IN THE MATTER OF MIAMI-DADE WATER AND SEWER AUTHORITY DEPARTMENT

NPDES Appeal No. 91–14

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

Decided July 27, 1992

Syllabus

Miami-Dade Water and Sewer Authority Department seeks review of the denial of an evidentiary hearing request on certain issues relating to the renewal of an NPDES permit by U.S. EPA Region IV for Miami-Dade's North District Wastewater Treatment Facility. The Facility discharges to the Atlantic Ocean 11,000 feet offshore. Miami-Dade's evidentiary hearing request raised issues relating to the toxicity testing requirements, which were included in the permit to ensure compliance with Florida's numeric whole effluent toxicity standard for open ocean discharges at Rule 17–4.244(3)(c), F.A.C. The Regional Administrator denied the evidentiary hearing request in its entirety on the ground that none of the issues raised by Miami-Dade were factual issues. In its petition for review, Miami-Dade also raises as a legal issue for the Environmental Appeals Board to decide whether the permit must include the biomonitoring protocol implementing the Florida regulations contained in Rule 17–4.244(3)(c), F.A.C. to assure compliance with Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C).

Held: The following issues raised in Miami-Dade's evidentiary hearing request are factual ones that should be heard at an evidentiary hearing: (1) whether Miami-Dade's effluent is causing, has a reasonable potential for causing, or contributes to a violation of Florida's toxicity standard for open ocean discharges at Rule 17–4.244(3)(c), F.A.C.; (2) whether the test species specified in the permit will accurately predict how indigenous species would fare when exposed to Miami-Dade's effluent at 30% full strength for 96 hours. Assuming Miami-Dade's effluent has a reasonable potential for causing or contributing to a violation of Florida's toxicity standard for ocean discharges, the Region is required under the Clean Water Act and implementing regulations to include a permit limitation to ensure compliance with that standard. With respect to the other issues raised in Miami-Dade's petition, review is denied.

Before Environmental Appeals Judges Ronald L. McCallum and Edward E. Reich.

Opinion of the Board by Judge Reich:

Miami-Dade Water and Sewer Authority Department seeks review of the denial of an evidentiary hearing request on certain issues relating to the renewal of an NPDES permit by U.S. EPA Region IV for Miami-Dade's North District Wastewater Treatment Facility (the "Facility"). The Facility discharges to the Atlantic Ocean 11,000 feet offshore.[1] Miami-Dade sought an evidentiary hearing on various issues related to the toxicity testing requirements in the permit, which were included in the permit to ensure compliance with Florida's numeric whole effluent toxicity standard for open ocean discharges. Rule 17–4.244(3)(c), F.A.C. In its petition for review, Miami-Dade also raises a legal issue for this Board to decide, as follows: whether the permit must include the biomonitoring protocol implementing the Florida regulations contained in Rule 17–4.244(3)(c), F.A.C. to assure compliance with Clean Water Act § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). At the request of the Agency's Chief Judicial Officer, the Region filed a response to the petition for review, and in response to that submission, Miami-Dade filed a reply brief.[2] For the reasons set forth below, we are remanding the following two issues to the Region for an evidentiary hearing: (1) whether Miami-Dade's effluent is causing or contributing to or has a reasonable potential to cause or contribute to a violation of Florida's toxicity standard for open ocean discharges at Rule 17–4.244(3)(c), F.A.C.; (2) whether the test species specified in the permit will accurately predict how indigenous species would fare when exposed to Miami-Dade's effluent at 30% full strength for 96 hours. We also conclude that, if the Administrative Law Judge determines that Miami-Dade's effluent causes or contributes to or has a reasonable potential to cause or contribute to a violation of Florida's toxicity standard, the

[1] A Temporary Operating Permit issued by the Florida Department of Environmental Regulation describes the Facility as follows:

> A 90 MGD (interim operational capacity) pure oxygen activated sludge process WWTF with primary settling and disinfection by chlorination, discharging to the Atlantic Ocean 11,000 feet off shore via a 90" outfall line at a depth of approximately 108 feet with a center feed diffuser (right angle to outfall) at terminus.

Region's Response to Comments, Appendix 9.

