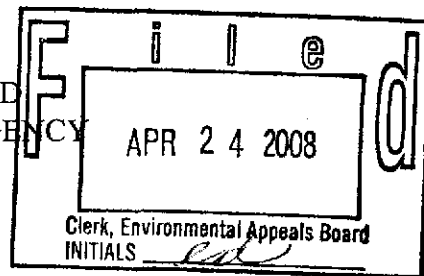


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)

BHP Billiton Navajo Coal Company)

NPDES Permit No. NN0028193)

) NPDES Appeal No. (08-06)

ORDER DENYING EXTENSION OF TIME TO FILE PETITION FOR REVIEW

Before the Environmental Appeals Board (“Board”) are two requests, each for a two-week extension of time to file a Petition for Review of the final NPDES Permit issued by U.S. EPA Region 9 (“the Region”) to BHP Billiton Navajo Coal Company (“Final Permit”). The first, received by the Board on April 14, 2008, is from San Juan Citizens Alliance. The second, also received on April 14, 2008, is from Jeffrey Stant, of Clean Air Task Force. Both letters indicate as the basis for the request that Jeffrey Stant, the “principal author” of the comments on the draft permit, submitted collectively by San Juan Citizens Alliance, Diné CARE, and Clean Air Task Force, never received notice of the Final Permit decision at his mailing address in Indianapolis, Indiana.

In response to these requests, the Board, by order, requested the Region’s position on the requested extensions, which the Region submitted on April 18, 2008.¹ In addition to opposing

¹ By order, on April 15, 2008, the Board requested EPA Region 9 to inform the Board of its position on the extensions by close of business on Wednesday, April 16, 2008. See Order Requesting Region’s Position on Extension (Apr. 15, 2008). On April 16, 2008, Region 9 moved the Board for an additional two days to respond to the Board’s request. We granted Region’s 9’s motion and extended the time to file a response to April 18, 2008. On April 18, 2008, Region IX filed a response opposing the pending extension requests.

any extension, the Region provided a copy of the comments that it received on the draft permit, as well as the notice of the Final Permit that it had served, and an email exchange between Jeffrey Stant and the Region concerning an earlier request for additional time to file comments on the proposed permit.

Pursuant to 40 C.F.R. § 124.19, “any person who filed comments on [a] draft [NPDES] permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision” within 30 days after notice of the final permit decision is served, unless otherwise specified by the permit issuer. The Final Permit in this case was issued by Region 9 on March 5, 2008. Assuming proper service by mail was made on the date the permit was issued, the time for appeal ran on April 7, 2008,² prior to either extension request being filed with the Board. The Board rarely grants extensions of appeal deadlines in permit cases and does so only in extraordinary circumstances. *See, e.g., AES Puerto Rico, L.P.*, 8 E.A.D. 324, 328-30 (EAB 1999).

When a final permit decision is issued, 40 C.F.R. § 124.15 requires that the Regional Administrator “shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision.”

Region 9 received a single set of comments on the proposed permit on the letterhead of San Juan Citizens Alliance. The comments purported to represent the interests of three organizations: San Juan Citizens Alliance, Diné Citizens Against Ruining our Environment (Diné Care), and Clean Air Task Force. There were three signatures at the end of the comments:

² 40 C.F.R. § 124.20(d) provides for an additional three days to the prescribed time for appeal to account for service by mail.

Mike Eisenfeld of San Juan Citizens Alliance, Lori Goodman of Diné CARE, and Jeffrey Stant of Clean Air Task Force. Although Jeffrey Stant's signature line associated him with Clean Air Task Force, no individual address for him was provided, nor was he identified as the principal author of the comments. The letterhead of the comment letter, however, listed three addresses:

108 North Behrend, Suite I, Farmington, New Mexico, 87492
1022 ½ Main Avenue, Durango, CO 81302
10 West Main, Suite 104, Cortez, CO 81321

When Region 9 issued the Final Permit, it sent notification to San Juan Citizens Alliance at the first address listed on the letterhead (108 North Behrend, Suite I, Farmington, New Mexico, 87492), to Diné Care at the second address listed on the letterhead, and to Jeffrey Stant at the third address listed on the letterhead (10 West Main, Suite 104, Cortez, CO 81321).³

San Juan Citizens Alliance has not asserted that it did not receive notice of the permit decision, and the documentation provided by Region 9 indicates that such notice was given. Instead, both San Juan Citizens Alliance and Mr. Stant request more time on the grounds that Mr. Stant, who apparently was the principal author of the comments, never received notice. Whether Mr. Stant received notice, however, does not change the fact that notice was provided to San Juan Citizens Alliance. Therefore, we find no good cause for granting an extension of time to file a petition for review to San Juan Citizens Alliance, irrespective of whether notice was provided to Jeffrey Stant.

