



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10

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ENVIR. APPEALS BOARD
OFFICE OF
REGIONAL COUNSEL

November 25, 2009

Via Federal Express

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, DC 20005

Re: City of Caldwell
NPDES Permit No. IDS-028118
NPDES Appeal No. NPDES 09-11

Dear Sir or Madam:

Pursuant to the EAB's letter, dated October 15, 2009, enclosed please find the original and two (2) copies of EPA Region 10's Response Brief with attached exhibits and EPA Region 10's Certified Administrative Record Index in the above-referenced matter. If you have any questions, please call me at (206) 553-1477.

Sincerely,

A handwritten signature in black ink, appearing to read "Courtney J. Weber".

Courtney J. Weber
Assistant Regional Counsel

Enclosures

cc: Matthew McGee, Moffatt Thomas

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ENVIR. APPEALS BOARD

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5 UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
6 ENVIRONMENTAL APPEALS BOARD
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8)
9 In the Matter of:)

) Appeal No. NPDES 09-11

10 CITY OF CALDWELL)

) EPA REGION 10'S
) RESPONSE BRIEF

11 NPDES Permit No. IDS-028118)

12
13 I. INTRODUCTION

14 Pursuant to 40 C.F.R. § 124.19 and the October 15, 2009 letter from the Clerk of the
15 Environmental Appeals Board ("EAB"), the U.S. Environmental Protection Agency, Region 10
16 ("Region") respectfully submits this response to the Petition for Review ("Petition") of National
17 Pollutant Discharge Elimination System ("NPDES") Permit No. IDS-028118 ("Permit"). The
18 Petition was filed by Pioneer Irrigation District ("Pioneer") on October 9, 2009. For the reasons
19 discussed below, the EAB should deny Pioneer's Petition.

20 II. STATEMENT OF THE CASE

21 A. Statutory and Regulatory Background

22 In 1987, Congress passed the Water Quality Act of 1987 which, among other things,
23 added Section 402(p) to the Clean Water Act ("CWA"). See 55 Fed. Reg. 47,990, 47,992 (Nov.
24 16, 1990). Section 402(p) of the CWA requires NPDES permits for four types of storm water
25 discharges: (1) discharges with respect to which a permit had been issued prior to February 4,

1 1987; (2) discharges associated with industrial activity; (3) discharges from municipal separate
2 storm sewer systems (“MS4s”) serving populations over 100,000; and (4) any discharge for
3 which the permitting authority determines to be contributing to a violation of a water quality
4 standard or is a significant contributor of pollutants to waters of the United States. 55 Fed. Reg.
5 at 48,992. In addition, CWA Section 402(p)(6) expands the types of regulated storm water
6 discharges by requiring EPA to “issue regulations ... which designate storm water discharges ...
7 to be regulated to protect water quality....” 33 U.S.C. § 1342(p)(6); *see also* 64 Fed. Reg.
8 68,722, 68731 (Dec. 8, 1999).

9 Pursuant to CWA Section 402(p)(6), EPA promulgated the Phase II storm water
10 regulations in 1999.¹ 64 Fed. Reg. 68,722 (Dec. 8, 1999). The Phase II storm water regulations
11 set forth the permitting requirements for small MS4s and storm water discharges associated with
12 construction sites that disturb between one to five acres. 64 Fed. Reg. at 68,722. Small MS4s
13 are defined as a conveyance or system of conveyances owned or operated by federal, State,
14 Tribal, or local governments, including State departments of transportation, that are either (1)
15 located within an urbanized area as determined by the latest Decennial Census by the Bureau of
16 the Census or (2) designated by the NPDES permitting authority. 40 C.F.R. § 122.32(a); *see*
17 *also* 64 Fed. Reg. at 68,748-68,752.

18 The CWA requires NPDES permits for regulated MS4 discharges to “reduce the
19 discharge of pollutants to the maximum extent practicable” and “effectively prohibit non-storm
20 water discharges” into the MS4. 33 U.S.C. § 1342(p)(3)(B). The Phase II storm water
21 regulations require that NPDES permits contain conditions that require the regulated small MS4
22 operator to develop, implement, and enforce a storm water management program (“SWMP”) that

23
24 ¹ EPA promulgated the Phase I storm water regulations in 1990. 55 Fed. Reg. 47,990 (Nov. 16, 1990).
25 The Phase I storm water regulations set forth the requirements for storm water discharges associated with
industrial activity, including construction sites disturbing more than five acres, and discharges from large
and medium size MS4s (*i.e.*, MS4s serving a population over 100,000). 55 Fed. Reg. at 47,990; *see also*
40 C.F.R. § 122.26.

