly equated failure of a 96-hour toxicity test with a violation of Florida law. We further held that the permit's reliance on toxicity testing (as "the limitation itself") was not subject to challenge in a federal permit proceeding, because such testing is an integral component of the Florida effluent toxicity standard for open ocean discharges and is expressly prescribed by State regulation. In other words, the Florida regulation does not (as the permittee suggested) prohibit "actual effluent toxicity"—although that is presumably its underlying objective. Rather, the regulation by its terms prohibits any wastewater discharge that fails a specified test: "[T]he effluent when diluted to 30% full strength, shall not cause more than 50% mortality in 96 hours * * *." Fla. Admin. Code rule 17–4.244(3)(c). Or, as we paraphrased the rule, "Florida's toxicity standard for open ocean discharges * * * provides that no effluent shall be permitted to fail the toxicity test specified in the standard." *Miami-Dade* at 12.

A specified test methodology is likewise integral to the effluent toxicity standard involved in the present appeals: "[T]he maximum concentration of wastes in the mixing zone shall not exceed the amount lethal to 50% of the test organisms in 96 hours * * *." Rule 17–4.244(3)(a) thus does not, as Cyanamid implies, prohibit effluent "lethality" or "toxicity," while leaving to the permit issuer the task of defining those terms. The regulation instead provides that wastewater discharges shall not fail a 96-hour toxicity test by killing more than 50% of the test organisms. Relative to the test methodology itself, as we stated in *Miami-Dade*, "[t]he range of variability of toxicity testing was obviously acceptable to the State of Florida, and that is what is determinative. Under CWA § 301(b)(1)(C), the Region is required to incorporate limitations into the permit as necessary to implement the State standard, without reviewing the scientific basis for the standard." *Miami-Dade*, at 12. We therefore hold that Cyanamid's request for an evidentiary hearing to challenge the toxicity testing provisions in its permit, on grounds of accuracy, reproducibility and reliability, was properly denied.[6]

[6] In connection with its challenge to the accuracy and reliability of toxicity testing, Cyanamid also asserts that under its existing permit language, "a violation * * * could as easily result from a flawed test as from actual toxicity of Cyanamid's effluent." Petition for Review, at 3. To the extent that Cyanamid's reference to a "flawed test" represents a challenge to the toxicity testing methodology specified in Florida's rule 17–4.244(3)(a), for the reasons already stated, the challenge is not one that EPA can properly entertain.

The reference to a "flawed test" may, however, suggest that Cyanamid reads the permit to preclude it from raising actual errors in the performance or reporting of a toxicity test (*e.g.*, laboratory error) as a defense to liability for an alleged permit violation. If that is Cyanamid's concern, we believe it is unfounded. We note that in the context of civil litigation under the Clean Water Act, permit limitation exceedances recorded in a permittee's Discharge Monitoring Reports pursuant to Section 308 of the Act and 40 CFR § 122.41(*l*) ordinarily provide conclusive evidence of the permittee's liability, *e.g.*, *Atlantic States Legal Foundation* v. *Tyson Foods, Inc.*, 897 F.2d 1128, 1135 (11th Cir. 1990); *United States* v. *CPS Chemical Co.*, 779 F. Supp. 437, 442–43 (E.D. Ark. 1991), but can be overcome by direct evidence of "reporting inaccuracies" or of "errors in the actual tests performed which showed a permit violation." *Public Interest Research Group* v. *Yates Industries*, 757 F. Supp. 438, 447 (D.N.J. 1991), *modified in part on other grounds*, 790 F. Supp. 511 (D.N.J. 1991). Cyanamid should likewise be allowed to demonstrate, as an affirmative defense to liability for exceeding the effluent toxicity limitation in its permit, that a failed toxicity test was not correctly performed or that the results of the test were not correctly reported. As we stated in *City of Jacksonville*, "To determine compliance with Florida's toxicity standards * * * the only relevant question (*assuming the test is performed properly*) is whether the concentration of wastes in the mixing zone exceeded the amount lethal to 50% of the test organisms in 96 hours for a species significant to the indigenous aquatic community." *Id.* at 8 (emphasis added). Cyanamid cannot, however, argue that a failed, properly conducted toxicity test should not be interpreted as a violation of the Florida criterion for whole effluent toxicity.

