

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

In re:)
)
)
Puerto Rico Public Buildings)
Authority)
S.U. Mameyes Ward School) NPDES Appeal No. 00-20
)
Docket No. PR0023132)
)

ORDER DENYING REVIEW

I. INTRODUCTION

In a petition dated July 17, 2000, which was timely filed on July 31, 2000, the Public Building Authority of Puerto Rico ("Petitioner") seeks review of three of the limitations in a final National Pollutant Discharge Elimination System ("NPDES") permit¹ ("permit") issued by U.S. EPA Region II ("Region II") on June 28, 2000, regulating discharges from S.U. Mameyes Ward School. Petitioner challenges the applicability of Special Conditions 14, 15, and 16 of the permit to the effluents normally discharged by the facility. The special conditions at issue require that Petitioner:

(1) implement a monthly monitoring program for a list of

¹Under the Clean Water Act ("CWA"), discharges into waters of the United States by point sources must have a permit in order to be lawful. See CWA § 301, 33 U.S.C. § 1311. The NPDES is the principal permitting program under the Clean Water Act. See CWA § 402, 33 U.S.C. § 1342.

selected parameters (Special Condition 14); (2) establish through monitoring that arsenic levels in wastewater are below detection levels (Special Condition 15); and (3) conduct quarterly toxicity tests for a one-year period on two specified test species (Special Condition 16).

Petitioner contends that the challenged conditions are unnecessary and inapplicable because: (1) the discharging facility is a public education institution that only discharges domestic sanitary waste water; (2) the parameters required to be monitored are not among those applicable to the receiving water body according to Puerto Rico's Water Quality Standards; (3) the petitioner's existing NPDES permit does not require analyses of the parameters established in Special Conditions 14 through 16; and (4) a "RCRA test" of the waters at the facility found no toxic substances. See Petition for Review at 3-4.

In its response to Petitioner's claims, Region II requests that this Board dismiss the petition because Petitioner failed to satisfy "its burden to provide a showing under 40 C.F.R. § 124.19 that the conditions in question are reviewable by the EAB" and that "[t]he conditions at issue were contained in and are attributable to a State water

quality certification." Response to Petition for Review at 2 ("Response").

II. BACKGROUND

On July 3, 1998, Petitioner applied for renewal of its existing permit. Pursuant to 40 C.F.R. § 124.53(b) (1998), on May 4, 1999, Region II requested that the Puerto Rico Environmental Quality Board ("PREQB") provide a water quality certificate for petitioner's discharge. On September 14, 1999, the PREQB issued a water quality certificate ("WQC") in accordance with section 401(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1341(a). See Response Exhibit 1 (Final Water Quality Certificate). In the letter accompanying the WQC, the PREQB notified Petitioner of its right to request the PREQB to reconsider the conditions of the WQC within twenty (20) days from the date Petitioner received the WQC. *Id.* at 2. Petitioner did not avail itself of this opportunity.

Once the final WQC was issued, Region II proceeded to prepare a draft permit incorporating the conditions and monitoring requirements of the WQC. See Response Exhibit 3 at 2 (Statement of Basis for the Draft Permit).² Public notice

²Compare Response Exhibit 2 (Draft Permit) with Response Exhibit 1 (Final Water Quality Certificate).

of the draft permit was given on March 10, 2000, through a newspaper of local circulation. The notice established a thirty-day period for submission of comments and requests for public hearings. The thirty-day period expired on April 10, 2000, and, according to Region II, no comments or requests for public hearing were submitted by Petitioner. See Response at 3.

Region II thereafter proceeded with the preparation of the final permit, which essentially incorporates all the conditions and monitoring requirements included in the draft permit³. On June 28, 2000, Region II mailed to Petitioner a notice of issuance of the final NPDES permit. The notice informed Petitioner of its right to file a petition for review with the Environmental Appeals Board ("EAB") of the final permit.

Petitioner has filed a timely appeal with this Board. For the reasons stated below, however, the petition is denied.

³Compare Response Exhibit 2 (Draft Permit) with Response Exhibit 4 (Final Permit Decision).

III. DISCUSSION

A. Standing

As the Board has consistently explained, "[e]ven if a petition for review has been timely filed, the merits of the petition may not be considered by the Board unless the petitioner has standing to assert the issues raised in the petition." *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996); *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 16 (EAB 1994).

