

IN THE MATTER OF ALMA PLANTATION, LTD.

NPDES Appeal No. 92-27

**ORDER REMANDING IN PART AND DENYING REVIEW IN
PART**

Decided December 16, 1992

Syllabus

Alma Plantation, Ltd. ("Alma") has petitioned for review of the denial by U.S. EPA Region VI of its request for an evidentiary hearing. The hearing was requested in conjunction with the issuance to Alma of a National Pollutant Discharge Elimination System permit for water discharges from its sugar refinery at Lakeland, Louisiana.

Alma raises six issues in its appeal. For three of these issues, Alma argues that Region VI incorrectly concluded that Alma had not raised the issue during the comment period on the draft permit. (40 CFR § 124.76 limits the scope of the hearing request to issues raised during the comment period, absent good cause.) These issues relate to both the discharge limitations and compliance dates. For two other issues, relating to Outfall 002 and to the form of the Biochemical Oxygen Demand ("BOD") limits, Alma asserts good cause for its failure to comment during the comment period. Region VI rejected this assertion in denying the hearing request. Finally, Alma raises one issue, relating to a requested variance from the technology-based effluent limitations, which it says that Region VI failed to address in its denial letter.

Held: Alma's comments on the draft permit raised, and thus preserved for its hearing request, two of the issues raised on appeal. These issues relate to adjusting the Phase A (interim) discharge limits to reflect higher anticipated grinding rates and extending the applicability of the Phase A limits beyond August 31, 1990. These issues are remanded to Region VI so the Region can address the evidentiary hearing request for these issues on the merits. In addition, one of the remaining issues, relating to the form of the BOD limits, is remanded to the Region to determine if good cause exists for Alma's failure to raise it during the comment period. Region VI's denial of the request as to the other three issues was not erroneous since those issues were not raised during the comment period and Alma has not shown good cause for not raising them.

***Before Environmental Appeals Judges Nancy B. Firestone,
Ronald L. McCallum, and Edward E. Reich.***

Opinion of the Board by Judge Reich:

Alma Plantation, Ltd. ("Alma") seeks review of the denial of its evidentiary hearing request by U.S. EPA Region VI in conjunction with the issuance to it of a National Pollutant Discharge Elimination System ("NPDES") permit. The NPDES permit authorizes discharges from Alma Plantation's sugar refinery one half mile east of Lakeland, Louisiana to receiving waters named Stumpy Bayou and Poydras Bayou, parts of the Terrebonne Basin. The facility is engaged in the grinding, milling and processing of sugarcane into raw sugar, molasses and bagasse. The denial of the evidentiary hearing was timely appealed to the Board pursuant to 40 CFR § 124.91, 57 Fed. Reg. 5336 (Feb. 13, 1992).

I. BACKGROUND

The final permit decision in question was issued pursuant to 40 C.F.R. § 124.15 on February 2, 1990. The permit establishes effluent discharge limitations for the combined pollutant load from three outfalls, denominated Outfalls 001, 002 and 003. The effluent limitations are primarily for Biochemical Oxygen Demand ("BOD") and Total Suspended Solids ("TSS"). These limitations establish both mass loading limitations (in terms of daily average and daily maximum) and a concentration limitation (daily maximum) for each of these effluent characteristics. Two different sets of limitations are established, Phase A (interim) limitations which are effective from permit issuance through August 31, 1990, and more stringent Phase B limitations which are effective from September 1, 1990, to the date of expiration (March 2, 1995) (AR 00023-00028).

A draft permit for the Alma Plantation was noticed for public comment on December 10, 1988 (AR 00073). Alma provided comments on the draft in an undated letter from Harold G. Leggett, Gulf Engineers and Consultants to Ms. Ellen Caldwell of Region VI (AR 00066-68), received on January 31, 1989. There was one substantial change from the draft to the final permit, in that the discharge limitations in the final permit were based on a State water discharge permit issued on August 23, 1989.¹ As previously noted, the final permit decision was issued on February 2, 1990.

¹ While the State issued its own permit, it was not an authorized State under Section 402(b) of the Clean Water Act, 33 U.S.C. § 1342(b), and therefore a Federal permit was still required.

