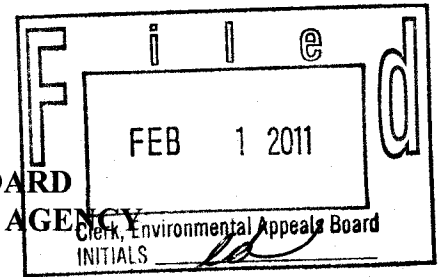


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



_____)
In re:)
)
City of Caldwell) NPDES Appeal No. 09-11
)
NPDES Permit No. IDS-028118)
_____)

ORDER DENYING REVIEW

The City of Caldwell owns and operates a small municipal separate storm sewer system (“MS4”) in Canyon County, Idaho, that covers approximately twenty-one square miles of land and serves approximately 37,000 people. The MS4 is comprised of roads, drains, catch basins, curbs, gutters, ditches, and other structures that collect storm water runoff from rain, sleet, and snow events and convey it to specific discharge points (“outfalls”) into the waters of the United States. The discharge of water through the MS4 outfalls is regulated under section 402(p) of the Clean Water Act (“CWA”), 33 U.S.C. § 1342(p), and implementing regulations promulgated by the United States Environmental Protection Agency (“EPA” or “Agency”) at 40 C.F.R. part 122. *See* Regulations for Revision of the Water Pollution Control Program Addressing Storm Water Discharges, 64 Fed. Reg. 68,722 (Dec. 8, 1999) (codified in scattered sections of 40 C.F.R. pts. 9, 122-124) (“Phase II” expansion of storm water program to address discharges from small MS4s, which serve fewer than 100,000 people).

On September 4, 2009, EPA Region 10 issued a National Pollutant Discharge Elimination System (“NPDES”) permit to Caldwell, pursuant to the CWA and the storm water rules. The permit authorizes discharges of storm and certain non-storm water flows from Caldwell’s MS4 to waters of the United States, including the Boise River, Indian Creek, Mason

Creek, Parker Gulch, and nine named drains (the Elijah, A, Solomon, Laurel, Isaiah, Dixie, West End, Wilson, and Noble Drains).

On October 13, 2009, Pioneer Irrigation District (“Pioneer”) filed a timely petition with EPA’s Environmental Appeals Board (“Board”) under the permit appeal rules at 40 C.F.R. § 124.19(a), seeking review of Caldwell’s NPDES permit. Pioneer owns, operates, and/or maintains a network of irrigation ditches and canals in Canyon County, and it is concerned that Caldwell’s new permit will shift many of the burdens and liabilities of managing storm water from the municipal government to Pioneer. Accordingly, in its petition, Pioneer challenges several aspects of the Region’s permit decision and asks the Board to vacate Caldwell’s permit and remand it to the Region for further consideration.

I. Issues on Appeal

The Board must determine whether, under 40 C.F.R. § 124.19(a), Pioneer established any basis for a grant of review of the Region’s NPDES permit decision. Specifically, the Board must decide whether Pioneer established that: (1) the Region clearly erred or exercised its discretion in excluding a proposed permit condition in such a way as to warrant permit review; or (2) the Board for policy reasons should exercise its own discretion to grant review of the Region’s decision to exclude the condition.

II. Summary of Decision

The Board holds that Pioneer did not establish that the Region clearly erred or exercised its discretion in excluding the proposed condition in such a way as to warrant permit review.

Furthermore, the Board holds that Pioneer did not establish a policy basis upon which to justify a discretionary grant of review of the Region's permit decision. Accordingly, the Board denies review of Caldwell's NPDES permit.

