BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	)	
Town of Milford, Massachusetts Board of Sewer Commissioners	)	NPDES Appeal No. 00-30
NPDES Permit No. MA 0100579	)	

ORDER DENYING PETITION FOR REVIEW

I. *INTRODUCTION*

In a petition dated November 3, 2000 ("Petition"), the Town of Milford, Massachusetts Board of Sewer Commissioners ("Milford") seeks review of a National Pollutant Discharge Elimination System ("NPDES") permit decision made by U.S. EPA Region I ("Region") on September 29, 2000. The decision approved the reissuance of an NPDES permit[1] ("Permit") to Milford to replace its existing permit. The reissued permit contains new and revised requirements.

Milford objects to the requirement that it develop a

[1]Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources into waters of the United States must obtain a permit in order for the discharge to be lawful. See CWA § 301, 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. 33 U.S.C. § 1342.

Pretreatment Program for its publicly owned treatment works ("POTW"), and to the Permit's effluent limitations for copper and phosphorus. With regard to the copper and phosphorus effluent limitations, Milford argues that (1) there is a national debate on the bioavailability of metals in the effluent of POTWs; (2) insufficient data were included in the fact sheet that accompanied the public notice; and (3) its POTW cannot meet the limitations without the addition of unit processes, the cost of which would cause social and economic harm to the community. *See* Petition at 1-2.

II. *FACTUAL AND PROCEDURAL BACKGROUND*

Milford operates a POTW in Milford, Massachusetts, which discharges into the Charles River. In a meeting held in Spring 2000, the Region, together with the Massachusetts Department of Environmental Protection ("MADEP"), shared with Milford a preliminary draft of the NPDES permit to be reissued for its discharges into the Charles River ("Preliminary Draft"). *See* Response Exhibit F ("R Ex").

In addition to requiring Milford to develop a Pretreatment Program, *see id* at 7, the Preliminary Draft contained a monthly average effluent limitation for copper of 5.0 micrograms per

liter ("Fg/l"), and a maximum daily average effluent limitation of 7.0 Fg/l.[2] *See id* at 3. Also, consistent with a letter dated March 24, 2000, in which the Region informed Milford of its (and MADEP's) intent to address eutrophication[3] in the Charles River by requiring several POTWs, including Milford's POTW, to limit discharge concentrations of phosphorus to 0.2 milligrams per liter ("mg/l"), *see* R Ex E at 2, the Preliminary Draft contained an average monthly effluent limitation for phosphorus of 0.2 mg/l. *See id.*[4]

Milford responded in a May 10, 2000 letter to the Region, questioning the sufficiency of the data supporting the tightening of the effluent limitations for copper and phosphorus. *See* R Ex G ¶ 5. Milford also stated that it would be willing to proceed with the establishment of the Pretreatment Program if EPA and MADEP "acknowledge[d] the actual capacity of the [POTW] as 6.3 mgd." *See id* ¶ 7.

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[2]The previous permit for this discharge contained a monthly average effluent limitation for copper of 7.2 Fg/l, and a maximum daily effluent limitation of 10.1 Fg/l. *See* R Ex B at 2.

[3]Eutrophication refers to "[t]he process by which a body of water becomes, either by natural means or by pollution, excessively rich in dissolved nutrients, resulting in increased primary productivity that often leads to a seasonal deficiency in dissolved oxygen." *McGraw-Hill Dictionary of Scientific and Technical Terms* 710 (5th ed. 1994).

[4]The previous permit for this discharge, which was issued on September 30, 1992, and modified August 30, 1996, contained a monthly average, weekly average, and maximum daily average effluent limitation for phosphorus of 10 mg/l. *See* R Ex B at 2.

On June 16, 2000, the Region prepared an updated draft permit ("Draft Permit") and Fact Sheet, this time for public comment. *See* R Ex D. The Region and MADEP issued a joint public notice of the Draft Permit, which informed the public that the public comment period would begin on June 19, 2000, and end on July 18, 2000. *See* R Ex J. The Draft Permit contained the same copper and phosphorus effluent limitations as the Preliminary Draft. *Compare* R Ex F at 3 *with* R Ex D, Draft Permit at 3. On July 17, 2000, Milford submitted comments on the Draft Permit, in which it stated that it "reiterates [its] concern with regard to the proposed copper and phosphorus limitations set forth in the draft permit." *See* R Ex K ¶ 3.

