IN THE MATTER OF MINERS ADVOCACY COUNCIL

NPDES Appeal No. 91–23

REMAND ORDER

Decided September 3, 1992

Syllabus

In a previous decision in this appeal, the Board granted review on the issue of whether 40 CFR § 125.3(d), which requires a permit writer to consider the "process employed" in setting case-by-case limitations in technology-based permits, precludes the Region from dividing the integrated placer mining process by authorizing discharges from one part of that process (sluicing) while not authorizing discharges from another part of that process (hydraulic removal of overburden). The parties have subsequently briefed this issue.

Held: The permit must consider the entire process, including the use of hydraulic removal of overburden, if any permit applicant so requests. The actual terms of the permit would depend on a site-specific factual analysis. The proceeding is remanded to the Region with direction of notify the permit holders of their right to apply for a single permit covering discharges from both sluicing operations and hydraulic overburden operations at the same mine site.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Reich:

On May 29, 1992, this Board granted in part and denied in part a petition for review filed by the Miners Advocacy Council ("MAC"). This petition arose out of the issuance in 1991 by U.S. EPA Region X of a set of 31 virtually identical NPDES permits to individual placer miners in Alaska. The Miners Advocacy Council requested an evidentiary hearing on numerous provisions of the permits. MAC is not a permit holder but rather is a trade association representing the affected industry. While this Board found that the denial of an evidentiary hearing was appropriate in all respects,

it granted review of a legal issue not suitable for an evidentiary hearing.[1]

The legal issue on which review was granted was whether 40 CFR § 125.3(d), which requires a permit writer to consider the "process employed" in setting case-by-case limitations in technology-based permits, precludes the Region from dividing the integrated placer mining process by authorizing discharges from one part of that process (sluicing) while not authorizing discharges from another part of that process (hydraulic removal of overburden). The parties submitted briefs on this issue in accordance with the previous order. More specifically, MAC submitted a brief on June 18, Region X a response on July 30, and MAC a reply brief on August 13.

MAC, in its June 18 brief, argues that a permit writer must consider the entire process used when setting case-by-case effluent limitations and that the regulations do not require a discharger to obtain different permits for different phases of his operation. For this reason, MAC argues that the Region "improperly denied a discharge from the hydraulic removal of overburden." MAC Brief at 4. The MAC brief also states that it is not unusual for a miner to spend the first portion of a mining season removing the overburden and the second portion sluicing the pay gravels. Thus, MAC asserts "[i]f a miner is not sluicing at the time he is removing overburden, he cannot recycle any excess water created by thawing the frozen overburden through his recovery plant." *Id.* In this instance, the prohibition of a discharge from the removal of the overburden would prohibit the use of hydraulic removal and effectively prohibit mining. MAC also presents data on the relative cost of hydraulic and mechanical methods for removing overburden, purporting to show that hy-

[1] 40 CFR § 124.74(b)(1), 57 Fed. Reg. 5336 (Feb. 13, 1992), provides that the Environmental Appeals Board may review a purely legal issue, even though a Regional Administrator has correctly denied an evidentiary hearing on the issue:

> 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.

draulic removal may be the only cost-effective method that can be employed at some sites.

Region X, in its response, argues first that the issue of permits for the hydraulic removal of overburden was not presented to the Region during the 1991 permit process. According to the Region, "[n]one of the 1991 permit applications described hydraulic removal of overburden as a process that would be employed." Region's Response at 2. The Region further states that, to its knowledge, no 1991 permit applicant even considered using the process at his or her mine site. *Id.* The Region also indicates that it believes that whether the hydraulic removal of overburden and sluicing are an integrated process is a question of fact. If the Board determines this issue to be before it, it should remand it to the Region for resolution. *Id.* at 3.