2. *Consistency with Florida law*

Cyanamid next argues that the Region's effort to characterize any single toxicity test failure as a violation of rule 17–4.244(3)(a), and our approval of that approach in *Miami-Dade* and *City of Jacksonville*, are in conflict with Florida statutory law and with the FDER's interpretation of the rule.

In particular, Cyanamid relies on Section 403.021(11) of the Florida Statutes, which provides:

> It is the intent of the Legislature that water quality standards be reasonably established and applied to take into account the variability occurring in nature. The department [of Environmental Regulation] shall recognize the statistical variability inherent in sampling and testing procedures that are used to express water quality standards. The department shall also recognize that some deviations from water quality standards occur as the result of natural background conditions. The department shall not consider deviations from water quality standards to be violations when the discharger can demonstrate that the deviations would occur in the absence of any man-induced discharges or alterations to the water body.

Cyanamid calls our attention specifically to the second sentence of the statute, which states that "[t]he department shall recognize the statistical variability inherent in sampling and testing procedures that are used to express water quality standards." That sentence, Cyanamid argues, compels a different interpretation of Florida's rule 17–4.244(3)(a) than the one Region IV has adopted.

Cyanamid claims that in order to give appropriate recognition to the "statistical variability inherent in" toxicity testing, it is necessary for the Florida regulators (and EPA, in the context of a permit limitation derived from Florida water quality standards) to provide an opportunity for confirmatory testing before concluding that a violation of rule 17–4.244(3)(a) has occurred. As further support for its position, Cyanamid notes that the wastewater discharge permit issued for the Santa Rosa plant in February 1987 by the FDER contains a provision calling for confirmatory testing in the event of a failed toxicity test, and ultimately for implementation of a toxicity control plan if it is determined that the plant's wastewater is being

discharged in violation of the State's effluent toxicity limits.[7] "Therefore," Cyanamid reasons, "the NPDES permit condition asserting that a single exceedance constitutes a violation of the Florida standard (and consequently a violation of the permit) is simply incorrect." Cyanamid Reply Brief in Support of Petition for Review, at 3.

We agree that EPA should endeavor to construe State water quality regulations such as rule 17–4.244(3)(a) in a manner that is consistent with applicable State statutory law. We do not believe, however, that EPA can or should presume to relax an otherwise clear State water quality standard, and thereby risk violating its own obligations under the Clean Water Act, unless there are very compelling reasons to conclude that the State standard does not mean what it says. There are no such reasons here.

The statutory language cited by Cyanamid is simply too general to require the limiting construction of rule 17–4.244(3)(a) that we are asked to impose. It is far from obvious what the Florida Legislature intended to accomplish by instructing the State's environmental regulators to "recognize" the statistical variability inherent in the testing procedures used to express water quality standards.[8] If, as Cyanamid insists, the Legislature intended that no violation of a water quality standard be enforced by FDER except after two or

[7] Specifically, the permit provides:

> In the event that any static renewal bioassay shows a concentration in excess of the 96 hour LC_{50} concentration as defined by Florida Administrative Code Rule 17–4.244, the permittee shall conduct a confirming static renewal bioassay. Should the 96 hour LC_{50} concentration be confirmed, a follow-up dynamic (flow-through) bioassay shall be conducted. Results of these bioassays shall be reported to the Department prior to the next scheduled quarterly bioassay. [Florida DER Permit No. 1057–121893, Specific Condition No. 28.]
>
> If the bioassay tests indicate that the wastewaters are being discharged in violation of FAC 17–3 or 17–4 toxicity limits, the permittee shall submit to the Department a toxicity control plan and accompanying implementation schedule within 90 days of the finalization of the bioassay test results. The control plan shall include appropriate measures to reduce the toxicity of the wastewater discharge to acceptable levels. [Specific Condition No. 27.C.]

