

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

In re:)
)
)
City of Abilene Municipal)
Separate Storm Sewer System) NPDES Appeal No. 00-16
)
Docket No. TXS000101)
)

ORDER DENYING REVIEW OF PETITION

The City of Abilene ("Abilene") has filed a Petition for Review ("Petition") dated August 14, 2000, seeking review of several conditions set forth in a National Pollutant Discharge Elimination System ("NPDES")¹ permit issued to Abilene by the U.S. Environmental Protection Agency Region VI ("Region") on September 11, 1998. The permit would authorize storm water discharges from Abilene's municipal separate storm sewer system ("MS4").² The Petition argues that several conditions violate

¹Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources (discrete conveyances, such as pipes) 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.

²Under CWA § 402(p) and 40 C.F.R. § 122.26, an NPDES permit is required for MS4s serving populations of 150,000 or more (large systems), and those serving populations of more than 100,000 but less than 250,000 (medium systems). It is undisputed that Abilene satisfies the requirement of a medium system.

Abilene's constitutional rights under the First and Tenth Amendments and that the Region clearly erred or abused its discretion in setting several other permit conditions.

In its Response to Petition for Review ("Response"), the Region contends that its actions were a lawful exercise of its discretion and that the conditions objected to by Abilene are required under the Clean Water Act ("CWA") and implementing regulations and in no way violate Abilene's constitutional rights. Response at 7-13. The Region further argues that, as a general matter, the Board does not review arguments challenging the constitutionality of statutes administered by EPA. *Id.* at 7.

Because we decline to assume jurisdiction over Abilene's constitutional claims and Abilene has failed to demonstrate how the Region's findings were clearly erroneous, an abuse of discretion, or otherwise unlawful, we deny review.

I. Background

Abilene owns and operates an MS4 that discharges primarily into a nearby lake that also serves as Abilene's main source of drinking water. Petition at 1. Pursuant to the requirements for an MS4 permit set forth in CWA § 402(p)(4) ("Permit application requirements") and implementing regulations at 40 C.F.R.

§ 122.26(d) ("Application requirements for large and medium municipal separate storm sewer discharges"), Abilene submitted Part 1 of the required two-part NPDES permit application in 1993 and the Part 2 application in 1994. *Id.* at 2. Over the next few years the Region worked with Abilene in developing an MS4 permit, culminating in the Region's issuance of a draft permit on June 29, 1996. Response at 3. Abilene filed its Comments on Draft NPDES Permit No. TXS000101 ("Comments") on July 31, 1996, raising concerns about a number of the permit's provisions. Petitioner's Exhibit ("P Ex") 2. The Region thereafter continued negotiations with Abilene and, after having received certification from the Texas Natural Resource Conservation Commission,³ issued its Response to Comments on Draft Permit ("RTC") (AR Ex. 33) and the final permit for Abilene's MS4 on September 11, 1998. P Ex 3. On October 19, 1998, Abilene filed a Request for Evidentiary Hearing pursuant to regulations governing the NPDES program at that time. P Ex 4. On July 14, 2000, the Region returned Abilene's Request for Evidentiary Hearing without prejudice to Abilene's filing an appeal with the Board under changes made to

³Under CWA § 401(a), 33 U.S.C. § 1341, the Region may not issue a permit until the state in which a facility is located (in this case Texas) either certifies that the permit complies with the state's water quality standards or waives certification. See 40 C.F.R. § 124.53.

the NPDES permit appeals process effective June 14, 2000.⁴

Respondent's Exhibit ("R Ex") 2. Abilene filed its Petition with the Board on August 14, 2000.

In its Petition, Abilene makes several challenges to the permit on constitutional grounds. The first is that several provisions of the permit⁵ violate the constitutional principle cited in cases such as *Koog v. United States*, 79 F.3d 452 (5th Cir. 1996), *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), that Congress (and thus federal agencies by association) cannot, under the principles of federalism contained in the Tenth Amendment, compel

⁴Procedures for issuing, modifying, revoking, or terminating permits are governed generally by 40 C.F.R. pt. 124. Prior to June 14, 2000, subpart E of part 124 established an evidentiary hearing process for NPDES permits. Section 124.74 required that any person challenging a final NPDES permit decision submit a request to the Regional Administrator for an evidentiary hearing within 30 days of service of the notice. 40 C.F.R. § 124.74(a) (1998). Only a decision after an evidentiary hearing or a denial of the request for an evidentiary hearing could be appealed to the Board. *Id.* § 124.91. On May 15, 2000, EPA promulgated substantial changes to the permit review process. See 65 Fed. Reg. 30,887 (May 15, 2000). Included in these changes was the elimination of the evidentiary hearing procedures for NPDES permits. *Id.* at 30,896. Under current procedures, persons appealing an NPDES permit condition may now file a petition directly with the Board within 30 days after the issuance of a final NPDES permit decision. *Id.* at 30,911 (codified at 40 C.F.R. § 124.19(a)).

