IN RE DISTRICT OF COLUMBIA, DEPARTMENT OF PUBLIC WORKS

NPDES Appeal No. 95-5

REMAND ORDER

Decided May 3, 1996

Syllabus

On July 25, 1995, U.S. EPA Region III issued Permit Amendment No. 2, which modifies an NPDES permit issued to the District of Columbia's Department of Public Works ("the Department"). The permit authorizes pollutant discharges from the Department's Blue Plains Waste Water Treatment System. Permit Amendment No. 2, among other changes, adds Combined Sewer Overflow ("CSO") conditions consistent with EPA's Combined Sewer Overflow Control Policy, issued in April of 1994. On August 28, 1995, the Department requested an evidentiary hearing on various aspects of Permit Amendment No. 2. With respect to certain permit conditions that were meant to implement the 1994 CSO Policy, the Regional Administrator denied the Department's evidentiary hearing request for the reason that such conditions were "attributable to State certification" and, therefore, were not appealable to the Agency. The Department filed a petition with the Environmental Appeals Board, seeking review of the Regional Administrator's denial of the Department's evidentiary hearing request relating to those conditions. In its petition, the Department argues that the Regional Administrator erred in deciding that the challenged CSO conditions were "attributable to State certification."

Held: The permit conditions at issue are not "attributable to State certification" because the District of Columbia's certification letter in response to the draft permit amendment leaves open the possibility that those conditions could be made less stringent and still comply with State water quality requirements. Accordingly, the Board is remanding the challenged conditions to the Regional Administrator for reconsideration of the denial of the evidentiary hearing request.

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

Opinion of the Board by Judge Reich:

On July 25, 1995, the Director of the Water Management Division of U.S. EPA Region III issued Permit Amendment No. 2, which modifies a National Pollutant Discharge Elimination System ("NPDES") permit issued to the District of Columbia's Department of Public Works

("the Department").[1] The permit authorizes pollutant discharges from the Department's Blue Plains Waste Water Treatment System ("Blue Plains Facility"). Permit Amendment No. 2, among other changes, adds Combined Sewer Overflow ("CSO") conditions consistent with EPA's Combined Sewer Overflow Control Policy (EPA 830-8-94-001) issued in April of 1994 by EPA's Office of Water ("the 1994 CSO Policy"). Exhibit E, Region's Response to Petition.

On August 28, 1995, the Department requested an evidentiary hearing on various aspects of Permit Amendment No. 2.[2] With respect to certain conditions that were meant to implement the 1994 CSO Policy, the Regional Administrator denied the Department's evidentiary hearing request for the reason that such conditions were "attributable to State certification."[3] Before us now is a petition filed by the Department seeking review of the Regional Administrator's denial of the Department's evidentiary hearing request relating to those conditions.[4] In its petition, the Department argues that the Regional Administrator erred in deciding that the challenged CSO conditions were "attributable to State certification." For the reasons set forth below, we agree with the Department. We are therefore remanding the challenged conditions to the Regional Administrator for reconsideration.

I. *BACKGROUND*

A combined sewer system is a wastewater collection system owned by a State or municipality that conveys domestic, commercial, and industrial wastewaters together with storm water through a sin-

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[1] Under the Clean Water Act, discharges into waters of the United States by point sources, like the Blue Plains facility, must be authorized under a permit to be lawful. 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System is the principal permitting program under the Clean Water Act. 33 U.S.C. § 1342.

[2] Under 40 C.F.R. § 124.74, any interested person may submit a request to the Regional Administrator for an evidentiary hearing within 30 days following the service of notice of the Regional Administrator's final permit decision.

[3] As will be discussed at greater length below, when a State certifies that a particular permit condition is necessary to ensure compliance with a State water quality standard and cannot be made less stringent without violating the water quality standard, that condition is said to be "attributable to State certification." A permit condition that is "attributable to State certification" is not appealable to the Agency. 40 C.F.R. § 124.55(e) ("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] Under 40 C.F.R. § 124.91, within 30 days of the denial of a request for an evidentiary hearing, any requester may appeal any issue set forth in the denial by filing a notice of appeal and petition for review with the Environmental Appeals Board.

gle-pipe system to a Publicly Owned Treatment Works ("POTW") facility. 1994 CSO Policy at 8. To protect the POTW from being inundated beyond its capacity by storm water during wet weather, combined sewer systems typically have outfalls at various points upstream of the POTW, where excess flow within the system can be discharged. A CSO is a discharge from a one of these outfalls. *Id.* Because combined sewer systems mix storm water with wastewaters, CSOs often contain high levels of untreated sewage and other pollutants, the discharge of which can cause exceedances of water quality standards. *Id.* Accordingly, CSOs are treated as point sources subject to NPDES permit requirements including both technology-based and water quality-based requirements of the Clean Water Act. *Id.*