1 is designed to reduce the discharge of pollutants from the MS4 to the maximum extent
2 practicable (“MEP”), protect water quality, and satisfy the appropriate water quality
3 requirements of the CWA. 40 C.F.R. § 122.34(a); *see also* 64 Fed. Reg. at 68,752-68,753. The
4 SWMP must include the following six minimum control measures: (1) public education and
5 outreach on storm water impacts; (2) public involvement and participation; (3) illicit discharge
6 detection and elimination; (4) construction site storm water runoff control; (5) post construction
7 storm water management in new development and redevelopment; and (6) pollution
8 prevention/good housekeeping for municipal operations. 40 C.F.R. § 122.34(b).

9 A regulated small MS4 must submit a NPDES permit application that includes a
10 description of the actions, activities, and management practices (collectively “best management
11 practices” or “BMPs”) that the operator will implement to meet the six minimum control
12 measures.² 40 C.F.R. § 122.34(d); *see also* 64 Fed. Reg. at 68,764. When issuing an individual
13 permit to a small MS4, EPA reviews the application and incorporates into the NPDES permit the
14 specific BMPs for the SWMP that are required to meet the six minimum control measures.
15 These BMPs can include those set forth in the NPDES permit application as well as additional
16 requirements or BMPs necessary to meet the six minimum control measures, an approved total
17 maximum daily load (“TMDL”), or approved water quality standards. *See* 40 C.F.R. § 122.34(a)
18 and (e); *see also* 64 Fed. Reg. at 68,752.

19 **B. Factual and Procedural Background**

20 The City of Caldwell (“City”) owns/operates a small MS4 located within the Nampa
21 Urbanized Area.³ The City’s MS4 serves a population size of approximately 37,000 residents
22

23
24 ² The application must also include the information required in 40 C.F.R. § 122.21(f) and an estimate of
square mileage served by the small MS4. 64 Fed. Reg. at 68,764.

25 ³ Since the City’s MS4 is located within an urbanized area as defined by the Census Bureau and does not
meet the definition of a Phase I MS4 (*i.e.*, it serves a population less than 100,000), the City’s MS4 is a

1 within an area covering approximately 12.5 miles. The MS4 consists of roads with drainage
2 systems, municipal streets, catch basins, curbs, gutters, ditches and storm drains used for
3 collecting or conveying storm water. The MS4 discharges to various receiving waters including,
4 but not limited to, Indian Creek, Mason Creek, the Boise River, and irrigation canals owned by
5 Pioneer. *See* Region's Administrative Record ("AR") Exhibits ("Ex.") A-2 at p. 1-2 and E-3 at
6 p. 6.⁴

7 On January 17, 2003, the Region notified the City that, as an owner/operator of a
8 regulated small MS4, it was required to submit a NPDES permit application that included a
9 description of a SWMP. *See* Region's AR Ex. A-1. On February 20, 2003, the City submitted a
10 NPDES permit application that included the City's proposed SWMP which set forth BMPs that
11 would meet the six minimum control measure set forth in 40 C.F.R. § 122.34. *See* Region's AR
12 Ex. A-2. On July 11, 2008, the Region issued for public comment a draft NPDES permit that
13 proposed to authorize discharges from the City's MS4 to waters of the United States. *See*
14 Region's AR Ex. E-2. The draft NPDES permit included BMPs identified in the City's proposed
15 SWMP, submitted with the City's NPDES permit application, as well as additional BMPs that
16 the Region felt were necessary to ensure that the Permit met State water quality standards and
17 approved TMDLs. Not all of the BMPs identified in the City's NPDES permit application were
18 included as Permit conditions. For example, the City proposed the following BMP as part of its
19 post-construction storm water management program for new development and redevelopment:
20 develop a guidance handbook for structural controls to ensure proper design, operation and
21 maintenance. Region's AR Ex. A-2 at p. 16. This proposed BMP was not included as a Permit

22
23
24 regulated small MS4 subject to the Phase II storm water regulations. 40 C.F.R. §§ 122.26(b)(16) and
122.32; *see also* 40 C.F.R. Part 122, App. F-I.

