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

In re:	)	
CITY OF CALDWELL,	)	NPDES Appeal No. 09-11
NPDES Permit No. IDS-028118	)	

APPLICANT-IN-INTERVENTION CITY OF CALDWELL'S PROVISIONAL RESPONSE TO PID'S PETITION FOR REVIEW

The City of Caldwell ("City" or "Caldwell") has moved (1) to intervene as a party respondent in this proceeding, and (2) for leave to file a response to Pioneer Irrigation District's ("PID's") Petition for Review. Caldwell provides this provisional response to PID's Petition in the event that the Board grants Caldwell's motion.

PID's Petition fails to satisfy the requirements for obtaining Board review under 40 C.F.R. § 124.19(a) because PID fails to show that the Board has jurisdiction over this appeal and PID fails to meet its burden of showing that the Board should review the City's Permit.

FACTUAL BACKGROUND

In February 2003, Caldwell submitted a NPDES permit application ("Application") to the United States Environmental Protection Agency, Region 10, for authorization of the discharge of storm water from all municipal separate storm sewer system ("MS4") outfalls owned and operated by the City. The Application included an initial municipal storm water management

plan formally adopted by the City in 1998 which included the following sentence: "[d]evelopments proposing to discharge to a ditch, drain or pond under the jurisdiction of another entity are subject to the review and approval of the entity operating or maintaining the ditch, drain or pond." *See* Application, 1998 Storm Water Management Plan, at 16 (Feb. 2003).

In September 2006 the City formally adopted the Caldwell Stormwater Municipal Management Manual ("Manual"). The Manual outlines the City's storm water management program ("SWMP") which is intended to meet the objectives of State and Federal storm water regulations. *See* Manual at 5, § 100.1 (Sept. 2006); *see also* Manual at 5, § 100.1 (July 2009).[1] The Manual does not contain the sentence quoted above from the City's 1998 Storm Water Management Plan, but instead states:

> Any development proposing new of increased discharge off-site, in compliance with this manual, shall notify in writing the owner of the canal, ditch, drain or pond into which the discharge shall occur. In addition, the design or new discharging facilities shall be subject to the review of the entity operating or maintaining the canal, ditch, drain or pond. Any development proposing to increase the rate or reduce the quality of discharge from a site may be denied permission to discharge.

Manual at 10, § 101.1.5 (Sept. 2006); Manual at 11, § 101.1.5 (July 2009). The Manual was provided to EPA and considered by EPA as part of the City's Application. *See*, *for example*, EPA, Fact Sheet for NPDES Permit #IDS-028118 ("Fact Sheet"), City of Caldwell, at 22 (July 11, 2008) (EPA states that the Caldwell Municipal Stormwater Management Manual, dated

[1] Available at http://www.cityofcaldwell.com/file_depot/0-10000000/10000-20000/13986/folder/27848/Stormwater+Manual+July+2009.pdf

September 2006, describes the City's storm water management policy and requirements in detail.).[2]

On July 11, 2008, EPA requested public comments on the City's proposed NPDES permit for storm water discharges. *See id.* at 1-3. Both the City and PID, among others, submitted comments on the City's proposed permit and the comments of both the City and PID were addressed by EPA. *See* EPA, Region 10, Response to Comments on Proposed Permit ("Response to Comments"), NPDES Permit No. IDS-028118, at 30-36 (Sept. 2009). After considering and responding to the public comments on the proposed permit, and finalizing the proposed permit according to the comments received, EPA issued NPDES Permit No. IDS-028118 ("Permit") to the City of Caldwell on September 4, 2009. The Permit, effective October 15, 2009, authorized the City to discharge from all MS4 outfalls existing as of the effective date of the Permit to waters of the United States in accordance with the conditions and requirements in the Permit. *See* Permit at 1.

Two days before the Permit was to take effect, on October 13, 2009, PID filed its Petition for review of the Permit alleging that "the Permittee misrepresented facts, which led to the Regional Administrator's failure to properly address permit conditions that would address the water quality and liability concerns of the Petitioner." *See* Petition at 1.

On October 15, 2009, the Board requested that EPA, Region 10, prepare a response to address PID's contentions and whether PID has satisfied the requirements for obtaining review under 40 C.F.R. § 124.19(a). *See* Letter from Eurika Durr, Clerk of the Board, Environmental Appeals Board, to Teddy Ryerson, Regional Counsel (Acting), Office of Regional Counsel, U.S.

[2] Available at http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/DraftPermitsID/$FILE/IDS028118-FS-Caldwell-MS4.pdf.