The 1994 CSO Policy was adopted to: (1) ensure that CSOs occur only as a result of wet weather; (2) bring all wet weather CSO discharge points into compliance with technology-based and water quality-based requirements of the Clean Water Act; and (3) minimize water quality, aquatic biota, and human health impacts from CSOs. *Id.* at 8-9. Under the policy, which is to be implemented through the NPDES permitting and Clean Water Act enforcement programs, permittees with combined sewer systems that have CSOs are called upon to demonstrate implementation of what are called:

> [T]he nine minimum controls as a minimum best available technology economically achievable and best conventional technology (BAT/BCT) established on a best professional judgment basis by the permitting authority (40 CFR section 125.3).

Id. at 26. They are also "responsible for developing and implementing long-term control plans that will ultimately result in compliance with the requirements of the CWA." *Id.* at 14.[5]

The Blue Plains facility treats wastewater from combined sewers that collect sanitary sewage and rain water from various jurisdictions in the Washington, D.C. metropolitan area. Fact Sheet from Draft Permit, Exhibit A of Region's Response to Petition. The Department operates a CSO system, which is designed to prevent wet weather flow from exceeding the hydraulic capacity of the sewer and/or the treatment plant. *Id.*

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[5] To the extent there may be elements of the Policy that are not appropriate for inclusion in the permit, enforcement mechanisms are suggested as a means to establish enforceable requirements. For example, the Policy suggests using an "enforceable mechanism" other than the permit to establish a compliance schedule to meet the nine minimum controls (Policy at 14) and an initiative to address dry weather flows, which are prohibited by the Clean Water Act (*id.* at 10).

The permit conditions that the Regional Administrator determined to be "attributable to State certification" are meant to implement the 1994 CSO policy. They are as follows: 1) Part III.2, which requires the Department to address coordination with stormwater control efforts in documenting the Nine Minimum Controls and in developing its long-term CSO control plan; 2) Part III.2.c.(1)(a), which requires the Department to include in the Nine Minimum Controls consideration of "redirecting roof leader flows from sanitary sewer lines to storm sewer lines" and "elimination of groundwater flow and sump pump dewatering from combined storm sewers;" 3) Part III.2.e.(2)(c), which establishes mandatory minimum parameters for the Department's long-term plan monitoring program and requires that the monitoring program contain sampling to determine toxics loadings from the system to the Department's waters; 4) Part III.2.e.(2)(e), which requires the Department to determine the contribution of storm water from federal facilities to overflows and to develop remedial plans as needed; 5) Part III.2.e.(3), which designates the Anacostia River as a sensitive area under the CSO Control Policy; 6) Part III.2.e.(7), which establishes restrictions on the extent to which the Department can propose water quality standards revisions as part of the long-term CSO control planning process.

The Department appealed the Regional Administrator's decision with respect to all of the permit conditions listed above; however, the permit conditions listed at 2, 3, and 4 above are no longer at issue on appeal, because the Region has chosen to delete them. *See* Region's Response to Petition at 7 n.5.

II. *DISCUSSION*

Under the rules governing an NPDES proceeding, there is no appeal as of right from the Regional Administrator's decision. *In re Florida Pulp and Paper Association & Buckeye Florida, L.P.*, 6 E.A.D. 49, 51 (EAB 1995). 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.[6] *See, e.g., In re Town of Seabrook, N.H.*, 4 E.A.D. 806, 808 (EAB 1993). The petitioner has the burden of demonstrating that review should be granted. *Id.*

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[6] With respect to appeals under Part 124 regarding NPDES permits, Agency policy is that most permits should be finally adjudicated at the Regional level. 44 Fed. Reg. 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. See In re J & L Specialty Products Corporation*, 5 E.A.D. 31, 41 (EAB 1994).

Under section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341, the Agency may not issue a permit until the State (in this case the District of Columbia) in which the facility is located either certifies that the permit complies with the State's water quality standards or waives certification. This requirement is implemented in EPA's regulations at 40 C.F.R. § 124.53. The State's certification letter is required to include "[a] statement of the extent to which each condition of the draft permit can be made less stringent without violating the requirements of State law, including water quality standards." 40 C.F.R. § 124.53(e)(3). If the State's certification letter communicates the idea that a particular permit requirement is necessary to ensure compliance with a State water quality standard and cannot be made less stringent and still comply with the standard, the permit requirement is said to be "attributable to State certification." *In re General Electric Company, Hooksett, New Hampshire*, 4 E.A.D. 468, 471-472 (EAB 1993). A permit condition that is "attributable to State certification" may not be contested within the Agency. *See* 40 C.F.R. § 124.55(e) ("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.").

