IN RE KETCHIKAN PULP COMPANY

NPDES Appeal No. 95-6

ORDER DENYING REVIEW

Decided December 10, 1996

Syllabus

The Ketchikan Pulp Company ("KPC") seeks review of the partial denial of an evidentiary hearing request on certain provisions of a renewed National Pollutant Discharge Elimination System ("NPDES") permit for KPC's pulp mill in Ketchikan, Alaska. The renewed permit regulates discharges of effluent from the facility into Ward Cove. KPC has appealed the denial of its evidentiary hearing request on the following three issues: 1) Whether the State's failure to certify a mixing zone was the result of misleading communications by the Region or of the State's having an inadequate period of time in which to provide certification; 2) Whether the Region should have reevaluated the permit's seasonal limits regulating biochemical oxygen demand ("BOD") and dissolved oxygen ("DO") concentrations based on a 1993 change in the depth of KPC's outfall to Ward Cove; and 3) Whether the permit should include a mixing zone for discharges of manganese.

Held: For the following reasons, review is denied. On the issue of whether the State's failure to certify a mixing zone was the result of misleading communications by the Region or an inadequate review period, KPC has failed to present sufficient evidence to establish the existence of a genuine issue of material fact justifying an evidentiary hearing. On the issue of whether the Region should have revised the permit's BOD and DO limitations based on a change in the depth of KPC's outfall, the issue was not raised during the comment period and therefore was not preserved for review. Finally, on the issue of whether the permit should include a mixing zone for manganese, review is denied because the issue is not material in the present case.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Reich:

I. *BACKGROUND*

The Ketchikan Pulp Company ("KPC") seeks review of U.S. EPA Region X's partial denial of an evidentiary hearing request on certain provisions of a renewed National Pollutant Discharge Elimination System ("NPDES") permit for KPC's pulp mill in Ketchikan, Alaska.[1]

[1] Under the Clean Water Act, discharges into waters of the United States by point sources, like KPC's pulp mill, must be authorized under a permit in order to be lawful. 33 U.S.C. § 1311. Continued

See Notice of Appeal and Petition for Review ("Petition"). The permit regulates the discharge of effluent from the mill into Ward Cove.[2] At the request of the Environmental Appeals Board, the Region filed a response to KPC's petition for review. *See* Region X's Response to Petition for Review ("Region's Response").

The background to this proceeding is as follows. On August 4, 1989, KPC filed an NPDES permit renewal application with Region X. The Region proposed a preliminary draft permit on March 26, 1992, and then issued a draft permit on August 4, 1993, providing a six-month public comment period expiring on February 4, 1994. *See* Exh. 3 to Region's Response. Among other things, the draft permit proposed a mixing zone which, consistent with State standards for the inclusion of such zones, would encompass 10% of Ward Cove.[3] A public hearing was held on January 25, 1994. KPC also submitted written comments on the draft permit on February 4, 1994.

On April 1, 1994, the Region requested that the Alaska Department of Environmental Conservation ("ADEC") certify the draft permit in accordance with Section 401 of the Clean Water Act, 33 U.S.C. § 1251.[4] Letter from Gregory L. Kellogg, Chief, Waste Management and Enforcement Branch, Region X, to Richard Stokes, ADEC (Exh. 6 to Region's Response). The letter stated that if the ADEC did not certify the permit within 90 days, the State would be deemed to have waived its right to certify. *Id.* at 1. No certification was provided by the State.

The National Pollutant Discharge Elimination System is the principal permitting program under the Clean Water Act. 33 U.S.C. § 1342.

[2] Ward Cove is connected to the Tongass Narrows which is part of the inner passage of the Pacific Ocean in Southeast Alaska.

[3] *See* Alaska Admin. Code tit. 18 § 70.032(e)(2) (Dec. 1989). Mixing zones are areas of water that receive effluent discharges and in which initial dilution occurs. It allows a person testing the effluent's effect on the receiving waters to collect samples downstream of the facility rather than at the point of discharge. Since the receiving water acts to dilute the effluent, the effluent could meet water quality standards at the outer edge of the mixing zone even if it would exceed those standards at the point of discharge. *See In re Broward County Florida*, 6 E.A.D. 535, 538 n.7 (EAB 1996); *In re Star-Kist Caribe, Inc.*, 2 E.A.D. 758, 759 n.4 (CJO 1989). As discussed *infra*, the Region's inclusion of a mixing zone in the final permit was contingent on the State certifying that a mixing zone complied with applicable provisions of State law.

[4] Under CWA § 401(a)(1), the Agency may not issue a permit until the State either certifies that the permit complies with State water quality standards or waives certification. 40 C.F.R. § 124.53. Where a State has waived certification, the Agency's application of State water quality standards is open to review for consistency with 40 C.F.R. § 122.44(d) (requiring that the Region include permit conditions necessary to ensure compliance with State water quality standards and requirements).

On July 7, 1994, the Region issued the final permit decision, along with a response to comments received during the comment period.

