IN RE ARIZONA MUNICIPAL STORM WATER NPDES PERMITS

NPDES Appeal No. 97-3

ORDER DENYING REVIEW

Decided May 21, 1998

Syllabus

This is a petition for review filed by the Defenders of Wildlife and the Sierra Club ("petitioners") seeking review of certain issues related to U.S. EPA Region IX's issuance of five National Pollutant Discharge Elimination System ("NPDES") permits on February 14, 1997. The permits would authorize storm water discharges from the municipal separate storm sewer systems of the City of Tucson, Pima County, the City of Phoenix, the City of Mesa, and the City of Tempe ("permittees").

Petitioners appeal from the Region's denial of their evidentiary hearing request on the following legal issues: 1) the Region improperly met with the permittees and the Arizona Department of Environmental Quality during the comment period to discuss the draft permits; 2) the permits fail to assure compliance with State water quality standards because they do not contain numeric effluent limits or whole effluent toxicity limits; 3) the permits are inconsistent with the Clean Water Act as well as EPA regulations and guidance because the permits do not require whole effluent toxicity testing of the discharge; 4) the storm water management programs incorporated into the permits fail to quantify the pollution reductions estimated to occur as a result of the pollution control measures required by the permits; 5) the permits for Pima County and the City of Tucson fail to address pollution from areas of new development; 6) the Region has improperly allowed the permittees to defer the submission of certain components of their storm water management programs; and 7) the Region has illegally deferred the requirement that the City of Tucson demonstrate adequate legal authority to carry out the required elements of a storm water management program.

Held: 1. Petitioners' appeal with regard to issues 4, 5, and 6 is dismissed. The Region has withdrawn the portions of the permits of concern to petitioners in accordance with 40 C.F.R. § 124.60(b) and, on April 15, 1998, the Region modified the permits. Petitioners will now have the opportunity to seek administrative review of the reissued provisions, beginning with an evidentiary hearing request under 40 C.F.R. § 124.74. Under these circumstances, issues 4, 5, and 6 in the petition for review are not ripe for review.

2. The Region's meeting with permittees during the comment period was neither unlawful nor an improper *ex-parte* communication. Nothing in the regulations bars the Region from scheduling meetings with permit applicants prior to issuance of the final permit. Indeed, such meetings may prove beneficial in clarifying issues for the Region, the permittees, and the general public. Moreover, contrary to petitioners' assertion, the regulatory prohibition on *ex parte* communications applies only after the granting of an evidentiary hearing. As no hearing was granted in this case, this prohibition is inapplicable. Further, notes from the meetings between

permittees and the Region were included in the administrative record for the permits, and the Region's response to comments accurately reflected the permittees' comments as well as any permit conditions changed as a result of these comments. Petitioners' assertion that any improper *ex parte* communications occurred in this case is therefore rejected.

3. Numeric effluent limitations are not necessary to ensure compliance with the Clean Water Act and its implementing regulations or with Arizona's water quality standards. Because it is often infeasible to include numeric effluent limitations in storm sewer permits due to the lack of sufficient information upon which to base such limitations, the Agency has developed an interim approach for NPDES storm water permits providing for the use of best management practices ("BMPs") in initial permits and expanded BMPs in later permits where necessary to meet State water quality standards. The Region has determined that numeric effluent limitations are not feasible at the present time in the context of the permits at issue, and petitioners have failed to show that this determination was in any way unlawful or inappropriate.

4. Petitioners' assertion that each of the permits must be revised to require whole effluent toxicity testing of the discharges is denied because petitioners failed to indicate why the Region's response to comments on this issue is erroneous or otherwise warrants review.

5. The Region did not improperly defer the requirement that the City of Tucson demonstrate adequate legal authority to carry out the required elements of its storm water management program as required by 40 C.F.R. § 122.26(d)(2)(i).

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich and Kathie A. Stein.

Opinion of the Board by Judge Stein:

The Defenders of Wildlife and the Sierra Club ("petitioners") seek review of certain issues related to U.S. EPA Region IX's issuance of five National Pollutant Discharge Elimination System ("NPDES") permits on February 14, 1997.[1] *See* Notice of Appeal and Petition for Review ("Appeal"). The permits would authorize storm water discharges from the municipal separate storm sewer systems ("MS4s") of the City of Tucson, Pima County, the City of Phoenix, the City of Mesa, and the City of Tempe ("permittees"). In their petition for review, petitioners appeal from the Region's denial of their evidentiary hearing request.[2]

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[1] Under the Clean Water Act ("CWA"), discharges into waters of the United States by point sources must have a permit in order to be lawful. CWA § 301, 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System is the principal permitting program under the CWA. CWA § 402, 33 U.S.C. § 1342. Under CWA § 402(p) and 40 C.F.R. § 122.26, an NPDES permit is required for MS4s serving populations of 250,000 or more (large systems), and those serving populations of 100,000 or more, but less than 250,000 (medium systems). It is undisputed that all the permittees in this case satisfy at least one of these criteria.

