

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

| | | |
|-------------------------|---|-----------------------|
| _____ |) | |
| In re: |) | |
| |) | |
| Grafton Water Pollution |) | NPDES Appeal No. 00-5 |
| Control Facility |) | |
| |) | |
| _____ |) | |

ORDER DENYING REVIEW

I. *PROCEDURAL BACKGROUND*

On July 24, 2000, Petitioner, the Town of Grafton Board of Sewer Commissioners ("Grafton"), filed a petition for review ("Petition") seeking review of several limitations and conditions in a final National Pollutant Discharge Elimination System ("NPDES")¹ permit decision issued by U.S. EPA Region I ("Region"), regulating discharges from Grafton's publicly owned

¹Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources into waters of the United States must have a permit in order for the discharge 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.

treatment works ("POTW") to the Blackstone River.² On May 11, 2001, after several time extensions requested by the parties, the Region filed a response to Grafton's Petition ("Response") explaining that the parties entered into a Stipulation and Partial Settlement ("Stipulation") to resolve certain issues on appeal. Response at 5.

The aftermath of the parties' agreement was an order issued on August 8, 2001, in which the Environmental Appeals Board ("Board" or "EAB") granted the parties' remand request as to some issues raised on appeal, dismissed some issues per the Stipulation, denied review in part, and stayed the appeal as to two remaining issues. More specifically, the Board dismissed

²On May 15, 2000, EPA published "Amendments to Streamline the National Pollutant Discharge Elimination System Program Regulations: Round Two." See 65 Fed. Reg. 30,886 (May 15, 2000). The amendments became effective on June 14, 2000. *Id.* Section 124.21(c)(3), as amended by 65 Fed. Reg. 30,886, 30,911, provides that for "any NPDES permit decision for which a request for evidentiary hearing was filed on or prior to June 13, 2000 but was neither granted nor denied prior to that date, the Regional Administrator shall no later than July 14, 2000 notify the requester that the request for evidentiary hearing is being returned without prejudice. * * * The requester may file an appeal with the Board * * * no later than August 13, 2000." 40 C.F.R. § 124.21(c)(3) (2000). Grafton had requested an evidentiary hearing on October 27, 1999, and on June 30, 2000, the Region returned Grafton's request, as required by the amendments, which led to the filing of this appeal.

issues number six, seven and eight, granted the Region's request to remand the terms described as issue ten in paragraph 2 of the Stipulation, denied review of issues number one, three, four and five, and granted the parties' request to stay the proceedings in regard to issues number two and nine until August 24, 2001.³

According to the Stipulation, issues number two and nine were to be resolved in a manner consistent with the final EAB decision in *In re Upper Blackstone Water Pollution Abatement District* ("UBWPAD"), NPDES Appeal No. 00-11, another case pending before the Board at the time. The Stipulation, however, did not seem to contemplate the possibility of having the parties in the UBWPAD appeal resolve their differences through a settlement without a Board decision. In our August 8 order, we required the parties to file a joint brief or individual briefs indicating the position of the parties relative to the disposition of the

³Issue number two is a challenge to the method used by the Region to calculate the winter limit for the ammonia nitrogen limitation. According to Grafton, in calculating a permit limit for the ammonia nitrogen condition, the Region failed to apply a dilution factor. Petition at 3. Issue number nine raises Grafton's concerns about the QUAL2E WLA Model used to develop the waste load allocations used to establish some of the permit limitations. *Id.* at 4.

remaining issues if resolution of the UBWPAD appeal was achieved without a decision being issued by the Board.

On August 27, 2001, the Region filed a motion indicating that in fact the parties did not have a stipulated resolution in the event the UBWPAD appeal was resolved through settlement. On the same date, the Region filed a response on the two remaining issues. The Region also requested a stay, which was granted until December 21, 2001.

On January 25, 2002, the Board received a Motion to Withdraw Petition from UBWPAD, which it granted on January 28, 2002. Because the parties in the UBWPAD appeal have reached a final resolution of that matter through settlement, and thus the two remaining issues in this appeal will not be resolved in accordance with the Stipulation, we will now proceed to address those issues.⁴

⁴For this reason, Grafton's request for a further stay, filed on January 23, 2002, prior to the Board's receiving the Motion to Withdraw in UBWPAD, is denied.