25 ⁴ The administrative record exhibit number corresponds to the Certified Index to the Region's
Administrative Record. A copy of the cited exhibits has been filed with this response brief.

1 requirement. *See* Region's AR Ex. E-2 at p. 10-11 (setting forth the Permit conditions for post-
2 construction storm water management requirements).

3 The public comment period was initially scheduled to end on September 19, 2008;
4 however, after receiving numerous extension requests, the Region extended the public comment
5 period to November 18, 2008. *See* Region's AR Ex. F-3. In addition, the Region held public
6 hearings on the Permit on August 13, 2008 and August 14, 2008.

7 On October 20, 2008, during the public comment period, Pioneer submitted a comment
8 letter on the draft permit. *See* Region's AR Ex. G-9. Pioneer's main request in its comment
9 letter was for the Region to include additional language in the Permit that prohibits the discharge
10 of storm water from the City's MS4 *and* private developments to constructed waterways owned,
11 operated or maintained by irrigation entities without their written permission. *Id.* at p. 3. After
12 reviewing all of the comments received during the comment period, on September 4, 2009, the
13 Region issued the final Permit with a response to comments document. *See* Region's AR Exs.
14 H-2 and H-5. The Permit authorizes discharges from the City's MS4 outfalls to waters of the
15 United States within the Nampa Urbanized Area. *Id.* The same day that the Region issued the
16 Permit, the Region sent a letter to all interested parties notifying the parties of the Permit
17 issuance. *See* Region's AR Ex. H-3.

18 Four days after issuance of the Permit, on September 8, 2009, Pioneer sent the Region a
19 letter that requested the Region consider additional information to support Pioneer's previous
20 requests that the Region add language to the Permit that prohibits the discharge of storm water
21 from the City's MS4 and private developments to constructed waterways owned, operated or
22 maintained by irrigation entities without their written permission. *See* Affidavit of Matthew J.
23 McGee ("McGee Affidavit") at Ex. E, filed by Pioneer on Oct. 9, 2009. Since this additional
24 information was submitted after the Region issued the Permit, it was not considered by the
25

1 Region during the Permit issuance process nor should it be considered by the EAB in this matter,
2 as explained below. On October 9, 2009, Pioneer filed the Petition with the EAB.

3 III. STANDARD OF REVIEW

4 Pursuant to 40 C.F.R. § 124.19(a), the EAB will not ordinarily review a permit decision
5 unless the decision is based on either a clearly erroneous finding of fact or conclusion of law, or
6 involves an important matter of policy or exercise of discretion that warrants review. *See In re*
7 *Westborough and Westborough Treatment Plant Board*, 10 E.A.D. 297, 303 (EAB 2002). The
8 preamble to 40 C.F.R. § 124.19 states that the “power of review should be only sparingly
9 exercised,” and “most permit conditions should be finally determined at the Regional level.” 45
10 Fed. Reg. 33,290, 33,412 (May 19, 1980).

11 The petitioner has the burden to demonstrate that there is clear error or an important
12 policy consideration that warrants that the permit condition should be reviewed. 40 C.F.R.
13 § 123.19(a)(1) & (2); *see also In re Three Mountain Power, LLC*, 10 E.A.D. 39, 47 (EAB 2001).
14 It is not enough that the petitioner merely repeat the objections that it made during the comment
15 period. Instead, the petitioner must (1) state the objections to the permit that are being raised for
16 review and (2) explain why the permit decision maker’s previous response to those decisions is
17 clearly erroneous or otherwise warrants review. *See In re Town of Ashland Wastewater*
18 *Treatment Facility*, 9 E.A.D. 661, 668 (EAB 2001). As previously stated by the EAB, “[a]
19 petitioner may not simply reiterate comments made during a public comment period, but must
20 substantively confront the permit issuer’s subsequent explanations.” *In re City of Attleboro, MA*
21 *Wastewater Treatment Plant*, NPDES Appeal No. 08-08, slip op. at 11 (EAB, Sept. 15, 2009).
22 Moreover, issues and arguments raised by a petitioner that are not raised during the public
23 comment period will not be considered preserved for review without a demonstration that they
24 were not reasonably ascertainable at the time. *In re Masonite Corp.*, 5 E.A.D. 551, 585 (EAB
25 1994).