[2] Under 40 C.F.R. § 124.91, within 30 days of the denial of a request for an evidentiary hearing, any requester may appeal any matter set forth in the denial by filing a notice of appeal and petition for review with the Environmental Appeals Board. Petitioners filed a single evidentiary hearing request covering all five permits.

At the request of the Environmental Appeals Board (the "Board"), the Region has filed a response to the petition for review. *See* EPA Region IX's Response to Petition for Review ("Region's Response"). The permittees have also filed responses.[3] For the reasons stated below, the petition for review is denied.

I. *BACKGROUND*

In accordance with the requirements set forth in CWA § 402(p)(4)("Permit application requirements") and 40 C.F.R. § 122.26(d) ("Application requirements for large and medium municipal separate storm sewer discharges"), between 1992 and 1993 the permittees submitted Parts 1 and 2 of the required NPDES permit application for storm water discharges from their MS4s.[4] Thereafter, the Region issued draft permits to each of the permittees and provided public notice on August 24 and 25, 1995. Several commenters, including the Arizona Center for Law in the Public Interest ("ACLIPI"), which is also serving as counsel for petitioners, submitted comments on the draft permits. The comment period closed on September 25, 1995, for each draft

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[3] The Board has also received several requests from organizations seeking to participate as *amici* in this proceeding. These are: the National Association of Flood and Storm Management Agencies, the National League of Cities - National Association of Counties, and the Association of Metropolitan Sewage Agencies. The requests have been granted and the accompanying submissions have been added to the record on appeal.

[4] Part 1 of the application includes general information on the applicant, a description of existing legal authority to control discharges, identification of sources of pollutants, a characterization of the discharge including data on the volume and quality of the discharges and results from field screening of major outfalls to detect illicit connections and illegal dumping, and a description of existing management programs to control pollutants. 40 C.F.R. § 122.26(d)(1). The Part 2 application requirements:

> are intended to build upon information submitted with the Part 1 application. Each part has virtually the same major areas of concern, but the Part 2 application requires a greater level of detail. Part 2 of the permit application requires a demonstration of adequate legal authority, additional information on pollution sources and outfalls, a limited amount of representative quantitative sampling data, a proposed monitoring program, a proposed storm water management program, an estimate of the effectiveness of storm water controls, and a fiscal analysis.

Guidance Manual for the Preparation of Part 2 of the NPDES Permit Applications for Discharges from Municipal Separate Storm Sewer Systems ("Part 2 Guidance Manual") at 2-1 (Nov. 1992) (Exhibit ("Exh.") 11 to Region's Response); 40 C.F.R. § 122.26(d)(2).

permit. Following certification of the permits by the State of Arizona,[5] the Region issued the final permits to each of the permittees on February 14, 1997.

Petitioners filed their evidentiary hearing request on March 9, 1997, raising the identical issues they raise in their petition for review with this Board. These are: 1) the Region improperly met with the permittees and the Arizona Department of Environmental Quality on August 29, 1995, to discuss the draft permits during the comment period (Appeal at 3); 2) the permits fail to assure compliance with State water quality standards because they do not contain numeric effluent limits or whole effluent toxicity limits (*id*. at 3-4); 3) the permits are inconsistent with the Act as well as EPA regulations and guidance because the permits do not require whole effluent toxicity testing of the discharge (*id*. at 4); 4) the storm water management programs incorporated into the permits fail to quantify the pollution reductions estimated to occur as a result of the pollution control measures required by the permit (*id*. at 4- 5); 5) the permits for Pima County and the City of Tucson fail to address pollution from areas of new development (*id*. at 5); 6) the Region has improperly allowed the permittees to defer the submission of certain components of their storm water management programs (*id*.); and 7) the Region has illegally deferred the requirement that the City of Tucson demonstrate adequate legal authority to carry out the required elements of a storm water management program (*id*. at 5-6).

By letter dated June 16, 1997, the Region denied the evidentiary hearing request on issues 1, 2, 3, and 7 listed above on the ground that these issues did not present a genuine issue of material fact.[6] Letter from Felicia Marcus, Regional Administrator, U.S. EPA Region IX, to David S. Baron, Assistant Director, ACLIPI (Exh. 6 to Region's Response). With regard to issues 4, 5, and 6, the Region decided to withdraw the permits and issue new draft permits addressing these issues. The Region stated:

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[5] Under CWA § 401(a), 33 U.S.C. § 1341, the Agency may not issue a permit until the State in which a facility is located (in this case Arizona) either certifies that the permit complies with the State's water quality standards or waives certification. *See* 40 C.F.R. § 124.53. Arizona certified each of the permits on January 28, 1997. *See* Exh. 4 to Region's Response.

[6] *See In re Ketchikan Pulp Co.*, 6 E.A.D. 675, 680 (EAB 1996) (a party requesting an evidentiary hearing must raise a genuine issue of material fact) (citing *In re Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 780-82 (EAB 1993)).

> As required by 40 C.F.R. § 124.60(b), the new draft permits will be subject to the same notice, opportunity for comment and administrative appeal procedures as the initial permit under 40 C.F.R. §§ 124.6 *et seq*. However, this decision to repropose pertains only to issues number 4, 5, and 6. Issues and arguments regarding all other aspects of the permits which were or could have been raised in this proceeding may not be raised during the comment period for the new decisions.