For the reasons set forth below, review of the remaining two issues is denied.

II. DISCUSSION

The burden of establishing grounds for review rests upon the petitioner. 40 C.F.R. § 124.19(a)(1), (2). To meet this burden, a petitioner must identify a clearly erroneous finding of fact or conclusion of law in the underlying permit decision or an important policy consideration or exercise of discretion that warrants Board review. 40 C.F.R. § 124.19(a); see, e.g., *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 567 (EAB 1998).

As we explained in our previous order denying review of certain other issues in this case, see *Order Granting Remand Request, Dismissing Permit Conditions, and Denying Review in Part* at 6-7 (EAB, Aug. 8, 2001), in establishing grounds for review, it is not sufficient for a petitioner to rely on previous statements of its objections, such as prior comments on a draft permit. *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 10 (EAB, Feb. 23, 2001), 9 E.A.D. ___. A petitioner must demonstrate with specificity why

the Region's response to the petitioner's comments was clearly erroneous. *Id.* at 11; see also *In re Caribe Gen. Elec. Prods., Inc.*, RCRA Appeal No. 98-3, slip op. at 43 (EAB, Feb. 4, 2000), 8 E.A.D. __; *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996); *In re NPDES Permit for Wastewater Treatment Facility of Union Township*, NPDES Appeal Nos. 00-26 & 00-28, at 11 (EAB, Jan. 23, 2001) (Order Denying Petitions for Review).

The Board has often denied review to petitioners that have failed to do more than simply reiterate previous comments made on the draft permit without addressing the Region's previous response to those same comments. See *Town of Ashland*, slip. op. at 14, 9 E.A.D. __; see also *In re City of Moscow, Idaho*, NPDES Appeal No. 00-10, slip op. at 14 n.26 (EAB, July 27, 2001), 10 E.A.D. __ ("Petitioner * * * does little more in its Petition than echo the same concerns that the Region addressed in the Response to Comments. Accordingly, we deny review on this ground as well."); *In re City of Irving, Tex. Mun. Separate Storm Sewer Sys.*, NPDES Appeal No. 00-18, slip op. at 27 (EAB, July 16, 2001), 10 E.A.D. __ ("In its Petition, Irving merely reiterates the comments that gave rise to these changes. As we have

observed in the past, something more is required to sustain a petition for review - namely, a petitioner must demonstrate with specificity why the Region's response to the petitioner's comments was clearly erroneous.").

In the instant case, Petitioner's appeal basically restates verbatim the same issues it raised in comments below,⁵ which were addressed by the Region in its response to comments.⁶ Petitioner, however, completely disregarded the Region's response to those concerns by not addressing the Region's response or explaining why the Region's response was clearly erroneous. By failing to address the Region's response to comments, Grafton has failed to establish clear error or abuse of discretion. Therefore, review of the two remaining issues is denied.

⁵*Compare* Petition with Response Exhibit E (Comments from Town of Grafton Wastewater Treatment Plant dated 2/22/99).

⁶See Response Exhibit F at 14-15 (Response to Comments).

III. CONCLUSION

Review of issues number two and nine, the only two issues remaining on appeal in this matter, is denied, for Petitioner has failed to meet its burden of establishing grounds for review.

So ordered.

Date: 1/29/02

ENVIRONMENTAL APPEALS BOARD⁷

By: _____ /s/ _____

Edward E. Reich
Environmental Appeals Judge

⁷The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich. See 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Grafton Water Pollution Control Facility, NPDES Appeal No. 00-5, were sent to the following persons in the manner indicated:

By Certified Mail, Return Receipt Requested:

Fred G. Haffty, Superintendent
Town of Grafton Wastewater Treatment Plant
9 Depot Street
So. Grafton, MA 01560
telephone: (508) 839-8526

Town Counsel:
Mark R. Reich
Jason R. Talerman
Kopelman and Paige, P.C.
31 St. James Ave.
Boston, MA 02116
telephone: (617) 556-0007

Jonathan C. Averback, Esq.
Sr. Assistant Regional Counsel
U.S. EPA, Region I
Office of Regional Counsel
1 Congress Street, Suite 1100
Boston, MA 02114-2023
telephone: (617) 918-1078

Dated: 01/29/02

_____/s/_____
Annette Duncan
Secretary