

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

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In re:)

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Storm Water Discharge Permit for the)
Municipal Separate Storm Sewer System)
of Anchorage, Alaska) NPDES Appeal No. 99-1

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NPDES Permit No. AKS 05255-8)

ORDER DENYING REVIEW

I. Background

Cook Inlet Keeper (“Petitioner”) appeals EPA Region X’s denial of its request for an evidentiary hearing on National Pollutant Discharge Elimination System (“NPDES”) Permit No. AKS 05255-8. The final permit decision in this matter was issued by Region X to the Municipality of Anchorage and the Alaska Department of Transportation and Public Facilities (collectively the “Permittees”) for the municipal storm sewer system that serves Anchorage, Alaska.¹ Notice of Appeal and Petition for Review (“Petition”). The sole issue raised in this

¹Under the Clean Water Act, discharges into waters of the United States by point sources, such as the Anchorage municipal storm sewer system, must be authorized by a permit to be lawful. Clean Water Act (“CWA”) § 301, 33 U.S.C. § 1311. The NPDES program established by CWA § 402, 33 U.S.C. § 1342, is the principal permitting program under the CWA. See *In re B.J. Carney Indus., Inc.*, 7 E.A.D. 171, 177 n.7 (EAB 1997), *appeal dismissed*, *B.J. Carney Indus., Inc. v. EPA*, No. 98-70315 (9th Cir., Sept. 23, 1999); *In re General Motors Corp., CPC-Pontiac Fiero Plant*, 7 E.A.D. 465, 466 n.1 (EAB 1997), *aff’d*, *General Motors Corp. v. EPA*, 168 F.3d 1377 (D.C. Cir. 1999).

appeal is whether Region X was required to include a provision in the permit that expressly mandates compliance with Alaska water quality standards. For the reasons stated below, the petition is denied.

Region X made a draft permit available for public comment on November 6, 1997, that required the Permittees to develop and implement a storm water management program that will “reduce the discharge of pollutants from the [municipal separate storm sewer system] to the maximum extent practicable.” Draft Permit, Part II, at page 3, Exhibit (“Ex”) 1 to Region X’s Response to Notice of Appeal and Petition for Review (“Response”). Although the Region stated in the fact sheet² that accompanied the draft permit that it expects the Permittees’ discharges to meet Alaska water quality standards, the draft permit did not expressly mandate compliance with those standards.

Petitioner argued, in comments on the draft permit, that “[t]o comply with Clean Water Act § 301(b)(1)(C) and 40 CFR 122.44(d), the permit should plainly state that * * * permittees must * * * meet Alaska water quality standards.”³ Comments on Proposed NPDES Permit No. AKS 05225-8, at 1, Ex 3 to Response. The Region responded that “EPA expects the Permittees to implement the [best management practices] required by this permit in such a way as to ensure compliance with state water quality standards.” Region’s Response to Comments, at 1, Ex 4 to Response. However, it did not add the requested condition to the final permit

²See Fact Sheet, Nov. 7, 1997, Ex 2 to Response.

³Section 301(b)(1)(C), quoted *infra* in section II, establishes a deadline for achieving compliance with certain effluent limitations. Section 122.44(d) sets forth specific conditions relating to “water quality standards and State requirements” that must be included in NPDES permits.

decision, which was issued September 28, 1998. Region X requested certification of the permit by the State of Alaska, as required by Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1).⁴ Alaska waived certification but stated that it supported issuance of the permit.⁵

Petitioner subsequently faxed a one-page evidentiary hearing request to Region X on October 28, 1998, in which it reiterated, with no supporting argumentation, that the permit is “illegal on its face” because it does not contain an express provision mandating compliance with Alaska water quality standards. Ex 6 to Response. Its hearing request raised no other issues. Under the regulatory scheme, the submission of an evidentiary hearing request is a prerequisite to obtaining review by the Environmental Appeals Board (“the Board”) of any NPDES permit decision, regardless of whether the issues raised are factual issues or issues of law and/or policy. *See* 40 C.F.R. § 124.91(a), 40 C.F.R. § 124.74, and note accompanying 40 C.F.R. § 124.74(b)

⁴Under section 401(a)(1), 33 U.S.C. § 1341(a)(1), EPA may not issue a permit until the State in which the facility is located either certifies that the discharge authorized by the permit will comply with the State’s water quality standards or waives certification. *See* 40 C.F.R. § 124.53.