Mr. Stant asserts that he had no previous knowledge of, and has never been in

³ The text of the comments, in identifying the commenters, included an address for Diné Care (10A Town Plaza, Suite 138, Durango, CO 81301), as well as an address for Clean Air Task Force (77 Summer Street, 8th Floor, Boston, MA 02110). Service was not provided to either of these two addresses. Neither San Juan Citizens Alliance nor Jeffrey Stant have suggested that Region 9 should have mailed the notice letter to either of these two addresses.

communication with, the Cortez, Colorado address, notwithstanding the fact that he signed comments submitted on letterhead that listed the Cortez, Colorado address. Mr. Stant asserts that he should have instead received notice of the final permit decision at his mailing address in Indianapolis, Indiana or at his email address.⁴ The comments submitted however, contained neither of these addresses. Apparently, the Indiana address and Mr. Stant's email address were contained in an email correspondence from Mr. Stant to the Region prior to the submission of comments, in connection with a request for additional time to submit written comments on the draft permit. That email request was not submitted on behalf of, or in anyway identified as being connected to, the joint comments subsequently submitted with San Juan Citizens Alliance and Diné CARE.

As previously noted, the Region is required to provide notice to "each person who has submitted written comments or requested notice of the final permit decision." *See* 40 C.F.R. § 124.15(a). Nothing in Agency regulations requires the Region to provide notice of a final permit issuance to persons who have submitted requests for extensions of time to submit comments. *Id.* Here, the Region provided notice to the commenters at all three of the addresses provided in the letterhead of the comment letter. It was not required to associate these comments with Mr. Stant's earlier e-mail which did not reference either San Juan Citizens Alliance or Diné CARE and was not mentioned in the comment letter. Nor did Mr. Stant personally request notice of the

⁴There is nothing in the record to indicate when Mr. Stant received actual notice of the permit issuance. Neither San Juan Citizens Alliance nor Mr. Stant indicate what communication there may have been between them when San Juan Citizens Alliance timely received notice of the permit issuance. As the Region notes, it is logical to assume that there would have been some communication since Mr. Stant, as principal drafter of the comments, would have been expected to participate, if not take the lead, in drafting any petition for review.

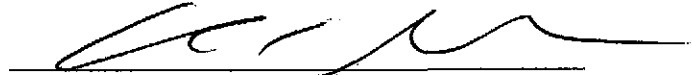
final permit decision as provided for in 40 C.F.R. § 124.15(a). Based on the information before us, we believe the Region reasonably notified the persons who had submitted comments on the permit.

Accordingly, both requests for an extension of time to file a Petition for Review of the final NPDES Permit issued by U.S. EPA Region 9 to BHP Billiton Navajo Coal Company (NPDES Permit No. NN0028193) are denied.

So Ordered.

Date: 4/24/08

ENVIRONMENTAL APPEALS BOARD



Edward E. Reich
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Denying Extension of Time to File Petition for Review** in the matter of *BHP Billiton Navajo Coal Company*, NPDES Appeal No. (08-06), were sent to the following persons in the manner indicated.

By Facsimile and Certified Mail Return Receipt Requested:

Jeffrey Stant
Director PPW Project / Safe Disposal Act
Clean Air Task Force
217 South Audubon Road
Indianapolis, IN 46219
Fax: 317-351-1170

Mike Eisenfeld
San Juan Citizens Alliance
108 North Behrend, Suit I
Farmington, NM 87402
Fax: 970-259-8303

By Certified U.S. Mail, Return Receipt Requested:

Lori Goodman
Dine CARE
1022 Main Avenue
Durango, CO 81302

By Facsimile and Pouch Mail:

Ann S. Nutt
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105
Fax: 415-947-3570
Mail Code: ORC-2

Kevin Minoli
Office of General Counsel
U.S. Environmental Protection Agency
12 Pennsylvania Ave., N.W. (2355A)
Washington, DC 20460
Fax: 202-564-1778
Mail Code: 2355A

Dated: APR 24 2008



Annette Duncan
Secretary