IN RE LIQUID AIR PUERTO RICO CORPORATION

NPDES Appeal No. 92-1

ORDER REMANDING IN PART AND DENYING REVIEW IN PART

Decided May 5, 1994

Syllabus

Liquid Air Puerto Rico Corporation ("Liquid Air") seeks review of the denial of its evidentiary hearing request by U.S. EPA Region II in connection with the renewal of the NPDES permit for Liquid Air's small industrial gas manufacturing facility in Catano, Puerto Rico. According to Liquid Air's permit renewal application, its facility has only one outfall, which discharges stormwater and "water table drainage," or groundwater. Clean Water Act section 402(p), 33 U.S.C. § 1342(p), provides a moratorium on NPDES permits for discharges "composed entirely of stormwater" until October 1, 1994. The Region issued the renewed permit, and denied Liquid Air's evidentiary hearing request, on the ground that because Liquid Air's discharge was composed of stormwater and groundwater, it was not composed entirely of stormwater, and thus not entitled to the moratorium. As alternative bases, the Region also cited three of the exceptions to the moratorium provided in section 402(p)(2). Liquid Air seeks review of the denial of its evidentiary hearing request that raised six legal issues and three alleged factual issues chiefly intended to determine the applicability of one or more of the statutory exceptions to the stormwater permit moratorium.

Liquid Air also seeks review of the Region's decision to turn a self-executing provision in Puerto Rico's water quality certificate into a non-self-executing provision in the permit, based upon the Region's exclusive authority to amend the permit. Lastly, Liquid Air also seeks review of the Region's decision to incorporate standard terms and provisions into this stormwater permit.

Held: The Region did not erroneously deny Liquid Air's evidentiary hearing request on the issue of whether Liquid Air's discharge is subject to the stormwater permitting moratorium. Here, the legal issues and alleged factual issues Liquid Air wants reviewed pertain to whether its discharge is encompassed within any of the statutory exceptions to the moratorium. These issues do not warrant review, however, because the Region did not rely solely upon the exceptions, but properly concluded that, based upon the facts known to it at the time it issued the permit and denied the evidentiary hearing request, the discharge is not composed entirely of stormwater and thus not entitled to the moratorium in the first place. Liquid Air's assertion, made for the first time on appeal, that its discharge is composed entirely of stormwater because it eliminated the groundwater infiltration from the discharge, comes too late in the process to alter this result, and instead should be raised in a request for a permit modification.

The Region's decision to eliminate the self-executing component of the provision contained in the water quality certificate is not justified by the Region's assertion that only

it has the authority to amend the permit. Absent any other basis for upholding the Region's deviation from the water quality certificate, this condition of the permit is remanded for the Region to either incorporate the condition in the permit as it appears in the water quality certificate or provide another basis for deleting its self-executing nature.

Liquid Air's assertion that the final permit contains standard terms and conditions that do not belong in this stormwater permit has not been preserved for review and is without merit.

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

Opinion of the Board by Judge McCallum:

Liquid Air Puerto Rico Corporation ("Liquid Air") seeks review of the denial of its evidentiary hearing request by U.S. EPA Region II in connection with the renewal of the NPDES permit for Liquid Air's small industrial gas manufacturing facility in Catano, Puerto Rico. Because Liquid Air has eliminated its process wastewater and cooling water discharge from its operations, leaving it with stormwater as the only remaining point source of discharge, Liquid Air claims that EPA no longer has authority to require an NPDES permit for the facility. Pursuant to section 402(p) of the Clean Water Act, EPA may not impose a permit requirement for certain discharges composed entirely of stormwater. Liquid Air asserts that its stormwater discharge is exempt under this statutory provision. For the reasons set forth below, we remand one condition of the permit for further action consistent with this opinion, and deny review of all other issues.

I. *BACKGROUND*

Section 402(p) was enacted into law by the Water Quality Act of 1987,[1] which established a phased approach to bringing stormwater discharges under regulatory coverage.[2] Section 402(p) provides, in pertinent part:

---

[1] Pub. L. No. 100-4, 101 Stat. 65 (1987).

[2] Previously, throughout the 1970's and early 1980's, the Agency's attempts to regulate point source discharges of stormwater were constantly challenged in court. Regulations promulgated in 1973 were invalidated in *Natural Resources Defense Council v. Train*, 396 F. Supp. 1393 (D.D.C. 1975), *aff'd NRDC v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). Regulations promulgated in 1976 and revised in 1979 and 1980 were challenged in *Natural Resources Defense Council v. EPA*, 673 F.2d 392 (D.C. Cir. 1980). As part of the settlement in *Natural Resources Defense Council v. EPA*, the Agency proposed new stormwater regulations in 1982 that were finally adopted in 1984. The 1984 regulations were challenged and vacated pursuant to the Agency's request, in *Natural Resources Defense Council v. EPA*, No. 80-1607 (D.C. Cir 1987). For a detailed history of the EPA's stormwater regulations, *see* 53 Fed. Reg. 49,416 (Dec. 7, 1988).

