

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

In re:)	
)	
NPDES Permit for Washington)	NPDES Appeal No. 01-14
Navy Yard)	
)	
)	
Docket No. DC0000141)	
)	

ORDER DISMISSING PETITION FOR REVIEW AND DENYING REVIEW OF PERMIT

On February 27, 2001, U.S. EPA Region III ("the Region") issued a final permit decision for National Pollutant Discharge Elimination System ("NPDES") Permit No. DC000141 ("the Permit") to Washington Navy Yard ("WNY"). The Permit regulates the discharge of pollutants contained in WNY's storm water runoff to the Anacostia River pursuant to the Clean Water Act, § 402, 33 U.S.C. § 1342. On April 9, 2001, Anacostia Riverkeeper ("Petitioner") filed a Petition for Review ("Petition") of certain conditions of WNY's Permit. For the reasons detailed below, which include Petitioner's failure to respond to an Order Directing Further Briefing this Board issued on May 30, 2002, and a subsequent Order to Show Cause issued on June 21, 2002, the Petition is dismissed with prejudice and review of the Permit is denied.

I. BACKGROUND

The procedural history of this Permit is lengthy and rather complex. The Region first issued a draft permit for public comment on August 11, 1999. Following a second round of public comment, the Region made further revisions to the draft permit, which were reflected in a "final permit" issued on May 31, 2000.

On July 3, 2000, WNY and Anacostia Watershed Society ("AWS") filed petitions for review of the May 31, 2000 permit with the Board. *In re Washington Navy Yard*, Docket No. DC000141, NPDES Appeal Nos. 00-2 & 00-3. In an effort to settle the disputed provisions of the permit, the parties engaged in Alternative Dispute Resolution. Following mediation efforts supervised by a neutral third party mediator, the parties reached an agreement to resolve the petitioners' appeals. On December 19, 2000, the Region filed with the Board, on behalf of the parties, a Notice of Settlement and Uncontested Motion to Dismiss Petitions for Review. On January 4, 2001, the Board dismissed WNY's and AWS's petitions. See Order Dismissing Petitions for Review (Jan. 4, 2001) ("Dismissal Order").

In accordance with the settlement, on December 8, 2000, the Region provided notice to the public of the provisions of the permit that the Region proposed to change as a result of the

settlement agreement and generally sought comment on those provisions. See Joint Public Notice of Revised WNY Permit (Dec. 8, 2000). The Region in turn received comments on the December 8, 2000 draft permit from two parties - Women Like Us and Damon P. Whitehead, on behalf of Anacostia Riverkeeper and Earth Conservation Corps. On February 16, 2001, the District of Columbia provided a certification stating that the December 8, 2000 amended draft permit would not violate the Water Quality Standards of the District of Columbia.

The Region responded to the comments submitted on the December 8, 2000 draft permit in its Responsiveness Summary - Washington Navy Yard Permit DC0000141 EPA Response to Comments Received after December 8, 2000 Public Notice, and issued a final Permit decision on February 27, 2001.

On April 9, 2001, the Petition now under consideration was filed.¹ Since that time several briefs have been filed with the

¹Petitioner raises four technical objections to the Permit that it presents to the Board for review:

1) The Permit's analytical method for monitoring polychlorinated biphenyls and the compliance standard for evaluating compliance with the "no discharge" limit for PCBs are not appropriate.

2) The Permit's effluent limits for certain metals are not sufficiently stringent, and additional effluent

(continued...)

Board. On May 30, 2001, the Region filed its Response to Petition for Review along with relevant portions of the administrative record in this matter. On June 5, 2001, the Board received an Amicus Curiae Brief By Permittee U.S. Department of the Navy. On August 30, 2001, the Board received Petitioner's Response to Amicus Curiae Brief by Permittee U.S. Department of the Navy. On September 26, 2001, the Board received Petitioner's Reply to U.S. Environmental Protection Agency Response Brief, along with a motion requesting leave to file Petitioner's Reply to Region. Finally, on December 20, 2001, the Navy filed an Amicus Curiae Reply to Petitioner's Response to EPA Region III ("Permittee's Reply"), along with a motion requesting leave to file Permittee's Reply.²

Permittee's Reply raised an issue regarding Petitioner's legal authority to bring this appeal before the Board. WNY asserted that Petitioner should be held to the terms of the

¹(...continued)
limitations for other metals need to be established.

3) The Permit erroneously omits water quality based effluent limitations for total suspended solids and fecal coliform.

4) The Permit erroneously omits a monitoring requirement for polycyclic aromatic hydrocarbons or dioxin.