Because ADEC waived certification, the Region removed the mixing zone provision from the draft permit. The Region reasoned as follows. A mixing zone — which would have the effect of relaxing the State's water quality standards in a designated area — could be included in a permit only if explicitly authorized by the State's water quality standards.[5] Region's Response at 4; *see In re Star-Kist Caribe*, 3 E.A.D. 172, 182 (Adm'r 1990) (whether limited forms of relief from State water quality standards such as mixing zones should be granted are purely matters of State law). Although Alaska's Water Quality Standard Regulations do authorize the inclusion of mixing zones in NPDES permits under certain circumstances, the applicable regulation specifically reserves this authority to ADEC. Alaska Admin. Code tit. 18 § 70.032 (Dec. 1989) (Exh. 9 to Region's Response) ("[I]n applying water quality criteria set out in this chapter, the [ADEC] will, upon application *and its discretion*, prescribe in its permits or certifications a volume of dilution for an effluent or substance within a receiving water * * *.") (emphasis added). Because Alaska's regulations make the authorization of mixing zones a matter of ADEC's discretion, the Region believed that it could not maintain the mixing zone in the permit unless ADEC indicated its approval by certifying the permit. Since ADEC did not certify the draft permit, the Region concluded that it could not, consistent with State water quality standards, provide for a mixing zone in the final permit. Thus, according to the Region, the final permit required KPC to comply with State water quality standards at the point of discharge into Ward Cove.

On August 5, 1994, KPC filed its request for an evidentiary hearing on numerous provisions of the renewed permit.[6] After the Region pointed out certain technical defects in the evidentiary hearing request, the request was revised and resubmitted on January 5, 1995. On February 10, 1995, the Region granted in part and denied in part KPC's request. KPC's petition for review followed.[7] KPC's petition rais-

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[5] Under CWA § 301(b)(1)(C), permits must include conditions necessary to meet applicable State water quality standards. 40 C.F.R. § 122.44(d)(same).

[6] Under 40 C.F.R. § 124.74, any interested person may submit a request to the Regional Administrator for an evidentiary hearing within 30 days following the service of notice of the Regional Administrator's final permit decision.

[7] Under 40 C.F.R. § 124.91, within 30 days of the denial of a request for an evidentiary hearing, any person who filed such a request may appeal any issue set forth in the denial by filing a notice of appeal and petition for review with the Environmental Appeals Board.

es the following objections:[8] *Issues 1 and 2*: The State's failure to certify a mixing zone was the result of misleading communications by the Region or an inadequate period of time within which to certify the permit; *Issue 3*: Seasonal limits regulating biochemical oxygen demand and dissolved oxygen concentrations were improperly based on data that are not representative of the current facility; and *Issue 4*: The permit should include a mixing zone for discharges of manganese. *See* Petition at 17-18.

Although KPC's petition did not challenge the conclusion that the Region had no authority to provide for a mixing zone at the KPC facility in the absence of a specific State authorization, the Board required additional briefing on this issue. In particular, by order dated March 20, 1996, the Board required the parties to provide additional briefing on the following two questions: (1) Where State water quality standards, or regulations implementing those standards, give the State agency the discretionary authority to include a mixing zone, may the Agency exercise that discretion in the absence of a specific State authorization of a mixing zone for the facility through certification or otherwise;[9] and 2) if the Agency has such discretion, was there anything about the State regulation or State actions in this matter that would have foreclosed the exercise of that discretion. The Region, jointly with EPA's Office of General Counsel, submitted its supplemental brief on August 12, 1996. EPA's Supplemental Brief on Mixing Zone Issues ("EPA's Supplemental Brief"). Along with its brief, the Region has provided the Board with a copy of a newly issued guidance document (dated August 1996) from the Assistant Administrator of EPA's Office of Water entitled: Guidance on Application of Mixing Zone Policies in EPA-Issued NPDES Permits ("Mixing Zone Guidance"). The Mixing Zone Guidance addresses the circumstances under which the Agency will include mixing zones in the absence of explicit authorization from the State. KPC submitted its response on October 3, 1996. Response to EPA's Supplemental Brief on Mixing Zone Issues ("KPC's Supplemental Brief"). For the following reasons, KPC's petition for review is denied.

II. *DISCUSSION*

Under the rules governing an NPDES proceeding, there is no appeal as of right from the Regional Administrator's decision. *In re*

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[8] KPC raised two additional issues in its petition on which the Region has now agreed to grant an evidentiary hearing. We therefore do not address these issues in this decision.

[9] The parties were also asked to discuss the applicability of the Administrator's reasoning in *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172, 177 and 182 (Adm'r 1990) (EPA may only include a schedule of compliance where authorized by State water quality standards).

Florida Pulp and Paper Association & Buckeye Florida, L.P., NPDES Appeal Nos. 94-4 & 94-5, 6 E.A.D. 49, 51 (EAB 1995). 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.[10] *See, e.g., In re J & L Specialty Products Corporation*, 5 E.A.D. 31, 41 (EAB 1994). The petitioner has the burden of demonstrating that review should be granted. *See* 40 C.F.R. § 124.91(a); *Buckeye Florida, supra*, at 4. Guided by these standards, we shall address each of KPC's objections.

