Decisions & Orders
About the Office of Administrative Law Judges
Statutes Administered by the Administrative Law Judges
Rules of Practice & Procedure
Environmental Appeals Board
Employment Opportunities

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Borough of Naugatuck,	)	Docket No. CWA 2-I-97-1017
Connecticut	)	
NPDES Permit: CT0100641	)	
	)	
Respondent	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION

and

DENYING RESPONDENT'S MOTIONS

Proceedings

The Region 1 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") filed an Administrative Complaint on March 19, 1997 against the Borough of Naugatuck, Connecticut (the "Respondent" or "Borough"). The Complaint alleges that the Borough discharged pollutants in excess of the effluent limitations in its National Pollutant Discharge Elimination System ("NPDES") permit, from the Borough's wastewater treatment plant, on numerous occasions from 1992 to 1996, constituting violations of the Clean Water Act ("CWA") §301(a), 33 U.S.C. §1311(a).

The majority of the alleged violations, which are at issue in these motions, concern the Borough's discharges of total residual chlorine ("TRC" or "chlorine"). The Complaint also charges that the Respondent committed several violations of its permit limits for fecal coliform bacteria. The charges relating to fecal coliform are not at issue in these motions. Pursuant to the CWA §309(g)(2)(B), 33 U.S.C. §1319(g)(2)(B), the Region seeks assessment of a Class II administrative civil penalty of $70,000 against the Borough for these alleged violations.

The Borough filed its Answer on April 10, 1997. The Answer denied the material allegations of the Complaint and raised a series of affirmative defenses. In its

defenses, the Respondent contends that the permit's "instantaneous" limit for chlorine is unauthorized by State and federal law; that its discharges were authorized by State order; and that the EPA should be estopped from enforcing the TRC effluent limits against Respondent in this matter.

This proceeding was assigned to the undersigned Administrative Law Judge ("ALJ"). After several extensions duly granted, the parties submitted prehearing exchanges of proposed evidence and witnesses in November and December 1997. The hearing was then scheduled to begin on March 24, 1997 in Hartford, Connecticut.

The Complainant filed a motion for partial accelerated decision on February 13, 1998. The Region seeks a determination that the Borough is liable for violations of the plant's NPDES permit's effluent limit for TRC from 1992 to 1996. Respondent then filed its own motion for partial accelerated decision on February 24, 1998, seeking dismissal of the charges. The parties jointly moved for a stay of the hearing on the ground that the motions presented complex legal issues that should be decided before holding any required hearing. On March 3, 1998 I issued an order staying the hearing until the cross-motions for accelerated decision were resolved. The parties then each submitted responsive briefs, opposing each other's motions.

In the interim, the Borough had sought disclosure of various documents from the Region through a series of requests made under the Freedom of Information Act ("FOIA"). The Region withheld disclosure of two internal memos upon a claim of governmental deliberative process privilege. The Respondent then moved for their discovery pursuant to the EPA Rules of Practice, 40 CFR §22.19(f). After an *in camera* inspection, I granted the Borough's motion for discovery of those memos.

The Respondent then, on April 13, 1998, filed a renewed motion for accelerated decision, which also requested sanctions against the Region. The Region responded in opposition on April 28, 1998, and the Borough filed a final reply on May 13, 1998.

Factual Background

For the most part, the essential facts around which this dispute revolves are not in dispute. The parties have submitted affidavits and extensive evidentiary materials with their prehearing exchanges and in support of their respective motions for accelerated decision. The following facts are drawn from those materials.(1)

The Borough of Naugatuck owns a wastewater treatment plant, or publicly owned treatment works ("POTW"), that discharges treated wastewater into the Naugatuck River. The plant is operated by the Naugatuck Treatment Company ("NTC") under a contract with the Borough.

In 1973, pursuant to the Clean Water Act §402(b), 33 U.S.C. §1319(b), the EPA delegated to the State of Connecticut, through its Department of Environmental Protection ("CTDEP"), the authority to issue NPDES permits to dischargers in the State. The CTDEP issued a NPDES permit to the Borough in November 1985. The permit authorized the Borough to discharge wastewater in accord with specific and general conditions, which included effluent limits for the various parameters covered by the Clean Water Act. With respect to chlorine, the 1985 NPDES permit provided as follows:

> "The total chlorine residual of the effluent shall not be less than 0.5 mg/l nor greater than 3.0 mg/l at any time during the period from May 1st through September 30th."

The 1985 permit also required the Borough to take four grab samples per working day to be measured for residual chlorine.