EPA, Region 10, at 1 (Oct. 15, 2009). The Board also requested that EPA prepare an index of the administrative record and submit the requested materials to the Board no later than November 30, 2009. *Id.*

EPA notified the City by letter on November 18, 2009, that the Permit would be temporarily stayed until December 21, 2009, as a result of PID's Petition, but become fully effective and enforceable as of that date. *See* Letter from Michael A. Bussell, Director, Office of Water and Watersheds, U.S. EPA, Region 10, to Larry Osgood, Public Works Director, City of Caldwell, at 1 (Nov. 18, 2009) (attached as Exhibit 1).

STANDARD OF BOARD REVIEW

The Board generally will not grant review of a petition filed under 40 C.F.R. § 124.19(a) unless it appears from the petition that the NPDES permit conditions at issue are based on clearly erroneous findings of fact or conclusions of law, or involve important policy considerations that the Board, in its discretion, should review. 40 C.F.R. § 124.19(a); *see In re City of Attleboro, MA, Wastewater Treatment Plant*, NPDES Appeal No. 08-08, slip. op. at 10 (EAB, Sept. 15, 2009); *In re District of Columbia Water and Sewer Authority*, NPDES Appeal Nos. 05-02, 07-10, 07-11 & 07-12, slip. op. at 18 (EAB, Mar. 19, 2008); *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 471 (EAB 2002); EAB Practice Manual § III.E.2. In reviewing NPDES permits, the Board is guided by the concept articulated in the preamble to the part 124 permitting regulations, which states that the Board's power of review "should be only sparingly exercised" and that "most permit conditions should be finally determined [by the permitting authority]." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); *accord City of Attleboro*, slip. op. at 10; *District of Columbia*, slip. op. at 18; *In re City of Moscow*, 10 E.A.D. 135, 141 (EAB 2001); *see also* EAB Practice Manual § III.E.2.

There is no appeal as of right from EPA's permit decision. *In re Miners Advocacy Council*, 4 E.A.D. 40, 42 (EAB 1992); *see also* EAB Practice Manual § III.E.2. Rather, the burden of demonstrating that the Board should review a permit rests with the petitioner. 40 C.F.R. § 124.19(a)(1)-(2); *City of Attleboro*, slip. op. at 10; *District of Columbia*, slip. op. at 18; *In re City of Jacksonville, District II Wastewater Treatment Plant*, 4 E.A.D. 150, 152 (EAB 1992); EAB Practice Manual § III.E.2. A petitioner seeking review must demonstrate that any issues and arguments it raises on appeal have been preserved for Board review, unless the issues or arguments were not reasonably ascertainable. 40 C.F.R. §§ 124.13, .19; *City of Attleboro*, slip. op. at 10; *City of Moscow*, 10 E.A.D. at 141. "In other words, the regulations require that persons who seek review of a permit decision 'must raise *all reasonably ascertainable issues* and submit *all reasonably available arguments* supporting their position by the close of the public comment period' on the draft permit." *City of Attleboro*, slip. op. at 10, n.9 (*citing* 40 C.F.R. § 124.13) (emphasis added by Board); *see also District of Columbia*, slip. op. at 18.

The Board frequently has emphasized that, to preserve an issue for review, comments made during the comment period must be sufficiently specific. *City of Attleboro*, slip. op. at 10; *In re New Eng. Plating*, 9 E.A.D. 726, 732 (EAB 2001); *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 230-31 (2000). On this basis, the Board has often denied review of issues raised on appeal that the commenter did not raise within the requisite specificity during the public comment period. *See*, *e.g.*, *New Eng. Plating*, 9 E.A.D. at 732; *In re Fla. Pulp & Paper Ass'n*, 6 E.A.D. 49, 54-55 (EAB 1995); *In re Pollution Control Indus. of Ind., Inc.*, 4 E.A.D. 162, 166-69 (EAB 1992).

Assuming that the issues have been preserved, the petitioner must state its objections to the permit and explain why the permit issuer's previous response to those objections is clearly

erroneous, an abuse of discretion, or otherwise warrants Board review. 40 C.F.R. § 124.19(a); *see City of Attleboro*, slip. op. at 11; *District of Columbia*, slip. op. at 18; *In re Town of Ashland Wastewater Treatment Facility*, 9 E.A.D. 661, 668 (EAB 2001); *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 71-72 (1998). A petitioner may not simply reiterate comments made during the public comment period, but must substantively confront the permit issuer's subsequent explanations. *City of Attleboro*, slip. op. at 11; *In re Peabody W. Coal Co.*, 12 E.A.D. 22, 33 (EAB 2005); *In re Dominion Energy Brayton Point, LLC*, 12 E.A.D. 490, 666 (EAB 2006).

ARGUMENT

I. The Board Does Not Have Jurisdiction to Grant Review of the Petition Because the Issue Raised by PID Does Not Relate to Conditions of the Permit and Is Outside the Permit Process.

