

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

\_\_\_\_\_) )  
In re: ) )  
 ) )  
City of Blackfoot Wastewater ) NPDES Appeal No. 00-32  
Treatment Facility ) )  
 ) )  
NPDES Permit No. ID-002004-4 ) )  
\_\_\_\_\_) )

**ORDER DENYING PETITION FOR REVIEW**

The City of Blackfoot, Idaho ("City") has filed a Petition for Review ("Petition") dated November 20, 2000, seeking review of two "new conditions" set forth in a National Pollutant Discharge Elimination System ("NPDES")<sup>1</sup> permit issued by the U.S. Environmental Protection Agency, Region X ("Region") on October 26, 2000, for the City's wastewater treatment facility. Petition at 1.

Specifically, the City appeals permit section I.A.3, and in particular those provisions establishing effluent limits and

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<sup>1</sup>Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources into waters of the United States must have a permit in order for the discharge 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.

corresponding sampling requirements for *E. coli* and ammonia. See Permit at 6-7. Because the City has failed to demonstrate how the Region's permit decision was clearly erroneous, an abuse of discretion, or otherwise unlawful, review is denied.

## I. BACKGROUND

### A. *The City's Wastewater Treatment Facility*

The City owns and operates a wastewater treatment facility that collects and treats domestic sewage from local residents and commercial establishments in Blackfoot, Idaho. See Response to Petition for Review of Permit Determination (filed Jan. 23, 2001) ("Response") at 1. The City's facility treats wastewater by "metering, grit removal, influent screening, biological treatment through conventional activated sludge, clarification, and chlorination." Response Ex. 6, at 4 (Fact Sheet - Proposed NPDES Permit No. ID-002004-4 (July 19, 2000)). Discharge of treated effluent occurs from a single outfall to the Snake River. *Id.* at 5. The City is in the process of updating the facility. *Id.* at 4. The existing NPDES permit under which the City operated the facility expired on November 1, 1993, but was continued in

force and effect pursuant to 40 C.F.R. § 122.6 pending the Region's evaluation of the City's permit application. See *id.* at 4-5.

## **B. Procedural Background**

### **1. The Draft Permit**

On July 19, 2000, the Region issued a fact sheet and draft permit for the City's facility. See Response Exs. 5 (Draft NPDES Permit No. ID-002004-4 (July 19, 2000)) & 6. The provisions of the draft permit relevant to the Petition are recited herein. The draft permit contained: 1) fecal coliform effluent limits of 200 colonies per 100 milliliters ("ml") as an average weekly limit;<sup>2</sup> 2) *E. coli* effluent limits of 126 colonies per 100 ml as an average monthly limit, and 406 colonies per 100 ml as a maximum daily limit; and 3) total ammonia limits of 3.83 milligrams per liter ("mg/L") as an average monthly limit, and

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<sup>2</sup>The fecal coliform limit is relevant to the Petition only because of its connection throughout this proceeding to the other bacteria of concern under the permit - *E. coli*. Although the City submitted comments on the draft permit objecting to the fecal coliform limit and monitoring requirement, the Petition itself does not seek relief from those permit conditions.

10.7 mg/L as a maximum daily limit. Response Ex. 5, at 4 (Permit Sec. I.A.3); Response Ex. 6, at 7.

The draft permit required that compliance with the average weekly fecal coliform effluent limit would be assessed "based on a minimum of 5 separate days worth of data \* \* \* calculated and recorded weekly." Response Ex. 5, at 4 n.4. The average *E. coli* monthly effluent limit was to be "based on a minimum of 5 samples taken every three (3) to five (5) separate days during a 30-day period." *Id.* at 4 n.5. The effluent monitoring requirements for fecal coliform and *E. coli* in the draft permit required sampling 5 days/week and 2 days/week, respectively. *Id.* at 6 (Permit Sec. I.B.2).

