

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

In re:)	
)	
Town of Ipswich Wastewater)	NPDES Appeal No. 00-19
Treatment Plant)	
)	
NPDES Permit No. MA 0100609)	
)	

ORDER DENYING REVIEW

On August 17, 2000, the Town of Ipswich, Massachusetts ("Town") filed a Petition for Review ("Petition") with the Environmental Appeals Board ("EAB" or "Board") challenging the copper and fecal coliform effluent discharge limits of the National Pollutant Discharge Elimination System ("NPDES")¹ permit issued to the Town by U.S. EPA New England ("Region"). At the Board's request, the Region filed its response to the Town's Petition on December 1, 2000. Because we find that the Town has failed to demonstrate that the permit conditions it challenges are clearly erroneous, an abuse of discretion, or involve an

¹Under the Clean Water Act ("CWA"), persons who discharge into waters of the United States from point sources must have a permit in order for the discharges to be lawful. CWA § 301, 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System is the principal permitting program under the CWA. CWA § 402, 33 U.S.C. § 1342.

important policy consideration that the Board should review, the Town's Petition for Review is denied.

I. BACKGROUND

The Town owns and operates a wastewater treatment plant that discharges effluent into Greenwood Creek, a tributary of the Ipswich River. Respondent's Exhibit ("R Ex") 1 (Final NPDES Permit No. MA0100609 (Sept. 30, 1998) ("Final Permit") and Fact Sheet to Draft NPDES Permit No. MA 0100609 (June 15, 1998) ("Fact Sheet")). On June 15, 1998, the Region issued a Fact Sheet and draft NPDES permit ("Draft Permit") for the Ipswich facility, which was released for public notice and comment on June 26, 1998. R Ex 5 (Response to Comments on Draft Permit) ("RTC"). Among other conditions, the Draft Permit contained a provision limiting the discharge of fecal coliform to a monthly and weekly average of 14 Most Probable Number of Organisms ("MPN") per 100 milliliters ("ml"). It also set a maximum daily copper discharge limit of 2.9 micrograms per liter ("ug/l"). Administrative Record Exhibit ("AR Ex") 2 (Draft Permit No. MA0100609 (June 15, 1998)) at 2 .

The Clean Water Act's ("CWA") statutory scheme provides for effluent limits to be set on two different bases. The first

basis for effluent limitations is technology-based, i.e., limits are set to reflect the specified level of pollutant-reducing technology required by the CWA for that type of facility. CWA §§ 301(b)(1)(A) and (B), 33 U.S.C. §§ 1311(b)(1)(A) and (B). The second basis, which is central to this appeal, requires a permit to contain "any more stringent limitation" necessary to meet, *inter alia*, any water quality standards set by the federal government or set by states and approved by EPA. CWA §§ 301(b)(1)(C) and 402(a)(2), 33 U.S.C. §§ 1311(b)(1)(C) and 1341(a)(2). When setting water quality-based effluent discharge limits in a particular permit, if EPA finds that "a discharge causes, has the reasonable potential to cause, or contributes to" a violation of a state water quality standard, then "the permit must contain effluent limits for that pollutant." 40 C.F.R. § 122.44(d)(1)(iii); *see also* Fact Sheet at 2; Office of Water, U.S. Environmental Protection Agency, *U.S. EPA NPDES Permit Writers' Manual*, EPA-833-B-96-003, 99 (1996).

1. *The Draft Permit*

In support of the copper effluent limits established by the Region in the Town's Draft Permit, the Fact Sheet explained that in addition to requirements under the CWA outlined above, permit

effluent limits are based on the EPA-approved Massachusetts Surface Water Quality Standards, Mass. Regs. Code tit. 314, § 4.00 *et seq.* (2001). Fact Sheet at 2. These standards require "all surface waters [to] be free from pollutants in concentrations or combinations that are toxic to humans, aquatic life or wildlife." Mass. Regs. Code tit. 314, § 4.05(5)(e) (2001); Response at 9; Fact Sheet at 4. Moreover, because copper is considered a toxic pollutant, permit writers must use the surface water quality criteria for toxic pollutants established pursuant to CWA § 304(a), unless site-specific criteria are established. *Id.* The Fact Sheet concluded that "[t]here is a need to limit metals concentrations in the effluent since the aquatic life are highly sensitive to toxic pollutants." Fact Sheet at 4.

