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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT FOR	)	
	)	INITIAL DECISION
CITY OF MIDDLESBORO, KENTUCKY	)	
	)	
NPDES NO. KY00027235	)	

1. NPDES Permits - Monitoring Frequency - Publicly Operated Treatment Works. Political pressure and adverse publicity do not constitute legally acceptable reasons for imposing unusually frequent monitoring requirements for a number of atypical parameters in a municipal NPDES permit issued by the E.P.A.

2. NPDES Permits - Monitoring Frequency. Where no legal or scientific rational exists for the imposition of high monitoring frequencies in an NPDES permit, such frequencies will be reduced to a level consistent with demonstrated Agency practice.

Appearances:

William R. Phillips, Esquire
U.S. Environmental Protection Agency
Atlanta, Georgia

Thomas J. Roberts, Esquire
for the City of Middlesboro
Middlesboro, Kentucky

INITIAL DECISION

This proceeding under § 402 of the Clean Water Act (33 U.S.C. 1342) arises out of the renewal of the discharge permit issued to the City of Middlesboro on October 10, 1982. The permit authorizes discharges from the City's Publicly Operated Treatment Works (POTW), a single point source into Yellow Creek, a stream adjacent to the City of Middlesboro in the Commonwealth of Kentucky.

Requests for an evidentiary hearing to reconsider certain terms of the permit in accordance with 40 C.F.R. 124.74 were filed by the City of Middlesboro, Kentucky, and the Middlesboro Tanning Company of Delaware, Inc. (The Tannery). The request on behalf of the City was granted by a letter from the Regional Administrator of the USEPA, Region IV, dated February 23, 1983. The request for hearing on the part of The Tannery raised eight (8) issues, and in his letter of February 23, 1983 the Regional Administrator denied issues 2, 3, and 4, which had to do with the color limitations, on the basis that inasmuch as that limitation was imposed by the Commonwealth of Kentucky pursuant to § 401 of the Act, the Agency has no jurisdiction to question it. As to issues 1, 4, and 8, he stated that these issues do not have relevance to the permit decision. Issues 1, 4 and 8 had to do with best practicable technology, whether they should spend considerable sums of money in regard to meeting the color limitations prior to April 30, 1983, and that the time limitations imposed in the permit were unreasonable and technologically impossible to achieve within the time frame imposed. As to those issues, the

Regional Administrator denied the request since they do not raise issues that are amenable to a decision in a hearing under the Act. The Regional Administrator did grant the request as to issues 5, 6, and 7. Issues 5, 6, and 7 as identified by The Tannery had to do with the frequency of monitoring requirements for heavy metals and certain other more traditional pollutants identified in the permit such as suspended solids, BoD, and fecal coliform. By letter dated April 13, 1984, counsel for The Tannery advised the court that it was withdrawing its request for an evidentiary hearing and did not wish to pursue the matter further in the context of an evidentiary hearing. As to the request filed on behalf of the City, they likewise raised several issues which the Regional Administrator denied most of which had to do with color, as has been discussed above. The Regional Administrator granted the hearing to the City on the issues of influent monitoring and effluent monitoring for metals. In accordance with the provisions of 40 C.F.R. 124.61(d)(1), the twice monthly influent monitoring requirement for heavy metals and the weekly effluent monitoring for heavy metals was suspended pending final Agency action.

A pre-hearing conference was held and schedules for the submittal of direct and rebuttal testimony, and a date for the holding of the hearing was established. The hearing was held on August 31, 1984 at which time Mr. William R. Phillips appeared for the U.S. Environmental Protection Agency, and Mr. Thomas J. Roberts appeared on behalf of the City of Middlesboro.

Following the hearing, a briefing schedule was established and pursuant to the post-hearing order, proposed findings of fact, conclusions of law, and briefs in support thereof, as well as replies have been filed by the parties and duly considered by the court in reaching this Initial Decision.

