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October 9, 2009
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U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Re: City of Caldwell
In Re NPDES Permit No. IDS-028118
MTBR&F File No. 18946.0059

Dear Clerk of the Board:

Enclosed for filing in the above-entitled matter are the following documents:

1. One (1) original and five (5) copies of Pioneer Irrigation District's Petition for Review; and
2. One (1) original and five (5) copies of the Affidavit of Matthew J. McGee

Also enclosed is a sixth copy of these documents to be conformed/date stamp received and returned via the enclosed pre-addressed, postage prepaid envelope.

Thank you for your assistance.

Very truly yours,



Lela L. Pena
Administrative Assistant to
Matthew J. McGee

/llw
Enclosures

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Pioneer Irrigation District

BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY

CITY OF CALDWELL
IN RE NPDES PERMIT NO. IDS-028118

PETITION FOR REVIEW

COMES NOW Pioneer Irrigation District ("PID"), by and through its counsel of record, pursuant to 40 C.F.R. § 124.19, and hereby petitions the Environmental Appeals Board to review the issuance of NPDES Permit No. IDS-028118 on the grounds that the Permittee misrepresented facts, which led to the Regional Administrator's failure to appropriately address permit conditions that would address the water quality and liability concerns of the Petitioner. This Petition is supported by the attached Memorandum and the Affidavit of Matthew J. McGee.

ORIGINAL

I.
BACKGROUND

On or about February 25, 2003, the City of Caldwell ("City") submitted a National Pollutant Discharge Elimination System ("NPDES") Permit Application ("Application"), which sought authority from the Environmental Protection Agency ("EPA") for the discharge of storm water from its municipal separate storm sewer systems ("MS4"). *See* Exhibit A to the Affidavit of Matthew J. McGee. Enclosed with the Application was the City's Storm Water Management Program ("SWMP"). *See id.* The SWMP included the following statement in its description of baseline storm water management for new development and redevelopment:

On-site retention has been formally required at least since 1994, and as a matter of policy at least since 1992. ***Developments 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.***

Application at 16.

On September 5, 2006, the City formally adopted the Caldwell Stormwater Municipal Management Manual ("Manual"). *See* Manual, McGee Aff., Ex. B. This Manual provides that developers of residential and commercial property are permitted to discharge municipal storm water into a natural or man-made drainage way simply by giving notice to the owner or operator of the facility, and in some circumstances, without giving notice at all. Since enactment of the Manual, storm water discharge points within the City of Caldwell Area of Impact have been constructed to discharge municipal storm water into Pioneer's facilities without Pioneer's permission. On January 16, 2008, Pioneer filed a lawsuit in Idaho district court seeking, among other things, a declaration that the City's Manual violates Idaho's irrigation laws.

On October 20, 2008, Pioneer submitted comments to the EPA expressing its concerns about the policies and practices the City had implemented in order to comply with NPDES permitting requirements, including the Manual. *See Pioneer Comments, McGee Aff., Ex. C.* Pioneer expressed concern that these policies and practices essentially sought to shift as much of the burden associated with water quality and flooding as possible to Pioneer, an irrigation district delivering water to the largely agricultural community throughout Canyon County, Idaho. *See id.* In conformance with the baseline City policy, requiring third-party review and approval for discharges into third-party facilities that was explicitly stated in the City's Application, Pioneer requested that the Permit include the following condition: "No discharges are authorized by this Permit to constructed waterways, owned, operated, or maintained by irrigation entities." *See id.* at 3. The comment period closed on or about November 18, 2008.

On July 23, 2009, during the course of the deposition of Gordon Law, the City's Rule 30(b)(6) designate and the engineer listed as the "Responsible Person" on the Application (*see Application at 2*), Mr. Law was asked about the veracity of the statement in the City's submitted SWMP which provided that the City required third-party review and approval for discharges into third-party facilities. *See Deposition of Gordon Law, July 23, 2009, 181:7-181:15, McGee Aff., Ex. D.* Under oath, Mr. Law clearly indicated that it was not a true and accurate statement. *Id.*

Pursuant to 40 C.F.R. § 124.13, any person wishing to raise issues or provide pertinent materials to EPA must do so during the comment period. A commenter "must raise all *reasonably available* arguments supporting their position by the close of the public comment period. . . ." Because the information regarding the City's misrepresentations was not reasonably

available before the close of the comment period, on September 8, 2009, Pioneer sent a letter enclosing copies of Mr. Law's deposition transcript. *See* McGee Aff., Ex. E. In light of the City's disregard for the requirements of truth and accuracy in the NPDES Application, and its demonstrated intent to utilize the NPDES permitting process as a vehicle to shift responsibility for the City's municipal storm water away from the City, Pioneer requested that the following condition be placed in the Permit: "No discharges are authorized by this Permit to constructed waterways, owned, operated, or maintained by irrigation entities without their written permission." *See id.* at 3. Again, this condition conforms to the policy stated in the SWMP submitted with the City's Application. *See* Application at 16.