A. *Absence of a Mixing Zone*

1. *Issues 1 & 2 in KPC's Petition*

In its petition for review KPC has raised several objections to the Region's final permit determination to remove the mixing zone provisions from the draft permit and replace them with end-of-pipe effluent discharge limitations in the final permit. The permit provisions affected by this change include effluent limits for chronic toxicity, 2-3-7-8 TCDD, manganese, copper, chlorine, color, cadmium, chromium, nickel, zinc, total hydrocarbons, sulfide, and pH. According to the Region, because the State of Alaska failed to certify a mixing zone for the renewed permit, the Region had no choice but to impose limitations at the point of discharge in order to comply with applicable State water quality standards. In its petition, KPC asserts that the State's failure to certify a mixing zone was the result of misleading communications on the part of the Region or an inadequate period of time for exercising certification which somehow tainted the entire certification process. In particular, KPC makes the following three arguments: 1) the Region led the State to believe that the State could not certify a mixing zone larger than the one proposed in the draft permit (Petition at 5-6); 2) the Region did not provide adequate time for State certification (Petition at 10); and 3) the Region created confusion regarding its willingness to defer issuance of the permit pending the extension of KPC's outfall location from Ward Cove to Tongass Narrows (Petition at 9).

According to KPC, the resolution of these issues is material to the present permit proceedings because, but for the Region's misleading

[10] With respect to appeals under Part 124 regarding NPDES permits, Agency policy is that most permits should be finally adjudicated at the Regional level. 44 Fed. Reg. 32,887 (June 7, 1979). While the Board has broad power to review decisions in NPDES permit cases, the Agency intended this power to be exercised "only sparingly." *Id. See In re J & L Specialty Products Corporation*, 5 E.A.D. 31, 41 (EAB 1994); *In re Broward County, Florida*, 4 E.A.D. 705, 709 n.9 (EAB 1993).

communications regarding the State's ability to certify a mixing zone larger than the one proposed in the draft permit and the timing for issuance of the final permit, ADEC would have ultimately certified a mixing zone for Ward Cove. KPC's petition states that the issuance of the permit without a mixing zone despite "diligent efforts of KPC and ADEC to certify mixing zones for outfalls, * * * in and of itself constitutes arbitrary and capricious action on the part of the agency." Petition at 10 (*citing Puerto Rico Sun Oil Co. v. EPA*, 8 F.3d 73 (1st Cir. 1993)). In *Puerto Rico Sun*, the First Circuit vacated a decision by the Agency to issue an NPDES permit to Puerto Rico Sun Oil Company ("PRS") without including provisions for a mixing zone. The Agency's decision not to allow a mixing zone was based on a certification provided by the Puerto Rico Environmental Quality Board ("EQB"). The court based its decision on the fact that at the time the permit was issued, EQB was in the process of reconsidering its certification and informed the Agency that it might alter its decision. Yet, despite requests by both EQB and PRS for a delay in issuing the permit pending EQB's reconsideration of the certification as well as a request from EQB that EPA consider the certification not final pending reconsideration, the Agency issued a final permit without providing for a mixing zone and with no explanation of its refusal to wait. *See Puerto Rico Sun* at 75-76. The court held that "EPA's decision to issue a permit in September 1990, adopting EQB's certification but refusing to await EQB's decision on reconsideration, produces a result that on the present record appears manifestly arbitrary and capricious." *Puerto Rico Sun* at 81. (KPC's attempt to analogize this case to *Puerto Rico Sun* is discussed *infra* at note 13 and the accompanying text.)

As previously stated, KPC's petition does not challenge the Region's underlying conclusion that the Region did not have the authority to include a mixing zone in KPC's permit because such a zone was not specifically provided for by way of State certification. With regard to the objections specifically raised in KPC's petition, we conclude for the following reasons that KPC has failed to present sufficient evidence to establish the existence of a genuine issue of material fact warranting an evidentiary hearing.[11]

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[11] *See In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993) (stating that a party requesting an evidentiary hearing must raise a genuine issue of material fact; in the context of a request for an evidentiary hearing, a factual dispute is material where, under the governing law, it might affect the outcome of the proceeding; a genuine issue exists where a party presents sufficient probative evidence from which a reasonable decision maker could find in that party's favor by a preponderance of the evidence), *aff'd Puerto Rico Aqueduct and Sewer Authority v. EPA*, 35 F.3d 600 (1st Cir. 1994)

First, we find no evidence in the record on appeal that the State was misled in any way regarding the State's authority to certify mixing zones larger than those in the draft permit. On the contrary, the record evidence indicates the State was fully and accurately informed of its responsibilities in this regard at all stages of the certification process. For example, in a letter accompanying the Region's preliminary draft permit dated March 26, 1992, the Region called ADEC's attention to the permit's mixing zone provisions and stated that if ADEC "authorizes different mixing zones than those described in the fact sheet, EPA will revise the permit accordingly." Letter from Gregory L. Kellogg, Region X, to Richard Stokes, Regional Supervisor, ADEC at 1 (Exh. 1 to Region's Response). Similarly, in the fact sheet accompanying the August 4, 1993 draft permit, the Region stated:

> As part of the state's certification under section 401 of the Act, [the permit's] mixing zones will either be approved or modified. If the mixing zones approved by the state are different from the ones used to calculate the limits for the draft permit, the limits in the final permit will reflect these changes.

