IN THE MATTER OF THE CITY OF DENISON

NPDES Appeal No. 91–6

ORDER DENYING REVIEW

Decided December 8, 1992

Syllabus

The City of Denison has petitioned for review of EPA Region VI's denial of an evidentiary hearing request in connection with an NPDES permit for Denison's Iron Ore Wastewater Treatment Plant. On appeal, Denison questions the validity of the Deputy Regional Administrator's denial of the hearing request and the inclusion of several permit conditions relating to the biomonitoring provisions of the permit.

Held: The Deputy Regional Administrator was authorized to act on behalf of the Regional Administrator and, therefore, the Region's denial was effective. The Region properly denied the evidentiary hearing request on the grounds that the issues raised were purely legal, related to the State certification, or were not raised in Denison's comments to the draft permit. In addition, Denison's objections to the biomonitoring provisions of the permit do not warrant review under 40 C.F.R. § 124.91. Therefore, the petition for review is denied.

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

Opinion of the Board by Judge Firestone:

The City of Denison ("Denison"), Texas seeks review of U.S. EPA Region VI's denial of an evidentiary hearing request on issues relating to the issuance of an NPDES permit for Denison's Iron Ore Wastewater Treatment Plant (the "Iron Ore Plant").[1] The Iron Ore Plant discharges effluent into Iron Ore Creek, which eventually reaches the Red River. Denison sought an evidentiary hearing on various issues relating to the toxicity testing and biomonitoring provisions of the permit. At the request of the Agency's Chief Judicial

[1] Discharges into the navigable waters of the U.S. by point sources, like the Iron Ore Plant, must be permitted to be lawful. *See* Section 301 of the Clean Water Act, 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System (NPDES) is the principal permitting program of the Clean Water Act. 33 U.S.C. § 1342.

Officer,[2] the Region filed a response to the petition for review. For the reasons set forth below, we conclude that the Region did not err in denying Denison's request for an evidentiary hearing and the Board finds no exercise of discretion or policy issue warranting review. Denison's petition for review is, therefore, denied.

I. *BACKGROUND*

On May 26, 1990, U.S. EPA Region VI issued a public notice of a draft NPDES permit for Denison's Iron Ore Plant. Section B of the draft permit contained biomonitoring requirements. In particular, the draft permit provided that within thirty days of submitting test results demonstrating that the Iron Ore Plant's effluent has a lethal toxicity, Denison:

> [S]hall submit to EPA Region 6 an approvable proposal for conducting a Toxicity Reduction Evaluation (TRE). The TRE Proposal shall specify the approach and methodology to be used in performing a TRE. The Proposal shall specify the date on which the permittee will initiate the TRE.

Draft Permit, Part II, Section B.7.d. The test protocols and a specification of the test organisms to be used in determining whether the effluent causes lethality appeared in Part II, Section B.2, of the Draft Permit.

The public notice of the draft permit also specified that the State of Texas Water Commission ("TWC") would be concurrently reviewing the draft permit under Section 401 of the Clean Water Act, 33 U.S.C. § 1341, to determine whether the activities contemplated by the permit comply with Texas water quality standards.[3] On June 27, 1990, the TWC provided Region VI with a conditional certification for the Iron Ore Plant NPDES permit. In its certification, the TWC expressly included "Conditions of Certification," in which the TWC stated:

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[2] The Environmental Appeals Board now has jurisdiction to grant or deny review of this petition pursuant to 40 C.F.R. §§ 124.72 and 124.91. *See* 57 Fed. Reg. 5320 (Feb. 13, 1992).

[3] Section 401 provides, in pertinent part, that "[n]o * * * permit shall be granted until the certification required by this section has been obtained or waived * * *." Section 401 requires States to certify that the proposed permit complies with, *inter alia*, section 303 of the Clean Water Act, 33 U.S.C. § 1313, which provides for State promulgation of water quality standards.

> The final permit must continue the biomonitoring which appeared in the draft permit to include any changes recommended by the Commission, and may not be substituted by referencing the requirements of a 308 Order.

Letter from Allen Beinke, Executive Director TWC, to Robert E. Layton, Region VI (June 27, 1990). Thus, Texas certified that the requirements of the Iron Ore Plant's draft NPDES permit, in particular the biomonitoring requirements, are necessary to ensure compliance with Texas' water quality standards.