On September 29, 2000, the Region issued the Permit to Milford and responded to the public comments. The response addressed the issues raised by Milford by, in part, adjusting the copper effluent limits to 5.3 Fg/l (average monthly) and 7.4 Fg/l (daily maximum). *See* R Ex L at Att 2. However, the Region neither adjusted the effluent limitation for phosphorus, *see* R Ex A at 3, nor eliminated the requirement that Milford develop a Pretreatment Program for its POTW. *See id* at 7.

For the reasons stated below, Milford's request for review is denied.

III. *DISCUSSION*

A. *Standard of Review*

The burden of demonstrating that review of the Regional Administrator's decision is warranted rests with the petitioner. *See* 40 C.F.R. § 124.19(a); *see also In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997). A petitioner must state his or her objections to the permit and demonstrate that any contested permit conditions in question are based on "(1) A finding of fact or conclusion of law which is clearly erroneous, or (2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review." *See* 40 C.F.R. § 124.19(a).

In addition, a petitioner is required to show that any issues for which review is being sought were properly preserved for review. *See Commonwealth Chesapeake*, 6 E.A.D. at 770. To preserve an issue for review, a petitioner bears the burden of demonstrating in his or her petition that "any issues raised were raised during the public comment period (including any public hearing) to the extent required by these regulations." 40 C.F.R. § 124.19(a). *See In re Maui Elec. Co.*, PSD Appeal No. 98-2, slip op. at 9 (EAB, Sept. 10, 1998), 8 E.A.D. __; *In re Essex County*

(N.J.) Res. Recovery Facility, 5 E.A.D. 218, 223-24 (EAB 1994). Adherence to this requirement is necessary to ensure that the Region has an opportunity to address potential problems with the draft permit before it becomes final, thereby promoting the Agency's longstanding policy that most permit issues should be resolved at the Regional level. *See In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 9 (EAB, Feb. 23, 2001), 9 E.A.D. ___; *In re Fla. Pulp & Paper Assoc.*, 6 E.A.D. 49, 53 (EAB 1995); *see also In re Broward County, Fla.*, 4 E.A.D. 705, 714 (EAB 1993); *In re Sequoyah Fuels Corp.*, 4 E.A.D. 215, 218 (EAB 1992).

B. *The Copper and Phosphorus Effluent Limitations*

1. *Milford Did Not Preserve For Review The Issue Of An Alleged National Debate On The Bioavailability Of Metals In The Effluent of POTWs.*

In comments that were submitted in a timely manner on July 17, 2000, Milford contested the requirement to develop a local Pretreatment Program and the copper and phosphorus effluent limitations. *See* R Ex K. In the Petition, however, Milford raises the additional argument of an alleged national debate on the bioavailability of metals like copper in the effluent of

POTWs.[5]

Under 40 C.F.R. § 124.13, captioned "Obligations to raise issues and provide information during the public comment period," any person who believes that a permit condition is inappropriate must raise "all reasonably ascertainable issues and * * * all reasonably available arguments supporting [the person's] position by the close of the public comment period." The Board has consistently construed section 124.13 as requiring that all reasonably ascertainable issues and arguments be raised *during* the public comment period to be preserved for review by the Board. *See, e.g., In re City of Phoenix, Ariz. Squaw Peak & Deer Valley Water Treatment Plants*, NPDES Appeal no. 99-2 (EAB Nov. 1, 2000), 9 E.A.D. __ (holding that petitioner's issue was not preserved for review where petitioner raised it prior to, but not during, the public comment period); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 119-20 (EAB 1997)(holding that petitioner's issue was not preserved for review where petitioner's parent company raised an issue prior to the public comment period, and no comments were received on the issue during

[5]Specifically, Milford argues that "there is considerable national debate on the bioavailability of metals in the effluent from a [POTW]. The discharge limitations are based on the total recoverable amount of a metal, when in fact substantially less metal is actually bioavailable. Therefore a copper limitation which has been set near the detection limit of the laboratory procedure is excessive for its intended goal." Petition at 1.

the public comment period).