Alma requested an evidentiary hearing by letter of March 5, 1990, setting forth seven issues.² In its response,³ Region VI denied this request in its entirety. Alma has appealed the denial as to six of these seven issues. As to all issues of relevance here, Region VI gave the same reason for its denial. Region VI stated:

Alma did not raise this issue during the comment period as provided by 40 CFR §§ 124.13 and 124.76, and has not asserted "good cause" for failing to raise the issue during the public comment period, as provided by 40 CFR § 124.76. Therefore, your request for a hearing on this issue is denied.

Region VI relied on the requirements of 40 CFR § 124.76, which provide in pertinent part:

No issues shall be raised by any party that were not submitted to the administrative record required by § 124.18 as part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them. Good cause includes the case where the party seeking to raise the new issues or introduce new information shows that it could not reasonably have ascertained the issues or made the information available within the time required by § 124.15; or that it could not have reasonably anticipated the relevance or materiality of the information sought to be introduced.

See Puerto Rico Sun Oil Company, NPDES Appeal No. 92-20, at 16 (EAB, Oct. 23, 1992).

In its petition for review,⁴ Alma argues that the denial was clearly erroneous in that three issues were in fact raised during the comment period and two others were not reasonably ascertainable, and thus subject to the good cause exception. Alma also asserts that the sixth issue was not addressed in the Region's denial.

²Letter from James C. Carver, Attorney for Alma Plantation, Ltd. to Ms. Ellen Caldwell, U.S. EPA Region VI (AR 00001-3).

³Letter from B.J. Wynne, Regional Administrator, U.S. EPA Region VI to James C. Carver, dated July 22, 1992 (AR 00004-7).

⁴Notice of Appeal and Petition for Review of Denial of a Request for Evidentiary Hearing; Alma Plantation, Ltd. (NPDES Permit No. LA 0003034), dated September 17, 1992.

At the request of the Board, Region VI submitted a response to the petition.⁵ In its response, the Region reiterated its reasons for the denial and disputed some of Alma's assertions about the nature of its comments on the draft permit.

II. DISCUSSION

The issues before the Board are relatively simple. The only reason given for the denial of the hearing request was that each issue had not been properly preserved for review. We must determine on appeal whether, as to each issue, it was raised during the comment period or good cause exists for its failure to be raised. If it was raised, or good cause exists, Region VI's denial was in error. For the reasons discussed in this opinion, we conclude that Region VI erred in finding that two of the issues had not been raised in Alma's comments on the draft permit. We further conclude that Region VI must determine whether good cause exists for Alma's failure to raise a third issue. We reject Alma's claims as to the remaining three issues.

Under the rules governing this proceeding, there is no appeal as of right from the Regional Administrator's decision. Ordinarily a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important, and should therefore be reviewed by the Environmental Appeals Board. *See, e.g., City of Denison*, NPDES Appeal No. 91-6, at 5 (EAB, Dec. 8, 1992); *Puerto Rico Sun Oil Company*, *supra*, at 5; 40 CFR § 124.91(a), 57 Fed. Reg. 5336 (Feb. 13, 1992). The petitioner has the burden of demonstrating that review should be granted.

The first basis for appeal was Region VI's inclusion in the permit of a reference to Outfall 002. Alma asserts that this is erroneous because Outfall 002 no longer exists. While it concedes that this issue was not raised during the comment period, it states that it was using Outfall 002 at that time and only subsequently took it out of service. As such, Alma argues that good cause exists for its failure to raise this issue. Petition for Review at 2-3.

The Region, in its response, states that "Petitioner has not shown that it could not have reasonably ascertained this issue during the comment period. If anyone could have known that Outfall 002 would shortly be taken out of service, it would have been Petitioner." Re-

⁵Response to Petition for Review, dated November 9, 1992.

sponse to Petition at 4. The Region suggests that the permit modification provision at 40 CFR § 122.62 is a more appropriate vehicle to deal with this circumstance. *Id.*

Alma's comments on the draft permit were undated but were received by Region VI on January 31, 1989. In its March 5, 1990 request for an evidentiary hearing, Alma indicated that it had already eliminated Outfall 002 wastewater from evaporator pan cleaning and wash down, consolidating it with the stabilized cane wash water at Outfall 003. The Administrative Record does not show the precise date during this period on which use of Outfall 002 was eliminated.

Alma has given no reason whatsoever for its failure to anticipate the shutdown of Outfall 002, an event within its own control. As such, it has failed to meet its burden of showing that this issue was not reasonably ascertainable and review of this issue is denied.⁶

The other issue which Alma concedes that it did not raise during the comment period but for which it asserts good cause relates to the BOD limits of the permit. Alma believes EPA should have granted net limits rather than gross limits. Alma states that it did not realize until it received a consultant report in February of 1990 that the well water used for its barometric condenser was high in BOD. Therefore, it believes it had good cause for failing to raise this issue during the comment period. Petition for Review at 4-5.

