IN RE CITY OF PHOENIX, ARIZONA SQUAW PEAK AND DEER VALLEY WATER TREATMENT PLANTS

NPDES Appeal No. 99-2

ORDER DENYING REVIEW

Decided November 1, 2000

Syllabus

The City of Phoenix ("City" or "Petitioner") appeals a decision of the U.S. Environmental Protection Agency Region IX ("Region" or "Respondent") denying the City's request for evidentiary hearings on two National Pollutant Discharge Elimination System ("NPDES") final permit decisions issued by the Region. One permit decision covers the Squaw Peak Water Treatment Plant ("WTP") and the other the Deer Valley WTP. The Squaw Peak and Deer Valley NPDES permits would authorize discharges of treated presedimentation basin blowdown, final sedimentation basin blowdown, and filter waste washwater from the WTPs into the Arizona Canal operated by the Salt River Project, a water and electric utility providing services in several counties in central Arizona.

Petitioner asserts that it is entitled to an evidentiary hearing in this case because the administrative record contains comments on the contested permit provisions, made by the City and others, even though those comments were not made during the public comment period. The Region contends that it is requisite that those comments be made during the public comment period to serve as the basis for an evidentiary hearing request. The comments in question were made prior to the public comment period and on preliminary versions of the NPDES permits; however, those comments were not raised with respect to the draft permits proposed for public comment. Because neither the Petitioner nor others submitted those comments during the public comment period on the contested permit provisions in the draft permits, the Region argues that it appropriately denied the Petitioner's requests.

Held: Petitioner failed to raise the issues it currently asserts during the public comment period, as required by 40 C.F.R. § 124.13. As these issues were not properly raised at that time, and no good cause exists for the failure to raise these issues, they cannot form the basis of an appeal of the Region's decision to deny the earlier requests for an evidentiary hearing. Moreover, 40 C.F.R. § 124.76 does not require a different result.

Issues must be raised during the public comment period before an evidentiary hearing request will be granted. Petitioner's position would require a permit issuer, before finalizing a draft permit, to search through the administrative record for comments submitted by anyone at any time, even on drafts that were never proposed for public comment, and to determine whether any of the comments called for a revision of the draft permit's terms. In this case, where the administrative record is spread over a number of years, and is com-

prised of several permit iterations, many of which were never proposed for public comment, the task would necessarily involve a time-consuming and exhausting search of the administrative record, just to assure that all potential comments had been identified. It would further require the permit issuer to divine, by means unknown, whether or not the comments were still being preserved for consideration or whether they had been resolved or abandoned by the commenter. The folly of such an enterprise is manifest. The practical effect of Petitioner's approach would more likely be to catch the permit issuer off guard than to alert the permit issuer to issues legitimately pertaining to the most recent draft permit.

Comments submitted by the Cities of Tempe and Chandler during the comment period did not preserve the contested issues for an evidentiary hearing request. The joint comments of the Cities of Tempe and Chandler entitled "Val Vista WTP Permit Comments," did not concern the Squaw Peak and Deer Valley WTP permits, nor did the comments mention the Squaw Peak and Deer Valley permits.

Good cause does not exist to grant an evidentiary hearing in this case. The issues sought to be raised outside of the public comment period by Petitioner were reasonably ascertainable before the close of the comment period.

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

Opinion of the Board by Judge McCallum:

The City of Phoenix ("City" or "Petitioner") appeals a December 21, 1998 decision of the U.S. Environmental Protection Agency Region IX ("Region" or "Respondent") denying the City's request for evidentiary hearings on two National Pollutant Discharge Elimination System[1] ("NPDES") final permit decisions issued by the Region. One permit decision covers the Squaw Peak Water Treatment Plant ("WTP") and the other the Deer Valley WTP. *See* Notice of Appeal and Petition for Review by City of Phoenix, Arizona ("Petition"). The Squaw Peak and Deer Valley NPDES permits would authorize discharges of treated pre-sedimentation basin blowdown, final sedimentation basin blowdown, and filter waste washwater from the WTPs into the Arizona Canal operated by the Salt River Project ("SRP"), a water and electric utility providing services in several counties in central Arizona. *See* Petition Exhibit ("Ex.") 1 and Ex. 2 (NPDES Permit Nos. AZ0023434, AZ0023426).[2]

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[1] Under the Clean Water Act ("CWA"), discharges into waters of the United States by point sources must have a permit in order to be lawful. CWA § 301, 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System is the principal permitting program under the CWA. CWA § 402, 33 U.S.C. § 1342.

[2] Under 40 C.F.R. § 124.91, within 30 days of the denial of a request for an evidentiary hearing, any requestor may appeal any matter set forth in the denial by filing a notice of appeal and petition for review with the Environmental Appeals Board. Petitioner filed separate, but virtually identical,

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On March 19, 1999, at the request of the Environmental Appeals Board ("Board"), the Region filed a response to the petition for review. *See* Response to Petition for Review of Denial of Request for Evidentiary Hearing ("Region's Response"). Petitioner filed a reply to the Region's Response on April 13, 1999. *See* Petitioner's Reply Brief in Support of Petition for Review by City of Phoenix, Arizona ("Reply").

The crux of the Petitioner's position is that it is entitled to an evidentiary hearing in this case because the administrative record contains comments on the contested permit provisions, made by the City and others, even though those comments were not made during the public comment period. The Region contends that it is requisite that those comments be made during the public comment period to serve as the basis for an evidentiary hearing request. Because neither the Petitioner nor others submitted those comments during the public comment period on the contested permit provisions, the Region argues that it appropriately denied the Petitioner's requests. For the reasons set forth below in Part II, review is denied.