Id. at 3.[7] In their appeal, petitioners do not dispute the Region's conclusion that petitioners failed to raise any issues of material fact requiring an evidentiary hearing. Rather, petitioners contend that the Region's permit determinations were invalid as a matter of law and therefore require Board review.[8]

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[7] In a status report to the Board dated April 21, 1998, the Region states that it gave public notice of its decision to modify the permits on April 15, 1997, and that the public comment period on these modifications closed on September 15, 1997. The Region further states that its decision on the final permit modifications was signed on April 15, 1998, and that any interested person may now submit a request for an evidentiary hearing on the specified issues under 40 C.F.R. § 124.74.

[8] Under 40 C.F.R. § 124.74 ("Requests for evidentiary hearing"), evidentiary hearing requests submitted to the Regional Administrator:

> [S]hall state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated and the hearing time estimated to be necessary for adjudication.

40 C.F.R. § 124.74(b)(1). A "Note" following § 124.74(b)(1) states as follows:

> This paragraph allows the submission of requests for evidentiary hearings even though both legal and factual issues may be raised, or only legal issues may be raised. In the latter case, because no factual issues were raised, the Regional Administrator would be required to deny the request. However, on review of the denial the Environmental Appeals Board is authorized by § 124.91(a)(1) to review policy or legal conclusions of the Regional Administrator. EPA is requiring an appeal to the Environmental Appeals Board even of purely legal issues involved in a permit decision to ensure that the Environmental Appeals Board will have an opportunity to review any permit before it will be final and subject to judicial review.

In their evidentiary hearing request, petitioners state:

> All the issues we are raising are legal, not factual. Accordingly, a fact-finding hearing is not necessary to resolve

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II. *DISCUSSION*

Under the rules governing an NPDES proceeding, there is no appeal as of right from the Regional Administrator's decision. *In re City of Port St. Joe*, 7 E.A.D. 275 (EAB 1997). *In re Florida Pulp and Paper Ass'n*, 6 E.A.D. 49, 51 (EAB 1995). Ordinarily a petition for review is not granted unless the Regional Administrator's decision is clearly erroneous or involves an exercise of discretion or policy that is important and should therefore be reviewed by the Board. 40 C.F.R. § 124.91(b). "While the Board has broad power to review decisions in NPDES permit cases, the Agency intended this power to be exercised 'only sparingly.'" 44 Fed. Reg. 32,887 (June 7, 1979); *City of Port St. Joe* at 282. Agency policy is that most permits should be finally adjudicated at the Regional level. *Id.; see also In re J & L Specialty Products Corp.*, 5 E.A.D. 31, 41 (EAB 1994); *In re Broward County*, 4 E.A.D. 705, 708-09 (EAB 1993). On appeal to the Board, a petitioner has the burden of demonstrating that review should be granted. 40 C.F.R. § 124.91(a). This standard applies even where petitioners are seeking Board review of purely legal issues. *See In re Liquid Air Puerto Rico Corp.*, 5 E.A.D. 247, 253 (EAB 1994).

At the outset, we must dismiss petitioners' appeal with regard to issues 4, 5, and 6 set forth above because these issues are not ripe for review. As previously stated, the Region has withdrawn the portions of the permit of concern to petitioners in accordance with 40 C.F.R. § 124.60(b) and, on April 15, 1998, the Region modified the permits. Petitioners will now have the opportunity to seek administrative review of the reissued provisions, beginning with an evidentiary hearing request under 40 C.F.R. § 124.74. Under these circumstances, we agree with the Region that issues 4, 5, and 6 in the petition for review are not ripe for review at this time. *See In re City of Port St. Joe*, 5 E.A.D. 6, 9 (EAB 1994); *In re City & County of San Francisco*, 4 E.A.D. 559, 573-74 (EAB 1993).[9]

> our concerns. However, pursuant to 40 C.F.R. § 124.74, we are obligated to request an evidentiary hearing in order to pursue an appeal to the Environmental Appeals Board, and to the courts.

Letter from David Baron, Assistant Director of ACLIPI, to Terry Oda, U.S. EPA Region IX (Mar. 19, 1997) (Exh. 5 to Region's Response).

[9] Petitioners have acknowledged that the Region has withdrawn the permit conditions of concern to petitioners in issues 4, 5, and 6 listed above. Nevertheless, petitioners state that they Continued

A. *Meeting With Permittees*

In its response to comments on the draft permits, the Region stated that in addition to receiving letters from the permittees:

> Region 9 also met with [the Arizona Department of Environmental Quality] and all [permittees] on August 29, 1995 to discuss the draft permits. The comments in the letters and the comments which were conveyed at the August 29 meeting were reviewed by Region 9 and considered in the formulation of the final determinations regarding the proposed permits.

