# IN THE MATTER OF CARIBBEAN PETROLEUM CORPORATION

NPDES Appeal No. 91–25

***ORDER DENYING REVIEW***

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Decided January 28, 1993

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Syllabus

Caribbean Petroleum Corporation petitions for review of the denial of an evidentiary hearing request by EPA Region II. The request sought to challenge the incorporation of certain permit conditions from a May 10, 1989 Water Quality Certificate issued by the Commonwealth of Puerto Rico's Environmental Quality Board into a proposed final National Pollutant Discharge Elimination System permit for Caribbean's Bayamón, Puerto Rico refinery.

The crux of petitioner's argument is that, because the Environmental Quality Board has undertaken to reconsider the terms of the May 1989 WQC, there is neither an effective certification of Region II's draft permit nor a waiver thereof upon which Region II can act. Thus the Region could not lawfully incorporate conditions from the WQC into a valid federal permit and, by purportedly doing so, the Region violated the Clean Water Act (which forbids the issuance of an NPDES permit in the absence of State certification or waiver of certification) and nullified the pending EQB reconsideration proceedings in violation of Commonwealth and federal constitutional standards of due process.

Held: The Regional Administrator properly denied the request for an evidentiary hearing. Notwithstanding the availability of further review before EQB and ultimately, perhaps, before the courts of the Commonwealth, the WQC was legally effective on the date the NPDES permit was issued. Even after EQB granted petitioner's request for reconsideration, EPA never received a modified certification or a waiver of certification from the Commonwealth, and was subject to no legal obligation, under the terms of the Clean Water Act or its implementing regulations, to postpone the issuance of the permit or to refrain from incorporating any of the conditions of the WQC. In addition, petitioner's substantive challenge to the WQC is proceeding in the appropriate forum and may yet result in modification of the federal permit, and there has therefore been no denial of due process. For these reasons, the petition for review is denied.

***Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.***

***Opinion of the Board by Judge McCallum:***

Petitioner Caribbean Petroleum Corporation ("Caribbean") seeks review of U.S. EPA Region II's denial of an evidentiary hearing request with respect to certain effluent limitations contained in an NPDES permit governing Caribbean's petroleum refinery at Bayamón, Puerto Rico. The challenged effluent limitations appeared in a May 1989 Water Quality Certificate ("WQC") issued for the Bayamón refinery by the Commonwealth of Puerto Rico's Environmental Quality Board ("EQB"), and were incorporated from the Commonwealth's certificate into the proposed federal permit in accordance with Section 401(d) of the Clean Water Act, 33 U.S.C. § 1341(d). In its petition for review, Caribbean contends that the challenged effluent limitations could not lawfully be incorporated into the federal permit because EQB, some twelve months before the issuance of the federal permit, had granted Caribbean's request for reconsideration of the May 1989 Water Quality Certificate and had so advised the EPA Regional Administrator for Region II. For the reasons that follow, we conclude that the Region properly denied Caribbean's evidentiary hearing request, and we therefore deny the petition for review.

## I. *BACKGROUND*

Caribbean's Bayamón refinery discharges process wastewater and stormwater runoff into a receiving water known as Las Lajas Creek, which flows into Cucharillas Channel and thence into San Juan Bay. EPA issued National Pollutant Discharge Elimination System permit PR 0000370 for these discharges in September 1983, and the scheduled expiration of that permit as of October 31, 1988 prompted the filing of the renewal application underlying this appeal.

Caribbean filed its renewal application with Region II on October 27, 1988. On or about November 10, 1988 the Region, acting in accordance with 40 C.F.R. § 124.53(b), requested that EQB—as the appropriate certifying agency for the State in which the discharges were to have originated—grant, deny, or waive certification of compliance with applicable Puerto Rican water quality standards. On February 1, 1989, EQB issued a draft Water Quality Certificate, and instructed the permittee and Region II that the limitations and monitoring requirements set forth in the draft certificate "shall be incor-

porated into [Caribbean's] NPDES permit in order to satisfy the provisions of Section 301(b)(1)(C) of the Act." [1]