## *2. The Comments on the Draft Permit*

Only the City commented on the draft permit. See Response Ex. 3, at 1 (Response to Comments - City of Blackfoot, Idaho NPDES Permit No. ID-002004-4 (Oct. 26, 2000)); Response Ex. 7 (Letter entitled "Comments on City of Blackfoot's Draft NPDES

Permit No. ID-002004-4" (Aug. 18, 2000)). In its comments, the City raised the following concerns.

**a. Fecal Coliform & *E. coli* Effluent Limits**

The City commented that in light of the substantial costs associated with conducting laboratory tests on samples, the permit was excessive in requiring monitoring for both fecal coliform and *E. coli*. *Id.* at 1. More specifically, because the permit included permit limits and monitoring requirements for *E. coli* -- coverage that the City was apparently prepared to concede as appropriate -- the City sought removal of the fecal coliform effluent limits and sampling requirements. With respect to *E. coli*, the City sought a clarification of the sampling frequency for this parameter. *Id.* at 1-2. In particular, the City sought a sampling frequency that allowed *E. coli* sampling on consecutive days (e.g., "2 separate days every 7 days."). *Id.*

**b.** *Ammonia Effluent Limits*

The City's comments also took issue with the ammonia effluent limits in the permit. *Id.* at 2-3. In particular, the City argued that the proposed limits should be removed because "the plant is not designed to nitrify<sup>3</sup> under current loadings." *Id.* at 3. The City sought removal of the ammonia limits "at least until the plant upgrade is completed." *Id.*

**3.** *The Response to Comments & Final Permit*

The Region responded to the City's comments in the following manner. The Region declined to relax the fecal coliform effluent limit and monitoring requirement in the final permit because Idaho's water quality standards require that "fecal coliform concentrations must not exceed a geometric mean of 200/100 ml \* \* \*." Response Ex. 3, at 1 (citing Idaho Administrative Code ("IDAPA") 16.01.02.420.05, Disinfection Requirements for Sewage Wastewater Treatment Plant Effluent). The Region did, however, revise the permit to respond to Petitioner's concerns regarding

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<sup>3</sup>Nitrification capacity is the ability of the plant to oxidize ammonia or ammonium salts initially to nitrites and subsequently to nitrates. See 40 C.F.R. § 439.1(f).

sampling frequency for *E. coli*. *Id.*<sup>4</sup> The Region also relaxed the ammonia effluent limits in response to the City's comments, but not to the level sought by the City. See Response Ex. 3, at 2. The Region removed from the permit the immediately effective ammonia effluent limits, and added ammonia effluent limits that will take effect upon completion of a planned plant upgrade. *Id.* at 2-3. Following certification of the permit by the State of Idaho on October 19, 2000,<sup>5</sup> the Region issued the final permit and a written response to comments on October 26, 2000. Response at 1.

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<sup>4</sup>Based on our examination of the permit, it is unclear whether the Region did, in fact, make the change referenced in the response to comments. Compare Response Ex. 3, at 1 (stating that, "The permit has been revised to require sampling for two separate days every five days.") with Response Ex. 2, at 4 n.3 ("A Geometric mean based on a minimum of 5 samples taken every five (5) separate days during a 30-day period worth of data."). In any case, in light of the fact that the petition is silent on this point, we can only assume that Petitioner is not dissatisfied with the outcome on this particular issue.

<sup>5</sup>Under CWA § 401(a), 33 U.S.C. § 1341(a), the Region may not issue a permit until the State in which a facility is located (in this case Idaho) either certifies that the permit complies with the State's water quality standards or waives certification. See 40 C.F.R. § 124.53.