Response to Public Comments at 1 (Exh. 8 to Region's Response). According to petitioners, the applicable regulations require that comments be submitted in writing or at a public hearing, and that it was therefore improper for the Region to schedule an additional meeting with the permittees during the comment period. Appeal at 3. Petitioners further state that the August 29 meeting constituted an improper *ex-parte* communication. *Id*. We disagree with both assertions.

First, although petitioner is correct that the sections of the Code of Federal Regulations cited in the appeal (40 C.F.R. §§ 124.10 - 124.18) contain provisions relating to the submission of written comments on a draft permit as well as the method for requesting and conducting public hearings, nothing in these regulations bars the Region from scheduling additional meetings with permit applicants and State authorities prior to issuance of the final permit. Indeed, such meetings may prove beneficial in clarifying issues for the Region, the permittees, and the general public. Viewed as a whole, the permit issuance regulations at 40 C.F.R. part 124 "contemplate that the permit issuer and the permit applicant will work together in developing a permit." *In re Velsicol Chem. Corp.*, 1 E.A.D. 882, 885 (Adm'r 1984) (footnote omitted).

In the present case, notes from the August 29 meeting were included as part of the administrative record for the permits. Region's Response at 6-7; Exh. 9 to Region's Response. Moreover, in its

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have appealed because the Region did not indicate when the permits would be reproposed and reissued and, according to petitioners, "the [Regional Administrator] can [not] defeat their right of administrative and judicial review by consigning these issues to bureaucratic oblivion." Appeal at 2. As the Region has now reissued the permit provisions of concern to petitioners and indicated that interested parties may exercise their rights to administrative review, petitioners' assertions are moot.

response to comments the Region summarizes those comments raised during the comment period and indicates which, if any, permit conditions were changed as a result of the permittees' comments. Petitioners do not assert that the Region's response to comments was incomplete or that petitioners were in any way prejudiced in their ability to file objections to the final permit. We further note that the Region states, and petitioners do not dispute, that "none of the issues discussed at the meetings or in additional written comments were new and the Region placed all documentation in the administrative record." Region's Response at 7. Under these circumstances we see nothing unlawful or improper with the Region holding informational meetings between itself and a permittee during the public comment period.[10] *Cf. In re Chemical Waste Management of Ind., Inc.*, 6 E.A.D. 66, 82 (EAB 1995) (A Region may schedule meetings beyond those required by the applicable regulations).

Second, petitioners' assertion that the August 29 meeting constituted an improper *ex parte*, non-record communication is not supported by the record before us. Contrary to petitioners' assertion, the applicable regulatory prohibition on *ex parte* communications applies only after the granting of an evidentiary hearing. 40 C.F.R. § 124.78(d). As no hearing was granted in this case, this prohibition is inapplicable. Further, as previously stated, notes from the meetings[11] between permittees and the Region have been admitted to the administrative record, and the Region's response to comments accurately reflected the permittees' comments as well as any permit conditions changed as a result of these comments. We therefore reject petitioners' assertion that any improper *ex parte* communications occurred in this case.

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[10] We also note that under 40 C.F.R. § 124.18, the Region must base its final permit determination on documents contained in the administrative record as defined in that section. The administrative record includes documents contained in the supporting file for the permit. 40 C.F.R. § 124.18(b)(6). As previously stated, notes from the August 29 meeting were included as part of the administrative record for this permit.

[11] In its response to this petition for review, the Region states:

> Meeting notes taken by Region 9 staff during the meeting in question are part of the administrative record for the permits as are the meeting notes taken by Region 9 staff at several other meetings with the municipalities and other interested parties which took place prior to, during, and after the comment period.

Region's Response at 6-7.

B. *Compliance With Water Quality Standards*

Petitioners argue that Part I.A.4. of each permit must be revised to include numeric effluent limitations in order to meet applicable State water quality standards.[12] Appeal at 3-4. According to petitioners, numeric effluent limitations are required by "33 U.S.C. § 1311(b)(1)(B) as well as EPA's national rules and guidance, including, but not limited to 40 C.F.R. § 122.44 and .45." *Id.* at 3.[13] The Region concedes that the permits at issue in this case must meet State water quality standards, but argues that numeric effluent limitations and whole effluent toxicity limits are not necessary to ensure compliance with these standards. Region's Response at 8. We agree.

Under CWA § 402(p)(3)(B)(iii) permits for discharges from municipal storm sewers:

> [S]hall require controls to reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the Administrator or the State determines appropriate for the control of such pollutants.

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[12] Part I.A.4. of each permit states:

> Compliance with Arizona Water Quality Standards
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> To ensure that the permittee's activities achieve timely compliance with applicable water quality standards (Arizona Administrative Code, Title 18, Chapter 11, Article 1), the permittee shall implement the [storm water management program ("SWMP") described in Part I.E.12 of the permit], monitoring, reporting and other requirements of this permit in accordance with the time frames established in the SWMP referenced in Part I.A.2, and elsewhere in this permit. The timely implementation of the requirements of this permit shall constitute a schedule of compliance authorized by Arizona Administrative Code, section R18-11-121(C).