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IV. MOTION TO STRIKE EXHIBITS D AND E TO PIONEER'S PETITION

As a preliminary manner, the Region moves to strike two exhibits submitted by Pioneer in support of the Petition. Exhibit D to the Petition consists of excerpts from the deposition of Gordon Law, dated July 23, 2009, in the case of *Pioneer Irrigation District v. City of Caldwell*, Case No. CV 08-556-C ("Law Deposition Excerpt"). See McGee Affidavit at Ex. D. Exhibit E to the Petition consists of a letter from Pioneer to the Region, dated September 8, 2009 ("September 8th Letter"). See McGee Affidavit at Ex. E. The September 8th Letter enclosed the Law Deposition Excerpt. *Id.* As Pioneer admits in its Petition, both of these exhibits were submitted to the Region after the Region issued the Permit. Petition at p. 3.

40 C.F.R. § 124.18(c) states that "[t]he record shall be complete on the date the final permit is issued." The EAB has consistently interpreted this provision to mean that the administrative record is closed at the time of permit issuance and that documents submitted subsequent to permit issuance cannot be considered part of the administrative record. See *In re Prairie State Generating Co.*, PSD Appeal No. 05-05, slip op. at 90-91 (EAB Aug. 24, 2006) (stating that "permitting authorities are under no obligation to consider comments received after the close of the comment period."); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 518-519 (EAB 2006) (interpreting 40 C.F.R. § 124.18(c) to mean that the record is closed at the time of permit issuance and documents submitted subsequent to permit issuance cannot be considered); *In re Carlota Copper Co.*, 11 E.A.D. 692, 728 (EAB 2004). Further, the EAB has stated that "[i]t is the exceptional case in which data developed after the issuance of the final permit will be deemed substantial enough to warrant reopening of the permitting record. If it were otherwise, the permitting processes provided under existing statutory and regulatory authorities might never be brought to an end." *In re Keene Waste Water Treatment Plant*,

1 NPDES Appeal No. 07-18, slip op. at 23 (EAB March 19, 2008); *see also In re BP Cherry Point*,
2 12 E.A.D. 209, 219-220 (EAB 2005).

3 Here, the Region issued the final Permit on September 4, 2009. Region's AR Ex. H-5.
4 Subsequently, Pioneer sent the September 8th Letter that contained the Law Deposition Excerpt.
5 *See* McGee Affidavit at Exs. D & E. Pioneer is precluded from using the September 8th Letter
6 and the Law Deposition Excerpt because these documents were not part of the administrative
7 record nor could they have been part of the administrative record as they were sent to the Region
8 *after* the Permit was issued. To allow this "would run contrary to the principle that the
9 administrative record for a permitting decision is complete at the time of permit issuance" and
10 would potentially allow for a never-ending permitting process. *BP Cherry Point*, 12 E.A.D. at
11 220.

12 Pioneer attempts to overcome this bar by arguing that the proof of the City's alleged
13 misrepresentations was not discovered until after the close of the comment period, thus, the issue
14 was not reasonably ascertainable. However, this argument fails on its face because Pioneer, in
15 fact, did provide a comment to the Region that it was concerned that the City was authorizing or
16 allowing developers to discharge into Pioneer's facilities. Specifically, Pioneer stated:

17 Under Caldwell's existing SWMP, developers of residential property are
18 permitted to discharge municipal storm water into a natural or man-made
19 drainage way simply by giving notice. In some circumstances, no notice is
20 required at all and since enactment of the existing SWMP, discharge points have
21 been constructed to discharge municipal storm water into Pioneer's facilities
22 without Pioneer's permission.

23 Region's AR Ex. G-9 at p. 4. Moreover, in that same comment letter, Pioneer requested that the
24 Region include language in the Permit that prohibited discharges to constructed waterways,
25 owned, operated or maintained by irrigation entities. *Id.* at p. 3. Thus, during the public
comment period, Pioneer knew that private developers were constructing discharge points to

1 Pioneer's facilities without Pioneer's permission.⁵ As such, Pioneer knew that the City was not
2 following the review and approval process it had established through City ordinance and did, in
3 fact, submit a comment to that effect during the comment period. As discussed below, the
4 Region considered this comment when it issued the Permit. Therefore, the evidence Pioneer is
5 attempting to use merely provides support to a comment that Pioneer already raised during the
6 comment period. The Region respectfully requests that the EAB strike Exhibits D and E to the
7 McGee Affidavit, submitted with Pioneer's Petition, and not consider these exhibits in ruling on
8 Pioneer's Petition.