The Board's jurisdiction under 40 C.F.R. § 124.19(a) is "limited to issues related to the 'conditions' of the Federal permit that are claimed to be erroneous." *See* EAB Practice Manual § III.E.1 ("Scope of Review"); *see also* 40 C.F.R. § 124.19(a) (authorizing review only if petition claims that permit "conditions" are at issue based on clearly erroneous findings of fact or conclusions of law or because they involve important policy considerations); *City of Attleboro*, slip. op. at 10 (same). "The EAB does not have authority to rule on matters that are outside the permit process." EAB Practice Manual § III.E.1 (*citing In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722 (EAB 1997); *In re Tondu Energy Co.*, 9 E.A.D. 710, 716, n.10 (EAB 2001)).

A. There is No Condition of the Permit at Issue.

PID does not claim that any condition of the Permit is erroneous. *See* Petition at 1-13. As EPA recognized, "[PID's] petition for review does not appear to contest a specific condition of the Permit." Letter from Michael A. Bussell at 1. There is no debate over compliance with State water quality standards, required pollution control measures, or any other condition of the Permit for which the Board has previously considered review. *See*, *e.g.*, *City of Attleboro,* slip.

op.; *District of Columbia*, slip. op.; *City of Marlborough, MA, Easterly Wastewater Treatment Plant*, 12 E.A.D. 235 (EAB 2005); *Arizona Municipal Storm Water NPDES Permits*, 7 E.A.D. 646 (EAB 1998). After reviewing PID's Petition, EPA provided, "the Permit's conditions are uncontested within the meaning of 40 C.F.R. § 124.60(b)(6)(ii)." Letter from Michael A. Bussell at 1. Rather than arguing that a condition of the Permit is clearly erroneous, as required for the Board's jurisdiction under 40 C.F.R. § 124.19(a), PID argues that the City "misrepresented facts" in a single sentence in the City's draft Storm Water Management Plan submitted with its 2003 Application. *See* Petition at 1-2, 7-13; *see also* Letter from Michael A. Bussell, at 1 ("Instead, the petition for review challenges the absence of a condition that Pioneer requested Region 10 to add to the Permit during the public comment period."). Not only is this alleged misrepresentation immaterial, but because PID fails to show how any condition of the Permit is erroneous due to the alleged misrepresentation, *see* Petition at 1-13, this is not the type of issue that the Board has authority to review.

The Board has declined to grant review of a Permit in order for the permitting authority to further explain its permitting decision where "the petitioner has identified no substantive challenge" to a permit condition. *See In re Chukchansi Gold Resort and Casino Waste Water Treatment Plant*, NPDES Appeal Nos. 08-02, 08-03, 08-04 & 08-05, slip. op. at 16 (EAB, Jan. 14, 2009). Review in such a situation "would not only relieve the petitioner of the burden to demonstrate review is warranted, but would also constitute a needless waste of time and resources." *Id.* Section 124.19(a) limits the Board's jurisdiction to review of "conditions" of the Permit claimed to be erroneous. 40 C.F.R. § 124.19(a). Similarly here, where there is no specific, identified Permit condition at issue, the Board should decline review under its precedents and policies.

B. The Issue Raised by PID is Outside the Permit Process.

As PID acknowledges, the sentence at issue from the City's 1998 Storm Water Management Plan submitted with its 2003 Application was not included in the City's formally adopted 2006 Stormwater Municipal Management Manual. Petition at 2. As a result, and because PID disputes the lawfulness of the City's approved storm water discharge points, PID filed a lawsuit in Idaho district court seeking a declaration that the City's Manual violates Idaho irrigation laws. *Id.* While that litigation is ongoing, the district court has ruled on summary judgment that the City's Manual is a valid exercise of its general police powers and does not violate Idaho law. *See Pioneer Irrigation District v. City of Caldwell*, Case No. CV 08-556-C, slip op. at 5 (Idaho 3d Jud. Dist., Nov. 12, 2009) (order on October 22, 2009 rulings) (attached as Exhibit 2).

The main issue from PID's Petition involves PID's concern that the Permit somehow allows the City to obtain jurisdiction or property rights over irrigation waterways claimed by PID. PID is concerned about alleged liabilities resulting from the City's storm water discharges into PID's claimed irrigation waterways. *See* Petition at 1, 2, 4, 10-12. This issue regards jurisdiction over PID's claimed irrigation waterways and is an issue outside the NPDES permit process. Thus, the Board does not have authority to rule on the matter. *See* EAB Practice Manual § III.E.1 (citations omitted).

The record shows that EPA was well aware of PID's concern about jurisdiction over its claimed irrigation waterways. *See* Response to Comments at 30-31 ("EPA understands that there is ongoing litigation between the Irrigation District and Caldwell that concerns this exact issue."); *id.* at 34 ("EPA feels this matter should be resolved between the City and Pioneer Irrigation District."). Consequently, EPA specifically addressed PID's concern, stating that Section VI.H. of the Permit makes it clear that the Permit does not convey a property right or

jurisdiction over PID's claimed irrigation waterways. *Id.* at 31 ("the Permit is clear that the Permit is not authorizing such property rights or jurisdictional rights"); *see also* Permit § VI.H. EPA recognized its lack of authority to decide PID's jurisdiction issues, suggested such issues would be best resolved by the proper authority, and clearly stated that the Permit does not concern PID's jurisdiction issues.