Caribbean submitted comments on the draft certificate to EQB on April 7, 1989, objecting to the proposed effluent limitations as technologically unachievable and as grounded in an incorrect and unscientific assessment of the quality of the receiving water. Notwithstanding these objections, on May 10, 1989, EQB issued to Caribbean a final Water Quality Certificate incorporating the challenged effluent limitations in Tables designated A–1 and A–2, and declaring that "it is certified that there is reasonable assurance as determined by the Environmental Quality Board that [Caribbean's] discharge will not violate applicable water quality standards if the limitations on Table A–1,2 are met." The final WQC stated, once again, that "[t]he conditions specified in the aforementioned table shall be incorporated into the NPDES permit in order to satisfy the provisions of Section 301(b)(1)(C) of the Act." On or about August 7, 1989, Region II issued a draft NPDES permit incorporating the challenged limitations, and on September 6, 1989, Caribbean submitted comments to the Region in which it reiterated its view that compliance with those limitations "would be unreasonable, impracticable and unfeasible under currently available technology, and would cause [Caribbean] undue hardship." [2]

Meanwhile, on June 30, 1989, Caribbean filed a request with EQB for reconsideration of the terms of the final Water Quality Certificate.[3] By letter dated October 13, 1989, EQB informed Region II that it had undertaken to reconsider the final certificate, and asked that the Region refrain from issuing a final NPDES permit

[1] Section 301(b)(1)(C) of the Clean Water Act, 33 U.S.C. § 1311(b)(1)(C), mandates that discharges of pollutants comply not only with federal standards but also with "any more stringent limitation, including those necessary to meet water quality standards, * * * established pursuant to any State law or regulations."

[2] This synopsis of Caribbean's comments on the draft NPDES permit is quoted from Caribbean's petition for review (at page 4), because we have not been provided with a copy of the draft permit or of the comments submitted by Caribbean in September 1989. Caribbean's petition for review, and the contents of the administrative record subsequent to September 1989, suggest that Caribbean's comments on the Region's draft permit were no different, in substance, from its earlier comments on EQB's draft Water Quality Certificate. It appears that the thrust of Caribbean's argument in both instances was that the water quality-based effluent limitations proposed by EQB (on the basis of the Commonwealth's regulatory standards) were overly stringent and impossible, or nearly impossible, to achieve by means of existing technology.

[3] As a matter of Commonwealth law, such a request for reconsideration is a prerequisite to obtaining judicial review, in the courts of the Commonwealth, of a decision of an administrative body such as EQB.

until further notice.[4] The Region honored this request for the following eleven and one-half months, during which time EQB issued no further pronouncements with respect to Caribbean's motion for reconsideration[5]; then, on September 28, 1990, the Region issued a final permit based on the limitations, monitoring requirements and other conditions in EQB's May 1989 certificate. The Region notified EQB of the issuance of the final NPDES permit by letter dated October 10, 1990. In its letter, the Region acknowledged EQB's October 1989 correspondence setting forth the request that issuance of a final permit be deferred until further notice, but explained:

> The [October 1989] letter contains no statement that EQB has stayed the final WQC. In the absence of an explicit statement from EQB that the final WQC has been stayed, EPA has proceeded with the permitting process, including public notice and finalization, based upon the certification granted by EQB on May 10, 1989 (40 CFR § 124.55(e)). Should EQB modify the WQC as a result of the request for reconsideration, EPA may modify the permit on request of the permittee, but only to the extent necessary to delete any conditions based on a condition in the certification which has been invalidated by a court of competent jurisdiction or by an appropriate State board or agency (40 CFR § 124.55(b)).

On November 6, 1990, Caribbean submitted to Region II a request for an evidentiary hearing to contest the Region's incorporation of

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[4] Specifically, EQB's October 13, 1989 letter to Region II stated, in relevant part:

> This is to inform you that [Caribbean] has requested reconsideration of the final Water Quality Certificate (WQC) issued by the Environmental Quality Board (EQB) on May 10, 1989. This permittee's request is based on the fact that the comments submitted by the permittee were received after public participation comment period elapsed.
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> Representatives from [Caribbean] manifested concerns regarding compliance with the present permit limits and considered that it would not be practical to engage in a compliance plan to achieve compliance with the present final WQC. EQB's Governing Board accepted [Caribbean's] request for reconsideration. We request that EPA delay issuance of the final NPDES permit until EQB takes the corresponding action on the permittee's petition for reconsideration. As soon as a decision on this matter is taken, EQB will notify EPA in writing.

[5] Indeed, so far as we are aware EQB has not issued any further decision or order in connection with Caribbean's request as of the date of this writing.

fifteen specified effluent limitations from the May 1989 WQC into the final NPDES permit. The Regional Administrator denied Caribbean's evidentiary hearing request in its entirety on October 15, 1991, and this appeal followed.