⁵Abilene's Petition cites Pts. I.B, II (Introductory Provisions), II.A, II.E-G, and V.C. Petition at 5-6, 10, 15-16, 20.

states to enact or enforce a federal regulatory program. See Petition at 3-10. Abilene argues that the permit's structure requires Abilene to regulate, legislate, and use its enforcement powers according to requirements set by EPA rather than in a manner chosen by Abilene itself. *Id.* at 5. Similarly, Abilene argues that permit conditions requiring it to ensure adequate legal authority to control discharges to and from its MS4 also go beyond the constitutional restrictions mentioned above.⁶

Abilene's second set of constitutional arguments challenge permit conditions⁷ that require it to develop training and education programs designed to help reduce various sources of storm water pollution. Petition at 10-12. Abilene argues that these provisions infringe upon its First Amendment right to free speech "by compelling Abilene to 'speak' to its citizens and by

⁶Abilene also objects to this provision on the basis of its First Amendment right to petition the government. While Abilene asserts that the permit requires it to work with higher sovereign powers to ensure legal authority is maintained, Abilene makes no argument as to why or how this violates its First Amendment rights, nor cites any authority to support its claim. Petition at 12-13. Given Abilene's failure to substantiate its First Amendment objection, we will not entertain it further. See 40 C.F.R. § 124.19(a) (petition shall include a statement of the reasons supporting that review); *City of Port St. Joe & Fla. Coast Paper Co.*, 7 E.A.D. 275, 283 n.17 (EAB 1997) (legal arguments presented in summary fashion without arguments or documentation do not meet regulatory requirements that petition shall include a statement of reasons supporting review.)

⁷These include Pts. II.A.9.c and II.A.10.

compelling Abilene to deliver a message chosen by EPA." *Id.* at 10.

Besides its constitutional claims, Abilene argues that other permit conditions set by the Region evidence error, abuse of discretion, or are otherwise unlawful. First, Abilene alleges that the Region violated CWA § 402(p) and its supporting regulations by failing to authorize all forms of discharges from Abilene's MS4, and limiting the permit to municipal storm water discharges only. *Id.* at 13-16. Abilene maintains that accidental spills, sanitary sewer overflow discharges, and storm water associated with industrial activity that enter the MS4 despite Abilene's efforts to prevent their entry should be legally authorized under its NPDES permit. *Id.* at 14. It argues that the current structure of the permit would make Abilene liable for every form of discharge that passes through the MS4 regardless of whether Abilene has control over it. This structure, according to Abilene, is contrary to EPA's stated approach to regulating storm water discharges from MS4s. *Id.* at 15-16.

Abilene also argues that permit language requiring it to develop a storm water management program ("SWMP") is unnecessary and ambiguous.⁸ *Id.* at 17. In particular, it argues that the

⁸Abilene specifically references the introductory paragraphs in Pt. II and all of Pts. II.A, D-F.

language in the permit requiring development of an SWMP strongly suggests that the Region did not determine whether the SWMP incorporated in the permit already satisfies the statutory standards for MS4s under the CWA. *Id.* Abilene argues that the inclusion of the language that anticipates development of an SWMP thus creates a conflict in the operative provisions of the permit and is arbitrary and capricious.⁹ *Id.*

The Region argues in response that Abilene fails to meet its burden of showing that the Region committed any clear error of law or fact or abuse of discretion when it set the permit conditions. Response at 5-6. The Region cites CWA §§ 402(p)(3)(B)(ii) and (iii), 33 U.S.C. §§ 1342(p)(3)(B)(ii) and (iii), as requiring NPDES permits for MS4s to "effectively prohibit" non-storm water discharges into storm sewers and to require controls to reduce discharges of pollutants from the MS4 to the "maximum extent practicable." *Id.* at 2. The Region states that the storm water program is incidental to the general prohibition of all unpermitted discharges under CWA § 301(a), 33 U.S.C. § 1311(a). *Id.* at 9. The Region also points to the permitting process for MS4s set forth in 40 C.F.R. § 122.26(d) as allowing EPA to work with municipalities in designing site-specific permits containing SWMPs and emphasizing the use of best

⁹Abilene also states that such language "could raise constitutional issues if wrongly interpreted" but fails to explain how this is so. *Id.* at 17.

management practices to meet the CWA § 402(p)(3)(B)(ii) and (iii) requirements. *Id.* at 2. The Region maintains that it properly issued Abilene's permit in accordance with the CWA, implementing regulations, and EPA guidance, and that the permit provisions were supported by the administrative record in this case. *Id.* at 7-8, 12.

