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

In re: Portland Water District Docket No. ME0102121	NPDES Appeal No. 95-10

ORDER DENYING REVIEW

In a one-page petition dated December 5, 1995, the Portland Water District ("Portland") seeks review of the denial of an evidentiary hearing request on an issue relating to a National Pollutant Discharge Elimination System ("NPDES") permit[1] issued by U.S. EPA Region I for Portland's Cape Elizabeth Wastewater Treatment Facility in Cape Elizabeth, Maine. Notice of Appeal on Petition for Review ("Petition"). The Petition states, in pertinent part, as follows:

> The Portland Water District has contested the provisions of the permit relating to total residual chlorine limits. In its decision, the Regional Director denied the request for evidentiary hearing on the ground that the contested permit condition was the result of state certification pursuant to [40 C.F.R.] Section 124.53. However, the state certification does

[1] Under the Clean Water Act ("CWA"), discharges into waters of the United States by point sources such as Portland's wastewater treatment facility must be authorized by a permit in order to be lawful. 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. 33 U.S.C. § 1342.

> not comply with the provisions of [40] C.F.R. [§] 124.53(e). Because the contested permit condition has not been validly certified, the Regional Director committed an error of law in denying the request for evidentiary hearing.

Petition at 1.

As requested by the Board, the Region filed a response dated January 24, 1996. Respondent's Memorandum in Opposition to Petition for Review ("Response"). Because we conclude that the disputed permit condition is attributable to State certification, review is denied.

I. *BACKGROUND*

In July 1995, the Region prepared a draft NPDES permit for Portland's facility. In pertinent part, the draft permit stated that the total residual chlorine ("TRC") limits were to be set at 0.22 milligrams per liter ("mg/l").[2] Thereafter, the Region submitted its draft permit to the Maine Department of Environmental Protection ("ME DEP") and, in response, received a letter of certification dated August 15, 1995 ("State Certification"). The State Certification stated that the permit would comply with sections 208(e), 301, 302, 303, 306, and 307 of the CWA, that Portland's discharges would not lower the receiving water quality below the minimum levels, and that the permit effluent limits would satisfy the requirements of Maine law

[2]The relevant part of the draft permit required Portland to meet both average monthly and maximum daily discharge limits of 0.22 mg/l. Draft Permit at 2.

subject to two modifications.[3] In relevant part, the State Certification stated that "[t]otal residual chlorine average monthly and maximum daily limits should be 0.23 mg/L, as determined by the Department's Division of Environmental Assessment personnel." State Certification at 1. In addition, the State Certification stated that "[a]ny change to the terms or conditions of the draft permit is not certified by this document, and will require a case-by-case determination by the State that the changed conditions will continue to satisfy the appropriate requirement of Maine law." *Id.* The Region issued the final permit on September 19, 1995, including monthly average and maximum daily TRC limits of 0.23 mg/l.

Thereafter, in its request for evidentiary hearing, Portland stated that it wanted to know specifically: (1) whether the "Cormix" model was utilized appropriately in determining the TRC limits; (2) whether EPA assumed accurate ambient and discharge parameters in running the model; and (3) whether the permit should have included a compliance schedule for the TRC limits. Request for Evidentiary Hearing at 1-2 (Oct. 20, 1995). The Regional Administrator denied Portland's request stating that pursuant to 40 C.F.R. § 124.55(e), the Region did not have the

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[3] Additionally, the letter stated that the monthly average flow limits needed to be changed "from 0.52 MGD to 0.499 MGD" in order to coincide with Portland's pending State license. Furthermore, the measurement frequency for biochemical oxygen demand, total suspended solids, and fecal coliform bacteria for the decreased flow limit was to be set at once per week.

authority to review decisions "attributable to State certification" and that review of the TRC limits must be made in state court.[4] Denial of Request for Evidentiary Hearing at 1. Thus, there was no material factual issue in dispute warranting an evidentiary hearing.[5]

In its petition for review, Portland objects to the denial of its evidentiary hearing request relating to the permit's TRC limits. As previously stated, Portland contends that the State's certification was invalid because it did "not comply with the provisions of [40] C.F.R. § 124.53(e)." Thus, according to Portland, the Region's reliance on the certification in denying the evidentiary hearing request was erroneous. Petition at 1.