Factual Background

The record reflects that for some period of time prior to the reissuance of the subject permit, the City of Middlesboro experienced considerable problems meeting the limitations of its original permit. The impact such failures had upon the quality of the water of the receiving stream, that is to say Yellow Creek, caused a great deal of concern among the citizens of the area, as well as various State and Federal officials. Apparently, the plant was an old one to which various new pieces of equipment had been added over the years in response to the requirements of the Federal Clean Water Act. Despite these additions, the City seemed to have a serious problem operating the plant in an efficient manner. The result being that there were continual malfunctions of various essential pieces of equipment--such as: pumps, vacumn filters, digestors, and primary clarifiers--to the end that there was general non-compliance with permit requirements.

The result of this situation was that citizens' groups were formed to protest to State and Federal officials about the malfunctioning of the treatment facility and resulting damage to the aquatic environment of Yellow Creek. The Regional Audubon society also became involved in this controversy and wrote letters to State and Federal officials expressing their alarm and outrage that such a situation should be allowed to continue. The Governor of the State wrote to the Regional Administrator, and a U.S. Senator from Kentucky wrote to Ms. Gorsuch, then Administrator of USEPA, expressing his concern about the general situation relative to the discharges emanating from the City of Middlesboro's treatment facility.

One of the primary problems which contributed to a large extent to the City's difficulties is the discharge they receive and treat from the Middlesboro Tanning Company. This discharge is apparently the source of the heavy metals which is the issue in this case, as well as highly colored wastewater and high concentrations of chromium and corrosive materials.

The Agency publicly announced its intent to issue a permit to the City and as a result, thereof, received a sizeable number of public hearing requests from individual citizens and environmentally-involved organizations and groups. The result of this was that a public hearing was held on the question of the issuance of the permit in the City of Middlesboro on November 18, 1982. Statements were made at this hearing by Paul J. Traina, Director of Water Management Division, USEPA, Region IV; P. Michael Taimi, Commissioner of Environmental Protection for the Commonwealth of Kentucky; and Ms. Jeanette Maulding, an environmental scientist with the Water Management Division, USEPA, Region IV. Although purportedly a recording of the comments by the public-at-large made at the public hearing was done, no transcript of those comments, to my knowledge, has been made and the transcript does not appear in the Administrative Record, or in the other exhibits of this case and, therefore, we do not know precisely what was said by the citizens or representatives of the City and The Tannery. However, based on my reading of the file in this case, one can imagine that the comments made by the citizens in regard to the issuance with this permit were consistent with their written observations that they had forwarded both to the Agency and to various

elected officials in the State of Kentucky. The result of the aforementioned exercises was the issuance of a permit to the City of Middlesboro which contained both effluent limitations and monitoring requirements for the traditional pollutants, such as: BoD, fecal coliform, and total suspended solids. Appearing in the permit for the first time, were limitations and monitoring requirements for the aforementioned heavy metals. The precise terms of the permit are found in Exhibit 33 of the Administrative Record which, among other things, contains a copy of the final permit. The permit requires the weekly monitoring of cadmium, copper, cyanide, lead, mercury, nickel, zinc, total sulfide, total phenals, and oil and grease. The permit also requires influent monitoring of the same parameters on a twice-per-month basis. The City objected to both the monitoring frequency on the final discharge limitations as well as the monitoring frequency for heavy metals on the influent portion from The Tannery. As indicated above, The Tannery objected to the monitoring frequency as well, but they withdrew from the proceedings and, therefore, the other issues which they raised will not be addressed in this decision.

The issues at the hearing then were limited to the monitoring frequency for the heavy metals as discussed above.

Discussion

Pursuant to the regulations, at the hearing the City proceeded with its evidence and presented one witness, who, in addition to some of his own testimony, sponsored testimony prepared by Dr. Foree. That witness was Mr. Peace, who is an employee of the City and helps operate the

facility in question, and prior to that was an employee of the State of Kentucky's environmental department and, as such, was involved with the issuance and review of State and Federal water permits.