²The Board granted this motion in its Order Directing Further Briefing issued on May 30, 2002. Order at 2, n.1.

previous settlement between the Region, WNY, and AWS, and the subsequent Dismissal Order issued by the Board on January 4, 2001. That Dismissal Order provides in part, "This dismissal is with prejudice as to the [U.S. Department of the Navy and AWS's] rights to contest the final Washington Navy Yard NPDES Permit No. 0000141 * * * issued by Respondent on May 31, 2000." Dismissal Order at 2. WNY argued that Petitioner, Anacostia Riverkeeper, is AWS's alter ego and, as such, Anacostia Riverkeeper should be bound by the acts of AWS. See Permittee's Reply at Part II.³

To assist the Board in its determination of these issues, on May 30, 2002, the Board issued an Order Directing Further Briefing in which the Board ordered Petitioner and the Region to address the merits of the issues raised by Permittee's Reply discussed above. The Board's Order stated, in part:

In their briefs, the parties shall state whether the alter ego doctrine applies in these circumstances, discuss the applicable law, including the elements of

³WNY stated that Damon Whitehead, attorney for Anacostia Riverkeeper, should be bound by the acts of AWS and, therefore, precluded from bringing the present appeal under the terms of the previous settlement between the Region, WNY, and AWS and the subsequent Dismissal Order issued by the Board on January 4, 2001. In support of its position, WNY cited Mr. Whitehead's service as AWS's legal representative in previous litigation involving stormwater discharge from WNY and his position as AWS's representative during the mediation of AWS's petition to review WNY's May 31, 2000 draft permit. Permittee's Reply at Part II.

the alter ego doctrine, and provide sufficient documentation to support the evidentiary or factual basis for their contentions. In addition, the Anacostia Riverkeeper shall - and the Region may - respond to the contentions of WNY that Damon Whitehead and, by implication, Anacostia Riverkeeper should be foreclosed from taking a position in conflict with the parties in the earlier proceeding.

Order at 3. The parties were directed to file their briefs on or before Friday, June 14, 2002. The Region filed EPA Region III's Response to Board's Order Directing Further Briefing on June 14, 2002.

The Board did not receive a brief from Petitioner in response to the Board's May 30, 2002 order. Accordingly, on June 21, 2002, the Board issued an Order to Show Cause directing Petitioner to "show cause why its Petition for Review should not be dismissed, with prejudice, for failure to respond to the Board's May 30, 2002 order." Order to Show Cause at 4. The Board ordered Petitioner to file its brief in response to the Order to Show Cause on or before Friday, June 28, 2002. As of the date of this Order, the Board has not received a response from Petitioner.

II. DISCUSSION

Petitioner failed, without explanation, to respond to the Board's May 30, 2002 Order Directing Further Briefing and its June 21, 2002 Order to Show Cause. The Board's power of review under Part 124 is discretionary. See 40 C.F.R. § 124.19(a). In fact, the preamble to the Part 124 Procedures for Decisionmaking states that the Board's power of review "should be only sparingly exercised" and that "most permit conditions should be finally determined at the [r]egional level." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). See also *In re Phelps Dodge Corp. Verde Valley Ranch Dev.*, NPDES Appeal No. 01-07, slip. op. at 16 (EAB May 21, 2002), 10 E.A.D. ___. The Board's authority to grant review of a permit should be exercised, if otherwise appropriate, in matters where the issues have been fully briefed, as directed by the Board. Here, in contrast, Petitioner offers no justification for its failure to timely respond to the Board's Order Directing Further Briefing and its apparent abandonment of its Petition.

In the interest of achieving an "orderly and expeditious disposition of [our] cases," especially in a matter such as this, where the permitting process has taken a considerable length of time and where Petitioner has failed to respond to two orders issued by the Board, it is appropriate to exercise our power of

dismissal.⁴ See *Link v. Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962) ("The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."). The Board prefers to adjudicate petitions for review on their merits, and does not lightly exercise its power of dismissal. Where, as here, however, a party fails to respond to two orders of the Board, thereby failing to adhere to the process we established for the orderly disposition of issues, dismissal of the Petition is appropriate. See, e.g., *Jourdan v. Jabe*, 951 F.2d 108, 10 (6th Cir. 1991); *In re Craig Tucker v. Connecticut Winpump Co.*,

⁴Although the Federal Rules of Civil Procedure are not applicable to administrative proceedings, the Board may look to them for guidance. *In re H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 449 n.20 (EAB 1999). Here, the Board finds Federal Rule of Civil Procedure 41(b) instructive. Rule 41(b) provides:

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

Fed. R. Civ. P. 41(b).

2002 WL 451302, 451303-04 (DOL Adm. Rev. Bd. Mar. 15, 2002)
(affirming ALJ's recommendation of dismissal on the grounds that complainant abandoned his appeal when he failed to appear for a scheduled hearing and failed to respond to an order of the Board to show cause why the case should not be dismissed).

III. CONCLUSION

For the foregoing reasons, we dismiss with prejudice the Petition filed by Anacostia Riverkeeper and, therefore, deny review of the Permit.

So ordered.⁵

ENVIRONMENTAL APPEALS BOARD

By: _____/s/_____
Kathie A. Stein
Environmental Appeals Judge

Dated: 07/03/02

⁵The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein. See 40 C.F.R. § 1.25(e)(1) (2001).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Petition For Review And Denying Review of Permit in the matter of NPDES Permit for Washington Navy Yard, NPDES Appeal No. 01-14, were sent to the following persons in the manner indicated:

**By Facsimile and Certified Mail,
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Date: 07/03/02

/s/
Annette Duncan
Secretary