With regard to the Town's copper discharge, the Region stated that it reviewed testing reports from the facility and "found that copper concentrations in the effluent have in 4 reports exceeded water quality criteria-based limits for metals. Therefore, Copper [sic] control has been proposed for this [permit] at a limit of 2.9 ug/l, maximum daily." *Id.* The Region included in the Draft Permit an explanation of the calculation

used to arrive at the 2.9 ug/l limit. Draft Permit, Attachment B.

2. *The Town's Comments and Request for Evidentiary Hearing*

The Town commented on the Draft Permit on July 24, 1998. Letter from Jonathan Golden, Metcalf & Eddy, to Victor Alvarez, Office of Ecosystem Protection (July 24, 1998) ("Comments"). Following certification of the permit by the State of Massachusetts on September 23, 1998,² the Region issued the Final Permit and its RTC on September 30, 1998. Response at 3-4.

On October 30, 1998, the Town filed a request for an evidentiary hearing with the Regional Administrator. R Ex 2. On June 30, 2000, the Region returned the Town's Request for Evidentiary Hearing without prejudice to the Town's filing an appeal with the Board under changes made to the NPDES permit appeals process effective June 14, 2000.³ R Ex 3. Citing 40

²Under CWA § 401(a), 33 U.S.C. § 1341, the Region may not issue a permit until the state in which the facility is located (in this case Massachusetts) either certifies that the permit complies with the state's water quality standards or waives certification. See 40 C.F.R. § 124.53.

³Procedures for issuing, modifying, revoking, or terminating permits are governed generally by 40 C.F.R. pt. 124. Prior to June 14, 2000, subpart E of part 124 established an evidentiary hearing process for NPDES permits. Section 124.74 required that
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C.F.R. § 124.19(a), the letter notified the Town that it must file its appeal with the Board "no later than August 13, 2000." *Id.*

3. *The Town's Petition*

On August 17, 2000, the Board received the Town's two-page Petition, dated August 10, 2000, requesting review of the Final Permit's effluent discharge limits for copper and fecal coliform. The Town objects to the Final Permit's 2.9 ug/l effluent limit for copper as being "not realistic, * * * below the current drinking water standard, and * * * not currently attainable." Petition at 1. The Petition states that "there is no site specific evidence which suggests that such a stringent discharge limit is necessary to protect the biological organisms residing

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any person challenging a final NPDES permit decision submit a request to the Regional Administrator for an evidentiary hearing within 30 days of service of the notice. 40 C.F.R. § 124.74(a) (1998). Only a decision after an evidentiary hearing or a denial of the request for an evidentiary hearing could be appealed to the Board. *Id.* § 124.91. On May 15, 2000, EPA promulgated substantial changes to the permit review process. See 65 Fed. Reg. 30,886 (May 15, 2000). Included in these changes was the elimination of the evidentiary hearing procedures for NPDES permits. *Id.* at 30,896. Under current procedures, persons appealing an NPDES permit condition may now file a petition directly with the Board within 30 days after the issuance of a final NPDES permit decision. *Id.* at 30,911 (codified at 40 C.F.R. § 124.19(a)).

in the Ipswich shores." *Id.* The Town also disputes the Region's conclusion that the Town's treatment system should be able to meet the permit limit for copper as being "simply not accurate." *Id.* The Town argues that it is making every effort to remove copper at its facility through pretreatment and pH adjustment and is examining other options for copper treatment, and requests that the limit be reconsidered and/or that its due date for compliance be extended. *Id.* at 2. In its Petition, the Town also contests its fecal coliform limit, which is currently set as a weekly and monthly average limit, and requests that the limit be based instead upon a weekly and monthly geometric mean, as contemplated by existing water quality standards. *Id.*

4. *The Region's Response to the Petition*

On December 1, 2000, the Board received the Region's Memorandum in Opposition to Petition for Review ("Response"). The Region's Response argues that the Town's request for review of its copper and fecal coliform limits should be denied. Among other matters, the Region raises procedural grounds for dismissal of the entire Petition as untimely.⁴ Response at 2 n.1.