Most municipal sewage treatment plants use chlorination of treated sewage is the primary means of wastewater disinfection, for the removal of fecal coliform

bacteria from the effluent. In 1987, chlorination was used universally in all Connecticut POTWs, where it served as an effective, reliable and economical means of effluent disinfection. Chlorine and chlorinated byproducts remaining in the effluent, however, can be highly toxic to aquatic life at very low concentrations.

These facts led the EPA's Office of Water, pursuant to the authority of the CWA §304(a)(1), to promulgate ambient water quality criteria for chlorine, in January 1985. The ambient water quality criteria were based on studies of the toxicity of chlorine to various forms of aquatic life. The Office of Water determined that freshwater organisms would not be adversely affected if the four-day average concentration of chlorine does not exceed 11 micrograms per liter more than once every three years on the average, and if the one-hour average concentration does not exceed 19 micrograms per liter more than once every three years on the average. The EPA directed the states to use these criteria in conducting wasteload allocations for establishing state water quality standards and effluent limits for dischargers of wastewater containing chlorine.

In accord with the EPA's water quality standard for chlorine, CTDEP, in April 1987, formulated a Strategy for the Reduction of Chlorine Toxicity for Treated Sewage Effluents. The strategy called for dischargers to choose one of three options to reduce chlorine in sewage treatment plant effluents to conform with EPA recommendations. The dischargers could install dechlorination units; use an alternate form of disinfection; or conduct a detailed biological study to determine the toxicity of the discharge.

In October 1988, the CTDEP published its Water Quality Analysis of the Lower Naugatuck River, which included a wasteload allocation. With respect to chlorine, a dilution analysis was performed to determine the instream concentration of TRC for each POTW's effluent, and to compare it to EPA's toxicity criteria. This analysis yielded an effluent limit of 0.06 mg/l TRC for the Naugatuck plant.

In implementing the Chlorine Strategy, the CTDEP issued an Order to Abate Pollution (#4898) to the Borough on December 11, 1989. Such abatement orders are authorized under Connecticut law, Connecticut General Statutes ("CGS") §22a-431. The Order found that the Borough's facility was not adequately preventing pollution of the waters of the State. It required the Borough to conduct an engineering study to evaluate its wastewater disposal needs in order to meet the wasteload allocation for the Naugatuck River. The Order further required the Borough to submit its report, with recommendations for construction of any new facilities, by June 30, 1991.

The Borough retained an engineering firm, Stearns and Wheler, to evaluate alternatives. Following its consultant's recommendation, the Borough determined that construction of a dechlorination system at the plant would be necessary. The Borough informed CTDEP of these plans in 1991.

The CTDEP renewed the Borough's NPDES permit on July 25, 1991. The renewed permit incorporated the effluent limit for chlorine derived from the Naugatuck River wasteload allocation. The new limit reads as follows (¶7):

> "The total chlorine residual of the effluent shall at no time be greater than 0.06 mg/l during the period from May 1st through September 30th."

The new maximum concentration of TRC was thus set at 2% of the maximum of 3 mg/l allowed under the former permit. The Borough soon realized that it could not meet the new TRC effluent limit until it completed its dechlorination system, which was then in the planning stage.

The Naugatuck plant manager, Douglas Ritchie, then wrote a letter on May 12, 1992, to the CTDEP, to request a modification of that permit condition. The Respondent requested that the applicability of the new chlorine limit be delayed until completion of the dechlorination system as required by the 1989 Order.

The CTDEP did not modify the Borough's NPDES permit, but instead issued an Order Modification on May 29, 1992, citing the authority of CGS §22a-431. The Order Modification included a new set of interim effluent limits with which the Borough was required to comply "during the study and construction periods" mandated by the 1989 Order. The Order Modification, in paragraph 7, stated the following with regard to TRC:

> "The total chlorine residual of the effluent shall not be less than .2 mg/l nor greater than 1.5 mg/l at any time during the period from May 1st through September 30th."

Thus, the 1992 Order Modification established an interim chlorine limit, to be in effect during construction of the dechlorination facility. The interim limit was set at a maximum concentration one half of that in 1985 permit.

The Order Modification also stated, however, that it "does not constitute a waiver or a modification of the terms and conditions of the NPDES Permit CT0100641 issued on July 25, 1991." Neither the 1991 permit nor the 1992 Order Modification made any change in the required sampling for chlorine of 4 grab samples per day. Both the 1985 and 1991 permits, as well as the 1992 Order Modification, retained equivalent language expressing the effluent limitation for TRC as one not to be exceeded at any time, without mentioning any averaging period.