[13] The section of the CWA cited by petitioners (33 U.S.C. § 1311(b)(1)(B)) does not refer to State water quality standards but to discharges from publicly owned treatment works. Further, petitioners do not specify which section of the applicable regulations allegedly require the inclusion of numeric water quality-based effluent limitations. For the purposes of this decision, we assume, as did the Region (Region's Response at 8), that petitioners intended to cite CWA § 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) (requiring effluent limitations necessary to meet State water quality standards), and 40 C.F.R. § 122.44(d) (requiring that NPDES permits include limitations necessary to comply with State water quality standards including State narrative criteria for water quality).

33 U.S.C. § 1342(p)(3)(B)(iii). In implementing this requirement the regulations require that the permit applicants submit a proposed storm water management program ("SWMP") to control the discharge of pollutants in storm water. 40 C.F.R. § 122.26(d)(2)(iv). Mirroring the language of the statute, the regulations require that the SWMP reduce the discharge of pollutants to the maximum extent practicable ("MEP") "using management practices, control techniques and system, design and engineering methods which are appropriate." *Id*. All or part of the SWMP is then typically incorporated into the permit. *See id*. (the proposed SWMP will be considered when developing permit conditions); Part 2 Guidance Manual at 6-1 ("If the municipality proposes a thorough and complete program, the permitting authority is likely to incorporate all or part of the proposed management program into the NPDES storm water permit written for that municipality."). In this way the regulations allow for the development of site-specific permitting requirements.[14]

The SWMP prepared by each permittee in the present case (and incorporated into each permit) describes those management practices necessary to meet the MEP level of control required by the Act.[15]

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[14] In the preamble to 40 C.F.R. part 126, the Agency noted that:

> The water quality impacts of discharges from [MS4s] depend on a wide range of factors including: The magnitude and duration of rainfall events, the time period between events, soil conditions, the fraction of land that is impervious to rainfall, land use activities, the presence of illicit connections, and the ratio of storm water discharge to receiving water flow. In enacting [CWA § 402(p)] Congress recognized that permit requirements for [MS4s] should be developed in a flexible manner to allow site-specific permit conditions to reflect the wide range of impacts that can be associated with these discharges.

55 Fed. Reg. 47,990 (Nov. 16, 1990).

[15] Condition I.A.2. of each permit states:

> The permittee shall control pollutants in storm water discharges to the maximum extent practicable, and to demonstrate compliance with this requirement, the permittee shall implement in its entirety the proposed storm water management program (SWMP) described in * * * this permit. All storm water pollution control measures identified in the SWMP shall be implemented, including existing measures and proposed measures. Proposed control measures shall be implemented in accordance with the implementation schedules provided in the SWMP, with the effective date of the permit serving, at a minimum, as the starting date for the implementation of the schedule.

These include measures to: 1) reduce pollutants from residential and commercial areas (40 C.F.R. § 122.26(d)(2)(iv)(A)); 2) control illicit connections and illegal dumping (40 C.F.R. § 122.26(d)(2)(iv)(B)); 3) control pollutants from municipal landfills and industrial facilities (40 C.F.R. § 122.26(d)(2)(iv)(C)); and 4) control pollutants from construction sites (40 C.F.R. § 122.26(d)(2)(iv)(D)).

Under the regulations, best management practices ("BMPs")[16] may be incorporated into storm water permits where numeric limitations are infeasible. 40 C.F.R. § 122.44(k)(2). *See also NRDC v. Costle*, 568 F.2d 1369, 1380 (D.C. Cir. 1977) ("[W]hen numeric effluent limitations are infeasible, EPA may issue permits with conditions designed to reduce the level of effluent discharges to acceptable levels."). The Agency has noted that it is often infeasible to include numeric effluent limitations in storm sewer permits due to the lack of sufficient information upon which to base such limitations.[17] The Agency has therefore developed an interim approach for NPDES storm water permits providing for the use of BMPs in initial permits and expanded BMPs in later permits where necessary to meet State water quality standards. Interim Permitting Approach; *see also* Questions and Answers Regarding Implementation of an Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits ("Q&As for Interim Permitting Approach"), 61 Fed. Reg. 57,425 (Nov. 6, 1996). As the Agency has stated:

> EPA has found that numeric limitations for storm water permits can be very difficult to develop at this time because of the existing state of knowledge about the intermittent and variable nature of these types of discharges and their effects on receiving waters.

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[16] Best management practices are defined as follows:

> [S]chedules of activities, prohibitions of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of "waters of the United States." BMPs also include treatment requirements, operating procedures, and practices to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw material storage.

40 C.F.R. § 122.2.

[17] Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits ("Interim Permitting Approach"), 61 Fed. Reg. 43,761 (Aug. 26, 1996).

