DEP NPDES Permitting Discretion Not Unbridled—EHB Agrees

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How often in negotiating NPDES permits has DEP refused to do something because of a policy, because they believe the decision is left to their unquestionable discretion, because they just don't want to, or because "if they do it for you they will have to do it for others?" That usually leaves the permittee with one of two choices: appeal the DEP permitting decision or live with the costs, obligations and legal liability associated with the DEP assertion of unbridled discretion. In Municipal Authority of Union Township v. Department of Environmental Protection, Environmental Hearing Board (EHB) Docket No. 2001-043-L, a small Pennsylvania authority decided that it had no other choice but to appeal the DEP permitting decision.

As background, the Municipal Authority of Union Township ("Union") owns and operates a small publicly owned treatment works ("POTW")—0.65 MGD. One of its industries, a dairy, discharges a significant amount of the plant's flow and loading. The Union POTW consistently exceeded its NPDES permit limits for TSS and CBOD in the early 1990's. This resulted in a federal lawsuit against both the Authority and the industrial user since it was determined that a number of the municipal permit exceedances were due to the industry. Although Union settled the federal lawsuit for $20,000 (wherein EPA initially wanted millions of dollars in penalties), Union, nevertheless, had spent significant time and resources in defending the action. The industrial user was ultimately determined to be subject to a penalty of more than $4 million. United States of America v. The Municipal Authority of Union Township and Dean Dairy Products Co., Inc., 929 F. Supp. 800 (M.D. Pa. 1996), aff'd. 150 F.3d 259 (3rd Cir. 1998).

As part of a corresponding settlement with DEP, Union had agreed to upgrade its treatment plant and DEP agreed to reissue Union's NPDES permit with secondary treatment limits for TSS and CBOD adjusted in accordance with applicable law. Federal secondary treatment standards at 40 C.F.R. § 133.103(b), as incorporated by reference by state regulations, provide that if an industrial category discharges more than ten percent of the flow or loading of BOD or TSS, then the limits may be adjusted upward based upon the technology-based standard applicable to the industrial facility.

Under the secondary treatment regulation, if one were to apply the municipal technology-based standard to one hundred percent of the municipal influent, then the monthly average discharge limits would normally be 30 mg/l TSS and 30 mg/l BOD5. If, however, fifty percent of the municipal flow is from a single industry, then the technology-based standard would be determined by calculating the loadings associated with (1) the technology-based limit applicable to that industrial discharge flow and (2) adding it to fifty percent of the municipal loadings under the 30/30 secondary treatment standard. In Union's case, this resulted in their 1994 NPDES permit having final monthly average adjusted effluent limits of 58

mg/l TSS and 45 mg/l CBOD (which is deemed to equate to approximately 54 mg/l BOD).

Five years later when Union's permit was up for reissuance, Union continued to ask for the permit limits to be adjusted since the industrial flow was so significant. DEP simply refused to reissue the Union permit. Without getting into the nuances of the issues associated with the multiple draft permits, DEP decided that it would not adjust Union's BOD5 and TSS limits above the monthly average values of 30 mg/l because Union, apparently to its detriment, had such a good compliance record that, according to DEP, Union did not need the higher limits.

The fact that Union might be able to meet the permit limits, however, did not comfort Union. Whether due to changes in industrial influent, a shock load, or other unpredictable fluctuations in plant performance, Union wanted the higher limits as provided for by law (recognizing that at some point water quality standards may impose a ceiling on the adjustment). If the calculations justify a higher limit, why should Union needlessly be exposed to potential liability of approximately $825,000 per monthly average violation (i.e., $27,500 per day of violation)? Having been burned once already, Union wanted to, consistent with applicable law, assure that it would not again be subject to a lawsuit for noncompliance.

In Municipal Authority of Union Township v. Department of Environmental Protection, EHB Docket No. 2001-043-L (February 4, 2002), EHB agreed with Union, granted the authority summary judgment and ordered DEP to reissue the permit in accordance with the adjustment provision of the secondary treatment regulation.

DEP's assertion that it had discretion to deny the adjustment merely because the regulation said that the permitting authority "may" adjust the permit was found to be without merit. The EHB ruled that, even assuming the Department has any discretion, there would have to be a lawful, reasonable and appropriate basis. DEP's refusal to adjust the limits because Union does not really need the adjustment to comply, as ruled by EHB, "does not constitute a lawful basis." DEP could not use the word "may" as a basis for ignoring the regulatory program and the intent behind technology-based requirements.

DEP also argued that, notwithstanding the lack of a specific regulation, it had broad authority under the Clean Streams Law. The EHB, however, indicated that the general provisions of the Clean Streams Law "do not give the Department the authority to do whatever it chooses in setting effluent limits." The Court noted that if DEP wanted to amend its rules to apply a more restrictive standard, it potentially could by following rulemaking procedures, not by vague references to broad agency discretion.

This case exemplifies the potential relief available for other communities that are forced to achieve more restrictive requirements based on unadopted policies or more restrictive interpretations of federal regulations. As reflected by the decision, DEP does not have unbridled discretion in issuing permits. It is bound by the regulations and cannot superimpose policy or ad hoc criteria upon the regulated community. ■

Gary B. Cohen is special counsel and John C. Hall is director at Hall & Associates (Washington, D.C.). Hall & Associates represents the Authority in the recent EHB permit appeal. Mr. Cohen further represented the Authority in the past actions with EPA and DEP. Hall & Associates also provide environmental counsel on a contract basis to PMAA.