In January 1996, the Borough applied for renewal of its NPDES permit. The CTDEP has not yet acted on that application. Hence, the 1992 permit remains in effect until the renewed permit is granted.

The Borough's plant's discharge monitoring reports ("DMRs") show the maximum and the minimum values from among each day's four grab samples for TRC. The results are summarized in attachments to declarations by Michael Fedak, an environmental engineer in the Region's NPDES program. The Borough exceeded the 0.06 mg/l TRC limit in a grab sample virtually every day during the 5-month chlorination seasons from 1992 to 1996, i.e., 153 days per year.[(2)] The Borough reported a sample exceeding the 1.5 mg/l interim limit on the following number of days for each year: 1992, 23 days; 1993, 40 days; 1994, 87 days; 1995, 95 days; and 1996, 41 days.

If the TRC concentrations are calculated as weekly or monthly averages, the Borough exceeded the 0.06 limit for all 22 weeks and 5 months in each chlorination season from 1992 to 1996. On an average weekly basis, the Borough exceeded the interim 1.5 mg/l TRC limit five times during those years. On an average monthly basis, the Borough's discharge exceeded the interim limit for two months during the chlorination seasons from 1992 to 1996.[(3)] If the TRC limit is calculated as a "maximum daily concentration" as defined in the Regulations of Connecticut State Agencies ("CRSA") §22a-430-3(a)(3), which requires averaging each day's grab samples, the Borough exceeded the 0.06 limit on all days, 153 per year (except the one day for which sample results were not available), during May through September, 1992 through 1996. The plant's discharge of TRC exceeded the 1.5 mg/l interim limit, on a maximum daily average basis, on the following number of days in each year: 1992, 6 days; 1993, 10 days; 1994, 41 days; 1995, 27 days; and 1996, 11 days.

The Borough's contractor, NTC, purchased most of the equipment necessary for the dechlorination unit in 1994 and 1995. Dechlorination is accomplished by adding a solution of sodium bisulfite to the effluent. NTC tested the equipment initially in August 1994, then again in September 1995 and August 1996. The tests could not confirm that dechlorination was fully effective to the 0.06 mg/l limit. NTC communicated this concern in a letter to CTDEP on March 2, 1997, and in later correspondence (November 5, 1997) with the Region. The Borough's consultants believe that the practical detection limit for TRC from the Naugatuck plant is 0.10 or 0.12 mg/l. In 1996, the Borough reported 6 samples with TRC concentrations between 0.06 and 0.12 mg/l.

During an inspection of the Naugatuck plant in February 1997, a CTDEP engineer, Roy Fredricksen, noted that the Borough did not operate its dechlorination unit in

1996, although it appeared it had been capable of operating since December 1995. The plant staff indicated they believed the Order Modification, requiring a minimum TRC discharge of 0.2 mg/l, remained in effect. Mr. Fredricksen directed the NTC to start operating the dechlorination system the next season, in 1997. The Borough did then begin operating its dechlorination system in May 1997.

Discussion

The EPA Rules of Practice, at 40 CFR §22.20(a), empower the Administrative Law Judge to render an accelerated decision on all or part of the issues in a proceeding, "if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." The motion for accelerated decision is substantively equivalent to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

It is not disputed that the Respondent, the Borough of Naugatuck, is a municipality and person who discharges pollutants, from a point source, into a navigable water of the United States, within the meaning of those terms as defined in the Clean Water Act §502, 33 U.S.C. §1362. Respondent's discharges are subject to the effluent limitations and conditions in its NPDES permit, which was issued pursuant to the CWA §402, 33 U.S.C. §1342. Any discharges in excess of its NPDES permit effluent limitations would constitute violations of the CWA §301(a), 33 U.S.C. §1311(a).

The issues raised by the parties' cross-motions for accelerated decision revolve around the interpretation of the Borough's NPDES permit in light of the Orders issued by the CTDEP under the CWA's federal - state delegation scheme. The Respondent contends that it was obliged to follow the limitations in the CTDEP Orders, where they conflicted with the permit. The Borough also argues that the effluent limitation for TRC should be construed as a weekly or monthly average, rather than an instantaneous or daily maximum limit. The Borough further contends that the EPA should be estopped from enforcing the NPDES permit effluent limit for TRC in the circumstances surrounding this proceeding.