PID's Petition attempts to obtain review of the same issues being litigated in Idaho district court, namely PID's jurisdiction issues. These issues are being reviewed in the state district court. The Board is not the proper forum for deciding these issues because review of these issues is outside the Board's jurisdiction under 40 C.F.R. § 124.19(a), and outside the Permit process. Further, review of the Permit in this situation would be contrary to the Board's "sparingly exercised" power of review. *See* 45 Fed. Reg. at 33,412; *accord City of Attleboro*, slip. op. at 10; *District of Columbia*, slip. op. at 18; *In re City of Moscow*, 10 E.A.D. 135, 141 (EAB 2001). Thus, the Board should decline jurisdiction to review the Permit on this basis as well.

II. PID Has Not Met Its Burden to Show that the Issues Were Preserved for Appeal or that the Issues Were Material to EPA's Permitting Decision.

The burden of demonstrating that the Board should review a permit rests with PID. *See* 40 C.F.R. § 124.19(a)(1)-(2); *City of Attleboro*, slip. op. at 10; *District of Columbia*, slip. op. at 18; EAB Practice Manual § III.E.2. PID must demonstrate that any issues and arguments it raises on appeal were raised by the close of the public comment period on the draft permit, and thus preserved for Board review, unless the issues or arguments were not reasonably ascertainable. 40 C.F.R. §§ 124.13, .19; *City of Attleboro*, slip. op. at 10; *In re District of Columbia*, slip. op. at 18; *City of Moscow*, 10 E.A.D. at 141.

As previously discussed, PID's Petition is premised on the claim "that the Permittee misrepresented facts" in a single sentence in its 1998 Storm Water Management Plan submitted with its 2003 Application. Petition at 1-2, 7-13. PID specifically states, "[t]he purpose of this Petition is to request that the EAB address the City's failure to provide truthful and accurate information to the EPA in its Application and [Storm Water Management Plan]." Petition at 5. Not only is review on this basis outside the Board's jurisdiction, *see supra* Section I, review of this issue is further barred because PID failed to raise this issue during the comment period, and it was thus not preserved for Board review.

PID admits that it did not raise the issue of the City's alleged "misrepresentations" before the close of the comment period. Petition at 3-4. PID claims this delay was because information regarding the alleged "misrepresentations" was not "reasonably available" before the close of the comment period. *Id.* Yet, the sentence at issue from the City's 1998 Storm Water Management Plan has been available for review at least since 2003 when the City submitted its Application. PID has had well over six years to raise this issue. If that was not enough notice, the City formally adopted its Manual in 2006, over three years ago. As PID is well aware, the 2006 Manual does not contain precisely the same language as the sentence at issue from 1998 Storm Water Management Plan. After all, PID filed a lawsuit in Idaho district court contesting the language in the 2006 Manual in January of 2008. *See* Petition at 2.

Furthermore, EPA was aware of PID's jurisdiction issues and the language in the Manual, and PID's issues therewith. EPA reviewed and considered the Manual in deciding to issue the Permit. *See*, *e.g.*, Fact Sheet at 22. EPA also recognized PID's lawsuit concerning "the Irrigation District's concern over whether this Permit allows Caldwell to obtain some jurisdiction over the Irrigation District's irrigation canals and other such facilities through the issuance of the

Permit." Response to Comments at 30-31. EPA stated, "EPA understands that there is ongoing litigation between the Irrigation District and Caldwell that concerns this exact issue." *Id.* As a result, EPA provided that "Section VI.H. of the Permit makes it clear that the Permit does not convey this type of property right or jurisdiction." *Id.*; *see* Permit VI.H; *see also* Response to Comments at 34 ("EPA feels this matter should be resolved between the City and Pioneer Irrigation District."). It simply contradicts the evidence in the record for PID to argue that it was somehow unaware of the City's policy on discharges to waterways owned, operated or maintained by irrigation entities, or for it to contend that EPA was also unaware. *See* Responses to Comments at 30-36.

