

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

In re: )  
)  
)  
CITY OF CALDWELL, ) NPDES Appeal No. 09-11  
)  
NPDES Permit No. IDS-028118 )  
\_\_\_\_\_ )

**CITY OF CALDWELL’S MOTION FOR LEAVE TO INTERVENE AND REQUEST  
FOR LEAVE TO RESPOND TO PETITION**

The City of Caldwell (“City” or “Permittee”) (1) moves for leave to intervene as a party respondent in this appeal filed by Pioneer Irrigation District (“PID” or “Petitioner”), and (2) requests leave to file a response to PID’s petition.

**FACTUAL BACKGROUND**

The United States Environmental Protection Agency (“EPA”), Region 10, issued National Pollutant Discharge Elimination System (“NPDES”) Permit No. IDS-028118 (“Permit”) to the City of Caldwell on September 4, 2009. The Permit, effective October 15, 2009, authorized the City to discharge from all municipal separate storm sewer system (“MS4”) outfalls existing as of the effective date of the Permit to waters of the United States in accordance with the conditions and requirements in the Permit.

Two days before the Permit was to take effect, on October 13, 2009, PID filed a Petition for Review (“Petition”) of NPDES Permit No. IDS-028118 alleging that “the Permittee

misrepresented facts, which led to the Regional Administrator's failure to properly address permit conditions that would address the water quality and liability concerns of the Petitioner." *See* Petition at 1. The Petition does not specifically name any respondent.

On October 15, 2009, the Environmental Appeals Board ("EAB" or "Board") requested that EPA, Region 10, prepare a response to address Petitioner's contentions and whether Petitioner has satisfied the requirements for obtaining review under 40 C.F.R. § 124.19(a). *See* Letter from Eurika Durr, Clerk of the Board, Environmental Appeals Board, to Teddy Ryerson, Regional Counsel (Acting), Office of Regional Counsel, U.S. EPA, Region 10, at 1 (Oct. 15, 2009). The Board also requested that EPA prepare an index of the administrative record and submit the requested materials to the Board no later than November 30, 2009. *Id.*

EPA notified the City by letter on November 18, 2009, that the Permit would be temporarily stayed until December 21, 2009, as a result of PID's Petition, but become fully effective and enforceable as of that date. *See* Letter from Michael A. Bussell, Director, Office of Water and Watersheds, U.S. EPA, Region 10, to Larry Osgood, Public Works Director, City of Caldwell (Nov. 18, 2009) (attached as Exhibit 1).

### **GROUND FOR RELIEF**

While the regulations for NPDES permit appeals do not explicitly provide for intervention, 40 C.F.R. pt. 124 (2009), the Board has discretion to allow intervention and/or non-party briefing and it typically allows permittees to participate as intervenors when supported by an appropriate motion. *In re Dominion Energy Brayton Point, LLC*, NPDES Appeal No. 03-12, slip. op. at 7-8, n.13 (EAB, Feb. 19, 2004) (order granting review in *In re Dominion Energy Brayton Point, LLC*, 11 E.A.D. 525 (EAB July 23, 2004)). Also, the EAB Practice Manual notes that the Board will "generally allow the permit applicant to respond to a petition filed by a third

party petitioner if the permit applicant has filed a request to respond.” EAB Practice Manual § III.D.1 (June 2004); *see also id.* § III.D.4 (Board “will entertain a motion by a permittee to participate in the proceeding”). Additionally, the Board has typically granted motions for intervention upon the request of the permittee. *See, e.g., In re District of Columbia Water and Sewer Authority*, NPDES Appeal No. 07-12, slip. op. at 2 (EAB, June 15, 2007) (order granting permittee’s motion for leave to intervene and file a response to petition for review); *In re City of Cambridge, MA, Department of Public Works*, NPDES Appeal Nos. 06-01, 06-02 & 06-03, slip. op. at 1-2 (EAB, Jan. 26, 2006) (order granting permittee’s motion for leave to intervene and file response to petition for review); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 470 (EAB 2002) (explaining that permittee’s motion to intervene and file response to petition was granted).

Further, the Board generally grants leave to intervene if: (1) the movant claims an interest relating to the cause of the action, (2) a final order may as a practical matter impair the movant’s ability to protect that interest; and (3) the movant’s interest is not adequately represented by existing parties. *See, e.g., District of Columbia Water*, slip. op. at 2; *City of Cambridge*, slip. op. at 1-2; *see also* 40 C.F.R. § 22.11 (providing factors for consideration of leave to intervene in a Board proceeding); EAB Practice Manual § II.I.2 (*citing* to 40 C.F.R. § 22.11(b) for position that “[a]ny person who is not a party to a proceeding may move for leave to intervene or to file a non-party brief”). The Board practices and precedents allowing permittees to intervene and participate should be followed in this appeal.

Here, the City would be substantially and specifically affected by the results of this proceeding if the relief requested by PID is granted. The City is the permittee under the NPDES Permit at issue in this case and has overall responsibility for compliance with the Permit. As such, the City has a definite and unique interest in the validity of the Permit and the outcome of

this matter. Any relief afforded in this proceeding will directly and substantially affect the City by imposing new or modified legal obligations on the City under the Permit. The City is already affected by the delay in the effective date of the Permit occasioned by the Petition. *See* Letter from Michael A. Bussell, at 1. If the relief requested is granted, the City could be exposed to significant additional liabilities associated with implementation of its Storm Water Management Program and may be forced to expend significant resources to comply with those new or modified legal obligations—in addition to the large expenditures that the City has already incurred in obtaining, and will incur in implementing, the Permit.