The Region, in its response, points out that the engineering consultant report cited by Alma⁷ indicates that the samples showing the high levels of BOD were taken in response to a request during a meeting of January 8, 1990 between Gulf Engineers & Consultants (acting on behalf of Alma) and the Louisiana Department of Environmental Quality. We note further that the consultant's letter, in describing that meeting, states the following:

As we discussed, Gulf Engineers & Consultants, Inc. (GEC), acting on behalf of Alma, was concerned that Alma could not comply with their upcoming permit

⁶See *City of Denison, supra*, at 13. It is unclear what the practical effect of the references to Outfall 002 is since all discharge limitations apply to the combined pollutant load from Outfalls 001, 002, and 003. Permit Part 1, Section A (AR 00024-27). However, Alma may wish to pursue a permit modification as suggested by the Region if it wants the references to Outfall 002 deleted.

⁷Letter from Chris Ingram, Gulf Engineers and Consultants to Richard Duerr, Permits Section, Louisiana Department of Environmental Quality, dated February 26, 1990.

limitations for BOD because of excessive concentrations of BOD in their source water.

This meeting occurred approximately one full year after the submission of Alma's comments. There is nothing in the record discussing this issue prior to that date. This does not necessarily mean that the issue was not "reasonably ascertainable" at an earlier date. However, the Region has not addressed Alma's contention that the issue was not reasonably ascertainable. It rejected Alma's evidentiary hearing request without discussing whether good cause exists for Alma's failure to raise this issue.⁸ Further, the Region's response to the petition for review is premised on the misstatement that Alma's comments were received on January 31, 1990 (after the January 8, 1990 meeting), rather than the correct date of January 31, 1989.⁹ Therefore, it is not clear whether the Region's denial was also premised on an incorrect understanding of the facts. For this reason, we are remanding this issue to the Region to determine whether the issue was reasonably ascertainable as of the time of the comment period. If it was not reasonably ascertainable, Alma's hearing request must be addressed on the merits.

Alma also identifies one issue which it indicates that Region VI did not address in its denial. This issue was a request for a hearing to determine if Alma was entitled to a variance from the technology based effluent limits. Petition for Review at 6. However, a review of the denial clearly shows that this issue was addressed. The request for a hearing was rejected because the issue had not been raised during the comment period or good cause shown for failure to raise it (AR 00006). Alma has not shown why this was in error and, in fact, a review of Alma's comments on the draft permit confirms that this issue was not raised. Therefore, the petition for review as to this issue is denied.

The other three bases for the appeal involve issues where Alma asserts that its comments on the draft permit were sufficient to preserve the issue and Region VI disagrees. We will discuss each of these in turn.

The first of these issues involves Alma's assertion that the mass loading limits should be raised for both BOD and TSS. Alma states

⁸ AR00006. The Region is technically correct that Alma did not specifically assert good cause, although Alma's request makes clear that it only "recently" discovered the problem with the BOD source water (AR00002).

⁹ Response to Petition at 7.

that in its comments, it requested that the permit limits be based on the expected grinding rates for the 1988 and 1989 seasons. It further states that "[i]t is clear that the only reason one would need to consider the grinding rates would be because the mass loading limits should be increased as the grinding rates are increased." Petition for Review at 4.

In response, Region VI quotes from Alma's comments and points out that there was no mention of BOD and TSS. Response to Petition at 6.

In its comments, Alma stated that "[w]hen Alma Plantation applied for renewal of its [sic] NPDES permit insufficient information was available regarding the total tonnage of sugar cane which was anticipated to be ground." It then discussed the grinding rate for the recently completed 1988 season and the anticipated rate for the 1989 season. It concluded by stating that "Alma Plantation feels that the permit limits should reflect these anticipated grinding rates" (AR 00067).

As previously noted, the discharge limitations in the permit relate to BOD and TSS, and include limits on the maximum amount of daily discharge in terms of lbs/day. The amount of daily discharge necessarily relates to the tonnage of sugarcane processed on that day. If the daily average grinding rate is higher than originally projected, this will result in higher levels of discharges in terms of lbs/day.