As explained previously, the public comment period started on June 19, 2000, and ended on July 18, 2000. *See* R Ex J. Prior to raising the issue of an alleged national debate on the bioavailability of metals in the effluent of POTWs in its Petition, Milford had raised it only in a May 10, 2000 letter to the Region. *See* R Ex G.

In its timely comments on the Draft Permit submitted on July 17, 2000, Milford stated that it "reiterates [its] concern with regard to the proposed copper and phosphorus limitations set forth in the draft permit." *See* R Ex K ¶ 3. The phrase "reiterates [its] concern," without more, however, was not sufficiently informative to put the Region on notice that Milford was intending to preserve the bioavailability issue for review. To suggest otherwise would require a permit issuer, before finalizing a draft permit, to search through the administrative record for comments submitted prior to the public comment period, to determine which concerns of various commenters were being "reiterate[d]." Consistent with the policy concerns we cited in *In re City of Phoenix*[6], we reject that approach. Moreover, after

[6]Specifically, we said "the task would necessarily involve a time-consuming and exhausting search of the administrative record,

(continued...)

stating that it reiterates its concern, Milford specified the bases for its objections to the copper and phosphorus effluent limits in three full paragraphs without ever raising the issue of an alleged national debate on the bioavailability of metals.[7] *See* R Ex K ¶ 3. Accordingly, since this issue was not raised during the public comment period, it cannot be raised now.

2. *Milford Failed To Demonstrate That The Copper And Phosphorus Effluent Limitations Are Based On An Erroneous Finding Of Fact Or Conclusion Of Law.*

Milford argues that the copper and phosphorus effluent limitations are inappropriate because "[i]nsufficient data was included in the fact sheet which accompanied the public notice to support the requirement for reduced copper and phosphorus limitations. Sufficient data are necessary to prove 'reasonable potential'[8] for toxicity or for deterioration of in stream water

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[6](...continued)
just to assure that all potential comments had been identified." *In re City of Phoenix*, slip op. at 19.

[7]Furthermore, Milford does not explain the substance or significance of the alleged debate, nor offer an alternative approach for calculating the contested copper effluent limitations.

[8]The regulations at 40 C.F.R. § 122.44(d)(l)(iii) require the permitting authority, before imposing an effluent limitation mandated by a state water quality standard, to make a determination on the discharge's reasonable potential to cause or contribute to an in-stream excursion above that standard.

quality." Petition at 1.[9]

This argument must be rejected, for Milford does not specify which of the data, or how the total quantum of data, relied upon by the Region's permit writer to form the "reasonable potential" determination are "insufficient." *See In re Ariz. Mun. Storm Water NPDES Permits,* 7 E.A.D. 646, 659 n.21 (EAB 1998), *aff'd sub nom. Defenders of Wildlife v.* Browner, 191 F.3d 1159 (9th Cir. 1999), *amended on denial of reh'g by* 197 F.3d 1035 (9th Cir. 1999)("As petitioners have not elaborated on this assertion or provided any legal or other support, petitioners' request lacks the specificity necessary for a grant of review."); *In re Commonwealth Chesapeake Corp.* 6 E.A.D. 764, 772 (EAB 1997) (petition for review must provide sufficient information or specificity from which the Board could conclude that a permit determination was erroneous); *In re Broward County*, 4. E.A.D. 705, 709 (EAB 1993) (disputed issues must be stated with specificity in order to support a petition for review). Thus, Milford has not demonstrated with any minimal degree of specificity that review of this issue is warranted. Milford has

[9]We note that Milford does not specify which limitations it is contesting. Specifically, Milford fails to specify whether it is contesting the monthly average or daily maximum effluent limitation for copper and, similarly, whether it is contesting the monthly average, weekly average, or maximum daily average effluent limitation for phosphorus. *See* Petition for Review at 1-3.

failed to show that the copper and phosphorus effluent limitations are based on a finding of fact or conclusion of law that is clearly erroneous or an exercise of discretion or an important policy consideration that the Board should review. Accordingly, we deny review of this issue.