> (p) Municipal and industrial stormwater discharges
>
> (1) General rule
>
> Prior to October 1, 199[4],[3] the Administrator * * * shall not require a permit under this section for discharges composed entirely of stormwater.
>
> (2) Exceptions
>
> Paragraph (1) shall not apply with respect to the following stormwater discharges:
>
> (A) A discharge with respect to which a permit has been issued under this section before February 4, 1987.
>
> (B) A discharge associated with industrial activity.
>
> (C) A discharge from a municipal separate storm sewer system serving a population of 250,000 or more.
>
> (D) A discharge from a municipal separate storm sewer serving a population of 100,000 or more but less than 250,000.
>
> (E) A discharge for which the Administrator * * * determines that the stormwater discharge contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

33 U.S.C. § 1342(p). Under section 402(p)(1), EPA cannot require an NPDES permit for discharges consisting entirely of stormwater until October 1, 1994, except for those discharges identified under section 402(p)(2). After October 1, 1994, all stormwater discharges will presumably require an NPDES permit.[4]

---

[3] As originally adopted, section 402(p)(1) provided "[p]rior to October 1, 1992 * * *." Section 312 of the Water Resources Development Act of 1992, Pub. L. No. 102-580 (Oct. 31, 1992), changed this date to October 1, 1994, while this appeal was pending.

[4] Barring any other legislative or regulatory changes, after October 1, 1994, all stormwater discharges are required to have NPDES permits in accordance with Clean Water Act section 301, 33 U.S.C. § 1311, which provides that any discharge of pollutants is unlawful unless in compliance with, *inter alia*, the NPDES permit requirement in Clean Water Act section 402, 33 U.S.C. § 1342. NPDES permits are required for all discharges of pollutants from point sources into the waters of the United States. 40 C.F.R. § 122.1(b) (listing stormwater discharges, as set forth in § 122.26, as a category of point sources requiring NPDES permits).

This proceeding evolved from Liquid Air's effort to renew the NPDES permit issued to its small industrial gas manufacturing facility[5] by Region II in 1983.[6] The 1983 permit authorized Liquid Air to discharge "process, cooling, and stormwater" from a single outfall, Outfall 001. On January 5, 1988, near the expiration of the 1983 permit's five-year term, Liquid Air informed Region II that it had successfully separated the stormwater and the process wastewaters into two outfalls. On June 27, 1988, Liquid Air submitted an application to renew its NPDES permit. The application reflected Liquid Air's discharges from the two outfalls, but specifically added that Outfall 001 discharged both stormwater and "water table drainage."

On August 14, 1989, slightly more than a year after it had filed its permit application, but before the Region had prepared a draft permit, Liquid Air informed the Region that it wanted to withdraw the application. At this time, Liquid Air had eliminated its process wastewater discharge at Outfall 002, thus leaving the stormwater and water table drainage discharge at Outfall 001 as the only discharge at the facility. According to Liquid Air, this discharge was exempt from the NPDES permit requirements until October 1, 1994 under the "moratorium" for stormwater permits provided by section 402(p)(1) of the Clean Water Act,[7] and thus no permit was required for the facility.

After the passage of another year, Region II responded to Liquid Air's request to withdraw its permit application. It explained to Liquid Air that its construction of section 402(p) of the Clean Water Act was different from Liquid Air's and that an NPDES permit was required for the discharge under that section of the Act.[8] Noting that the permitting moratorium set forth in section 402(p)(1) applies only to discharges "composed entirely of stormwater," Region II advised Liquid Air that the moratorium does not apply to its discharge because the discharge

---

[5] Liquid Air manufactures industrial gases such as acetylene, nitrogen, oxygen, carbon dioxide (dry ice) and argon.

[6] The 1983 permit was issued to Puerto Rico Cryogenics Corp., Liquid Air's corporate predecessor. Puerto Rico Cryogenics Corp. changed its name to Liquid Air Puerto Rico Corporation in early 1991. We shall use "Liquid Air" throughout this opinion to refer to both.

[7] Actually, Liquid Air asserted that its discharge was exempt from the permitting requirements until October 1, 1992. As explained above, *see supra* note 3, the moratorium on permitting provided in section 402(p) of the Clean Water Act was extended from October 1, 1992 to October 1, 1994 by virtue of legislation enacted in 1992. Consequently, we will use the October 1, 1994 date.

[8] Letter from Patrick M. Durack, Chief, U.S. EPA Region II Water Permits & Compliance Branch to Oliver [sic] M. Cauquil, General Manager, Puerto Rico Cryogenics Corp. (Aug. 1, 1990) ("Aug. 1, 1990 Letter").

is not composed entirely of stormwater, but consists also of groundwater, as indicated by Liquid Air's reference to "water table drainage" in its permit application. As alternative bases for requiring a permit, the Region explained that even if the moratorium did apply, Liquid Air's discharge falls within three of the exceptions contained in section 402(p)(2).[9] Aug. 1, 1990 Letter at 1. Region II further advised Liquid Air that if Liquid Air did not contact the Region within ten days to definitively withdraw its application for renewal, Region II would proceed to issue the NPDES permit based upon the application previously submitted by Liquid Air.