[8] The preamble to the Florida legislation that became Section 403.021(11) offers no specific guidance. The preamble indicates that Section 403.021(11) was designed "to improve the operation of state permitting procedures for the construction and operation of wastewater treatment facilities so as to promote efficiency and certainty in the permitting process without diminishing the state's ability to properly protect the state's environment."

more exceedances, the statute could readily have been drafted so as to ensure that result. We note that the Legislature was considerably more explicit when, in the final sentence of Section 403.021(11), it instructed the FDER not to regard deviations from water quality standards as violations when the deviations are not attributable to wastewater discharges. Because the statute includes no such direct language in its discussion of testing procedures and their "statistical variability," and because rule 17–4.244(3)(a) is, by contrast, clear and categorical, we find no error in Region IV's adoption of a straightforward prohibition based on the text of the rule.

Nor do the terms and conditions of the 1987 FDER permit for this facility persuade us otherwise. As a preliminary matter, the FDER permit provisions requiring confirmatory biological testing and a toxicity control plan neither state nor fairly imply that FDER will not regard the first failed toxicity test as a violation of Florida law or of the permit. Rather, as the Region pointed out in its response to Cyanamid's comments on the draft federal permit, the FDER permit also includes a provision (Specific Condition No. 25) stating that "[a]t no time shall the discharge exceed the 96 hour LC_{50} at the point of discharge, or be present in such concentrations to be acutely toxic in the mixing zone * * *." See Response to Cyanamid Comments, at 3.[9] Thus, the FDER permit itself appears to characterize any single exceedance as a violation of the State's effluent toxicity criteria. Here we see no conflict between a permit provision (like the Region's) expressly stating that a single toxicity test failure constitutes a violation and a provision (like the FDER's) requiring additional and/or intensified testing before the permittee is required to implement a control plan.[10]

[9] We therefore cannot agree with Cyanamid's unqualified assertion that the FDER permit "does not contain a discharge limitation on effluent toxicity," Petition for Review, at 3, and that the FDER permit "specifically recognizes the need for confirmatory bioassay testing before a 'violation' is determined," Reply Brief in Support of Petition for Review, at 3.

[10] It is eminently sensible to conclude that, although a single toxicity test failure constitutes a permit violation, a single violation may not necessarily establish the need for formal implementation of long-term control measures. The purpose of additional or follow-up testing, then, is not to confirm the occurrence of a past violation but to determine whether similar violations might routinely occur in the absence of additional controls. We note that the Jefferson Smurfit Corporation permit addressed in this opinion appears to follow just such logic: It includes a provision characterizing a single acute toxicity test failure as a permit violation (Section I.7), and also includes a provision requiring a series of follow-up tests after the first such violation (Section V.3.a). *See supra* note 3.

Moreover, if the FDER believed that Region IV was misapplying Florida law, it could have raised that concern during the certification process provided by Clean Water Act section 401.[11] EPA forwarded the draft Cyanamid permit to the FDER for certification on July 27, 1988, but the FDER waived certification by letter dated September 30, 1988. When the State chooses to participate in the certification process in this limited fashion, the Region is left to exercise its own judgment in establishing an NPDES permit limitation to implement a State water quality standard "without the benefit of the State's input." Miami-Dade, at 14. In those circumstances, if the Region reasonably interprets the State standard we will uphold its judgment. *See id.* Here, Cyanamid has not demonstrated that the Region's interpretation of rule 17–4.244(3)(a) is unreasonable.[12] Review of the Region's permit decision on grounds of inconsistency with State law is, accordingly, denied.

B. *The Jefferson Appeal*

Following the usage employed by the Region and by Jefferson, we shall treat Jefferson's evidentiary hearing request as having raised a total of ten issues for the Region's consideration. Fully nine of the ten issues questioned the Region's adoption of permit provisions that characterize a single toxicity test failure as a violation of Florida

[11] According to Section 401(a)(1) of the Act, 33 U.S.C. § 1341(a)(1),

> Any applicant for a Federal license or permit to conduct any activity * * * which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate * * * that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title.