II. *DISCUSSION*

Under the rules governing an NPDES proceeding, there is no appeal as of right from the Regional Administrator's denial of an evidentiary hearing request. *In re Broward County, Florida*, NPDES Appeal No. 95-7, slip op., at 9-10, 6 E.A.D. ___ (EAB, Aug. 27, 1996). Ordinarily, a petition for review is denied unless

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[4]With respect to the compliance schedule issue, the Regional Administrator acknowledged that Portland may have difficulty complying with the permit's TRC limits and offered to develop an administrative order that "would establish an expeditious schedule for achieving compliance." Denial of Request for Evidentiary Hearing at 2.

[5]*See In re Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 780 (EAB 1993) (stating that a party requesting an evidentiary hearing must raise a genuine issue of material fact), *aff'd sub nom. Puerto Rico Aqueduct and Sewer Auth. v. U.S. EPA*, 35 F.3d 600 (1st Cir. 1994).

the Regional Administrator's decision to deny a hearing was clearly erroneous or involved an exercise of discretion or policy that is important, thereby warranting review by the Environmental Appeals Board. *Id.* The Agency's long-standing policy is that NPDES permits should be finally adjudicated at the Regional level, and that the power to review NPDES permit decisions should only be exercised "sparingly." *Id.* The petitioner has the burden of demonstrating that review should be granted. *Id.*; 40 C.F.R. § 124.91(a).

The sole issue here is whether the Region's denial of Portland's evidentiary hearing request was properly based on the Region's finding that the contested permit limits were attributable to State certification.[6]

Section 401 of the CWA[7] authorizes States to certify that any effluent limits and monitoring requirements in an NPDES permit will comply with the applicable provisions of the CWA and with any appropriate State requirements set forth in such certification. Any such limits or requirements certified by the

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[6]The Region has argued that Portland waived its right to challenge the adequacy of the State's Certification because it failed to raise this issue in its evidentiary hearing request. Response at 5. Because we conclude that the disputed conditions are, in any event, attributable to State certification, we do not reach this issue. *See In re General Electric Co., Hooksett, New Hampshire*, 4 E.A.D. 468, 473 n.7 (EAB 1993).

[7]33 U.S.C. § 1341.

State then become "attributable to State certification." 40 C.F.R. § 124.55(e). As the Board has previously stated:

> Challenges to permit limitations and conditions attributable to State certification will not be considered by the Agency. Rather, such challenges must be made through applicable State procedures. *See* 40 C.F.R. § 124.55(e). It is well established that the Agency may not "look behind" a State certification issued pursuant to section 401 of the Clean Water Act, 33 U.S.C.A. § 1341, for the purpose of relaxing a requirement of that certification.

General Electric, 4 E.A.D. at 470 (citations omitted).

Upon consideration, we agree with the Regional Administrator that the permit's TRC limits and immediate compliance date were attributable to State certification and the evidentiary hearing request was therefore properly denied. In its certification letter, ME DEP made clear that certification was conditioned on the TRC limits being set at 0.23 mg/l. The draft permit required compliance immediately, *i.e.*, it did not include a compliance schedule. The certification emphasized that "[a]ny change in the terms or conditions [of the permit] * * * is not certified by this document." State Certification at 1. Although ME DEP did not expressly state that the TRC limits were necessary or that they could not be made less stringent, this Board is confident, based on the above-quoted language from the State Certification, that those were ME DEP's intentions. *See General Electric*, 4 E.A.D. at 471-72. Thus, we reject Portland's contention that the

requirements of 40 C.F.R. § 124.53(e) have not been satisfied.[8] The certification satisfies both 40 C.F.R. § 124.53(e)(1) and (3). 40 C.F.R. § 124.53(e)(2) is not applicable because the State Certification had the effect of making the permit less stringent not more stringent. *See General Electric*, 4 E.A.D. at 471 n.4.

III. *CONCLUSION*

Because the permit's TRC limits are "attributable to State certification" within the meaning of 40 C.F.R. § 124.55(e), it may not be reviewed in this forum. Review is therefore denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 2/11/97

By: /s/
Kathie A. Stein
Environmental Appeals Judge

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[8]We note that Portland's petition does not identify any specific flaws in the State Certification and therefore lacks the degree of specificity generally required to support a petition for review. *See In re Broward County, Florida*, 4 E.A.D. 705, 709 (EAB 1993). Because we conclude, however, that the State Certification satisfies the requirements of 40 C.F.R. § 124.53(e), we need not rule on this issue.