[2] At that time, the Agency's Judicial Officers held delegated authority to decide NPDES permit appeals. Subsequently, effective on March 1, 1992, the position of Judicial Officer was abolished, and all cases pending before the Judicial Officers, including this case, were transferred to the Environmental Appeals Board. *See* 57 Fed. Reg. 5321 (Feb. 13, 1992).

Region is required under CWA § 301(b)(1)(C) to include a permit limitation that will ensure compliance with that standard. With respect to the other issues raised in Miami-Dade's petition, review is denied.

I. *BACKGROUND*

On October 15, 1986, Miami-Dade filed an NPDES permit renewal application with Region IV. On May 21, 1987, the Region sent out public notice of a draft permit, and on June 2, 1987, Miami-Dade filed its comments on the draft permit. In its comments, Miami-Dade complained that a statement in the draft permit—"The discharge of toxic pollutants in toxic amounts is prohibited."—was vague. Miami-Dade urged the Region to replace the vague statement with a recently enacted Florida numeric whole effluent toxicity standard, Rule 17–4.244(3)(c), F.A.C., which provides, in part, as follows:

> For open ocean discharges, the effluent when diluted to 30% full strength, shall not cause more than 50% mortality in 96 hours (96-hr. LC50) in a species significant to the indigenous aquatic community.

On June 22, 1987, the Region sent out public notice of a revised draft permit, along with a revised fact sheet. The permit had been revised to include the toxicity testing conditions at issue here. Those conditions were included in the permit to ensure compliance with the numeric whole effluent toxicity standard quoted above. On June 25, 1987, Miami-Dade filed its comments on the revised draft. Even though it had urged inclusion of the Florida toxicity standard quoted above, Miami-Dade challenged among other things the inclusion of toxicity testing requirements in the permit. In its comments on the revised draft permit, Miami-Dade stated: "Due to limited response time, a reply detailing our specific concerns will follow at a later date." Miami-Dade, however, did not file a more detailed reply.

On August 10, 1987, the Final Permit was issued along with an Amendment to the Revised Fact Sheet and a Response to Comments. The Amendment to the Revised Fact Sheet states that:

> State certification was requested for the original draft permit on April 29, 1987. State certification was requested for the revised draft permit on June 22, 1987 and June 30, 1987. State certification is hereby deemed waived, as per 40 CFR 124.53(c).

In addition to the challenged toxicity testing requirements, the final permit contains conditions relating to ocean discharge criteria. On September 14, 1987, Miami-Dade requested an evidentiary hearing on issues related to both the ocean discharge criteria and the challenged testing requirements.

On December 1, 1988, the Regional Administrator granted an evidentiary hearing on the issues related to the ocean discharge criteria but denied a hearing on the issues related to toxicity testing. Miami-Dade appealed the denial of the toxicity testing issues to the Agency's Chief Judicial Officer. On May 10, 1989, Miami-Dade sent to the Region a request for permit modification "based on new information and new standards that were not available at the time of permit issuance." The Region then asked the Chief Judicial Officer for a stay of appeal to allow the Region to consider the modification request. On May 17, 1989, the Chief Judicial Officer granted the Region's motion for a stay of appeal. Almost two years later, on May 9, 1991, the Chief Judicial Officer determined that the stay had not resulted in any final resolution and had not served as a catalyst to bring about such a resolution. The Chief Judicial Officer, therefore, remanded the appeal to the Region, directing the Region to reconsider the matters that had been appealed and dismissing the appeal without prejudice. On May 28, 1991, the Regional Administrator issued a decision denying the hearing request with respect to the toxicity testing requirements and denying as moot the previously granted hearing on issues related to ocean discharge criteria. The Regional Administrator explained that the toxicity testing issues are legal issues because the contested requirements are based on Florida water quality standards and are required to be incorporated into the permit under § 301(b)(1)(C) of the Clean Water Act. This appeal followed.

II. *DISCUSSION*

Under the rules governing this proceeding, there is no appeal as of right from the Regional Administrator's decision. 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 Administrator. *See* 40 CFR § 124.91(a) (1990). The petitioner has the burden of demonstrating that review should be granted.

