

EXHIBIT F-3
Public Notice of Extension to Comment Period
(9/2/08)

PUBLIC NOTICE

United States Environmental Protection Agency (EPA)
Region 10
Park Place Building, 13th Floor
1200 Sixth Avenue, Suite 900, OWW-130
Seattle, Washington 98101
(206) 553-0523
1-800-424-4372 (within Region 10 only)

NOTICE OF EXTENSION TO COMMENT PERIOD
FOR PROPOSED ISSUANCE OF EIGHT (8)
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM (NPDES) PERMITS
TO DISCHARGE STORM WATER TO
WATERS OF THE UNITED STATES
and
NOTICE OF STATE CERTIFICATIONS

Technical Contact: Misha Vakoc, (206) 553-6650
or toll free 1-800-424-4372, extension 6650
E-mail: vakoc.misha@epa.gov

Original Public Notice Issuance Date: July 11, 2008
Original Public Notice Expiration Date: September 19, 2008

Extended Public Notice Expiration Date: November 18, 2008

1. Applicants

a) Permit applications were submitted by each of the following entities:

Permit # IDS-028100	City of Middleton 6 North Dewey Avenue P.O. Box 487 Middleton, Idaho 83644
Permit # IDS-028118	City of Caldwell 621 Cleveland Boulevard Caldwell, Idaho 83605
Permit # IDS-028126	City of Nampa 411 Third Street South Nampa, Idaho 83651
Permit # IDS-028134	Canyon Highway District #4 15435 Highway 44

	Caldwell, Idaho 83607
Permit # IDS-028142	Nampa Highway District #1 4507 Highway 45 P.O. Box 76 Nampa, ID 83686
Permit # IDS-028151	Notus-Parma Highway District # 2 106 South 4th Street P.O. Box 719 Parma, ID 83660
Permit # IDS-028177	Idaho Transportation Department, District 3 8150 Chinden Boulevard P.O. Box 8028 Boise, Idaho 83707
Permit # IDS-028185	Ada County Highway District 3775 Adams Street Garden City, Idaho 83714

This action responds to the applicants' requests to extend the comment period based on the need to conduct comprehensive review and analysis of their respective permit requirements. Each applicant requested additional time allowing for coordination, research and consultation among various organizations. EPA has therefore decided to extend the comment period for an additional 60 days to November 18, 2008.

2. Tentative Determination

The Region 10 Office of EPA has tentatively determined to issue eight permits for the discharge of storm water from the MS4s owned and operated by each of the above listed applicants.

3. State Certification

This Notice also announces Idaho Department of Environmental Quality's intent to certify that the subject discharges will comply with the applicable provisions of Sections 208(e), 301, 302, 303, 306 and 307 of the Clean Water Act. The NPDES permit will not be issued until the certification requirements of Clean Water Act Section 401 have been met. Idaho Department of Environmental Quality has provided draft certifications for each of the eight draft permits, copies of which are contained in Appendix C of each respective Fact Sheet.

4. Public Comments

Persons wishing to comment on the tentative determinations contained in any of the draft permits may do so in writing to EPA at the above address or by e-mail to

vakoc.misha@epa.gov no later than November 18, 2008. Comments should include a name, address, and phone number; the relevant NPDES permit number; and a concise statement of the basis of the comment, including relevant facts upon which the comment is based.

Persons wishing to comment on the draft State Certifications should submit written comments during the comment period to:

Regional Administrator
Idaho Department of Environmental Quality
Boise Regional Office
1445 North Orchard
Boise, Idaho 83706

5. Administrative Record

Each of the proposed NPDES permits, fact sheets, and other related documents are available electronically on the Internet at <http://www.epa.gov/region10/stormwater.htm>. Draft documents are also on file and may be inspected at the above EPA address any time between 8:30 a.m. and 4:00 p.m., Monday through Friday. Copies and other information may be requested by writing to the EPA at the above address to the attention of the NPDES Permits Unit, by sending an e-mail to washington.audrey@epa.gov or by calling (206) 553-0523. Copies of the draft permits and fact sheets are also available for public review at the following locations:

EPA Idaho Operations Office
1450 North Orchard Street
Boise, Idaho 83706

Idaho Department of Environmental Quality
Boise Regional Office
1445 North Orchard
Boise, Idaho 83706

Disability Reasonable Accommodation Notice:

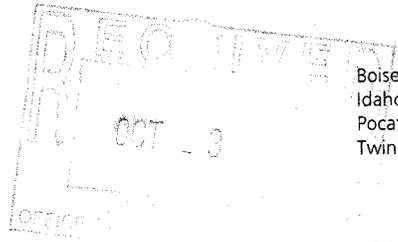
If you need a reasonable accommodation for a disability, please contact Misha Vakoc at 206-553-6650 (voice). TTY/TDD users please dial Washington Relay Service at 1 (800) 833-6388. Please provide one week advance notice for special requests not related to ongoing programs and services.

EXHIBIT G-9

**Letter from Scott Campbell, Moffatt Thomas, to Misha
Vakoc, EPA, re: Pioneer Irrigation District Comments
(10/20/08)**

Moffatt Thomas

MOFFATT THOMAS BARRETT ROCK & FIELDS, CHTD.



Boise
Idaho Falls
Pocatello
Twin Falls

Eugene C. Thomas	Michael E. Thomas	Jon A. Stenquist
John W. Barrett	Patricia M. Olsson	Tyler J. Anderson
R. B. Rock	Christine E. Nicholas	Paul D. McFarlane
Richard C. Fields	Bradley J. Williams	Tyler J. Henderson
John S. Simko	Lee Radford	C. Edward Cather III
John C. Ward	Michael O. Roe	Michelle C. Michaud *
D. James Manning	Nancy J. Garrett	Andrew J. Waldera
David B. Lincoln	David S. Jensen	Dylan B. Lawrence
Gary T. Dance	James L. Martin	Benjamin C. Ritchie
Larry C. Hunter	C. Clayton Gill	Rebecca A. Rainey
Randall A. Peterman	Michael W. McGreaham	Andrew J. Snook
Mark S. Prusynski	David P. Gardner	Matthew J. McGee
Stephen R. Thomas	Tara Martens	<i>* licensed in WA, ID application pending</i>
Glenna M. Christensen	Mark C. Peterson	Robert E. Bakes, <i>of counsel</i>
Gerald T. Husch	Julian E. Gabiola	<i>Willis C. Moffatt, 1907-1980</i>
Scott L. Campbell	Kimberly D. Evans Ross	<i>Kirk R. Helvie, 1956-2003</i>
Robert B. Burns	Jason G. Murray	

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October 20, 2008

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Misha Vakoc
Manager, NPDES Permits Unit
United States EPA - Region 10
1200 Sixth Avenue, Suite 900
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Seattle, Washington 98101

Re: Pioneer Irrigation District
Comments on NPDES Permit Number IDS-028118
MTBR&F File No. 18946.0059

Dear Ms. Vakoc:

This correspondence is in response to the United States Environmental Protection Agency's ("EPA") requests for public comment on proposed NPDES Permit Number IDS-028118 ("Permit"), authorizing the discharge of storm water from all municipal separate storm sewer system ("MS4") outfalls owned and operated by the City of Caldwell ("Caldwell"). These comments are provided on behalf of the Pioneer Irrigation District ("Pioneer").

Pioneer is located in the Boise River Valley of southwest Idaho. It delivers irrigation water and performs irrigation drainage functions to approximately 34,000 acres in Canyon County, including large portions of Caldwell. Pioneer provides irrigation water to highly productive farmland and urban areas. The farmland would not produce agricultural products absent irrigation, and many urban residents and municipalities rely on Pioneer to supply irrigation water.