The substance of Mr. Peace's testimony was that the facility has not violated the heavy metals limitations placed on it by the permit since the issuance thereof in December 1982, and furthermore that the monitoring frequency imposed on the City of Middlesboro by the USEPA is more stringent than that imposed on similar municipalities of like-size and -situation in the State of Kentucky and, for that matter, elsewhere in Region IV of USEPA. Dr. Foree concluded that his review of the monitoring results for the past fifteen (15) months indicate that there are no significant contributions of any of the monitored metals except chromium. He suggests that monitoring should be continued for chromium and the other non-metal parameters until a pre-treatment program has been approved. He feels that since a significant data base has already been established, monthly, instead of semi-monthly or weekly, monitoring frequencies should be adequate. Mr. Peace's testimony essentially states that the City of Middlesboro has been issued a water permit containing monitoring requirements generally reserved for facilities five (5) times its size. The permit contains monitoring requirements for a host of non-conventional pollutants, none of which have been associated with in-stream water quality standards. He feels that analysis conducted by the City over the past several months continues to document the absence of most of these pollutants. Violation of the permit standards has not been approached for most of the metals and

violations for most of the other parameters have been very few. He concludes by stating that no rationale exists that would warrant continued testing of the parameters listed on the City's water permit at the frequency specified. The City's Exhibit No. 2 is apparently a copy of a memorandum prepared by the USEPA and sent to the State of Kentucky and other states in the Region as guidance for the preparation of water discharge permits since, as I understand the situation, the authority to issue such permits has since been delegated to some of them by the USEPA. This exhibit purports to advise the State permit issuing authorities as to monitoring frequencies for traditional pollutants. The exhibit categorizes the plants by size and then establishes a monitoring frequency based on that size. The Middlesboro plant has a capacity of approximately 3,000,000 gallons per day and, according to Exhibit No. 2 of the City, that size would indicate a requirement for a daily monitoring of flow and a weekly monitoring of the traditional pollutants associated with a municipal sewage treatment plant, that is to say: fecal chloriform, BOD, pH, ammonia, and total suspended solids. Nothing in the exhibit addresses the question of the required monitoring frequency for other more esoteric parameters, such as heavy metals. Upon examination of this question, Mr. Hyatt, who was the primary witness appearing on behalf of the USEPA, offered the opinion that metals would be considered under the general heading of "others" which appears on the memorandum.

In this regard, it should be noted that Mr. Hyatt was not the permit writer for the City of Middlesboro permit, although he did have some input into the decisions involving the setting of the limitations

of heavy metals appearing therein. Ms. Jeanette Maulding wrote the permit, but unfortunately she was unable to appear and testify at the hearing. Mr. Hyatt, with the concurrence of counsel for the City, was allowed to sponsor her testimony and be cross-examined on its contents.

Ms. Maulding's testimony, which appears as EPA Exhibit No. 3, cited several reasons why the Middlesboro permit contained a more frequent influent and effluent monitoring requirements than the usual permit. The first reason given by Ms. Maulding was that they were so established to protect water quality of Yellow Creek, the receiving stream. She states that more frequent monitoring requirements protect water quality in two ways: (1) they are more likely to detect and thus provide a motivation to the City to prevent violations of substantive permit limits; and (2) they are more likely to detect and thus provide a motivation to the City to prevent "slugs"--episodes of heavy loading of pollutants--from The Tannery to the City or from the City treatment works to Yellow Creek. The second reason offered by Ms. Maulding for the frequent monitoring requirements were to protect against worsening possible previous contamination of private drinking wells down stream of the City's discharge. In this regard, it should be noted that no where in the record is there any indication that, based upon reliable data, there is any demonstration of adverse effects on the down-stream drinking water wells of any of the citizens as a result of the heavy metals discharges from the treatment works. The only evidence that Ms. Maulding cites for the Agency's purported concern in this area are letters from concerned citizens to various politicians and those politicians' subsequent letters to State and Federal agency officials concerning the problem.