3. *Technological Infeasibility and Cost*

Milford also contests the copper and phosphorus effluent limitations established in the Draft Permit because "[t]he proposed discharge limitations for copper and phosphorus cannot be consistently met without the addition of unit processes to the * * * [POTW][,] [t]he cost [of which] * * * would cause social and economic harm to the community." Petition at 2-3. This argument seeks to raise the issue of whether cost considerations are relevant to the establishment of water quality-based effluent limitations. In addition, while Milford does not specifically categorize this argument as raising an issue of technological feasibility, it can be reasonably construed as such, for it equates the need to undergo major modifications with the POTW's ability to achieve compliance.

In its Response to Comments, the Region noted that "40 C.F.R. § 122.44(d)(l)(i) mandates that effluent limitations

control all pollutants or pollutant parameters which are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any state water quality standards," and that it had "determined from the levels being discharged into the Stop River that there is a need for [a] water quality based limit for copper." R Ex L at 3. With regard to phosphorus, the Region noted that "state water quality standards require highest and best practical treatment to remove nutrients from the discharge of any existing point source discharge containing nutrients in concentrations which encourage eutrophication," and that "the Charles River has impounded areas downstream of the discharge and there is evidence of eutrophic conditions in the river." *Id.*

In setting permit limits, the Agency is required under CWA § 301(b)(1)(C) to set permit limitations necessary to meet water quality standards, even if those limits are more stringent than those required under technology-based effluent limits. 33 U.S.C. § 1311(b)(1)(C). Regulations pertaining to this provision make it clear that whenever EPA determines that a facility has a reasonable potential to violate state water quality standards as to an individual pollutant, "the permit must contain effluent limits for that pollutant." 40 C.F.R. §122.44(d)(1)(iii). *See also In re Mass. Corr. Inst. - Bridgewater,* NPDES Appeal 00-9, at

9 (EAB, Oct. 16, 2000); *In re Broward County, Fla.*, 6 E.A.D. 535, 543 (EAB 1996); *In re City of Ames, Iowa*, 6 E.A.D. 374, 379-380 (EAB 1996); *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 219 (1976).

Because the Region determined that Milford had a reasonable potential to violate the Massachusetts Water Quality Standards for copper and phosphorus, it was obligated by law to set limits on Milford's discharges of these pollutants to prevent the facility from exceeding those standards.

Moreover, it is settled law that cost and technological considerations are not a factor in setting water quality-based effluent limits. *See, e.g.*, *In re New England Plating Co.,* NPDES Appeal No. 00-7, slip op. at 18 (EAB, Mar. 29, 2001) 9 E.A.D. __ ("In requiring compliance with applicable water standards, the CWA simply does not make any exceptions for cost or technological feasibility")(quoting *In re Mass. Corr. Inst. Bridgewater*, slip op. at 10; *In re City of Fayetteville*, 2 E.A.D. 594, 600-601 (CJO 1988)); *In re Pub. Serv. Co. of Ind., Inc.*, 1 E.A.D. 590, 610 (Adm'r, 1979)("[T]he states are free to force technology * * *" and "[i]f the states wish to achieve better water quality, they may [do so], even at the cost of economic and social dislocations * * *.")(quoting *U.S. Steel Corp. v. Train*, 556 F.2d 822, 838

(7th Cir. 1977)); *see also In re Town of Hopedale,* NPDES Appeal No. 00-04, at 24 (EAB, Feb. 13, 2001) ("[T]he legal standard is that technological considerations are not a factor in setting water quality-based effluent limits"); *Bridgewater,* NPDES Appeal 00-9, at 9 (EAB, Oct. 16, 2000) ("Not only was it not error for the Region to set the permittee's copper discharge limit without regard to its technological capacity, the Region was obligated to do so by law").

Thus, the Region complied with the CWA § 1311(b)(1)(C) and 40 C.F.R. §122.44(d)(1)(iii) by setting Milford's copper and phosphorus discharge limit without regard to Milford's technological capacity and costs. Therefore, Milford's request for the reinstatement of the copper and phosphorus effluent limitations contained in the previous permit, and/or for the establishment of limits that are less stringent than in the permit, is without legal support.