On June 23, 1990, Denison filed its comments on the draft permit. In its comments, Denison complained, *inter alia,* about several of the draft permit provisions relating to toxicity testing and biomonitoring, particularly those concerning the TRE requirement. The Region responded to these comments, stating that the TWC has designated chronic biomonitoring as the appropriate indicator of toxic impact for these receiving waters, citing the "Implementation of the Texas Water Commission Standards Via Permitting," (May 5, 1989) (hereinafter "TWC Implementation Guidance")[4] Response to Comment No. 3. Thus, the Region's response to comments plainly indicates that it relied upon the TWC Implementation Guidance to draft the permit's biomonitoring requirements that are necessary to maintain water quality standards for the receiving waters.[5] The certification indicates that Texas plainly approved these biomonitoring requirements.[6]

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[4] Upon request of the Board for a copy of this document, Region VI supplied a copy of a document bearing the heading "Implementation Procedures for Domestic and Industrial Permits," which Region VI represents was also dated May 5, 1989. *See* Letters from Robyn Moore, Assistant Regional Counsel, Region VI, to Kathleen A. Calder, Counsel to the Environmental Appeals Board (Sept. 9 and Oct. 28, 1992). In the absence of any indication to the contrary, we assume they are the same document. The document provided by Region VI is part of the administrative record in this case.

[5] Under the terms of the TWC Implementation Guidance, all domestic wastewater treatment facilities with a design capacity of 1 million gallons per day (MGD) or greater must perform whole effluent toxicity testing and biomonitoring. The Iron Ore Plant has a capacity of 2 MGD. The specific permit requirements for implementing such testing and monitoring are detailed in the TWC Implementation Guidance.

Also in support of its conclusion that biomonitoring is warranted for these receiving waters, Region VI cited "a communique of January 26, 1990 [in which] TWC provided EPA with hydrologic information on the receiving stream, Iron Ore Creek." Response to Comment No. 3.

[6] To the extent Denison's petition for review expresses disagreement with the biomonitoring requirements necessitated by the State certification, these concerns should be resolved at the State level and not through EPA permit procedures. *See*

On August 24, 1990, Region VI issued the final NPDES permit for the Iron Ore Plant. Although the Region made two changes to the draft permit based on Denison's comments, Denison's comments relating to biomonitoring were not accepted. On September 24, 1990, Denison filed a request for an evidentiary hearing with Region VI, again challenging the toxicity testing and biomonitoring requirements of the permit. The Region VI Deputy Regional Administrator denied the request for an evidentiary hearing on February 25, 1991, on the grounds that the issues raised are purely legal, required by the State certification, or were not raised during the public comment period. This appeal followed.

II. *DISCUSSION*

Under the rules governing this proceeding, there is no appeal as of right from the denial of an evidentiary hearing request. Ordinarily a petition for review is not granted unless the denial is clearly erroneous or involves an exercise of discretion or policy that is important, and, therefore, should be reviewed. *See,* 40 C.F.R. § 124.91(a); *In re Puerto Rico Sun Oil Company, Inc.,* NPDES Appeal No. 92–20, slip op. at 5 (EAB, Oct. 23, 1992); *In re Miami-Dade Water and Sewer Authority Department,* NPDES Appeal No. 91–14, slip op. at 5 (EAB, July 27, 1992). The petitioner has the burden of demonstrating that review should be granted. *Id.*

The petition asserts four grounds warranting review. They are as follows:

> (1) The denial of the request for an evidentiary hearing was not effective because it was signed by the Deputy Regional Administrator and not the Regional Administrator;
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> (2) The Region erred in requiring the permittee to submit an "approvable" proposal for conducting a

40 C.F.R. § 124.55(e); *In re Lone Star Steel Company,* NPDES Appeal No. 91–5, unpub. op. at 4 (CJO, Nov. 24, 1991). The public notice of the draft permit clearly reminded Denison of this procedure, stating:

> This public notice is also issued for the purpose of advising all known interested persons that there is pending before the TWC a decision on water quality certification under [the relevant Texas Code provision]. Any comments concerning this certification by the State of Texas may be submitted to the Executive Director * * * Texas Water Commission. * * * These comments must be received by the TWC within 30 days of the date of this notice.

> Toxicity Reduction Evaluation for chronic toxicity, without providing criteria for preparing a TRE;
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> (3) The Region erred in failing to include a permit condition that would terminate the need to continue with the TRE, in the event effluent ceases to induce toxicity; and
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> (4) The test protocols and test organisms specified in the permit are not appropriate because they are not representative of aquatic life in a limited stream aquatic habitat.