The third reason suggested by Ms. Maulding's testimony was that there had been a long history of non-compliance with the permit in the past and that these frequent monitoring requirements were set to insure compliance and to enable EPA to be notified quickly of non-compliance. The previous non-compliance to which Ms. Maulding refers have nothing whatsoever to do with heavy metals, but rather the City's historic non-compliance problems as they relate to the more traditional pollutants, such as: BOD, fecal choloform, and total suspended solids. Since the permit requires daily monitoring for these traditional pollutants, I am at a loss to understand how weekly monitoring for heavy metals will in any way provide the Agency with more expeditious notification of the City's violation of the permit terms.

The fourth reason given by Ms. Maulding for the more frequent monitoring requirements was due to the public's concern over the City's discharge. These concerns seem to have manifested themselves in three areas: (1) protection of the water quality of Yellow Creek; (2) prevention of possible contamination of drinking water wells downstream; and (3) the long history of non-compliance by the City. This fourth reason does not really seem to be a reason at all, at least not one that the statute or the regulations recognizes, but merely a reiteration of the previously mentioned reasons. The effect that the above-mentioned public concern had on the ultimate terms of this permit will be discussed below.

The fifth reason given by Ms. Maulding for the high monitoring frequencies was to determine whether Tannery influent was violating EPA pre-treatment regulations. The record reflects that the City has passed

a pre-treatment ordinance which requires certain limitations on the manner in which The Tannery sends its wastewater to the City's treatment works. Although it appears that, in the past, the nature of the wastewater sent to the City's treatment plant from The Tannery caused some adverse effects on the treatment equipment and processes, nothing in the record suggests that this situation is continuing since the permit was issued.

The sixth reason given by Ms. Maulding was to allow the City to improve the performance of its treatment works. The witness, in her prepared testimony, refers to a report prepared by a consultant hired by the City which says:

> "The Tannery discharge appears to impact treatment operations by introducing a mixture of corrosive wastewaters and by contributing significant hydraulic and BOD variation to the treatment plant.
>
> "It will be necessary to define the role of waste characteristics, including the quantity of immediate oxygen-demanding materials generated by the Tannery."

She then goes on to say that the metals required to be monitored in The Tannery's influent and effluent of the City's POTW can, in sufficient quantities, have toxic effects on activated sludge at the City's POTW and on Yellow Creek. Although I have no reason to argue with the quoted statements, the parameters which are the subject of this hearing are not to my knowledge oxygen-demanding materials and there is nothing in the record to suggest that at any time in the operation of this facility have the heavy metals had an adverse effect on the activated sludge which provides the primary treatment process at the facility.

The seventh reason given by Ms. Maulding was that the above-mentioned consultant recommended such monitoring on page 2 of its report which states:

"An intensive performance monitoring program must be initiated. This should include purchase of continuous samplers and upgrading of laboratory capabilities for monitoring industrial discharges and treatment plant operations."

I have examined the report to which Ms. Maulding refers, which is attached to her testimony as Attachment O, and find that although she has exactly quoted the portions of the report, nothing contained therein have anything whatsoever to do with heavy metals, nor the frequency of monitoring for such parameters.

As indicated above, the sole issue before me in this hearing was not whether there should be any monitoring for heavy metals, but simply the high frequency of such monitoring and, therefore, the report to which Ms. Maulding cites the reader and apparently upon which she says the Agency relied does not support her conclusions as they refer to reasons 6 and 7.

The eighth reason proferred by Ms. Maulding was that The Tannery recommended weekly monitoring of its influent. The rationale behind this observation also escapes me since, if what Ms. Maulding says is true, the Agency ignored that advice and required bi-monthly monitoring of The Tannery influent rather than weekly as The Tannery suggested. So this reason, once again, does not in my judgement, support the conditions of the permit.

