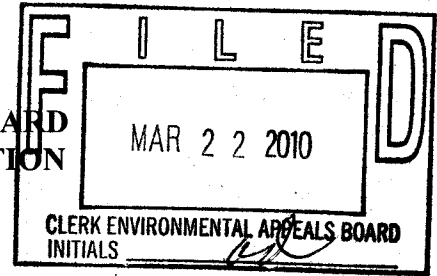


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION
WASHINGTON, D.C.



In re:)
)
San Jacinto River Authority) NPDES Appeal No. 09-09
)
NPDES Permit No. TX0054186)
)

AMENDED ORDER DENYING MOTION TO ABATE PROCEEDINGS¹

By motion dated February 18, 2010, San Jacinto River Authority (“SJRA”) seeks to abate, or stay, the above-captioned proceeding before the Environmental Appeals Board (“Board”). Motion to Abate Proceedings (Feb. 18, 2010) (“Motion”). On March 10, 2010, U.S. Environmental Protection Agency (“EPA”), Region 6 (“Region”), filed an opposition to the Motion. Region 6’s Response in Opposition to San Jacinto River Authority’s Motion to Abate Proceedings (Mar. 10, 2010) (“Region’s Opposition to Motion”). For the following reasons, the Motion is DENIED.

The above-captioned appeal concerns a modification of a National Pollutant Discharge Elimination System (“NPDES”) permit previously issued by Region 6 that regulates discharges from the Woodlands Wastewater Treatment Plant No. 1 (“WWTP #1”), a publicly owned treatment works operated by SJRA, into a tributary of the San Jacinto River Basin in Montgomery County, Texas. After the Region issued the modified permit on July 24, 2009, SJRA petitioned for review on August 24, 2009. SJRA’s Petition for Review (Aug. 21, 2009)

¹ This Amended Order Denying Motion to Abate Proceedings supercedes the Order Denying Motion to Abate Proceedings issued March 22, 2010.

("Petition"). The Region filed its response on December 3, 2009, pursuant to a Board order granting an extension of time in which to do so. Region's Resp. Br. (Dec. 3, 2009).

In support of the Motion, SJRA states that the primary issue in this appeal – the inclusion of lethal and sublethal Whole Effluent Toxicity ("WET") limits in the modified permit – is likely to arise in a future permitting decision by the Region involving another facility operated by SJRA and known as the Woodlands Wastewater Treatment Plant No. 2 ("WWTP #2"). SJRA predicts that it will "protest the WET limits proposed for WWTP #2, as it has for WWTP #1, and anticipates that this second protest will similarly result in an appeal to the Board." Motion at 3. SJRA asserts that participation in two appeals that have similar factual and legal issues will be unduly burdensome and that "to avoid the duplication of the time and effort of SJRA, the Region, and the Board, [SJRA requests that] the Board delay its consideration of the Petition until the point in the appeals process where appeals for both WWTP#1 and WWTP #2 may be heard together." *Id.* SJRA continues, "Such an abatement will allow the Board to consider the record for both permits before making a decision that will affect both." *Id.*

The Board observes that the Region authorized the Texas Commission on Environmental Quality ("TCEQ") to administer the NPDES permitting program for facilities within TCEQ's jurisdiction in 1998, and accordingly, TCEQ typically issues Texas Pollutant Discharge Elimination System ("TPDES") permit decisions. Memorandum of Agreement between the Texas Natural Resource Conservation Commission [now TCEQ] and the U.S. EPA, Region 6 Concerning the National Pollutant Discharge Elimination System pt. I (Sept. 14, 1998) ("MOA"). However, in certain circumstances, such as those applicable to the permitting decision for WWTP #1, exclusive authority to issue the permits in compliance with the federal

NPDES program reverts to the Region in accordance with CWA § 402(d), 33 U.S.C. § 1342(d) and 40 C.F.R. § 123.44(h)(3). *See also* MOA pt. IV.C.3.g. At this time, such circumstances are absent in the permitting process for WWTP #2, and pursuant to the MOA, TCEQ is the permitting authority for the TPDES permit for WWTP #2. Letter from Lawrence E. Starfield, Deputy Regional Administrator, U.S. EPA, Region 6 to Mark R. Vickery, Executive Director, TCEQ, enclosure (Dec. 22, 2009) (Motion Ex. A) (“Starfield Letter”) (identifying “SJRA Woodlands #2” as one of several proposed TCEQ permits backlogged with toxicity issues); *see also* Region’s Opposition to Motion at 2 (discussing TCEQ’s discretion to re-issue permit for WWTP #2).