III. *Procedural History*

In January 2003, the Region notified the City of Caldwell that it qualified as a "regulated small MS4" under EPA's storm water regulations and therefore would be required to apply for an individual NPDES permit for its MS4 discharges into the waters of the United States. Letter from Robert Robichaud, NPDES Permits Unit Manager, EPA Region 10, to Gordon Law, City Engineer, City of Caldwell 1-2 (Jan. 17, 2003) (A.R. A-1). The Region instructed Caldwell that the terms of any forthcoming permit must be consistent with section 122.34 of the storm water rules, which directs applicants to develop, implement, and enforce a storm water management program with three specific goals. Those goals are: (1) to reduce the discharge of pollutants from the MS4 "to the maximum extent practicable"; (2) to protect water quality; and (3) to satisfy appropriate CWA water quality requirements. 40 C.F.R. § 122.34(a); *see* CWA § 402(p)(3)(B)(iii), 33 U.S.C. § 1342(p)(3)(B)(iii). The Region also advised that Caldwell's storm water management program would be required to address six "minimum control measures" set forth in the regulations. Letter from Robert Robichaud at 1; *see* 40 C.F.R. § 122.34(b)(1)-(6). One of those measures is post-construction storm water management in new development and redevelopment. *See* 40 C.F.R. § 122.34(b)(5).

Caldwell submitted its permit application on February 20, 2003, along with a Storm Water Management Plan ("SWMP") prepared in accordance with 40 C.F.R. § 122.34(a). On

July 11, 2008, the Region issued a draft NPDES permit proposing to authorize Caldwell's MS4 discharges, along with a fact sheet inviting public comment on the proposals. *See* EPA Region 10, *Fact Sheet for Draft NPDES Permit, City of Caldwell MS4, NPDES Permit No. IDS-028118* (July 11, 2008) (A.R. E-3) [hereinafter Fact Sheet]. On August 13-14, 2008, the Region held public hearings on the draft permit, and it closed the public comment period on November 18, 2008. Pioneer submitted timely comments on the draft permit on October 20, 2008. *See* Letter from Scott L. Campbell, Esq., Moffatt, Thomas, Barrett, Rock & Fields, Chtd., to Misha Vakoc, NPDES Permits Unit Manager, EPA Region 10 (Oct. 20, 2008) (A.R. G-9) [hereinafter Pioneer Cmts]. After reviewing Pioneer's and other comments received during the public review period, the Region issued a final NPDES permit, along with a response-to-comments document, on September 4, 2009. *See* EPA Region 10, *Final NPDES Permit for City of Caldwell MS4, NPDES Permit No. IDS-028118* (Sept. 4, 2009) (A.R. H-5) [hereinafter Permit]; EPA Region 10, *Response to Comments on Proposed NPDES Permit for City of Caldwell MS4* (Sept. 2009) (A.R. H-2) [hereinafter RTC].

As noted above, Pioneer filed a petition for review of Caldwell's permit on October 13, 2009. *See* Pioneer Irrigation District, Petition for Review ("Pet'n"). At the Board's request, the Region filed a response to Pioneer's petition on November 30, 2009. *See* EPA Region 10, Response Brief ("R10 Resp."). That same day, Caldwell filed a motion to intervene as a party respondent and for leave to file a response to Pioneer's petition – which the Board hereby grants – along with its response to the petition for review. *See* City of Caldwell, Provisional Response to PID's Petition for Review.

IV. *Factual History*

A. *City of Caldwell's Storm Water-Related Guidance*

In its February 2003 permit application, Caldwell submitted its SWMP with a section entitled “Post-Construction Storm Water Management in New Development and Redevelopment.” See City of Caldwell, Idaho, *Phase II Storm Water Permit Application* 15-17 (Feb. 20, 2003) (A.R. A-2) [hereinafter Permit App.]. This section discussed “baseline” storm water controls already in place within Caldwell’s MS4 service area, along with additional “best management practices,” or “BMPs,” proposed to ensure area-wide compliance with the minimum control measures in 40 C.F.R. § 122.34(b)(5). The “baseline” controls included various measures set forth in Caldwell’s existing storm drainage, landscaping, and subdivision ordinances, as well as detailed requirements for the design and operation of storm water conveyance systems, detention/retention facilities, infiltration/percolation facilities, and related matters, as prescribed in Caldwell’s December 1998 “Stormwater Management Interim Policy.” Permit App. at 15-16.

The post-construction section of the SWMP specified, as a baseline practice, that “[d]evelopments proposing to discharge to a ditch, drain, or pond under the jurisdiction of another entity are subject to the review and approval of the entity operating or maintaining the ditch, drain, or pond.” *Id.* at 16 (emphasis added).