Liquid Air evidently did not contact the Region because on August 25, 1990, Region II issued a draft permit for Liquid Air's stormwater discharge. Liquid Air filed comments on the draft permit on September 20, 1990, again disputing the Region's conclusion that an NPDES permit can be required prior to October 1, 1994. In its comments, Liquid Air did not dispute the presence of groundwater in the stormwater discharge, but asserted that this fact should not be dispositive as Liquid Air has "undertaken to eliminate sources of groundwater infiltration into the facility stormwater system * * *."[10]

Repeating its previous determination that Liquid Air's discharge is composed of stormwater and groundwater, and thus is not entitled to the moratorium because it is not entirely composed of stormwater, the Region issued the renewed permit in final form on September 28, 1990. On November 21, 1990, Liquid Air requested an evidentiary hearing on the permit to dispute the Region's authority to issue a permit for this stormwater discharge before the October 1, 1994 moratorium expired. The request specified three factual, and six legal, issues focussing on the section 402(p) issue.[11] It did not provide any information on the status of Liquid Air's efforts to eliminate groundwater infiltration from its stormwater discharge, and instead merely challenged, as a matter of law, the Region's jurisdiction to exercise any authority over groundwater under the NPDES program.

---

[9] The exceptions cited by the Region are contained in Clean Water Act section 402(p)(2)(A), (B), and (E).

[10] Letter from Georges Delteil, General Manager, Puerto Rico Cryogenics Corp. to Laura Livingston, Chief, U.S. EPA Region II Permits Administration Branch, at 2 (Sept. 20, 1990).

[11] The evidentiary hearing request also specified two legal issues not related to the section 402(p) issue. These two legal issues are addressed in Part III of this opinion, and pertain to the permit's incorporation of a "Special Condition" contained in Puerto Rico's certification of the permit, and to the permit's incorporation of standard permit conditions.

One year later, Region II denied Liquid Air's evidentiary hearing request on November 27, 1991. The Region concluded that Liquid Air's request did not set forth material issues of fact relevant to the issuance of the permit as required by 40 C.F.R. § 124.75, and therefore an evidentiary hearing was not required. The Region also addressed each of the issues of law raised in Liquid Air's evidentiary hearing request. This appeal followed.[12]

II. *ANALYSIS*

Under the rules governing NPDES permit proceedings, there is no review as a matter of right from the denial of an evidentiary hearing request. *See In re J&L Specialty Products Corp.*, NPDES Appeal No. 92-22, at 12 (EAB, Feb. 2, 1994). Ordinarily, a petition for review of a denial of an evidentiary hearing request is not granted unless the denial of the request is clearly erroneous or involves an exercise of discretion or policy that is important and therefore should be reviewed. *Id.*; 40 C.F.R. § 124.91(a). The Agency's longstanding policy is that NPDES permits should be finally adjudicated at the Regional level, and that the power to review NPDES permit decisions should be exercised only "sparingly." *See* 44 Fed. Reg. 32,887 (June 7, 1979); *see, e.g., In re City of Hollywood Florida,* NPDES Appeal No. 92-21 at 3 n.1 (EAB, Mar. 21, 1994). The petitioner has the burden of demonstrating that review should be granted. *See, e.g., In re American Cyanamid Company,* NPDES Appeal No. 92-18 at 5 (EAB, Sept. 27, 1993).

A. Legal Issues

Evidentiary hearings are granted pursuant to 40 C.F.R. § 124.75(a)(1) to resolve "material issues of fact relevant to the issuance of the permit." Liquid Air maintains that it has been erroneously or arbitrarily and capriciously denied "a right to a hearing on * * * disputed issues of * * * law." Notice of Appeal at 5. This argument is without merit.

---

[12] Liquid Air's petition for review, which under the rules should have been filed by December 30, 1991, was not received by the Agency until January 2, 1992. This delay will be excused, however, because in the denial of the evidentiary hearing request, Region II advised Liquid Air that its petition could be filed within thirty days of *receipt* of the denial, not of *service* of the denial, as required under 40 C.F.R. § 124.91. Liquid Air complied with this advice by filing its petition for review on January 2, 1992. Where a Region provides advice contrary to the procedures for filing a petition for review, and a petitioner complies with such advice, the untimeliness of the petition will be disregarded. *In re BASF Corporation,* UIC Appeal Nos. 86-10, 86-11 (Adm'r, Oct. 3, 1989); *In re Tecroney, Inc.*, UIC Appeal No. 87-4 (Adm'r, Nov. 2, 1988).

At the time this appeal was filed, the Agency's Chief Judicial Officer held delegated authority to decide NPDES permit appeals. Subsequently, effective March 1, 1992, the position of Judicial Officer was abolished, and all cases pending before the Chief Judicial Officer, including this case, were transferred to the Environmental Appeals Board. *See* 57 Fed. Reg. 5321 (Feb. 13, 1992).