Unfortunately, Pioneer's letter and the EPA's issued Permit crossed in the mail. Pioneer received a copy of the final NPDES Permit No. IDS-028118 from EPA on September 9, 2009. EPA also included its Response to Comments. *See* McGee Aff., Ex. F. In response to Pioneer's requested condition, EPA noted that Section VI.H of the Permit addresses the property-related concerns of Pioneer by expressly disclaiming the grant of any property or jurisdictional rights by issuance of the Permit. *See id.* at 30-31.

The Response to Comments does not, however, address the fact that the City's actual implementation of a SWMP shifts the burdens and liabilities associated with storm water from the City to Pioneer, nor does it address the fact that the City's actual implementation of a SWMP does not comport with the representative SWMP submitted with the Application. To that end, the EPA only responds that it cannot eliminate the SWMP from the NPDES program. Pioneer does not suggest that the EPA has the authority to eliminate the requirement of a SWMP from the NPDES permitting process. However, the EPA has the authority to place a condition on the Permit to ensure that the SWMP provides adequate controls to prevent and/or minimize

water quality impacts, especially when that condition is represented as a baseline policy or practice in the Application for Permit. *See* 40 C.F.R. § 122.34.

The 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 SWMP. As the EPA notes in its Response to Comments, "[t]he SWMP is the heart of the MS4 permit. . . ." The City's misrepresentations to EPA regarding its own SWMP in the Application should not be countenanced. Further, Pioneer requests an order that the Permit be vacated and remanded so that the EPA can collect more information and comments and investigate the City's actual baseline policies and practices, as well as the necessity of Pioneer's proposed condition language.

II. JURISDICTION AND STANDING

The EAB has jurisdiction to review the Permit, and conditions therein, pursuant to 40 C.F.R. § 124.19(a). Pioneer has standing to seek review of the Permit conditions because it participated in the permit process leading up to the permit decision. *See* 40 C.F.R. § 124.19(a). Specifically, Pioneer provided comments regarding the draft permit on October 20, 2008, addressing among other issues, whether the City's SWMP 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. This issue is eligible for review by the EAB under the regulations because the issue was raised during the comment period and was reasonably ascertainable at that time. *See* 40 C.F.R. 124.13; 40 C.F.R. 124.19.

III. STANDARD OF REVIEW

There is no appeal as of right from the issuance of a permit. *See In re Miners Advocacy Council*, 4 E.A.D. 40, 42 (EAB, May 29, 1992). A petitioner has the burden of

demonstrating that review should be granted. *Id.* The petition must show a permit condition is based on “(1) [a] finding of fact or conclusion of law which is clearly erroneous, or (2) [a]n exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.” 40 C.F.R. § 124.19(a).

IV. ARGUMENT

A. The Certification Requirement

All NPDES storm water permit applications shall be signed by “either a principal executive officer or ranking elected official.” 40 C.F.R. § 121.22(a)(3). Such an individual must certify the truth, accuracy, and completeness of the application and all attachments. 40 C.F.R. § 121.22(d). The required certification follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.¹

¹ Note that 33 U.S.C. § 1319(c)(4) provides that:

Any person who *knowingly makes any false material statement, representation, or certification in any application*, record, report, plan, or other document filed or required to be maintained under this chapter or who knowingly falsifies, tampers with, or renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than \$10,000, or by imprisonment for not more than 2 years, or both.

33 U.S.C. § 1319(c)(4) (emphasis added).

Id. The certification clearly requires truth and accuracy in the presentation of an NPDES Application. In this case, City of Caldwell Mayor Garret Nancolas signed the certification and Gordon Law, the City's Public Works Director, was designated as the Responsible Person.

B. Representations In The City's Application

In its Permit Application, the City of Caldwell made the following representation:

On-site retention has been formally required at least since 1994, and as a matter of policy at least since 1992. *Developments 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.*

Application at 16.