A. *The Validity Of The Deputy Regional Administrator's Denial Of The Request For An Evidentiary Hearing*

Denison argues that the denial of its request for an evidentiary hearing was not effective because it was signed by the Deputy Regional Administrator. The rules governing evidentiary hearing requests require that such requests be submitted to and acted upon by the Regional Administrator. *See* 40 C.F.R. §§ 124.74, 124.75. The term "Regional Administrator" is defined in 40 C.F.R. § 124.2(a) as "the Regional Administrator of the Environmental Protection Agency or the *authorized* representative of the Regional Administrator." (Emphasis added.) Denison contends that absent action by the Regional Administrator, only the Regional Administrator's *delegated* representative may legally act to deny an evidentiary hearing. According to Denison, the Regional Administrator of Region VI has delegated his authority to "issue and condition applications for permits for discharge pursuant to the Clean Water Act ("CWA"), Section 402, to the Director, Water Management Division."[7] Hence, Denison concludes, the Deputy Regional Administrator acted without authority and his denial of an evidentiary hearing was not effective.

The Region, in response, argues that in the Regional Administrator's absence, the Deputy Regional Administrator is the Regional Administrator's *authorized* representative, citing the Deputy Regional Administrator's job description and the Region's organizational chart. In the alternative, the Region asks that the Board take official notice of this fact.

[7] Denison cites the Region VI Delegation Manual. *See* Letter from Jim Mathews, Counsel for Denison, to Bessie Hammiel, U.S. EPA Hearing Clerk (July 2, 1991).

Denison's reliance on the Region's *delegation* to the Division Director is misplaced as the applicable regulations allow evidentiary hearing requests to be addressed by the Regional Administrator's *authorized* representative. Because the Regional Administrator's delegation to the Division Director pertains only to the issuance of permits and does not by its terms cover requests for evidentiary hearings, it does not answer whether the Deputy Regional Administrator was authorized to deny a request for an evidentiary hearing.

While the role of a Deputy Regional Administrator varies from Region to Region, it is well-recognized that a Deputy Regional Administrator is the authorized representative of the Regional Administrator in the Regional Administrator's absence. This is confirmed by Region VI Order R–1110.9 (Mar. 31, 1989), which establishes the "line of succession" in the Region.[8] Under the terms of the Order, the Deputy Regional Administrator is authorized to sign correspondence or other documents on behalf of the Regional Administrator when the Regional Administrator is absent from the office. Plainly, in Region VI, the Deputy Regional Administrator is the Regional Administrator's authorized representative within the meaning of the regulations governing evidentiary hearing requests, and, therefore, the Deputy Regional Administrator's denial of Denison's request for an evidentiary hearing was effective and valid.

B. *The Permit Condition Calling For Submission Of An Approvable Proposal For A Toxicity Reduction Evaluation*

Denison requested an evidentiary hearing on the permit condition requiring it to submit an approvable proposal for a TRE on the ground that because criteria for an "approvable" plan are unavailable, the requirement is impermissibly vague. Region VI denied this request, maintaining that the TRE requirement, which helps control effluent toxicity, is an "integral component of the State certification." Denial of Evidentiary Hearing Request at 2.

In its petition for review, Denison contends that the State certification requires only biomonitoring, not a TRE, and therefore Region VI erred in denying the evidentiary hearing request. In the alternative, Denison seeks review of the permit condition on the grounds that it is impermissibly vague.

[8] This Order is not part of the administrative record in this proceeding, but is an official government record subject to official notice. *See, e.g., In re Hawaiian Commercial & Sugar Company,* PSD Appeal No. 92–1, slip op. at n.13 (EAB, July 20, 1992); *In re Rubicon, Inc.,* NPDES Appeal No. 85–10, unpub. op. at n.11 (CJO, May 9, 1988).

We agree with the Region that the TRE requirement is a component of the State certification of this permit. In its response to comments, the Region made clear that the chronic biomonitoring requirements, including the conditions relating to the preparation of an approvable proposal for a TRE plan, were included in the permit to meet Texas' water quality standards. *See* Response to Comment No. 3. The Texas certification of the draft permit is conditioned upon the continuation of the biomonitoring requirements contained in the draft permit.

Furthermore, the basis for the Region's action is explained in its response to comments. In particular, the Region explained that the permit's biomonitoring requirements are necessary because, consistent with the TWC Implementation Guidance, the TWC designated chronic biomonitoring as the appropriate indicator of toxic impact for these receiving waters. Response to Comment No. 3. The TWC Implementation Guidance provides that "draft permit language for toxicity testing [of which biomonitoring is a method] *shall* include such things as * * * Implementation of a Toxicity Reduction Evaluation (TRE) upon confirmation of an effluent which is toxic due to lethality." TWC Implementation Guidance at 22 (emphasis added). In addition, the TWC Implementation Guidance provides that if the biomonitoring confirms lethality, the permittee must within 30 days submit a "general action plan for a TRE." TWC Implementation Guidance at 23. Without any doubt, the TRE requirement is an element of the biomonitoring requirements in both the TWC Implementation Guidance and the permit, and is thereby a condition of the State certification.

