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

In the Matter of:	)	
City of McCall	)	NPDES Appeal No. 97-4
Docket No. ID-002023-1	)	

ORDER DENYING REVIEW

On July 28, 1997, U.S. EPA Region X denied an evidentiary hearing request made by the City of McCall, Idaho ("McCall") in connection with an NPDES permit issued to McCall by the Region for McCall's wastewater treatment facility. McCall filed a petition for review of that denial, claiming that the denial rests upon an erroneous conclusion of law, namely, the conclusion that Idaho's certification of the permit was effective even though McCall had initiated the process of appealing that certification before a State administrative body. For the reasons set forth below, we deny review.

I. *BACKGROUND*

McCall operates a wastewater treatment facility for the treatment and disposal of sewage and other wastes from McCall and surrounding areas. The facility discharges into the North Fork of the Payette River ("NFPR"), and therefore requires a National Pollutant Discharge Elimination System ('NPDES") permit.[1] In

'Under the Clean Water Act, discharges into waters of the United States by point sources, like the City of McCall facility, must be authorized under a permit to be lawful. 33 U.S.C.

1993, McCall applied to the Region to renew its NPDES permit; it is the renewed permit that is at issue here.

At the time the permit was renewed, water quality standards in the lower end of the NFPR were being violated, resulting in water quality degradation in the Cascade Reservoir. The State, in particular the Idaho Division of Environmental Quality (DEQ), identified phosphorus as the pollutant causing the violations of the State water quality standards. McCall's wastewater treatment facility discharges phosphorus, and thus contributes to the annual phosphorus load to the reservoir.[2]

Because of the impaired water quality conditions in the Cascade Reservoir, the DEQ identified the reservoir as a high priority water quality limited segment under Clean Water Act section 303(d), 33 U.S.C. § 1313(d). Section 303(d) requires the development and implementation of total maximum daily loads (TMDLs) that allocate pollution limits to all sources that contribute the pollutants of concern. The DEQ prepared a watershed management plan containing TMDLs for the reservoir reflecting a 37% reduction in the phosphorus load to the reservoir. According to the DEQ, this reduction is necessary to achieve the State's water quality standards. The plan projects: 1) a zero discharge of phosphorus by McCall's wastewater

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§ 1311. The NPDES program is the principal permitting program under the Clean Water Act. 33 U.S.C. § 1342.

'According to McCall, it contributes less than 6% to 8% of the total phosphorus loading to the Cascade Reservoir. City of McCall's Request for an Evidentiary Hearing at 3.

treatment facility, or 2) the complete removal of McCall's effluent from the NFPR, to ensure compliance with water quality standards. The DEQ submitted this plan to the Region for approval in January 1996, while the McCall's permit renewal application was pending.[3]

As noted above, McCall applied to renew its NPDES permit in 1993. In February 1996, the Region issued a draft NPDES permit for the facility, which was based upon the DEQ's watershed management plan. On April 12, 1996, the DEQ issued its water quality certification for the draft permit pursuant to Clean Water Act section 401.[4] The DEQ's certification provides that "the proposed NPDES permit for the City of McCall must include a scheduled zero discharge of phosphorus consistent with the requirements of this letter and the Phase I water quality management plan or TMDL submitted to EPA for approval." Letter from Joy L. Palmer, Regional Administrator, Idaho Department of Health and Welfare, Division of Environmental Quality, to the Honorable Bill Killen, Mayor of McCall, at 3 (Apr. 12, 1996). Further, the certification requires McCall to eliminate its

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[3]On May 13, 1996, before the final permit was issued, the Region approved DEQ's watershed management plan.

[4]This section provides in pertinent part that "[a]ny application for a Federal * * * permit to conduct any activity * * * which may result in any discharge into the navigable waters, shall provide the * * * permitting agency a certification from the State in which the discharge originates * * * that any such discharge will comply with the" specified provisions of the Clean Water Act pertaining to effluent limitations, water quality, standards, national performance standards and toxic and pretreatment effluent standards. 33 U.S.C. § 1341(a)(1).

discharge to the NFPR by January 1, 1999. Id. at 8-9.