Threshold conditions for standing are set forth in 40 C.F.R. § 124.19(a), which states in part: "[w]ithin 30 days after a[n] NPDES final permit decision has been issued, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any conditions of the permit decision." 40 C.F.R. § 124.19(a), *as amended by* 65 Fed. Reg. 30,886, 30,911 (May 15, 2000). Section 124.19(a) further provides that "[a]ny person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit decision." *Id.*; *see also In re American Soda, LLP*, UIC Appeal Nos. 00-1 & 00-2, slip op. at 12 (EAB, June 30, 2000), 9 E.A.D.____.

Region II alleges that no comments or public hearing requests on the Draft Permit were submitted to EPA during the thirty-day period designated for such purposes. See Response at 3. Our review of the Certified Index to the Administrative Record confirms that the record before us contains neither written comments nor a request for a public hearing on Petitioner's behalf. Because Petitioner neither commented nor requested a public hearing on this matter, and because the challenged conditions do not involve changes between the draft and final permit, Petitioner is barred from pursuing an appeal on the final permit before this Board. See 40 C.F.R.

§ 124.19(a)(1998); see also *American Soda*, slip op. at 13; *Envotech*, 6 E.A.D. at 267; *Beckman Prod.*, 5 E.A.D. at 17.

B. *The Contested Conditions are Attributable to State Certification*

Section 401(a) of the CWA requires all NPDES permit applicants to obtain a certificate from the appropriate state agency validating the permit's compliance with the pertinent federal and state water pollution control standards. See CWA § 401(a), 33 U.S.C. § 1341(a); see also *United States v. Commonwealth of Puerto Rico*, 721 F.2d 832, 834 (1st Cir. 1983). When an application is received without a state certification, the Region is required to notify the

appropriate state agency and request that certification be granted or denied. See 40 C.F.R. § 124.53(b) (1998). The conditions and limitations set forth by the certifying state are required to be incorporated in the NPDES permit. See CWA § 401(d), 33 U.S.C. § 1341(d).

The NPDES regulations provide that "[r]eview on appeals of limitations and conditions attributable to State certification shall be made through the applicable procedures of the State and may not be made through the procedures" established in the federal regulations. 40 C.F.R. § 124.55(e) (1998); see *Roosevelt Campobello Int'l. v. U.S. EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982). Thus, EPA is without authority to "'look behind' a State certification issued pursuant to section 401 of the Clean Water Act, 33 U.S.C.A. § 1341, for the purpose of relaxing a requirement of that certification." *In re General Electric Company, Hooksett, N.H.* ("G.E. Hooksett"), 4 E.A.D. 468, 470 (EAB 1993); *In re Lone Star Steel Co.*, 3 E.A.D. 713, 715 (CJO 1991).

It is well settled that conditions are "attributable to State certification" when "the State indicates (in writing) that these conditions are necessary in order to comply with State law and cannot be made less stringent and still comply with State law." *In re City of Fitchburg, Mass.* (*East and*

Waste Plants), 5 E.A.D. 93, 98 (EAB 1994); *G.E. Hooksett*, 4 E.A.D. at 471.

Having reviewed PREQB's certification letter, we conclude that Special Conditions 14, 15, and 16 are "attributable to State Certification." In its certification letter, the PREQB stated that "the alluded discharge will not cause violations to the applicable water quality standards at the receiving water body *if* the limitations and monitoring requirements on Table A-1 are met." Response Exhibit 1 (Final Water Quality Certificate) (emphasis added). The language employed by the PREQB clearly indicates its intention to communicate that Special Conditions 14 to 16, which are contained in Table A-1, are "necessary in order to comply with State law and cannot be made less stringent and still comply with State law." See *G.E. Hooksett*, 4 E.A.D. at 471 (although a certification did not explicitly say that the conditions are necessary or cannot be made less stringent, the words employed were nonetheless sufficient to reflect an intent to communicate these ideas).

Petitioner did not avail itself of its right to request reconsideration of the limitations imposed by the WQC as it was entitled to under the laws of the Commonwealth of Puerto Rico. Whereas "the proper forum to review the appropriateness of a state's certification is the state court, and the federal

courts and agencies are without authority to review the validity of requirements imposed under state law or in a state's certification," this Board is unable to entertain this petition. *Roosevelt Campobello*, 684 F.2d at 1056.

IV. CONCLUSION

Finding that Petitioner has no standing to assert the issues raised in the petition and that the challenged conditions are attributable to state certification, the petition is hereby denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 10/19/2000

By: _____/S/_____

Scott Fulton
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Puerto Rico Public Buildings Authority, S.U. Mameyes Ward School, NPDES Appeal No. 00-20, were sent to the following persons in the manner indicated:

By Certified Mail, Return Receipt Requested:

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Dated: 10/20/2000

/S/
Annette Duncan
Secretary