I. *BACKGROUND*

The Squaw Peak and Deer Valley WTPs, with capacities of 140 and 150 million gallons per day, respectively, produce potable water for over 450,000 residents of Phoenix. Petition at 5. The WTPs draw raw water from the Arizona Canal which they purify, in part, by removing total suspended solids ("TSS"), before distributing it to the City as potable and firefighting water. *Id.* at 6. The solids, a combination of naturally occurring materials and alum residue from the purification process, are removed from the water by the WTPs and are discharged

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evidentiary hearing requests with the Region for the Squaw Peak and Deer Valley NPDES permits. *See* Petition Exs. 3, 4.

On May 15, 2000, the U.S. Environmental Protection Agency published "Amendments to Streamline the [NPDES] Program Regulations: Round Two," which became effective June 14, 2000. 65 Fed. Reg. 30,886 (2000). The streamlining regulations "eliminated the previous requirement for NPDES permits to undergo evidentiary hearing after permit issuance * * * ." *Id.* at 30,911 (to be codified at 40 C.F.R. § 124.21(b)). The streamlining regulations contemplate a transition from the previous hearing requirements to the new streamlined regulations. For pending cases, like this one, where:

> a request for evidentiary hearing was denied on or prior to June 13, 2000, but for which the Board has not yet completed proceedings under § 124.91, the appeal, and any hearing or other proceedings on remand if the Board so orders, shall proceed pursuant to the procedures of this part as in effect on June 13, 2000.

Id. (to be codified at 40 C.F.R. § 124.21(c)(2)). Since the procedures in effect on June 13, 2000, are the pre-streamlined procedures, section 124.91, which was still in effect on June 13, 2000, applies in this case.

back into the Arizona Canal. *Id.* The solids discharged into the canal may also contain *cryptosporidium*, a microbiological organism that can be fatal to humans, especially those with impaired immune systems.[3] *See* Region's Response at 4.

The procedural history preceding these permits is quite protracted but is integral to Petitioner's arguments on appeal. We recount it here chiefly to underscore the extensive informal exchanges of documents and information that occurred between the Petitioner and the Region prior to the formal solicitation of comments by the Region from the Petitioner and the other interested persons on the particular draft permits that, as proposed by the Region, eventually culminated in the final permit decisions currently under consideration.

In 1989, EPA became aware of the discharges into the Arizona Canal and required the City to submit NPDES permit applications. *Id.* The City began negotiations with the Region concerning four WTPs — Squaw Peak, Deer Valley, Val Vista, and Verde. The City submitted the initial permit applications on November 3, 1989, but shortly thereafter withdrew the permit application for Verde. Petition Ex. 7. On May 21, 1990, the Region released unsigned drafts of the proposed permits for the Squaw Peak and Deer Valley WTPs stamped "DRAFT — FOR REVIEW AND DISCUSSION." *See* Petition Ex.9. (We presume that the Region also released a May 1990 draft of the Val Vista WTP permit to the City for review.)[4] The City provided written comments objecting to the TSS effluent limits[5] in the Deer Valley and Squaw Peak draft documents on December 4, 1990. Petition Exs. 9 - 10. In response to the City's stated concerns, the Region withdrew the drafts from further consideration, and provided the City with an opportunity to conduct studies of the best conventional pollutant control technology ("BCT Study")[6] for the effluent discharges, the first of which was completed in February

[3] The City's amended best conventional pollutant control technology ("BCT") study entitled "*Cryptosporidium and Nonconventional Parameter Studies on Salt River Project Canals*" concluded "that there is no statistically significant increase in Cryptosporidium in SRP canals downstream of WTP discharges." *See* Petition Ex. 6, "*Fact Sheet — Deer Valley Water Treatment Plant*" at 6 (undated).

[4] While the City submitted preliminary NPDES applications for all four WTPs on November 3, 1989, *see* Petition Ex. 7, and it subsequently withdrew the application for the Verde WTP, *see* Petition at 7, the record before us does not contain any May 1990 draft of a Val Vista WTP permit. Nonetheless, the City's March 15, 1994 amended permit application cover letter does indicate that the amended application was for the Deer Valley, Squaw Peak, and Val Vista WTPs. *See* Petition Ex. 11.

[5] For purposes of this appeal we need only focus on the background regarding the TSS effluent limits issue raised in this document. The City raised other issues in its December 4, 1990 comments that are not relevant to the resolution of this case.

[6] Best conventional pollutant control technology requirements include consideration of:

(i) The reasonableness of the relationship between the costs of attaining a reduction in effluent and the effluent reduction benefits derived;

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1994.

On March 15, 1994, the City submitted amended permit applications for the three WTPs. *See* Petition Ex. 11. The Region prepared so-called "initial draft" permits for the City's review on June 27, 1996. Petition Ex. 12. The Region proposed a technology-based effluent limit for each WTP of 85% removal of plant intake of TSS. *Id.* at 1. The City responded by letters dated July 29, 1996, and October 14, 1996, expressing "serious concerns over the limit for [TSS] and with the Best Management Practices (BMPs)[7] as proposed in the draft." Petition Ex. 13, at 1.

On March 14, 1997, the Region, after deciding to address the Val Vista WTP separately,[8] prepared what it termed "revised draft permits" for the Squaw

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(ii) The comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources;
(iii) The age of equipment and facilities involved;
(iv) The process employed;
(v) The engineering aspects of the application of various types of control techniques;
(vi) Process changes; and
(vii) Non-water quality environmental impact (including energy requirements).