Florida's toxicity standard for ocean discharges reads as follows:

> For open ocean discharges, the effluent when diluted to 30% full strength, shall not cause more than 50% mortality in 96 hours (96-hr. LC50) in a species significant to the indigenous aquatic community. Rapid dilution shall be ensured by the use of multiport diffusers, or a single port outfall designed (by a professional engineer registered in Florida) to achieve a minimum of 20:1 dilution of the effluent prior to reaching the surface. * * *

Rule 17–4.244(3)(c), F.A.C. In order to ensure compliance with the above-quoted toxicity standard, the Region included the following permit provisions:

> Part I, Item 8
>
> The effluent collected at serial Outfall 001, when diluted to 30% full strength, shall not be lethal to more than 50% of appropriate test organisms in 96 hours (96 hr LC50). The testing necessary to demonstrate compliance with this requirement is specified in Part IV of this permit. Failure to demonstrate compliance with this requirement will constitute a violation of Florida Administrative Code 17–4.244([3])(c) and the terms of this permit.
>
> Part IV Biomonitoring Program
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> 1. The permittee shall conduct 48-hour static renewal toxicity tests using the Mysid shrimp (*Mysidopsis bahia*) and the inland silverside (*Menidia beryllina*) or any other species approved by EPA. Tests shall be conducted once every two months for a period of one year following the initiation of the tests and once every six months thereafter for the duration of the permit using samples of post-chlorinated effluent. Four separate grab samples shall be collected at evenly-spaced (6 hr.) intervals over a 24-hour period and used in four separate tests in order to catch any peaks of toxicity and to account for daily variations in effluent quality. Concurrent total residual chlorine measurements on post-chlorinated effluent shall be conducted. * * *

> 2. 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. * * *

For the purposes of this appeal, a key aspect of Florida's toxicity standard is that the effluent is to be tested at precisely 30% full strength. The toxicity testing required by the standard, therefore, does not reflect the actual dilution that will take place once the effluent mixes with the receiving waters. Hence, when determining whether a violation of the standard has occurred, it is not necessary to consider the actual impact of the effluent on the receiving waters or the dilution of the effluent that will occur once the effluent mixes with the water.

A. *Whether Any Permit Limitation is Necessary*

In its petition, Miami-Dade argues that the Region is not required to include any permit limitation to ensure compliance with Florida's toxicity standard at Rule 17–4.244(3)(c), F.A.C., because that standard is not a water quality standard and because Miami-Dade's effluent has no reasonable potential for causing or contributing to a violation of the standard. These two arguments are addressed below.

Legal Status of Florida's Standard: Under Clean Water Act Section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), the Region is required to include in the permit "any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations * * *." The Region believes that, under Section 301(b)(1)(C), it is required to include the challenged permit limitations because those limitations are necessary to ensure compliance with Florida's toxicity standard for ocean discharges, Rule 17–4.244(3)(c), F.A.C.[3] Miami-Dade, on the other hand, contends that

[3] In its reply brief, Miami-Dade notes in passing that "the pertinent Florida water quality standard" is Florida's narrative whole effluent toxicity standard, which prohibits discharges that are "acutely toxic." Rule 17–302.500, F.A.C. (formerly Rule 17–3.051(1)(d), F.A.C.). Miami-Dade then states that Rule 17–4.244(3)(c), F.A.C. is the test methodology used by the State of Florida to monitor for compliance with the water quality standard in Rule 17–3.051(1), F.A.C. Miami-Dade's Reply Brief, at 2. Miami-Dade's point in mentioning Rule 17–302.500, F.A.C. is not entirely clear. Perhaps it is that Rule 17–4.244(3)(c), F.A.C. is associated with a water quality standard (*i.e.* Rule 17–302.500, F.A.C.) but is not in itself a water quality standard and therefore does not trigger the need for a permit limitation under CWA § 301(b)(1)(C).

Florida's standard is not a water quality standard because it is not designed to protect a designated use and that, accordingly, the Region is not required under Section 301(b)(1)(C) to include a permit limitation to ensure compliance with the standard.[4]