As we discussed above, the issue before me in this proceeding is whether or not the monitoring frequencies established by the Agency for heavy metal discharge from the City's treatment works are appropriate given the facts and circumstances surrounding this entire matter. The

Agency's primary witness in this regard was Ms. Jeanette Maulding, who was unable to appear and testify in person at the hearing. The several reasons given in her testimony (EPA Exhibit No. 3) do not, in my judgement, provide any legal or scientific basis for the monitoring frequencies called for in the permit. In her six page prepared testimony, Ms. Maulding proffered eight reasons as to why the Agency needed to put more frequent monitoring requirements in this permit as opposed to those for other permits which the Agency issued for the eight states that comprise Region IV. Mr. Hyatt, who appeared and sponsored Ms. Maulding's testimony, stated that in conversations with her that she said the real reason she required such a monitoring frequency was to make the monitoring frequency for heavy metals consistent with that which the new regulations require for the more traditional pollutants emanating from a POTW. When confronted with this new revelation about the Agency's rationale for the writing of the permit, the court asked Mr. Hyatt why, if that was the reason for the monitoring frequency, did Ms. Maulding take six pages and never say that. Mr. Hyatt stated that he did not know.

The record indicates that out of the approximately 250 municipal permits which the Agency has issued since 1980, none of such permits issued for Kentucky require any monitoring whatsoever for heavy metals and in those instances in other states where such monitoring is required, it is usually on a monthly basis. Mr. Hyatt testified that to his knowledge there is only one permit (Middlesboro) issued by this Region which: (1) contains limits for heavy metals, and (2) requires that these metals be tested at the frequency required by the subject permit.

When quizzed as to why this unusual situation existed, Mr. Hyatt surmised that the reason why monitoring for heavy metals was required is that the City, in its permit application, identified its discharge as containing these metals. Since the presence of these metals in the City's discharge was identified in the permit application, Mr. Hyatt's opinion was that that was the reason for there being limits for metals placed in the permit. The City's witness, Mr. Peace, identified four or five other municipalities of similar size to the City of Middlesboro which recieved influent from either tanneries, battery operations, metal plating facilities and other industrial activities which all produce heavy metals in their discharges. Mr. Hyatt observed that of the permits he has worked on in the State of Kentucky, he has seen none wherein the permit application disclosed the presence of heavy metals in the discharge. It occurs to me that the Agency is seriously remiss in its duty and obligation to protect the waters of this Nation when they place permit limitations in a municipal permit based solely upon what the permittee tells them is in their discharge and exercises no independent investigation or inquiry as to the nature of the industrial contributors to the wastewater treatment plants influent. It is inconceivable to me that EPA, who has been in the business of issuing water permits for many years, does not have some kind of industrial inventory at its fingertips to which it can refer in writing permits for municipalities which would identify the kind and character of the industries which discharge their wastewater to the city's treatment plants. To rely simply upon the city's own investigation and understanding of the nature of its discharges in determining the terms and conditions of a permit borders on negligence of the highest order.

One will recall from the discussion above concerning Ms. Maulding's testimony, several of the reasons she cited for the Agency including the higher than usual monitoring frequency for heavy metals was to insure that the permit limitations for these metals are met and that the Agency could have a more frequent notification of any excursions or violations of the permit's limitations as they apply to heavy metals. An examination of this rationale reveals that it is entirely without substance. It is undisputed in this record, that there is no equipment in the City's treatment scheme which is specifically designed to remove heavy metals from the effluent. It was Mr. Peace's testimony that the primary treatment technique employed by the City, and to his knowledge, almost every other municipality of any size in the State of Kentucky is activated sludge. Mr. Peace testified that the bacteria which attack the tradional pollutants found in the municipal sewage, in the course of their activity and the creation of the sludge that results also take up the heavy metals which are present in the treated material. Thus the notion that weekly monitoring for heavy metals will in some way assure the City and the Agency that they are properly operating their facility has no basis in science or fact. It will be remembered that the permit requires daily monitoring for all of the traditional parameters and if there are violations of those parameters as reported to the State and Federal agencies, that would alert such regulatory bodies to the fact that heavy metal violations are also likely to be present since their removal is tied directly to the removal of the traditional pollutants. Therefore, the notion that weekly monitoring of the heavy metals will somehow give the Agency a better handle on the performance of the City's treatment works is baseless.