40 C.F.R. § 125.3(d)(2).

The study showed that BCT was not cost-effective and that the best practicable control technology currently available was 85% removal of TSS as a monthly average for both WTPs. *See* Region's Response at 4; Response Ex. 4.

[7] Best management practices are defined as follows:

> [S]chedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

40 C.F.R. § 122.2.

[8] The Region also "tentatively determined" that the best practicable control technology available for the Val Vista WTP was "zero discharge," and proposed that no permit should be issued for the Val Vista WTP. *Id.* In the alternative, the Region proposed that its June 27, 1996 "previous draft of the Val Vista WTP permit which require[d] 85 percent removal of solids taken in by the WTP as a monthly average" was "an equally acceptable determination of [best practicable control technology]." *Id.*

The best practicable control technology currently available requirement mandates consideration of:

(i) The total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application;

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Peak and Deer Valley WTPs for the City's review. Petition Ex. 19. The revised draft permits contained monthly average TSS effluent discharge limits of 38.1% for the Squaw Peak WTP, and 20% for the Deer Valley WTP, measured against average monthly influent samples.[9] *Id.* In other words, the City's facilities would be required to remove at least 61.9% and 80%, respectively, of the TSS from the influent before discharging into the Arizona Canal. On April 24, 1997, the City submitted comments on the March 14, 1997 revised draft permits for the Squaw Peak and Deer Valley WTPs. It also addressed the Val Vista WTP. *See* Petition Ex. 20. The City's comments covered three issues:

> (1) the [best practicable control technology] for the Val Vista plant; (2) the appropriate method for incorporating compliance with Arizona water quality standards into all three NPDES permits; and (3) the question of whether "source water substitution" is a legally permissible or practicable best management practice ("BMPs") for inclusion in these permits.

Id. at 2.

In the meantime, the City was negotiating with the SRP on "the nature of the solids handling facilities ['SHFs'] proposed for the three water treatment plants and certain provisions of NPDES Permits for each of the facilities." Petition Ex. 21, at 1. By letter dated May 15, 1997, self-described as a joint response to the Region's March 14, 1997 letter, the City and SRP stated that they had "reached consensus" and "recommend[ed] that [the Region] incorporate [their] compromise into the final NPDES Permits * * * for the three [WTPs]." *Id.* at 4. *Id.* at 2-3. In particular, the City requested a "minimum of 85 percent retention of solids based on a monthly average" for each permit. *Id.* The City noted "this 85 percent reten-

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> (ii) The age of the equipment and facilities involved;
> (iii) The process employed;
> (iv) The engineering aspects of the application of various types of control techniques;
> (v) Process changes; and
> (vi) Non-water quality environmental impact (including energy requirements).

40 C.F.R. § 125.3(d)(1).

[9] Section A.1(a)(3) of each draft permit provides in pertinent part:

> The arithmetic mean of the total suspended solids, by weight, for effluent samples collected over a calendar month shall not exceed [38.1 per cent for Squaw Peak WTP and 20 per cent for Deer Valley WTP] of the arithmetic mean of the total suspended solids, by weight, for influent samples collected over the same period. On days when there is no discharge to the canal, effluent sampling is not required and a value of "zero" shall be used for the effluent in determining the monthly arithmetic mean.

Petition Ex. 19, at 2 (Permit Nos. AZ0023426, AZ0023434).

tion proposal is more stringent than the [61.9 and 80 percent requirements] in the draft NPDES [permits] included in your letter of March 14, 1997." *Id.* Furthermore, the City stated it would agree to BMPs similar to the BMP provisions contained in the March 14, 1997 revised draft permits, "except that Phoenix cannot agree to the provision of finished source water substitution as part of the BMPs."[10] *Id.*

On June 2, 1997, the Region faxed another set of revised draft permits to the City and other interested parties for review prior to issuance of a public notice of availability. Petition Ex. 23. The June 2, 1997 revised draft permits adopted the City's requested 85% retention of solids on a monthly average under Section A.1(3) of the permits, and eliminated the objectionable BMP provision related to finished source water substitution (Section B.1.b). *Id.*

On July 28, 1997, the Region and the Arizona Department of Environmental Quality ("ADEQ") published a Joint Notice of Proposed Action announcing "tentative determinations * * * to issue NPDES permits" for the Deer Valley, Squaw Peak and Val Vista WTPs. The Joint Notice provided for a thirty-day public comment period beginning July 28, 1997. Petition Ex. 24. This was the first instance of the proposed permits being submitted for public comment.

On August 27, 1997, the City commented on the proposed permits, stating therein that the proposed permits were acceptable, provided there were no further changes made to Section B (i.e., after deleting section B.1.b. of the proposed permits). *See* Petition Ex. 25; *supra* note 10. On August 29, 1997, the City amended its August 27 comments "to correct a typographical error" concerning the schedule for construction of the Val Vista WTP. *Id.* Neither of the City's two letters submitted during the public comment period contested any provisions of the proposed permits. By letter dated August 22, 1997, the Cities of Chandler and Tempe filed joint comments during the public comment period regarding the Val Vista WTP permit. Petition Ex. 27. The Region issued its response to comments on June 19, 1998, and the final permit decisions for the Deer Valley, Squaw Peak

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[10] Section B.1 of the March 14, 1997 revised draft permits contains the BMP provisions, including, in subparagraph B.1.b, the so-called finished source water substitution provision:

> Within six months of the effective date of this permit, [the City] shall submit * * * a Best Management Practice (BMP) Plan * * * including the following elements:
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> * * * * * * *
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> > b. An analysis of the capability of the entire water supply, treatment, storage and distribution system to be operated in such a way as to reduce the use of highly turbid water sources to the maximum extent practicable. Based on this analysis, procedures shall be developed and included in the BMP Plan for operating the system in this manner.

and Val Vista WTPs on June 24, 1998.[11] Petition Ex. 29.