Although legal issues may be raised in an evidentiary hearing request, "they cannot themselves provide a basis for an evidentiary hearing, a procedure reserved for factual issues." *In re Town of Seabrook, N.H.*, NPDES Appeal Nos. 93-2, 93-3, at 13 (EAB, Sept. 28, 1993). Although legal questions related to factual issues for which an evidentiary hearing has been granted may be addressed in the course of an evidentiary hearing, *In re 446 Alaska Placer Miners*, NPDES Appeal No. 84-13 (CJO, Apr. 2, 1985), that situation does not apply here, since no evidentiary hearing on factual issues has been granted.

Where there is no evidentiary hearing, legal issues that were raised in the request for an evidentiary hearing can nevertheless be reviewed on appeal from the denial of the request, 40 C.F.R. § 124.74(b)(1)(note), provided the petitioner demonstrates that the legal issues merit review under the standards noted previously. On appeal, Liquid Air seeks review of the questions of law that are chiefly intended to determine the applicability of one or more of the statutory exceptions to the moratorium for stormwater discharges.[13] Because the Region determined that Liquid Air's discharge is not a qualifying stormwater discharge in the first instance, and because Liquid Air has not persuaded

---

[13] With respect to whether Liquid Air's discharge is subject to the permitting moratorium, the evidentiary hearing request specifically raised the following six questions, characterizing them as questions of law:

> 1. Whether the present stormwater discharge from Requestor's facility has heretofore been the subject of a lawfully issued NPDES permit.
>
> 2. Whether the discharge of groundwater, resulting from an elevated water table, is subject to regulation under the NPDES system.
>
> 3. Whether the stormwater presently discharged from Requestor's facility is "associated with industrial activity."
>
> 4. Whether the stormwater presently discharged from Requestor's facility contributes to a violation of a water quality standard.
>
> 5. Whether there is as a matter of law substantial evidence to conclude that the present stormwater discharge from Requestor's facility from time to time represents "a significant contribution of pollutants to waters of the United States."
>
> * * * * * * *
>
> 7. Whether the recently promulgated stormwater regulations set forth at 40 C.F.R. §124.26, *et seq.*, supersede and nullify administrative determinations heretofore made by EPA Region 2 regarding Requestor's NPDES permit.

Request for Evidentiary Hearing at 2-3.

us that the Region erred in making that determination, there is no need to address the statutory exceptions to the moratorium. Accordingly, we conclude that none of the six legal issues identified by Liquid Air warrant review. Our more specific reasons follow.

The permitting moratorium in section 402(p)(1) provides that "[p]rior to October 1, 199[4], the Administrator * * * shall not require a permit under this section for *discharges composed entirely of stormwater.*" 33 U.S.C. § 1342(p) (emphasis added). Thus, under the plain terms of the statute, the permitting moratorium applies only to discharges that are composed *entirely* of stormwater. As explained in the legislative history of section 402(p):

> Before October 1, 199[4], relief from the permit requirement is afforded *only* to discharges composed *entirely* of stormwater. Storm sewers that discharge *any* other type of effluent or into which pollutants are introduced by means other than incidental to stormwater runoff are required to obtain a permit.

H.R. Conf. Rep. No. 1004, 99th Cong., 2d Sess. 158 (Oct. 15, 1986) (emphasis added).

The Region concluded that Liquid Air's sole discharge is not subject to the permitting moratorium because it is not composed entirely of stormwater. Liquid Air's permit application indicates that the discharge consists of "facility stormwater and water table drainage," in other words, stormwater and groundwater. The Agency, in defining "stormwater" in 40 C.F.R § 122.26(b)(13),[14] specifically decided not to include groundwater infiltration in the definition of stormwater. 55

[14] This regulation defines "stormwater" as "storm water runoff, snow melt runoff, and surface runoff and drainage." This definition is contained in the regulations adopted on November 16, 1990, just prior to Liquid Air's evidentiary hearing request in this matter. *See* 55 Fed. Reg. 47,990 (Nov. 16, 1990). On appeal, Liquid Air contends that these regulations are applicable to its permit renewal application, and that under these regulations its discharge is subject to the permitting moratorium. We agree with Liquid Air that regulations adopted before a permit decision becomes final upon the completion of administrative review should be considered when examining the issues raised on appeal. *See In re J&L Specialty Products Corporation*, NPDES Appeal No. 92-22, at 42 (EAB, Feb. 2, 1994) (remanding permit for reconsideration in light of changed designation of water body under State water quality standard); *Ziffrin, Inc. v. U.S.*, 318 U.S. 73, 78 (1943) ("[A] change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to the existing legislation.") However, we disagree with Liquid Air's contention that under these regulations its discharge is subject to the permitting moratorium.

Fed. Reg. 47,996 (Nov. 16, 1990).[15] The Agency recognized that stormwater, as surface water runoff, differs from groundwater, which has a longer exposure to pollutants in the soil. *Id.* Therefore, the Region correctly concluded that because Liquid Air's discharge contains stormwater *and* groundwater infiltration, the discharge is not composed *entirely* of stormwater, and thus the relief afforded by the moratorium is not available for the discharge.