⁴The Petition received from the Town was dated and sent August 10, 2000, via Federal Express' overnight service to our
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Further, the Region argues, and we agree, that the Town's challenge to the fecal coliform effluent limit is moot.⁵

⁴(...continued)

mailing address at 1200 Pennsylvania Avenue, NW, Washington, DC 20460, rather than to our *hand-delivery* address at 607 14th Street, NW, Washington, DC 20005. (It is unclear why the Town did not use our hand-delivery address, as required by the Board and as indicated by the Region in its June 30, 2000 letter.) Delivery of the Petition was, in fact, attempted to the EPA mailroom on August 11, 2000, before the Petition was redirected to the proper address. As receipt by the mailroom on August 11, 2000, would have been considered timely had the mailroom accepted the package, see *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 99-8 through 99-72, at 5 (EAB, Jan. 3, 2000); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 124 (EAB 1997) (holding that petitions for review must be received by the Board (or received by the mailroom) within the filing deadline to be timely") (emphasis added), we are disinclined to agree with the Region's argument that we should dismiss the Petition in this case on the basis of untimeliness. Because we dismiss the appeal for reasons stated below, we need not decide this issue.

⁵On December 6, 2000, the Board received a letter from the Region indicating its intention to withdraw the fecal coliform effluent limitation of the Final Permit in order to set a limit based upon a geometric mean, rather than on an average, per the Town's objection. Pursuant to its December 6, 2000 letter, the Region withdrew the fecal coliform limit and issued a new draft permit modification on January 18, 2001, which set a monthly fecal coliform effluent limit based on a geometric mean value and eliminated the weekly test altogether. As cited by the Region in its Response, 40 C.F.R. § 124.19(d) grants the Regional Administrator the right to withdraw a contested permit and draft a new permit any time prior to the rendering of a decision by the Board. Response at 11. It is clear, therefore, that the Region's withdrawal of this permit condition is within its absolute authority, and having done so, the Region's action renders the issue moot. Thus, the issue of the Town's fecal

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With respect to copper, the Region states that whether or not it is "realistic," CWA section 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C), requires the Region to set copper limits in accordance with water quality standards, and that these standards "may well be 'more stringent' than the technology-based limits established under Clean Water Act subsections 301(b)(1)(A) and (B) (which take into account what well operated treatment systems are capable of achieving)." Response at 7. It further contends that neither federal nor State regulations require a site-specific showing of harm to the aquatic environment before it can impose water quality-based effluent limits. *Id.* at 8-9. The Region observes that while State regulations allow Massachusetts to modify copper criteria to reflect site-specific conditions, neither the Town nor the State have performed such an analysis, nor have any site-specific criteria for copper been proposed. *Id.* at 10. The Region also argues that while the Town fails to identify the drinking water standard to which it is referring, such an argument is inapplicable where, as here, the law requires application of the surface water quality criteria adopted by the State in Mass. Regs. Code tit. 314, § 4.05(5)(e) (2001).

⁵(...continued)
coliform limits is no longer before the Board. *See In re Lincoln Pulp & Paper Co.*, NPDES Appeal No. 00-8 (EAB, Oct. 25, 2000) (Order Dismissing Petition for Review).

Because we find that the Town has failed to meet its burden to demonstrate clear error, abuse of discretion, or an important policy consideration with respect to the copper limit that the Board should, in its discretion, review, and because the fecal coliform issue is rendered moot by the Region's withdrawal of that condition, we deny the Town's Petition for Review.