- Effect of CTDEP Order Modification

The 1992 Order Modification established an effluent limit for TRC that required the Borough to discharge chlorine in excess of the 0.06 mg/l limit required by the permit. Yet the Order Modification also provided that it did not constitute a waiver or modification of the terms of the permit. The inherent contradiction is apparent in its title. It is an Order *Modification* that states it is not a *modification* of the permit conditions. The Order Modification actually referred back to the 1989 Order, which simply required the Borough to study options for dechlorinating its effluent. The 1989 Order did not address or alter any effluent limits. The TRC effluent limit in effect at that time was the 3.0 mg/l limit in the 1985 permit. The 1992 Order Modification, however, did purport to modify the 0.06 mg/l TRC effluent limitation in the 1991 permit, while the dechlorination unit was under construction.

The federal courts have consistently held that conditions in NPDES permits cannot be legally superseded by inconsistent orders issued by the State, without formal permit modification.[(4)] The Order Modification itself recognized this principle by explicitly stating that it did not constitute a waiver or modification of any terms of the 1991 NPDES permit. A state order imposing less stringent conditions than those in the NPDES permit, or allowing a discharger time to come into compliance, may nevertheless properly be issued. Connecticut did have the authority to issue the orders to the Borough here, under CGS §22a-431. Indeed, the EPA, in its review of Connecticut's CWA regulations in 1985, stated that, in order to remain consistent with the deadlines in the CWA, interim limits in a compliance schedule should be placed in an administrative order, while the final limits must be placed in the permit.[(5)]

The effect of state orders granting such dispensation to permittees is best construed as an exercise of the permitting authority's enforcement discretion. In

this case, the CTDEP and EPA have signaled their intent to only consider TRC discharges exceeding the 1.5 mg/l interim limit as violations of the permit, while the Order Modification remained in effect. Any debate over whether the Borough should have sought a formal permit modification is moot, since only the interim effluent limit for TRC in the Order Modification will be enforced.

In *Citizens for a Better Environment v. Union Oil Co.*, 861 F.Supp. 889 (N.D. Cal. 1994), *aff'd* 83 F.3d 1111 (1996), a similar situation arose. The State of California issued an order that included less stringent effluent limits for selenium than those in the NPDES permit issued four months earlier. The district court ruled that the state order did not modify the NPDES permit, but did constitute an agreement by the permitting authority to exercise its enforcement discretion in accord with the order. *Union Oil* at 902. That is exactly how the Order Modification issued in this case is interpreted. The Region, and the Administrator, by this decision, are adopting the interim limit for TRC in the Order Modification for the purposes of enforcement in this proceeding.

The CTDEP issued the 1992 Order Modification in recognition of the obvious fact that the Borough could not meet the permit's 0.06 mg/l TRC effluent limit until its dechlorination unit was brought on line. The Order was an expedient and legally authorized means of addressing the practicalities of the situation. It was necessary to require sufficient chlorination of the wastewater to meet the effluent limits for fecal coliform bacteria, while minimizing potentially toxic discharges of chlorine. The fact that the Borough could not meet the TRC permit limit until the dechlorination unit was installed was, or should have been, obvious to all parties at the time. The CTDEP properly established interim limits in an administrative order under Connecticut law. If the Borough had sought to modify its final effluent limit for chlorine, a formal permit modification would have been necessary, as discussed in the next section.

The issuance of the Order Modification does not in any way affect the EPA's power to enforce the underlying NPDES permit. The EPA retains enforcement authority to seek a Class II civil penalty under the CWA §309(g), for violations of conditions in state-issued NPDES permits. In this case, the Borough's own DMRs indicate it exceeded its permit's effluent limits for TRC on a daily basis, and the interim limits in the Order Modification on a regular basis. Those discharges between 0.06 and 1.5 mg/l will be excused, pursuant to the terms of the Order Modification. The Respondent is found in violation, however, for those discharges that exceeded the Order Modification's interim chlorine effluent limit, during the period that the Order Modification remained in effect.[(6)]

- Instantaneous TRC Effluent Limits

The Borough argues that the effluent limits for TRC set forth in the permit and 1992 Order Modification should be interpreted as monthly or weekly averages, rather than "instantaneous" limits. The Region contends that the TRC effluent limit is properly an instantaneous limit, or one never to be exceeded in any grab sample. The crux of the issue here is that the plain language of the effluent limit appears, at first glance, to be inconsistent with a Connecticut rule derived from the federal Clean Water Act regulations.

The Borough's NPDES permit states that it "shall be subject to the following sections of the Regulations of Connecticut State Agencies which are hereby incorporated into this permit." The permit then cites CRSA §22a-430-3, General Conditions, and §22a-430-4, Procedures and Criteria, with all subsections. Included is subsection (*l*) of §22a-430-4, which is entitled "Establishing Effluent Limitations and Conditions." Specifically, §22a-430-4(*l*)(4)(A)(xiii) provides that "For POTWs, all effluent limitations shall be stated as average weekly and average monthly limitations."