SJRA states that the Region recently informed TCEQ that TPDES permits for thirty-one facilities, including WWTP #2, must include lethal and sublethal WET limits. Motion at 2 (citing Starfield Letter and Letter from Miguel I. Flores, Director, Water Quality Protection Division, U.S. EPA, Region 6 to L’Oreal W. Stepney, Director, Office of Water, TCEQ (Dec. 18, 2009) (Motion Ex. B)). According to SJRA, “the issues between the EPA and TCEQ regarding WET limits in TPDES permits may not be resolved in the near future,” resulting in the “clear possibility” that exclusive authority to issue NPDES permits for the affected facilities will pass to the Region. Motion at 3. SJRA foresees the inclusion of lethal and sublethal WET limits in a permit issued by the Region for WWTP #2. *Id.* If this is the case, SJRA states that it anticipates protesting the WET limits during any comment period and later petitioning the Board to review those permit conditions. *Id.*

The Region first notes that the challenged provisions in the permit for WWTP #1 “cannot become effective until the Board takes action on the Petition.” Region’s Opp. to Mot. at 2. The

Region adds that "the duration of the requested abatement would be determined by the possible outcomes of discretionary decision making by two separate governmental actors, [TCEQ] and EPA Region 6[,] and "SJRA's motion amounts to a request for an indefinite delay that could result in their EPA-issued permit never taking effect." *Id.*

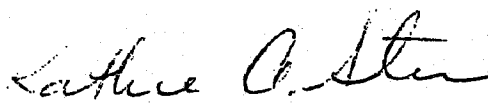
Upon consideration of the Motion and the Region's Opposition to the Motion, the Board determines that SJRA has not demonstrated good cause for a stay in this proceeding. SJRA's sole basis for seeking an abatement is a series of events that have yet to – and may never – occur. Whether there will be a petition for review before the Board of an NPDES permit for WWTP #2 is highly speculative. Moreover, as the Region points out, granting the motion would indefinitely delay resolution of the issues in this appeal. Accordingly, the Board declines to stay the resolution of this case, and the Motion is DENIED.

So ordered.

Dated: March 22, 2010

ENVIRONMENTAL APPEALS BOARD

By: _____



Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Amended Order Denying Motion to Abate Proceedings in *In re San Jacinto River Authority*, NPDES Appeal No. 09-09, were sent to the following persons in the manner indicated:

By Facsimile and First Class U.S. Mail:

Lauren Kalisek
Lloyd Gosselink Rochelle & Townsend, P.C.
816 Congress Avenue
Suite 1900
Austin, TX 78701
facsimile: (512) 472-0532

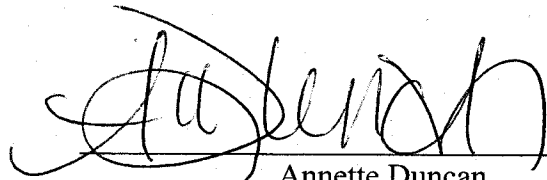
By Facsimile and EPA Pouch Mail:

Thomas David Gillespie
U.S. Environmental Protection Agency, Region 6
Office of Regional Counsel
1445 Ross Avenue, Suite 1200
Mail Code 6RCM
Dallas, TX 75202
facsimile: (214) 665-2182

By Facsimile and Inter-Office Mail:

Stephen J. Sweeney
Water Law Office
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Mail Code 2355A
Washington, DC 20460
facsimile: (202) 564-5477

Date: MAR 22 2010


Annette Duncan
Secretary