II. DISCUSSION

A. Standard of Review

In appeals under 40 C.F.R. ' 124.19(a), the Board will not grant review unless the petition establishes that the permit condition in question is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that the Board determines warrants review.⁶ 40 C.F.R. ' 124.19(a) (2000); see also *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No.

⁶As noted *supra*, note 3, prior to the Amendments to Streamline the NPDES Program Regulations, 65 Fed. Reg. 30,886 (May 15, 2000), the rules governing petitions for review of NPDES permitting decisions were set out in 40 C.F.R. § 124.91 (1998). Even though these amendments have eliminated the evidentiary hearing requirement in favor of direct appeal to the Board, the standard of review under 40 C.F.R. § 124.91 is essentially identical to that of 40 C.F.R. § 124.19. See, e.g., *In re New England Plating Co.*, NPDES Appeal No. 00-7, slip op. at 6 n.10 (EAB, Mar. 29, 2001), 9 E.A.D. __; *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 9 n.11 (EAB Feb. 26, 2001), 9 E.A.D. __.

00-15, slip op. at 9 (EAB, Feb. 23, 2001), 9 E.A.D. ___. The Board exercises its authority to review permits sparingly, in recognition of Agency policy favoring resolution of most permit disputes at the Regional level. *In re New England Plating Co.*, NPDES Appeal No. 00-7, slip op. at 7 (EAB, Mar. 29, 2001), 9 E.A.D. __; *Ashland*, slip op. at 9-10; *In re Town of Hopedale, Bd. of Water & Sewer Comm'rs.*, NPDES Appeal No. 00-04, at 8-9 n.13 (EAB, Feb. 13, 2001). The petitioner bears the burden of establishing grounds for review. 40 C.F.R. § 124.19(a)(1) & (2).

Moreover, in order to preserve an issue for appeal, federal regulations governing NPDES permit appeals require any petitioner who believes that a permit condition is inappropriate to raise "all reasonably ascertainable issues and * * * all reasonably available arguments supporting [that petitioner's] position" during the public comment period. 40 C.F.R. § 124.13; *New England Plating*, slip op. at 8; *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 53 (EAB 1995); *see also In re City of San Marcos*, NPDES Appeal No. 97-6, slip op. at 4 (EAB, July 6, 1998) (Order Dismissing Appeal); *In re Ketchikan Pulp Co.*, 6 E.A.D. 675, 688 (EAB 1996). The purpose of such a provision is to "ensure that

the Region has an opportunity to address potential problems with the Draft Permit before the permit becomes final, thereby promoting the longstanding policy that most permit issues should be resolved at the Regional level, and to provide predictability and finality to the permitting process." *New England Plating*, slip op. at 10; *In re Sutter Power Plant*, PSD Appeal Nos 99-6 & 99-7, slip op. at 9 (EAB, Dec. 2, 1999) ("The intent of these rules is to ensure that the permitting authority * * * has the first opportunity to address any objections to the permit, and the permit process will have some finality."); *In re Encogen Cogeneration Facility*, PSD Appeal Nos 98-22 to 98-24, slip op. at 8 (EAB, Mar. 26, 1999), 8 E.A.D. ___ (same). Accordingly, all reasonably ascertainable issues and arguments must be raised during the comment period to be properly preserved for appeal to the Board. *New England Plating*, slip op. at 8.

Furthermore, this Board has frequently emphasized that in order for an issue to be reviewed on appeal it must have been *specifically* raised during the comment period. See *In re Steel Dynamics, Inc.*, PSD Appeal Nos. 99-4 & 99-5, slip op. at 95 (EAB, June 22, 2000), 8 E.A.D. ___; *New England Plating*, slip op. at 7; *In re Maui Electric Company*, PSD Appeal No. 98-2, slip op. at 11