Miami-Dade's contention that the toxicity standard is not a water quality standard is certainly subject to debate. However, for our purposes, whether Rule 17–4.244(3)(c) technically meets the definition of "water quality standard" at 40 CFR § 131.3(i) is unimportant because even if Rule 17–4.244(3)(c), F.A.C. is not a water quality standard, the Region still has an obligation under Section 301(b)(1)(C) to include a permit limitation to ensure compliance with the standard (if there is reason to believe that Miami-Dade's effluent might violate the standard). Miami-Dade apparently assumes that Section 301(b)(1)(C) only applies to State water quality standards, treatment standards, or schedules of compliance. We read Section 301(b)(1)(C) more broadly. We interpret the section as requiring a permit limitation to ensure compliance not just with the three types of State standards listed in the statute but, as also provided in the statute, with *any* more stringent "State law or regulations" that might be violated by the discharge. The three types of standards listed in the statute—water quality standards, treatment standards, and schedules of compliance—are merely examples of a larger class of State requirements that might trigger the need for a permit limitation under Section 301(b)(1)(C). *See Occidental Chemical Agricultural Products, Inc.,* NPDES Appeal No. 87–6, at 3–4 (CJO, March 23, 1990)(CWA § 301(b)(1)(C) "does not restrict the subject matter of EPA's permit writing to limitations based on State water quality standards.").

This interpretation is borne out by the regulation at 40 CFR § 122.44(d), which implements CWA Section 301(b)(1)(C). Section 122.44(d) provides for the establishment of permit limitations necessary to ensure compliance with State water quality standards and other State requirements. Section 122.44(d)(1) provides that a permit

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If that is Miami-Dade's point, we disagree. For the reasons set out in the text accompanying this footnote, we believe that even if Rule 17–4.244(3)(c) is not a water quality standard, the Region might still be required under CWA § 301(b)(1)(C) to include a permit limitation implementing it.

[4] *See* 40 CFR § 131.3(i):

> *Water quality standards* are provisions of State or Federal law which consist of *a designated use or uses* for the waters of the United States and water quality criteria for such waters based upon such uses. * * *

(Emphasis added.)

must contain limitations necessary to ensure compliance with State water quality standards. Requirements other than water quality standards are addressed at § 122.44(d)(5), which provides that the permit must include limitations necessary to:

> Incorporate any more stringent limitations, treatment standards, or schedule of compliance requirements established under Federal or State law or regulations in accordance with section 301(b)(1)(C) of CWA.

Read in context with the rest of Section 122.44(d), the above-quoted provision clearly provides that the permit must incorporate State "limitations" that are neither water quality standards, treatment standards, nor schedule of compliance requirements. Thus, subject to a determination that Miami-Dade's effluent has a reasonable potential for causing or contributing to a violation of Florida's toxicity standard, as discussed in the following section, we conclude that the Region was required under CWA Section 301(b)(1)(C) to include a permit limitation to ensure compliance with the standard. Accordingly, review of this issue is denied.

Potential for a Violation: Miami-Dade argues further that under established EPA policy and practice, the Region may not impose the challenged permit provisions unless it first screens the effluent to determine whether there is some potential for a violation of Florida's toxicity standard.[5] Miami-Dade believes that the Region does not have enough data to predict the likelihood of a violation, and that the Region, therefore, has no basis for imposing the challenged permit provisions.

We agree with Miami-Dade that the Region is required to characterize Miami-Dade's effluent before imposing permit limitations to ensure compliance with Florida's toxicity standard. This requirement is found in Section 301(b)(1)(C) of the Clean Water Act and its implementing regulations at 40 CFR § 122.44(d). Under Section

[5] Miami-Dade raised this issue during the comment period when it noted that no screening of the effluent had been performed: "To our knowledge, not a single open ocean sample has ever been analyzed for toxicity although about 50% of the wastewater discharges in the State of Florida are dispersed in the open ocean." Appendix 5, p.1. Miami-Dade raised the issue in its evidentiary hearing request when it discussed the permit's single failed test provision, which provides that a single failed toxicity test will constitute an enforceable violation of the permit. Appendix 8, pp.2–3. In its evidentiary hearing request, Miami-Dade argues that, before any toxicity testing is required, the Region should first determine whether Miami-Dade's effluent has a potential for causing a violation of Florida's toxicity standard.