This representation was made as part of the City's description of its baseline standards, policies, and activities addressing post-construction storm water management in new development and redevelopment. *See id.* at 15-16. In other words, according to the City, the "review and approval" requirement was already part of the City's SWMP that was to become part of the NPDES Permit-compliant MS4.²

Clearly, the City represented in its Application that its SWMP required any person proposing discharge to facilities under the jurisdiction of another entity to obtain the review and approval of that entity. Even more, as discussed in Section III.A., *supra*, the City certified the truth and accuracy of this assertion in its Application.

² Pioneer acknowledges that a SWMP is not necessarily a static document for purposes of the NPDES program and that the Permit contemplates progression by implementation of BMPs to reduce pollutants to the maximum extent practicable. However, the misrepresentation of a baseline policy or practice like the one at issue here—an inaccurate statement of policy and practice which attempts to portray the City as playing an active role in management of its own jurisdictional responsibilities—is clearly for show.

C. The Truth And Accuracy Of The City's Representation

Due to the extreme consequences of the City's storm water policy and practice, Pioneer instituted litigation in Idaho district court in January 2008 to obtain judicial relief. On July 23, 2009, during the course of discovery in that case, Pioneer conducted the deposition of Gordon Law, who was the City Engineer at the time the City submitted the Application to EPA. Mr. Law was deposed as the Rule 30(b)(6) representative of the City. During his deposition, Mr. Law was asked about the veracity of the following statements contained in the Application. At page 16 of the SWMP attached to the Application, the City states:

On-site retention has been formally required at least since 1994, and as a matter of policy at least since 1992. Developments 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.

Application, at 16.

Under questioning from Brad Williams, attorney for Pioneer, Mr. Law was asked:

Q. The question is, with respect to that last sentence that "Proposed developments proposing to discharge to a ditch, drain, or pond under the jurisdiction of another entity are subject to review and approval of the entity operating or maintaining the ditch, drain, or pond," is that a true and accurate statement as of this date here, to your knowledge?

A. No.

Law Depo. at 181:7-181:15.

In later questioning, Mr. Williams returned to this issue and directed the following question to Mr. Law:

Q. You testified previously that these comments in Joan Meitl's application about whether you had to get approval from the irrigation district for discharging, your opinion was that was not accurate, it was just a courtesy that we did that, we didn't have to get their review and approval; right? And the application the

mayor signed for the EPA permit, you did not agree with that statement?

A. That's only partially correct. If there was land that had not historically drained, I felt that we needed to get their approval.

Law Depo. at 232:8-232:19.

These statements, made under oath by the engineer designated as the "Responsible Person" on the City's Permit Application, demonstrate that the City's statements of policy and practice regarding post-construction storm water management in new development and redevelopment, as provided in its submitted SWMP, were not truthful or accurate.

D. The City's Factual Misrepresentation Was Material To EPA's Decision To Issue The Permit And Involves Important Policy Considerations

Review of the Permit is appropriate in this case because (1) issuance of the Permit was based in part on a misrepresentation by the City, and (2) the misrepresented requirements of the City's SWMP involve important policy considerations. *See* 40 C.F.R. § 124.19(a). The factual misrepresentation by the City in its Application is material to EPA's decision to issue the Permit and the Permit should therefore be vacated and remanded for investigation of the misrepresentation and modification of the necessary conditions. Specifically, the EPA's issuance of the Permit relied in part upon the Application submitted by the City, which Application included baseline practices and proposed BMPs. According to the Application, one of the primary baseline practices in place for post-construction storm water management in new development and redevelopment was to require a party seeking to discharge off-site to seek the permission of the entity that owns or operates the affected facility. However, as established *supra*, that was not actually the City's policy.

In order to make EPA aware of this inconsistency, Pioneer requested a condition reinforcing that under the Permit, the City should be responsible to implement a NPDES-

compliant SWMP without distributing this responsibility and the attendant water quality problems and liabilities associated with municipal storm water to Pioneer, which is exempt from the NPDES permit program. The proposed condition reads: "No discharges are authorized by this Permit to constructed waterways, owned, operated or maintained by irrigation entities." EPA responded that "[s]ince 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."