Notwithstanding its lack of objections to the permits during the public comment period, the City requested an evidentiary hearing on the June 24, 1998 Squaw Peak and Deer Valley final permit decisions, challenging the effluent limitations and monitoring requirements contained in Section A and the BMP contained in Section B of both permit decisions. Petition Exs. 3-4. More specifically, the City contested the "effluent limitations for suspended solids contained in and implemented by Sections A(1)(a), B(1) and B(2) of the [permits]." *Id.* at 3. The City argued that the "discharge limitations fail to meet the BCT or [best practicable control technology] standards, including the pertinent cost reasonableness tests * * * [and] improperly attempt to compel Phoenix to install control technologies that exceed [best practicable control technology]." *Id.* at 5. The City also stated that it:

> bases this challenge upon all matters set forth in section I-VI and VIII-XI of this Request, as well as the matters delineated in this section. Phoenix also relies upon all documents provided to EPA by any party (including Phoenix) from 1989 to the date of this Request, all of which should be included in the formal Administrative Record. Phoenix also relies upon any new or different information it has discovered or will discover since the close of the public comment period on [these] Permit[s] that is relevant to the issues in this Request.

Id. at 8.

The Region denied the evidentiary hearing requests, stating that because the City had failed to comment on the relevant issues (i.e., the effluent limitations and monitoring requirements in Section A, and the BMP in Section B) during the public comment period, these issues were not properly preserved for inclusion in an evidentiary hearing request. Petition Ex. 5. This appeal to the Board followed.

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[11] We note that the final permit determinations for the Squaw Peak and Deer Valley WTPs differed from the July 27, 1997 proposed permits in two respects. First, two sentences were added to footnote 4 of Section A.1.a. to exempt WTP startup and shutdown events from the footnote's requirements. Second, subparagraph B.3. was added to regulate discharge of drainage, rinse, and disinfection water during startup and shutdown events. These provisions were not challenged by the City in seeking an evidentiary hearing, *see* Petition Exs. 3-4, at 3-5, nor are they at issue on appeal here.

II. *DISCUSSION*

Under the rules governing this NPDES proceeding, there is no appeal as of right from the Region's decision.[12] *In re Ariz. Mun. Storm Water NPDES Permits,* 7 E.A.D. 646, 651 (EAB 1998); *In re City of Port St. Joe,* 7 E.A.D. 275, 282 (EAB 1997); *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 51 (EAB 1995). Ordinarily a petition for review will not be 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 Board. 40 C.F.R. § 124.91(a)(1)(i)-(ii). "While the Board has broad power to review decisions in NPDES permit cases, the Agency intended this power to be exercised 'only sparingly.'" 44 Fed. Reg. 32,887 (1979); *City of Port St. Joe*, 7 E.A.D. at 282. Agency policy is that most permits should be finally adjudicated at the Regional level. *In re J & L Specialty Prods. Corp.*, 5 E.A.D. 31, 41 (EAB 1994); *In re Broward County,* 4 E.A.D. 705, 708-09 (EAB 1993) ("*Broward I*"). On appeal to the Board, a petitioner has the burden of demonstrating that review should be granted. 40 C.F.R. § 124.91(a). This standard applies even where a petitioner is seeking Board review of purely legal issues. *See In re Liquid Air P.R. Corp.*, 5 E.A.D. 247, 253 (EAB 1994).

Petitioner asserts the Region's decision to deny its evidentiary hearing requests was clearly erroneous. The reasons are summarized as follows:

> [The Region] adopted an incorrect legal standard * * * [Petitioner] raised the issues in a timely fashion * * * [Petitioner] and other interested parties addressed the applicable permit provisions during the August 1997 comment period * * * and [Petitioner] meets the "good faith" test for being excused from compliance with the normal exhaustion requirements * * *.

Petition at 13.

The Region responds that it appropriately denied Petitioner's hearing requests on the basis that Petitioner failed to raise the issues during the public comment period. Response at 9. The Region also asserts that others did not raise the issues during the public comment period, nor has Petitioner shown good cause exists to grant review. *Id.* at 12-13. For the reasons outlined below, Petitioner's request for review of the Region's decision to deny its evidentiary hearing requests is denied.

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[12] Under the applicable procedures, the Board's jurisdiction to review appeals from denials of evidentiary hearings is conferred by 40 C.F.R. § 124.91(a)(1).

A. *Issues Must be Raised During the Public Comment Period Before an Evidentiary Hearing Request Will be Granted*

The permit decisions of the Agency are subject to the procedural requirements set out in 40 C.F.R. part 124. Under 40 C.F.R. § 124.13, captioned "Obligation to raise issues and provide information *during the public comment period*" (emphasis added), any person who believes that a permit condition is inappropriate must raise "all reasonably ascertainable issues and * * * all reasonably available arguments supporting [the person's] position by the close of the public comment period." This procedural requirement applies to "all RCRA, UIC, PSD and *NPDES* 'permits'." 40 C.F.R. § 124.1(a) (emphasis added). The Board has consistently construed section 124.13 as requiring that all reasonably ascertainable issues and arguments be raised *during* the public comment period to be preserved for review by the Board. *See, e.g., In re Kawaihae Cogeneration Project,* 7 E.A.D. 107, 119-20 (EAB 1997) (holding that petitioner's issue was not preserved for review where petitioner's parent company raised an issue prior to the public comment period, and no comments were received on the issue during the public comment period). The Board has arrived at this interpretation by relying, in part, on the express use of the word "during" in the caption, on the purpose of the requirement (to put the Region on notice, as discussed below), and on the relationship between section 124.13 and the complementary provisions of sections 124.19 and 124.76 (also discussed below).