Liquid Air asserts for the first time on appeal that during the pendency of its request for an evidentiary hearing it eliminated the discharge of the groundwater infiltration, so that the discharge is now entirely stormwater. Notice of Appeal at 7.[16] Liquid Air had not made any such assertion in its evidentiary hearing request or in any other submissions to the Region prior to the issuance of the permit. Although Liquid Air's earlier comments on the draft permit did mention that Liquid Air was in the process of eliminating groundwater from the stormwater outfall, there is nothing in the record indicating that Liquid Air ever notified or certified to the Region that groundwater had been eliminated. Accordingly, the Region had no basis for knowing when or whether Liquid Air's efforts would meet with success. Moreover, even after the Region subsequently denied the evidentiary hearing request (12 months after the request was made and 14 months after receiving Liquid Air's comments on the draft permit), Liquid Air's appeal gives no indication that it had ever provided the Region with any confirmation of its factual contentions. Thus, it appears from the record that Liquid Air's appeal represents the first formal notice to the Region of Liquid Air's factual contention that the discharges from the stormwater outfall consist solely of stormwater.

---

[15] That portion of the Federal Register provides:

> The proposed rule included infiltration in the definition of storm water. *** Infiltration is defined at 40 CFR 35.2005(b)(20) as water other than wastewater that enters a sewer system * * * from the ground through such means as defective pipes, pipe joints, connections, or manholes. * * * In today's rule, the definition of storm water excludes infiltration since pollutants in these flows will depend on a large number of factors, including interactions with soil and past land use practices at a given site. * * * Accordingly, the final regulatory language does not include infiltration in the definition of storm water.

[16] Liquid Air makes this contention in connection with seeking review of whether the Region properly concluded that groundwater infiltration could be subject to an NPDES permit. *See* question of law number 2, *supra* note 13. Without explanation, Liquid Air seeks review of this legal issue, yet contends that the issue is moot because Liquid Air has now eliminated the groundwater infiltration.

Quite obviously this information comes too late in the process, for it did not come to the Region's attention until after it had made its final permit determination and after it had denied the evidentiary hearing request. Under the rules governing NPDES permits, it is expected that information will be submitted with the response to comments on the draft permit or in the request for an evidentiary hearing. *See generally* 40 C.F.R. §§ 124.13 and 124.74(b)(1). In these circumstances, the Region cannot be charged with any reviewable error for having issued a permit that was predicated on the discharge at Outfall 001 being composed of stormwater and groundwater. This is the factual information that the Region had at the time, and it came from Liquid Air's permit application. We are evaluating the validity of the Region's action based upon the facts available to the Region at the time it made its determination. The Region was entitled to rely upon that information. Therefore, Liquid Air is not entitled to benefit from the moratorium on permitting stormwater discharges.[17]

Our decision does not mean that Liquid Air can never ask the Region to revoke the permit because groundwater infiltration has been eliminated from the stormwater discharge. If Liquid Air wishes to press such a claim, the appropriate procedure to follow is for Liquid Air to seek a permit modification (revocation) under 40 C.F.R. § 122.62(a)(1) ("Alterations"). This procedure appears to be reasonably suited to the facts and circumstances of this case.[18] Other means of addressing the issue are either no longer available or are not as well suited to the circumstances. For example, the opportunity for Liquid Air to withdraw its application to renew its permit has passed, so that option is

---

[17] Many of the legal issues Liquid Air wants reviewed specifically pertain to whether Liquid Air's discharge comes within the exceptions to the permitting moratorium provided in section 402(p)(2). The parties have devoted most of their energies in this appeal to contesting whether Liquid Air's discharge can be permitted under the exceptions to the permitting moratorium, even though the Region cited the exceptions as alternative bases for concluding that the permitting moratorium is not applicable here. The exceptions would be implicated only in a situation where the moratorium otherwise applied, that is, in situations where the discharge was composed entirely of stormwater. As discussed above, that circumstance is not presented in this case. Because the Region did not rely solely upon any of the exceptions in issuing the permit, and instead properly concluded that Liquid Air's discharge is not composed entirely of stormwater and thereby entitled to the moratorium, the legal issues raised by Liquid Air pertaining to the applicability of exceptions to the permitting moratorium do not warrant review under 40 C.F.R. § 124.91.