Exh. 4 to Region's Response at 15. These communications put ADEC on notice that it was free to certify a larger mixing zone than proposed in the draft permit. Even if ADEC had any remaining doubts in this regard, these doubts should have been put to rest by an additional letter from Region X to ADEC dated January 13, 1994. The January 13 letter specifically addressed ADEC's authority to certify the proposed mixing zone. It stated, in part, that "it is [the Region's] position that the state has the discretion to certify either a larger or smaller mixing zone than that presented in the proposed final permit which complies with state water quality standards." Letter from Gregory L. Kellogg, Region X, to Richard Stokes, ADEC (Exh. 14 to Region's Response). Thus, despite clear and unambiguous statements by the Region that ADEC was free to certify a larger mixing zone than the one proposed in the draft permit, ADEC chose not to do so. KPC's assertions in this regard are therefore rejected as a basis for review.

Second, we find no basis for KPC's assertion that ADEC was not given sufficient time to certify the draft permit. On the contrary, as the following discussion indicates, the State was given clear notice of the period for certification and such period was ample for this purpose.

Under the regulations, a State is deemed to have waived certification if it does not act within the time period specified in the request

for certification, generally a period not to exceed 60 days from the date the draft permit is mailed. 40 C.F.R. § 124.53(c)(3). A 30-day period for certification was negotiated between Region X and the State of Alaska and is included in an agreement addressing procedures for coastal NPDES permit reviews. Joint EPA/State of Alaska Procedures for Coastal NPDES Permit Reviews, October 1986 (Exh. 10 to Region's Response) ("Joint Procedures"). The Joint Procedures also provide that if the State needs additional time to certify a permit, "the state shall request an extension in writing stating the reasons for needing the additional time." *Id.*

In the present case, the record before us indicates that ADEC had adequate notice of the Region's pending permit action. In a February 8, 1994 letter from Region X to KPC (and copied to ADEC), the Region stated that it was giving the State additional time for certification, beyond what was called for in the joint procedures:

> EPA plans to provide the state of Alaska with a proposed final permit and formally request state certification by April 1, 1994. While EPA's agreement with the state calls for a 30 day period for certification, we will request certification within 90 days in this case. If the state has not certified the permit within 90 days, EPA will deem that the state has waived its right to certify the permit in accordance with the regulations.

Letter from Gregory L. Kellogg, Region X to Steve Hagan, Mill Manager, KPC (Exh. 4 to Region's Response). Consistent with the approach outlined in this letter, on April 1, 1994, the Region sent ADEC a copy of the proposed final NPDES permit containing the proposed mixing zone. The letter accompanying the draft stated, in part:

> Final action on this permit cannot be taken until your agency has granted or denied certification under 40 CFR 124.55, or waived its right to certify. As conveyed to you in a copy of our February 8, 1994, letter to [KPC], the state will be deemed to have waived its right to certify unless that right is exercised within 90 days of the receipt of this proposed final permit."

Letter from Gregory L. Kellogg, Region X, to Richard Stokes, ADEC (Exh. 6 to Region's Response). In addition, in a June 2, 1994 letter, following up on a May 27, 1994 conference call between Region X and ADEC representatives, the Region reiterated that it intended to issue

the final permit by July 1, 1994.[12] It is clear from these letters that the Region provided ADEC with adequate notice of the timing of the Region's pending permit action. Further, ADEC was given more time than routinely provided for in the Joint Procedures (*i.e.*, 90 days rather than 30 days) and there is no indication in the record that ADEC ever requested additional time to certify the permit. We therefore find no support for KPC's assertion that ADEC was not given sufficient time to certify the permit's mixing zone provisions if it chose to do so.

Finally, KPC argues that an evidentiary hearing is necessary to determine "whether the agency acted unreasonably in departing from its assurances to the State and KPC that it would defer issuing the permit if the parties proceeded diligently with the process of permitting the extended outfall into Tongass Narrows." Petition at 9. In support of this assertion, KPC cites to a statement made at the January 25, 1994 public hearing by Gregory Kellogg from Region X. Mr. Kellogg stated that if KPC ultimately decided to move its outfall location, "that will affect what their permit looks like, and again, we'll be back in Ketchikan for still another public hearing." Environmental Protection Agency Public Hearing On Ketchikan Pulp Company's Waste Water Discharge Permit ("Public Hearing") at 11-12 (Exh. 5 to Region's Response). In addition, KPC cites to an April 19, 1994 letter from Region X to ADEC stating that if ADEC certified discharge limits for both Ward Cove and the proposed Tongass Narrows outfall within the 90-day time frame established for state certification, the Region would reopen the comment period on a revised draft permit containing conditions limiting discharges from both outfalls. Letter from Gregory L. Kellogg, Region X, to Richard Stokes, ADEC ("April 19 Letter")(Exh. 12 to Region's Response).