Q&As for Interim Permitting Approach, 61 Fed. Reg. at 57,426.[18] *See also* Region's Response at 11 (stating that storm water discharges present difficult challenges in determining reasonable potential to cause or contribute to an excursion above any State water quality standard (40 C.F.R. § 122.44(d)(1)(i)), "as well as in the calculation of numeric water quality-based effluent limitations because of the high degree of variability in pollutants, volumes of discharge and impacts of discharge depending on land uses, storm events and receiving waters.").[19]

In the present case, the Region determined that due to the unique nature of storm water discharges in the arid Arizona environment and the uncertainties associated with the environmental effects of short-term, periodic discharges, "it would be premature to include in the final permit any specific toxicity-related effluent limitations * * *." Fact Sheets at § III.C.; *see also* Response to Public Comments at 3. Thus, as the Region stated in its response to comments, "[f]or the storm water permits, the effluent limitations that have been included are the BMPs set forth in the SWMPs which are intended to reduce pollutants to the MEP level, and to ensure compliance with the Arizona [water quality] standards." Response to Public Comments at 3. In responding to the present appeal, the Region states:

> [T]he Region did not have sufficient information (and commenters did not present additional information) regarding either the effects of the municipal storm water discharges or the efficacy of the municipal control measures to derive appropriate numeric effluent limitations. The Arizona municipal storm water discharges are largely to normally dry washes and/or effluent-dominated ephemeral streams and therefore the municipal storm water discharges present complex issues regarding their in-stream impacts. Because of these complexities and the lack of experience in understanding the effects and nature of municipal storm water discharges, an appropriate analysis of the reasonable potential to cause or contribute to a water

[18] The Agency notes that "[s]ome storm water permits, however, currently do contain numeric water quality-based effluent limitations where adequate information exists to derive such limitations." Q&As for Interim Permitting Approach, 61 Fed. Reg. at 57,426.

[19] The *amicus* submissions filed with the Board by the National Association of Flood and Storm Management Agencies, the National League of Cities - National Association of Counties, and the Association of Metropolitan Sewage Agencies assert that the permits are consistent with the Act and the applicable regulations as well as with the Agency's Interim Permitting Approach.

> quality standard exceedance as well as the development of appropriate numeric water quality-based effluent limitations was infeasible in these permits. Thus, the Region chose to require the development of BMPs designed to reduce pollutants in the discharge at this time. Through the gathering of additional information on the effect and nature of the municipal discharges and experience in the implementation of the BMPs, the Agency should be in a better position to develop appropriate additional requirements to assure compliance with [water quality standards], if shown to be necessary at the end of this initial permitting term.

Region's Response at 12 (citations omitted). This determination is consistent with above-cited Agency policy recognizing that permitting agencies frequently lack adequate information to establish appropriate numeric water quality-based effluent limitations, and providing for the inclusion of BMPs until such information becomes available.

Petitioners make no specific challenges to the Agency's interpretation in this regard, but simply allege (without support) that numeric effluent limitations are required under both the Act and the regulations. As the Agency has stated, however, nothing in the Act requires that permits of the type at issue in this case include numeric effluent limitations.

> Section 301 of the CWA requires that discharger permits include effluent limitations necessary to meet State or Tribal [water quality standards]. Section 502 defines "effluent limitation" to mean *any* restriction on quantities, rates, and concentrations of constituents discharged from point sources. The CWA does not say that effluent limitations need be numeric. As a result, EPA and States have flexibility in terms of how to express effluent limitations.

Q&As for Interim Permitting Approach, 61 Fed. Reg. at 57,426 (emphasis in original).[20] Similarly, the regulations do not require numeric effluent limitations. Rather, as stated above, the regulations explicitly provide for the use of BMPs to supplement or replace numeric limitations in NPDES permits where such limitations are not

[20] *See also* 55 Fed. Reg. 47,990 (Nov. 16, 1990) ("The whole point of the permitting scheme for these discharges is to avoid inflexibility in the types and levels of control.").

feasible. 40 C.F.R. § 122.44(k).

We also note that in accordance with 40 C.F.R. § 122.42(c), the permits require the submission of an annual report describing the pollutant control and monitoring activities during the previous year. Among the requirements of the report is that the permittees "identify data limitations and proposed changes to the SWMP that are established as permit conditions along with a specific timetable for implementation." Permit Condition I.D.3. of permits for City of Tempe and City of Tucson; Condition I.C.3. of permits for Pima County, City of Mesa, and City of Phoenix. Thus, these annual reports may serve as the basis for appropriate permit modifications during the permit term.

The Region has determined that numeric effluent limitations are not feasible in the present context and petitioners have failed to convince us that this determination was in any way unlawful or inappropriate. The petition for review is therefore denied.[21]

C. *Whole Effluent Toxicity Testing*

Petitioners assert that each of the permits must be revised to require whole effluent toxicity ("WET") testing of the discharges on at least an annual basis. Appeal at 4. According to petitioners, the absence of such a requirement violates Agency regulations and guid-