In September 2006, Caldwell issued a revised storm water management document, entitled the “Caldwell Municipal Stormwater Management Manual.” See City of Caldwell Engineering Department, *Caldwell Municipal Stormwater Management Manual* (Sept. 2006) [hereinafter Manual]. The new Manual did not include the explicit third-party review-and-

approval requirement articulated in the SWMP (quoted above). Instead, the new Manual contained the following provision:

Any development proposing new or increased discharge off-site, in compliance with this manual, shall notify in writing the owner of the canal, ditch, drain, or pond into which discharge shall occur. In addition, the design of new discharging facilities shall be subject to the review of the entity operating or maintaining the canal, ditch, drain, or pond. Any development proposing to increase the rate or reduce the quality of discharge from a site may be denied permission to discharge.

Manual § 101.1.5, at 12.

B. Pioneer's Comments on the Permit

In comments on the draft permit, Pioneer claimed that the 2006 storm water provision allowed residential developers to discharge municipal storm water from their properties into natural or manmade drainage ways "simply by giving notice" to the owner or operator of the facility, or, in some circumstances, without giving any notice at all. Pioneer Cmts at 4. Further, Pioneer claimed, since Caldwell's promulgation of the new provision, developers had installed multiple points of municipal storm water discharge into Pioneer's irrigation and drainage facilities without Pioneer's permission. *See id.* at 5.

Pioneer opposed construction of these discharge points, contending that they violate its legal rights-of-way in the ditches, drains, and canals it owns, operates, and/or maintains within Caldwell's MS4 service area, adversely affect water quality, and threaten the physical integrity of the manmade waterways. *Id.* at 2-4. Pioneer explained that many of its facilities were constructed more than a century ago for delivery of seasonal irrigation and agricultural return flows. Year-round MS4 drainage exceeds the design capacity of the facilities, Pioneer stated,

and prevents Pioneer from performing routine off-season facility maintenance. *Id.* at 5. The consequent increased risk of property damage and danger to human and aquatic life from flooding and water quality impairment are liabilities and burdens that, in Pioneer's view, the permit impermissibly shifts from Caldwell to Pioneer. *See id.* at 3-7.

Furthermore, Pioneer noted that its facilities have long qualified for an exclusion from NPDES requirements under CWA section 402(l)(1), which prohibits EPA from requiring NPDES permits for discharges composed entirely of return flows from irrigated agriculture. *Id.*; *see* CWA § 402(l)(1), 33 U.S.C. § 1342(l)(1); 40 C.F.R. § 122.3(f). Pioneer fears losing this exclusion if large quantities of MS4 water from new developments and redevelopments are discharged into, and commingle with, the agricultural return flows in its ditches and canals, thus nullifying the exclusion. Pioneer Cmts at 5, 7.

For these reasons and others, Pioneer urged the Region to add the following condition to Caldwell's permit to ensure protection of its rights-of-way and prevention of storm water burden-shifting from Caldwell to Pioneer:

No discharges are authorized by this Permit to constructed waterways, owned, operated, or maintained by irrigation entities.

Id. at 3 (emphasis added).

C. *The Region's Response to Pioneer's Comments*

In its response to comments, the Region declined to add Pioneer's proposed condition, explaining the following:

The issue appears to be [Pioneer's] concern over whether this Permit allows Caldwell to obtain some jurisdiction over [Pioneer's] irrigation canals or other such facilities through the

issuance of the Permit. EPA understands that there is ongoing litigation between [Pioneer] and Caldwell that concerns this exact issue. Section VI.H of the Permit makes it clear that the Permit does not convey this type of property right or jurisdiction. * * * [Accordingly,] EPA declines to add [Pioneer's] suggested language.

RTC cmt. 73, at 30-31; *see* Permit § VI.H, at 26-27 (“The issuance of this permit 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.”).

Moreover, in response to Pioneer's fears about the integrity of its old waterways under an onslaught of new MS4 water, the Region wrote:

EPA understands [Pioneer's] concerns regarding excess discharges into the irrigation canals and other [Pioneer] facilities. However, all municipal storm water permits require the permittee to implement a storm water management program []. The [storm water management program] is the heart of the MS4 permit and it requires the permittees to implement [best management practices] that will reduce pollutants in the storm water to the maximum extent practicable. EPA does not have the authority to eliminate the [storm water management program] from the Permit. *See* 40 C.F.R. §§ 122.26, .34.