While the Region is correct that Alma did not specifically mention BOD and TSS, we believe the reference to "permit limits" in Alma's comments was specific enough to call these limits into question. Alma clearly requested a reconsideration of these limits based on the higher anticipated grinding rates. To the extent that Alma's request for an evidentiary hearing raises the same issue, Region VI's denial based on the conclusion that the issue had not been previously raised was erroneous. For this reason, we remand this issue to Region VI to make a determination on the merits as to whether an evidentiary hearing is appropriate.¹⁰

The next issue involves Alma's request for a hearing because "the period during which the original permit was issued was incon-

¹⁰In determining whether an evidentiary hearing is appropriate, the Regional Administrator must determine whether the request sets forth any material issues of fact. 40 CFR § 124.75(a)(1). We express no opinion as to this determination.

sistent with the period of time during which Alma operated." It is unclear exactly what Alma means by this. Alma says this issue was raised in its comments through a request that the final permit reflect a construction and compliance schedule consistent with that produced by the State. Petition for Review at 5-6. The Region, in its response to the petition, states that "Alma does not refer [in its comments] to any state enforcement action by the State of Louisiana. It only refers to the enforcement action by EPA." Response to Petition at 8.

This issue is most clearly articulated in the request for an evidentiary hearing, where Alma stated:

In Part 1, Phase A, Alma objects to the discharge limitations not lasting beyond August 31, 1990. This part of the permit, as written, would be moot since it only regulates from March 3, 1990 through August 31, 1990, and the sugar refinery only operates in the fall and early winter months, beginning after August 31, 1990. Alma requests that this discharge limit be extended for the duration of the permit.

AR 00002. As the permit is presently structured, Phase A limits would apply from the date of issuance through August 31, 1990, and the significantly more restrictive Phase B limits would apply thereafter until the expiration date of the permit (AR 00024 and 00026).

Region VI is correct that in Alma's comment 2, Alma referenced only a consent decree signed with Region VI. This consent decree would require development of a multi-year construction schedule to achieve compliance with environmental regulations. Alma requested that "any permit issued to Alma Plantation should reflect ongoing enforcement action" and that the phase schedules "should coincide with the construction milestones approved by the Enforcement Branch" (AR 00067). This, presumably, is the basis for arguing for an extension of the Phase A (interim) limitations.

However, Alma does mention in the transmittal letter to its comments the issuance of an administrative order by the State, the

fact that the multi-year construction schedule is being developed in close cooperation with EPA and the State, and that the schedule will ultimately need to be approved by both EPA and the State (AR 00066).¹¹ In any event, irrespective of the references to the State, Alma's reference to the EPA consent decree and its desire to adjust the phases of the permit in light of this consent decree, raised the issue of whether the Part A limitations should extend beyond August 31, 1990. Thus, we remand this issue to Region VI to address it on the merits. Because the relationship between the construction schedule and the permit compliance schedule is not explained in the record before us, we express no opinion as to the substance of this determination.

The final issue raised in the petition for review relates to an assertion by Alma that Region VI erred by issuing a permit that was inconsistent with a permit modification issued by the State regarding both concentration and mass loading limitations. Alma indicates that it raised this issue during the comment period by requesting a compliance schedule with interim limits to comport with those agreed to by the State. Petition for Review at 3. The Region disputes that Alma made such a request. Response to Petition at 4-5.

Alma did raise in its comments an issue with respect to the stringency of the interim limitations. However, the comment indicates that the interim limits which Alma is requesting "are dependent upon the facility modifications and environmental controls which EPA's Enforcement Branch and Alma Plantation develop" (AR 00068). There is no reference to a State permit modification, either in the comment or the transmittal letter.¹² As such, we find that this issue was not preserved and the denial of the evidentiary hearing was not in error.

¹¹The letter also indicates that the schedule will bring Alma Plantation into compliance by October 1993. It is unclear why Alma asks for the Phase A interim limitations to be extended for the duration of the permit, which expires on March 2, 1995.

¹²It is not clear from the Administrative Record what permit modification Alma refers to. As previously noted, the EPA permit was consistent with the permit issued by the State on August 23, 1989. However, Alma's evidentiary hearing request does mention a proposed State variance for the 1990 grinding season (AR 00001-2), and this may be the "permit modification" to which this issue is addressed. If so, this issue may now be moot.

III. CONCLUSION

In conclusion, this matter is remanded to Region VI to make a further determination of the appropriateness of an evidentiary hearing on the three issues identified herein. Review of the other three issues is denied.

So ordered.