⁵Letter from Mr. Robert Dolan, State of Alaska Department of Environmental Conservation) (“ADEC”), to EPA Region X, July 14, 1998, stating that:

ADEC believes * * * that there is reasonable assurance that full implementation of the pollution control measures required by this permit and anticipated in successor permits will eventually result in full compliance with water quality standards in the receiving waters.

However, ADEC hereby waives certification that all stormwater discharges authorized by this permit will meet applicable water quality standards on a continuous basis at this time. ADEC supports permit issuance despite its inability to certify the final draft permit at this time and sees no reasonable conditions or controls to add to the permit to assure compliance with water quality standards.

Ex 9 to Response.

(1998). If an evidentiary hearing request is based solely on an issue of law, the Regional Administrator is required to deny the request on the ground that no material factual issues were raised. 40 C.F.R. § 124.74(b)(1)(note); *see In re City of Port St. Joe*, 7 E.A.D. 275, 283 (EAB 1997). However, legal or policy issues raised in the evidentiary hearing request can be reviewed on appeal from the denial of the request, provided that such issues satisfy the applicable standards for review. *See In re Liquid Air Puerto Rico Corp.*, 5 E.A.D. 247, 253 (EAB 1994).

In this case, the Region denied the evidentiary hearing request on two grounds.⁶ First, it stated that the request “satisfies few, if any,” of the requirements at 40 C.F.R. § 124.74 that pertain to the form of an evidentiary hearing request, and that, without the information required by the regulation, “neither EPA nor the proposed permittees are able to accurately review the merits or intended effect of Appellants’ challenge.” Ex 7 to Response, at 3. Second, it stated that it is required to deny review because the request did not raise a material issue of fact relevant to the issuance of the permit, as required by 40 C.F.R. § 124.75(a)(1).

Petitioner filed a petition for review with the Board, dated January 5, 1999. In seeking review, Petitioner argues as follows:

[T]he Clean Water Act requires NPDES permits to mandate compliance with State water quality standards. The permit in this case does not specifically require compliance with State water quality standards, and the State of Alaska has stated that it cannot certify that discharges under the permit will comply with State water quality standards.

Petition at 3. Petitioner asserts that this issue raises “important legal policy concerns” that merit

⁶Letter from Chuck Clarke, Regional Administrator, Region X, to Petitioner, Dec. 3, 1998. Ex 7 to Response.

Board review. *Id.* Region X submitted a response to the petition, asking the Board to deny the petition because it does not comply with form requirements for requesting an evidentiary hearing, did not raise an issue of material fact, and did not present an issue of discretion or policy warranting Board review.

II. Discussion

There is no administrative appeal as of right from the denial of an evidentiary hearing request. *In re City of Port St. Joe*, 7 E.A.D. 275, 282 (EAB 1997). The Board does not ordinarily grant review unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important and therefore that should be reviewed by the Board. 40 C.F.R. § 124.91(a).⁷ On appeal to the Board, a petitioner has the burden of demonstrating that review should be granted. *City of Port St. Joe* at 283. This standard applies even where petitioners are seeking Board review of purely legal issues. *See In re Liquid Air Puerto Rico Corp.*, 5 E.A.D. 247, 253 (EAB 1994).

Petitioner wholly fails to meet its burden. This petition contains no statement of supporting reasons. It makes general reference to the Clean Water Act but it does not cite any specific provision of the Act nor does it articulate any rationale for its contention that the Clean Water Act expressly mandates a permit condition requiring compliance with state water quality

⁷A petition for review shall be accompanied by:

[A] statement of the supporting reasons and, when appropriate, a showing that the initial decision contains: (i) A finding of fact or conclusion of law which is clearly erroneous, or (ii) An exercise of discretion or policy which is important and which the Environmental Appeals Board should review.

40 C.F.R. § 124.91(a)(1).

standards. We agree with Region X that the petition should be denied because it fails to provide “sufficient information and specificity to allow the Board to conclude that the appealed decision was erroneous.”⁸ Response at 5. *City of Port St. Joe* at 283 n.17 (denying review of seven legal and/or policy issues that were listed in “summary fashion” in the petition, without “arguments or documentation,” on the ground that “none meet the supporting statement requirement” for Board review imposed by 40 C.F.R. § 124.91(a)(1));⁹ *see also In re City of San Diego Urban Area Pretreatment Program*, NPDES Appeal No. 98-4, unpub. op. at 2 (EAB, Dec. 1, 1998).

