UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Buckeye Florida, L.P., NPDES Permit No. FL0000876

Permittee

ORDER GRANTING EPA'S MOTION FOR SUMMARY DETERMINATION AND DENYING HOPE'S COUNTER-MOTION

Background

Buckeye Florida, L.P. ("Buckeye"), formerly known as Procter & Gamble Cellulose Company, operates a pulp and paper mill in Perry, Florida. On June 26, 1992, the U.S. Environmental Protection Agency ("EPA") issued National Pollutant Discharge Elimination System ("NPDES") Permit No. FL0000876 (the "Permit") to Buckeye authorizing the discharge of certain industrial wastewater into the Fenholloway River. Admin. Rec. Ex. 32.[1]

In accordance with the NPDES Permit, the Buckeye mill daily discharges approximately 50 million gallons of treated pulp production effluent into the Fenholloway River. The Fenholloway River is presently designated by the State of Florida as a Class V (Navigation, Utility, and Industrial Use) water body. Admin. Rec. Ex. 9; EPA Ex. 2 [2] Under the State's water body classification system, a Class V classification has the least stringent water quality standards. As Class V's title suggests, the water quality of the Fenholloway River is required to be maintained only at a level sufficient to support navigation, utility, and industrial uses. EPA Ex. 2.

On July 24, 1992, Help Our Polluted Environment ("HOPE") filed a request for an evidentiary hearing with the EPA Regional Administrator to contest certain provisions of Buckeye's Permit. [3] On June 20, 1994, the Regional Administrator granted HOPE's request for hearing on the following issues:

I. Whether existing uses included in Florida's Class III designated use classification (recreation, etc.) have occurred on the Fenholloway River.

II. Whether the Permit is required to include effluent limitations necessary to fully maintain and protect the water quality criteria associated with Florida's Class III designated use classification.

III. Whether the effluent limitations included in the Permit are sufficient to fully maintain and protect the water quality criteria associated with Florida's Class III designated use classification.

IV. Whether the Class V designation of the Fenholloway River should be disregarded in the development of effluent limitations because existing uses of the River are "higher" than the designated uses of the Fenholloway River.

V. Whether the intent of the Clean Water Act is being met when EPA refuses to acknowledge the fact that effluent being discharged into the Fenholloway (surface water) is contaminating the groundwater of Taylor County.

Thereafter, EPA moved for summary determination on all issues pursuant to 40 C.F.R. § 124.84. HOPE, in turn, filed a counter-motion for summary determination, likewise seeking judgment on all issues. Both parties argue that summary determination is appropriate because "there is no genuine issue of material fact for determination." *Ibid.* Buckeye and FPPA have filed an opposition to HOPE's counter-motion. For the reasons that follow, EPA's motion is granted and HOPE's counter-motion is denied.

Discussion

Issues I through IV involve the designated use classification of the Fenholloway River, its existing use, and the validity of Buckeye's NPDES permit given the river's designated use classification and existing use. These issues are closely related and will be considered together. Issue V, which involves matters raised by the possible contamination of groundwater by effluent being discharged into the Fenholloway River, will be considered separately.

A. Issues I Through IV

Section 403.061(10) of the Florida Statutes provides for water quality classifications to designate the "present and future most beneficial uses" of the waters of the State. As noted, the Fenholloway River presently is

designated by the State of Florida as a Class V water body. This means that the river's designated uses include navigation, utility, and industrial uses. The Fenholloway River is the only river in the State to receive a Class V designation. HOPE Ex. 2.

The "Existing Use" Of The Fenholloway

In September of 1990, prior to the issuance of Buckeye's NPDES permit, the Florida Department of Health and Rehabilitative Services, in conjunction with the Florida Department of Environmental Regulation, issued a press release announcing a health advisory relating to the Fenholloway River. This health advisory in part urged the public not to consume fish caught in the river because of dioxin contamination. HOPE Ex. 3. In addition, Procter & Gamble Cellulose Company, Buckeye's predecessor, posted signs at four locations along the river warning in the English language that the Fenholloway was classified as a Class V river and that it was "not designated for recreation or fishing." HOPE Ex. 3.