Under part 124, in the case of RCRA, UIC, and PSD permits (but until recently not NPDES permits), a Region's permit determination is subject to review by the Board immediately following the Region's permit determination.[13] *See* 40 C.F.R. § 124.19(a). Standing to appeal a final permit decision is limited under section 124.19 to those persons who "filed comments on [the] draft permit or participated in the public hearing" and any person who failed to comment or participate in the public hearing on the draft permit "only to the extent of the changes from the draft to the final permit decision." 40 C.F.R. § 124.19(a). Those persons seeking to appeal based on their status as commenters or public hearing participants also must demonstrate to the Board, *inter alia*, "that any issues being raised were raised *during* the public comment period (including any public hearing) to the extent required by these regulations * * *." *Id.* (emphasis added). The Board has consistently declined to review issues or arguments in petitions that fail to satisfy this basic requirement. *See, e.g., In re Rockgen Energy Center,* 8 E.A.D. 536, 540 (EAB 1999).

[13] The recent amendments to the NPDES procedural regulations, discussed in note 2 *supra*, add NPDES permits to the list of permits subject to review under 40 C.F.R. § 124.19. But, as previously explained, the amendments do not affect the permits in this proceeding.

In construing the requirements of section 124.19, the Board has done so in conjunction with section 124.13, citing the latter provision as a related, and complementary, part of the overall procedural scheme. *See In re Jett Black, Inc.*, 8 E.A.D. 353, 356 n.8, 23 (EAB 1999) (finding that reasonably ascertainable arguments not raised during the public comment period were not preserved for appeal); *In re Envt'l. Disposal Sys., Inc.*, 8 E.A.D. 23, 30 nn.7, 14, 37 (EAB 1998).

In the case of NPDES permits subject to the pre-streamlined rules, a Region's permit determination is not immediately reviewable by the Board; instead, a request for an evidentiary hearing must first be submitted to and acted upon by the Region.[14] *See* 40 C.F.R. § 124.74. Such a request must state "each legal or factual question alleged to be at issue." 40 C.F.R. § 124.74(b)(1).[15] Further, under 40 C.F.R. § 124.76, a party is expressly barred from raising issues that were not "submitted to the administrative record required by section 124.18 as part of the preparation of and comment on a draft permit" except for good cause shown. The Board has also consistently construed this provision in conjunction with section 124.13 as requiring that petitioners seeking an evidentiary hearing must demonstrate that the issues sought to be heard were raised *during the public comment period*.[16] *See, e.g., In re City of San Marcos,* NPDES Appeal No. 97-6, slip op. at 4 (EAB, July 6, 1998) (Order Dismissing Appeal) (holding that to be preserved for review, all reasonably ascertainable issues must first have been raised during the public comment period); *In re Ketchikan Pulp Co.,* 6 E.A.D. 675, 688 (EAB 1996); *In re Broward County, Florida,* 6 E.A.D. 535, 548 (EAB 1996) ("*Broward II*"); *In re Fla. Pulp & Paper Ass'n & Buckeye Fla., L.P.*, 6 E.A.D. 49, 53 (EAB 1995); *In re P.R. Sun Oil Co., Inc.,* 4 E.A.D. 302, 315-16 (EAB 1992). The Board has arrived at this interpretation of section 124.76 by following an analogous process to that followed in interpreting section 124.13: the Board relies, in part, on the purpose of the requirement (to put the Region on notice) and on the section's relationship to section 124.13.

Petitioner points out, however, that all of the Board's decisions construing section 124.76 (applicable to NPDES permits only), and which hold that issues

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[14] The Region's permit decision is reviewable by the Board under section 124.91 following an evidentiary hearing, if one was granted, or, as in this instance, upon the denial of a request for an evidentiary hearing. The evidentiary hearing procedures, applicable to NPDES permits only, are embedded in the broader procedures applicable to all permits. *See* 40 C.F.R. pt. 124, subpt. E. The recent amendments to the NPDES regulations, discussed in note 2 *supra*, eliminate evidentiary hearings altogether, making the procedures correspond to those applicable to RCRA, UIC, and PSD permits.

[15] A "Note" immediately following section 124.76(b)(1) explains that where only legal issues are raised, the Region would be required to deny the evidentiary hearing request. Any such legal issues would, however, then be reviewable by the Environmental Appeals Board.

[16] So long as the issue was raised by someone (not necessarily the person requesting the evidentiary hearing) during the public comment period, the issue may serve as the basis for an evidentiary hearing or appeal to the Board. *See In re Broward County*, 6 E.A.D. 535, 548 n.19 (EAB 1996).

for an evidentiary hearing must first be raised during the public comment period, have only dealt with situations where the issues identified in the evidentiary request were raised after the close of the public comment period. Petitioner therefore seeks to distinguish its request on the basis that its issues and arguments had in fact been raised before the close of the public comment period, albeit just not during the public comment period.[17] Because the Board has not previously encountered this fact pattern in the context of an NPDES permit, the precise question presented by Petitioner's petition for review is technically one of first impression. We say "technically" because, as discussed below, a very similar fact pattern was before the Board in a case involving a Prevention of Significant Deterioration ("PSD") permit under the Clean Air Act, 42 U.S.C. §§ 7470-7515.

