10/3/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of | ) | |
| | ) | |
| Metropolitan Dade County, | ) | |
| Miami-Dade Water and Sewer | ) | NPDES Permit No. FL0024805 |
| Authority, | ) | |
| | ) | |
| Permittee | ) | |

RULINGS ON MOTION FOR SUMMARY DETERMINATION

Proceedings

This proceeding arises under section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342, and 40 C.F.R. Part 124, governing the issuance of National Pollution Discharge Elimination System ("NPDES") permits. On June 20, 1994, pursuant to 40 C.F.R. § 124.15(a), the United States Environmental Protection Agency, Region IV ("Region") reissued a NPDES permit to Metropolitan Dade County, Miami-Dade Water and Sewer Authority ("Miami-Dade" or "Permittee") authorizing discharges from its Central District Wastewater Treatment Plant at Virginia Key, Miami, Florida into the Atlantic Ocean. Following the procedures in 40 C.F.R. § 124.74, to contest a final permit decision, Miami-Dade filed a motion on July 19, 1994 requesting an evidentiary hearing to contest two conditions in the permit.

Miami-Dade objects to the permit conditions in Part I.A.2 that set the percent removal levels for total suspended solids ("TSS") and biological oxygen demand ("BOD"); and to the requirement in Parts I.A.1., A.8., and Part IV, that the Permittee conduct whole effluent toxicity ("WET") monitoring. On September 15, the Regional Administrator granted Miami-Dade's request for an evidentiary hearing in accordance with 40 C.F.R. § 124.75.

On November 10, 1994 the Region filed a Motion for Summary Determination pursuant to 40 C.F.R. § 124.84. Miami-Dade filed its response in opposition to this motion on December 15, 1994. The parties have each also submitted reply briefs. The undersigned was redesignated as the presiding Administrative Law Judge in this proceeding on February 8, 1996.

These rulings deny the Region's motion for summary determination, and order that an evidentiary hearing be held on the issues raised.

Background

Miami-Dade operates the Central District Wastewater Treatment

Plant, located on Virginia Key, in Miami, Florida. The plant is a publicly owned facility that treats and discharges municipal wastewater. The facility receives wastewater collected from the City of Miami and several neighboring communities in Dade County, Florida, serving a population of about 868,000 persons. After treatment, the sanitary wastewater is discharged into the Atlantic Ocean from a pipeline that extends approximately 3.6 miles offshore.

The Region reissued Miami-Dade's NPDES Permit No. FL0024805, effective October 1, 1994, with an expiration date of June 30, 1999. After issuance, Miami-Dade sought an evidentiary hearing to challenge two provisions of the final permit: percent removal requirements and whole effluent toxicity monitoring. The permit requires Miami-Dade to meet adjusted percent removal limits of 78% for biochemical oxygen demand ("BOD") and 79% for total dissolved solids ("TSS"). The Permittee contends that these limits should be less stringent due to the nature of the plant's influent and its removal capability. The permit requires Miami-Dade to conduct a semi-annual WET monitoring program to measure the acute inherent toxicity of its effluent. The Permittee challenges the legal and factual basis for the WET monitoring program.

Summary Determination Standard

The regulations governing this proceeding provide that any party to an evidentiary hearing may move "for a summary determination in its favor upon any of the issues being adjudicated on the basis that there is no genuine issue of material fact for determination." 40 C.F.R. § 124.84. The motion for summary determination is the functional equivalent to the motion for accelerated decision under the EPA Rules of Practice in enforcement actions, 40 CFR §22.20, which, in turn, is analogous to the motion for summary judgment motion under Rule 56 of the Federal Rules of Civil Procedure. See, *e.g.*, In re CWM Chemical Serv., TSCA Appeal 93-1 (EAB, Order on Interlocutory Appeal, May 15, 1995).

The burden of showing there exists no genuine issue of material fact is on the party moving for summary judgment or summary determination. Adickes v. Kress, 398 U.S. 144, 157 (1970). In considering such a motion, the tribunal must construe the factual record and reasonable inferences therefrom in the light most favorable to the non-moving party. Cone v. Longmont United Hospital Assoc., 14 F.3d 526, 528 (10th Cir., 1994). The mere allegation of a factual dispute will not defeat a properly supported motion for summary judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). The decision on a motion for summary judgment or accelerated decision must be based on the pleadings, affidavits, and other evidentiary materials submitted in support or opposition to the motion. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986); 40 C.F.R. §22.20(a); F.R.C.P. §56(c).