301(b)(1)(C), the Region is only required to include a permit limitation if that limitation is "necessary" to ensure compliance with the State requirements. Similarly, Section 122.44(d), which requires the establishment of permit limitations to ensure compliance with water quality standards and other State requirements, also only applies if the permit limitation is "necessary" to ensure compliance with the State requirement. In the context of water quality standards, a permit limitation is deemed "necessary" to ensure compliance with a water quality standard if the subject discharge "will cause, ha[s] the reasonable potential to cause, or contribute to an excursion above any State water quality standard * * *." 40 CFR § 122.44(d)(1)(i).[6] Thus, under the Clean Water Act and its implementing regulations, the Region is authorized to include the challenged toxicity testing provisions only if it first determines that Miami-Dade's effluent causes or contributes to or has a reasonable potential to cause or contribute to an excursion over Florida's toxicity standard.[7]

The Regional Administrator rejected Miami-Dade's hearing request in its entirety on the ground that all of the issues raised by Miami-Dade were legal ones. We are of the view, however, that whether Miami-Dade's effluent causes, has the reasonable potential

[6] Even if the Florida standard were not a water quality standard, we would still apply this same formulation by asking whether Miami-Dade's effluent causes or contributes to or has a reasonable potential to cause or contribute to an excursion above Florida's standard for open ocean discharges. While 40 CFR § 122.44(d)(1)(i) is applicable only to water quality standards, we believe it contains a reasonable interpretation of the word "necessary" in Section 301(b)(1)(C), and we therefore conclude that the same standard is appropriate for other types of State requirements.

[7] The formula set out at 40 CFR § 122.44(d)(1)(i) expressly includes discharges that cause, have a reasonable potential to cause, or contribute to an excursion over a water quality standard. The formulation, however, does not expressly include discharges that have a reasonable "potential to contribute" to such an excursion. We nevertheless believe that 40 CFR § 122.44(d)(1)(i) implicitly covers such discharges. Because the provision expressly applies to discharges that contribute to an excursion as well as those that cause an excursion, we see no reason to distinguish between discharges having a reasonable potential to cause and those having a reasonable potential to contribute to such an excursion. That 40 CFR § 122.44(d)(1)(i) was meant to cover discharges having a reasonable potential to contribute is supported by the preamble that accompanied the promulgation of 40 CFR § 122.44(d)(1)(i). In discussing that provision, the preamble states as follows:

> Where a discharge has a reasonable potential to cause or contribute to an excursion above a water quality criterion, effluent limitations are necessary to ensure that water quality standards will always be met.

54 Fed. Reg. 23872 (June 2, 1989). Thus, the preamble supports the conclusion that there is no basis for distinguishing between discharges having a reasonable potential to cause and those having a reasonable potential to contribute to an excursion over a water quality standard.

for causing, or contributes to a violation of Florida's toxicity standard is a factual issue.[8] Accordingly, we are remanding this issue to the Regional Administrator so that an evidentiary hearing on the issue may be conducted.

B. *Whether the Challenged Permit Limitations Faithfully Implement Rule 17–4.244(3)(c), F.A.C.*

Miami-Dade argues in the alternative that, even if the Region is required to include some permit limitation to ensure compliance with Rule 17–4.244(3)(c), F.A.C., the permit limitations chosen by the Region are inappropriate and do not accurately incorporate the Florida standard. Each of Miami-Dade's arguments is addressed below.

Test Variability: The permit provides that a single failed toxicity test will constitute a violation of the 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 believes that toxicity tests exhibit substantial variability and that a result of less than 50% survival in a single test may not be statistically significant or indicative of actual effluent toxicity. Miami-Dade contends that, because of the substantial degree of variability exhibited by toxicity tests, a single failed test should not be considered a violation of the permit, but should merely signal the need for a more definitive study concerning toxicity of the effluent. 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.

The Region responds that Miami-Dade's arguments regarding variability and statistical significance of toxicity tests are advanced

[8] In its response, the Region does not explain how it came to conclude that Miami-Dade's effluent would violate Florida's toxicity standard, and the record contains scant information on the issue. One of the few pieces of relevant information on the issue is in Miami-Dade's evidentiary hearing request, where Miami-Dade asserts that the Facility's "service area is residential in nature with limited industrial loading as evidenced by the unusually low concentrations of priority pollutants detected * * *." Appendix, p. 3.

in support of its contention that the first failed test should not be regarded as a violation. The Region argues that under Florida's toxicity standard for ocean discharges, a discharger is not allowed to fail one or more tests without violating the standard. The Region concludes, therefore, that Miami-Dade's arguments relating to variability are irrelevant.