Despite these facts, it is undisputed that fishing has taken place on the river, both before and after the issuance of the Permit, and that people are consuming the fish. *See* HOPE Br. at 5, citing Admin. Rec. Exs. 23h, 23j, & 23m; *see also,* EPA Br. in Opp. at 4. Indeed, a Use Attainability Analysis submitted to EPA by the State of Florida, Department of Environmental Protection, in December, 1994, concluded that 3,500 hours of recreational fishing occurred on the Fenholloway River during the period of March 24, 1993 to June 16, 1993. EPA Ex. 2 at 29. It is also undisputed, however, that the fishing that does occur on the Fenholloway is limited. Indeed, even HOPE concedes that the Fenholloway River supports only a "diminished" fishery resource. HOPE Br. at 12 n. 11.

HOPE contends that because of this fishing the Fenholloway River's "existing use" classification is Class III, and not Class V.[4] A Florida Class III designated use classification encompasses "Recreation -- Propagation and Maintenance of a Healthy, Well-Balanced Population of Fish and Wildlife", as opposed to Class V's "Navigation, Utility, and Industrial Use" classification. As evident from these class descriptions, a Class III designation carries with it stricter water quality standards than does a Class V designation.

EPA admits that the fishing that has occurred on the Fenholloway River constitutes a form of recreation. It argues, however, that the "existing use" fishing cited by HOPE is not a proper basis for elevating a water body's classification from Class III to Class V. EPA is correct. As EPA asserts, the

mere fact of dropping a fishing line into a water body cannot serve to change that water body's designated use to a higher use. While this characterization runs the risk of over-simplification, it helps to illustrate the point that the Fenholloway was classified for Class V industrial type uses and *not* Class III recreational uses. As such, that classification cannot be changed because certain individuals, contrary to posted signs and against the advisement of a State health advisory, choose to fish a Class V river. Despite this fishing, the river remains a Class V river.[5]

While the limited fishing that has occurred on the Fenholloway River does not result in an automatic higher reclassification of the river, this limited recreational activity still cannot be ignored. Even if inadvisable, this fishing constitutes an "existing use" of the river and it must be taken into account in evaluating HOPE's present challenge to the Permit provisions. In that regard, the question is whether the limited fishing which occurs on the Fenholloway River, *i.e.,* an existing recreational use, has been adversely affected as a result of the issuance of the Buckeye Permit. If not, then HOPE's challenge to the Permit provisions must fail. Resolution of this question involves consideration of the Federal and State antidegradation policies.

The Federal And State Antidegradation Policies

Evaluating the effect of the Buckeye Perrnit on the existing use recreational fishing on the Fenholloway River is accomplished by application of the Federal antidegradation policy governing water bodies. The Federal antidegradation policy is set forth at 40 C.F.R. § 131.12. This antidegradation policy in part provides:

Existing instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.

40 C.F.R. § 131.12(a)(1).[6] For purposes of this case, this anitdegradation regulatory language mandates that the limited fishing which occurs on the Fenholloway River is be "maintained and protected." As discussed below, EPA has shown that it has.

With respect to the antidegradation issue, EPA correctly points out that data in the case supports the conclusion that water quality in the Fenholloway River has remained the same, or has marginally improved, since 1975. In that regard, EPA submits: "The average levels of dissolved oxygen (DO) for 1970 through 1988, as set forth in FDER's Fenholloway River Quality Data 1970-1988 are

similar to those found by EPA in September of 1989 (Water Quality and Biological Assessment of the Fenholloway River, ESD, EPA Athens 9/12-9/14/89)." EPA Br. at 20, citing Admin. Rec. Ex. 23g; EPA Br. in Opp. at 3.