The summary determination rule allows a motion to be granted in part. 40 CFR §124.84(e). If a partial summary judgment determination is granted in part, then the ALJ shall "issue a memorandum opinion and order, interlocutory in character," while the remaining issues proceed to hearing.

Miami-Dade initially claims that the Region's motion is inconsistent. The apparent inconsistency however lies in the regulations themselves. The Regional Administrator granted the Permittee's request for an evidentiary hearing, thus necessarily finding, under 40 CFR §124.75(a)(1), that the request "sets forth material issues of fact relevant to the issuance of the permit." Yet the regulations also allow a party, despite that finding, to subsequently move for summary determination "on the basis that there is no genuine issue of fact for determination." 40 CFR §124.84(a). Thus, the Region has moved for a summary determination that no genuine issue of fact exists, although the Regional Administrator has already granted an evidentiary hearing on the basis that material issues of fact were raised by the Permittee.

"Courts should attempt to reconcile two seemingly conflicting statutory provisions whenever possible, instead of allowing one provision to effectively nullify the other provision." U.S. v. Gordon, 961 F.2d 426 (1992). This rule of statutory construction can be applied here to reconcile these seemingly inconsistent provisions. In this proceeding, the Region is now in an advocacy role, rather than in the decision-making role on the evidentiary hearing request. The Region, on its motion for summary determination, now bears the burden of proving that no genuine issues of fact exist. It may attempt to carry that burden by presenting further evidentiary materials and affidavits that may not have been presented or available for the administrative record below. 40 CFR §124.84(c). Since the Permittee must submit rebuttal materials, a more detailed record can now be made on the particular issues and subsidiary issues than was made for the record of the administrative permit application. In addition, summary determination may be granted on only some of the matters certified for hearing. In this litigation context, the record may be viewed diffently by the decision-maker, the ALJ, than it was viewed by the Regional Administrator.

By the same token, the Region's objections to the submittal of alleged new evidence by the Permittee (the affidavits of Bertha M. Goldenberg and Robert Morrell) must be overruled. The summary determination procedure contemplates an exploration of the issues in greater detail, and explicitly requires the parties to respond in kind with affidavits based on personal knowledge. 40 CFR §124.85(b). The Region's argument, taken to its logical conclusion, would preclude any new material being received in evidence beyond the administrative record. Hence, the Region's motion for summary determination is addressed substantively below, with consideration given to the parties' submittals.

Percent Removal Requirements

The permit sets effluent limitations for biochemical oxygen demand (5-day) ("BOD") and total suspended solids ("TSS") of 30 mg/l for a monthly average and 45 mg/l for a weekly average, in accord with the minimum secondary treatment standards set forth in the regulations. 40 CFR §133.102(a)(1,2), (b)(1,2). The permit, however, sets a percent removal limit for those parameters lower than the 85% removal required by §§133.102(a)(3) and (b)(3). Miami-Dade is required to remove a monthly average of 78% BOD and 79% TSS. (Permit, Part I, ¶2, Administrative Record, Ex. 18).

This waiver is authorized by 40 CFR §133.103(d), which was designed to allow substituted lower percent removal requirements for facilities which receive less concentrated influent wastewater from separate sewer systems. Under this regulation, the Regional Administrator may substitute a lower percent removal requirement or mass loading limit provided that the permittee satisfactorily demonstrates that:

> "(1) The treatment works is consistently meeting, or will consistently meet, its permit effluent concentration limits but its percent removal requirements cannot be met due to less concentrated influent wastewater, (2) to meet the percent removal requirements, the treatment works would have to achieve significantly more stringent limitations than would otherwise be required by the concentration-based standards, and (3) the less concentrated influent wastewater is not the result of excessive I/I [infiltration and inflow]."

The Region has determined that the Permittee has met these requirements for a reduced percent removal requirement since 1987 (Ex. 12, Fact Sheet, p. 3). In its request for an evidentiary hearing, Miami-Dade contends that the permit's average monthly percent removal requirements should be still lower -- as low as 60% for BOD and 61% for TSS.

In support of its motion for summary determination, the Region has supplied affidavits of Marshall Hyatt and James H. Scarbrough, the primary permit writers. The thrust of the Region's position is that its method of calculating adjusted percent removal requirements for this permit, based on the facility's recent past performance data, is in accord with the intent of the regulations and EPA's national policy. The Permittee contends that the Region's method was arbitrary and capricious in its failure to consider other factors, such as projected increases in influent flows and the design capability of the plant, and in its use of certain statistical methods. Miami-Dade's affiants, Bertha Goldenberg, the plant engineer, and Robert Morrell, a consulting engineer, challenge the Region's methods and assumptions and present

alternative methods for deriving adjusted percent removal limits. The Permittee has also submitted other permits in which percent removal limits were apparently further relaxed or omitted, leaving only the concentration-based limits.