In NPDES proceedings, as well as other permit proceedings, the broad purpose behind the requirement of raising an issue during the public comment period is to alert the permit issuer to potential problems with a draft permit and to ensure that the permit issuer has an opportunity to address the problems before the permit becomes final. *See Broward I*, 4 E.A.D. at 714; *In re NPC Servs., Inc.,* 3 E.A.D. 586 (CJO 1991); *see also, In re Sutter Power Plant*, 8 E.A.D. 680, 687 (EAB 1999). In the specific context of NPDES permits, alerting the permit issuer to problems with the permit during the public comment period takes on added significance because of the potentially resource-intensive and adversarial nature of the evidentiary hearing process. Thus, as explained in *NPC Services Inc.*, by alerting the permit issuer to problems during the public comment period:

> [T]here is still time for the permit issuer to reverse directions with a minimum expenditure of time and resources, i.e., prior to the permit determination becoming final. In this manner, proposed permit conditions can be changed efficiently in the relatively informal setting of a "notice and comment" forum, rather than in the more formal and cumbersome forum of an adversarial evidentiary hearing.

3 E.A.D. at 586. In addition to these benefits, alerting the permit issuer to problems during the public comment period serves to focus everyone's attention on the problems at a time when everyone is on notice that this period of time represents the last and final stage of problem resolution at the Regional level. Thus, in this sense, alerting the permit issuer to problems during the public comment period serves to promote the longstanding policy that most permit issues should be resolved at the Regional level. *See Broward I*, 4 E.A.D. at 714.

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[17] Petitioner asserts that it raised the issues at various times throughout the long history of the permit, including during earlier comment periods. There is no evidence in the record of prior public comment periods, i.e., a public comment period convened pursuant to section 124.12. It is not disputed, however, that Petitioner raised issues disputing both the TSS effluent limitations monitoring requirements and the BMP provisions with the Region during pre-public comment phases of the permit proceeding.

Petitioner asserts that since the issues forming the basis of its evidentiary hearing request were included within the administrative record of the contested permit prior to the public comment period, and were therefore available for consideration by the Region prior to making its final permit decision, the foregoing policy considerations are in fact furthered in this instance. Although we acknowledge there may be some superficial appeal to the logic of this contention, we nonetheless doubt that the underlying policies would be advanced in actual practice. In *Kawaihae* — a case involving a PSD permit — we rejected an interested party's petition for review on the grounds that the party's issue had not been raised with the permit issuer during the public comment period. The issue in question had been raised by the petitioner's parent company at an earlier stage of the proceeding, prior to the public comment period. In rejecting the petition, we explained the policy basis for our decision:

> The permit review process would be unmanageable if a permit issuer was required to discuss every issue raised during the development of a draft permit prior to the public comment period. * * * Because no comments were received on this issue during the public comment period, DOH [the permit issuer] could well have assumed that any objections relating to merged plume dispersion techniques had been resolved or abandoned.

7 E.A.D. at 120.

The same policy objections to granting review in *Kawaihae* counsel against granting Petitioner an evidentiary hearing in this case. The practical effect of Petitioner's position, if it were adopted, would be to require a permit issuer, before finalizing a draft permit, to search through the administrative record for comments submitted by anyone[18] at any time, even on drafts that were never proposed for public comment, starting on the date the permit application was initially filed, and to then determine whether any of the comments called for a revision of the draft permit's terms. In a case such as the one before us, where the administrative record is spread over a number of years, and is comprised of several permit iterations, many of which were never proposed for public comment, the task would necessarily involve a time-consuming and exhausting search of the administrative record, just to assure that all potential comments had been identified. It would further require the permit issuer to divine, by means unknown, whether or not the comments were still being preserved for consideration or whether they had been resolved or abandoned by the commenter. The folly of such an enterprise is manifest. The practical effect of Petitioner's approach would more likely be to catch the permit issuer off guard than to alert the permit issuer to issues legitimately

[18] *See supra* note 16.

pertaining to the most recent draft permit. As a consequence, on a strictly policy basis, we find no merit to Petitioner's position.

With this policy-based analysis as context, we turn to Petitioner's legal arguments. It is Petitioner's position that issues are preserved for evidentiary hearings so long as they are included within the administrative record of the contested permit. Petition at 14. Petitioner bases its position, in part, on the italicized portion of section 124.13, which provides:

> All persons, including applicants who believe any condition of a draft permit is inappropriate * * * must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position *by the close of the public comment period* (including any public hearing) under § 124.10."

40 C.F.R. § 124.13 (emphasis added). Petitioner argues that it fulfilled this requirement because its comments were indisputably submitted well before the close of the public comment period — indeed, we note, they were submitted before the public comment period had even been established. Petitioner submitted letters to the Region on December 4, 1990 (Petition Ex. 10) (raising concerns with the solid effluent limitations and seeking a narrative effluent limit for the Deer Valley and Squaw Peak WTPs); July 4, 1996 (Petition Ex. 13, at 1) (stating "serious concerns regarding the limit for total suspended solids(TSS) and with the Best Management Practices (BMPs) as proposed"); January 16, 1997 (Petition Ex. 16) (alleging "faulty legal framework" resulting in a call for zero discharge as Best Practicable Control Technology); and April 24, 1997 (Petition Ex. 20) (providing "comments on three critical legal issues").[19] Petitioner also claims to have satisfied 40 C.F.R. § 124.76, which allows issues to be raised for consideration at an evidentiary hearing if they were "submitted to the administrative record * * * as part of the preparation of and comment on a draft permit." As thus presented, there appear to be three elements to Petitioner's claim of having satisfied this requirement: first, Petitioner's comments are in the administrative record; second, Petitioner's comments relate to the preparation of a draft permit; and third, Petitioner's comments are manifestly comments. As a result, Petitioner contends that it has met all requirements of both sections 124.13 and 124.76.