#### 4. *The Petition for Review*

Subsequently, the City filed its Petition with the Board on November 27, 2000. The City now challenges the imposition of the *E. coli* effluent limits and sampling requirements in the permit because the "monthly and daily limits and the monitoring requirements for *E. coli* in the effluent are beyond what is required by the [Idaho] Code." Petition at 2. The City recommends that the *E. coli* effluent limits and monitoring requirements "be removed from the permit." *Id.* In the alternative, the City argues that, at a minimum, "the limits in the permit for *E. coli* should be adjusted to include a mixing zone \* \* \* because the *E. coli* criteria in the [Idaho] Code is designated for the receiving water and not for the effluent." *Id.*

The City also challenges the ammonia effluent limits in the final permit. See Petition at 2-3. Petitioner generally asserts that "new data" now available necessitates reevaluation of such conditions and that the conditions imposed in the final permit "may be impossible to comply with, given the City Wastewater



Treatment Plant's current capabilities and limited funds available \* \* \* ." Petition at 1.

## II. 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, e.g., *In re Knauf Fiber Glass, GMBH*, PSD Appeal

Nos. 98-3 through 98-20, slip op at 8 (EAB, Feb. 4, 1999), 8 E.A.D. \_\_\_ (“A petitioner must have both standing to Appeal and must be seeking review of issues that have been properly preserved for review.”). To preserve an issue for review, a petitioner bears the burden of demonstrating in his or her petition that “any issues being raised were raised during the public comment period (including any public hearing) \* \* \* ,” 40 C.F.R. § 124.19(a), unless an issue was not reasonably ascertainable at that time. 40 C.F.R. § 124.13; see, e.g., *In re Jet Black, Inc.*, UIC Appeal Nos. 98-3 & 98-5, slip op. at 8 & nn. 18, 23 (EAB, May 27, 1999), 8 E.A.D. \_\_\_ (finding that reasonably ascertainable issues not raised during the public comment period were not preserved for appeal). 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).

The City's arguments are considered in light of this framework. For the reasons set forth below, the petition for review is denied.

**B. *The City's E. coli Effluent Limits & Sampling Arguments Were Not Preserved for Review***

In comments that were timely submitted on August 18, 2000, the City contested the *E. coli* bacteria sampling requirements of the Region's draft permit. See Response Ex. 7, at 1-2. The City's concerns regarding *E. coli* at that time apparently centered around a desire for clarification of the sampling frequency for the *E. coli* effluent limits.<sup>6</sup> In the Petition,

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<sup>6</sup>Specifically, the City commented that:

The footnote for *E. coli* states that the limit is based on a minimum of 5 samples, taken every 3 to 5 separate days during the 30-day period. *This requirement is unclear.*

\* \* \* \*

*The sampling frequency for E. coli should be*  
(continued...)

however, the City raises new arguments questioning the permit's consistency with provisions of Idaho's water quality standards. In particular, the City argues that the "monthly and daily limits and the monitoring requirements for *E. coli* in the effluent are beyond what is required by the [Idaho] Code,"<sup>7</sup> and in the alternative, that a mixing zone calculation is required because the "*E. coli* criteria listed in the Code is designated for the receiving water and not for the effluent." Petition at 2. Thus, the City seeks removal of the *E. coli* effluent limits and monitoring requirements. *Id.*

We deny the City's request for review since the issues now raised by the City regarding whether the permit's *E. coli* limit is consistent with the State water quality standard were reasonably ascertainable during the public comment period, but

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<sup>6</sup>(...continued)  
*clarified.* \* \* \* Please revise the footnote for *E. coli* with something simple to understand such as "2 separate days every 7 days."

Response Ex. 7, at 1-2 (emphasis added).

