EPA United States of America
Environmental Protection Agency

A FAX FROM: Region 10

TO:	FAX NO.:
Eurika Durr	(202) 233-0121

SUBJECT: Motion to Dismiss Petition for Review and Request for Extension

FROM:	PHONE NO.:
Pete Ford	(206) 553-2116
OFFICE:	FAX NO. FOR:
ORC Region 10, Seattle	

COMMENTS:

DATE and TIME:	NO. of PAGES:

EPA Form 1315-18 (Rev. 5/97) (WebForms v1.0)

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

In the Matter of:	
CITY OF TWIN FALLS	Appeal Nos. NPDES 09-12, 09-13
NPDES Permit No. ID-002127-0	

MOTION TO DISMISS PETITION FOR REVIEW AND REQUEST FOR EXTENSION

Region 10 of the United States Environmental Protection Agency (the Region) files this motion to dismiss as moot the petition for review filed by Idaho Conservation League (ICL) in the above-captioned matter because the Region has withdrawn the portions of the permit challenged by ICL. *See* attached "Notification of Withdrawal of Permit Conditions." In addition, the Region requests an extension to file its response to the petition for review filed by the City of Twin Falls (the City) until September 8, 2010. The City supports the request for extension. In the event that the Board denies the Region's request for extension until September 8, 2010, the Region requests a 10-day extension from date of the Board's denial to file its response to the City's petition.

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BACKGROUND

The Region issued NPDES Permit No. ID-002127-0 to the City on September 22, 2009. On October 26, 2009, the Board notified the Region that the City had filed a petition for review, dated October 21, 2009, and set a December 8, 2009 deadline for the Region's response. On October 28, 2009, the Board notified the Region that ICL had filed a petition for review, dated October 26, 2009, and set a December 14, 2009 deadline for the Region's response. By letter dated November 20, 2009, the Region identified the various conditions challenged by the City or ICL as stayed until final agency action under 40 C.F.R. § 124.19(f). The remaining permit conditions were uncontested and severable from the contested conditions and, in accordance with 40 C.F.R. §§ 124.16(a)(2) and 124.20(d), became fully effective and enforceable on November 1, 2009. On November 23, 2009, the Region filed a motion for extension and single response date to file its responses to the petitions from the City and ICL by January 11, 2009. The Board granted the Region's motion by letter dated December 1, 2009. The Region subsequently requested and the Board subsequently granted two additional extensions to respond to the petitions, and the Region's response is currently due March 8, 2010.

DISCUSSION

In some cases, dismissal of a petition may be appropriate if and when all contested conditions have been withdrawn. *See In re Cavenham Forest Indus.*, 5 E.A.D. 722, 728 & n.10 (EAB 1995) (declining to reinstate appeal where each contested permit condition had been remanded; no contested conditions from original petition remained for Board to review); *In re City of Port St. Joe*, 5 E.A.D. 6, 9 (EAB 1994) (holding appeal was mooted by Region's withdrawal of permit under predecessor to 40 C.F.R. § 124.19(d) despite petitioner's objection to new draft permit proposed as replacement); *In re City of Haverhill Wastewater Treatment*

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Facility, NPDES Appeal No. 08-01, Order Dismissing Petition for Review at 2 (EAB, Feb. 28, 2008) (granting motion to dismiss petition as moot after Region withdrew sole contested condition).

Here, Section I.B.1 and Appendix A of the permit were the sole contested conditions in ICL's petition for review. As explained in the "Notification of Withdrawal of Permit Conditions" attached hereto as Exhibit 1, the Region has withdrawn Section I.B.1 and Appendix A from the permit, effective immediately. As a result, pursuant to 40 C.F.R. § 124.19(d), the Region believes that ICL's petition is moot, and the Region hereby moves to dismiss ICL's petition for review.

As explained in Exhibit 1, and pursuant to 40 C.F.R. § 124.19(d), the Region intends to issue a proposed permit modification *to not include* Section I.B.1 and Appendix A (i.e., total phosphorus trading) in the permit. The Region informed the City of its intention to withdraw Section I.B.1 and Appendix A from the permit and to subsequently issue a proposed permit modification *to not include* Section I.B.1 and Appendix A (i.e., total phosphorus trading) in the permit. In response, the City indicated its intention to submit comments during the permit modification public notice period and subsequently file a petition for review with the Board regarding the Region's decision not to include these provisions authorizing total phosphorus trading in the City's permit. As noted above, the City currently has a petition for review of the permit pending before the Board, to which the Region's response is due March 8, 2010. The Region believes that the Board may prefer to address and resolve all issues raised by the City in its current and prospective petitions in one consolidated petition for review. Thus the Region requests to extend its deadline to respond to the City's petition until September 8, 2010. Such extension would allow the Region to propose a permit modification *to not include* Section I.B.1

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and Appendix A (i.e., total phosphorus trading) in the permit, the City to comment on that proposal, the Region to finalize that proposal, and the City to file a petition for review with the Board, which the Board could then consolidate with the City's pending petition. If the Board denies the Region's request, the Region requests a 10-day extension from the date of denial to file its response to the City's pending petition for review.