Moreover, PID fails to establish how the sentence at issue from the City's 1998 Storm Water Management Plan submitted its 2003 Application was in any way material to EPA's issuance of the Permit. The burden of demonstrating that the Board should review a permit rests with the petitioner. 40 C.F.R. § 124.19(a)(1)-(2); *City of Attleboro*, slip. op. at 10; *District of Columbia*, slip. op. at 18; EAB Practice Manual § III.E.2. PID does not show that EPA relied on the sentence at issue, or even considered it, in making its permitting decision. *See* Petition at 1-13. To the contrary, EPA provided in the Permit and in its responses to comments that the Permit does not authorize property rights or jurisdictional rights over PID's irrigation canals and other facilities, and that EPA would not be involved in such issues. *See* Response to Comments at 30-31, 34; Permit § VI.H. After reviewing PID's Petition, EPA did not find that PID's Petition contested a specific condition of the Permit, and thus, "all of the Permit's conditions will have to be met regardless of the outcome of [PID's] appeal." Letter from Michael A. Bussell at 1. Thus, the sentence at issue was not determinative in EPA's permitting decision, and continues to be of no consequence to EPA's permitting decision.

PID does not show how any part of the Permit was influenced by the sentence at issue from the City's draft Storm Water Management Plan submitted in its 2003 Application. *See* Petition at 1-13. As the Board has held before, a "bald assertion of procedural error" does not satisfy a petitioner's burden to demonstrate that review is warranted. *See Chukchansi Gold Resort and Casino*, slip. op. at 16 (*citing ConocoPhillips*, PSD Appeal No. 07-02, slip. op. at 24 (EAB, June 6, 2008) (failure of petitioner to specifically identify or explain challenges to final permit conditions constrained Board's ability to review the permit decision)). Similarly, PID's bald assertion that the Permit at issue here is somehow flawed does not satisfy its burden to demonstrate that review is warranted. As a result, the Board should deny review.

III. PID Has Not Met Its Burden To Show that EPA's Previous Responses to PID's Objections Were Clearly Erroneous, An Abuse of Discretion, or Otherwise Warrant Board Review.

Assuming *arguendo* that PID's issues have been preserved for review, PID must state its objections to the permit and explain why EPA's previous responses to those objections were clearly erroneous, an abuse of discretion, or otherwise warrant Board review. 40 C.F.R. § 124.19(a); *see City of Attleboro*, slip. op. at 11; *District of Columbia*, slip. op. at 18; *Town of Ashland*, 9 E.A.D. at 668. PID may not simply reiterate comments made during the public comment period, but must substantively confront EPA's subsequent explanations. *See City of Attleboro*, slip. op. at 11; *Peabody W. Coal Co.*, 12 E.A.D. at 33; *Dominion Energy Brayton Point*, 12 E.A.D. at 666.

Without referencing any of its specific comments, PID argues that the following issue is eligible for review by the Board because it was raised during the comment period: "[w]hether the City's [Storm Water Management Program] must require a party seeking to discharge municipal storm water off-site to seek the permission of the entity that owns or operates the affected facility." Petition at 5. This issue most closely mirrors Comment #73, as summarized

in EPA's Response to Comments.[3] Response to Comments at 30. Comment #73 provides in full:

> The Irrigation District has broad rights and responsibilities as an irrigation entity. *See* Idaho Code §§ 42-1202, 42-1203, 42-1204, 42-1207, 42-1208, and 42-1209. These rights and responsibilities prohibit any encroachments into the Irrigation District's easements and rights-of-way without express written authorization. Caldwell has constructed and authorized the construction of storm water discharge outfalls into these easements, rights-of-way, etc. This construction interferes with the purpose of these facilities and interferes with the proper operation and maintenance of these facilities. Therefore, the Irrigation District requests that EPA clarify in the Permit that the Permit issuance does not grant to Caldwell any jurisdiction or authority to take over these facilities. The Irrigation District suggest the addition of the following language: 'No discharges are authorized by this Permit to constructed waterways, owned, operated or maintained by irrigation entities.'

Id. at 30. In response to PID's comment (Comment #73), EPA provided in full:

> The issue appears to be the Irrigation District's concern over whether this Permit allows Caldwell to obtain some jurisdiction over the Irrigation District's irrigation canals and other such facilities through the issuance of the Permit. EPA understands that there is ongoing litigation between the Irrigation District and Caldwell that concerns this exact issue. Section VI.H. of the Permit makes it clear that the Permit does not convey this type of property right or jurisdiction. Since the Permit is clear that the Permit is not authorizing such property rights or jurisdictional rights, EPA declines to add the Irrigation District's suggested language.

Id. The Permit clearly states that "[t]he issuance of this permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to persons or

[3] Note that this is a different issue than the one concerning the City's alleged "misrepresentations," and thus this issue did not preserve that misrepresentation issue for review. To preserve an issue for review, "it is not sufficient for the petitioner to have raised a more general or related argument during the public comment period." *In re Scituate Wastewater Treatment Plant*, 12 E.A.D. 708, 724 (EAB 2006) (citations omitted).

property or invasion of other private rights, nor any infringement of state or local laws or regulations." Permit § IV.H.