As implemented by EPA regulations at 40 CFR §§ 124.55(c) and 124.53(e), the certification process does not allow a State to block the issuance of an EPA permit on the grounds that State law allows a less stringent condition than one that EPA proposes to include, but does call upon the State to identify "the extent to which each condition of the [EPA's] draft permit can be made less stringent without violating the requirements of State law * * *." *See Miami-Dade*, at 14 n.10.

[12] The analysis is different, however, when a State certification specifically prescribes a permit condition or limitation that interprets one of the State's water quality standards less strictly than the Region might prefer. In those circumstances, the Region would have to provide a compelling reason for rejecting the State's interpretation of the standard. *See In re Ina Road Water Pollution Control Facility*, NPDES Appeal No. 84–12, at 3–4 & n.7 (CJO, Nov. 6, 1985) (EPA permit condition based on State water quality standard rejected in view of conflicting limitation certified by the State, where EPA had not defended its interpretation of the State standard by demonstrating, *e.g.*, that its interpretation enjoyed "strong scientific or technological support").

rule 17–4.244(3)(a) and of the permit. Those issues were stated as follows:

> Whether EPA had sufficient basis in fact or law to make the standard in Florida Administrative Code 17–4.244(3), which concerns the impact of waste concentrations in mixing zones on significant indigenous aquatic species, congruent with the results of a single test using a specified EPA biomonitoring protocol;
>
> Whether EPA's conclusively equating the mixing zone lethality standard in FAC 17–4.244(3) to the results of a single biomonitoring test is consistent with the Florida DER's interpretation and application of that provision;
>
> Whether available information supports EPA's position that any unsatisfactory result in a biomonitoring test conclusively proves that the effluent is toxic and that Florida water quality standards have been violated;
>
> Whether available information indicates that the prescribed biomonitoring techniques at times show unexplained mortality in the control water and mortality in control water and effluent that has no dose-response relationship to the effluent concentration;
>
> Whether the prescribed biomonitoring techniques are insufficiently consistent and reliable for use as an absolute unconditional permit limitation rather than as an indicator of possible toxicity;
>
> Whether on the specific facts EPA has the authority to require biomonitoring limits as a permit condition;
>
> Whether the specific permit language, including the conclusive presumption of toxicity on the basis of a single adverse test result, is supportable in law or fact;
>
> JSC objects specifically to the language in Part I.A.7 and in Parts V.1.b and V.3.a [stating] that greater than 50% mortality in any single test with any single species conclusively establishes that the mill's efflu-

> ent is toxic and that the permit and Florida rules are violated; and
>
> Under the Florida rules and the facts of the existing case, EPA does not have the authority to require such a "pass/fail" biomonitoring program as a permit condition.

In addition, in its tenth and final objection, Jefferson challenged the provisions of its permit (quoted in note 3, *supra*) requiring additional testing, according to a specific schedule, in the event that an initial toxicity test is failed.

Each of Jefferson's first nine objections is foreclosed by the interpretation of rule 17–4.244(3)(a) that we have endorsed in *Miami-Dade*, in *City of Jacksonville*, and again in today's opinion. We have held that biological testing methods such as those specified in the Jefferson permit are necessary and appropriate means of implementing the Florida toxicity standard, and specifically that the characterization of any single exceedance as a violation is consistent with the plain meaning of the Florida rule. Further, we have held that the FDER's allegedly contrary interpretation of rule 17–4.244(3)(a) does not, under any of the circumstances with which we have been presented, alter the result.[13] For the same reasons, we hold that the Jefferson permit's effluent toxicity limitation and biological testing provisions are, as a matter of law, properly included in the permit pursuant to Clean Water Act section 301(b)(1)(C), in order to ensure compliance with Fla. Admin. Code rule 17–4.244(3)(a).

We proceed, then, to Jefferson's challenge to the permit provisions requiring that follow-up testing be commenced within two weeks after an initial toxicity test failure, and that a total of three valid follow-up tests be conducted:

> JSC * * * objects to the requirement in Part V.3 that if mortality for any test species exceeds 50%, the permittee must begin a follow-up test within two weeks and continue with weekly tests until three valid (less than 10% mortality in the control group) additional tests have been completed. Because the

[13] We note that in connection with the Jefferson permit, the FDER provided a Clean Water Act section 401 certification in response to Region IV's request, and that the FDER's certification did not suggest any perception of error in the Region's application of rule 17–4.244(3)(a). Indeed, the certification did not mention that section of Jefferson's permit at all.