It is well settled that EPA must include in an NPDES permit the conditions required by a State certification without inquiry as to whether they are proper or too stringent. *Puerto Rico Sun Oil Company,* slip op. at 14; *In re Lone Star Steel Co.,* NPDES Appeal No. 91–5, unpub. op. at 3 (CJO, Nov. 24, 1991); *see also Roosevelt Campobello International Park Commission, et al.* v. *U.S. EPA,* 684 F.2d 1041, 1056 (1st Cir. 1982). In denying Denison's request for an evidentiary hearing, the Region explained that the permit condition requiring submission of an approvable proposal for a TRE "is an integral component of the State certification." Denial of Request for an Evidentiary Hearing at 2. We agree. Therefore, we find no error in the Region's denial of the evidentiary hearing request on this issue.

Concerning Denison's alternative argument, we conclude that review of the requirement to submit an "approvable" TRE proposal

is unwarranted. Denison contends that this requirement is impermissibly vague "because it requires the permittee to submit an 'approvable' scientific protocol in the absence of criteria to assist the permittee or EPA in measuring the adequacy of the protocol." Petition for Review at 5. First, to the extent Denison's concerns extend to the implementation of the permit condition (approval of the TRE proposal) as opposed to the validity of the condition itself, its concerns are beyond the purview of this Board's permit review authority. *See In re General Electric Co.*, RCRA Appeal No. 91–7, slip op. at 14 (EAB, Nov. 6, 1992). Second, Denison has been provided with guidance as to what the TRE proposal should contain. For example, the TWC Implementation Guidance provides that:

> Appropriate components of a TRE may include:
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> —chemical analyses
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> —effluent characterization test (physical/chemical properties)
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> —toxicity tests on effluent prior to and after characterization treatment
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> —toxicity tests on effluent after chemical/physical separations
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> —instream toxicity tests
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> —chemical identification after chemical/physical separations and toxic phase
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> —assessment of treatment technology available to remove the toxic substance from the effluent

TWC Implementation Guidance at 23. The guidance also provides that the TRE proposal should:

> [D]escribe preparations to assemble expert assistance to develop and implement a TRE, establish a schedule to dedicate monies, select consultants, * * * and establish an initiation date to begin the whole effluent evaluation.

Id. at 24. In addition, the Region explained that the TRE proposal called for in the permit "shall describe the general approach and

methods used in the performance of the TRE and * * * shall include * * * a description of project personnel and funds, a schedule for obtaining any needed consultants, a discussion of the available * * * data, a sampling and analytical schedule, and the TRE initiation date." Response to Comment No. 4. The Region also referred Denison to four EPA technical guidance documents for use in preparing Denison's proposal for a TRE. Response to Comment No. 7. Accordingly, Denison's claim that the permit condition is vague due to lack of guidance is unfounded, and review of this permit condition is denied.

C. *The Region's Failure To Include A Permit Condition That Would Terminate The Need To Continue With The TRE*

Denison sought an evidentiary hearing on the ground that the permit fails to provide for discontinuing the TRE if the effluent ceases to induce toxicity in test organisms, which request was denied by the Region. Denison seeks review of this denial, and in the alternative, review of the permit on this issue.

The Region denied Denison's evidentiary hearing request on this matter because Denison raised only legal issues. *See* 40 C.F.R. § 124.74(b)(note); Denial of Request for Evidentiary Hearing at 1. With this, we agree, and uphold the denial of the evidentiary request.

Denison maintains that:

> Effluent from a municipal wastewater treatment plant can be highly variable, and the potential exists that effluent samples from the same plant may pass the biomonitoring test on some occasions and fail on others. Although it may be possible that an 'approvable' proposal for conducting a TRE could provide for discontinuing the TRE under these circumstances, * * * EPA requires that the TRE *must* conclude with the selection of appropriate controls and elimination of toxicity.

Petition for Review at 5 (emphasis added). Denison's petition refers to the Region's response to comments, which provides that "if permit conditions are to comply with the prohibition of toxic discharges contained in the * * * Texas Water Quality Standards, the TRE must conclude with the selection of appropriate controls and elimination of toxicity." Response to Comment No. 8.