## II. *DISCUSSION*

Under the rules governing this proceeding, there is no appeal as of right from the Regional Administrator's decision. Ordinarily a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important and should therefore be reviewed by the Environmental Appeals Board. *See, e.g., General Electric Co. (Hooksett, New Hampshire),* NPDES Appeal No. 91–13, slip op. at 3 (EAB Jan. 5, 1993), and authorities cited therein. The petitioner has the burden of demonstrating that review should be granted.

Petitioner's principal contention on this appeal concerns the "finality" of the May 1989 Water Quality Certificate from which the allegedly objectionable permit conditions were incorporated. Because petitioner cannot substantively challenge permit conditions and limitations attributable to State certification except through the certifying State's own procedures, *see* 40 C.F.R. § 124.55(e), petitioner frames its appellate argument in terms of the validity and effectiveness of EQB's certification, rather than the contents of that certification. Petitioner's argument in this regard is essentially twofold: First, because EQB granted petitioner's request for reconsideration of the May 1989 WQC, the WQC was no longer effective at the time the Region issued petitioner's final NPDES permit; and second, because a substantive challenge to the terms of the May 1989 WQC is pending in the appropriate State forum, the WQC has never become sufficiently "final" to allow EPA to incorporate its terms into a federal permit. For these reasons, the argument continues, Region II's issuance of a final NPDES permit (1) violated the Clean Water Act prohibition against issuing any permit in the absence of the required State certification or waiver of certification,[6] and (2) effectively deprived Caribbean of any meaningful review of the contested effluent limitations by "voiding" and "mooting" the EQB reconsideration proceedings, in violation of the due process provisions of the Commonwealth and United States Constitutions. We recently considered and rejected the core elements of this argument, against the backdrop of the very same State administrative procedures involved in the

[6] *See* 33 U.S.C. § 1341(a)(1) ("No license or permit shall be granted until the certification required by this section has been obtained or has been waived * * *.").

present appeal, in our decision in *In re Puerto Rico Sun Oil Co.*, NPDES Appeal No. 92–20 (EAB Oct. 23, 1992).

As in *Puerto Rico Sun,* petitioner's argument fails to come to grips with 40 C.F.R. § 124.55(b), which states:

> 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 notice of waiver and forward it to EPA. If the modified certification is received before final agency action on the permit, the permit shall be consistent with the more stringent conditions which are based upon State law identified in such certification. If the certification or notice of waiver is received after final agency action on the permit, the Regional Administrator may modify the permit on request of the permittee only to the extent necessary to delete any conditions based on a condition in a certification invalidated by a court of competent jurisdiction or by an appropriate State board or agency.

It is clear from the regulation that, once an effective certification has been issued by the State and received by EPA, the federal permitting process need not be held in abeyance pending further administrative or judicial review of that certification at the State level. It is also clear from the regulation that the federal permitting authorities need not undertake to evaluate for themselves the impact of a change in State law or regulations, or the impact of continuing State administrative or judicial proceedings, on the terms of an outstanding certification. Rather, once an effective certification is received by EPA, the regulation is crafted so that the federal permitting process remains unaffected by State-level statutory or regulatory changes, and by State-level administrative or judicial review proceedings, until and unless EPA receives from the State a modified certification or a notice of waiver of certification.

The application of these principles in the present context is relatively straightforward. As in *Puerto Rico Sun,* we continue to find no support in the Clean Water Act or in EPA's Part 124 regulations for the view that a State certification remains ineffective until such time as the permittee exhausts (or has forgone the opportunity to

exhaust) all available administrative and judicial appeals at the State level. To the contrary, we note again that 40 C.F.R. § 124.55(b) expressly contemplates a situation in which, upon further administrative or judicial review of a final WQC at the State level, the State issues a modified certification *after* EPA has already incorporated the terms of the original WQC into a final federal permit. Such a situation could never arise if the pendency of a challenge to a WQC at the State level, without more, precluded EPA from incorporating the terms and conditions of the challenged WQC into an enforceable federal permit. We observe that, in his denial of Caribbean's evidentiary hearing request, the Regional Administrator correctly focused on this provision of the Part 124 regulations and properly concluded that "in the event EQB stays, vacates or remands [Caribbean's] certification and EQB modifies and changes certain terms and conditions of the WQC per [Caribbean's] reconsideration request, * * * EPA's Regional Administrator may modify the permit upon [Caribbean's] request,* * * to the extent necessary to delete any conditions based on a WQC condition which EQB has invalidated."