<sup>7</sup>The Idaho water quality standard for *E. coli* requires compliance with a daily maximum limit of 406 *E. coli* organisms per one hundred milliliters and a geometric mean of 125 *E. coli* organisms based on a minimum of 5 samples taken every 3 to 5 days over a thirty day period. See IDAPA § 16.01.02.251.01.

were not raised. It is a fundamental aspect of the NPDES program that permits include limitations as necessary to meet applicable state water quality or treatment standards. See CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C). Accordingly, the question of the extent to which the permit was consistent with water quality standards was present throughout the permitting process and was certainly inherent in the draft permit. Indeed, the Fact Sheet that accompanied the draft permit specifically referenced IDAPA section 16.01.02.251.01, the provision of the Idaho water quality criteria about which the City is now raising concerns, as a predicate for the permit's *E. coli* limits and monitoring requirements. See Response Ex. 6, at B.1 (Fact Sheet for Draft NPDES Permit No. 002004-4 (July 19, 2000)).

The issues that Petitioner now attempts to raise were thus reasonably ascertainable during the public comment period, but the City did not raise them. While the City commented on the permit's *E. coli* sampling frequency requirement and sought clarification of the requirement, this issue is clearly distinguishable from the questions the City is now attempting to propound. Thus, the issues the City seeks to raise here were not

preserved for review, and they cannot be raised at this late stage of the process.

*C. The Ammonia Effluent Limits of the Final Permit are not Clearly Erroneous*

When a Region has responded to objections made by a petitioner, a petitioner must "demonstrate why the Region's response to those objections \* \* \* is clearly erroneous or otherwise warrants review." *In re LCP Chemicals-N.Y.*, 4 E.A.D. 661, 664 (EAB 1993); see also 40 C.F.R. § 124.19(a); *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 404 (EAB 1997) ("Petitioners must provide compelling arguments as to why the Region's technical judgments or its previous explanations of those judgments are clearly erroneous or worthy of discretionary review.").

Here, the City alleges in its petition that the Region should apply "recommended new ammonia criteria"<sup>8</sup> because the

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<sup>8</sup>The "recommended new ammonia criteria" are apparently under consideration by the State as a basis for amending the State's water quality criteria for ammonia. See Petition Ex. 2, at 7 (Letter from the Association of Idaho Cities to the Idaho Attorney General's Office, Environmental Quality Section re:

(continued...)

criteria currently "used in this permit, will cause unnecessary cost, over design and unnecessary regulatory liability for the City." Petition at 3.

As backdrop, in its comments, the City had pointed out that the assumed flow quantities in the Snake River did not accurately account for the increased predictability of minimum flows following installation of an upstream dam in 1957. The Region responded by revising its flow assumptions, consistent with the City's comments. See Response Ex. 3, at 3. As a result, the Region's final permit decision eliminated ammonia effluent limits for the facility at its present capacity, and relaxed the ammonia effluent limits that will take effect upon completion of an expected upgrade in the facility's capacity. See Response Ex. 2, at 4. However, the City is still unsatisfied with the upgraded

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<sup>8</sup>(...continued)

June 2, 1999 Proposed Water Quality Standards and Wastewater Treatment Requirements) (Aug. 2, 1999) (urging the adoption of "August 1998 Update of Ammonia Criteria \* \* \* in the final rulemaking package"). Nothing in the Petition indicates that this recommendation has been adopted by the state of Idaho, or that the rulemaking package was ever made final. Accordingly, we assume that these new criteria remain only recommendations.

plant's ammonia limits because they are more stringent than the sought-after 20 mg/L figure the City asserts it can meet.

The Region contends, and we agree, that the City has not identified any error on the part of the Region with respect to the methodology, facts, or assumptions used by the Region in crafting the ammonia effluent limits in the final permit. Instead, the City urges that the Region apply speculative "recommended" standards, rather than the state of Idaho's codified water quality standards to impose an achievable ammonia effluent limit for the City's updated facility. This request is antithetical to the Clean Water Act and the implementing regulations of the NPDES program which require that NPDES permit limitations be derived from "all applicable water quality standards." See 40 C.F.R. § 122.44(d)(1)(vii)(A). Indeed, the Region is duty bound to adhere to Idaho's existing water quality standards until such time as they are changed. CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C); 40 C.F.R. § 122.44(d)(1); see also *In re Mass. Corr. Inst.- Bridgewater*, NPDES Appeal No. 00-9, at 9 (Oct. 16, 2000) (Order Dismissing Petition for Review) ("In setting permit limits, EPA is required under CWA 301(b)(1)(C) to set permit limitations necessary to