As further support, EPA refers to the Suwannee River Water Management District water quality data for the period of 1989-1991, as well as to the Northeast Florida District Water Quality Assessment, 1994 305(b) Technical Appendix *(see* EPA Ex. 1) to show that the DO level actually has increased over time. *Ibid.* The Northeast Florida District water Quality Assessment is particularly instructive as it finds a stable overall trend in the water quality below the Buckeye mill discharge from 1984-1993, with the above noted improving trend in the level of dissolved oxygen. EPA Ex. 1 at 42.

Moreover, in December of 1994, the State of Florida issued a "Use Attainability Analysis" ("UAA") on the Fenholloway River. EPA Ex. 2. The UAA offers a view of the water quality status of the Fenholloway River after the effective date of the Buckeye Permit. The findings contained in the UAA are particularly relevant here inasmuch as, "[e]xcept for a relatively small contribution from the City of Perry sewage treatment plant to a tributary of the Fenholloway, the mill discharge contributes the entire source point pollutant load and at times constitutes the entire flow of the River at the mill discharge location." EPA Ex. 2 at 1-2.

In this UAA, the State concluded that full Class III uses cannot be attained in the Fenholloway River until Buckeye's industrial discharge point is moved downstream near the mouth of the river. EPA Ex. 2 at 53.[7] The UAA also shows, however, that the limited Class III uses discussed earlier, *i.e.,* to the extent that fishing occurs on the Fenholloway, are being maintained and protected and that the Buckeye Permit, therefore, satisfies Federal and State antidegradation policies.

In sum, it is concluded that Class III recreational uses, however limited, do take place on the Fenholloway River. Nonetheless, this is not the starting point for analysis of HOPE's challenge to the Buckeye NPDES Permit. Rather, the starting point for analysis is the fact that the Fenholloway River is a Class V, Navigational, Utility, and Industrial Use river. Next, application of Federal and State anitdegradation policies shows that the challenged Permit provisions do not result in a degradation of the "existing uses" on this Class V river. Accordingly, EPA must prevail on Issues I through IV.

B. Issue V[8]

This issue, as referred for hearing by the Regional Administrator, is "[w]hether the intent of the Clean Water Act is being met when EPA refuses to acknowledge the fact that effluent being discharged into the Fenholloway (surface water) is contaminating the groundwater of Taylor County." [9]

It is undisputed that there is a direct hydrologic connection between the Fenholloway River and the Florida Aquifer ("Aquifer"). Under certain hydrologic conditions, the industrial wastewater in the Fenholloway enters the Aquifer. Under other conditions, Aquifer water enters the Fenholloway River. HOPE Ex. 4.

In moving for summary determination on this issue, HOPE maintains that the water that enters the Fenholloway River "from the Aquifer" constitutes a separate discharge of wastewater and is illegal absent authorization by permit. HOPE Br. at 22. The issue addressed by HOPE, however, is not the issue referred by the Regional Administrator for hearing. Accordingly, HOPE is not entitled to summary determination.[10]

EPA, on the other hand, directly addresses the issue referred for hearing. In moving for summary determination, EPA submits that it has no authority under the Clean Water Act to promulgate standards for the protection of groundwater. Citing to 44 Fed. Reg. 32,853 and 32,870 (June 7, 1979), EPA argues that it has adopted the view expressed by the Fifth Circuit in *Exxon Corp. v. Train,* 554 F.2d 1310 (1977), that in issuing NPDES permits the Agency cannot include conditions that would limit associated disposal of wastes into underground wells. Although noting that the Seventh Circuit came to a different conclusion in *United States Steel Corp. v. Train,* 556 F.2d 822 (1977), EPA submits that its interpretation of the Clean Water Act is entitled to deference under *Chevron U.S.A. v. NRDC,* 467 U.S. 837, 843-844 (1984). EPA Br. at 22-23.[11]

EPA's argument that it is entitled to deference on this matter is not challenged by HOPE. Given this fact, and given the representations by EPA counsel regarding the Agency's interpretation of its permit authority, summary determination for the Agency is appropriate in this case. [12]

ORDER

For the foregoing reasons, EPA's Motion for Summary Determination is *Granted* as to all five issues and HOPE's Counter-motion for Summary Determination is *Denied.*

Carl C. Charneski
Administrative Law Judge

Issued: March 7, 1997
Washington, D.C.