If, on the other hand, the certification letter leaves open the possibility that the permit condition could be made less stringent and still comply with the State water quality standard, the permit condition is not "attributable to State certification" and is subject to further challenge within the Agency pursuant to the procedures in 40 C.F.R. part 124. *See In re Boise Cascade Corporation*, 4 E.A.D. 474, 483 n.7 (EAB 1993) (Because certification letters from Louisiana left open the possibility that the effluent limitations in the permit could be made less stringent and still comply with Louisiana's water quality standards, such limitations were not "attributable to State certification."). A certification letter stating only that a permit condition will comply with the State's water quality standards or only that it will not violate those standards leaves open the possibility that the permit condition could be made less stringent and still comply with the standards. 44 Fed. Reg. 32,880 (June 7, 1979).

The Regional Administrator's opinion that the above-listed permit conditions were "attributable to State certification" was based on the highlighted language in the following certification letter issued by the District of Columbia's Department of Consumer and Regulatory Affairs ("DCRA"):

> Based on our review, and with the changes enclosed with this correspondence incorporated into it, it

> is hereby certified that the draft amendments to the permit will not violate the Water Quality Standards of the District of Columbia, and are in accordance with any approved water quality management plans.
>
> Also, in accordance with Section 401 of the Clean Water Act it is hereby certified that the draft amendments to the permit, as amended, will comply with the applicable provisions of Section 208(e), 301, 302, 303, 306, and 307 of the Clean Water Act, as amended, 33 U.S.C. 1251 *et seq.*
>
> Therefore, it is hereby authorized that the District of Columbia, Department of Public Works, be allowed to discharge from the Blue Plains Wastewater Treatment Plant via the outfalls stated in the draft amendments to the permit, as amended, receiving waters being the Potomac River, the Anacostia River, and Rock Creek.
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> We find no conditions which would place more stringent limitations on the draft amendments to the permit, *nor should limitations on the discharge as stated in the draft amendments to the permit, be made less stringent.*

Letter to Renee Gruber, EPA, from Ferial S. Bishop, District of Columbia Environmental Regulations Administration (Nov. 10, 1994), Attachment C, Petition (emphasis added).

Of all the statements in the letter quoted above, only the highlighted statement can be read as communicating the idea that there are permit conditions — in this instance, "limitations on the discharge" — that cannot be made less stringent and still comply with the District of Columbia's water quality standards. The precise issue before us, as framed by the parties, is whether the limitations referred to in the highlighted statement include every form of limitation identified in Permit Amendment 2 or just those that directly and numerically limit the allowable level of pollutants in the discharge. (None of the CSO conditions at issue here are numeric limitations.)

The Department argues that:

> None of the contested conditions for which review is sought here are "limitations on the discharge," rather they are conditions on the development and imple-

> mentation of the District's long-term CSO control plan and Nine Minimum Controls. Therefore, they do not fall within DCRA's prohibition on less stringent conditions and may be made less stringent by EPA.

Petition at 9-10. The Region, on the other hand, equates the words "limitations on the discharge" with the term "effluent limitations," which has a broad definition and is not restricted to numeric standards.[7] The Region therefore contends that the term "limitations on the discharge" includes non-numeric permit conditions, as does the term "effluent limitations," and that "[a]ll of the contested conditions affect the quality and quantity of the discharge even though they are not numeric." Region's Response to Petition at 6. The Region points out, for example, that: "In the present case, the coordination of stormwater plans is needed in order to assess wet weather loads and develop CSO controls. The absence of a long term CSO control plan or an inadequate one would cause the Petitioner to not meet water quality standards." *Id.*

After careful consideration of the parties' arguments, we conclude that, although the question is not free from doubt, the Department's reading of the certification letter is more consistent with the language of the letter than the Region's reading. We recognize that the Agency has defined the term "effluent limitation" very broadly.[8] The resolution

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[7] The Region argues that:

> EPA has a large degree of discretion in interpreting the term "effluent limitation," and determining whether an effluent limitation must be expressed as a numeric standard. *See Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984) and *American Iron & Steel Institute v. EPA*, 543 F.2d 521, 527 (3rd Cir. 1976).
>
> In the exercise of its discretion, EPA has determined that effluent limitations may be expressed as best management practices if it is infeasible to express effluent limitations numerically.