The regulation to which Mr. Hyatt referred to in his testimony and alluded to in his conversation with Ms. Maulding is substantially that found in the City's Exhibit No. 2. If we accept the Agency's proposition that the reason for requiring the more frequent monitoring for heavy metals in the Middlesboro permit, was to make such monitoring consistent with that which the regulations require for the traditional pollutants, one would have expected that all permits issued in the State of Kentucky, which the Agency knows from the application or has ligitimate reasons to suspect, contains heavy metals or other more exotic pollutants, would contain weekly monitoring frequencies as well. None of the witnesses proferred by the Agency in this matter were able to identify a single permit issued by EPA in the eight states which comprise Region IV which contained monitoring frequencies similar to that imposed upon the City of Middlesboro. Since the regulation has been in existence since 1980 and since the Agency has issued approximately 250 municipal permits during that period of time, it occurs to me that if such a permit existed, the Agency would have been the first party to bring such permit(s) forward and place them in the record as proof of its consistency in writing permits for the municipalities over which it maintains jurisdiction. Since no such permit was proferred, nor were any of the witnesses produced on behalf of the Agency able to identify the existence of any such permit, the court must assume that such a permit or permits does not exist and that, therefore, logic would dictate that the permit issued to the City of Middlesboro is the only permit in this Region which contains heavy metal limitations for which a weekly monitoring frequency is required.

Having addressed the Agency's reasons for placing these monitoring frequencies in the permit and having found such reasons to be without substance, I will now address what I consider to be the real reason for the monitoring frequency required. Throughout the testimony of EPA's witnesses and the exhibits associated therewith, it becomes apparent that the Agency found the City of Middlesboro to be a source of embarrassment, adverse public and political notoriety, and in general has caused the Agency to expend a great deal of time and effort in regard to this municipality in far greater proportion than its relative importance and size would dictate. This time and effort includes responding to several congressional inquiries, the holding of public hearings, private meetings by the Agency with outraged citizens' groups, pressure from the State Governor's office, and a prior history of noncompliance on the part of the City in regard to the more traditional pollutants.

When asked about the relevancy of the attachments to Ms. Maulding's testimony, which refers letters from outraged citizens both individually and in groups, and articles appearing in various news media in and around the City and the State of Kentucky concerning the City's discharge, Mr. Phillips advised the court that the regulations require that in the face of such public outrage that weekly monitoring be imposed. When asked for the citation of these regulations, Mr. Phillips cited the court and counsel for the City, to two Federal regulations, which upon examination of the Code of Federal Regulations, are found not to exist. In his brief, Mr. Phillips did cite the court's attention to two regulations which I assume are the ones he meant to cite to our attention at

the trial. These regulations say that the Agency has the right to write permits on a case-by-case basis, and that the monitoring frequency placed in a permit shall be sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring. Neither of these regulations say anything at all about what the Agency's responsibilities are in writing a permit when there has been a great public outcry concerning the permittee's past violations. Additionally, nothing in these regulations, in and of themselves, would justify the monitoring frequency contained in the instant permit. Absent some expert testimony on behalf of the Agency that given the nature of the metals involved, a weekly frequency is scientifically required in order to give the regulatory agencies a true picture of the character of the permittee's discharges, one must assume that no such reason exists.

During the course of the City's cross-examination of EPA's second and last witness, counsel for the City asked counsel for the EPA whether or not the Agency had received a letter from Commissioner Tiami of the Commonwealth of Kentucky expressing an opinion as to the necessity of the frequency of the monitoring requirements imposed in the permit. Mr. Phillips stated that there was no letter from Commissioner Tiami. Counsel for the City then said, well, is there a letter from someone in Frankfurt on the subject, to which Mr. Phillips replied:

> "There was a letter from another person - well, a little background on this since I am a witness here. A lot of people from Kentucky - well, when I talked to someone initially, the person who should have written the letter, they were afraid to say anything about Middlesboro because it was so politically charged. I assume they were afraid for their jobs if they said anything adverse about Middlesboro.