Neither of these submissions supports KPC's assertion that the Region provided "assurances" to the State that the Ward Cove permit would be delayed if the parties proceeded diligently with the permitting process for an extended outfall into the Tongass Narrows. Rather, they merely indicate that in the event that the draft permit governing discharges into Ward Cove needed to be revised due to changes in the outfall location, the Region would reopen the comment period. More importantly, the April 19 Letter made clear that any delay in issuing the Ward Cove permit was contingent on ADEC certifying discharges from both the Ward Cove and Tongass Narrows outfalls within the 90-day certification period. As previously stated, however, no such certification was provided.

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[12] As stated previously, the renewed permit was actually issued on July 7, 1994.

As the foregoing discussion indicates, the facts of this case are clearly distinguishable from those in *Puerto Rico Sun*.[13] In particular, there is no indication in the present case that the State ever sought additional time to provide certification or that it ever sought a delay in issuance of the final permit. In short, there is no evidence in the record before us that the Region's final permit determination for discharges into Ward Cove was contrary to the State's intent. Thus, for the reasons stated above, we find no basis for KPC's assertion that the Region's decision to issue the permit for Ward Cove without providing for a mixing zone was arbitrary and capricious. Accordingly, KPC has failed to present sufficient probative evidence from which a reasonable decision maker could find in its favor by a preponderance of the evidence. Thus, KPC has failed to establish the existence of a genuine issue of material fact warranting an evidentiary hearing. *See supra* note 11. The petition for review is therefore denied on the above issues.

2. *Mixing Zone Authority — Supplemental Briefs*

As previously stated, following submission of KPC's petition and the Region's response, the Board sought additional briefing from the parties on the issue of whether the Region had the authority to prescribe a mixing zone for KPC's facility even absent explicit authorization from ADEC. The Board also asked the parties to discuss the extent to which the Administrator's reasoning in *In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172 (Adm'r 1990) (disallowing inclusion of schedules of compliance in federally issued permits when the provisions of State law fail to provide for their inclusion) would apply in this context. In its supplemental brief and the accompanying Mixing Zone Guidance, the Region argues that where, as here, a State's water quality standards allow for the inclusion of mixing zones only at the discretion of the State permit-issuing authority, it would not be reasonable for EPA to issue a permit with a mixing zone where the State has waived certification and has not otherwise indicated that EPA could include a mixing zone. EPA's Supplemental Brief at 2, 5-6 (*citing In re American*

[13] The limited applicability of *Puerto Rico Sun* is demonstrated by the First Circuit's subsequent decision in *Caribbean Petroleum Corp. v. EPA*, 28 F.3d 232 (1st Cir. 1994). In *Caribbean Petroleum*, the same court that decided *Puerto Rico Sun* held that EPA was not arbitrary and capricious in issuing a final permit based on a certification provided by the EQB, even though the certification was ostensibly undergoing review by EQB. The court relied, in part, on the fact that, despite being given sufficient time to reconsider the certification, EQB did not do so, nor did it stay its original certification. *Caribbean Petroleum*, 28 F.3d at 235. *See also In re Broward County Florida*, 6 E.A.D. 535, 546-547 n.18 (EAB 1996) (distinguishing *Puerto Rico Sun* from *Broward* where, among other things, the State waived certification and did not request that EPA defer action on the permit).

Cyanamid Company, 4 E.A.D. 790, 801 (EAB 1993) (where the State waives certification, the Region's interpretation of the State's water quality standards will be upheld if "reasonable")). The Region contends that the inclusion of a mixing zone under these circumstances would not be consistent with the State's water quality standards. Specifically, the Region states, in part:

> The Clean Water Act reserves to the States primary authority to determine appropriate water quality requirements, and explicitly authorizes States to be more stringent than federal standards. 33 U.S.C. 1251(b) and 1370. Respect for the State role under the Act to determine the appropriate water quality standards and necessary implementing regulations suggests that EPA should not assume that Alaska's mixing zone provision also gives EPA the authority to grant a mixing zone without some extrinsic evidence that Alaska intends EPA to exercise such authority.
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> Absent such a State written interpretation, and without a permit-specific authorization through the Section 401 certification process (in other words, if Alaska waives Section 401 certification), then it would not be reasonable and would not, therefore, be within EPA's discretion under *American Cyanamid*, for EPA to grant a mixing zone in Alaska. An EPA-created mixing zone in these circumstances would infringe on the [State's water quality standards'] apparent reservation of that discretion to the State. In other words, without an interpretation by Alaska of its regulations that EPA could exercise that discretion, it would not be reasonable for EPA to interpret Alaska's regulations as constituting the "necessary enabling language" for EPA to include a mixing zone in an NPDES permit if Alaska waives section 401 certification.