Denison does not contest the Region's need to implement controls for the elimination of toxicity pursuant to the State certification. Instead, Denison protests that based upon the Region's response to comments, it appears the Region will require a TRE to conclude with the implementation of such controls even if the effluent ceases to demonstrate lethal toxicity in the interim.

We conclude that review of the permit on this basis is not warranted. First, Denison's concerns appear to be over future implementation of the permit, and to that extent are not subject to review. *See In re General Electric Co., supra.* Second, Region VI has retreated somewhat from its response to comments. In denying the request for an evidentiary hearing, the Region noted that pursuant to the State certification, the permit must control toxicity, and that if toxicity has been demonstrated, 40 C.F.R. § 122.44(d)(1)(v) requires the permit to contain whole effluent limits for whole effluent toxicity. Thus, the Region stated, "[t]he permit may be reopened and modified to contain enforceable effluent toxicity limits *in lieu of the completion of the TRE.*" Denial of Evidentiary Hearing Request at 3 (emphasis added).[9] More recently, in its response to the petition, Region VI states that an approvable TRE plan "could contain provisions for cessation if toxicity is eliminated or 'goes away' prior to full completion of the TRE." Response to Petition at 5. Clearly, Region VI acknowledges Denison's concerns that factual circumstances may eliminate the need for a full TRE prior to its completion. This is consistent with the TWC Implementation Guidance, which provides that "[t]he [TWC] will require that a permittee having a toxic effluent due to lethality * * * perform a TRE unless it can be demonstrated * * * that the effluent has ceased to induce lethal responses in the test organisms." TWC Implementation Guidance at 23 (emphasis added). In these circumstances, the Region's denial of an evidentiary hearing request on this basis was proper and the issue presents no policy determination warranting review.

D. *The Appropriateness Of The Test Protocols And Test Organisms*

Denison also contends that the Region erroneously denied its evidentiary hearing request as to the toxicity test protocols and test organisms specified in the permit. In the alternative, Denison asks this Board to review those permit conditions. The Region, in its

[9] By stating that the Texas Water Quality Standards could be satisfied by modifying the permit to include whole effluent toxicity limits in lieu of completing the TRE, the Region indicated that completion of the TRE is not mandated by the State certification, and thus the Region properly did not rely on the State certification in denying the evidentiary hearing request on this issue.

response, asserts that it properly denied the evidentiary hearing request and review of these provisions should be denied because Denison failed to raise these concerns during the public comment period on the draft permit and because they are required by the State certification.

Denison concedes that it failed to "identify the specific issue of the appropriateness of the test organisms in its comments." Petition for Review at 8. Nonetheless, Denison contends that by objecting to the appropriateness of requiring chronic biomonitoring it preserved the issue for review. Denison's analysis is flawed.

Under the applicable regulations, no issue may be raised in these proceedings that was not made in the public comments on the draft permit absent good cause. *See* 40 C.F.R. § 124.76. The purpose of this requirement is to allow persons drafting the permit the opportunity to address these concerns before the permit is issued.[10] In this case, Denison's comments as to the appropriateness of the chronic biomonitoring requirements in the permit are not sufficient to preserve for review its concern raised here about test protocols and organisms. In other words, Denison's comments on the draft permit would not have alerted the permit drafters to any concerns about the test protocols or organisms.[11] Denison admits that it failed to raise this issue in its comments, which address other permit provisions pertaining to toxicity. In these circumstances, Denison has failed to meet its burden of demonstrating that the issue was not reasonably ascertainable at the time of the draft permit. As such, Denison cannot claim any good cause for this omission. Evidentiary hearing requests may be properly denied if they request a hearing on an issue not raised during the public comment period. *See Puerto Rico Sun Oil,* slip op. at 15–16. Accordingly, Region VI did not err in denying Denison's request for an evidentiary hearing on this issue.

In addition, contrary to Denison's contention, the issue does not present a significant policy question warranting review. As discussed above, the EPA has no authority to look behind a State water quality certification to determine whether the conditions contained therein are appropriate. Here, the permit includes the specific test protocols

[10] *See In re NPC Services, Inc.,* NPDES Appeal No. 91–4, unpub. op. at 2–3 (CJO, May 30, 1991).

[11] Specifically, Denison's comments pertained to the use of chronic instead of acute biomonitoring methods, the requirement to submit an approvable TRE proposal within thirty days of reporting toxicity, the failure to allow termination of the TRE if lethality ceases, the effluent concentrations used in the biomonitoring, and the circumstances allowing termination of biomonitoring.

Part I) and the final permit (page 6 part II).