Disposition of this matter without the City's involvement will, as a practical matter, impair the City's ability to protect its interests. EPA cannot be expected to represent the City's interests adequately in this proceeding, because, among other things, EPA is the permitting, regulatory and enforcement authority whose interests differ substantially from those of the City as the permittee. Moreover, the City and its taxpayers, rather than EPA, will bear the burden of the liabilities and costs of compliance with the Permit if Petitioner is successful. *See NRDC v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (noting the differing scope of interests between regulated industries, whose principal interest is in protecting their industries, and the more narrowly focused interest of regulatory agencies in implementing the law). Further, the City is also uniquely situated to provide the Board with insight and perspective into all the issues raised in the Petition.

The City's intervention in this matter is also timely. This motion follows closely upon the commencement of this action, which was only just filed on October 13, 2009. Except for the Board's letter direction to EPA to address the Petitioner's contentions, no orders have been issued and no substantive proceedings have occurred in this case. Conditional on the grant of

this motion and request, the City is filing an appropriate and timely response that addresses the Petitioner's contentions and whether PID has satisfied the requirements for obtaining review under 40 C.F.R. § 124.19(a). As a result, the City's participation will not delay this proceeding in any way.

The City's intervention and participation also will promote the interests of justice by allowing the City to represent its interests. The rights of the existing parties will not be prejudiced by the City's intervention. On the other hand, the City will be prejudiced if it is not allowed to intervene and participate in this appeal. The City has valid defenses to the permit appeal, and intervention would promote a just resolution of this case.

#### **CONCLUSION AND RELIEF REQUESTED**

The City's motion to intervene and request to file a response should be granted.

DATED this 25th day of November, 2009.

Respectfully submitted,

/s/Murray D. Feldman  
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**Attorneys for the City of Caldwell**

**CERTIFICATE OF SERVICE**

I certify that on November 25, 2009, copies of the foregoing CITY OF CALDWELL'S MOTION FOR LEAVE TO INTERVENE AND REQUEST FOR LEAVE TO RESPOND TO PETITION were sent to the following persons in the manner described below:

Original by Federal Express and copies by electronic submission to:

U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board  
1341 G Street, N.W. Suite 600  
Washington, DC 20005

Copy by first class mail to:

Teddy Ryerson, Regional Counsel (Acting)  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue  
Seattle, WA 98101

Copy by first class mail to:

Matthew J. McGee  
Moffatt, Thomas, Barrett, Rock & Fields, Chartered  
101 S. Capitol Blvd., 10th Floor  
P.O. Box 829  
Boise, ID 83701-0829

Copy by first class mail to:

Michael A. Bussell, Director  
Office of Water and Watersheds  
U.S. Environmental Protection Agency, Region 10  
1200 Sixth Avenue  
Seattle, WA 98101

/s/Murray Feldman  
for Holland & Hart LLP



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
1200 Sixth Avenue, Suite 900  
Seattle, WA 98101-3140

OFFICE OF  
WATER AND WATERSHEDS

NOV 18 2009

Mr. Larry Osgood  
Public Works Director  
City of Caldwell  
621 Cleveland Boulevard  
Caldwell, Idaho 83605

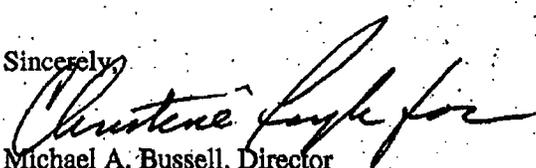
Re: Notification of Stayed Permit, City of Caldwell, NPDES Permit No. IDS-028118

Dear Mr. Osgood:

The above-referenced National Pollutant Discharge Elimination System (NPDES) permit (Permit) was issued to the City of Caldwell (City) on September 4, 2009. On October 20, 2009, the U.S. Environmental Protection Agency Region 10 (Region 10) received notification from the Environmental Appeals Board (EAB) that Pioneer Irrigation District (Pioneer) had filed a petition for review of the Permit (Appeal No. NPDES 09-11).

After reviewing the petition for review, Region 10 has determined that none of the conditions of the Permit should be stayed. Pioneer's petition for review does not appear to contest a specific condition of the Permit. Instead, the petition for review challenges the absence of a condition that Pioneer requested Region 10 to add to the Permit during the public comment period. Since all of the Permit's conditions will have to be met regardless of the outcome of Pioneer's appeal, the Permit's conditions are uncontested within the meaning of 40 C.F.R. § 124.60(b)(6)(ii). As such, in accordance with 40 C.F.R. § 124.16(a)(2), the entire Permit will become fully effective and enforceable 33 days after the date this notice is mailed. Please feel free to contact Misha Vakoc at (206) 553-6650 should you have any questions regarding this letter.

Sincerely,

  
Michael A. Bussell, Director  
Office of Water and Watersheds

cc: Environmental Appeals Board  
Lee Van de Bogart, City of Caldwell  
Matthew J. McGee, Moffatt Thomas



**Murray Feldman, Holland & Hart**  
**Craig Shephard, IDEQ Boise Regional Office**  
**Robert Schmillen, City of Middleton**  
**Cheryl Jenkins, City of Nampa**  
**Erica Anderson Maguire, Ada County Highway District**  
**Tim Richards, Canyon Highway District No. 4**  
**Rex Nichols, Notus Parma Highway District No. 2**  
**Jim Buffington, Nampa Highway District No. 1**  
**Ken Harward, Association of Idaho Cities**  
**Greg Vitley, Idaho Transportation Department**  
**Tom Dupris, Lower Boise Watershed Council**  
**Matthew Johnson, White Peterson**