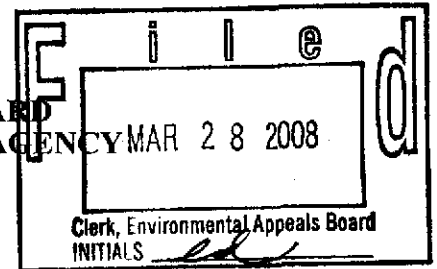


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
San Jacinto River Authority)
NPDES Permit No. TX0054186)

NPDES Appeal No. 07-19

ORDER DISMISSING PETITION FOR REVIEW

On October 29, 2007, the San Jacinto River Authority ("SJRA") filed a petition for review of certain conditions of a National Pollutant Discharge Elimination System ("NPDES") permit issued by U.S. EPA Region 6 (the "Region") on September 28, 2007. *See* Petition for Review of NPDES Permit Issued by Region 6 on September 28, 2007 (Oct. 29, 2007) ("Petition"). In its Petition, SJRA objects to conditions in the NPDES permit concerning the following: (1) the imposition of certain whole effluent toxicity ("WET") testing limits for lethality and sub-lethality; (2) the inclusion of a definition of "No Observed Effects Concentration" ("NOES") that is allegedly inconsistent with a definition previously approved by the Region and with EPA guidance; (3) the definition of a permit violation based on a single WET test result; (4) the Permit's use of NOES to report WET test results rather than an alternate method suggested by SJRA; (5) the inclusion of a permit limitation for E. coli; (6) the inclusion of a copper monitoring requirement based on a single data point; (7) the permit's definition for 24-hour composite sampling; and (8) the Region's failure to include certain allegedly agreed-upon changes to the permit concerning the permit's annual sludge report provisions, the critical dilution for WET testing, and the definition of certain terms used in the permit's WET testing requirements. Petition at 14-15.

By submission filed on March 14, 2008, the Region represents that it has withdrawn all contested permit conditions. *See* United States Environmental Protection Agency Region 6

Notification of Withdrawal of Portions of NPDES Permit (Mar. 14, 2008) (“Notification”). In addition, the Region has filed a memorandum in support of its withdrawal and a motion to dismiss the Petition as moot, or, in the alternative, to stay the proceedings until the permit modification process is complete. *See* Memorandum in Support of Notification of Withdrawal of Portions of NPDES Permit and Respondent’s Motion to Dismiss as Moot, or in the Alternative for a Stay of Proceedings (Mar. 14, 2008) (“Region’s Memorandum”). The Region states that it intends to prepare permit modifications for public comment in accordance with the provisions of 40 C.F.R. § 124.19(d), which authorizes the Region to withdraw a permit any time prior to the Environmental Appeals Board’s granting or denying of a petition for review. *Id.* at 3-4.

On March 25, 2008, SJRA filed a response to the Region’s Notification and the Region’s Memorandum. *See* San Jacinto River Authority’s Response to and Motion for Clarification of United States Environmental Protection Agency Region 6 Notification of Withdrawal of Portions of NPDES Permit; Objection to Dismissal and Motion to Stay Proceedings (Mar. 25, 2008) (“SJRA Response”). SJRA seeks an order from the Board requiring the Region to provide clarification on two issues.

First, SJRA seeks clarification on whether the Region is withdrawing only those conditions which SJRA has challenged in its Petition, or whether the Region also plans to withdraw additional conditions. *See* SJRA Response at 3-4. According to SJRA, the Region has failed to provide sufficient specificity regarding which permit conditions the Region plans to withdraw. In particular, SJRA argues that because the Region, in some instances, cited the contested conditions by their page numbers in the final permit rather than by their specific item numbers, it is not clear whether the Region intends to withdraw permit conditions other than those SJRA has contested that might appear on the same pages as the contested provisions. *Id.* at 3-4. However, upon examination of the Notification and the Region’s Memorandum, we find no need for additional clarification. Although

the Region has cited certain contested conditions by reference to the page numbers on which the conditions appear, it is clear from the Notification and the Region's Memorandum that the Region is only withdrawing the contested permit conditions. See Notification at 1 ("EPA is exercising its authority to withdraw *the challenged permit terms* in NPDES Permit No. TX0054186.") (emphasis added); Region's Memorandum at 1 (stating that the Region is withdrawing the "*challenged portions*" of the permit), *id.* at 3 (stating that the Region is withdrawing the permit's "*contested conditions*"). Under these circumstances, we see no need for further clarification. Moreover, even if the Region were to withdraw additional conditions and revise such conditions as part of any permit modification, SJRA would have the opportunity to submit comments and to seek Board review in accordance with 40 C.F.R. § 124.19.

Second, SJRA states that it is unclear "whether the Region intends to withdraw the permit provisions imposing WET limits in SJRA's permit for the reasons discussed in Section IV.B of SJRA's Petition." SJRA's Response at 4. Apparently, SJRA seeks an order from this Board requiring that the Region clarify its rationale for withdrawing the contested permits conditions relating to WET testing. We decline to issue such an order. Under the applicable regulation at 40 C.F.R. § 124.19(d), the Region may withdraw all or part of a permit at any time prior to issuance of a final decision by this Board. In taking such action, the Region need only provide notice to the Board and any interested parties. See 40 C.F.R. § 124.19(d). Nothing in this regulation requires that the Region provide the Board with a rationale for withdrawing a permit or any conditions thereof, nor has SJRA cited any support for such a requirement. Further, as stated, SJRA and other interested parties will have the opportunity to submit comments on any future action by the Region with respect to the permit, and to file a petition for review with this Board pursuant to 40 C.F.R. § 124.19. Under

these circumstances, SJRA's request that the Board issue an order requiring clarification from the Region on this issue is denied.

Finally, SJRA states that the Region's actions in withdrawing the contested permit conditions "confirms that this Petition raises important policy consideration necessitating review by the EAB." SJRA Response at 4-5. SJRA states further that it "may have many of the same objections and arguments after the modification process as were raised in its Petition." *Id.* at 5. Thus, according to SJRA, the current permit proceedings should be stayed rather than dismissed. *Id.*

Upon consideration, we conclude that the Region's withdrawal of the contested permit provisions renders the Petition moot. The Petition is therefore DISMISSED WITH PREJUDICE. As stated above, this dismissal with prejudice will have no effect on SJRA's rights to submit comments on any draft permit revisions or modifications or to seek Board review of any future EPA action with respect to NPDES Permit No. TX0054186 in accordance with 40 C.F.R. § 124.19.

So ordered.¹

Dated:

March 28, 2008

ENVIRONMENTAL APPEALS BOARD

By: 

Anna Wolgast

Environmental Appeals Judge

¹ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast. 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

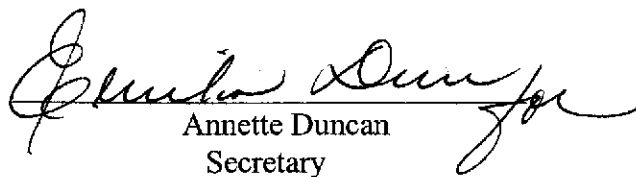
I hereby certify that copies of the forgoing Order Dismissing Petition for Review in the matter of San Jacinto River Authority, NDPEs Appeal No. 07-19, were sent to the following persons in the manner indicated:

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Dated: 3/28/2008


Annette Duncan
Secretary