(EAB, Sept. 10, 1998), 8 E.A.D. ___. Besides ensuring efficiency and finality, see *New England Plating*, slip op. at 10, this requirement ensures that while the permit issuer will be held accountable for a full and meaningful response to comments, it need not guess the meaning behind imprecise comments. *Id.*, slip op. at 14 ("Region is under no obligation to speculate about possible concerns that were not articulated in the comments * * *."); *In re Steel Dynamics Inc.*, PSD Appeal Nos. 99-4 & 99-5, slip op. at 95 (EAB, June 22, 2000). The Board has repeatedly found objections raised only in a general manner during the comment period insufficient to support review of more specific objections in the petition. See *Steel Dynamics*, slip op. at 95-96 (denying review because the permit issuer was not presented with the issue raised on appeal during the public comment period with sufficient clarity to enable a meaningful response); *In re Pollution Control Indus. of Ind., Inc.*, 4 E.A.D. 162, 166-69 (EAB 1992).

Finally, where the Region responds to comments when it issues a final permit, it is not sufficient for a petitioner to rely in its petition solely on previous statements of its objections, such as comments on a draft permit. Rather, a

petitioner must demonstrate with specificity in the petition why the Region's prior response to those objections is clearly erroneous or otherwise merits review. *Ashland*, slip op. at 11; *In re NPDES Permit for Wastewater Treatment Facility of Union Township*, NPDES Appeal Nos. 00-26 & 00-28, at 11 (EAB, Jan. 23, 2001); *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996).

The Town's arguments are considered in light of this framework. For the reasons set forth below, the Petition for Review is denied.

B. *Copper Limit*

As mentioned in section I above, the Town objects to its copper limit as being unrealistic and technically unattainable by its facility. The Town has petitioned the Board to reconsider its copper limit and/or obtain an extended schedule for compliance with the copper limit. Petition at 2. As explained more fully below, we find that the Town has not properly preserved for review all of its arguments concerning the copper effluent limit and has otherwise failed to meet the standards for granting review of this issue. Furthermore, the Town's request for a compliance schedule, as framed in its Petition, was not properly raised during the comment period, and we do not

otherwise find the Region's decision not to include such a schedule in the Final Permit to be in error, an abuse of its discretion, or otherwise warranting review.

1. *Copper Effluent Limit - Issues Not Preserved for Review*

In its Comments on the Draft Permit, the Town made four objections to the copper effluent limit set by the Region, namely that: (1) the Town believes it is "not currently feasible to achieve" a 2.9 ug/l copper limit; (2) efforts are being made to remove copper at the facility, but the Town requests "additional time to evaluate potential methods of achieving lower copper concentrations"; (3) The Town requests additional time to evaluate options that may potentially demonstrate that the proposed 2.9 ug/l limit is too stringent; and (4) the Town requests additional time to evaluate whether a mixing zone would be appropriate. Comments at 1-2.

The Town's Petition, on the other hand, argues that the copper limit should be reconsidered because it is unrealistic, technologically infeasible, below the current drinking water standard, and lacking in site-specific evidence to support it. Petition at 1. The latter two issues are not within the scope of the Town's Comments. With respect to the Town's drinking water

claim, although its Petition objects to the copper limit as being "below the current drinking water standard," no mention of such an objection is made in the Town's Comments. The Town offers no explanation as to why this matter was not reasonably ascertainable at the time the Town commented on its Draft Permit. Lacking any such explanation, we consider this issue to have been reasonably ascertainable at that time, and thus it should have been included in the Town's Comments in order to be preserved for appeal.⁷

Similarly, while the Town's Petition objects to the lack of site-specific evidence to support the copper limit set by the Region (Petition at 1), the Town's comments do not raise this objection. While the Town's Comments requested additional time to evaluate options that might "*potentially* demonstrate that the proposed copper limit of 2.9 ug/L is too stringent" (emphasis

⁷The Region, in any event, points out that drinking water standards, such as those found in the Safe Drinking Water Act, 42 U.S.C. § 300f, *et seq.*, are designed to protect only human health, whereas the Massachusetts Water Quality Standards, which are applicable to all NPDES permits issued in that State, protect both human health and aquatic life. Response at 5, 10 and n.5. The Region further notes that copper is more toxic to aquatic life than it is to human health. *Id.* at 10.