Region's Response to Petition at 6.

[8] The Agency has defined "effluent limitation" to mean:

> [A]ny restriction imposed by the Director on quantities, discharge rates, and concentrations of "pollutants" which are "discharged" from "point sources" into "waters of the United States," the waters of the "contiguous zone," or the ocean.

40 C.F.R. § 122.2. The Agency's definition was upheld in *American Iron & Steel v. EPA*, 543 F.2d 521, 526 (3d Cir. 1976)("[W]hen an agency employs its special knowledge and expertise in con-

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of this dispute, however, hinges on the proper interpretation of DCRA's certification letter. Accordingly, our concern is not how the Agency has defined the term "effluent limitation," but rather the meaning of the phrase "limitations on the discharge" in DCRA's letter. For the reasons set forth below, we conclude that DCRA did not mean to include the permit conditions at issue within that phrase.

By itself, DCRA's letter does not conclusively support the position of either party. Our reading of the certification letter, however, need not, and should not, be restricted to the four corners of the document. The State's certification letter responds to the Region's draft permit amendment. We believe, therefore, that the terminology used in the draft permit amendment may shed light on the proper interpretation of the language used in the certification letter. When we read DCRA's certification letter in this light, we find sufficient support for the Department's position to rule that the permit conditions at issue are not "attributable to State certification."

The draft permit amendment nowhere used the phrase "limitations on the discharge." It did, however, use the similar phrase "discharge limitations." The phrase "discharge limitations" was used in the draft permit amendment only to describe effluent limitations that were expressed as numerical limits on the concentration or amount of pollutants in the discharge. Permit Amendment 2 at 10, Exhibit A, Region's Response to Petition. The phrase did not appear in part III of the draft permit amendment, which contained all of the CSO-related permit conditions. This suggests that the phrase "limitations on the discharge" in the certification letter includes only effluent limitations that are expressed as numerical limits on the concentration or amount of pollutants, and does not include the permit conditions at issue.[9]

At most, the Region has shown that the phrase "limitations on the discharge" may be capable of either of the interpretations offered by

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struing significant terms of the act which it administers, particularly terms of art such as 'effluent limitation,' the agency's interpretation is then entitled to considerable deference."). *See supra* n.7.

[9] Even if the phrase "limitations on the discharge" in DCRA's certification letter were meant to be synonymous with the term "effluent limitations" as that term was used in the draft permit amendment, the Region's argument would fail. Section c. of Part III.2. of the draft permit amendment bore the heading "Effluent limits" and contained all of the CSO-related permit conditions that the Region denominated as "effluent limitations." The three permit conditions still at issue, however, were not found in that section and thus did not constitute "effluent limitations" in the narrow sense used in the Region's draft permit amendment. (For purposes of this decision we need not, and do not, reach the issue of whether the permit conditions at issue are properly classified as "effluent limitations" within the meaning of the Agency's broad definition of that term.)

the parties. In other words, DCRA's certification letter is arguably ambiguous. However, even if we were to conclude that the letter is ambiguous, that would still leave open the possibility that the permit conditions at issue could be made less stringent and still comply with the District's water quality standards. Under such circumstances, the Regional Administrator does not have a sufficient basis for concluding that a permit condition is "attributable to State certification" and thus may not decline to consider an evidentiary hearing request relating to such a condition on that basis. *See In re Boise Cascade Corporation*, 4 E.A.D. 474, 483 n.7 (EAB 1993).[10]

III. *CONCLUSION*

For all the foregoing reasons, we hold that the permit conditions at issue are not "attributable to State certification" and thus may be appealed to the Regional Administrator. We are therefore remanding the permit conditions at issue to the Regional Administrator. On remand, the Regional Administrator is directed to process the Department's evidentiary hearing request with respect to those conditions in a manner consistent with this order.[11]

So ordered.

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[10] In view of our holding that the permit conditions at issue are not "attributable to State certification," we need not reach the Department's alternative argument that the permit conditions at issue are materially different from the conditions proposed by DCRA in its certification letter. Petition at 11.

[11] Although 40 C.F.R. § 124.91 contemplates that further briefing will ordinarily be required upon a grant of a petition for review, "a direct remand without additional submissions is appropriate where, as here, it does not appear as though further briefs on appeal would shed light on the issues [to be] addressed on remand." *In re City of Ames, Iowa*, 6 E.A.D. 374, 390 n.24 (EAB 1996) (*quoting In re Amoco Oil Company Mandan, North Dakota Refinery*, 4 E.A.D. 954, 982 n.38 (EAB 1993)).