On May 17, 1996, McCall appealed the water quality certification on the draft permit to the State's Board of Health and Welfare. In that appeal, McCall made the argument that the DEQ's watershed management plan improperly requires McCall to eliminate its phosphorus discharge, and therefore, the certification, which is based on the watershed management plan, erroneously contains the same requirement. McCall's appeal included a request for a stay of the water quality certification, which, to our knowledge, has not been granted.[5]

On July 12, 1996, the Region issued the final permit, incorporating the requirements contained in the DEQ's water quality certification. McCall filed a request for an evidentiary hearing with the Region, pursuant to 40 C.F.R. § 124.74, on August 13, 1996, in essence asking the Region to reconsider the permit conditions based upon the DEQ's water quality certification. The Region denied that request on July 28, 1997. In general, the Region denied the request on the ground that the Region is required to include in a permit the conditions required by a State's water quality certification, see 40 C.F.R. § 124.55, and that the Region may not review the certification's requirements; the review of the certification's requirements is an exercise reserved to the certifying State.

On September 4, 1997, McCall filed with this Board a

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[5]In its response to the petition, the Region asserted that no stay has been issued. McCall did not refute this assertion in its reply brief.

petition for review of the Region's evidentiary hearing request denial. McCall, in sum, contends that the Region:

> Ignored the fact that the State Certification had been appealed prior to the issuance of the final NPDES permit. As a result, there was no final State Certification to be incorporated in the final NPDES permit. The EPA refusal to consider the request for evidentiary hearing, or to stay those provisions of the final NPDES permit which incorporate the State certification was [an] erroneous conclusion. Indeed, 40 C.F.R. § 124.53 and § 124.55 contemplate a final state certification shall be incorporated into the NPDES permit. Because of the appeal of the State certification to the appropriate state board, there was no final state certification. Hence, -the EPA's conclusion that it was without authority to consider the City of McCall's petition for evidentiary hearing was a conclusion of law that was clearly erroneous.

City of McCall's Notice of Appeal and Petition for Review ("Petition") at 4.

As requested by the Board, the Region filed a response to the petition on October 24, 1997. On November 18, 1997, McCall filed a reply brief, and a motion to consider that reply brief, which is hereby granted. In that reply brief, McCall represents that a hearing on its appeal of the State certification is scheduled for January 12, 1998. Further, McCall represents that it 'is currently involved in negotiations with the DEQ to revise or modify the State's certification. It is fully expected that these discussions and/or hearing will result in the modification of the * * * certification." City of McCall's Motion to File a Reply and Reply to EPA Region 10's Response ("Reply Brief") at 5.

For the reasons that follow, the petition for review is denied.

II. *DISCUSSION*

A. *Timeliness*

The Region argues that the petition for review must be dismissed as untimely because it was not filed within the period prescribed by 40 C.F.R. Part 124. In its reply brief, McCall argues that the petition is timely. We need not address this issue in depth.

The Region's argument is based upon an *assumption* as to when the Region served upon McCall the denial of the evidentiary hearing request. Response to Petition for Review at 2 ("Assuming the decision was mailed on July 29, 1997, a petition for review of the decision should have been filed (received by the EAB) on or before September 2, 1997," whereas McCall's petition was received September 4.). The Region has not provided the Board with any documentation of when the Region served the denial of the evidentiary hearing request. We decline to dismiss a petition for review based upon an *assumption* as to when service occurred. A determination that a petition is untimely should be based upon facts demonstrated to this Board, for example, a certificate of service. In the absence of any documentation as to when the denial was actually served,[6] the Region's argument is fatally flawed, and hereby rejected.

B. State *Certification Issue*

The main issue in this case is whether there was an

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[6] Under 40 C.F.R. § 124.91(a)(1), the deadline for appealing the denial of an evidentiary hearing request is "30 days after service" of the denial. Where service is by mail, this filing deadline is calculated from the date of mailing.

effective State certification that could provide the basis for conditions in an NPDES permit and upon which the Region could rely in denying McCall's evidentiary hearing request. McCall argues that the certification was not "final" or effective because it had been appealed. The Region contends that the mere act of filing an appeal did not render the certification ineffective, and we agree.

