

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

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In re:	)	
	)	
City of San Marcos	)	NPDES Appeal No. 97-6
San Marcos, Texas	)	
	)	
Docket No. TX0047945	)	

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**ORDER DISMISSING APPEAL**

By petition dated September 19, 1997, the San Marcos River Foundation ("SMRF") seeks review of the denial of an evidentiary hearing request relating to the reissuance of a National Pollutant Discharge Elimination System ("NPDES") permit by U.S. EPA Region VI to the City of San Marcos, Texas regulating discharges from the City's publicly owned treatment works ("POTW").<sup>1</sup> See Notice of Appeal and Petition for Review; Memorandum in Support of the San Marcos River Foundation's Notice of Appeal and Petition for Review

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<sup>1</sup>Under the NPDES program, which is authorized by Section 402(a)(1) of the Clean Water Act, 33 U.S.C. § 1342(a)(1), a permit is required for all discharges of pollutants from a point source, such as the City's POTW, into waters of the United States. A POTW is defined by Agency regulations to include "any \* \* \* system used in the treatment (including recycling and reclamation) of municipal sewage or industrial wastes of a liquid nature which is owned by a 'State' or 'municipality.'" 40 C.F.R. § 122.2.

("Memorandum in Support of Appeal"). As requested by the Board, the Region filed a response dated November 24, 1997. Response to Petition for Review ("Region's Response").

SMRF frames the issue before the Board as follows:

Does the volume of wastewater discharge allowed in an NPDES permit for a publicly owned treatment works issued to a municipality that owns and operates a sewage treatment plant that currently discharges all of its effluent directly to waters of the United States have to be reduced in volume in proportion to the volume of effluent the City will route into the intake of the City's proposed new drinking water treatment facility?

Memorandum in Support of Appeal at 3. According to SMRF, the City of San Marcos is planning to build and bring into operation a new drinking water treatment facility. SMRF states that this new facility will be operational at some date prior to expiration of the current permit on January 31, 2000, and that, once operational, the facility will be able to receive and treat all the discharge exiting the POTW, thereby converting it to potable drinking water. *Id.* at 4. SMRF expresses concern that once the new facility is constructed, the City does not plan to pipe the wastewater directly from the POTW to the new facility. Rather, according to SMRF, "the City has applied for a permit [from the State of Texas] to use the 'bed and banks' of the [San Marcos] River to transport its wastewater downstream approximately 2 miles to a diversion point and thence via pipeline 1.5 to 2 miles to the [new

facility]." *Id.* SMRF opposes the City's plans in this regard.<sup>2</sup> Ideally, SMRF would like the existing facility to cease all discharges to the San Marcos River and send its effluent via pipeline directly to the proposed new facility.

On March 5, 1997, SMRF filed an evidentiary hearing request raising similar concerns to those discussed above. On August 19, 1997, the Region denied the evidentiary hearing request on the ground that the issues raised by SMRF were not raised during the comment period. See Decision on Evidentiary Hearing Request.<sup>3</sup>

Upon review, we agree with the Region that the issue of whether the permit should require a reduction in the volume of wastewater discharged in proportion to the amount of water treated by a proposed new facility, as well as SMRF's other concerns related to the construction of a proposed new facility, were reasonably ascertainable but were not raised during the comment period. Thus, the issues raised in the SMRF's petition were not preserved for review.

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<sup>2</sup>SMRF further states that the City's NPDES permit application failed to consider the potential reduction in discharge volume that could result from the construction of the new facility. See Letter from John Hohn, Counsel for SMRF, to U.S. EPA Region VI (March 5, 1997) (requesting an evidentiary hearing) (hereinafter referred to as "Evidentiary Hearing Request").

<sup>3</sup>The Region also stated that it was without authority to regulate withdrawals from the San Marcos River to the proposed new facility.

Under 40 C.F.R. Part 124, in order to contest a final permit determination in an evidentiary hearing or to preserve an issue for review by the Board, "all reasonably ascertainable issues" must be raised by the close of the comment period. See 40 C.F.R. § 124.13. In addition, 40 C.F.R. § 124.76 provides that "[n]o issues shall be raised by any party that were not submitted to the administrative record \* \* \* as part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them." As the Board has previously stated, adherence to this requirement is necessary to alert the Region to potential problems with the draft permit and to ensure that it has an opportunity to address these problems before the permit becomes final, thereby promoting the longstanding policy that most permit issues should be resolved at the Regional level. See *In re Florida Pulp and Paper Ass'n & Buckeye Florida*, 6 E.A.D. 49, 53 (EAB 1995); *In re Broward County, Florida*, 4 E.A.D. 705, 714 (EAB 1992).

In the present case, SMRF does not dispute the Region's conclusion that the issues upon which SMRF seeks review were not raised during the comment period and our review of the record on appeal confirms the Region's conclusion in this regard. Further, SMRF does not assert good cause for failing to raise these issues, nor does the record before us suggest

that any good cause existed.<sup>4</sup> Thus, because the issues were reasonably ascertainable but were not raised in SMRF's comments on the draft permit, the issues were not preserved for review. Accordingly, the petition for review is hereby dismissed.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 7/6/98

By: \_\_\_\_\_/s/\_\_\_\_\_  
Ronald L. McCallum  
Environmental Appeals Judge

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<sup>4</sup>Based on SMRF's statements in its evidentiary hearing request, it appears as if the City publicly announced plans to build the new drinking water treatment facility before issuance of the draft permit in this case. See Evidentiary Hearing Request at 3 (stating that "during the period the City was applying for the reissuance of its NPDES permit the City of San Marcos revealed to the public its intention to construct a new domestic water treatment system.").

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the forgoing Order Dismissing Appeal in the matter of City of San Marcos, San Marcos, Texas, NPDES Appeal No. 97-6, were sent to the following persons in the manner indicated:

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Dated: 7/7/98

\_\_\_\_\_/s/\_\_\_\_\_  
Annette Duncan  
Secretary