> testing will be done by outside contractors, two weeks may be insufficient to initiate a test; at least 30 days should be allowed. Moreover, automatically requiring weekly tests until three valid ones have been achieved will be unnecessary in most cases.

Jefferson Evidentiary Hearing Request, at 2.

As to the first requirement, Jefferson's assertion that two weeks "may be insufficient" for the purpose of engaging an outside contractor to initiate further testing, and that thirty days would therefore be preferable, is hardly a compelling allegation of hardship.[14] By the same token, however, the Region has provided no explanation for its belief that two weeks represents a reasonable time limit. We nonetheless conclude that review of this issue is not warranted, because the burden of demonstrating that the Region's permit condition is erroneous rests with the petitioner, and because Jefferson's speculation that compliance with a two-week time limit may be difficult (Petition for Review, at 3) is not sufficient to carry that burden. Moreover, the Region has expressed its willingness to relax the two-week deadline if, in the course of implementing these permit requirements, a need for additional time should arise. *See* Response to Evidentiary Hearing Request, at 2; Response to Petition for Review, at 2. Review of this issue is, accordingly, denied. *Cf. In re City of Denison, Texas*, NPDES Appeal No. 91–6, at 11–12 (EAB, Dec. 8, 1992) (review denied where petitioner's objection related principally to an implementation issue, and where the Region expressed its readiness to reconsider and accommodate petitioner's concerns if warranted by specific circumstances arising during implementation).

With respect to Jefferson's second objection pertaining to follow-up testing, the nature of Jefferson's dissatisfaction is left entirely to the imagination; we are not told whether Jefferson objects to conducting *any* follow-up tests, whether it objects to conducting *three* (as opposed to one or two) follow-up tests, or whether it objects to conducting three *valid* follow-up tests. The reason for the objection is also unexplained, with Jefferson stating only that follow-up testing (or some unspecified aspect thereof) is "unnecessary." The evidentiary hearing request was properly denied as to this issue for lack of

[14] We agree with the Region that Jefferson cannot raise for the first time, in the context of this appeal, an argument that the follow-up testing requirements are too costly. *See* Response to Petition for Review, at 2. No cost-related objection was asserted or even implied in Jefferson's comments on the draft permit or in its evidentiary hearing request, and any such objection is therefore waived. *See In re Sequoyah Fuels Corp.*, NPDES Appeal No. 91–12, at 5 (EAB, Aug. 31, 1992).

specificity, *see* 40 CFR § 124.74(b)(1), and the petition for review is similarly deficient. *See Broward County,* NPDES Appeal No. 92–11, at 18 ("The requirement for specificity in articulating the legal or factual question at issue is essential to allow for an informed decision by the Regional Administrator, and meaningful review of the Regional Administrator's decision by the Board.").[15]

III. *CONCLUSION*

In Appeal No. 92–18, we conclude as a matter of law that Region IV did not err by including language in the American Cyanamid permit that characterizes a single toxicity test failure as a permit violation, and we therefore deny the petition for review in its entirety.

In Appeal No. 92–8, we again conclude as a matter of law that Region IV did not err by including language in the Jefferson Smurfit permit characterizing a single toxicity test failure as a permit violation. In addition, we hold that Jefferson has not articulated a sufficient basis for concluding that a two-week interval between an initial test failure and the commencement of follow-up testing is unreasonably short. We also hold that Jefferson's remaining objection or objections to the follow-up testing requirements in its NPDES permit were properly rejected because they were not stated with the requisite degree of specificity. Therefore, the petition for review in Appeal No. 92–8 is likewise denied in its entirety.

So ordered.

[15] Although we need not reach the issue for the purpose of deciding Jefferson's appeal, we note that, as a general matter, a requirement to conduct follow-up testing of effluent lethality appears reasonable on its face. *See supra* note 10.