The Region's argument in support of summary determination can be summed up by the maxim "My way or the highway!" The Region does not seem to consider that there could possibly be more than one way to derive adjusted percent removal limits under the circumstances presented by the Miami-Dade plant. The regulations themselves do not prescribe any particular method for calculating adjusted percent removal limits.

The Region relies heavily on the following language in the preamble in the Federal Register for the adoption of the amendment to the Secondary Treatment Regulation that provided for adjusted percent removal requirements:

> "If the permitting authority decides to adjust the percent removal requirement, in accordance with these amendments, an adjusted percent removal limit based upon actual plant performance, or expected performance (for new plants) must be calculated." 50 FR 23384.

This language is set forth in Part III of the preamble, as part of a response to a comment concerning the NPDES regulations at 40 CFR §122.45(b)(1) that require mass loading limits in NPDES permits based on design flow. In Part IV of the preamble, under the heading **Process for Revising NPDES Permits**, the following language appears twice:

> "Under this final rule, NPDES permitting authorities would be allowed to modify the percent removal requirement in existing secondary treatment permits on a case-by-case basis, based on the removal capability of the treatment plant, influent wastewater concentration and the I/I situation." 50 FR 23385, 23386.

This preamble language can hardly be considered "clear" in its prescription for calculating adjusted percent removal limits, as repeatedly asserted by Complainant's affiant, Marshall Hyatt.[1] For example, Mr. Hyatt states that the phrase "removal capability" in the preamble "is identical" to the phrase "actual plant performance."[2] In view of the fact that none of the words in those two phrases is repeated in the other phrase, they can hardly be considered identical. Indeed, a plain reading of this preamble

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[1] Affidavit of Marshall Hyatt, December 23, 1994, ¶¶12-17, submitted with Region IV's reply brief ("Hyatt Affidavit").

[2] Hyatt Affidavit, ¶13.

language leaves open the precise factors to be considered in determining an adjusted percent removal limit, on a "case-by-case" basis. If the EPA intended to prescribe a specific formula based only on historical plant performance, one would expect that to be promulgated as part of the rule, rather than addressed only in general terms in the preamble.

The Region has presented a defensible method for calculating an adjusted percent removal limit for this Permittee. However, the Permittee has presented its own reasonable objections to the Region's method, based on factual circumstances unique to the Central District plant. Miami-Dade's affiants assert that the historical data relied on by the Region does not accurately reflect the plant's removal capability over the permit term due to a number of factors. These include the past underloading of the plant below its design flows; the historic low concentrations of BOD and TSS in its influent; the projected growth in its service area; planned construction at the plant; and a projected increase in sludge treatment and other more highly concentrated sidestreams.[3] These facts are relevant to the the removal capability of the plant and the influent wastewater concentrations, two of the factors cited in the preamble. The parties also differ over the Region's use of a 95% confidence level in its calculations based on the historical data. The conflict between the parties' positions, each supported by expert testimony citing relevant facts, can only be resolved by an evidentiary hearing.

Miami-Dade has presented several permits issued to other POTWs throughout the country in which percent removal requirements were entirely deleted, leaving only mass loading or concentration-based effluent limits. As the Region argues, these other permits are generally distinguishable and not highly relevant. Although the Permittee has shown its entitlement to a reduced percent removal limit under 40 CFR §133.103(d), that does not mean, as in those permits, that it is automatically entitled to limits based only on the monthly average concentration limits for TSS and BOD of 30 mg/l. This would result in percent removal of only 60 or 61%. While this may be the absolute minimum level permissible, the thrust of the regulation, as expressed in the preamble, is to derive an adjusted percent removal by taking into account plant performance, removal capability, influent concentrations, and related factors.

The Region has already found that the standard 85% removal

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[3] See Affidavit of Bertha M. Goldenberg, December 14, 1994, and Affidavit of Robert Morrell, December 13, 1994, both submitted with Permittee's Response brief.

limit would result in a significantly more stringent"[4] concentration-based limitation, as one of the threshold requirements for an adjusted percent removal limit under §133.103(d). The degree to which the proposed 78/79% removal level would still result in a significantly more stringent concentration-based removal level may be related to those factors cited in the preamble, but is not alone determinative of any issue. The appropriate percent removal limit will be determined by a preponderance of the evidence on the relevant factors concerning the plant's removal capability received at the hearing. The Region's motion for summary determination on this issue is denied.