[21] Petitioners have made two additional assertions with regard to whether the permits meet applicable State water quality standards, neither of which contain the specificity necessary to support a grant of review by this Board. *See In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 772 (EAB 1997) (petition for review must provide sufficient information or specificity from which the Board could conclude that a permit determination was erroneous); *In re Broward County*, 4 E.A.D. 705, 709 (EAB 1993) (disputed issues must be stated with specificity in order to support a petition for review). First, petitioners assert that the permits must be revised to include whole effluent toxicity limits "to assure compliance with narrative criteria within the applicable state water quality standards." Appeal at 3-4. Petitioners provide no support for this assertion, nor do they specify the narrative criteria which the permits allegedly violate or indicate what permit limitations might be appropriate to satisfy these criteria. Moreover, based on our review of the record on appeal, the permits appear to be in full compliance with both Arizona and federal requirements and nothing in the petition for review convinces us otherwise. Second, petitioners suggest that the inclusion of compliance schedules in the permit are improper because they do not ensure compliance with State water quality standards. As petitioners have not elaborated on this assertion or provided any legal or other support, petitioners' request lacks the specificity necessary for a grant of review. Moreover, we note that: 1) Arizona has certified that these permits comply with State law; and 2) at the time the permits were issued, Arizona law specifically provided for the establishment of compliance schedules in NPDES permits. Ariz. Admin. Code R18-11-121(C) (1996) (Exh. 14 to Region's Response). *See In re Star-Kist Caribe, Inc.*, 3 E.A.D. 172 (Adm'r 1990) (EPA's authority to include a schedule of compliance in an NPDES permit that postpones compliance with State water quality standards is contingent upon authorization in the State's standards or implementing regulations).

ance. In support of this assertion, petitioners cite generally to 40 C.F.R. § 122.44, EPA's Interim Permitting Approach, 60 Fed. Reg. 53,529 (1995), and EPA, Office of Water, Whole Effluent Toxicity Control Policy (July 1994). Appeal at 4.

In responding to comments on the draft permits, in which petitioners also raised the issue of the permits' absence of whole effluent toxicity testing,[22] the Region stated:

> For these storm water permits, EPA has determined that it is appropriate to omit toxicity testing requirements. As discussed in section III.C of the fact sheets, Arizona's own toxicity implementation guidelines, approved by EPA in April, 1996,[23] call for no toxicity testing in the current cycle of municipal storm water permits. In cooperation with the State and the storm water dischargers, EPA is working to develop toxicity testing programs that will measure the effects of short term periodic pollutant exposures which characterize municipal storm water discharges in arid environments.

Response to Public Comments at 11.[24] Nothing in the petition for review indicates why the Region's response to petitioners' comments on this issue was erroneous or deficient in any respect.

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[22] *See* Letter from David S. Baron, Assistant Director of ACLIPI, to Rita Wong, U.S. EPA Region IX (Sept. 24, 1995) (Exh. 3 to Region's Response).

[23] *See* Letter from Felicia Marcus, Regional Administrator, U.S. EPA Region IX, to Russell F. Rhodes, Director, ADEQ, (Apr. 26, 1996) ("Approval of Arizona Implementation Guidelines") and attached portion of Interim Whole Effluent Toxicity Implementation Guidelines for Arizona. (Exh. 15 to Region's Response).

[24] Section III.C. of the fact sheets states, in relevant part:

> Toxicity monitoring was omitted because: (a) Arizona's Interim Whole Effluent Toxicity Guidelines of April, 1996, which EPA approved in April, 1996 call for no toxicity testing to be required in this cycle of municipal storm water permits, and (b) alternate toxicity testing procedures may be appropriate for municipal storm water discharges in the arid Arizona environment. Moreover, Region 9 believes that appropriate additional information concerning storm water toxicity can be obtained outside the purview of the permit. In 1994, Congress appropriated $5 million for additional studies of various water quality issues in the arid west. These funds are being provided * * * in the form of a grant to investigate a variety of water

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As the Board has stated, to obtain review of issues raised during the comment period, a petitioner must demonstrate why the Region's response to comments is clearly erroneous or otherwise warrants review. *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 392-93 (EAB 1997); *In re LCP Chemicals-New York*, 4 E.A.D. 661, 664 (EAB 1993). A petitioner may not simply reiterate its previous objections to the draft permit. *In re Austin Powder Co.*, 6 E.A.D. 713, 721 (EAB 1997); *In re J&L Specialty Products Corp.*, 5 E.A.D. 31, 76 n.55 (EAB 1994). Because petitioners provide no discussion as to why the Region's response to comments on this issue is erroneous or otherwise warrants review, the petition for review is denied on this issue.[25]

D. *Demonstration of Adequate Legal Authority*

Petitioners argue that the permit issued to the City of Tucson must be denied because Part I.B.[26] of the permit "illegally deferred the requirements that Tucson demonstrate adequate legal authority to carry out the required elements of a storm water management pro-

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> quality issues, including storm water toxicity and its implications for Arizona receiving waters. As part of this project, EPA will be reviewing its toxicity testing procedures and methods for establishing toxicity limits to determine whether they provide an accurate measure of municipal storm water dischargers' reasonable potential to cause or contribute to exceedances of Arizona's narrative toxicity criterion under the normally arid conditions that exist in Arizona.

See Exhs. 13 & 16 to Region's Response.