The Region maintains that while the constitutional principles raised by Abilene may involve an important policy decision, the Board, as a general matter, does not adjudicate arguments challenging the constitutionality of a statute, and "a permit appeal proceeding is not the appropriate forum in which to challenge either the validity of Agency regulations or the policy judgments that underlie them." *Id.* at 7. Furthermore, the Region argues that the MS4 program does not violate the Constitution as asserted by Abilene, because the Supreme Court has held that federal statutes of general applicability, such as the CWA, can be applied to states and municipalities so long as their application "does not excessively interfere with the functioning of those separate sovereign governments." *Id.* at 10, citing *Reno v. Condon*, 120 S. Ct. 666, 672 (2000); *South Carolina v. Baker*, 485 U.S. 505, 514-15 (1988); *Printz v. United States*, 521 U.S. 898, 932 (1997). The Region concludes that since

Abilene's objections do not allege such an interference, the Board should deny review of Abilene's Petition. *Id.*

II. DISCUSSION

In appeals under 40 C.F.R. § 124.19(a), the Board will not grant review unless it appears from the petition that the condition in question is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that warrants review.¹⁰ 40 C.F.R. § 124.19(a). The Board exercises its authority to review permits sparingly, in recognition of Agency policy favoring resolution of most permit disputes at the Regional level. *Ashland*, slip op. at 9-10; *New England Plating*, slip op. at 7,

¹⁰As noted *supra*, note 4, prior to the Amendments to Streamline the NPDES Program Regulations, 65 Fed. Reg. 30,886-30,913 (May 15, 2000), the rules governing petitions for review of NPDES permitting decisions were set out in 40 C.F.R. § 124.91 (1998). Even though these amendments have eliminated the evidentiary hearing requirement in favor of direct appeal to the Board, the standard of review under 40 C.F.R. § 124.91 is essentially identical to that of 40 C.F.R. § 124.19. See, e.g., *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 9 n.11 (EAB Feb. 26, 2001), 9 E.A.D. ___; *In re New England Plating Co.*, NPDES Appeal No. 00-7, slip op. at 6 n.10 (EAB, Mar. 29, 2001), 9 E.A.D. ___.

In re Town of Hopedale, Bd. of Water & Sewer Comm'rs., NPDES Appeal No. 00-04, at 8-9 n.13 (EAB, Feb. 13, 2001). The burden of establishing grounds for review rests upon the petitioner. 40 C.F.R. § 124.19(a)(1), (2).

The issues presented by Abilene in its Petition - including its supporting arguments - are identical to arguments presented by the petitioner in *In re City of Irving Municipal Separate Storm Sewer System*, NPDES Appeal No. 00-18, (EAB, July 16, 2001), 10 E.A.D. __. There, we denied the petition for review, finding that petitioner's constitutional arguments were a *de facto* challenge to the substance of the CWA and its implementing regulations. We also observed that constitutional challenges of the kind propounded by the petitioner were best reserved to the federal courts. For these reasons we rejected the petitioner's constitutional arguments in that case. *Irving*, slip op. at 17-20. We also disagreed with and denied review of that petitioner's arguments regarding whether the Region erred or otherwise abused its discretion in refusing to authorize all discharges from its MS4 and whether the Region's boilerplate language requiring submission of an SWMP was arbitrary and capricious. See *id.* at 21-23.

For the same reasons that we denied review in *Irving*, we deny review here. In so doing, we incorporate by reference our legal analysis in that case. See *Irving*, slip op. at 17-23. Abilene has failed to show clear error or abuse of discretion on the part of the Region or otherwise convince us that its arguments raise important policy considerations that warrant review.

III. CONCLUSION

Abilene's Petition for Review of NPDES Permit No. TXS000101 is DENIED in all respects.

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: _____ /s/
Scott C. Fulton
Environmental Appeals Judge

Dated: July 16, 2001

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review of Petition in the matter of City of Abilene, Texas Municipal Separate Storm Sewer System, NPDES Appeal No. 00-16, were sent to the following persons in the manner indicated:

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_____/s/
Annette Duncan
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