EPA's Supplemental Brief at 9-10. In support of this assertion, the Region cites to the Administrator's conclusion in *Star-Kist* that EPA may only include a schedule of compliance (delaying compliance with and thereby relaxing applicable water quality standards) if the State's water quality standards specifically provide for such schedules. The decision holds that whether or not schedules of compliance, mixing zones, or variances are appropriate "are purely matters of State law, which EPA has no authority to override." *Star-Kist*, 3 E.A.D. at 182. Thus, according to the Region, where, as here, State law allows for the inclusion of

a mixing zone only at the discretion of the State permitting authority, the Region has no independent authority to include a mixing zone absent State approval through certification or otherwise.

In its supplemental brief, KPC makes several arguments objecting to the Region's removal of the mixing zone provision. Having fully reviewed these arguments, however, we find nothing that convinces us that the Region's interpretation of Alaska's water quality standards as reserving to the ADEC the authority to prescribe mixing zones was unreasonable or contrary to the provisions of the CWA or the regulations governing certification of NPDES permits. KPC's arguments to the contrary are therefore rejected.[14]

In holding that the Region could properly conclude that it lacked the authority to include a mixing zone absent State certification, we

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[14] Since KPC's petition for review never challenged the Region's legal conclusion that the Region could not include mixing zones absent ADEC certification, we do not need to deal with KPC's arguments exhaustively. However, we note that in its supplemental brief, KPC argues, among other things, that under 40 C.F.R. § 121.16, ADEC's waiver of certification must be treated as a substitute for certification. Thus, KPC asserts that the Region should have deemed the permit effectively certified and issued it with the mixing zone provisions. KPC's Supplemental Brief at 8. The certification requirements at 40 C.F.R. Part 121, however, do not apply to NPDES permits. These regulations predate the 1972 amendments to the CWA (under which the NPDES permit program was established) and apply only to the certification of non-NPDES permit or license applications. *See* 44 Fed. Reg. 32,880 n.1 (June 7, 1979) (recognizing that the regulations at Part 121 were promulgated prior to establishment of the NPDES program and are in need of revision, but stating that "because of the impact of State certification of *non-NPDES* permits on a myriad of Federal programs, it will be necessary to consult with the affected agencies in some detail before changes are made.") (emphasis added). Further, as the regulations make clear, the procedures applicable to NPDES permits (including State certification of federally-issued permits) are governed by 40 C.F.R. Part 124 (Specific Procedures Applicable to NPDES Permits). Nothing in these regulations supports the assertion that a waiver of certification constitutes a substitute for certification. Thus, we reject KPC's assertion that the Agency must treat ADEC's waiver of certification as if it had certified all conditions in the draft permit.

KPC has also asserted that the language in Alaska's water quality regulations giving ADEC the discretion to prescribe mixing zones should have been disregarded because such language is purely procedural and therefore extraneous to the water quality standard. KPC's Supplemental Brief at 11. A mixing zone, however, represents an exception to the otherwise applicable water quality standards. As such, it is clearly substantive, not, as KPC suggests, merely "procedural." A State has no obligation under the CWA to provide for a mixing zone. That Alaska, in choosing to do so, made it a matter of discretion and reserved such discretion to ADEC is neither unrelated nor superfluous to the mixing zone provision. On the contrary, it is a condition precedent to the approval of a mixing zone. That is, whether or not a permittee will be granted a mixing zone is explicitly conditioned by the regulation on ADEC's determination that such a zone is appropriate given the nature of the discharge and the condition of the receiving water body. Thus, the fundamental premise of KPC's argument that the decision to include a mixing zone is not a matter of substance warranting EPA consideration is incorrect. KPC's arguments in this regard are therefore rejected as a basis for review.

also note that KPC and the State had been put on notice that the Region considered the inclusion of a mixing zone to be discretionary with the State and that the Region intended to remove the mixing provision from the draft permit if the State waived certification. Letter from Gregory Kellogg, Region X, to Steve Hagan, Mill Manager, KPC (and copied to ADEC) (February 8, 1994) (stating that if ADEC waives certification EPA will issue the permit with end-of-pipe water quality limits, *i.e.*, without a mixing zone); Letter from Gregory Kellogg, Region X to Richard Stokes, ADEC (April 1, 1994) (referencing the February 8, 1994 letter copied to ADEC and identifying the authorization of a mixing zone as an issue falling within the State's discretion). KPC's petition for review does not allege that either KPC or ADEC lacked notice of the Region's intention to remove the mixing zone provision if the State waived certification. Further, there is nothing in the record before us (either before or after issuance of the final permit) to suggest that the State was unaware of the Region's intentions in this regard.