meet water quality standards \* \* \*.""); *In re City of Fayetteville, Ark.*, 2 E.A.D. 594, 600-601 (CJO 1988) ("The meaning of [section 301(b) (1) (C)] \* \* \* is plain and straightforward. It requires unequivocal compliance with applicable water quality standards, and does not make any exceptions for cost or technological feasibility."), *aff'd sub nom. Arkansas v. Oklahoma*, 503 U.S. 91 (1992).

Even if Idaho is contemplating modifying the state's water quality standards for ammonia, such modification must be carried out in accordance with EPA regulations and applicable antidegradation policies. See *In re Star-Kist Caribe, Inc.*, 4 E.A.D. 33, 38 n.16 (EAB 1992). Furthermore, the permit condition to which the City objects cannot be relaxed so long as it is subject to the terms of the State's certification which provides "that compliance schedules for meeting the ammonia \* \* \* limitations as detailed in the proposed final permit are necessary and appropriate and are hereby granted." Response Ex. 4, at 2 (*401 Certification for City of Blackfoot NPDES permit # ID-002004-4* (Oct. 19, 2000)). We are loathe to look behind the State's certification for the purpose of relaxing a requirement

certified by the State. *In re NPC Services, Inc.*, 3 E.A.D. 586, 588 n.2 (CJO 1991). The City thus must first look to the State for relief. *Id.* Accordingly, review is denied.

**D. *The Unfunded Mandate Reform Act of 1995 is Inapplicable to NPDES Permit Decisions***

The City also contends that requiring compliance with the final permit's ammonia limit is prohibited by the Unfunded Mandate Reform Act of 1995 ("UMRA"), 2 U.S.C. § 1511. The UMRA mandates that "agencies should review and evaluate planned *regulations* to ensure that the cost estimates provided by the Congressional Budget Office will be carefully considered as *regulations* are promulgated." *Id.* (emphasis added).<sup>9</sup> Facility-specific NPDES permits of the kind issued to the City in this case are not regulations, but rather are licenses. See *Arkansas*

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<sup>9</sup>Title II of UMRA establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. See 2 U.S.C. § 1532. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for *proposed and final rules* with Federal mandates that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. *Id.*

*v. Oklahoma*, 503 U.S. 91, 103 (1992); see also 5 U.S.C. § 551(4)-(8). Accordingly, UMRA, which applies only to regulations, is inapplicable.<sup>10</sup> The City's petition for review is therefore denied on this ground.

### III. CONCLUSION

For the foregoing reasons, the petition for review of NPDES Permit ID-002004-4 is denied in all respects.

So ordered.

Dated: September 17, 2001

ENVIRONMENTAL APPEALS BOARD

By: \_\_\_\_\_/s/\_\_\_\_\_  
Scott C. Fulton  
Environmental Appeals Judge

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<sup>10</sup>Congress contemplated that rules subject to UMRA would "follow the requirements of section 553 of title 5, United States Code [Administrative Procedure Act] \* \* \* ." H.R. Rep. No. 104-76, at 39 (1995), *reprinted in* 1995 U.S.C.C.A.N. 64. Section 553 of the Administrative Procedure Act governs rule making, while section 554 governs adjudications. See 5 U.S.C. §§ 553-554. An adjudication is defined as the "agency process for the formulation of an order," and an order is defined to include "licensing." See 5 U.S.C. § 551(6)-(8).

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order Denying Review in the matter of the City of Blackfoot Wastewater Treatment Facility, NPDES Appeal No. 00-32, were sent to the following persons in the manner indicated:

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Dated: September 17, 2001 \_\_\_\_\_ /s/  
Annette Duncan  
Secretary