We agree with the Region. Florida's toxicity standard for open ocean discharges, Rule 17–4.244(3)(c), F.A.C., provides that no effluent shall be permitted to fail the toxicity test specified in the standard. Nothing in the language of the standard suggests that a particular effluent may fail the test one or more times without violating the standard. If the standard contemplated a series of toxicity tests, it would have been written differently. This interpretation of the standard is no less reasonable in light of Miami-Dade's assertions about the variability of toxicity testing.[9] The 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. Accordingly, we conclude that the Regional Administrator did not clearly err in rejecting this issue for an evidentiary hearing. Review of this issue is therefore denied.

Consistency with Florida Law: Miami-Dade argues that the single failed test provision in the permit is inconsistent with Rule 17–6.180(1)(b), F.A.C., which provides that a domestic wastewater facility's compliance with certain treatment standards is determined by reference to the arithmetic mean of pollutant values over time and not just a single measurement. We fail to see Miami-Dade's point in citing this provision. For our purposes, the provision is only important because it illustrates that, when Florida wants to base compliance determinations on the arithmetic mean of pollutant values over time, it knows how to do so and does so explicitly. Thus, when a Florida standard does not mention the arithmetic mean of pollutant values over time, it can be assumed that Florida did not want compliance to be based on the arithmetic mean of pollutant values over time. We conclude, therefore, that Rule 17–6.180(1)(b), F.A.C. sheds little light on the issue before us and to the extent it provides any guidance, it contradicts rather than supports Miami-Dade's position.

[9] EPA's Technical Support Document for Water Quality-Based Toxics Control, at 11 (March, 1991) acknowledges that "toxicity test procedures exhibit variability," but it nevertheless concludes that toxicity testing, when performed properly, is reliable enough to evaluate compliance with a permit. The Technical Support Document cites studies in support of this conclusion.

SEFLOE Tests: Miami-Dade represents that it, the State of Florida, other Southeast Florida municipalities, EPA, and the National Oceanic and Atmospheric Administration are currently involved in a study of open ocean outfalls to characterize the effluent, the receiving waters and the mixing properties of the outfalls. The study is referred to as SEFLOE for the Southeast Florida Outfalls Experiment. Miami-Dade contends that the results from the first phase of the SEFLOE experiments demonstrate that, at the Miami-Dade outfall under consideration here (Outfall 1), there is a 71:1 minimum dilution in the zone on initial dilution. Miami-Dade's Reply Brief, at 9. Miami-Dade argues that, with this degree of dilution, there is no potential for a violation of the toxicity standard and thus no need for a permit limitation. Miami-Dade further represents that, pending the outcome of the SEFLOE tests, the Florida Department of Environmental Regulation (FDER) is not imposing enforceable toxicity testing requirements in its permits, and has issued a Temporary Operating Permit (TOP) to Miami-Dade that does not impose such requirements. The TOP imposes only non-enforceable monitoring requirements to help FDER evaluate specific conditions at the subject outfall. Miami-Dade argues that the TOP issued to Miami-Dade reflects FDER's position on the need for toxicity testing requirements in EPA's NPDES permit.

The information gathered in the SEFLOE experiments about dilution at Outfall 1 has no bearing on the applicability of Florida's toxicity standard. That standard, as noted earlier, applies to the effluent at exactly 30% full strength without regard to the actual dilution that would take place in the receiving waters. As such, data on actual dilution are irrelevant to a determination of compliance. Moreover, Florida's decision to issue a Temporary Operating Permit to Miami-Dade that does not incorporate Florida's toxicity standard as an enforceable limitation also has no bearing on the Region's responsibilities. If FDER believes that its toxicity standard for open ocean discharges is too stringent, it should take whatever steps are necessary and appropriate to have the standard amended or repealed. If it disagrees with the Region's interpretation of the standard, it should have expressed its views during the certification process, the formal opportunity provided by the Clean Water Act and its implementing regulations for a State to communicate its position on whether permit limitations are needed to ensure compliance with State requirements.[10] The State's permitting decisions,

[10] While a State may not condition or deny a certification on the grounds that State law allows a less stringent permit condition, 40 CFR § 124.55(c), a State is required to include in the certification a "statement of the extent to which each

however, are outside the certification process, and Florida waived certification, so the Region is required to make a judgment concerning the need for a permit limitation without the benefit of the State's input. We are not persuaded that the Region's judgment is unreasonable. Accordingly, review of this issue is denied.