In *Puerto Rico Sun* we also recognized that, according to the Puerto Rican statute governing EQB proceedings, a permit applicant's filing of a request for reconsideration with EQB does not, of its own force, operate to stay or limit the effectiveness of an otherwise final WQC. A provision of the Commonwealth's Public Policy Environmental Act, 12 L.P.R.A. § 1134, provides that the mere filing of a petition for reconsideration with EQB

> will not exempt any person from complying with or obeying any decision or order of the Board [*i.e.*, EQB], *neither shall it in any way operate as a suspension or postponement of its effect, unless so ordered by the Board.*

*Id.* § 1134(d)(2) (emphasis added). Here, however, Caribbean points to the fact that EQB had already granted its request for reconsideration, and had so notified the Regional Administrator, many months before EPA proceeded to issue a final NPDES permit based on the terms and conditions of the contested Water Quality Certificate. We are therefore called upon to determine whether, from the standpoint of the federal permitting process, EQB's decision to reconsider a final WQC—either alone or in combination with notice to the Regional Administrator—renders the WQC ineffective (and a federal permit issued in reliance thereon invalid) until such time as the reconsideration proceedings are completed. We are persuaded that it does not.

As a preliminary matter, we perceive no justification for equating each and every EQB decision to reconsider a WQC with the type of action, described in 12 L.P.R.A. § 1134(d)(2), through which EQB may order a "suspension" or "postponement" of the WQC as a matter of Commonwealth law. Absent a clear and unambiguous statement to that effect, we are unwilling to infer that EQB intends to bring about the withdrawal, even temporarily, of any conditions in a final WQC that has already been issued and forwarded to the Regional Administrator for incorporation into a final NPDES permit.

More fundamentally, however (and irrespective of State rules of administrative law such as 12 L.P.R.A. § 1134), EPA's Part 124 regulations simply will not allow a State certification to remain indefinitely in an indeterminate status—either as an initial matter,[7] pending reconsideration by the certifying agency, or pending the completion of appellate proceedings before the certifying agency or a reviewing court. As we noted earlier, 40 C.F.R. § 124.55(b) provides that even if a State court or agency explicitly "stays, vacates, or remands a certification," the State's action does not by itself suspend, postpone, or otherwise affect the federal permitting process. Once an effective certification has been issued, a subsequent stay, remand, or vacatur of that certification by the State authorities only affects the federal permitting process when and if the State forwards to EPA a modified certification or a notice of waiver of certification. As a result, EPA need not speculate as to whether a particular certification, once issued by the appropriate State agency, has or has not become "final" as a matter of State law. The State itself is left to determine whether the status of an outstanding certification has been altered by subsequent events to such an extent that the certification ought to be modified or waived.[8]

[7] *See* 33 U.S.C. § 1341(a)(1) (State will be deemed to have waived its right to certify unless that right is exercised within a reasonable period of time, not to exceed one year); 40 C.F.R. § 124.53(c) (a "reasonable time" for State certification generally means within sixty days after EPA's issuance of a draft NPDES permit).

[8] *In re Miners Advocacy Council,* NPDES Appeal No. 91–23 (EAB May 29, 1992) (Order Denying Review in Part and Granting Review in Part), addresses the limited effect of a certifying State's election to "stay" an already-certified permit condition after EPA has incorporated that condition into a final NPDES permit:

> The language of Section 124.55(b) clearly suggests that a mere stay of a certified permit requirement does not authorize the Agency to remove that requirement from the permit. To undo a State certification, Section 124.55(b) requires the Agency to wait until the State takes a second step by forwarding a modified certification or notice of waiver to the Agency. As a matter of policy, this provision makes sense because the Agency should not undo

Because EQB has never clearly and unambiguously stayed, vacated, or remanded any portion of its May 1989 WQC for Caribbean's Bayamón facility, and because EQB has never, in any event, issued a modified certification or a notice of waiver, we find that the entire May 1989 WQC was effective on the date the federal permit was issued, and that the Region's incorporation of the challenged effluent limitations into the federal permit was wholly consistent with Section 401(a)(1) of the Clean Water Act. Moreover, because Caribbean can continue to pursue its substantive challenge to the WQC through the appropriate State procedures—and, if it is successful, seek modification of the federal permit—the EQB proceedings are not mooted and there is no denial of due process. *See Puerto Rico Sun,* slip op. at 11–12. The Region's denial of an evidentiary hearing as to the validity of the Water Quality Certificate (and as to the propriety of the permit conditions derived from it) was therefore correct. The Region properly concluded that this was a legal issue, and review of that issue is, for the reasons identified above, denied.[9]

Caribbean also argues that Region II did not act in a timely manner in denying its request for an evidentiary hearing. Caribbean

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a State certification unless it gets a clear authorization from the State.