This provision is apparently inconsistent with the effluent limits for TRC in the permit and Order Modification. The permit states that the TRC in the effluent shall "at no time" be greater than 0.06 mg/l from May 1st through September 30th. The Order Modification states that TRC in the effluent shall not be greater than 1.5

mg/l "at any time" from May through September. The permit does not include a weekly or monthly averaging period for TRC, or for several other parameters.

The starting point for this analysis must be the language of the permit. The plain meaning of the language in the 1991 NPDES permit (as well as that in the 1985 permit and 1992 Order Modification) establishing the effluent limit for TRC is that the limit is never to be exceeded, or "instantaneous." The phrases "at no time" or "not at any time" simply do not lend themselves to any other meaning in the English language.

The federal regulations do not specifically define or provide for instantaneous effluent limits. However, the definitions at 40 CFR §122.2 are not intended to be exhaustive. The permitting authority, whether the EPA or a state, is authorized to promulgate effluent limitations to meet the objective of the CWA to restore and maintain the chemical, physical, and biological integrity of the nation's waters. CWA §101(a), 33 U.S.C. §1251(a). In furtherance of this objective, the discharge of toxic pollutants in toxic amounts is prohibited. 33 U.S.C. §1251(a)(3). Effluent limitations are defined to include restrictions on the rates and concentrations of pollutants discharged from point sources into navigable waters. CWA §502(11), 33 U.S.C. §1362(11).

The Connecticut regulations do include a definition for an instantaneous limit, denominated a "maximum concentration:". It is defined as "the maximum concentration at any time as determined by a grab sample." CRSA §22a-430-3(a)(3). An effluent limit based on an instantaneous limit or maximum concentration is thus explicitly recognized by the State of Connecticut as authorized by and consistent with the Clean Water Act. The only reasonable interpretation of the meaning of the phrases "shall *at no time* be greater" or "shall not be greater *at any time*" is that these effluent limitations established instantaneous limits or "maximum concentrations" as defined in Connecticut law. Such limitations track the language of the Connecticut definition as the "maximum concentration *at any time* as determined by a grab sample." (Italics added).

The context and structure of the permit demonstrate that the CTDEP intended to require an instantaneous effluent limit for TRC. The Borough's 1991 NPDES permit includes effluent limitations for some nine parameters, as well as additional permit conditions and requirements. The permit quite clearly establishes average monthly, average weekly, and maximum daily effluent limits for other parameters, such as biochemical oxygen demand, total suspended solids, and fecal coliform bacteria. The permit (p.2, ¶5) includes an average monthly limit, as well as an instantaneous effluent limit for settleable solids. The same language is employed as for TRC: "at no time shall the settleable solids exceed 0.3 milliliters per liter." The parameter of pH also is subject to an effluent limit range that is applicable "at any time." This context indicates that CTDEP intended to distinguish between average and instantaneous effluent limitations throughout the permit. Michael Harder, the director of the permitting division in the CTDEP's Bureau of Water Management, confirmed in his declaration that CTDEP intended to establish an instantaneous limit for TRC in the 1991 NPDES permit issued to the Borough.

This interpretation is further supported by the reporting of TRC discharges by the Borough itself, in its DMRs. The DMRs report the highest and lowest of the four grab samples taken each day for TRC. The monthly summaries apparently report the instantaneous maximum and minimum grab samples for each month. The DMRs do not report weekly or monthly averages for TRC. Indeed, the space for reporting such averages for TRC is crossed out in the DMRs. It is difficult to understand how the Borough could have believed it was subject to a weekly or monthly average limitation for TRC when it never reported its TRC discharges as such during the 5-year permit term.

The Borough's consultant, Stearns & Wheler, was also specifically informed of the TRC effluent limit in correspondence with the CTDEP. Stearns & Wheler wrote to CTDEP in 1990 when it began planning the dechlorination and denitrification facilities for the Naugatuck plant, to request confirmation of the renewed permit's proposed effluent limitations. One of the exchanged tables of effluent limitations, prepared by the CTDEP, listed TRC as a parameter without an averaging period. The

other, Table 3-1 prepared by Stearns & Wheler, listed TRC under the column for maximum daily concentration,[(7)] rather than in the column for weekly or monthly averages. The accuracy of these effluent limits was confirmed in a return letter by Kim Kisilis, a sanitary engineer with CTDEP. Copies of this correspondence were sent to the Naugatuck plant's manager, Douglas Ritchie, and engineer, Robert Lambalot. This provides another indication that the Borough had ample notice that a weekly or monthly averaging period was not intended to apply to the effluent limit for total residual chlorine.