Pioneer organized in 1903 and has the distinction of being one of the first irrigation districts formed in Idaho after the Idaho legislature enacted statutes allowing the creation of irrigation districts. As an early irrigation district, Pioneer was a leader in the effort to create the Boise Irrigation Project, including Arrowrock Dam and Reservoir and Anderson Ranch Dam and Reservoir. Pioneer diverts water from the Boise River under the authority of natural flow water rights. Pioneer also holds water rights and related storage contracts with the United States Bureau of Reclamation for water from Arrowrock Dam and Reservoir, Anderson Ranch Dam and Reservoir, and Lucky Peak Dam and Reservoir.

Pioneer's comments focus first on the requirements and effect of the proposed issuance of Permit, and second on the breadth, scope, and adequacy of the control measures outlined in Part II.B. of the Permit.

Pioneer notes the clear language in the Permit recognizing that it "does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to persons or property or invasion of other private rights, nor any infringement of state or local laws or regulations." *Permit, VI.H.* The Idaho Department of Environmental Quality ("IDEQ") also recognized that its certification does not affect the private property rights of others when it stated that the Permit's certification "does not excuse the permit holder from the obligation to obtain any other necessary approvals, authorizations or permits, including without limitation, the **approval from the owner of a private water conveyance system**, if one is required, to use the system in connection with the permitted activities." Idaho Department of Environmental Quality, Draft Clean Water Act § 401 Certification (emphasis added).

It is clear that the scope of the Permit, and the certification thereof, is expressly limited to property over which Caldwell has legal jurisdiction or authority and that EPA and IDEQ will not offer any opinions regarding disputes about such jurisdiction or authority. However, Pioneer wishes to make both IDEQ and EPA aware of its situation because it clearly affects further implementation and continued development of Caldwell's storm water management program ("SWMP") in accordance with the Permit.

Pioneer's property rights are well-recognized and firmly established in the law of the State of Idaho. In addition to clear property interests created under the Common Law by continuous, open use, under claim of right, Pioneer's property rights have been confirmed and reinforced by statutory enactment.

Title 42 of the Idaho Code confirms and grants rights-of-way for irrigation facilities and provides that the existence of a "visible ditch, canal or conduit shall constitute notice to the owner, or any subsequent purchaser, of the underlying servient estate" that Pioneer "has the right-of-way and the incidental rights confirmed or granted by this section." I.C. § 42-1102. Such rights-of-way are "essential for the operations of the ditches, canals, and conduits." *Id.* Accordingly, "[n]o person or entity shall cause or permit any encroachments onto the right-of-way . . . without the written permission of the owner of the right-of-way, in order to ensure that any such encroachments will not unreasonably or materially interfere with the use and enjoyment of the right-of-way." *Id.*

The importance and sanctity of Pioneer's property rights are further underscored in Idaho Code Sections 42-1207, 42-1208, and 42-1209, which provide irrigation entities with broad legal rights and protection from interference. Changes to the land across which ditches, canals, drains, or conduits run are prohibited if they injure any person with interests in those ditches,

canals, drains, or conduits. I.C. § 42-1207. The easements and rights-of-way of irrigation districts are not subject to adverse possession. I.C. § 42-1208. Finally, pursuant to Idaho Code Section 42-1209, “no person or entity shall cause or permit any encroachments onto the easements or rights-of-way [of an irrigation district] without [its] written permission.” I.C. § 42-1209.

These protections are necessary in light of the duties and obligations imposed upon irrigation entities. Pioneer must maintain its ditches, canals, and conduits “in good order and repair, ready to deliver water.” I.C. § 42-1202. It must “keep and maintain the embankments thereof in good repair” to avoid wasting water during irrigation season. I.C. § 42-1203. Pioneer must also avoid permitting “a greater quantity of water to be turned into [the] ditch, canal or conduit than the banks thereof will easily contain.” *Id.* Finally, Pioneer must maintain its ditches, canals, and conduits “in good repair and condition, so as not to damage or in any way injure the property or premises of others.” I.C. § 42-1204.