C. *POTW Pretreatment Program*

Milford objects to the Permit requirement that it develop a Pretreatment Program for its POTW. The Milford POTW has a design flow of less than 5 million gallons a day ("mgd"). The Region included a pretreatment program in the Permit under the authority

provided in 40 C.F.R. § 403.8(a). However, by its terms, § 403.8(a) provides that a Region may only require a pretreatment program at POTWs with less than 5 mgd if the Region finds that such a program is warranted to prevent an occurrence of "interference"[10] or "pass through."[11] 40 C.F.R. § 403.8(a).

Milford argues that because the Region did not demonstrate that an instance of pass through or interference has already occurred, it may not require a pretreatment program. In Milford's own words, "[n]one of these conditions has occurred to date in Milford, [t]herefore, we respectively [sic] appeal the inclusion of this requirement in the NPDES permit." Petition for Review at 1.

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[10]The term "interference" means a discharge which, alone or in conjunction with a discharge or discharges from other sources, both:

> (1) Inhibits or disrupts the POTW, its treatment processes or operations, or its sludge processes, use or disposal; and
>
> (2) Therefore is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation) or of the prevention of sewage sludge use or disposal * * *.

40 C.F.R. § 403.3(i).

[11]A "pass through" is defined as:

> [A] discharge which exits the POTW into waters of the United States in quantities or concentrations which, alone or in conjunction with a discharge or discharges from other sources, is a cause of a violation of any requirement of the POTW's NPDES permit (including an increase in the magnitude or duration of a violation).

40 C.F.R. § 403.3(n).

As we noted in our Order Denying Motion to Dismiss for Untimeliness and Requesting Briefing, the Agency is not required to demonstrate that an instance of pass through or interference has already occurred before it may require a pretreatment program; rather, the Agency must demonstrate the *real possibility* of interference or pass through.[12]

Nevertheless, the Region has since modified the Permit by withdrawing the requirement that Milford develop an Industrial Pretreatment Program within 270 days of the effective date of the Permit. *See* Draft Modification of Authorization to Discharge Under The National Pollutant Discharge Elimination System at 7 (May, 2001) ("Draft Permit Modification"). The Draft Permit Modification includes a requirement to develop an Industrial

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[12]Specifically, we noted that in *In re City of Yankton*, 5 E.A.D. 376 (EAB 1994), the Board had previously examined the language of 40 C.F.R. § 403.8(a), and determined that the correct analysis of the issue of the Agency's authority to require a POTW to develop a pretreatment program requires two distinct inquiries. *Id.* at 383-384. The first inquiry is whether any of the circumstances demonstrated by the Region present a real possibility of interference or pass through; if the Region cannot establish any "circumstances" that present the possibility of an interference or pass through, then the analysis need not go further since there is nothing for the pretreatment program to "prevent". *Id.* at 384. The second inquiry is whether there is some nexus between the pretreatment program and the possibility of interference or pass through; that is, the Region must establish that the condition or event that presents the possibility of interference or pass through is attributable to an industrial discharger that would be subject to the pretreatment program. *Id.* Consequently, rather than having to demonstrate the *occurrence* of an instance of pass through or interference, the Region must demonstrate *a real possibility* of interference or pass through. *Id.*

Pretreatment Program within 270 days of notification by the Region that the Region has found that the nature or volume of the industrial influent, treatment process upsets, violations of POTW effluent limits, contamination of municipal sludge, or other circumstances warrant the development of a pretreatment program to prevent interference or pass through. *See id.*

Consequently, since the contested provision has now been withdrawn, this obviates the need for review of this issue by the Board.

V. *CONCLUSION*

For all the foregoing reasons, Milford's petition for review is hereby denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 07/09/01

By: /s/
Ronald L. McCallum
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Review, in the matter of the Town of Milford, Massachusetts Board of Sewer Commissioners, NPDES Appeal No. 00-30, were sent to the following persons in the manner indicated:

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/s/
Annette Duncan
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