Effect on Receiving Waters: Miami-Dade argues that the toxicity test imposed in the permit does not accurately reflect or simulate the effect of the discharge on the receiving waters. In the same vein, Miami-Dade argues that, based on the nature of the outfall and rapid mixing at the point of discharge, the appropriate dilution factor used in the test should be 2%–3% full strength effluent, rather than 30%. Miami-Dade also argues that:

> [T]he required 48-hour static renewal test is predicated on a Eulerian exposure, *i.e.*, a constant concentration exposure over the test period, whereas marine organisms that may be affected by the actual discharge are subject to a LaGrangian exposure, *i.e.*, the concentration of potential toxicants is dramatically diluted over time.

Petition for Review, at 8. Miami-Dade argues, therefore, that under the permit methodology, test organisms are exposed to "concentrations over time which do not represent or reflect actual conditions in the receiving water." *Id.* at 8–9.

The gist of these arguments is that the toxicity test prescribed in the permit does not reflect the actual dilution that will take place once Miami-Dade's effluent mixes with the receiving waters. As explained earlier, however, Florida's standard specifies that the effluent should be tested at exactly 30% full strength. Accordingly, if a sample of the effluent at 30% full strength over 96 hours is lethal to the specified percentage of test organisms, a violation occurs, regardless of how diluted the Facility's effluent actually becomes once it has mixed with the receiving waters. Miami-Dade's comments may go to the representativeness of the State provision but that is not a basis for a challenge to a permit implementing this provision. In light of these considerations, we conclude that the Regional Administrator was not clearly erroneous in denying an evidentiary hearing on these issues. Review of these issues is therefore denied.

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condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards." 40 CFR § 124.53(e)(3).

Use of Non-Indigenous Species: Florida's toxicity standard for ocean discharges provides that the effluent at 30% full strength shall not be lethal to 50% of "species significant to the indigenous aquatic community." Rule 17–4.244(3)(c), F.A.C. To determine compliance with Florida's standard, Part IV of the permit specifies that Mysid shrimp and inland silverside be used. Miami-Dade argues that the two test organisms specified in the permit are not "representative or indigenous." Petition for Review, at 8.

The Region contends that Miami-Dade did not contest the use of the species named in the permit in its evidentiary hearing request, but only mentioned the test species in passing in support of its argument that a single test failure should not be a violation. Region's Response, at 4 n.3. In that evidentiary hearing request, Miami-Dade stated that "the recommended test organisms are non-endemic and have limited correlation to our indigenous species population." Appendix 8, at 6.[11] The Region is correct that this sentence appears in Miami-Dade's discussion of the permit provision that treats a single failed test as a permit violation, but we nevertheless believe that Miami-Dade's statement is sufficiently clear to communicate a request for an evidentiary hearing on the issue.[12]

Because the Region believes that the indigenous species issue was not properly raised in the evidentiary hearing request, the Region's Response does not address the merits of Miami-Dade's argument. The merits of Miami-Dade's argument were addressed, however, in the Region's Response to Comments on the Revised Draft Permit. There, the Region states that the "use of standard laboratory species in toxicity tests is consistent with EPA's *Technical Support Document,* various EPA test protocols, and the May 5, 1986 Regional policy cited above." Appendix 7, at 2. EPA's Technical Support Document for Water Quality-Based Toxics Control, at 17 (March, 1991) states that "EPA considers it unnecessary to test resident species since standard test species have been shown to represent the sensitive range of all ecosystems analyzed." The Region also states that

[11] The Appendix cited in this decision is part of the Region's Response to the petition for review.

[12] It is beyond argument that Miami-Dade raised the indigenous species issue in its comments on the revised draft permit. In those comments, Miami-Dade stated that it was:

> concerned about the use of non indigenous species, which are not significant to the endemic population, as indicator species. This appears to directly conflict with the Florida Administrative Code Chapter 14–4.244(4)(c).