In addition, the use of instantaneous effluent limits is not necessarily inconsistent with the provisions of Connecticut law and the Clean Water Act that generally require effluent limitations for POTWs to be weekly or monthly averages. The Connecticut regulations, including CRSA §22a-430-4(*l*)(4)(A)(xiii), must be consistent with federal law. This basic principle is recognized in the preamble of the same rule, CRSA §22a-430-4(*l*)(1)(A): "The commissioner shall establish effluent limitations . . . for all discharges in order to protect the waters of the state from pollution . . . and to ensure that his or her actions are consistent with the provisions of the CWA."

The federal regulation upon which the Connecticut rule governing continuous discharges from POTW's is based, is 40 CFR §122.45(d). It states that continuous discharges from POTWs shall be stated as average weekly and average monthly discharge limitations "unless impracticable." The Connecticut rule uses the phrase "unless impracticable" in the immediately preceding sentence concerning continuous discharges other than those from POTWs. The next sentence in CSRA §22a-430-4(*l*)(4)(A)(xiii) requiring averaging periods for discharges from POTWs must be read as also subject to the proviso "unless impracticable" in order to be consistent with the CWA.

The state permitting authority is also required to ensure that effluent limits are consistent with the findings of any available wasteload allocation for the discharge. 40 CFR §122.44(d)(1)(vii)(B). The CTDEP's decision to impose an instantaneous effluent limit for TRC on the Naugatuck plant's discharge was based directly on a wasteload allocation that determined the maximum concentration of chlorine that the Naugatuck River could receive in order to comply with applicable water quality criteria to prevent toxic effects on aquatic life. This decision explicitly and necessarily represented a determination that average weekly or monthly limits were impracticable for chlorine (as well as for other parameters subject to instantaneous limits), due to the potential toxic effects of short-term chlorine discharges. Several EPA memoranda indicate that instantaneous effluent limits for chlorine are not widely used, but could be justified in particular circumstances. The technical basis for requiring instantaneous effluent limits for chlorine was outlined in correspondence submitted by the Region, by James Pendergast of the EPA's Office of Water.

Further, as previously mentioned, the Borough did not appeal its permit or seek a permit modification under Connecticut's CWA-derived procedures, to include an averaging period for TRC or to challenge the numerical effluent limitation. In its letter requesting CTDEP to modify the permit, the NTC only requested that the application of the new TRC limit be delayed until the construction of the dechlorination unit was completed. This relief was granted by CTDEP in its Order Modification, which established an interim TRC limit. However, the instantaneous nature of the TRC effluent limit remained unaffected. It is well established that a permittee is precluded from raising objections to a state-issued permit in an enforcement proceeding, when it has failed to properly appeal the relevant permit conditions.[(8)] The Environmental Appeals Board has also applied this principle to an argument, similar to that made by the Borough here, that the relevant permit condition was not authorized by state law. *In re General Motors Corporation, CPC-Pontiac Fiero Plant*, CWA Appeal No. 96-5 (EAB, December 24, 1997).

In response to these points, the Borough contends that it did not have fair notice that the TRC effluent limit was intended to be applied as an instantaneous limit. The letter by Mr. Pendergast of the EPA's Office of Water recommended that the permitting authority discuss in the permit fact sheet any departure from standard

time periods for effluent limits. It appears that CTDEP did not specifically address the establishment of instantaneous limits for TRC and other parameters in the permit process here. It also appears that the CTDEP never cited the Borough for violations of the interim limit during the permit term, despite numerous inspections and opportunities to do so.

The Borough cites a line of cases that follow *General Electric Co. v. EPA*, 53 F.3d 1324 (D.C. Cir. 1995). In that case, the court held that "where the regulations and other policy statements are unclear, where the [respondent's] interpretation is reasonable, and where the agency itself struggles to provide a definitive reading of the regulatory requirements, a regulated party is not `on notice' of the agency's ultimate interpretation of the regulations, and may not be punished." 53 F.3d at 1333. However, in this proceeding, the language on the face of the permit is clear, and the Borough's interpretation is not reasonable. The EPA has adequately supported its authority to require POTWs to meet instantaneous effluent limits for chlorine. Hence, the Borough is found to have had actual or constructive notice of the instantaneous effluent limits for TRC in its NPDES permit.

To the extent that the Borough can show that it did not have actual notice of the instantaneous TRC effluent limit, due to the actions or inaction of CTDEP or EPA, that can be considered in relation to the Borough's culpability in determining the amount of the civil penalty. In light of the clear notice provided by the permit itself, however, the Borough's claim of lack of actual or fair notice will not support a defense to liability.