added) and to evaluate whether a mixing zone⁸ might be appropriate, Comments at 1-2, there is nothing in its Comments to indicate that the Town objected to the copper limit itself because the Region had not conducted site-specific studies or because of a lack of site-specific evidence to support the copper limit in the Draft Permit.⁹ The Town's open acknowledgment in its Comments that such studies would only *potentially* support a higher copper limit is further indication that the Town was not

⁸A mixing zone is an allocated impact zone dealing with the area where effluent discharge undergoes initial dilution and mixes with the receiving water body. A permitted mixing zone designates a limited zone around the initial discharge where water quality criteria can be exceeded so long as acute toxic conditions are prevented and overall water quality is not impaired. Office of Water, U.S. Environmental Protection Agency, NPDES Permit Writers' Training Manual, EPA-833-B-96-003, G-7 (1996).

⁹The Region, when it proposed the limit in the Draft Permit and in its RTC, provided a detailed explanation of its basis and rationale for the copper limit. Specifically, it stated that the 2.9 ug/l limit was included because of "the low in-stream available dilution and the corresponding reasonable potential to cause toxicity due to the copper levels in the wastewater." Response at 6 and n.3, citing RTC at 2. See also discussion at 3-5, *supra*. Furthermore, the Fact Sheet also included the history of copper violations by the Town, supporting the Region's determination that the Town had the reasonable potential to exceed the copper criteria, as well as the calculation method (including the flow and dilution values) used by the Region to derive the copper limit. Fact Sheet, Attachment B. Thus, even if we were to consider this issue on the merits, the Town's challenge would fail.

arguing actual error on the Region's part when it set the limit. Rather, the Town's Comments on this issue center around its request for *additional time* to conduct site-specific studies and evaluate the mixing zone option, not on whether the Region erred when it calculated the copper limit. As stated earlier, specificity during the comment period is central to preserving issues for review. *See, e.g., New England Plating*, slip op. at 9; *Fla. Pulp*, 6 E.A.D. at 54-55 (holding that comment regarding one aspect of sludge testing required by an NPDES permit was insufficient to preserve for appeal issue of legal authority to require any sludge testing).

Furthermore, since the Town commented on its desire to conduct site-specific studies itself and given that the Fact Sheet included the data relied upon by the Region when it set the copper limit, an objection by the Town to the Region's alleged lack of site-specific data to support the copper limit was certainly reasonably ascertainable by the Town at that time. *New England Plating*, slip. op. at 15.

The Town has provided no explanation for the discrepancy between its Comments and its Petition regarding the Town's objections regarding drinking water standards and lack of site-

specific evidence. Because we conclude that the Town could reasonably have ascertained these issues when it submitted its Comments but failed to include them, we find that these issues are not preserved for appeal. *New England Plating*, slip op. at 15-16.

2. *Copper Effluent Limit - Technical Infeasibility*

The Town's remaining objections to the copper limit are that the limit is unrealistic and that the facility does not currently have the technological capacity to meet the limit. We consider these objections to represent essentially one argument, namely that the limit is unrealistic in light of technical infeasibility. Petition at 1-2. As mentioned earlier, EPA is required under CWA §§ 301(b)(1)(C) and 402(a) to set permit limitations necessary to meet water quality standards set by states and approved by EPA, even if those limits are more stringent than those required under technology-based effluent limits. 33 U.S.C. §§ 1311(b)(1)(C) and 1342(a). Regulations promulgated pursuant to these provisions make it clear that whenever EPA determines that a facility has a reasonable potential to violate 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 Town of Hopedale, Bd. of Water & Sewer Comm'rs.*, NPDES Appeal No. 00-04, at 23 (EAB, February 13, 2001); *In re Massachusetts Correctional Institution - Bridgewater*, NPDES Appeal 00-9, at 9 (EAB, October 16, 2000) (Order Dismissing Petition for Review); *Broward*, 6 E.A.D. at 543 (EAB 1996); *EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 219 (1976).