IN THE MATTER OF BUCKEYE FLORIDA, L.P., Respondent

NPDES Permit No. FL0000876

CERTIFICATE OF SERVICE

I certify that the foregoing Order, dated March 7, 1997, was sent in the following manner to the addressees listed below:

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Dated: March 7, 1997

[1] In a letter dated August 5, 1991, the Florida Department of Environmental Regulation responded to the EPA request for state certification of the draft NPDES permit as follows: "This letter provides official notification that the state waives certification of this permit. All effluent limits in the NPDES permit *are at least as stringent* as those specified in the state's permit for this facility." Admin. Rec. Ex. 20 (emphasis added).

[2] Effective December 31, 1997, the Fenholloway River will be classified as a Class III, recreational use, water body. Fla. Admin. Code R. 62-302.600(3)(b)62 (amended April 12, 1995). *See* Buckeye & FPPA Resp. at 2; *see also,* HOPE Ex. 1 (Fenholloway River Agreement). This new classification will be discussed, *infra.*

[3] Buckeye and the Florida Pulp and Paper Association ("FPPA") also filed evidentiary hearing requests with the Regional Administrator. While those

hearing requests were granted in part, the issues raised by Buckeye and FPPA are not addressed in this order.

[4] The term "existing uses" is defined in the Code of Federal Regulations as follows:

> *"Existing uses* are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.

40 C.F.R. § 131.3(e). This definition is consistent with the definition of "existing uses" provided by the State of Florida. *See* Fla. Admin. Code 17-302.200(l).

[5] Relative to this point, Buckeye and the FPPA raise an interesting argument. They submit: "By HOPE's reasoning, if HOPE could find a person willing to swallow a mouthful of water from the Fenholloway, or even from a Class III water body in Florida, then that water body would automatically be entitled to protection as a potable water supply, Class I." Buckeye & FPPA Resp. at 3.

[6] The State of Florida's anitdegradation policy parallels this Federal Policy. *See* Admin. Rec. Ex. 23f ("New 'Antidegradation' Requirements", September 28, 1989, Memorandum to the Florida Department of Environmental Resources Water Program Administrators); *see also,* Fla. Admin. Code 62-302.300(4).

[7] Buckeye has committed to moving its discharge point downstream, and EPA has represented that the permittee already has begun that process. Accordingly, the State will reclassify the Fenholloway as a Class III river, effective December 31, 1997. Buckeye admits, however, that completion of discharge point movement might extend beyond the year 2000, depending upon its ability to obtain issuance of permits and easements over public and private lands necessary for the relocation of the discharge. *See* EPA Br. at 9; Buckeye & FPPA Resp. at 4; *see also,* HOPE Ex. 2, December 2, 1994, memorandum of the Florida Department of Enviromnental Protection, at 3 ("It must be also noted that a pipeline alone will not result in attaimnent of Class III standards in the Estuary and Gulf.")

[8] This issue is listed as Issue VIII in HOPE's request for an evidentiary hearing.

[9] In making this referral, the Regional Administrator states that it "does not set forth material issues of fact relevant to the issuance of the permit." The Regional Administrator further states that this issue was referred for hearing

"based on its relevance to the permitting decision in this case." Ltr. of Reg. Admin., dated June 30, 1994, at 2

[10] In addition, 40 C.F.R. § 124.76 provides that an issue not raised during the comment period may not be later raised unless "good cause is shown for the failure to submit it." Here, it appears that HOPE did not raise this issue during the comment period. HOPE also has not shown good cause for failing to do so.

[11] EPA also cites to the Clean Water Act's legislative history which it claims further supports its position. *See* EPA Br. at 24-25.

[12] Because of the circumstances of this case, whether EPA in fact lacks the authority to protect groundwater through the issuance of an NPDES permit is an issue best left for another day.