RTC cmt. 75, at 31. The Region then referred Pioneer to its response explaining that the permit disclaimed any conveyance of property or jurisdictional rights of any kind. *Id.*

Finally, in responding to Pioneer's claim that Caldwell's permit jeopardizes Pioneer's agricultural exemption, the Region wrote:

Irrigation/agricultural return flows are excluded from regulation under the NPDES program. *See* 40 C.F.R. § 122.3(f). * * * Irrigation return flows are exempt from storm water permit coverage and the commingling of irrigation return flow and storm water does not automatically revoke the exempt status of the

irrigation return flow. *See* 55 Fed. Reg. 47,990, 47,996 (Nov. 16, 1990). * * * [I]f the MS4 discharges into [Pioneer's] irrigation facilities are [authorized by an NPDES permit], then the irrigation return flow exemption would remain. It should be noted, however, that if the MS4 discharge or other NPDES regulated discharge is unpermitted when it enters [Pioneer's] facilities, then [Pioneer] may need to be authorized to discharge under a[n] NPDES permit. Therefore, if there are NPDES regulated point source discharges into [Pioneer's] facilities, it would be in [Pioneer's] best interest to ensure that those point source discharges are permitted through an appropriate NPDES permit such as Caldwell MS4 Permit at issue here.

RTC cmt. 76, at 32; *accord id.* cmt. 83, at 35.

V. *Analysis*

Under the 40 C.F.R. part 124 permitting regulations, the Board will not grant review of decisions related to an NPDES permit unless the decisions are based on clearly erroneous findings of fact or conclusions of law, or involve important matters of policy or exercises of discretion that warrant Board review. 40 C.F.R. § 124.19(a). The Board wields its power of permit review “sparingly,” in keeping with Agency policy that most permit conditions be finally determined at the permit issuer’s level. 45 Fed. Reg. at 33,412; *accord In re City of Moscow*, 10 E.A.D. 135, 141 (EAB 2001). Importantly, the petitioner – and not the permit issuer or the permittee – bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a); *see, e.g., In re Dominion Energy Brayton Point Station, LLC*, 12 E.A.D. 490, 588-90 (EAB 2006) (remanding NPDES permit where petitioner established that permit issuer failed to adequately explain the maximum number of allowable monthly water temperature exceedances).

A. *The Storm Water Permitting Regulations Do Not Require Inclusion of the Condition Pioneer Seeks*

The storm water regulations applicable in this MS4 case require Caldwell to develop, implement, and enforce a specific kind of storm water management program; namely, one that is “designed to reduce the discharge of pollutants from [the] MS4 to the *maximum extent practicable (MEP)*.” 40 C.F.R. § 122.34(a) (emphasis added). Such a program is required to address six minimum control measures, including: (1) public education and outreach on storm water impacts; (2) public involvement/participation; (3) illicit discharge detection and elimination; (4) construction site storm water runoff control; (5) post-construction storm water management in new development and redevelopment; and (6) pollution prevention/good housekeeping for municipal operations. *Id.* § 122.34(b)(1)-(6). Best management practices generally comprise, in EPA’s view, the most appropriate form of MEP limitation on pollutant discharges from small MS4s. *Id.* § 122.34(a). Accordingly, the regulations direct small MS4 operators to identify the BMPs that will be implemented for each of the six minimum control measures, to describe measurable goals for each of the BMPs, and to evaluate, through recordkeeping and reporting, their compliance status and progress toward achieving their goals. *Id.* § 122.34(d)(1), (g).

The storm water regulations also set forth a number of standard conditions that must be incorporated into all MS4 permits. These conditions include, among other things, duties to comply with all conditions of the permit, to mitigate any discharge that has a reasonable likelihood of adversely affecting human health or the environment, to properly operate and maintain all facilities and treatment systems at all times, and to provide information to the permit

issuer. *See id.* § 122.41. These standard conditions also include one that specifically provides that the permit “does not convey any property rights of any sort, or any exclusive privilege.” *Id.* § 122.41(g).