9 V. ARGUMENT

10 Pioneer appears to be arguing that the City made a factual misrepresentation in its permit
11 application which Pioneer claims was somehow material to the Region's Permit decision and, as
12 a result, the Permit should be remanded to allow the Region to investigate the alleged
13 misrepresentation and to reconsider adding a provision that Pioneer had requested the Region
14 add to the Permit. Pioneer attempts to bolster its argument by attempting to argue that the
15 Region did not properly consider the comments it submitted during the public comment period.
16 As explained below, Pioneer has failed to demonstrate clear error in a finding of fact or
17 conclusion of law and has failed to raise any important policy considerations. Therefore, the
18 EAB should dismiss Pioneer's Petition.

19 A. The Region's Decision To Issue The Permit Was Not Based On The City's Alleged 20 Factual Misrepresentation.

21 Even assuming that the information submitted in the September 8th Letter is considered
22 by the EAB, Pioneer has not shown that the Region's decision to issue the Permit was based
23
24

25 ⁵ The failure to comply with the review and approval process in the City's subdivision ordinance is the
action that Pioneer claims the City has misrepresented to the Region.

1 upon any alleged factual misrepresentations in the City's NPDES permit application or that this
2 information was relevant to the Region's Permit determination.

3 The City's NPDES permit application included a SWMP that described existing
4 programs and activities as well as additional actions that the City planned on taking to comply
5 with federal storm water regulations. See Region's AR Ex. A-2 at p. 4-20. In the section of the
6 City's SWMP entitled "Post-Construction Storm Water Management in New Development and
7 Redevelopment," the City explained that a subdivision ordinance was already in existence which
8 required "[d]evelopments proposing to discharge to a ditch, drain or pond under the jurisdiction
9 of another entity [to obtain] review and approval of the entity operating or maintaining the ditch,
10 drain or pond." *Id.* at p. 16. Pioneer argues that the Region relied on this statement in the
11 NPDES permit application in establishing the SWMP actions and activities for post-construction
12 storm water management in new development and redevelopment. Petition at p. 9-10. There is
13 nothing, however, in either the Fact Sheet or the Permit to indicate that this is the case.

14 Section II.B.5 of the Permit requires the City to implement the following actions and
15 activities in its SWMP for post-construction storm water management in new development and
16 redevelopment:

- 17 • The City is required to implement and enforce a program to address post-
18 construction storm water runoff from new development and redevelopment
19 projects that disturb greater than or equal to one acre and that result in discharge
20 into the City's MS4 within the permit area;
- 21 • The City must adopt an ordinance or other regulatory mechanism to the extent
22 allowable under State or local law to address post-construction runoff from new
23 development and redevelopment projects;
- 24 • The City must ensure proper long term operation and maintenance of all
25 permanent storm water management controls for newly developed project areas
greater than or equal to one acre discharging to its MS4;
- The City must develop and implement a process for pre-construction plan review
and inspection of permanent storm water management controls to ensure proper
installation and appropriate long-term operation and maintenance; and

- The City must educate the development community about appropriate design, operation and maintenance of storm water retention facilities and vegetative practices to address post-construction storm water runoff from new development and redevelopment within the permittee's jurisdiction.

Region's AR Ex. H-5 at p. 10-11. All of these actions and activities are designed to ensure that the City establishes a post-construction storm water program for new development and redevelopment designed to reduce runoff from new development and redevelopment that flows into the City's MS4. See Region's AR Ex. E-3 at p. 21. Although the Fact Sheet recognizes that the City has an existing Landscape and Subdivision Ordinance that addresses post-construction storm water management requirements, there is nothing in the Fact Sheet that supports the conclusion that the Region relied on the subdivision ordinance provision that pertains to review and approval by another entity to establish any of the above-referenced Permit conditions. *Id.*