PID further argues that this response does not address its concerns with (1) excess discharges to irrigation waterways and (2) compliance with PID's agricultural exemption from regulation under the NPDES program. Petition at 10-11. However, both of these concerns are adequately addressed by EPA's responses to Comments #74-76. *See* Response to Comments at 31-32. Petitioner merely restates its comments, to which the EPA already adequately responded. *Compare* Petition at 10-11, *with* Response to Comments at 31-32 (Comments #74-76). PID may not simply reiterate comments made during the public comment period, but must substantively confront EPA's subsequent explanations. *See City of Attleboro*, slip. op. at 11; *Peabody W. Coal Co.*, 12 E.A.D. at 33; *Dominion Energy Brayton Point*, 12 E.A.D. at 666.

Addressing PID's concerns with excess discharges to irrigation waterways, EPA responded:

> EPA understands the Irrigation District's concerns regarding excess discharges into the irrigation canals and other Irrigation District facilities. However, all municipal storm water permits require the permittee to implement a storm water management program (SWMP). The SWMP is the hear of the MS4 permit and it requires the permittees to implement BMPs that will reduce pollutants in the storm water to the maximum extent practicable. EPA does not have authority to eliminate the SWMP from the Permit. *See* 40 C.F.R. §§ 122.26 & 122.34.

Response to Comments at 31. Furthermore, as EPA points out in its responses to PID's comments, "[t]he permittee is not authorized to discharge storm water that will cause, or have the reasonable potential to cause or contribute to, an excursion above Idaho water quality standards." *Id.*; *see* Permit § I.C.2 (same). Thus, once the Permit is issued, "if the permittees' discharges into waters of the U.S. contribute to an in-stream excursion above an Idaho water quality standard, then the permittee would be in violation of the Permit." Responses to Comments at 31.

EPA clearly addresses PID's concerns about water quality issues and liabilities in its responses to PID's comments.

As is required, PID fails to explain how EPA's responses to its comments are in any way legally or factually insufficient. *See Chukchansi Gold Resort and Casino*, slip. op. at 21. As discussed previously, "petitioners are required to explain with sufficient specificity why a permit issuer's previous response to an objection was clearly erroneous, an abuse of discretion, or otherwise warrants review. *Id.*, slip. op. at 21-22 (*citing* 40 C.F.R. § 124.19(a); *ConocoPhillips*, slip. op. at 11). "The failure to do so is grounds for denial of review. *Id.*, slip. op. at 22 (*citing Town of Ashland*, 9 E.A.D. at 670). Because PID fails to show that EPA's responses were clearly erroneous, an abuse of discretion, or otherwise warrant Board review, the Board should deny review.

Similarly, EPA clearly addresses PID's concerns about compliance with PID's agricultural exemption. *See* Response to Comments at 31-32. And, again, PID fails to show, in any way, that EPA's responses to those concerns were clearly erroneous, an abuse of discretion, or otherwise warrant Board review. EPA acknowledges that "[i]rrigation/agricultural return flows are excluded from regulation under the NPDES program." Responses to Comments at 32 (*citing* 40 C.F.R. § 122.3(f)). Further, EPA clearly states:

> 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. 47990, 47996 (Nov. 16, 1990).
>
> . . .
>
> If the MS4 discharge is permitted before it is commingled with the irrigation return flow, the operator of the conveyance transporting the commingled flow does not need its own NPDES permit for the commingled discharge and the irrigation return flow would retain its exemption. In other words, if the MS4 discharges into the

> Irrigation District's irrigation facilities are permitted, *then the irrigation return flow exemption would remain*.

Response to Comments at 32 (emphasis added). EPA's response to PID's concerns about its agricultural exemption provides, in no uncertain terms, that the City's permitted MS4 discharges will not affect PID's agricultural exemption. There is no need for Board review of this clear-cut issue.

CONCLUSION

PID's Petition fails to satisfy the Board's requirements for obtaining review. PID does not contest a Permit condition or otherwise raise an issue that the Board has jurisdiction to review. Moreover, PID fails to show that the issues it raises were preserved for appeal or how EPA's previous responses to PID's issues were clearly erroneous, an abuse of discretion, or otherwise warrant Board review. Thus, the Board should decline to review PID's Petition.

DATED this 25th day of November, 2009.

Respectfully submitted,

/s/Murray D. Feldman

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Attorneys for the City of Caldwell

CERTIFICATE OF SERVICE

I certify that on November 25, 2009, copies of the foregoing APPLICANT-IN-INTERVENTION CITY OF CALDWELL'S PROVISIONAL RESPONSE TO PID'S PETITION FOR REVIEW were sent to the following persons in the manner described below:

Original by Federal Express and copies by electronic submission to:

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

Copy by first class mail to:

Teddy Ryerson, Regional Counsel (Acting)
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 10
1200 Sixth Avenue
Seattle, WA 98101

Copy by first class mail to:

Matthew J. McGee
Moffatt, Thomas, Barrett, Rock & Fields, Chartered
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Copy by first class mail to:

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/s/Murray Feldman
for Holland & Hart LLP

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
WATER AND WATERSHEDS

NOV 18 2009

Mr. Larry Osgood
Public Works Director
City of Caldwell
621 Cleveland Boulevard
Caldwell, Idaho 83605

Re: Notification of Stayed Permit, City of Caldwell, NPDES Permit No. IDS-028118

Dear Mr. Osgood:

The above-referenced National Pollutant Discharge Elimination System (NPDES) permit (Permit) was issued to the City of Caldwell (City) on September 4, 2009. On October 20, 2009, the U.S. Environmental Protection Agency Region 10 (Region 10) received notification from the Environmental Appeals Board (EAB) that Pioneer Irrigation District (Pioneer) had filed a petition for review of the Permit (Appeal No. NPDES 09-11).

After reviewing the petition for review, Region 10 has determined that none of the conditions of the Permit should be stayed. Pioneer's petition for review does not appear to contest a specific condition of the Permit. Instead, the petition for review challenges the absence of a condition that Pioneer requested Region 10 to add to the Permit during the public comment period. Since all of the Permit's conditions will have to be met regardless of the outcome of Pioneer's appeal, the Permit's conditions are uncontested within the meaning of 40 C.F.R. § 124.60(b)(6)(ii). As such, in accordance with 40 C.F.R. § 124.16(a)(2), the entire Permit will become fully effective and enforceable 33 days after the date this notice is mailed. Please feel free to contact Misha Vakoc at (206) 553-6650 should you have any questions regarding this letter.

Sincerely,

Michael A. Bussell, Director
Office of Water and Watersheds

cc: Environmental Appeals Board
Lee Van de Bogart, City of Caldwell
Matthew J. McGee, Moffatt Thomas

EXHIBIT
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Murray Feldman, Holland & Hart
Craig Shephard, IDEQ Boise Regional Office
Robert Schmillen, City of Middleton
Cheryl Jenkins, City of Nampa
Erica Anderson Maguire, Ada County Highway District
Tim Richards, Canyon Highway District No. 4
Rex Nichols, Notus Parma Highway District No. 2
Jim Buffington, Nampa Highway District No. 1
Ken Harward, Association of Idaho Cities
Greg Vitley, Idaho Transportation Department
Tom Dupris, Lower Boise Watershed Council
Matthew Johnson, White Peterson

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

PIONEER IRRIGATION DISTRICT, Plaintiff, vs. CITY OF CALDWELL, Defendant.	Case No. CV 08-556-C ORDER RE: PIONEER IRRIGATION DISTRICT'S FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT, DATED JULY 10, 2009; CITY OF CALDWELL'S SECOND MOTION FOR SUMMARY JUDGMENT DATED JULY 28, 2009; CITY OF CALDWELL'S RENEWED MOTION TO DISMISS FOR FAILURE TO JOIN NECESSARY PARTIES
CITY OF CALDWELL, Counterclaimant, -vs.- PIONEER IRRIGATION DISTRICT, Counterdefendant.	

On July 10, 2009, Plaintiff/Counterdefendant Pioneer Irrigation District ("Pioneer") filed its first Motion for Partial Summary Judgment (the "Motion"). Pioneer's Motion requested six separate rulings regarding the interpretation and

application of Idaho Code Section 42-1209. In opposing the Motion, Defendant/Counterclaimant, the City of Caldwell ("Caldwell"), asserted legal arguments regarding the interpretation and application of Section 42-1209 and related provisions of Idaho Code, Title 42. The parties fully briefed Pioneer's Motion. Oral argument on the Motion occurred on September 18, 2009, at the Canyon County Courthouse. The Court considered the arguments of counsel and the record on file in this matter and took the matter under advisement at the conclusion of the hearing.

On July 28, 2009, the City of Caldwell filed its Second Motion for Summary Judgment. Caldwell and Pioneer Irrigation District fully briefed Caldwell's Motion, and oral argument on the Motion occurred on September 29, 2009, at the Canyon County Courthouse. The Court considered the arguments of counsel and the record on file in this matter and took the matter under advisement at the conclusion of the hearing.

On August 10, 2009, the City of Caldwell filed its Renewed Motion to Dismiss for Failure to Join. Caldwell and Pioneer Irrigation District fully briefed Caldwell's Motion. Oral argument on the Motion also occurred on September 29, 2009, at the Canyon County Courthouse. The Court considered the arguments of counsel and the record on file in this matter and took the matter under advisement at the conclusion of the hearing.

The Court subsequently scheduled a hearing for October 22, 2009, for the purposes of issuing its rulings on the afore-mentioned motions in open court. At that hearing, counsel for Pioneer and counsel for Caldwell appeared and participated telephonically. The Court announced its rulings and conclusions of law regarding each of

the afore-mentioned motions into the record. The Court hereby adopts and incorporates the conclusions of law into this Order, as if fully set forth herein. Both parties have submitted proposed orders that each side feels accurately reflect the Court's Oct 22 rulings.