In their prehearing exchanges, the parties have listed intended witnesses from the NTC and CTDEP who have personal knowledge of these matters. The facts and circumstances concerning Respondent's asserted lack of actual notice of the instantaneous TRC limit will be further elucidated through these witnesses' testimony at the hearing. The evidence on these matters could develop facts relevant to the factors to be considered in determining the appropriate amount of the civil penalty, under the CWA §309(g)(3), 33 U.S.C. §1319(g)(3).

On a motion for accelerated decision, the facts alleged by the party opposing the motion must be accepted as true. This decision finds accordingly that, assuming the truth of the Borough's assertion that it did not have actual notice of the application of the instantaneous TRC limit, the Borough is nevertheless liable. Such a limit was authorized by law, and properly established in the Respondent's 1992 NPDES permit. The Borough is therefore found liable for violating the applicable effluent limits for TRC in the Borough's NPDES permit.[(9)]

- Expiration of Order Modification

The parties disagree over the period that the CTDEP's Order Modification remained in effect. The Order Modification established the interim TRC effluent limit of 1.5 mg/l "during the study and construction periods" for the Borough's dechlorination facility. The Region points to evidence that the construction of the dechlorination unit was complete by December 1995, and possibly earlier. The Borough insists it could not begin operation of the unit until it received approval from CTDEP. Such approval was not forthcoming because testing of the effluent could not confirm dechlorination was successful to the required 0.06 mg/l level. In that regard, the Borough also contends that TRC cannot be accurately measured at such low levels in its POTW's effluent. If the interim limit in the Order Modification expired in December 1995, the Respondent would be liable for 153 violations of the 0.06 mg/l permit limit in 1996, rather than only 41 violations of the interim 1.5 mg/l limit in that year.

These positions delineate a factual dispute concerning precisely when construction of the dechlorination unit was complete, and when the Borough should have begun operating it pursuant to the CTDEP Order. The evidentiary materials submitted thus far do not establish the relevant facts or clarify the full nature and intent of the communications between the Borough and CTDEP in regard to the expiration date of the Order Modification. This issue also encompasses the question of the ability to detect chlorine in the Borough's effluent at levels below 0.12 mg/l.[(10)] An EPA

memo suggests that, depending on local conditions, some dischargers may have difficulty detecting chlorine at low levels in POTW effluents.

In their prehearing exchanges the parties have proposed witnesses from CTDEP and NTC, as well as opposing expert witnesses, who will address these matters. Therefore, the issues concerning the expiration date of the Order Modification, and the feasible detection level for TRC, will be addressed at the hearing. Resolution of these issues will affect the determination of the number of the Borough's violations, and the appropriate amount of the penalty.

- Estoppel

In its motions, the Borough has also argued that the Region should be estopped from enforcing the permit limits for TRC due to its alleged misleading course of conduct in this matter. Further in this vein, the Respondent claims that the Region or EPA has engaged in such misconduct that sanctions are warranted.

The particular matters that the Borough alleges to have comprised "misconduct" concern the following: (1) the Borough's failure to obtain a permit modification for TRC effluent limits; (2) the interpretation of the TRC effluent limit as an instantaneous limit; (3) the ability of the Borough to detect TRC in its effluent at concentrations as low as 0.05 mg/l; and (4) the date on which the Borough should have started operation of its dechlorination system. These matters are all thoroughly discussed above, and will not be considered again here.

I find nothing in the record to support these allegations of misconduct. At most, the EPA and CTDEP could be said to have created some confusion and acquiesced in allowing the Borough to discharge TRC in concentrations exceeding the applicable effluent limits. This type of acquiescence, indifference, or inaction falls far short of the affirmative misconduct required to apply equitable estoppel against the government. See *City of Toledo, supra,* 867 F.Supp. 603, 607-608. Such matters may, of course, be relevant in determining the appropriate amount of the civil penalty to be assessed. The hearing will focus on the course of conduct of the parties during the permit term. The ultimate factual findings on the totality of these circumstances could lead to adjustments in the amount of the proposed civil penalty, which is already well below the $125,000 maximum.

