

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

_____	)	
In re:	)	
	)	
City of San Diego	)	
Permit No. R9-2002-0025	)	
as amended by	)	NPDES Appeals No. 02-07
Order No. WQO 2002-0013	)	& 02-08
	)	
and	)	
	)	
City of San Diego	)	
Permit No. CA0107409	)	
_____	)	

**ORDER GRANTING JOINT STIPULATION FOR WITHDRAWAL OF APPEALS**

**AND RESERVATION OF RIGHTS**

On March 23, 2004, the Petitioners in the above-captioned matters, the City of San Diego ("City"), Appeal No. 02-07, and the San Diego BayKeeper, Surfrider Foundation, and Sierra Club ("BayKeeper"), Appeal No. 02-08, jointly with Region IX (collectively the "Parties"), filed a stipulation for withdrawal of appeals and reservation of rights.<sup>1</sup> The joint stipulation

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<sup>1</sup> In October 2002, the City and BayKeeper filed separate petitions seeking review of NPDES permit No. CA0107409 issued by Region IX to the City of San Diego. On November 2002, the Petitioners, jointly with Region IX, filed a request for a stay of proceedings for one year. The Board granted the request to allow the parties time to negotiate an agreement to resolve the issues on appeal. On December 2, 2003, the Board granted a joint request to further stay the proceedings to February 2, 2004. The  
(continued...)

explains that the Petitioners have agreed to the implementation of certain projects - referred to by the Parties as "elements" - in return for a mutual withdrawal of their respective appeals.<sup>2</sup> The Region, for its part, agreed to the insertion of a footnote in the permit to preserve the rights of any party to address the legal issue of the applicability of section 301(j)(5) of the Clean Water Act, 33 U.S.C. § 1311 (j)(5), to the City's future NPDES permits.<sup>3</sup>

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<sup>1</sup>(...continued)  
second stay was once again extended to March 22, 2004, to allow additional time for final resolution.

<sup>2</sup> The Petitioners specifically agreed to the implementation of the following three elements:

(a) improved ocean monitoring and participation by BayKeeper, Surfrider and Sierra Club in ongoing review of the monitoring program;

(b) a one-year pilot test of biological aerated filter ("BAF") technology to determine the feasibility of achieving secondary treatment, if BAF proves feasible, the City would be able to comply with the Clean Water Act without pursuing 301(h) waivers, and the applicability of 33 U.S.C. § 1311(j)(5) becomes moot; and

(c) a one-year study and report on increasing the use of reclaimed water, including using appropriately treated reclaimed water for "reservoir augmentation," i.e., potable water use of reclaimed water.

See Joint Stipulation for Withdrawal of Appeals, Reservation of Rights and, Order Thereon at 1-2 (March, 23, 2004).

<sup>3</sup> In its petition for review the City of San Diego objected to a permit provision requiring the City to comply with the requirements of section 301(j)(5) of the Clean Water Act, 33  
(continued...)

The Petitioners also agreed to the withdrawal and dismissal, with prejudice, of their respective appeals to the pending NPDES permit, except that the stipulation clarifies that the dismissal of the current appeals is without prejudice to the Petitioners' ability to challenge the applicability of 33 U.S.C. § 1311(j) (5) in any subsequent permit or appeal of a reissued NPDES permit, and that nothing in the stipulation should be construed to have adjudicated the issues regarding section 1311(j) (5) in the current permit.

In accordance with, and pursuant to, the joint stipulation of the Parties, the Board hereby dismisses NPDES Appeals Nos. 02-07 and 02-08.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 3/29/2004

By: \_\_\_\_\_ /s/  
 Ronald L. McCallum  
 Environmental Appeals Judge

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<sup>3</sup>(...continued)  
 U.S.C. § 1311 (j) (5). The City claimed that Congress intended to limit that section to a single initial 1995 application and, as such, section 301(j) (5) does not apply to the permit renewal. See City Petition for Review at 12-22 (Oct. 16, 2002).

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order Granting Joint Stipulation for Withdrawal and Reservation of Rights, NPDES Appeals No. 02-07 & 02-08, were sent to the following persons in the manner indicated:

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Dated: 3/29/2004

\_\_\_\_\_/s/  
Annette Duncan  
Secretary