Here, the Town does not challenge the Region's findings with regard to its potential to violate Massachusetts Water Quality Standards or its method of calculating the 2.9 ug/l copper effluent limit. See discussion *supra* section B.1. Thus, the issue before the Board is whether the Region erred in failing to adjust the 2.9 ug/l limit to address the Town's concerns that the limit was unrealistic in light of technological considerations.

It is well-settled law that technological considerations are not a factor in setting water quality-based effluent limits. See, e.g., *Hopedale* at 23-25; *Bridgewater* at 10, *J&L Specialty Prod. Corp.*, 5 E.A.D. at 48 (EAB 1994) (stating that Region is not authorized under CWA to grant variances from water quality-based limitations because of lack of technical feasibility); *In re Goodyear Aerospace Corp.*, 2 E.A.D. 919, 920 (CJO 1989) (Region

has no discretion to alter water quality-based effluent limitations even if such limits are not technologically achievable); see also *United States Steel Corp. v. Train*, 556 F.2d 822, 838 (7th Cir. 1977) (states are free to set water quality standards that force technology); *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1163 (9th Cir. 1999) (EPA obligated to set water quality standards without regard to practicability). In *In re City of Fayetteville*, 2 E.A.D. 594 (CJO 1988), *aff'd sub nom Arkansas v. Oklahoma*, 503 U.S. 91 (1992), the Chief Judicial Officer stated that the meaning of the language of CWA § 301(b)(1)(C) was "plain and straightforward. It requires unequivocal compliance with applicable water quality standards, and does not make any exceptions for cost or technological feasibility." *Id.* at 600-01. Thus, not only did the Region not err when it set the Town's copper discharge limit without regard to its technological capacity, but the Region was obligated to do so by law. Applying the same rationale used by the Board in *Hopedale* and *Bridgewater*, the Town's request to set a higher limit due to technological limitations is without legal support and is therefore denied.

3. Copper Effluent Limit - Compliance Schedule

Finally, the Town's Petition requests that if the copper limit cannot be adjusted that the Board should alternatively grant an extension for compliance. We have doubts whether the Town's Comments raised this matter with sufficient specificity to preserve it for review.¹⁰ However, the Region addressed the Town's request for additional time in its RTC. It stated that it believed the Town to be capable of meeting the proposed copper limit, but that if reported copper levels in the Town's effluent exceeded that limit for the first year of the Final Permit, then the Region might negotiate a compliance order under which the Town might be allowed to pursue site-specific studies or other

¹⁰As stated earlier, objections to permit conditions must be raised *specifically*. *New England Plating*, slip op. at 9. The Board has, in very limited circumstances, considered the merits of an issue raised in a petition that was not raised specifically in a petitioner's comments but is very closely related to an issue that was raised during the comment period. *Id.*, slip op. at 10. One factor in evaluating whether the issue is sufficiently closely related is how the Region treated the issue in the Response to Comments. *Id.* Although we do not view the Town's general comment regarding its inability to meet the proposed copper limit or its request for additional time to conduct additional studies to support a higher copper limit as necessarily encompassing a specific request for a compliance schedule, *id.* at 11-14, it appears from the Region's RTC that it may have considered the Town's request in such a manner. RTC at 2-3. Because we deny review of the Town's request for a compliance schedule on other grounds, see text *infra*, we do not decide this issue on issue-preservation grounds.

treatment methods in order to achieve compliance. RTC at 3. The Region also stated that while it believed the Town's proposed mixing zone to be inconsistent with Massachusetts' mixing zone policy - and therefore unlikely to be approved - should a mixing zone be approved for the Town's discharge at a later date, the permit might then be modified based on such information. *Id.*

The Town's Petition fails to respond in any way to these points in the Region's RTC, which appear to substantially address the Town's concerns. Nor does the Town explain why the Region's responses are erroneous or otherwise merit review. As stated earlier, the Board has repeatedly held that when the Region has responded to a petitioner's objections, the petitioner must "demonstrate why the Region's response to those objections is clearly erroneous or otherwise warrants review." *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996); *see also In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 11 (EAB, Feb. 23, 2001), 9 E.A.D. __; *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 404 (EAB 1997). Because the Town failed to show why the Region's RTC was clearly erroneous, we deny review of the Town's request for a compliance schedule.