Because of the broad scope of both Pioneer’s rights and responsibilities as an irrigation entity, it has actively prohibited any encroachments into its easements and rights-of-way without express written authorization. Nonetheless, Caldwell has passed an ordinance enacting a Storm Water Management Plan (“SWMP”) which authorizes the construction of storm water discharge outfalls in the easements, rights-of-way, and facilities owned, operated, and maintained by Pioneer. Caldwell’s use of Pioneer’s facilities conflicts with the purposes for which those facilities were created, and interferes with the proper operation and maintenance of those facilities.

It appears that the adopted SWMP will act as the foundation for compliance with the Permit. Therefore, Pioneer requests that EPA modify the Permit to clearly state that the requirements and control measures imposed on Caldwell by EPA’s issuance of the Permit are not an affirmative grant of power over Pioneer or its facilities. Pioneer will not permit Caldwell to take any action in its efforts to conform with Permit requirements over which Caldwell does not have jurisdiction or authority to take.¹ Specifically, Pioneer requests that explicit limitations be included in the Permit to ensure compliance with state right-of-way and property law. The following language should be included in the Permit conditions: ***No discharges are authorized by this Permit to constructed waterways, owned, operated, or maintained by irrigation entities.***

¹ Pioneer takes the same position with respect to any other entities seeking NPDES Permits from EPA for stormwater discharge that may affect Pioneer’s rights and/or obligations. Specifically, Pioneer notes that it will not permit Caldwell or Nampa to take any action affecting Pioneer facilities that it does not have the authority to take in an effort to conform with the requirements of proposed Permit Number IDS-028126.

Pioneer believes that Caldwell already exceeds, and will continue to exceed, its authorization under the Permit because Caldwell is not authorized to “discharge storm water that will cause, or have the reasonable potential to cause or contribute to, violations of the Idaho water quality standards.” *Permit, I.C.2*. The impact of municipal storm water runoff on water quality is of increasing concern. EPA has recognized that “[w]aterways and receiving waters near urban and suburban areas are often adversely affected by urban storm water runoff.” EPA, Preliminary Data Summary of Urban Storm Water Best Management Practices, 1-1 (August 1999). These adverse effects include increased rates of sediment transport, loss of sensitive aquatic species, and risks to public health and recreation. *Id.*; see also IDEQ, Storm Water Best Management Practices Catalog at 2.1 (September 2005).

According to IDEQ’s water quality standards, Pioneer’s water supply is designated for agricultural use and, as such, water quality should be “appropriate for the irrigation of crops or as drinking water for livestock.” See IDAPA 58.01.02.100.03.b. In addition, Pioneer’s water supply is also increasingly used for the irrigation of residential and urban lands (such as parks, schools, yards, and playgrounds).

Under Caldwell’s existing SWMP, developers of residential property are permitted to discharge municipal storm water into a natural or man-made drainage way simply by giving notice. In some circumstances, no notice is required at all and since enactment of the existing SWMP, discharge points have been constructed to discharge municipal storm water into Pioneer’s facilities without Pioneer’s permission. Such discharges violate Idaho water quality standards. State standards demand that “[n]o pollutant shall be discharged from a single source or in combination with pollutants discharged from other sources in concentrations or in a manner that . . . [w]ill injure designated or existing beneficial uses.” IDAPA 58.01.02.080.01.b. Pioneer believes municipal storm water discharges into its facilities compromise water quality for the purposes of agriculture, residential landscaping, and secondary potential contact.

Furthermore, IDEQ water quality standards require that “man-made waterways are to be protected for the use for which they were developed.” IDAPA 58.01.02.101.02. Pioneer’s man-made waterways were developed for irrigation and agricultural return flows only. Thus, Pioneer’s facilities must be protected from any conflicting use Caldwell might authorize in the development or implementation of its Permit-compliant SWMP. Currently, the SWMP and Caldwell’s practices violate IDEQ water quality standards because of the adverse water quality impacts of municipal storm water discharges upon irrigation water uses.