*Miners Advocacy Council,* slip op. at 7. By contrast, in this case we have no occasion to consider whether a State's mere election to stay a WQC, or any conditions therein, *before* such conditions have been incorporated into an NPDES permit constitutes sufficient authorization for the Region to exclude those conditions from the permit. We simply hold that the Region need not exclude the stayed conditions from a final NPDES permit in the absence of a modified certification, and that the Region does not commit reversible error by incorporating the stayed conditions into the federal permit in these circumstances.

[9] After presenting Caribbean's legal argument, the petition for review enumerates the particular conditions of the WQC (as incorporated into the final NPDES permit) to which Caribbean objects, and outlines the technical basis for the objections. It is unclear to what extent this technical discussion has been presented to us merely to illustrate the practical reasons for Caribbean's dissatisfaction with the WQC, and to what extent it has been presented as an independent argument in favor of appellate review. Each of the enumerated permit conditions (which are listed in Section II.D of Caribbean's petition) appears in EQB's May 1989 Water Quality Certificate, and the WQC states, in mandatory terms, that the conditions "shall be incorporated into the NPDES permit in order to satisfy the provisions of Section 301(b)(1)(C) of the [Clean Water] Act." Each of the enumerated conditions is thus "attributable to State certification" within the meaning of 40 C.F.R. § 124.55(e). *See In re Boise Cascade Corp.,* NPDES Appeal No. 91–20, slip op. at 10–11 n.7 (EAB Jan. 15, 1993). Therefore, to the extent that the discussion in Section II.D of the petition is intended to set forth independent grounds for this appeal, those grounds are beyond the proper scope of our review and the appeal must be denied. *See In re City of Denison, Texas,* NPDES Appeal No. 91–6, slip op. at 8 (EAB Dec. 8, 1992); *Puerto Rico Sun,* slip op. at 14.

points out, and the Region does not dispute, that the evidentiary hearing request was filed in November 1990 but that the Region did not respond by denying the request until October 1991, nearly a full year later. This delay, petitioner observes, is inconsistent with 40 C.F.R. § 124.75(a)(1), which directs the Regional Administrator to grant or deny such a request within thirty days after the expiration of the time allowed for submission of the request, provided that the request "conforms to the requirements of § 124.74, and sets forth material issues of fact relevant to the issuance of the permit."

Without in any way condoning dilatory conduct (if any) on the part of the Region, we do not see how the Region's failure to respond within thirty days can, in the circumstances of this case, result in an obligation to *grant* the evidentiary hearing request. The regulation does not prescribe such a result generally, and there is no logic whatever to commend it in this particular instance, given our conclusion that the Region's final permit decision was correct as a matter of law and that no material issues of fact are presented for review. Moreover, Caribbean identifies no untoward consequences of the delay; the permit conditions to which Caribbean takes exception were stayed pending the Region's decision on the evidentiary hearing request, and have also been stayed pending our own consideration of this appeal. Caribbean has attempted no showing of prejudice resulting from the delay, and no such prejudice is apparent. Any error is therefore harmless,[10] and review of this issue, too, is denied.

## III. *CONCLUSION*

For the foregoing reasons, the petition for review is denied in its entirety.

So ordered.

[10] *See In re Ashland Oil, Inc. (Floreffe, Pennsylvania),* SPCC Appeal No. 91–1, slip op. at 5–6 (EAB Sept. 15, 1992) (employing harmless error analysis in the context of the thirty-day decisionmaking period provided in 40 C.F.R. § 114.10). In cases where an agency's procedural deadlines are missed, courts are loath to declare a forfeiture of the agency's decisionmaking authority. *See United States* v. *Boccanfuso,* 882 F.2d 666, 671–72 (2d Cir. 1989) (citing *Brock* v. *Pierce County,* 476 U.S. 253, 260 (1986)).