

**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 FOR REVIEW

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").¹ The modifications

¹Under 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. Under CWA § 402(p) and 40 C.F.R. § 122.26, an NPDES permit is required for MS4s serving populations of 250,000 or more (large

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

systems), and those serving populations of 100,000 or more, but less than 250,000 (medium systems). It is undisputed that all the permittees in this case satisfy at least one of these criteria.

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") state that they have 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 state that the Board should stay all proceedings in this matter to allow the Region sufficient time to carry out its obligations under the Agreement.

The permittees have each filed responses opposing the Consent Agreement and urging the Board to reject it. See City of Tucson, Arizona's Opposition to the Notice of Filing of Consent Agreement and Request for Stay Order and Tucson's Renewed Motion to Intervene ("Tucson Opposition") (Dec. 14, 1998); Response of the County of Pima, Arizona to Consent Agreement ("Pima Opposition") (Dec. 14, 1998); City of Phoenix, Arizona's Opposition to the Notice of Filing of Consent Agreement Request for Stay Order and Renewed Motion to Intervene ("Phoenix Opposition") (Dec. 11, 1998); Comments by City of Mesa on Consent Agreement ("Mesa Opposition") (Dec. 15, 1998); and City of Tempe's Response to Consent Agreement ("Tempe Opposition") (Dec. 14, 1998). Among other things, the permittees assert that: 1) the petition for review is moot and should therefore be dismissed. (Phoenix Opposition at 6-8, Pima Opposition at 4, Mesa Opposition at 4); 2) the deadlines imposed by the Consent Agreement are unrealistic and prejudice the rights of the permittees. (Pima Opposition at 15; Tucson Opposition at 3; Tempe Opposition at 4; Phoenix Opposition at 14-17); 3) the provision of the Agreement allowing the Region to prepare its own

version of the modified SWMP infringes on local authority and is contrary to the Clean Water Act. (Tempe Opposition at 4-5); 4) implementation of the Consent Agreement which modifies the measures of compliance without sufficient participation of the permittees violates the permittees' right to due process. (Tempe Opposition at 5; Pima Opposition at 17; Phoenix Opposition at 21); and 5) the provision of the Consent Agreement requiring that the Region determine whether the permittees' pollution reduction estimates indicate that the existing SWMP will be adequate to reduce discharges to the maximum extent practicable is contrary to the Clean Water Act in that it improperly creates "a link between the MEP standard and the estimation of pollutant load reductions because EPA must consider other factors as well when determining MEP." (Mesa Opposition at 8; Phoenix Opposition at 10-11).

Upon consideration, we agree with those permittees who assert that the petition for review is moot and therefore must be dismissed. As the Board stated in *In re Cavenham Forest Industries, Inc.* 5 E.A.D. 722 (EAB 1995):

[I]n addressing a claim of mootness, the Board looks to whether there remain any contested permit conditions **B** that is, conditions identified as objectionable in the petition for review - that the Regional Office has not undertaken to revise in the manner requested by the petitioner. If no such challenged condition remains, a petition under section 124.19 must be dismissed as moot, even if the parties continue to disagree over the meaning of the applicable legal principles.

Cavenham, at 728 (footnote omitted).² There is no dispute in the present case that the Consent Agreement between petitioners and the Region resolves all issues raised in the present petition for review. Nevertheless, petitioners and the Region would have the Board retain jurisdiction of the appeal in the event the Region does not comply with the Consent Agreement. We decline to do so. The Board's role in this proceeding is neither to approve nor enforce the Consent Agreement. Rather, we need only determine what action is appropriate with regard to the petition for review now before us. Because the parties as well as the permittees agree that if the Region complies with the provisions of the Consent Agreement, all issues raised in the petition for review will be moot, the appeal must be dismissed.

Although it is understandable for Petitioners to seek a mechanism by which to enforce the Consent Agreement, the present permit appeal cannot serve as this mechanism. Any potential disputes arising in the course of implementing the Consent Agreement will almost certainly involve new or significantly different issues from those raised in the present petition, and thus the review of the existing petition is obviously not an appropriate vehicle for addressing those issues. Further, the Board will not concern itself with the potential "reviewability"

²Although *Cavenham* involved a RCRA permit appeal governed by the provisions of 40 C.F.R. § 124.19, the analysis applies equally to petitions filed under § 124.91.

of as yet undefined issues. See *Cavenham* at 729-31. The Board will only address new issues that may arise in the implementation of the Agreement when (and if) the Region decides to issue a later permit modification and an interested party files a timely petition for review with the Board.³

We note that the first condition of the Consent Agreement states that the petition will be stayed pending performance by the Region of its obligations under the Agreement. As today's dismissal renders this provision ineffective, petitioners will

³We reject the permittees' assertion that the Consent Agreement violates their right to due process. The Consent Agreement by itself imposes no new obligations on the permittees. Moreover, the Agreement states that any changes to the permit imposing additional obligations will be subject to the permit modification procedures of 40 C.F.R. part 124. Thus, before any additional obligations can be imposed, permittees will have the right to submit comments, request an evidentiary hearing, and if necessary, file an appeal with the Board.

have ten days from the date this order is served to cancel the Agreement and reinstate their petition for review.⁴

So ordered.

Dated: 12/22/98

ENVIRONMENTAL APPEALS BOARD

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

⁴As previously noted, the Board's role does not extend to reviewing the Consent Agreement itself, and we have not been asked by the parties to do so. Thus, we obviously express no opinion at this time on the substance of the objections raised by the permittees as to the terms of the Consent Agreement.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Petition for Review 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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