Pursuant to 40 C.F.R. § 124.55(a), a final NPDES permit must incorporate the requirements specified in a State certification. Moreover, the requirements of a State certification, even as expressed in the terms and conditions of an NPDES permit, can be reviewed only through the applicable State procedures, not. through the procedures for reviewing NPDES permits. 40 C.F.R. § 124.55(e) ("Review and 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 process of petitioning this Board for review under 40 C.F.R. Part 124); *In re* General *Electric Company, Hooksett, New Hampshire,* 4 E.A.D. 468, 470 (EAB 1993).[7]

The regulation pertaining to State certifications and NPDES permits, and in particular 40 C.F.R. § 124.55(b), contemplates that appeals of State certifications may produce changes to State certifications, and provides procedures for making changes to

[7]McCall has not claimed that the challenged permit conditions are not attributable to the DEQ's certification.

NPDES permits to correspond to such changed certifications.* In this case, however, McCall's appeal to the Board of Health and Welfare has to date produced no change in the State certification, and therefore, as the Region points out, the certification as issued is still operative and required to be incorporated in McCall's NPDES permit under 40 C.F.R. § 124.55(a).

Although the Board of Health and Welfare has apparently scheduled a hearing on the State certification, it has not stayed the effectiveness of the certification (despite McCall's request that it do so), and the certification remains in effect as a matter of law. *Caribbean Petroleum Corporation v. EPA, 28* F.3d

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*Section 124.55(b) provides, in pertinent part:

> If there is a change in the State law 'or regulation upon which a certification is based, or if a court of competent jurisdiction or appropriate State board or agency stays, vacates or remands a certification, a State which has issued a certification under § 124.53 may issue a modified certification or waiver and forward it to EPA.

McCall acknowledges that 40 C.F.R. § 124.55(b) provides a process for changing an NPDES permit once a State certification has been changed as a result of an appeal at the State level. McCall is concerned that despite this regulation, the anti-backsliding provision of the Clean Water Act may preclude this permit from being changed to reflect the more relaxed standards in a modified certification that McCall hopes to obtain through the State process. At this time, when the outcome of the certification appeal is unknown, those concerns are speculative. However, we note that a federal court, in *Caribbean Petroleum Corporation v. EPA,* 28 F.3d 232, 235 (1st Cir. 1994), stated "the modification of a[n] NPDES [permit] to reflect changes in the local agency certification likely would come within one of several exceptions to" the anti-backsliding provision.

232, 233 (1st Cir. 1994).[9] McCall suggests that the mere act of filing an appeal is sufficient to render the certification ineffective, but, as the Region points out, there is nothing in the Idaho Administrative Procedure Act (IAPA), Idaho Code § 67-5201, et *al.,* providing for such an automatic stay.

McCall, in essence, asks us to prevent its NPDES permit from becoming final until after its appeal of the State certification is resolved through a modified certification. See Petition at 5 (asking Board to stay permit); Reply Brief at 7 (asking Board to withhold permit until certification appeal resolved). This we decline to do because, for the reasons set forth above, staying the issuance of the permit would only frustrate the implementation of a certification that is currently effective. McCall has failed to demonstrate why it is entitled to such relief,[10] particularly since there is, at this time, no way of knowing if and how the certification will be modified as a result of McCall's appeal.

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[9] In *Caribbean Petroleum,* the court found that no stay of a State certification had been issued, even though the State had notified EPA that it was reviewing the certification and requested EPA to delay issuing the final NPDES permit in light of its review. 28 F.3d at 233. In the case at bar, the circumstances are even less compelling.

[10] In these proceedings, the petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.91(a).

III. CONCLUSION

For the reasons set forth above, the petition for review is denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: NOV 25 1997

By: _____
Edward E. Reich
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the Mater of City of McCall, NPDES Appeal No. 97-4, were sent to the following persons in the manner indicated:

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Mildred T. Johnson
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