Based upon the arguments of the parties, the pleadings, depositions, and affidavits on file with the Court, and the conclusions rendered by this Court at the telephonic conference conducted in this matter on October 22, 2009, and for good cause appearing therefrom, this written order reflects the October 22, 2009 decision of the Court.

Pioneer Irrigation District's First Motion for Partial Summary Judgment

The Court hereby GRANTS in part and DENIES in part the Pioneer's Motion for Declaratory Relief. More particularly, the Court grants Pioneer's Motion for Summary Judgment with regard to the following Declaratory Relief:

1. Idaho Code Section 42-1209 requires persons seeking to encroach upon Pioneer's irrigation or drainage easements or rights-of-way to obtain prior written permission before installing any such encroachment.

2. Caldwell is subject to, and not exempt from, the operation of Section 42-1209.

3. Idaho Code Section 42-1209 vests Pioneer with the initial discretion to determine whether an encroachment is likely to unreasonably or materially interfere with the use and enjoyment of its irrigation or drainage easements or rights-of-way, and to deny permission for the encroachment on those grounds. Judicial review of Pioneer's determination and decision is limited to (a) whether Pioneer's denial of permission to

encroach was arbitrary and capricious or based on clearly erroneous findings, and (b) whether Pioneer's decision-making process was reasonable.

4. Idaho Code Section 42-1209 authorizes Pioneer to enforce the removal of any encroachments installed after the effective date of Section 42-1209 that Pioneer determines materially and unreasonably interfere with the use and enjoyment of its irrigation and drainage easements or rights-of-way, at the expense of the encroaching party, subject to certain limitations:

A. Pioneer must initially request removal of the encroachment by the encroaching party;

B. Pioneer's right of self-help (i.e., in lieu of pursing a judicial remedy) to remove of the encroachment must be accomplished within the borders of its easement or right-of-way and without a breach of the peace; and

C. Judicial review of Pioneer's determination and decision is limited to (a) whether Pioneer's decision to request removal of an existing encroachment was arbitrary and capricious or based on clearly erroneous findings, and (b) whether Pioneer's decision-making process was reasonable.

5. Compliance with the provisions of Caldwell's Municipal Storm Water Management Manual (the "Manual") is not an affirmative defense to Pioneer's removal of an encroachment that violates Section 42-1209 and does not excuse compliance with the provisions of Section 42-1209.

The Court DENIES the following requested Declaratory Relief:

6. Pioneer's requested holding that City of Caldwell approval of the construction of an encroachment into a Pioneer facility pursuant to, and in conformance with, the City's Municipal Stormwater Management Manual makes it an "entity causing or permitting such encroachments" under Section 42-1209, IS DENIED.

The City of Caldwell's Second Motion for Summary Judgment

The Court hereby GRANTS in part and DENIES in part Caldwell's Second Motion for Summary Judgment, as follows:

1. Caldwell's Municipal Stormwater Management Manual (the "Manual) is an enforceable exercise of Caldwell's police power and not in conflict with the laws of the state of Idaho. As a result, the Court enters summary judgment in Caldwell's favor on Pioneer's prayer for a declaratory judgment that the Manual is void because it conflicts with state law.

2. Caldwell's Motion for Summary Judgment based on Pioneer's failure to exhaust administrative remedies for outfalls A-15, A-17, and B-1 is denied. Any failure by Pioneer to pursue administrative remedies by not appealing a decision of the city engineer approving certain outfalls into Pioneer's canals or ditches, assuming they were determined to be an aggrieved party, does not eliminate the responsibility under Idaho Code Section 42-1209 that a party seeking to encroach must obtain written permission from Pioneer prior to installing an encroachment into Pioneer's facilities.

3. Because there are disputed issues of material fact, Caldwell's motion for summary judgment on Pioneer's claims seeking the removal of the five identified outfalls

based on theories of trespass, nuisance, violation of Idaho Code Section 42-1209, and injunction IS DENIED.

The City of Caldwell's Renewed Motion to Dismiss for Failure to Join

1. Caldwell's Renewed Motion to Dismiss for Failure to Join, based on Pioneer's failure to join necessary parties with regard to outfalls A-15, A-17, and B-2 is denied, but with the following limitations:

A. To the extent that the Court determines at trial that injunctive relief sought by Pioneer will have an adverse effect on indispensible non-parties, the relief will be summarily denied. If such injunctive relief can be issued without such impact on non-parties, the Court will address the merits of the claim.

B. Likewise, there will be no declaratory relief granted that will prejudice the rights of persons or entities who are not parties to the proceeding.

Be it so ordered, this 12 day of November, 2009,

Gregory M. Culet, District Judge