WET Monitoring Requirements

The Miami-Dade permit requires the Permittee to conduct semi-annual whole effluent toxicity ("WET") monitoring of its discharge from its open ocean outfall. WET means "the aggregate toxic effect of an effluent measured directly by a toxicity test." 40 C.F.R. § 122.2. A WET test is a biological monitoring technique designed to assess the total toxic effect of an effluent by measuring its effect on exposed test organisms. In an acute WET test, an effluent sample is collected, diluted to various concentrations, and placed in test chambers with approved test species. After periods of 24, 48, 72 and 96 hours, the number of live species remaining in each test dilution is recorded. The dilution that causes 50% lethality is designated as $LC_{50}$. This information can then be used "to determine whether a given discharge will cause acutely toxic conditions in the receiving stream after dilution has occurred." (Hyatt Affidavit, ¶ 18).

The permit requires Miami-Dade to conduct semi-annual WET monitoring with a duration of 96 hours; using the mysid shrimp and inland silverside; and with effluent dilution concentrations of 100%, 50%, 30%, 12.5% and 6.25%. (Permit, Ex. 18, Part IV).[5]

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[4] The term "significantly more stringent limitation" is defined at 40 CFR §133.101(m) as "BOD and SS limitations necessary to meet the percent removal requirements of at least 5 mg/l more stringent than the otherwise applicable concentration-based limitations (e.g., less than 25 mg/l in the case of the secondary treatment limits for BOD and SS), or the percent removal limitations in §§133.102 and 133.105, if such limits would, by themselves, force significant construction or other significant capital expenditure.

[5] The WET monitoring test follows the protocols set forth in *Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms*, issued by EPA's Office of Research and Development, August 1993. (Appendix A to the Administrative Record).

Miami-Dade's previous permit contained also required WET testing in accord with an earlier version of the standard protocol. Under the prior permit, WET testing was only for 48 hours at 30% dilution. (Ex. 3).

The Region has cited the CWA §308 as the legal authority for imposing WET monitoring in this permit. The CWA §308(a)(A), 33 U.S.C. §1318(a)(A) does explicitly grant broad authority to the Administrator to "reasonably" require owners of point sources to conduct monitoring, including biological monitoring, "[w]henever required to carry out the objectives of this chapter." Since the WET monitoring required here is not related to developing or enforcing any specific effluent limitation, the Region has cited the objective of the CWA "that the discharge of toxic pollutants in toxic amounts be prohibited." CWA §101(a)(3), 33 U.S.C. §1251(a)(3). The Region points out that Miami-Dade is one of the largest dischargers in the area and it is reasonable to require semi-annual WET monitoring as a preventive measure.

Miami-Dade contends that the EPA does not have authority to require WET monitoring unless it is in relation to an applicable State or Federal water quality standard or effluent limitation. Most permits requiring WET monitoring do so in order to ensure compliance with applicable State water quality criteria.[6] The Central District's discharge pipe, 3.6 miles offshore in the Atlantic Ocean, is in marine waters presumably not subject to any water quality criteria.[7]

Despite the lack of an applicable water quality standard in the receiving waters, the Region still has the general legal authority under the CWA to require WET monitoring where reasonably appropriate to fulfill the CWA's objectives. These include, under §101(a)(3), the prevention of the discharge of toxic pollutants in toxic amounts. Such authority has been upheld in at least one proceeding before the Environmental Appeals Board ("EAB") where the biomonitoring was to be used only as an information gathering tool to screen for toxicity, without any direct correlation to a

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[6] See, e.g., In re J&L Specialty Products Corp., NPDES Appeal No. 92-22, 5 EAD 31, 59 (February 2, 1994); and 40 CFR §122.44(d)(1)(ii).