The Region applied all of these regulatory criteria in its review and approval of Caldwell’s permit. *See, e.g.*, Fact Sheet § VI, at 10-27; Permit §§ II-VI, at 5-27. Notably, none of the regulatory provisions directed the Region to include in Caldwell’s permit the condition sought by Pioneer. Moreover, Pioneer has not identified any specific statutory or regulatory authority that requires the inclusion of such a condition. The Board concludes that no legal requirement for the requested condition exists and therefore holds that the Region did not err in excluding it. As outlined in the next section, the Board holds further that the Region adequately responded to the concerns Pioneer raised in its comments.

B. *The Region Adequately Responded to Pioneer’s Comments*

Under the Agency’s permitting rules, permit issuers are required to “[b]riefly describe and respond to all significant comments on the draft permit.” 40 C.F.R. § 124.17(a)(2). A failure to adequately respond can provide grounds for a permit remand. *E.g., In re Amerada Hess Corp.*, 12 E.A.D. 1, 14-20 (EAB 2005) (remanding Clean Air Act permit where permit issuer failed to respond to significant comments on stack test studies, nickel emissions levels, and opacity); *In re Wash. Aqueduct Water Supply Sys.*, 11 E.A.D. 565, 589-90 (EAB 2004) (remanding NPDES permit where permit issuer failed to respond, adequately or in some cases at all, to significant comments on data representativeness and the facility’s reasonable potential to cause exceedances of water quality standards).

As noted above, during the comment period, Pioneer raised its allegation that private developers were constructing discharge points into Pioneer's facilities without its permission, contrary to the third-party review-and-approval provision in the SWMP, and it asked the Region to insert specific permit language to remedy this alleged problem. Pioneer Cmts at 4. In comments Caldwell sent after Pioneer's own comment submittals, Caldwell urged the Region to reject Pioneer's request for a permit condition prohibiting discharges to irrigation waterways. RTC cmt. 81, at 34. Caldwell asserted that its "right and ability to discharge stormwater flows into canals and drains also used by Pioneer arises from other sources and authorities and cannot be abrogated or affected by EPA in this Permit." *Id.*

The Region responded to both sets of comments by acknowledging that Caldwell and Pioneer were in litigation concerning this issue¹ and asserting that "EPA does not have the authority to prohibit discharges into 'constructed waterways owned, operated, or maintained by irrigation entities,'" as Pioneer had asked. *Id.* Furthermore, "EPA feels this matter should be resolved between Caldwell and Pioneer Irrigation District." *Id.* The Region ultimately did not add Pioneer's proposed condition to the permit, explaining that section VI.H of the permit explicitly disclaims the conveyance to Caldwell, by means of the permit's issuance, of any property rights, privileges, or jurisdiction in or over Pioneer's facilities. *Id.* cmt. 73, at 30-31.

As noted above, Pioneer also raised concerns about the effect of increased MS4 discharges on the integrity of its old waterways. The Region met Pioneer's concerns in this

¹ In addition to filing the present permit appeal, Pioneer is also proceeding on a parallel track in another forum. In early 2008, Pioneer filed a lawsuit against Caldwell in state court to litigate its property claims under Idaho law. That case is still pending on the state court's docket. *See Pioneer Irrigation Dist. v. City of Caldwell*, Case No. CV-2008-0000556-C (Idaho 3d Jud. Dist. filed Jan. 16, 2008) (Culet, J., presiding).

regard by resting squarely on the storm water regulations and their required six controls, including post-construction discharge controls, to protect against flooding, water quality impairment, and other possible storm water-related ills. *See* RTC cmt. 75, at 31 (citing 40 C.F.R. §§ 122.26, .34). Moreover, the Region referenced permit provisions it thought would at least partially alleviate Pioneer's concerns. For example, the permit contains a provision that prohibits discharges of storm water that will cause, have the reasonable potential to cause, or contribute to an exceedance of an Idaho water quality standard. *See* Permit § I.C.2, at 5; RTC cmt. 17, at 10. When Pioneer expressed concerns about water quality impairment, the Region responded by referencing this provision and explaining that "[o]nce the Permit is issued, if the permittee's discharges into waters of the [United States] contribute to an in-stream excursion above an Idaho water quality standard, then the permittee would be in violation of the Permit." RTC cmt. 74, at 31. The Region also stated that, under the permit's "duty to comply" provision, Caldwell's failure to implement any condition of its NPDES permit, including post-construction storm water management requirements for new development and redevelopment, would constitute a permit violation and could subject Caldwell to EPA enforcement. RTC cmt. 79, at 33; *see* Permit § V.A, at 21 ("[a]ny permit noncompliance constitutes a violation of the [CWA] and is grounds for enforcement action").