[18] Title 40 C.F.R. § 122.62(a)(1) provides for either permit modification or, with the applicant's consent, permit revocation whenever there has been an "alteration [ ] * * * to a permitted facility or activity * * * which occurred after permit issuance." The quoted elements of this regulatory provision are substantially satisfied in this instance, if the facts are as Liquid Air asserts. Liquid Air is contending that it altered its facility or activities by eliminating the groundwater infiltration problem. By Liquid Air's account the alteration took place *after* the Region had issued its final permit determination for the facility. The only potential point of debate is whether the permit itself was actually

Continued

no longer available. Also, in our judgment, a remand of this issue to the Region for further fact finding would not be appropriate. The ultimate purpose of such a remand would be to determine whether Liquid Air is correct in contending that it is not required to have a permit; yet, such a contention is conceptually at odds with Liquid Air having applied for the permit in the first instance. The procedural regulations under which Liquid Air has made its application for a renewed NPDES permit are, as one would expect, intended to facilitate the issuance of permits to those who apply for them. The regulations tacitly assume that the person applying for the permit wants a permit, whereas in this instance Liquid Air is applying for a permit that it contends is not needed.[19] Under these circumstances, it is our position that the onus is on Liquid Air to establish its case in a manner that respects the fundamental permit-issuing goals of the procedures. Thus, we will not remand the permit to accomplish a purpose inconsistent with those goals. The permit modification (revocation) procedure referred to above is more suited to the situation now confronting Liquid Air.

B. Factual Issues

Under 40 C.F.R. § 124.75(a)(1), the Regional Administrator must grant an evidentiary hearing request that "sets forth material issues of fact relevant to the issuance of the permit." An issue of fact is material for the purposes of § 124.75(a)(1) if it might affect the outcome of the proceeding. *J&L Specialty Products, supra*, at 13 (*citing In re Mayaguez Regional Sewage Treatment Plant*, NPDES Appeal No. 92-23, at 12-13 (EAB, Aug. 23, 1993)). Liquid Air's evidentiary hearing request fails to meet this requirement, and therefore Liquid Air has failed to demonstrate that the Region clearly erred in denying its evidentiary hearing request.

---

issued at that time, since the filing of the petition for review operated to stay the effectiveness of the permit temporarily, 40 C.F.R §§ 124.15(b)(2) and 124.16. Nevertheless, that fact should not bar Liquid Air from invoking the modification (revocation) regulation. Any concerns in this instance over the availability of this regulation are strictly procedural and may be disregarded. *See American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 539 (1970) (Agency may relax procedural rules where justice so requires); *In re Genesee Power Station Limited Partnership*, PSD Appeal Nos. 93-1 *et seq.* at 6 n. 6 (EAB, Oct. 22, 1993) (same). Moreover, the stay will be lifted automatically once our decision denying review of this aspect of the Region's permit determination is issued. Thus, for purposes of making 40 C.F.R. §122.62(a)(1) available, Liquid Air's alteration will be deemed to have taken place after the permit was issued. We, of course, express no opinion as to the whether the alteration actually eliminated the groundwater infiltration from the stormwater discharge. Also, as a separate matter, we note that recourse to 40 C.F.R. § 122.62(a)(1) may have limited value due to the impending October 1, 1994 expiration of the moratorium.

[19] In effect, Liquid Air is applying for the permit *under protest.*

In setting forth material issues of fact purportedly requiring an evidentiary hearing, Liquid Air's evidentiary hearing request reads:

> III. *QUESTIONS OF FACT*
>
> Requestor submits that the following facts are in dispute and were any decided in favor of Requestor, the proposed NPDES permit would have to be withdrawn by EPA Region 2:
>
> > a. Whether the stormwater presently discharged from Requestor's facility contains pollutants and contaminants associated with industrial activity.
> >
> > b. Whether the stormwater presently discharged from Requestor's facility is directly related to manufacturing, processing or raw materials storage areas at an industrial plant.
> >
> > c. Whether there is contained within the stormwater presently discharged from Requestor's facility significant amounts of pollutants.

Request for Evidentiary Hearing at 8. Each of the three factual questions pertains to whether Liquid Air's stormwater discharge falls within two of the exceptions to the permitting moratorium that the Region provided as alternative bases for issuing the permit.[20] We conclude that these alleged factual issues are not material to the issuance of the permit. For the reasons set forth above, the Region appropriately relied upon another basis for issuing the permit, namely, that based upon the facts known to the Region when it issued the permit as well as when it subsequently denied the evidentiary hearing request, Liquid Air's discharge is not encompassed by the permitting moratorium provided in Clean Water Act section 402(p)(1). Where, as here, the moratorium does not apply to the stormwater discharge, it is not necessary to examine whether the discharge is within any exceptions to the moratorium, and therefore, any factual questions relating to the applicability of the exceptions are not material to the issuance of the permit.

---

[20] The first two questions of fact pertain to whether the stormwater discharge is associated with industrial activity under Clean Water Act section 402(p)(2)(B), and the third question of fact pertains to whether the discharge is a significant contributor of pollutants to waters of the United States under section 402(p)(2)(E).