"So, the person who would have properly been the one writing it did not write a letter. Another person--his supervisor did. And well--two supervisors above him did--and essentially said, we defer to EPA's judgement on a permit monitoring frequencies. So non-committal also.

"So, politically, this case is--no one wants to get any adverse effects or say anything against Middlesboro. That's part of the motivation for the wording in the letter."

At the request of counsel for the City and at the court's direction, Mr. Phillips found the letter in question and provided the court and counsel for the City with a copy thereof. This letter will be identified as Court's Exhibit No. 1 and placed in the record in this proceeding. The letter in question dated June 13, 1984 is addressed to Mr. Greene, Associate Regional Counsel, EPA Region IV, and contrary to what Mr. Phillips would have the parties believe, is not all that non-committal. The first sentence in the letter which seems to set the tenure thereof states:

"With regard to the above permit, this Division considers the monitoring requirements to be unusually frequent and the list of parameters to be atypical."

The last sentence in the second paragraph of the letter states as follows:

"But it was not considered to be within our authority (the State) to dispute monitoring requirements; either as too lax or overly stringent."

My reading of this letter suggests that the writer thereof, who is the Director of the Division of Water of the Natural Resources and Environmental Protection Cabinet of the Commonwealth of Kentucky, apparently had sufficient strength of character to make even a veiled criticism of the permit issued by EPA.

This letter, taken in the context of Mr. Phillips observation at the trial, as well as the testimony of Ms. Maulding concerning the weight which the Agency accorded the public outcry associated with this permit, leads me to believe, as suggested by counsel for the City in its brief, that the real reason for including such unusually frequent monitoring requirements for a long list of atypical parameters was motivated by political pressure and adverse publicity. I do not consider these reasons to constitute scientific or legal justification to be seriously considered by the Agency in writing a permit, whether it be for a publically owned treatment works or for an industrial discharger.

The permit itself in regard to the disputed parameters and the monitoring frequency associated therewith states as follows:

> "These parameters shall be monitored once per week for the first 52 weeks after the effective date of the permit. If the year's sampling for any of the parameters shows no significant amount present, then the monitoring frequency for that parameter may be reduced as deemed appropriate by the Water Management Division Director for EPA Region IV. If the data for lead, sulfide, or zinc shows significant amounts present, then numerical limitations will be set accordingly."

In this regard, it should be noted that the permit does not contain any limitations for lead and zinc, but merely require that they be monitored on a weekly basis. Since the permit was issued and effective on October 10, 1982, the Agency has had approximately two years of data available to it since the issuance of the permit. This situation was addressed both by the witnesses for the City and primary witness for the Agency. The City's witnesses were of the opinion that, given the 15 months data which appear in the record in this case, there is no basis in law,

science or fact to justify the continuation for monitoring these parameters since, with only one or two exceptions, the presence of these metals in the City's discharge have been well below the limits set in the permit.

Mr. Hyatt, appearing for the Agency, stated that there was only one violation for cadmium in 15 months and that he would not suggest that a permit limitation be continued on the basis of one data point. As to copper, there were no violations and Mr. Hyatt suggested that monitoring for that parameter could be safely eliminated. As for nickel, there were no violations and Mr. Hyatt was of the opinion that there was no basis for continued monitoring as that parameter either. As for lead and zinc for which there are no limits, Mr. Hyatt was of the opinion that the amounts of those two metals appearing in the City's discharge, as evidenced by the 15 months data, do not show that they appear in sufficient quantities to cause any problems to either water quality or any aquatic species which are known to reside in Yellow Creek. The aquatic species utilized by the Agency in establishing several of the limits in question was the fat-head minnow, and Mr. Hyatt was of the opinion that none of the levels indicated in the above-mentioned data would cause any injury to it. The record further contains no evidence of any in-stream problem that could be associated with the heavy metals in the City's discharge. (Tr. 173). Likewise there is no evidence in this record to suggest that there have been any adverse effects on domestic wells downstream from the City's discharge associated with the heavy metals in question. During the course of the hearing, several studies were alluded to, none of which appear in the record. None of

the witnesses either for the City of for the Agency, who purportedly were familiar with such studies, could point to any conclusions which suggested that there are any in-stream problems of any nature associated with the heavy metals discharge emanating from the City's treatment works.

