

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 )	
)	
Permit No. MA0101311 )	
_____ )	

ORDER GRANTING REMAND REQUEST, DISMISSING PERMIT CONDITIONS  
AND DENYING REVIEW IN PART

I. 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") permit decision issued by U.S. EPA Region I ("Region"), regulating discharges from Grafton's publicly owned treatment works ("POTW") to the Blackstone River.<sup>1</sup> On May 11, 2001, after

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<sup>1</sup>On 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 July 14, 2000. 40 C.F.R. pt. 124. 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  
(continued...)

several extensions of time at the request of the parties to allow for settlement discussions, the Region filed a response to the Petition ("Response"). The Response explained that on May 9, 2001, the Region and the Petitioner entered into a Stipulation and Partial Settlement ("Stipulation") to resolve and simplify the resolution of the issues raised by Grafton on appeal. Response at 5.

According to the Stipulation, Petitioner has agreed to withdraw three of the issues it raised on appeal. More specifically, Petitioner has agreed to seek voluntary dismissal of its issues concerning the infiltration/inflow requirements (enumerated as issue number six in the Petition), its request for a compliance schedule for the total ammonia nitrogen limit (issue number seven), and the inclusion of effluent trading guidelines in the permit (issue number eight). Response at 5; Stipulation at 2-3. In addition, according to the Stipulation, the Region has agreed to withdraw specified permit terms regarding weekly ammonia nitrogen limits, winter phosphorus reporting, and

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<sup>1</sup>(...continued)  
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.

nitrate/nitrite reporting, and requests that the Board remand the withdrawn terms to the Region.<sup>2</sup> Response at 5; Stipulation at 3.

As to two other issues, the parties have agreed in the Stipulation to have the issues decided "in a manner that is consistent with the final decision in the UBWPAD [Upper Blackstone Water Pollution Abatement District] appeal," i.e., referring to a not-yet-issued final decision in a related case currently pending before this Board.<sup>3</sup> Response at 5-6; Stipulation at 2. These are issues number two and number nine, dealing with the methodology used to calculate the total ammonia nitrogen limit applicable during the winter months, and the QUAL2E Model that was used for the development of the dissolved oxygen waste load allocation.

This leaves four issues on which the parties did not reach an agreement. These are the issues pertaining to the total phosphorus limits (issue number one), total suspended solids

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<sup>2</sup>For purposes of the Stipulation, the parties refer to these issues as issue number ten.

<sup>3</sup>The NPDES permit for the Grafton facility was issued along with other NPDES permits for other POTWs that discharge to the Blackstone River as part of a coordinated effort to address, among other concerns, dissolved oxygen and eutrophication in the Blackstone River. See Response at 4; Joint Motion for Stay of the Proceedings dated December 1, 2000 ("Joint Motion") at 1. Permits for each of the POTWs were based, in part, on the data used in the development of a waste load allocation for dissolved oxygen in the Blackstone River. See Joint Motion at 1. One of the other permittees, the Upper Blackstone Water Pollution Abatement District ("UBWPAD"), also appealed its permit decision to the Board.

limits (issue number three), the chronic whole effluent toxicity testing requirement (issue number four), and the total residual chlorine limits (issue number five). The Region addressed each of these issues in its Response.

## II. DISCUSSION

### A. *Issues Withdrawn or Remanded Pursuant to the Stipulation*

The Board hereby dismisses with prejudice issues number six, seven, and eight, and grants the Region's request and remands the withdrawn terms described as issue ten in paragraph 2 of the Stipulation.

### B. *Issues to be Decided "Consistent with the Final Decision in the UBWPAD Appeal"*

As previously noted, the parties have stipulated that they agree to having the Board decide two issues "in a manner that is consistent with the final decision in the UBWPAD appeal." The term "final decision in the UBWPAD appeal" is defined in part in the Stipulation as "the decision of the EAB in In re: Upper Blackstone Water Pollution Abatement District, NPDES Appeal No. 00-11, unless judicial appeal is taken from that decision." Stipulation at 2.

However, it is the Board's understanding that the parties to the UBWPAD appeal are engaged in settlement negotiations which

may result in a resolution of the two issues covered by the Stipulation without a Board decision. The Stipulation does not seem to contemplate this possibility. Therefore the parties are directed to file by no later than August 24, 2000, a joint brief or individual briefs indicating the position of the parties relative to the disposition of these two issues if the UBWPAD appeal is resolved without a Board decision.

*C. Remaining Issues*

For the reasons set forth below, review of the four remaining issues on appeal (issues one, three, four, and five) is denied in its entirety.

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). Moreover, the Board traditionally assigns a heavy burden to petitioners seeking review of issues that are essentially technical in nature; clear error or a reviewable exercise of discretion is not established simply because a petitioner presents a difference of opinion or alternative theory regarding a technical matter. *In*

*re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 10 (EAB, Feb. 26, 2001), 9 E.A.D. \_\_\_; *NE Hub Partners*, 7 E.A.D. at 567.

The Board has often emphasized that 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; a petitioner must demonstrate with specificity why the Region's response to the petitioner's comments was clearly erroneous. *Town of Ashland*, slip. op. at 11, 9 E.A.D. \_\_\_; *In re NPDES Permit for Wastewater Treatment Facility of Union Township*, NPDES Appeal Nos. 00-26 & 00-28, at 11 (EAB, Jan. 23, 2001); *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 *Town of Ashland*, for instance, we denied review of one of the issues raised on appeal because of petitioner's failure to do more than simply reiterate previous comments it made on the draft permit without addressing the Region's previous response to those same comments. *Town of Ashland*, slip. op. at 14, 9 E.A.D. \_\_\_; see also *In re City of Moscow, Idaho*, NPDES Appeal No. 00-15, slip op. at 14 n.26 (EAB, Jul.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, Jul. 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 basically restates verbatim the same concerns that the Region already addressed in the response to comments. In framing this appeal, Petitioner completely disregarded the Region’s response to those concerns. Based on Grafton’s failure to do more than reiterate its previous comments without addressing the Region’s response to comments, we conclude that Grafton has failed to establish any clear error or abuse of discretion by the Region. Accordingly, review of issues number one, three, four, and five is denied.

### **III. CONCLUSION**

Issues number six, seven, and eight, are dismissed with prejudice. Review of issues one, three, four, and five is denied, and the Region’s request for a remand of issue number ten is granted. In addition, a joint brief or individual briefs regarding how to deal with issues number two and nine in the

eventuality a resolution of the UBWPAD appeal is achieved without a decision being issued by the Board, must be received by the Board no later than August 24, 2001.

So ordered.

Date: 08/08/01

ENVIRONMENTAL APPEALS BOARD

By: \_\_\_\_\_ /s/ \_\_\_\_\_

Edward E. Reich  
Environmental Appeals Judge



**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order Granting Remand Request, Dismissing Permit Conditions, and Denying Review in Part 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:**

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Dated: 08/08/01

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