

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

In re:)
)
)
Arizona Municipal Storm)
Water NPDES Permits for City)
of Tucson, Pima County, City)
of Phoenix, City of Mesa,) NPDES Appeal No. 98-5
and City of Tempe)
)
Permit Nos. AZS000001,)
AZS000002, AZS000003,)
AZS000004, and AZS000005)

ORDER DISMISSING PETITION

In a petition filed with the Board on July 29, 1998, the Defenders of Wildlife and the Sierra Club ("petitioners") seek review from the denial of their evidentiary hearing request on certain issues related to U.S. EPA Region IX's issuance of five modified National Pollutant Discharge Elimination System ("NPDES") permits on April 21, 1997. See Notice of Appeal and Petition for Review ("petition") at 2. The original permits, issued on February 14, 1997, authorize storm water discharges from the municipal separate storm sewer systems ("MS4s") of the City of Tucson, Pima County, the City of Phoenix, the City of Mesa, and the City of Tempe ("permittees"). The modifications require, among other things, that: 1) the permittees submit estimates of pollutant load reductions to waters of the U.S. expected from the implementation of their storm water management programs; and 2) Pima County and the

City of Tucson submit proposals within 6 months of the effective date of the modifications, for post-construction storm water pollution control measures for new developments and significant redevelopments proposed within their jurisdiction.

According to petitioners, these modifications are insufficient to ensure compliance with the Clean Water Act and its implementing regulations. In particular, with regard to the requirement that the permittees submit pollution reduction estimates, petitioners assert that the modifications are flawed because they do not provide for further action by EPA in response to the estimates. Petition at 5. To correct this alleged deficiency, petitioners state:

[T]he permit modification must be supplemented as follows: a) Within 60 days after submission of the pollution reduction estimates, EPA must determine whether those estimates are based on sound technical analysis. If EPA determines that the estimates are not reliable, EPA will make its own pollution reduction estimate based on the available data; b) If the permittees' or EPA's estimate shows that the storm water management program will not assure reductions to the [maximum extent practicable ("MEP")] standard, then EPA must either deny the permit or modify it within 60 days to require additional pollution reduction measures as necessary to meet the MEP standard.

Petition at 6. With respect to the permit modifications requiring that Pima County and the City of Tucson submit storm water pollution control measures, petitioners argue that in order to comply with the Clean Water Act, "[t]he permits must

go further and set deadlines for incorporation of the control measures into the permits, and for permittee compliance therewith." *Id.* at 7.

By submission filed with the Board on November 20, 1998, the Region and petitioners ("the parties") informed the Board that they had reached a settlement reflected in a signed Consent Agreement purporting to resolve this matter. Notice of Filing of Consent Agreement, Request for Stay Order ("Notice"). According to the parties:

The Consent Agreement provides that the Region will determine whether the estimates in pollution loading reductions that the permittees are required to provide to EPA Region 9 pursuant to the permit modifications at issue in this proceeding * * * indicate that the existing storm water management programs ("SWMPs") required by the permits are adequate to reduce the permittees' discharge of pollutants to the maximum extent practicable in accordance with 40 C.F.R. § 122.26(d)(iv) ("the MEP standard"). If the Region determines based on pollution reduction estimates that the SWMPs are not adequate, the Region is required to modify the permits in issue to address the deficiencies in the SWMPs according to specified deadlines [(within 90 days of receipt of the permittees' pollution reduction estimates)]. The Consent Agreement further provides that the Region will adhere to specified deadlines for modifying the City of Tucson['s] * * * and Pima County['s] * * * NPDES permits to include the post-construction storm water control measures that Tucson and Pima are required to provide to EPA Region 9 pursuant to the permit modifications at issue in this appeal.

Notice at 2. The parties further stated that the Board should stay all proceedings in this matter to allow the Region sufficient time to carry out its obligations under the

Agreement. At the same time, the parties urged the Board to retain jurisdiction over the appeal in the event the Region did not comply with the Consent Agreement.

By Order dated December 22, 1998, the Board declined to retain jurisdiction over the appeal. Order Dismissing Petition for Review ("Dismissal Order"). We stated that the Board's role in this proceeding is neither to approve nor enforce the Consent Agreement but only to determine what action was appropriate regarding the petition before us. *Id.* at 6. Because the parties agreed that if the Consent Agreement were carried out all issues raised in the petition for review would be moot, we dismissed the petition for review. Because this dismissal rendered a provision of the Consent Agreement ineffective, however, we gave petitioners ten days to cancel the Agreement and reinstate their petition for review. *Id.* at 7.

By joint motion dated January 2, 1999, the parties requested that the Board amend the December 22 Dismissal Order to include the following sentence: "Dismissal of the petition for review is without prejudice to petitioners' right to request reinstatement of the appeal if the Region fails to comply with the Consent Agreement." Joint Motion to Modify Dismissal Order and Petitioners' Motion in the Alternative to Reinstate Appeal ("Joint Motion"). The Joint Motion further

stated that if the Board declines to amend the dismissal order "Petitioners hereby move in the alternative that their petition for review be reinstated." Joint Motion at 2. By order dated January 20, 1999, the Board denied the parties' request to modify the December 22 Dismissal Order, stating again that the Board will not serve as the overseer of the parties' Consent Agreement. Order Denying Motion to Modify Dismissal Order and Granting Motion to Reinstate Petition for Review. The Board granted petitioners' request that the petition be reinstated and ordered the Region to file a response to the petition by March 1, 1999.