Pioneer's main concern is that the City has a subdivision ordinance that contains a provision requiring private developers to obtain review and approval from another entity before discharging directly into that entity's conveyances (*e.g.*, canals, ditches, etc.). The Permit, however, only imposes conditions designed to reduce the discharge of pollutants into the City's MS4—it does not regulate the discharge of storm water directly from private developments in the City boundaries to a third party's conveyances. See Region's AR Ex. H-5. Pioneer's concern has nothing to do with the City's MS4 or BMPs that the City is required to undertake to reduce the discharge of pollutants into *the City's MS4*. Instead, Pioneer's concern is over discharges from private developments into *Pioneer's irrigation canals*. The discharges from private developments in City boundaries to Pioneer's irrigation facilities are outside the scope of the City's MS4 Permit. See Region's AR Ex. H-5. To the extent that Pioneer is arguing that the City is not complying with its own subdivision ordinance, Pioneer should raise this issue with the City because the City's compliance with its own ordinance is outside the scope of this NPDES permit. In sum, Pioneer has failed to show that the Region relied on the alleged

1 misrepresentations by the City in establishing any of the Permit conditions or that the Region's
2 decision in issuing the Permit was clearly erroneous.

3 **B. The Region's Decision Not To Include Pioneer's Suggested Language Was Not**
4 **Clearly Erroneous And Does Not Raise An Important Policy Consideration.**

5 Pioneer's main argument is that the Region should have included language in the Permit
6 that prohibited "discharges to constructed waterways, owned, operated, or maintained by
7 irrigation entities without their written permission." Petition at p. 10. Pioneer appears to have
8 two concerns surrounding the lack of such Permit language: (1) discharges from the City's MS4
9 to Pioneer's irrigation facilities will result in liability being imposed on Pioneer and (2)
10 discharges from private developments in City boundaries to Pioneer's irrigation facilities will
11 result in liability being imposed on Pioneer. Pioneer attempts to use the City's alleged
12 misrepresentation to obscure the fact that it is merely reiterating what it set forth in its public
13 comment letter and fails to actually explain why the Region's responses to those comments are
14 inadequate or clearly erroneous.

15 During the public comment period, Pioneer requested that the Region include the
16 following language in the Permit:

17 No discharges are authorized by this Permit to constructed waterways, owned,
18 operated or maintained by irrigation entities.

19 Region's AR Ex. G-9 at p. 3. To support this request, Pioneer stated that it was concerned that,
20 without this provision, the City would continue to authorize or allow private developers to
21 discharge directly to Pioneer's facilities without requiring the private developers to first obtain
22 Pioneer's permission. *Id.* at p. 3-4. Pioneer also stated that, without this provision, it would be
23 subject to NPDES permitting because of the commingled discharge of the City's storm water
24 with irrigation return flow water in Pioneer's facilities. *Id.* at p. 5. Specifically, Pioneer was
25 concerned that without the provision, it would lose the exemption from NPDES permitting that

1 is applicable to return flows from irrigated agriculture (“agricultural return flow exemption”).⁶
2 Thus, Pioneer went on to comment that it would be exposed to water quality issues and
3 liabilities to which is it not currently exposed. *Id.* at p. 4-5.

4 In the response to comments document, the Region explained that it declined to add the
5 requested permit language because Section VI.H of the Permit makes it clear that the Permit does
6 not allow the City to convey any property rights or jurisdiction over Pioneer’s irrigation
7 facilities, such as authorizing discharges from third parties (*e.g.*, private developments) into
8 Pioneer’s facilities. *See* Region’s AR Ex. H-2 at p. 31. Thus, the Region stated that “[s]ince the
9 Permit is clear that the Permit is not authorizing such property rights or jurisdictional rights, EPA
10 declines to add the Irrigation District’s suggested language.” *Id.* Section VI.H of the Permit
11 states that “[t]he issuance of this permit does not convey any property rights of any sort, or any
12 exclusive privileges, nor does it authorize any injury to persons or property or invasion of other
13 private rights, nor any infringement of state or local laws or regulations.” Region’s AR Ex. H-5
14 at p. 26-27. Pioneer has not explained why this response was not adequate. Instead, Pioneer
15 attempts to argue that the City’s alleged misrepresentation provides a basis for EAB review.
16 Pioneer, however, is merely reiterating comments that were made during the public comment
17 period to which the Region has already responded.

18 First, as discussed above, the City’s alleged misrepresentation is irrelevant to the
19 Region’s Permit determination. *See* Section I.A, above.