The Board holds, based on the record described above, that the Region adequately responded to Pioneer's comments.

C. Caldwell's Future Compliance or Noncompliance with Its MS4 Permit, and Pioneer's Permit Exclusion Status, Do Not Provide Bases for Review

While, as just discussed, Pioneer's petition focuses in several ways on the omission of specific language from Caldwell's MS4 permit, lurking beneath the articulated claims are questions about Caldwell's future compliance with its obligation to manage storm water discharges from new development and redevelopment in the MS4 permit area, and concerns that Caldwell's practices may result in loss of Pioneer's NPDES permitting exclusion. Pioneer writes:

The Permit condition Pioneer has requested addresses more than just infringement upon jurisdiction or property rights; it addresses the issue of the City's responsibility under the [CWA] and the attendant CWA liabilities for Pioneer should the City fail to meet that responsibility. Therefore, the Permit must prohibit discharges to irrigation waterways without the entity's permission as the Application provided; otherwise, Pioneer's water quality will be inexorably tied to the City's [storm water management program] and not Pioneer's own efforts to safeguard water quality in its facilities. Should the City's [storm water management program] fail to meet the requirements of the recently issued Permit, such a failure will unavoidably impact and expose Pioneer to water quality issues and liabilities it was not exposed to before the City implemented the [storm water management program] during the NPDES permitting process.

Pet'n at 10. Pioneer's arguments are speculative and do not call into question the permit's terms.

The terms of the permit provide for enforcement mechanisms should illegal discharges occur. *See* Permit § V.A, at 21 (“[a]ny permit noncompliance constitutes a violation of the Act and is grounds for enforcement action, for permit termination, revocation and reissuance, or modification, or for denial of a permit renewal application”); Permit § V.B, at 21-23 (describing administrative, civil, and criminal penalties for violations of permit conditions). A permit appeal

is not a forum to entertain speculations about future permit violations and enforcement. *See, e.g., In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-01 to -05, slip op. at 113 (EAB Nov. 18, 2010), 15 E.A.D. ____ (“fear of lax enforcement by the permit issuer is not grounds for review of the permit”) (citing cases), *appeal docketed sub nom. Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, No. 10-73870 (9th Cir. Dec. 20, 2010).

D. Pioneer Has Failed to Establish Any Misrepresentation by Caldwell with Respect to Storm Water Management

a. Pioneer’s Supplemental Documents Supporting Its Misrepresentation Claims Are Not Accepted

On September 8, 2009, several months after conducting depositions in the Idaho state court case (mentioned in note 1, *supra*) but before Pioneer received notice that the Region had issued Caldwell’s final NPDES permit, Pioneer mailed a letter and a portion of a deposition transcript to the Region, asking that those materials be considered in support of its request for the protective permit condition discussed above. The Region had issued the final permit on September 4, 2009, a few days prior to Pioneer’s September 8th mailing. In that final permit, which Pioneer received on September 9, 2009, the Region declined to add Pioneer’s requested permit condition.

Pioneer now submits the transcript and letter to the Board as Petition Exhibits D and E, seeking to use them to prove that Caldwell misrepresented the post-construction discharge protocols in a way that warrants a permit remand. According to Pioneer, these exhibits establish that Caldwell *knew* developers were not always notifying and receiving the approval of Pioneer prior to constructing storm water discharge outfalls into Pioneer’s waterways, contrary to the

third-party review-and-approval protocol set forth in Caldwell's SWMP. Pet'n at 3-4, 8-9. The Region moves to strike the two exhibits on the ground that the administrative record is closed at the time of permit issuance and that, absent exceptional circumstances, documents submitted subsequent to that time cannot be considered part of the administrative record. R10 Resp. at 7-9 (citing cases).