We note that, although the petition itself does not refer to any particular provision of the CWA, Petitioner contended in its comments on the draft permit and evidentiary hearing request that section 301(b)(1)(C) is the provision of the Clean Water Act which imposes the requirement that an NPDES permit must expressly mandate that municipal storm water discharges comply

⁸The Region also contends that it properly denied Petitioner’s hearing request because the request failed to comply with numerous “form requirements” at 40 C.F.R. § 124.74. Response at 5. Since the Petitioner concedes that the Region properly denied the evidentiary hearing request on other grounds, we need not address that issue.

⁹*See also* decisions of the Board denying petitions for review of permit decisions under 40 C.F.R. § 124.19(a), which imposes a supporting statement requirement that is essentially identical to the standard in 40 C.F.R. § 124.91. *E.g.*, *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 through 98-20, slip op. at 9 (EAB, Feb. 4, 1999), 8 E.A.D. ___ (stating that the Board “expects the petition to articulate some supportable reason as to why the permitting authority erred or why review is otherwise warranted”); *Envotech, L.P.*, 6 E.A.D. 260, 267-68 (EAB 1996) (stating that “a petition for review must contain certain fundamental information in order to justify consideration on its merits,” and that several of the petitions filed in that case “provide no discussion whatsoever as to why the Region’s response to [petitioners’] objections is erroneous or otherwise warrants review”); and *Inter-Power of New York, Inc.*, 5 E.A.D. 130, 152 (EAB 1994) (denying review of a PSD permit condition because the petitioner “has not provided the Board with any reason for questioning the Region’s conclusion” that a challenged permit condition was adequately protective).

with state water quality standards.¹⁰ Section 301(b)(1)(C) provides that “there shall be achieved”:

[A]ny more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations * * * or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

Petitioner did not explain why it believes that section 301(b)(1)(C) mandates any particular permit language,¹¹ nor has it made any effort to explain why the Region’s response to its comments on the draft permit was clearly erroneous. The burden imposed by the regulations of showing that the Region has made a clearly erroneous decision or an exercise of discretion or policy that warrants review cannot be satisfied merely by requesting review of the Region’s

¹⁰While we are dismissing the petition on other grounds, we note that the U.S. Court of Appeals for the Ninth Circuit has recently ruled (contrary to the interpretation of the statute set forth by the Region and assumed by this Board in *In re Arizona Municipal Storm Water NPDES Permits*, 7 E.A.D. 646 (EAB 1998)) that section 301(b)(1)(C) does not apply to municipal storm-sewer discharge permits. *See Defenders of Wildlife v. EPA*, No. 98-71080 (9th Cir., Sept. 15, 1999). The court held that “Congress did not require municipal storm-sewer discharges to comply strictly with [section 301(b)(1)(C)].” *Defenders of Wildlife*, 1999 U.S. App. LEXIS 22212, at *13-14. It stated that the CWA distinguishes between industrial and municipal storm water discharges. According to the Ninth Circuit, section 402(p)(3)(A), 33 U.S.C. § 1342(p)(3)(A), applies to discharges associated with industrial activity, and provides that such discharges must comply with section 301(b)(1)(C). However, the Ninth Circuit stated that discharges from municipal storm-sewer discharges are subject to section 402(p)(3)(B), 33 U.S.C. § 1342(p)(3)(B), which does not require compliance with section 301(b)(1)(C) but which instead provides that municipal storm-sewer discharges shall “require controls to reduce the discharge of pollutants, to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.” While EPA “has the authority to determine that ensuring strict compliance with state water quality standards is necessary to control pollutants,” it can also require “less than strict compliance with state water quality standards.” *Defenders of Wildlife*, 1999 U.S. App. LEXIS 22212, at *21.

¹¹Neither has Petitioner explained the basis for its reliance on 40 C.F.R. § 122.44(d), to which it also made brief reference in its comments on the draft permit. Ex 3 to Response.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Storm Water Discharge Permit for the Municipal Separate Storm Sewer System of Anchorage, Alaska, NPDES Appeal No. 99-1, were sent to the following persons in the manner indicated:

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Dated: November 23, 1999

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_____/s/_____
Annette Duncan
Secretary