20 Second, Pioneer appears to be arguing that the Region should have included the requested
21 language to prevent the City from either authorizing or allowing private developers from
22 discharging directly to Pioneer’s facilities. As the Region explained in the response to comments

23
24 ⁶ Agricultural return flows are excluded from regulation under the NPDES program. 33 U.S.C.
25 § 1342(l)(1); 40 C.F.R. § 122.3(f). As a result, agricultural return flows are exempt from NPDES storm
water permit coverage and the commingling of agricultural return flows and storm water does not
automatically revoke the exempt status of the agricultural return flow. *See* 55 Fed. Reg. 47,990, 47,996
(Nov. 16, 1990).

1 document, "Section VI.H of the Permit makes it clear that the Permit does not convey this type
2 of property right or jurisdiction." Region's AR Ex. H-2 at p. 31. Moreover, the Permit only
3 authorizes discharges from the City's MS4 to waters of the United States. It does not authorize
4 discharges from private developments to Pioneer's facilities. Therefore, as the Region explained
5 in its response to comments document, the requested language is not needed to protect any of
6 Pioneer's property rights. *Id.*

7 Next, Pioneer appears to argue that the Region should have included the requested
8 language to prevent the City from discharging storm water to its facilities which jeopardizes
9 Pioneer's agricultural return flow exemption. Specifically, Pioneer argues that "[w]hile the
10 City's application indicates that irrigation entities will have the authority to review and approve
11 discharges, the City actually implemented a policy that requires the discharge and commingling
12 of municipal storm water with irrigation water in primarily agricultural water delivery facilities.
13 This threatens Pioneer's agricultural exemption." Petition at p. 11.

14 During the public comment period, Pioneer submitted the following comment:

15 Pioneer maintains that EPA's issuance of the Permit invalidly exposes Pioneer to
16 liability under the Clean Water Act. The Clean Water Act ... prohibits point
17 source discharges of pollutants into waters of the United States without a proper
18 NPDES permit.... Pioneer is exempt from NPDES program jurisdiction because
19 agricultural return flows are exempt from the CWA's permitting requirements
20 Pursuant to Caldwell's SWMP, developers have installed multiple points of
21 municipal storm water discharge into Pioneer's irrigation and drainage facilities
22 without authorization. Caldwell's SWMP and the Permit will jeopardize
23 Pioneer's protections under the agricultural return flow exemption.

24 Region's AR Ex. G-9 at p. 5. In response to this comment, the Region explained that:

25 [i]rrigation/agricultural return flows are excluded from regulation under the
NPDES program [pursuant to 40 C.F.R. § 122.3(f)] Irrigation return flows
are exempt from storm water permit coverage and the commingling of irrigation
return flow and storm water does not automatically revoke the exempt status of
the irrigation return flow. *See* 55 Fed. Reg. 47,990, 47,996 (Nov. 16, 1990). The
MS4 discharges may be authorized by a permit at the point they discharge to
receiving waters or at the point they discharge into a separate conveyance. If the
MS4 discharge is permitted before it is commingled with the irrigation return

1 flow, the operator of the conveyance transporting the commingled flow does not
2 need its own NPDES permit for the commingled discharge and the irrigation
3 return flow would retain its exemption.... It should be noted, however, that if the
4 MS4 discharge or other NPDES regulated discharge is unpermitted when it enters
5 the Irrigation District's facilities, then the Irrigation District may need to be
6 authorized to discharge under a NPDES permit. Therefore, if there are NPDES
7 regulated point source discharges into the Irrigation District's facilities, it would
8 be in the Irrigation District's best interest to ensure that those point source
9 discharges are permitted through an appropriate NPDES permit such as the City's
10 MS4 Permit at issue here.

11 Region's Record Ex. H-2 at p. 32. Moreover, in the response to comments document, the Region
12 explained numerous times that "[u]pon issuance of the Permit, if the City fails to implement [a
13 condition of the Permit], the City would be in violation of their Permit and could be subject to
14 EPA enforcement action." *Id.* at p. 33; *see also id.* at p. 33-34 ("The Permit is being issued to
15 the City Pioneer ... is not named as a permittee..., and is not required to comply with the
16 Permit requirements."). Pioneer does not explain why the Region's response was clearly
17 erroneous. In fact, all Pioneer does is reiterate the same concern that it raised during the public
18 comment period (*i.e.*, that it would somehow lose the agricultural return flow exemption).