The Board agrees with the Region and declines to supplement the administrative record with the two postdecisional documents. The permit rules provide that "[t]he record shall be complete on the date of final permit issuance." 40 C.F.R. § 124.18(c); see *Russell City*, slip op. at 46-52, 15 E.A.D. at _____. Board cases interpreting this provision have established the "critical cutoff" as final permit issuance; once that occurs, the record is officially closed. *E.g.*, *Russell City*, slip op. at 115 n.106, 15 E.A.D. at _____ ("it is not appropriate to supplement the administrative record with documents the permit issuer did not consider in making its permitting decision"); *In re Dominion Energy Brayton Point Station, LLC*, 12 E.A.D. 490, 518-19 (EAB 2006). Were it otherwise and the administrative record either left open or easily supplemented, permitting processes would potentially never come to an end. See *In re BP Cherry Point*, 12 E.A.D. 209, 219-20 (EAB 2005) (describing importance of consistent procedural rules in ensuring efficiency, predictability, and finality of permitting processes).

Accordingly, the Board declines to order the Region to reopen the administrative record to include Pioneer's Exhibits D and E. These exhibits are hereby treated as outside the record in this permit appeal. See, e.g., *Dominion*, 12 E.A.D. at 518-19 (documents submitted subsequent to permit issuance cannot be considered); *BP Cherry Point*, 12 E.A.D. at 219-20.

b. *Pioneer Provided No Evidence That the Region Relied on Caldwell's Purported Misrepresentations in Preparing the Permit Conditions*

In the fact sheet accompanying the draft permit, the Region stated the following with respect to post-construction storm water discharges from private development and redevelopment:

In [the SWMP portion of] its [2003] permit application, Caldwell describes its storm water management policy[,] which addresses flow controls, water quality protection and erosion and sedimentation control for residential development; on-site detention is required for new industrial and commercial developments. The Caldwell Municipal Stormwater Management Manual, dated September 2006, describes these requirements in detail. The Landscape and Subdivision Ordinances of the Caldwell City Code (CCC) address post-construction storm water management requirements.

Fact Sheet § VI.D.5, at 22. This leaves no doubt that the Region knew about and considered Caldwell's 2006 Manual while preparing Caldwell's draft permit. The Board concludes from this passage that the Region was aware of, and familiar with, the contents of *both* the 2003 SWMP and the 2006 Manual.

After it received public comments on the draft permit, the Region was certainly well aware of the dispute between Pioneer and Caldwell over MS4 discharges into Pioneer's facilities. In its comments, Pioneer submitted for the Region's consideration a lengthy list of Idaho laws that govern irrigation district activities, duties, and rights-of-way in canals and ditches. Pioneer then urged the Region to include specific language in Caldwell's permit to prohibit MS4 discharges into irrigation districts' manmade facilities. Pioneer Cmts at 2-3. Pioneer also asserted that Caldwell was allowing private developers to discharge MS4 water into irrigation facilities simply by notifying Pioneer or, in some cases, without any notification at all. *Id.* at 4.

Notably, the Region made no objection to Caldwell's implementation of the SWMP in its response-to-comments document. Instead, it left property and jurisdictional issues to the parties to be resolved between them as necessary. RTC cmts. 73, 81, at 30-31, 34.

The Board finds that Pioneer has not provided evidence that the Region based any particular permit term or condition on, or omitted any particular permit term or condition because of, misrepresentations by Caldwell. Thus, the Board finds no basis for review.

VI. Conclusion

In conclusion, the Board holds that Pioneer has failed to identify clear error or other grounds for a grant of review of Caldwell's NPDES permit.

VII. Order

For the foregoing reasons, the Board denies Pioneer's petition for review, denoted NPDES Appeal No. 09-11.

So ordered.

ENVIRONMENTAL APPEALS BOARD²

Dated: February 1, 2011

By: Kathie A. Stein for Charles J. Sheehan
Charles J. Sheehan
Environmental Appeals Judge

² The three-member panel deciding this matter is comprised of Environmental Appeals Judges Charles J. Sheehan, Kathie A. Stein, and Anna L. Wolgast. 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 *City of Caldwell*, NPDES Appeal No. 09-11, were sent to the following persons in the manner indicated:

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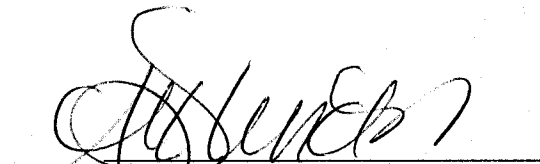
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