Pioneer requests that EPA recognize the practical burden that Caldwell’s existing SWMP (and any future iteration which permits discharge into Pioneer facilities) places on Pioneer. In addition to Caldwell’s encroachment into Pioneer’s irrigation easements and rights-of-way, producing water quality violations, Caldwell’s SWMP dramatically increases flood risks for Pioneer and greatly burdens seasonal maintenance of its facilities. Many of Pioneer’s facilities

were constructed more than a century ago for delivery of seasonal irrigation and agricultural return flows. They were not designed or constructed for year-round municipal storm water drainage.

Subjecting Pioneer facilities to the demands of municipal storm water prevents it from performing routine off-season maintenance and improvements that require its facilities be devoid of water. In addition, the increased impervious surfaces involved in the expansive urbanization of Caldwell prevent natural percolation and evaporation and increase the risk of flooding in Pioneer waterways. *See* IDEQ, Storm Water Best Management Practices Catalog at 2.1 (September 2005). The Permit must not authorize use of Caldwell's SWMP because it increases the risk of property damage and poses an immediate danger to human life or aquatic wildlife. It impermissibly shifts those liabilities and burdens from Caldwell to Pioneer. *See, e.g.,* I.C. §§ 42-1202, 42-1203, and 42-1204.

Pioneer maintains that EPA's issuance of the Permit invalidly exposes Pioneer to liability under the Clean Water Act. The Clean Water Act ("CWA"), 33 U.S.C. § 1251, *et seq.*, prohibits point source discharges of pollutants into waters of the United States without a proper NPDES permit. CWA § 402. Pioneer is exempt from NPDES program jurisdiction because agricultural return flows are exempt from the CWA's permitting requirements if discharges are "composed entirely of return flows from irrigated agriculture." *Id.* at § 402(l). Pursuant to the Caldwell's SWMP, developers have installed multiple points of municipal storm water discharge into Pioneer's irrigation and drainage facilities without authorization. Caldwell's SWMP and the Permit will jeopardize Pioneer's protections under the agricultural return flow exemption.

Pioneer will now comment on the control measures outlined in Part II.B of the Permit. Parts II.B.1 and II.B.2 of the Permit require Caldwell to develop and implement a public education program and involve interested stakeholders in the development of a SWMP. To the extent Caldwell has already implemented a SWMP, it has demonstrated a high level of disregard for a large group of interested stakeholders, including Pioneer, and has consistently taken action that primarily benefits commercial and residential development interests. Caldwell has failed to effectively involve, educate, and notify Pioneer and its customers. That failure is particularly egregious in light of the fact that, pursuant to the Caldwell's SWMP, developers have installed multiple points of municipal storm water discharge into Pioneer's irrigation and drainage facilities without authorization.

Pioneer requests EPA to modify the Permit to require Caldwell to more effectively educate and address stakeholders about the environmental impacts of municipal storm water discharges, and about the impacts of these discharges upon the legal rights of others. Pioneer submits that a more prominent component of public education and involvement should involve notice to stakeholders that any Permit issued does not authorize Caldwell to utilize the property of others in the implementation of a SWMP.

EPA states that “[b]road public support is crucial to the success of a SWMP because citizens who participate in the development and decision-making process may be less likely to raise legal challenges to the SWMP and are more likely to take an active role in its implementation.” Fact Sheet for NPDES Permit No. IDS-028118, 16. Caldwell’s plan to “engage stakeholders” has been so poorly executed that Pioneer’s only means of engagement has been to seek redress via litigation over actions taken pursuant to the existing SWMP.

Pioneer has no reason to believe that the issuance of the Permit will foster cooperation or more respect for Pioneer’s rights and obligations. Moreover, Pioneer believes final issuance of the Permit will encourage Caldwell to take further unilateral actions against the interests of Pioneer and its customers. This is likely unless EPA issues a revised Permit which delineates the integrity of Pioneer’s private property rights, confirms the integrity of the CWA agricultural return flow exemption, and emphasizes that any actions undertaken in conjunction with the permit must not conflict with these rights.