19 Pioneer attempts to argue that, if the City did not discharge in compliance with its Permit,
20 the Region "warns that Pioneer will likely need its own NPDES permit to maintain compliance
21 with the [CWA] in order to mitigate for any City-based permit compliance deficiencies (*i.e.*,
22 unpermitted discharges)." Petition at p. 11. In fact, the Region stated that "if the MS4 discharge
23 or other NPDES regulated discharge is unpermitted when it enters the Irrigation District's
24 facilities, then the Irrigation District *may* need to be authorized to discharge under a NPDES
25 permit." Region's Record Ex. H-2 at p. 32 (emphasis added). To support this response, the
Region cited to a letter from EPA Headquarters to Ada County Highway District, dated July 20,
2007, which explained that "if there are any sources of storm water discharged into the
conveyance that require a permit but have not received a permit, then the discharge of the
resulting mixture of storm water and irrigation return flows could be subject to NPDES permit

1 requirements. The permitting authority may then determine that the operator of the conveyance
2 must seek permit coverage as a permittee or co-permittee.” Region’s Record Ex. A-4 at p. 2. In
3 other words, the discharge of the unpermitted commingled flow to waters of the U.S. could be
4 permitted if EPA makes such a determination. Pioneer’s argument has nothing to do with the
5 Permit or a condition of the Permit. In fact, Pioneer appears to be concerned over an action that
6 the Region may take some time in the future. If the Region made a determination that Pioneer
7 was subject to NPDES permitting, Pioneer would have the opportunity to challenge that
8 determination at the time it is made. At this time, the argument is premature.

9 Moreover, as previously stated, the Region explained in its response to comments
10 document that if the City failed to implement a Permit condition, the City, not Pioneer, would be
11 subject to an EPA enforcement actions. Even if the Region took an enforcement action against
12 Pioneer, Pioneer could contest that action at that time. Again, Pioneer’s argument is premature.

13 Pioneer further argues that the Region’s response does not address its concerns over
14 potential citizen suit liability under Clean Water Act Section 505, 33 U.S.C. § 1365. However,
15 Pioneer did not raise this issue during the public comment period and, thus, is precluded from
16 raising the issue for the first time in this appeal. *See* Region’s AR Ex. G-9. Even if Pioneer
17 raised this issue during the comment period, it is beyond the scope of the Permit and would be
18 resolved in any potential future federal court litigation.

19 In sum, Pioneer appears to merely disagree with the Region’s response to comments and
20 simply reiterates the comments it made during the public comment period. This does not warrant
21 review by the EAB. *See In re City of Attleboro, MA Wastewater Treatment Plant*, NPDES
22 Appeal No. 08-08, slip op. at 11 (EAB, Sept. 15, 2009). Therefore, the EAB should deny
23 Pioneer’s petition for review.

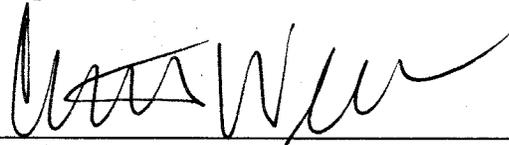
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V. CONCLUSION

Pioneer has failed to demonstrate that the Region committed clear error and has failed to raise any important policy considerations on any of the grounds raised in the Petition for Review. Accordingly, for the foregoing reasons, the Region respectfully requests that the EAB deny Pioneer's Petition for Review.

DATED: November 25, 2009

Respectfully Submitted



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1 CERTIFICATE OF SERVICE

2 I certify that the foregoing "EPA Region 10's Response Brief" and "Certified Index to
3 EPA Administrative Record" were sent to the following persons, in the manner specified, on the
4 date below:

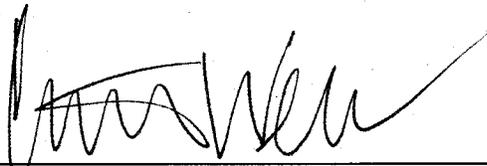
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5 U.S. Environmental Protection Agency
6 Clerk of the Environmental Appeals Board
7 1341 G Street NW, Suite 600
8 Washington, DC 20005

8 A true and correct copy, by U.S. Mail:

9 Matthew J. McGee
10 Moffatt, Thomas, Barrett, Rock & Fields
11 101 S. Capitol Blvd., 10th Floor
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12 DATED: November 25, 2009

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