B. *Issue 3: Seasonal Limits - Total Maximum Daily Load*

In its petition, KPC objects to the denial of its evidentiary hearing request on the permit's Total Maximum Daily Load ("TMDL")-based seasonal limitations from June through October for biochemical oxygen demand ("BOD") and for dissolved oxygen ("DO"). Petition at 11-13. A TMDL sets the maximum amount of a pollutant which can be contributed or "loaded" to a water body without violating water quality standards.[15] KPC asserts that the data used to develop these permit limits are out of date and do not represent current conditions at the facility. In particular, KPC states that because of a change in the depth of its outfall in November 1993, such that all of its process effluent was combined at a mixing chamber and is now discharged through a single outfall located at a depth of five meters below the surface of Ward Cove (Petition at 12-13), the permit's effluent limits must be

[15] Section 303(d) of the Clean Water Act, 33 U.S.C. § 1313(d), requires the imposition of a TMDL where technology-based effluent limitations are not stringent enough to implement any applicable water-quality standard. *See* CWA § 303(d)(1)(A), 33 U.S.C. § 1313(d)(1)(A). The Act also states that the TMDLs must be established "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." CWA § 301(d)(1)(C). The TMDLs are established by the State and are subject to final approval by the Regional Administrator after considering public comment. The TMDLs are then incorporated into the State's water quality management plan. *See* CWA § 303(d); 40 C.F.R. § 130.7(c) & (d). In decisions regarding specific NPDES permit limitations, Regional permit writers must assure consistency with any TMDL established for a particular water body. *See* 40 C.F.R. § 122.44(d)(1)(vii)(B).

reevaluated. Previously, KPC discharged wastewater through two outfalls, one discharging 60% of the flow at approximately one meter below the surface and the other discharging 40% of the flow at five meters below the surface. Petition at 12. KPC states that the Region "should have reevaluated how to apply the TMDL in setting permit limits in light of the change in the hydrographic conditions after KPC changed the discharge configuration into Ward Cove." Petition at 14.

In its response, the Region argues that an evidentiary hearing was correctly denied on this issue because KPC failed to raise the issue during the public comment period on the draft permit. The Region states that KPC's comments "focused almost entirely on [alleged] defects in the TMDL model itself" and did not indicate that any TMDL-based limits should be revised based on the change in depth of its outfall. Region's Response at 19.

Upon review of the record before us, we conclude that because the issue of whether the Region should have revised the TMDL-based permit limitations for BOD and DO based on the change in the depth of KPC's outfall was not raised during the public comment period, review must be denied on this issue. Under 40 C.F.R. Part 124, in order to contest a final permit determination in an evidentiary hearing or to preserve an issue for review by the Board, "all reasonably ascertainable issues" must be raised by the close of the comment period. *See* 40 C.F.R. § 124.13. In addition, 40 C.F.R. § 124.76 provides that "[n]o issues shall be raised by any party that were not submitted to the administrative record * * * as part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them." The purpose behind this requirement is to alert the Region to potential problems with the draft permit and to ensure that it has an opportunity to address these problems before the permit becomes final, thereby promoting the longstanding policy that most permit issues should be resolved at the Regional level. *See In re Broward County, Florida*, 4 E.A.D. 705, 714 (EAB 1992). Disputed legal and factual issues must also be stated with specificity. *See In re Sequoyah Fuels Corp.*, 4 E.A.D. 215, 218 (EAB 1992).

After reviewing KPC's comments on the draft permit, we agree with the Region that the comments did not raise an objection to the specific TMDL-based permit limitations at issue in this case based on the 1993 change in the depth of KPC's outfall. It is true that the comments noted changes in the operation of the facility since 1986, stating that "there have been several changes in the mill operation, processes, and treatment systems since 1986 which considerably impact the [TMDL] model inputs and assumptions." Ketchikan Pulp

Company Comments on Draft NPDES Permit Number AK-000092-2, ("Comments") at 6 (Feb. 4, 1994) (Exh. 17 to Region's Response). However, while KPC went on to note a number of these changes, nowhere in these comments does KPC mention the change in the depth of the outfall. Similarly, KPC never raised this change as a basis for revisiting the permit's TMDL-based limits for BOD or DO.[16] Although KPC later raised this issue in its evidentiary hearing request,[17] the issue was not raised during the comment period. Thus, the issue was not preserved for review. *See In re Broward County Florida*, 6 E.A.D. 535, 547-548 (EAB 1996) (to contest a final permit determination in an evidentiary hearing or to preserve an issue for review by the Board, all reasonably ascertainable issues must be raised by the close of the comment period). Thus, by not asserting in its comments that the Region should have reevaluated how to apply the TMDL in setting specific permit limitations for BOD or DO in light of the change in the depth of KPC's outfall into Ward Cove, KPC has failed to preserve this issue for review by the Board.[18]

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[16] In determining appropriate permit limitations for BOD or DO, the Region appears to have been aware of the change in KPC's outfall configuration but determined that this change was not significant enough to warrant revision of the permit's TMDL-based limitations. Region's Response at 20; Fact Sheet accompanying August 4, 1993 Draft Permit at 5 (Exh. 4 to Region's Response). Nothing in KPC's petition or in the record before us indicates that this determination was erroneous.