III. *OTHER ISSUES*

A. Special Condition 17

Pursuant to section 401 of the Clean Water Act, 33 U.S.C. § 1341,[21] the Puerto Rico Environmental Quality Board ("EQB") issued a water quality certification ("WQC") indicating that Liquid Air's proposed discharge, as represented in the permit renewal application, will not violate Puerto Rico's water quality standards if the effluent limitations contained in Table A-1 of the certification are met. In addition to effluent limitations, Table A-1 also contains monitoring requirements necessary to establish compliance with the effluent limitations. The WQC also contained a section entitled "Special Conditions." Although the certification contained twenty "Special Conditions," only one, Special Condition 17, is at issue here, as follows:

No monitoring by the permittee will be required for discharge 001 (Table A-1) if (1) within thirty (30) days after the effective date of the NPDES permit, the petitioner submits, for EQB approval, a Best Management Practices Plan (BMPP) for the control of pollutants in the storm water runoff and (2) within thirty (30) days after the date of approval of the BMPP, the petitioner should implement such plan. Failure to implement and comply with the BMPP shall submit the permittee to compliance with the requirements established in Table A-1 and in special conditions 18 and 19.

Special Condition 17 was not included in the draft permit, but was incorporated into the final permit pursuant to Liquid Air's request. *See* Comments at 4-5.[22]

---

[21] This statute provides, in pertinent part:

> Any applicant 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 applicable provisions of sections 1311, 1312, 1313, 1316, and 1317 of this title. * * * No * * * permit shall be granted until the certification required by this section has been obtained or has been waived * * *.

33 U.S.C. § 1341(a)(1). Puerto Rico is treated as a State for the purposes of this provision. 33 U.S.C. § 1362(3).

[22] The main thrust of Liquid Air's comments on the draft permit was that a permit could not be required for this stormwater discharge under the moratorium provided in Clean Water Act section 402(p). As an alternative, however, Liquid Air commented that it would "be willing to accept permit issuance at this time provided that EPA and EQB confirm that Special Condition 17 in the Water Quality Certificate issued on February 1, 1989, shall apply." Comments at 4-5.

The portion of the final permit reflecting Special Condition 17 is set forth below, highlighted with the Region's modifications thereto:

> The monitoring requirements *for the water quality based limits included in Table A-1 of the WQC* for discharges 001, may be deleted from the WQC, upon permittee's request if (1) within thirty (30) days after the effective date of the NPDES Permit, the petitioner submits, for EQB approval a Best Management Practices Plan (BMPP) for the control of pollutants in stormwater runoff and (2) within thirty (30) days after the date of the approval of the BMPP, the petitioner should implement such plan. Failure to implement and comply with the BMPP shall submit the permittee to compliance with the WQC requirements established in Table A-1 and in special conditions 12 and 13.
>
> Nevertheless, after EQB's modification of the WQC, in order to pursue any reduction in the requirements of the NPDES permit, the permittee must request modification from EPA. Since EPA could choose to impose discharge limitations based upon Best Professional Judgement, deletion of requirements by EQB would not necessarily result in a decision by EPA to delete all stormwater requirements.

Permit at 7 (emphasis added).

On appeal, Liquid Air contends that the final permit arbitrarily and capriciously places additional administrative burdens upon Liquid Air in contravention of Puerto Rico's right to determine what measures are necessary to protect its water quality standards. Liquid Air asserts that as contained in the WQC, Special Condition 17 is self-executing, and that if Puerto Rico approves Liquid Air's BMPP and Liquid Air implements the BMPP, Special Condition 17 expressly provides that no monitoring will be required.[23] According to Liquid Air, Region II has added two more contingencies that must be met before monitoring will not be required: first, that Liquid Air obtain a modification of the WQC from Puerto Rico, and second, that Liquid Air then obtain a permit modification from Region II. In Liquid Air's view, these permit conditions are arbitrary and capricious because they are not contained in the WQC.

---

[23] In its petition for review, Liquid Air notes that since the issuance of the permit it has prepared and implemented an EQB approved BMPP. Notice of Appeal at 12.

In response, the Region explains that it added clarifying language to Special Condition 17 when it incorporated that provision into the final permit "to inform the permittee that this Special Condition should not be interpreted to mean that EQB's approval of, and [Liquid Air's] implementation of, a BMPP would in and of itself constitute a permit modification." Response to Petition at 6. Further, the Region added, "because the NPDES program is not delegated to the Commonwealth of Puerto Rico, the proper procedure is for EPA, and not EQB, to grant or issue a permit modification relieving [Liquid Air] of a reporting requirement." *Id.*

The Region's analysis is faulty. The Region has turned a self-executing provision in the WQC to a non-self-executing condition in the permit. In attempting to justify this deviation from the WQC, the Region has framed the debate in terms of who has the authority to amend the NPDES permit—EPA or EQB. This argument, however, misses the mark. As Liquid Air points out, it is clear that the Region, in its discretion, could have made Special Condition 17 a separate and self-executing provision of the permit. Little or no modification to Special Condition 17 would be required to achieve that result. The Region's discussion of who has the authority to amend the permit fails to address why the self-executing component of Special Condition 17 was eliminated in the first instance, and why such a change from the terms of the WQC should be upheld here. Consequently, we have no basis for upholding the Region's decision to modify Special Condition 17. Therefore, we are remanding this portion of the permit to the Region for it to either incorporate Special Condition 17 into the permit as it appears in the WQC, or provide another basis for changing the self-executing nature of Special Condition 17.[24]