Part II.B.3 of the Permit requires Caldwell to develop and implement illicit discharge detection and elimination activities. Caldwell has operated under some form of the existing SWMP since 1998 and in that time has failed to institute an effective regulatory mechanism for illicit discharge as it pertains to anything but Caldwell’s publically-owned treatment works. Particularly, Caldwell has failed to provide adequate regulation of illicit discharge into the drainage and irrigation facilities operated by Pioneer. That failure burdens Pioneer and endangers thousands of Pioneer customers because discharge points authorized by the existing SWMP and maintained by Caldwell empty into Pioneer facilities. Pollution that may result from illicit discharge substantially interferes with the intended beneficial use of Pioneer facilities, and more importantly, directly and indirectly threatens aquatic, wildlife, and human health.

Over the course of ten years, Caldwell has made no effort to meaningfully regulate illicit discharges as it pertains to urban storm water, despite clear danger and complaints. Pioneer submits that such a desertion of public duty evidences a lack of good faith in Caldwell’s application for Permit and its development of a comprehensive SWMP. Pioneer requests EPA’s consideration of the potential liabilities and risks that Caldwell’s shortcomings have and will continue to place on Pioneer and its customers. In addition, Pioneer requests EPA’s acknowledgement that Caldwell’s improper utilization of Pioneer’s property in the implementation of a SWMP, including illicit discharge detection and elimination activities, will not be authorized or condoned by EPA’s issuance of the Permit.

Parts II.B.4 and II.B.5 of Permit require Caldwell to develop and implement construction site control activities and post-construction storm water management in new development and redevelopment. The population growth of Caldwell has led to increased impervious surfaces like asphalt and concrete and Caldwell has not yet implemented policies adequate to safeguard

Misha Vakoc
October 20, 2008
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against the dangers that high volume runoff and municipal storm water pollutants present to Pioneer and Pioneer customers. Instead of responding to urban growth with more responsible planning and standards for lower impact development, Caldwell has implemented a policy that enables and encourages developers to shift the burdens and liabilities of urban storm water planning, control, and maintenance from Caldwell to Pioneer.

Again, Caldwell's administration and implementation of the existing SWMP provides Pioneer with little hope that Caldwell will handle construction site control activities and post-construction storm water management under the Permit with any more consideration for the interests of stakeholders like Pioneer than it has in the past, especially in light of Caldwell's policy that is currently in place. Pioneer asks that EPA consider how the existing narrative limitations and requirements of the Permit will incentivize a more pro-active approach to construction site control and post-construction storm water management when EPA approves continued development of a SWMP that provides for unauthorized storm water discharge onto the private property of others. Pioneer requests EPA's acknowledgement that EPA is not authorizing Caldwell to utilize Pioneer's property in construction site control activities or in the implementation of post-construction storm water management.

To conclude, Pioneer reiterates that it will not tolerate the unauthorized use of its easements and rights-of-way to allow Caldwell's implementation of the Permit SWMP. While EPA clearly has the authority to require Caldwell's compliance with the Permit, it does not have the authority to require Pioneer's compliance with the Permit or to preempt state law governing Pioneer's rights and obligations. Because Caldwell has not effectively addressed Pioneer's valid stakeholder concerns regarding property rights, flood damage, environmental risks, and tort liability, these concerns should be more prominently addressed in any response EPA may have to these Comments and in the Permit itself.

Thank you for the opportunity to provide written comment in this critical matter. Please direct all notifications and communications to me at the address listed above.

Very truly yours,


Scott L. Campbell

SLC/dll

cc: Pioneer Irrigation District
Maria Lopez, US EPA, Region 10
Pete Wagner, Regional Administrator, Idaho DEQ
Mark Hilty, Caldwell City Attorney