Region's Response, Appendix 5.

the final recommendation of Florida's Bioassay Task Force regarding this issue is that "standard stock monocultures of known health and sensitivity must be used in testing." Appendix 7, at 2. The Region concludes, therefore, that "the use of standard laboratory test species is consistent with the intent of Rule 17–4.244(3)(c), F.A.C., as interpreted by FDER." *Id.* The Region also argues that the use of indigenous species is not practical because of: (1) the absence of sensitive organisms in the receiving water due to previous exposure to the effluent or other pollutants: (2) the difficulty in collecting and handling organisms of the desired age and condition (free from disease) from the receiving water; (3) the lack of extensive quality control and range-of-sensitivity information for such species; and (4) the lack of information on the diet of such indigenous organisms. *Id.*

Florida's toxicity standard for open ocean discharges clearly requires that the effluent's effect on indigenous species be determined. It is conceivable, however, that the effluent's effect on indigenous species may be ascertained by measuring the effluent's effect on non-indigenous species. Whether the test species designated in the permit can serve as suitable surrogates for determining the effluent's lethal effect on indigenous species is a genuine issue of material fact, not a legal issue as the Regional Administrator concluded. Accordingly, we are remanding the issue to the Region, so that an evidentiary hearing on the issue can be scheduled.

Grab Sample vs. Composite Sample: The permit requires that toxicity testing be done on "grab samples" of Miami-Dade's effluent. Miami-Dade argues that testing should be performed on "composite samples." This issue, however, was not preserved for review because is was not raised during the comment period and Miami-Dade has not shown good cause for not raising it at that time. An issue may not be raised in an evidentiary hearing request if it was not raised during the comment period, unless there was "good cause" for not raising it at that time. *See* 40 CFR § 124.76 ("No issues shall be raised by any party that were not submitted to the administrative record required by § 124.18 as part of the preparation and comment on a draft permit unless good cause is shown for the failure to submit them.").

> Good cause includes the case where the party seeking to raise the new issues or introduce new information shows that it could not reasonably have ascertained the issues or made the information available within the time required by § 124.15; or that it could not have reasonably anticipated the rel-

> evance or materiality of the information sought to be introduced.

Id. The grab sample issue was reasonably ascertainable during the comment period, so Miami-Dade should have raised it then. Because it did not raise it then, we conclude that the issue may not be raised at an evidentiary hearing. Review of this issue is therefore denied.

48-Hour Static Renewal Test: Florida's toxicity standard for ocean discharges specifies a 96-hour exposure period. Part I, Item 8 of the permit incorporates this 96-hour exposure period from the Florida standard. On the other hand, Part IV of the permit, by which compliance with Part I, Item 8 is to be determined, requires that the test organisms be exposed to the effluent for only 48 hours in a static renewal test. In its evidentiary hearing request, Miami-Dade argued that the two parts of the permit—Part I, Item 8 and Part IV—are "inconsistent, vague and ambiguous" because they specify different exposure periods. Appendix 8, at 2. To correct this problem, Miami-Dade proposed that the permit be revised to "[m]odify the LC50 test duration to a 48 hour test period."

As written, Miami-Dade's proposed solution does not make sense. If a 48-hour test is inconsistent with the 96-hour requirement in the permit, it is also inconsistent with the 96-hour requirement in the statute. To correct the inconsistency between the two permit provisions without correcting the inconsistency between the permit and the statute would not solve the problem. In any event, this issue was reasonably ascertainable during the comment period, but Miami-Dade did not raise it at that time and has not shown "good cause" for not raising it then. Accordingly, we conclude that the issue may not be raised at an evidentiary hearing. *See* 40 CFR § 124.76. Review of this issue is therefore denied.

III. *CONCLUSION*

We are remanding two issues to the Region for an evidentiary hearing: (1) whether Miami-Dade's effluent is causing or contributing to or has a reasonable potential to cause or contribute to a excursion above of Florida's toxicity standard for open ocean discharges at Rule 17–4.244(3)(c), F.A.C.; (2) whether the test species specified in the permit can serve as suitable surrogates for determining how indigenous species would fare when exposed to Miami-Dade's effluent at 30% full strength for 96 hours. On the legal issue raised in Miami-Dade's petition for review, we conclude that, if Miami-Dade's effluent

causes or contributes to or has a reasonable potential to cause or contribute to an excursion above Florida's toxicity standard, the Region is required under the Clean Water Act and implementing regulations to include a permit limitation to ensure compliance with that standard. With respect to the other issues raised in Miami-Dade's petition, review is hereby denied.

So ordered.