MAC, in its reply brief, takes issue with the Region's assertion that the issue was not raised in the permit process. MAC indicates that the issue was raised in its comments on the draft permit. MAC also indicates that "simply because no applicant mentioned the process of hydraulic removal of overburden when applying for a permit is not proof that such applicant did not wish to utilize that process." MAC Reply at 2. MAC adds that since the Region has been prohibiting discharges from hydraulic removal in permits issued since 1986, a permit applicant would have been "foolish" to apply for a permit authorizing such a discharge. In addition, MAC states that "the applications required by EPA Region X to apply for a permit to discharge simply do not provide an applicant the opportunity of supplying detailed information." *Id.*

We find that the issue of the hydraulic removal of overburden was presented during the 1991 permit process. While it may not have been presented clearly by any permit application, MAC objected in its comments on the draft permit to the provision stating that "[d]ischarges from hydraulic overburden removal operations are not authorized under this permit."[2] By including this statement, the Region has anticipated at least the possibility of hydraulic removal and taken a position on the effect of this permit on such operations. We believe that is sufficient to find that the issue is before us.

On the legal issue presented, the Region states that it recognizes "that NPDES permit limitations are derived based on a consideration

[2] Permit at Part I.E.3.

of the entire process employed upstream from a discharge point or points." Region's Response at 3–4. However, it goes on to say that:

> Establishing permit limits for a particular mining operation involving the hydraulic removal of overburden, however, will require a "detailed evaluation" including, among other things, an analysis of available overburden removal methods and a determination that alternative, non-discharging methods are infeasible at an applicant's mine site.

Region's Response at 4.

The Region also states that it "does not dispute that one permit application *could* be submitted for all the mining activities conducted by a given mining operation" and that "[i]f any miner wants to have one permit issued for discharges from both operations, the miner may submit a single permit application to the Region." Region's Response at 3.

In addressing this issue, it is important to keep distinct two separate questions: whether the permit must address removal of overburden, including proposed use of hydraulic removal, and what the terms of the permit addressing removal of overburden should be.

The Region seems to concede that the answer to the first question is that removal of overburden is part of the "process" to be considered for which a miner may obtain a single permit. We agree, and that resolves the legal issue for which we granted review.

Having determined that removal of overburden must be considered, we also agree with the Region that determining the appropriate permit limits for hydraulic removal of overburden requires a site-specific factual analysis. Such an analysis did not take place here for any of the permits since, in the Region's view, no permit application raised this issue. The Region has now acknowledged the possible confusion as to whether a single permit application could have been submitted covering both sluicing and overburden removal and has indicated that it will accept a single application for this purpose. While it is normally the obligation of the permit applicant to identify clearly all possible discharge points to be covered by a permit,[3] we believe this case warrants giving the permit applicants another, clear opportunity to at least apply for a permit covering discharges from

[3] *See* 40 CFR § 122.21(g).

hydraulic removal of overburden. This will provide an equitable resolution in light of the confusion that even the Region acknowledges exists.

Therefore, we are remanding this proceeding to Region X with direction that it provide within 30 days of the date of this Order a notice to each permit holder in this case that he or she may submit a revised permit application covering discharges from both sluicing operations and hydraulic overburden operations at the same mine site. Any such permit application received shall be processed in accordance with NPDES regulations and the resulting permit will supersede the 1991 permit.[4] The resulting permit may be appealed as provided in 40 CFR § 124.91.

Permit condition Part I(E)(3), which provides that discharges from hydraulic removal of overburden are not authorized, is presently stayed by this appeal in accordance with 40 CFR § 124.15. This condition will remain stayed until the conclusion of the period allowed for submission of an amended permit application.[5] For any permit for which an amended permit application is submitted, the stay shall remain in effect throughout the permit issuance and permit appeal process. For any permit for which an amended permit application is not submitted, the remand will be considered completed upon the passage of the deadline for submitting an amended application. This will constitute final Agency action in accordance with 40 CFR § 124.91(f)(3).

So ordered.

[4] In issuing any revised permit, the Region should assure that the requirements relative to incidental water from hydraulic removal of overburden are clearly stated, given that the Region admits that there is an apparent inconsistency between the current permit limitation and the Region's explanation of its effect.

[5] Stay of this condition does not allow discharges from hydraulic removal since even if the express prohibition is stayed, there is no permit presently *authorizing* such discharges.