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[19] We note that Petitioner also cites an October 14, 1996 letter from Mario B. Saldamando, Asst. Dir., City of Phoenix Water Dept. Technical Services, to Terry Oda, Chief, U.S. EPA Region IX Permits Section (Petition Ex. 14), as supporting its position that the issues it sought to raise in an evidentiary hearing on the Deer Valley and Squaw Peak WTP NPDES permits were preserved for review. Upon review of the record, we find that this letter, entitled, "Response to Comments from Tempe, Chandler, Gilbert and SRP Concerning BCT Study for the Val Vista Water Treatment Plant NPDES Permit," provides no support for Petitioner's assertion since it does not involve either the Deer Valley or Squaw Peak permits. In fact, the letter makes no specific reference to either of the WTPs at issue.

We are not persuaded by these arguments for several reasons. In regard to section 124.13, the caption for this section, as noted previously, speaks of the "Obligation to raise issues and provide information during the public comment period." The use of "during" in the caption cannot be dismissed as superfluous. The word is clearly consistent with the text of the section, for it simply represents an acknowledgment that the words of the text — "by the close of the public comment period" — refer to a period of time, which by definition includes both a beginning and an end. Obligating commenters to submit their comments within the interval of time between the beginning and end of the public comment period merely reinforces the notion of a period of time allocated for public comment. Granted, captions generally should not be given determinative effect if the text of a provision is otherwise free from ambiguity or vagueness; however, in this instance, the text is vague since it does not expressly delimit the beginning point for submission of all ascertainable issues and arguments. For us to attempt to fix the beginning at some point other than the commencement of the public comment period — perhaps, e.g., on the filing date of the permit application or on the date the application is determined to be complete[20] — would be arbitrary, and would undermine the orderly process established by the permitting regulations for processing large numbers of permits under a variety of different environmental permitting programs. It would ignore the carefully crafted scheme pursuant to which the public comment period performs a central role by conferring rights on all persons (not just the permit applicant) to influence the terms of a permit before the permit is issued by the Region as a final permit decision (subject to being contested in an evidentiary hearing). Therefore, as we construe section 124.13, persons who believe any condition of a permit is inappropriate must raise their issues and arguments *during* the public comment period.[21]

We are also not persuaded by petitioner's claim of having satisfied section 124.76. This section must be construed in a manner that is consistent with section 124.13, for the two provisions are *in pari materia* and are expressly applicable to NPDES proceedings. Further, both are intended to ensure that issues potentially affecting the terms of a permit are brought to the attention of the permit issuer in a timely and effective manner. Given the common purpose behind sections 124.13 and 124.76, and the applicability of both sections to NPDES permits, it obviously would make no sense to read section 124.76 as allowing a party to raise issues

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[20] In accordance with 40 C.F.R. § 124.6, once the permit-issuing authority determines that the permit application is "complete," a tentative decision can be made to either prepare a draft permit or to deny the application. (A draft permit is defined in section 124.2 as "a document prepared under § 124.6 indicating the Director's tentative decision to issue or deny * * * a 'permit.'")

[21] This is not to say that comments may not be made at an earlier date; it just means that to put the permit issuer on formal notice of any continuing objections to the terms of a draft permit, the person making the comments must register the objections with the permit issuer during the public comment period in order to preserve the right to contest any decision by the permit issuer not to implement the person's comments.

that were not submitted during the public comment period. The text of section 124.76 supports this conclusion, providing in pertinent part as follows:

> No issues shall be raised by any party that were not submitted to the administrative record required by § 124.18 *as part of the preparation and comment on a draft permit*, unless good cause is shown * * *.

40 C.F.R. § 124.76 (emphasis added).

Petitioner's reading of this provision gives no effect to the italicized clause. Petitioner seeks instead to limit the focus to issues that have been submitted to the "administrative record" but without asking whether those issues were also submitted "as part of the preparation and comment on a draft permit." Had this been done in determining whether the administrative record contains an issue that may be raised, it would be clear that an eligible issue must not only bear on the preparation of the draft permit by the permit issuer,[22] but it must also have been raised as part of a comment on the draft permit. Petitioner is unable to satisfy this requirement, as explained below.

The phrase "comment on a draft permit" has a distinct and formal meaning. It refers to comments made *during* a comment period set aside for the permit applicant and other interested persons to comment on a draft permit proposed for issuance by the permit issuer. It does not, therefore, encompass informal exchanges of draft documents, letters and notes that frequently occur between the permit applicant and EPA staff following the filing of a permit application and before a draft permit is prepared and proposed for public comment. Numerous references in the regulations to the words "comment" and "draft permit" confirm our reading of the phrase. *E.g.*, 40 C.F.R. § 124.10(a)(1)(ii) ("The [permit issuer] shall give public notice that * * * [a] draft permit has been prepared under § 124.6(d)"); *id.* § 124.10(e) ("All draft permits prepared by EPA under this section * * * shall be based on the administrative record (§ 124.9), publicly noticed (§ 124.10) and made available for public comment (§ 124.11)."); *id.* § 124.10(b) ("Public notice of the preparation of a draft permit * * * shall allow at least 30 days for public comment."); *id.* § 124.10(c) ("Public notice of [a draft permit] * * * shall be given [to] * * * (i) The applicant * * * and (ix) Persons on a mailing list developed by: * * * (C) Notifying the public of the opportunity to be put on the mailing list through publication in the public press * * *."); *id.* § 124.11 ("During the public comment period provided under 40 C.F.R. § 124.10, any interested person may submit written comments on the draft permit * * *.").