---

[24] We do not intend to express any opinion as to whether another basis for the Region's decision exists, but merely point out that we are unpersuaded by the basis the Region did provide. In this connection, we note that the focus on whether the Region properly incorporated Special Condition 17 into the permit may be unduly narrow. The Region also has the authority to require monitoring under Clean Water Act Section 308(a), 33 U.S.C. § 1318(a). This section, in pertinent part, provides:

> Whenever required to carry out the objective of this chapter, including but not limited to (1) developing * * * any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; * * * or (4) carrying out sections * * * 1342 * * * of this title:
>
> > (A) the Administrator shall require the owner or operator of any point source to * * * (iii) install, use, and
>
> Continued

B. Standard Permit Conditions

On appeal, Liquid Air contends that the final permit erroneously and arbitrarily or capriciously contains "twenty-nine pages of standard terms and conditions set forth in the permit which have been historically prepared for and applied to high volume and pollutant loaded industrial wastewater discharges," and therefore are not applicable to stormwater discharges. Notice of Appeal at 14. The focus of Liquid Air's objection is not entirely clear from this language. The entire permit is twenty-nine pages in length, so perhaps Liquid Air is asserting that the entire permit is unwarranted because the discharge is of stormwater and not industrial wastewater. If this is the true nature of Liquid Air's objection, it is without merit. As explained above, Liquid Air has not shown that the Region was without a legal basis for issuing the permit for this stormwater discharge. An NPDES permit regulating stormwater may parallel, and in some ways duplicate, an NPDES permit regulating industrial wastewater, because the goal of both permits is the same—to assure that the discharge complies with the Clean Water Act.[25]

> maintain such monitoring equipment or methods (including, where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, as such intervals, and in such manner as the Administrator shall prescribe) * * *.

Pursuant to section 308(a), the Region can also require monitoring by order. As explained in *In re Simpson Paper Company*, NPDES Appeal No. 87-14, at 14 (CJO, Mar. 26, 1991) (citations omitted):

> Section 308(a) is an information gathering tool that is not oriented exclusively toward permittees: it applies to any owner or operator of a point source, without reference to whether such person has a permit. The Agency may issue orders pursuant to CWA §308(a) to aid enforcement, to develop permit limitations and effluent standards, and to generate whatever information it needs to carry out its statutory responsibilities. * * * The authority conferred by the section may be exercised by the Agency at any time, and the lawfulness of orders issued pursuant thereto is subject only to a reasonableness standard.

In analyzing the permit's monitoring requirements, the parties have focussed exclusively on the WQC, and have not at all addressed section 308(a).

[25] The regulations detailing the required contents of NPDES permits apply to *all* NPDES permits, that is, permits for industrial discharges and permits for stormwater discharges. *See* 40 C.F.R. § 122.41 (standard permit conditions "apply to *all* NPDES permits") (emphasis added); 40 C.F.R. § 122.44 ("*[E]ach* NPDES permit shall include conditions meeting the following requirements when applicable") (emphasis added).

The Region interpreted Liquid Air's objection as a challenge to the inclusion of "standard" terms in the permit.[26] Assuming that Liquid Air intended to challenge the standard conditions that are set forth in the permit, we agree with the Region that this issue was not raised during the public comment period as required by 40 C.F.R. § 124.76, and good cause has not been demonstrated for the failure to raise it at that time. Accordingly, this issue cannot be raised for the first time in this petition for review. *Town of Seabrook, supra*, at 7.

Liquid Air argues that it did raise this issue during the public comment period, referring to that portion of its comments in which it proposed two alternatives to issuing the draft permit: undertaking a stormwater monitoring program for six months and then submitting a new stormwater discharge permit application under the newly promulgated regulations, or operating under the proposed permit provided the permit contains Special Condition 17. We agree with the Region that these proposed alternatives to issuing the permit do not in any way encompass an objection to the standard permit conditions contained in the draft permit.

IV. *CONCLUSION*

For the reasons set forth above, we conclude that the Regional Administrator did not clearly err in denying Liquid Air's request for an evidentiary hearing. The permit condition incorporating Special Condition 17 of the WQC is remanded to the Region for further action consistent with this opinion. Review of all other legal issues raised in the petition for review is hereby denied. Final Agency action for all issues concerning this permit shall occur upon completion of the administrative appeals process to the Board from the remanded proceeding. 40 C.F.R. § 124.91(f)(3).

So ordered.

---

[26] *See* Denial of Evidentiary Hearing Request at 7-8. Liquid Air's evidentiary hearing request challenged the conditions contained in Sections I.B and II of the permit. Section I.B of the permit is entitled "Monitoring and Reporting Requirements," and contains the protocols for conducting the monitoring required under Section I.A of the permit, and reporting the results. Section II of the permit contains "Definitions" and "General Conditions," including conditions pertaining to the duty to comply, the duty to reapply, the duty to mitigate, proper operation and maintenance, modification/revocation and reissuance, the duty to provide information, inspection and entry, signatory requirements, reporting requirements, bypasses, and upsets.