Moreover, were the Board to review the merits of the Town's request, the Town's Petition would still fall short of convincing us that the Region clearly erred or abused its discretion in failing to include a compliance schedule in the Town's Final Permit. The Region's approach here appears consistent with the observation we noted in *New England Plating* that as a "general rule NPDES permits * * * must require compliance with water-quality based effluent limitations immediately upon the effective date of the permit." *New England Plating*, slip op. at 11 n. 16; see also *In re J & L Specialty Products Corp.*, 5 E.A.D. 333, 344 (EAB 1994). An exception to this general rule allows a compliance schedule if the state's water quality standards or its implementing regulations "can be fairly construed as authorizing a schedule of compliance." *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 175 (Adm'r 1990), *modification denied*, 4 E.A.D. 33, 34 (EAB 1992). Under the applicable Massachusetts water quality standards, compliance schedules may be granted when appropriate. See Mass. Regs. Code. tit. 314, § 4.03(1) (2001) ("A permit may, when appropriate, specify a schedule leading to compliance with the Massachusetts and Federal Acts and regulations."). Thus, the Region was not compelled to provide a compliance schedule. To

the contrary, the Region's authority to grant a compliance schedule is limited, and can only be done upon a determination that such a schedule is "appropriate".

At this juncture, the Town has presented several theories but little or no actual data to support its contention that the copper limit should be adjusted. *See generally*, Comments; Petition; RTC at 3. Thus, the Town has not given the Region a sufficient basis for concluding that a compliance schedule in its Final Permit would be appropriate. Nor has the Town provided any such support for its request in its Petition to the Board. Given the paucity of information provided by the Town, we do see how a schedule of compliance would be appropriate at this time, or what an appropriate schedule should be. *See New England Plating*, slip op. at 19.

The Region's decision with regard to establishing a compliance schedule falls well within the bounds of its discretion. As noted above, the Region concluded that the Town should be able to meet the copper limit as it stands (a point which has not been refuted by the Town). *Id.* at 2. Moreover, the Region's RTC stated that:

[i]f the levels for copper reported in the toxicity testing analysis during the first four quarters of the permit life exceed the permit limits, EPA, [sic] may review the permit violations further and negotiate a solution under a compliance order, under which, the permittee may have time to proceed with the study or other methods of treatment and/or evaluate other options leading to the solution of this issue and ultimate compliance.

Id. The Region's Response also states that it is willing to work with the Town in the future to address its concerns via administrative compliance orders. Response at 6-7 n.4. The Region's decision, therefore, to wait until further data become available to better determine whether a compliance schedule is even necessary, as well as its willingness to consider the Town's proposals for site-specific studies at a later date should it actually be unable to comply with the copper limit, is especially appropriate in light of the lack of specific facts to support the request for an extension. We therefore do not find anything clearly erroneous or otherwise unlawful in the Region's decision with regard to establishing a compliance schedule and we decline to review the issue for this reason as well.

III. CONCLUSION

In sum, we find that the Town has failed to show that the Region committed clear error, abused its discretion, or raised an important policy consideration that we should review when it set the copper discharge limitations in the Town's permit. We further find that the withdrawal of the fecal coliform limit by the Region has rendered that issue moot. The Town's petition for review is therefore denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: _____/s/_____
Kathie A. Stein
Environmental Appeals Judge

Dated: July 26, 2001

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Town of Ipswich Wastewater Treatment Plant, NPDES Appeal No. 00-19, were sent to the following persons in the manner indicated:

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Secretary