EPA's response, however, does not entirely address Pioneer's concern. While Pioneer is clearly concerned with the real property issues associated with the City's SWMP and is duly addressing those concerns in state court, Pioneer's concern regarding the issued Permit is based upon the City's misrepresentation of the policies and procedures in the SWMP it has implemented for purposes of the NPDES storm water permit program. The Permit condition Pioneer has requested addresses more than just infringement upon jurisdiction or property rights; it addresses the issue of the City's responsibility under the Clean Water Act ("CWA") and the attendant CWA liabilities for Pioneer should the City fail to meet that responsibility. Therefore, the Permit must prohibit discharges to irrigation waterways without the entity's permission as the Application provided; otherwise, Pioneer's water quality will be inexorably tied to the City's SWMP and not Pioneer's own efforts to safeguard water quality in its facilities. Should the City's SWMP fail to meet the requirements of the recently issued Permit, such a failure will unavoidably impact and expose Pioneer to water quality issues and liabilities it was not exposed to before the City implemented its SWMP during the NPDES permitting process. These issues cannot be dismissed as solely jurisdictional or property disputes over which the EPA has no authority. They are issues that implicate the evaluation of best management practices under the CWA, an Act administered by the EPA.

While the City's Application indicates that irrigation entities will have the authority to review and approve discharges, the City actually implemented a policy that requires the discharge and commingling of municipal storm water with irrigation water in primarily agricultural water delivery facilities. This threatens Pioneer's agricultural exemption. Despite EPA's stated assurances in its Response to Comments that Pioneer's agricultural exemption is not in jeopardy, the plain language of the exemption reads: "The Administrator shall not require a permit under this section for discharges *composed entirely of return flows from irrigated agriculture*, nor shall the Administrator directly or indirectly, require any State to require such a permit." CWA § 402(l)(1) (emphasis added). The discharge of municipal storm water, whether covered by an NPDES permit or not, conflicts with the plain and unambiguous language of the CWA because irrigation flows commingled with municipal storm water cease to be "composed entirely of return flows from irrigated agriculture." For this reason alone, Pioneer's concerns regarding the continued application of the agricultural return flow exemption are legitimate and justifiable.

Further, EPA suggests in its Response that the agricultural return flow exemption that Pioneer enjoys may apply to NPDES-permitted commingled flows *so long as* the City discharges in compliance with its NPDES permit. Otherwise, EPA warns that Pioneer will likely need its own NPDES permit to maintain compliance with the Act in order to mitigate for any City-based permit compliance deficiencies (*i.e.*, "unpermitted" discharges). This concern over the City's ultimate NPDES permit compliance exemplifies a level of liability exposure that Pioneer did not historically face but for the discharge of municipal storm water into its facilities.

Even assuming, *arguendo*, that EPA's assertion that a permitted discharge will not affect Pioneer's exempt status for purposes of EPA enforcement is accurate, a citizen might

reasonably file suit against Pioneer under the CWA's citizen suit provision. *See* CWA § 505. Such a suit could be reasonably predicated upon the plain and unambiguous language of the agricultural return flow exemption, and EPA does not and cannot control the use of the Act's citizen suit provision.

Finally, and equally important, the Permit is premised upon an Application that did not accurately represent the City's storm water policies or the progression of such policies towards the elimination of pollutant discharges into the waters of the United States. The issuance of the Permit after misrepresentations by the City concerning a "review and approval" policy calls into question whether the permitted activities were appropriately considered in the context of the City's actual policies and practices—policies and practices allegedly implemented to obtain and comply with NPDES permitting requirements. Even more, the City's misrepresentations raise questions about what other baseline practices, policies and/or proposed BMPs were misrepresented or inaccurately stated and never actually contemplated by EPA in its review of the Application. The City's misrepresentations undermine the NPDES permitting process. The participation of Pioneer and other entities during the comment period and the analysis by EPA are marginalized if the Application and information provided by the City are not representative of the City's actual policies and practices. By issuing a permit despite a permittee's misstatement of facts and policies without requiring further inquiry into the misrepresentation and reason therefor, the EPA implicitly approves of such conduct in future applications and NPDES proceedings.

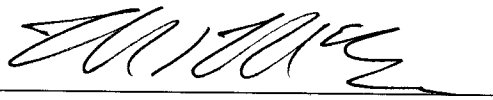
V. CONCLUSION

For the foregoing reasons, Pioneer requests that the EAB grant review of the Permit in order to address the City's failure to provide truthful and accurate information to the

EPA in its Application and in order to review whether the Permit should be vacated and remanded for further investigation and comment.

DATED this 9 day of October, 2009.

MOFFATT, THOMAS, BARRETT, ROCK &
FIELDS, CHARTERED

By 
Matthew J. McGee – Of the Firm
Attorneys for Pioneer Irrigation District