[25] We note that the Interim Permitting Approach recommends that storm water permits contain a water monitoring program to determine the extent to which the permit complies with State water quality standards. Interim Permitting Approach, 61 Fed. Reg. at 43,761. However, nothing in either the Interim Permitting Approach or the other citations listed by petitioners compels the inclusion of WET testing provisions in initial municipal storm water permits where, as here, such provisions are not required by State law. As the Region has pointed out, Arizona's guidelines for implementing the State's water quality standards explicitly state that toxicity testing is not required for the first round of municipal storm water permits. *See supra* note 24.

[26] Part I.B. of Tucson's permit states:

> LEGAL AUTHORITY REQUIREMENTS
>
> As part of the reapplication for this permit, the permittee shall submit to Region 9 an evaluation of the adequacy of the permittee's existing legal authority in implementing the requirements of this permit. This analysis shall be based on the permittee's experiences in implementing the requirements of this permit during the term of this permit.

gram" in violation of 40 C.F.R. § 122.26(d)(2)(i) (Adequate legal authority).[27] Appeal at 5-6.

In responding to comments on this issue the Region stated:

> [T]he existing authority is general in nature and centers on the permittee's authority to protect health and the environment. Although some municipalities have enhanced their legal authority through the adoption of special ordinances directed at controlling storm water pollution, the City of Tucson has argued that such an ordinance is not clearly needed in Tucson.
>
> Region 9 believes that the requirements of the permit represent a reasonable compromise in view of the City's concerns. The permit requires an assessment of adequacy of the existing legal authority based on the City's experiences during the term of the permit. If

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[27] Section 122.26(d)(2) states:

> Part 2 of the application shall consist of:
>
> (i) A demonstration that the applicant can operate pursuant to legal authority established by statute, ordinance or series of contracts which authorizes or enables the applicant at a minimum to:
>
> (A) Control through ordinance, permit, contract, or other similar means, the contribution of pollutants to the municipal storm sewer by storm water discharges associated with industrial activity and the quality of storm water discharged from sites of industrial activity;
>
> (B) Prohibit through ordinance, order or similar means, illicit discharges to the municipal separate storm sewer;
>
> (C) Control through ordinance, order or similar means, the discharge to a municipal separate storm sewer of spills, dumping or disposal of materials other than storm water;
>
> (D) Control through interagency agreements among coapplicants the contribution of pollutants from one portion of the municipal system to another portion of the municipal system;
>
> (E) Require compliance with conditions in ordinances, permits, contracts or orders; and
>
> (F) Carry out all inspection, surveillance and monitoring procedures necessary to determine compliance and noncompliance with permit conditions including the prohibition on illicit discharges to the municipal separate storm sewer.

> additional legal authority proves to be necessary, this would be addressed in the next permit term.

Response to Public Comments at 20-21. Although the Region's statement in this regard could have been clearer, we do not interpret the Region's actions as improperly deferring the requirements of § 122.26(d)(2)(i). Rather, the Region reviewed the underlying legal authority and accepted the City of Tucson's assertion that the City's existing legal authority was sufficient to carry out the elements of the SWMP, but required a reassessment of this conclusion at the end of the permit term. As the Region states in its response to this appeal:

> The City of Tucson provided a considerable amount of information regarding its legal authority [in its Part 1 and Part 2 permit applications]. * * * [T]his legal authority is largely based on the City's general authority to protect health and the environment. Although not specifically required by the regulations, many municipalities * * * have adopted special ordinances for control of storm water pollutants. The City of Tucson, however, explained that the authority described in its application was adequate to implement the SWMP described elsewhere in the applications. The Region concluded that, in the absence of information showing that the general legal authority was not sufficient, it is reasonable to defer to the City of Tucson's conclusion that the existing legal authority was adequate at this time and then re-evaluate the adequacy of the existing legal authority (including an evaluation of any need for a special storm water ordinance) when the City of Tucson applies for its next permit – within five years.

Region's Response at 15 (citations omitted). Under these circumstances, absent reason to believe that Tucson's interpretation of its legal authority is erroneous, we reject petitioners' assertion that the Region improperly deferred the legal authority requirement.[28]

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[28] We note that in its revised Part 2 permit application, the City of Tucson stated that the City Charter, Tucson City Code, and existing sections of Arizona's Revised Statutes provide Tucson with the legal authority to fully implement its storm water management program. *See* Part 2 Municipal Storm Water Permit Application for EPA Region IX, prepared by the City of Tucson, Executive Summary at E-1 (Exh. 19 to Region's Response). We find nothing in the petition for review or elsewhere in the record on appeal indicating that this determination was erroneous. *Cf. In re Ina Road Water Pollution Control Facility*, 2 E.A.D. 99 (CJO 1985) (Region

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III. *CONCLUSION*

For the reasons stated above, the petition for review filed by the Defenders of Wildlife and the Sierra Club is hereby denied.

So ordered.

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should ordinarily defer to State's interpretation of its own water quality standard regulations unless that interpretation is clearly erroneous). Moreover, as the Region has stated, "[t]he second permit term may include a requirement for a specific storm water ordinance if, based on the experience of the first term, the general authority upon which the City relies is later determined to be inadequate." Region's Response at 16.