RELIEF REQUESTED

Based on the foregoing, the Region requests that the Board dismiss ICL's petition for review as moot. In addition, the Region requests that the Board grant the Region's request for extension to September 8, 2010 to respond to the City's petition. If the Board denies the Region's request for extension, the Region requests a 10-day extension from the date of the Board's denial to respond to the City's petition.

Dated this 2nd day of March, 2010.

Respectfully submitted,

PETER Z. FORD
Assistant Regional Counsel
U.S. Environmental Protection Agency
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Seattle, Washington 98101
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Of Counsel:

Jim Curtin
Attorney Advisor
Water Law Office
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Exhibit 1: "Notification of Withdrawal of Permit Conditions"

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CERTIFICATE OF SERVICE

I certify that the foregoing "Motion to Dismiss Petition for Review and Request for Extension" and attached "Notification of Withdrawal of Permit Conditions" were sent to the following persons, in the manner specified, on the date below:

Original by fax and and first class U.S. mail, to:

Ms. Eurika Durr, Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
Colorado Building, Suite 600
1341 G Street, NW
Washington, D.C. 20005

One copy by fax and first class U.S. mail, to:

Fritz Wonderlich
Wonderlich & Wakefield
Attorney at Law
P.O. Box 1812
Twin Falls, Idaho 83303-1812
Fax: (888) 789-0935
Phone: (208) 352-0811

Justin Hayes
Idaho Conservation League
P.O. Box 844
Boise, Idaho 83701
Fax: (208) 344-0344
Phone: (208) 345-6933, ext. 24

Dated: 3/2/10

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Office of Regional Counsel

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
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Seattle, WA 98101-3140

MAR - 2 2010

OFFICE OF
WATER AND WATERSHEDS

VIA Fax and First Class Mail

Ms. Jackie Fields, City Engineer
City of Twin Falls
P.O. Box 1907
Twin Falls, Idaho 83303-1907

Re: NPDES Appeal No.09-13
NPDES Permit No. ID-002127-0
Notification of Withdrawal of Permit Conditions

Dear Ms. Fields:

The above-referenced National Pollutant Discharge Elimination System (NPDES) permit was issued to City of Twin Falls Wastewater Treatment Plant (the City) on September 22, 2009. On October 28, 2009, the Environmental Appeals Board (EAB) notified Region 10 that Idaho Conservation League (ICL) had filed a petition for review of the permit. By letter dated November 20, 2009, the Region identified those permit conditions that were stayed as a result of ICL's petition. (The Region's November 20, 2009 letter also identified those permit conditions that were stayed as a result of a petition for review filed by the City.) With respect to ICL's petition, the following contested conditions were identified as stayed until final agency action under 40 C.F.R. § 124.19(f):

- Section I.B.1: "The permittee may engage in pollutant trading for average monthly discharges of total phosphorus pursuant to the requirements in 'State of Idaho Department of Environmental Quality Pollutant Trading Guidance' (November 2003 draft). No trading is allowed to adjust discharges to meet average weekly limits or for other pollutants. This permit only authorizes trading with other point sources in Segments 1, 2, and 3 in the Middle Snake River watershed that have NPDES permits that authorize trading. Trading with non-point sources is not authorized. See Appendix A for details about the requirements for buying and selling pollutant credits and reporting such trades to EPA and the Idaho Department of Environmental Quality (IDEQ)."

- Appendix A (Pollutant Trading in the Upper Snake Rock Subbasin)

Pursuant to 40 C.F.R. § 124.19(d), the Region hereby withdraws Section I.B.1 and Appendix A from NPDES Permit No. ID-002127-0. As of the date of this notification, neither Section I.B.1 nor Appendix A is in effect as a permit condition. The Region intends to issue a proposed permit modification *to not include* Section I.B.1 and Appendix A in the permit in the near future.

If you have any questions, please feel free to contact Peter Ford, Office of Regional Counsel, at (206) 553-2116, or John Drabek, Office of Water and Watersheds, at (206) 553-8257.

Sincerely,

Michael A. Bussell, Director
Office of Water and Watersheds

cc: Ms. Erika Durr, Environmental Appeals Board
Mr. Fritz Wonderlich, Wonderlich & Wakefield
Mr. Justin Hayes, Idaho Conservation League
Ms. Marti Bridges, Idaho Department of Environmental Quality