[7] The State of Florida has an open ocean toxicity standard, based on WET tests at 30% dilution for 96 hours, using indigenous species. F.A.C. Rule 17-4.244(3)(c). However, Florida disclaimed jurisdiction over this permit since the discharge is more than three miles offshore (Ex. 14). As discussed below, this may be open to question since the Region states in its Fact Sheet that state water quality criteria may apply due the discharge occurring in the meandering Gulf Stream. (Ex. 15, p.5).

specific State or Federal water quality standard or effluent limitation.[8] In another case, the EAB has stated that the EPA may issue orders under CWA §308(a) as a tool "to generate whatever information it needs to carry out its statutory responsibilities, . . . subject only to a reasonableness standard." In re Simpson Paper Company, NPDES Appeal No. 87-14, 3 EAD 541, 549. Although no precedent has been cited for WET monitoring in the precise circumstances of this case -- in Federal marine waters to screen for acute toxicity -- such an exercise of authority under §308(a) would be a logical extension and lawful, if reasonably related to that purpose under the factual circumstances.

Although some form of WET monitoring may be legally permissible, there must be a reasonable basis to believe the Permittee' discharge could be or become acutely toxic. In addition, the proposed tests must be reasonably related to determining whether the discharge could lead to real world toxic effects. The CWA objective to prohibit the discharge of "toxic pollutants in toxic amounts" concerns toxicity in the receiving waters of the United States, not in a laboratory tank. The Permittee here has raised sufficient factual issues concerning the potential toxicity of its discharge and the reasonableness of the proposed WET monitoring to measure toxicity, to preclude summary determination.

Initially, there is an apparent contradiction in the Region's statements concerning the potential toxicity of Miami-Dade's discharges. According to the permit Fact Sheet, the WET tests done under the prior permit have never reported an $LC_{50}$ at 30% dilution. The Fact Sheet also cites a "historical lack of acute toxicity" in the effluent (Ex. 15, p. 5). However, the Region later states that the data shows the effluent was acutely toxic in some tests (Amendments to Fact Sheet, Ex. 17, p.1; Hyatt Affidavit, ¶22). In addition, the Fact Sheet states that the discharge may occur in state waters for some percentage of the time, due to the meandering of the Gulf Stream (Ex. 15, p. 5). If that is true, Florida WET testing protocols and standards would apply, vitiating the current proposed WET monitoring program (See note 7, above). These factual contradictions must be clarified through the evidentiary hearing process.

The Permittee has also attacked the proposed WET monitoring program as so unrelated to the actual conditions of the discharge as to be unreasonable as an indicator of toxicity in the environment. The affidavit of the permittee's expert, Robert E. Fergen, cites, for example, the results of the Southeast Florida Outfall Experiment ("SEFLOE") studies, which indicate rapid and high dilution of the effluent in the marine environment. Miami-Dade also challenges the appropriateness of the proposed test species

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[8] See In re Kaiser Aluminum & Chemical Corp., NPDES Appeal No. 85-22 (August 13, 1996).

and other technical aspects of the proposed WET monitoring protocol. (Fergen Affidavit, ¶¶15-19). Although EPA is presumably not bound by the more specific Florida protocols, its theory and program to measure "inherent toxicity" must still be reasonably related to the statutory objective of preventing toxic environmental effects.

The Region, through Mr. Hyatt's reply affidavit, responded substantively to the factual issues raised by Miami-Dade, by defending the permit's WET monitoring program. But it is not the judge's function to weigh and determine the merits of the parties' positions on a motion for summary determination. The evidentiary materials submitted raise material and genuine issues of fact on the appropriateness of the proposed WET monitoring program. Therefore, the Region's motion for summary determination on this issue must be denied.

Summary of Rulings

1. The Region's motion for summary determination is denied on the issue of the appropriate percent removal requirements for BOD and TSS in Miami-Dade's renewed NPDES permit for its Central District wastewater treatment plant. An evidentiary hearing will be held on this issue to determine whether the proposed percent removal requirements should be further adjusted pursuant to 40 CFR §133.103(d).

2. The Region's motion for summary determination is denied with respect to the issue of the appropriateness of the proposed permit requirements for a WET monitoring program. An evidentiary hearing will be held to determine whether the proposed WET monitoring program is reasonably related to the statutory objective of the Clean Water Act to prevent the discharge of toxic pollutants in toxic amounts.

Further Proceedings

A separate order will shortly be issued establishing a schedule for prehearing filings and hearing procedures.

Andrew S. Pearlstein

Andrew S. Pearlstein
Administrative Law Judge

Dated: October 3, 1996
Washington, D.C.

In the Matter of Metropolitan Dade County, Miami-Dade Water & Sewer Authority
NPDES Permit No. FL0024805

CERTIFICATE OF SERVICE

I certify that the foregoing **Rulings on Motion for Summary Determination**, dated October 3, 1996, was sent this day in the following manne to the addressees listed below:

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Dated: October 3, 1996