There was some prepared testimony and considerable discussion at the hearing on the question of how much this extra monitoring costs the City. The amounts involved, although amounting to several thousand dollars a year, are not significant enough to constitute a viable basis for my decision one way or the other.

Counsel for the USEPA argues that since The Tannery pays the City for the costs of the laboratory analyses associated with the influent monitoring requirement, the City has no standing to contest this issue. I find no support for this assertion.

It occurs to me that permit limitations must stand or fall on their own merit. If they pass this threshold test, then the question of cost might be considered depending on the nature of the requirement at issue. In some cases cost is relevant and not in others. Since cost considerations did not enter into this decision, I need not address the question of their relevancy to the issue in controversy here.

Given all of the above discussion, I am of the opinion that there exists no valid reason: (1) for the monitoring frequency required by the permit based upon what the Agency had at its disposal at the time it wrote the permit; and (2) that an evaluation of the 15 months of data which have been accumulated since the permit went into effect likewise indicates no necessity for continuation of the monitoring of the heavy

metals in question at any frequency. Although the Agency's own witness testified that he sees no reason to continue to monitor at all for some of the heavy metals contained in the permit, the City only challenged the frequency of such monitoring and not the fact that such monitoring was required. Therefore, I do not have before me the question of whether or not limitations imposed by the permit should be deleted. I would, however, strongly suggest that the Agency re-evaluate the terms of the permit as they apply to these parameters and give serious thought to removing any limitations for them from the permit.

CONCLUSION[1/]

Since the record before me does not support the reasons put forward by the Agency as justifying the frequency of monitoring set forth in the subject permit, the monitoring frequencies contained therein must be adjusted.

I, therefore, conclude and direct that:

1. The monitoring frequency for all of the heavy metals in the permit be reduced from once per week to once per month, both as to influent and effluent.
2. The Agency seriously consider a re-evaluation of the permit in the light of the two years of data that it now has at its disposal and in accordance with the terms of the permit itself, as quoted above, perhaps eliminate the limitations and associated monitoring for several of the metals in question.

[1/] Unless appealed in accordance with 40 CFR 124.91 or unless the Administrator elects, sua sponte, to review the same as therein provided, this Decision shall become the Final Decision of the Administrator in accordance with 40 CFR 124.89(b).

In making this initial decision I have carefully considered all of the record and any suggestions, arguments, or proposed findings of fact submitted by the parties inconsistent herewith are specifically rejected.

Thomas B. Yost
Administrative Law Judge

DATED: December 18, 1984

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IV

345 COURTLAND STREET
ATLANTA, GEORGIA 30365

IN THE MATTER OF	)
	)
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM PERMIT FOR	)
	)
CITY OF MIDDLESBORO, KENTUCKY	)
	)
NPDES NO. KY0027235	)

CERTIFICATION OF SERVICE

In accordance with 40 CFR 124.89(a), I hereby certify that the original of the foregoing Initial Decision issued by Honorable Thomas B. Yost, along with the official Agency file, was served on the Hearing Clerk (A-110), U.S. Environmental Protection Agency, 401 M Street, S.W. Washington, D.C. 20460 (service by certified mail return receipt requested); and that true and correct copies were served on: Honorable Chester H. Wolfe, Mayor, City of Middlesboro, City Hall, Middlesboro, Kentucky 40965 (service by certified mail return receipt requested); and William R. Phillips, Esquire, U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, Atlanta, Georgia 30365 (service by hand-delivery). Dated in Atlanta, Georgia this 18th day of December 1984.

Sandra A. Beck
Regional Hearing Clerk

cc: Thomas J. Roberts, Esquire
Post Office Box 69
Middlesboro, Kentucky 40965

Hon. Edward B. Finch (A-110)
Hon. Marvin Jones (Kansas City)
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