By submission received on March 1, 1999, the Region states that it is currently complying with the terms of the Consent Agreement and addressing the concerns raised in the petition for review.¹ Thus, "[r]ather than vigorously defend the permit modifications, * * * the Region voluntarily moves the Board to remand the modified permits and dismiss [the petition for review]." Region's Response at 4. In support of this request, the Region states that it is "currently conducting the activities that constitute the substance of petitioners' requested permit modifications." *Id.* at 4. With

¹EPA Region 9's Response to Board's Order Granting Petitioners' Motion to Reinstate Petition for Review and EPA Region 9's Motion for Voluntary Remand of Five Modified National Discharge Elimination System Permits ("Region Response").

regard to the issue of pollution reduction estimates, the Region states that the permittees have now submitted these estimates and that the estimates submitted by the Cities of Phoenix, Mesa, and Tempe are adequate to meet the requirements of the permit. The Region states further that:

Consistent with the remedy sought in the Petition and specified in the [Consent] Agreement, the Region is now prepared to re-evaluate whether these new estimates indicate that the Region remains correct in its determination that these municipalities' permits require controls to reduce the discharge of pollutants to the maximum extent practicable.

Id. at 5. The Region has requested additional information from the City of Tucson and Pima County, which will be provided by April 1, 1999, and will use this information to determine if the storm water control measures are adequate. The Region states that it expects to complete this analysis by mid-May 1999. *Id.* at 6. Finally, the Region states:

In keeping with the [Consent] Agreement, the Region is planning on making a formal determination, in accordance with 40 C.F.R. section 122.62, whether to modify the permits at issue to require additional storm water control measures. By May 17, 1999, the Region plans to issue a public notice of its determination in the form of a draft permit pursuant to 40 C.F.R. section 124.6. These actions will provide petitioners with their requested remedy -- and preserve all of the petitioners and permittees' procedural rights, as well. In accordance with 40 C.F.R. part 124, petitioners and the permittees will have full opportunities to comment on the Region's determination and to appeal any proposed permit modification at the time.

Id. at 6-7.

With regard to the requirement that Pima County and the City of Tucson submit proposals for post-construction storm water pollution control measures for new developments and significant redevelopments proposed within their jurisdiction, the Region states that both permittees submitted the information and the Region "is now evaluating the measures consistent with the remedy requested in the Petition, as well as the provisions of the [Consent] Agreement. The Region expects to complete this review in the next several weeks."

Id. at 7. The Region states further that:

If the Tucson and Pima County's post-construction measures are fully adequate, the Region plans, in accordance with the [Consent] Agreement, to issue a draft permit that will propose to require implementation of these measures. If the Region determines that the post-construction measures submitted by either Tucson or Pima County are inadequate, the Region plans to follow the Agreement and develop additional or modified post-construction measures to respond to the inadequacy. The Region's proposed alternative measures will be set forth in a draft permit(s) in accordance with 40 C.F.R. sections 124.6 and 122.62(a)(2). In either case, the Region expects to be able to issue a draft permit by May 17, 1999. * * * [T]hese actions will provide petitioners' with their requested remedy **B** and preserve all of the petitioners and permittees' procedural rights, as well.

Id.

Petitioners do not oppose a remand of the permit modifications at issue in this case, but argue that the Board should order the Region to comply with the Region's self-imposed deadlines and "additional deadlines contained in the

[Consent] Agreement with respect to issuing modified and final permits." Petitioners' Response to EPA Region 9's Motion for Voluntary Remand (March 24, 1999).

From the record before us, it appears as if the Region has continued to comply with the terms of the Consent Agreement, and, in so doing, continues to address the concerns raised in the petition for review. Petitioners agree that the Region's actions address their concerns and only seek assurances that the Region's proposed timetable will be met. In this regard, the Region states that it will "expeditiously complete the actions agreed to in the Consent Agreement." Region's Response at 4 Because the Region has chosen not to defend the permit modifications, instead requesting a voluntary remand, and petitioners (by acceding to a remand) have accepted compliance with the Consent Agreement as an adequate remedy in lieu of the relief sought in their petition, the issues raised in the petition have effectively become moot. We therefore conclude that no purpose is served by keeping this matter on our docket. This matter is therefore remanded to the Region for continued action in addressing petitioners' concerns and the petition is dismissed as moot. Although we decline to impose any additional deadlines or to oversee the Region's execution of the Consent Agreement, we would fully expect that the Region will continue

to carry out the terms of the Consent Agreement in an expeditious manner and as represented in its filings with this Board.

So ordered.

Dated: 3/25/99

ENVIRONMENTAL APPEALS

BOARD

By: _____/s/
Edward E. Reich
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Petition in the matter of Arizona Municipal Storm Water Permits for Pima County and the Cities of Mesa, Phoenix, Tempe, and Tucson, Arizona, NPDES Appeal No. 98-5, were sent to the following persons in the manner indicated:

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Dated: 3/25/99

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