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[22] Permits are prepared by the permit issuer, not the permit applicant. *See* 40 C.F.R. § 124.6 ("Once an application is complete, the Director shall tentatively decide whether to prepare a draft permit * * *.").

In the present case, it appears that Petitioner's comments submitted prior to the public comment period relate to earlier drafts of permits that were never proposed for public comment, not to the current draft permits for the Squaw Peak and Deer Valley plants that were publicly noticed and made available for public comment. *See* Petition Ex. 10 (Dec. 4, 1990), Ex. 13 (July 29, 1996), Ex. 16 (Jan. 16, 1997), Ex. 20 (April 24, 1997), Ex. 21 (May 15, 1997). As previously mentioned, Petitioner's comments submitted on the publicly noticed draft permits during the public comment period explicitly accepted the draft permits and did not raise the issues that Petitioner sought to raise in an evidentiary hearing request. *See* Petition Ex. 25.

Accordingly, we conclude that Petitioner's comments, although a part of the administrative record, are not comments that were submitted to the administrative record "as part of the preparation and comment on a draft permit." Instead, the comments, and the issues raised therein, were submitted during earlier phases of the permit proceeding. Consequently, we reject Petitioner's reading of section 124.76 as encompassing those earlier comments.

B. *Issues Were Not Raised by Others During the Public Comment Period*

In the alternative, Petitioner contends that comments submitted by the Cities of Tempe and Chandler during the comment period preserved the contested issues for review. Petition at 18-19. While we have held that an issue is preserved for review "as long as it was raised by someone, not necessarily the petitioner, during the comment period," *In re Broward County*, 6 E.A.D. 535, 548 n.19 (EAB 1996), we find no merit in Petitioner's argument here.

The Cities of Chandler and Tempe did file joint comments during the public comment period. *See* Petition Ex. 27. However, those comments, entitled "Val Vista WTP Permit Comments," did not concern the Squaw Peak and Deer Valley WTP permits. In fact, the letter makes no mention of the Squaw Peak and Deer Valley WTPs, and focuses solely on the language of the Val Vista WTP permit. *See id.* Therefore, the issues being asserted by Petitioner in this proceeding were not raised during the public comment period by the Cities of Chandler and Tempe, and, therefore, cannot be used as the basis of a request for an evidentiary hearing.

C. *Good Cause*

Petitioner also asserts that even if its issues were not raised during the public comment period, good cause exists here to grant an evidentiary hearing. In particular, Petitioner claims that with respect to Section B(2) of the permits, the Region enunciated a new interpretation of the effective date of this provision in its response to comments issued with the final permit decisions. *See* Petition at 22-23. Petitioner claims that it understood Section B(2) would become effective upon

construction of the solids handling facilities for the WTPs, while the Region interpreted the provision to be effective immediately. Thus, Petitioner argues, good cause exists for failing to raise specific objections during the public comment period because it had no knowledge of the Region's interpretation until the final permits were issued. The Region responds that the language relied upon by Petitioner for its good cause argument "refers only to the Val Vista permit, which Phoenix did not appeal. Moreover, the * * * statement does not apply to the Squaw Peak or Deer Valley WTPs." *See* Response at 14.

We agree with the Region that Petitioner's reliance on the language in the Region's Response to Comments document is misplaced. The plain language of section 124.76 defines "good cause" to include:

> the case where the party seeking to raise the new issues or introduce new information shows that it could not reasonably have ascertained the issues or made the information available within the time required by § 124.15; or that it could not have reasonably anticipated the relevance or materiality of the information sought to be introduced. Good cause exists for the introduction of data available on operation authorized under § 124.60(a)(2).

40 C.F.R. § 124.76.

In this case, Petitioner claims good cause exists here because the Region's interpretation "that the zero discharge provisions in the non-existent BMP Plan would be effective immediately" was only disclosed after the public comment period in the Region's Response to Comments document. Petition at 23. The record is clear that the Region revised the Squaw Peak and Deer Valley permits prior to the public comment period, as contemplated by negotiations between Petitioner and SRP, *see* Petition Ex. 21, and that Petitioner's and other comments during the public comment period failed to raise any objection to the permit provisions now at issue. *See* Petition Ex. 25. Furthermore, Petitioner appears to concede that there was a question of interpretation during the public comment period. Petitioner stated that it "assumed during the final public comment period in August 1997 that the zero discharge floors would not be applicable until the solids handling facilities were completed," even though "[a] key question for [Petitioner was] exactly when the BMP provisions [would] go into effect." Petition at 23. In this light, we cannot find good cause exists since the record before us demonstrates that the issues sought to be raised outside of the public comment period were reasonably ascertainable before the close of the public comment period.[23] Accord-

[23] We note that Petitioner's original assumption that the "zero discharge floors" in the Squaw Peak and Deer Valley permits "would not be applicable until the solids handling facilities were com-

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ingly, the petition for review is denied.

IV. *CONCLUSION*

For all the foregoing reasons, we hold that Petitioner failed to raise the issues it currently asserts during the public comment period, as required by 40 C.F.R. § 124.13. As these issues were not properly raised at that time, and no good cause exists for the failure to raise these issues, they cannot form the basis of an appeal of the Region's decision to deny the requests for an evidentiary hearing. Therefore, the petition for review is denied.

So ordered.

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pleted," *see* Petition at 22, appears to have been correct. First, the Region's Response confirms that only the Val Vista permit was subject to the immediate effectiveness of the BMP plan because its solids handling facility was already constructed. *See* Response at 14. Second, Section B.2 of the Squaw Peak and Deer Valley permits plainly only requires implementation of the BMP plan "[u]pon construction of the SHFs." *See* Petition Exs. 2-3.