The Borough, in its motions and briefs, never satisfactorily addresses two salient points. First, the plain language of the permit and Order Modification establishes an instantaneous effluent limit for TRC. And second, the Borough will only be charged with violations for discharges that exceeded the interim limit set in the Order Modification, for the period that the Order Modification remained in effect. Respondent's failure to address these points comprise fundamental flaws in its arguments. It is undisputed that the Borough violated the interim effluent limit for TRC on numerous occasions from 1992 to 1995, and violated both the interim limit and permit limit (whichever is determined to be applicable) during the chlorination season in 1996. On that basis, the Region's motion for partial accelerated decision will be granted, and Respondent's cross-motion for dismissal denied.

Summary of Rulings

1. The 1992 Order Modification did not legally supersede or modify the Borough's 1991 NPDES permit. However, its practical effect will be to limit enforcement, during the period the Order Modification was in effect, to violations for discharges exceeding the Order Modification's interim effluent limit for TRC.

2. The 1991 permit, as well as the Order Modification, established instantaneous effluent limits for TRC.

3. A factual issue is raised concerning the date that the Order Modification expired, and when the Borough should therefore have started operating its dechlorination system. Related to this issue is the question of the ability to detect chlorine in a POTW effluent at the low levels required by the permit.

4. There is no basis for applying the doctrine of equitable estoppel against the Region, or for any finding of misconduct by the EPA or Region in this matter.

5. The equitable concerns raised by the Borough concerning the notice and application of the TRC effluent limits, and the expiration of the Order Modification, will be considered at the hearing in determining the appropriate amount of the civil penalty to be assessed against the Respondent.

Order

1. Complainant's motion for partial accelerated decision is granted. Respondent is found liable for violating the applicable effluent limits for total residual chlorine for the Borough's POTW on 245 days from 1992 to 1995, and either an additional 41 or 153 in 1996, depending on whether the Order Modification is found to have expired.

2. Respondent's motions for partial accelerated decision, for dismissal, and for all other relief sought, are denied.

Further Proceedings

The hearing on the amount of the civil penalty, and on the charges concerning fecal coliform bacteria, will be scheduled in a separate order.

Andrew S. Pearlstein
Administrative Law Judge

Dated: August 26, 1998
Washington, D.C.

1. Citations to the various exhibits will not be included in this decision. The exhibits are indexed in the parties' briefs and prehearing exchanges. All documents referred to in this decision are included in those filings.

2. The DMRs show that the 0.06 limit was actually exceeded every day during the chlorination seasons of those years except one, May 5, 1993, when the TRC sample results were listed as "NA," presumably not available.

3. This is according to Mr. Fedak's second declaration. Respondent may dispute the two average monthly exceedences. I have not verified the calculations, but the point is moot since this decision finds that average monthly effluent limitations are not applicable to TRC in this permit.

4. Se, e.g., *United States v. Smithfield Foods, Inc.*, 965 F.Supp. 769, 787 (E.D. Va. 1997); and *United States v. City of Toledo* , 867 F.Supp. 603, 606 (N.D. Ohio 1994).

5. The Borough makes much of its allegation that the Region contradicts itself by "blaming" the Borough for not obtaining a permit modification when the EPA itself directed CTDEP to include interim limits in orders, not permits. EPA's 1985 review comment was only directed toward interim limits in a schedule of compliance. The relief in the Order Modification can be characterized as such, and was therefore properly embodied in an order. In any event, only the interim limit will be enforced in this proceeding. As further discussed below, the Borough never sought modification of the permit to include an averaging period or to challenge the numerical limit for TRC.

6. As discussed below, there is a factual dispute over the period that the Order Modification remained in effect.

7. The "maximum daily concentration," as defined in CSRA §22a-430-4(a)(3), is

measured as an average of a day's grab samples. This is essentially a daily average, which is not equivalent to an instantaneous limit, or "maximum concentration." The Stearns & Wheler table is somewhat ambiguous in its form. The CTDEP's intent to establish an instantaneous limit for TRC, as seen in the permit and other evidence, supersedes any possible listing for TRC as a maximum daily concentration. The DMRs actually reported the daily "maximum concentration" for TRC, or the maximum concentration obtained from among each day's four grab samples, and made no effort to average each day's samples, which would be necessary to report a "maximum daily concentration."

8. See *Public Interest Research of New Jersey v. Powell Duffryn*, 913 F.2d 64, 77-78 (3d Cir. 1990); *Smithfield Foods, supra,* 965 F. Supp 769, 767.

9. However, as discussed above, for the period that the Order Modification was in effect, the only such discharges that will be considered violations will be those that exceeded the interim effluent limit established in that Order Modification.

10. The Borough reported six discharges with TRC concentrations between 0.06 and 0.12 mg/l in 1996. However, the number of days of violation will not be affected, if the 0.06 limit is found to be in effect for 1996, because a higher discharge of TRC was also reported on each of those days.