[17] In its evidentiary hearing request, KPC stated as follows:

> The BOD limits effective during the months of June through October are arbitrary and capricious since they are based on old data that is not representative of current conditions. * * * The process effluent is now discharged from an outfall at about the 5-meter depth. Formerly, much of the process effluent was discharged to the surface layer of the receiving water. Monitoring of the receiving waters shows that the dissolved oxygen levels in the receiving waters have markedly improved since 1986 and that the seasonal relationship between dissolved oxygen levels and BOD discharges no longer exists. Similarly, the requirement of a minimum oxygen content of the effluent is not rationally related to dissolved oxygen concentrations in the receiving waters.

Request for an Evidentiary Hearing Regarding the Regional Administrator's Final Permit Decision On NPDES Permit No. AK-000092-2 for Ketchikan Pulp Company (Ketchikan Pulp Mill) Issued July 7, 1994 ("Hearing Request"), at 4 (August 1994 Revised July 1995) (Attachment to Petition for Review).

[18] We note that in denying the request for an evidentiary hearing, the Region did not directly address KPC's factual argument that the permit's BOD limitations were erroneous due to the change in the depth of KPC's outfall. Rather the Region interpreted KPC's argument as an objec-

Continued

KPC also argues in its petition that the Board has jurisdiction to review the Region's underlying TMDL decision as it relates to the permit's BOD and DO limitations on the grounds that the TMDL and the current permit proceeding are "inextricably linked" and that as a matter of judicial efficiency it would be appropriate for the EPA to review the TMDL decision in the context of this permit proceeding (*i.e.*, in an evidentiary hearing).[19] Petition at 15-16. This argument seems to be in response to assertions made by the Region in its hearing request denial that the TMDL could not be reviewed in this proceeding. *See supra* note 18. However, as stated above, the underlying factual issue related to the change in the depth of KPC's outfall as it affected the permit's BOD or DO limitations was not preserved for review. Thus, we need not reach the issue of the appropriateness of the Board's reviewing the TMDL in order to determine the effect of the change in the depth of KPC's outfall on the BOD and DO limitations.

C. *Issue 4: Manganese*

KPC argues that the Region improperly denied KPC's evidentiary hearing request on the permit's effluent limitations for manganese. In particular, KPC argues that the Region erroneously considered manganese to be a bioaccumulative pollutant and therefore (in accordance with State water quality standards) did not provide for a mixing zone in setting effluent limitations. KPC argues that manganese is not "the kind of substance typically considered to be bioaccumulative." Petition at 17. KPC states further that even if manganese were bioaccumulative, the State interprets its regulations "to allow mixing zones for bioaccumulative substances as long as there is no excessive risk associated with the mixing zone." *Id.* at 18 (footnote omitted).

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tion to the TMDL and, in its denial, only addressed the legal issue of whether KPC could challenge the underlying TMDL in the context of an evidentiary hearing request. *See* Regional Administrator's Decision on Hearing Request at 7-9. Thus, this is not a case where the Region had actually addressed an issue raised by a petitioner in a hearing request on the merits, after choosing to overlook the fact that the issue was not raised during the comment period. Had the Region specifically responded to KPC's assertions in the evidentiary hearing request as to the change in outfall depth, but later sought to have the petition for review dismissed because the issue had not been raised, the Board may well have chosen to consider the issue on the merits as well.

[19] In its response to KPC's petition for review, the Region argues that regardless of any linkage between the underlying TMDL for Ward Cove and the specific permit limitations at issue in this appeal, "the Ward Cove TMDL, like other final agency actions, should be challenged in the United States District Court under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, and not in this administrative proceeding." Region's Response at 22.

However, as the Region stated in response to an identical argument in KPC's comments on the draft permit:

> EPA finds merit in the assertion that KPC could be granted a mixing zone for manganese, if the relevant literature indicates that manganese discharges do not pose a significant bioaccumulation concern. In this case, the state waived its right to certify the permit, and no mixing zone for any pollutants in the KPC discharge was established. Therefore, the limitations in the draft permit (based on end-of-pipe compliance) remain unchanged.

Response to Comments at 10. Thus, the Region concluded that KPC had failed to raise a material issue of fact warranting an evidentiary hearing. *See supra* note 11. That is, because the State waived certification, whether or not the State's water quality standards would allow for a mixing zone for manganese is not material to the present permit determination. We agree.

As discussed above, the Region's interpretation of Alaska's water quality regulations as precluding the inclusion of a mixing zone absent State authorization was not unreasonable or contrary to the provisions of the CWA or the regulations governing certification of NPDES permits. Because the State waived certification and did not otherwise approve a mixing zone, the Region properly concluded that it could not include mixing zones in the final permit. Thus, whether or not Alaska's water quality regulations would otherwise allow for a mixing zone for manganese is not material in the present case. That is, even if KPC were correct on this issue, the failure of the State to authorize mixing zones would still preclude the inclusion of such a zone in the final permit for manganese. Thus, resolution of this issue would have no effect on the terms of the permit. The petition for review is therefore denied on this issue.

III. *CONCLUSION*

For the foregoing reasons, we find that the Region did not err in denying the request for an evidentiary hearing. Accordingly, the petition for review is denied.

So ordered.