

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

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| In the Matter of: |) | |
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| BHP Copper, Inc., |) | NPDES Appeal No. 02-05 |
| Pinto Valley Operations |) | |
| |) | |
| Docket No. AZ 0020401 |) | |
| _____ |) | |

ORDER GRANTING MOTION FOR VOLUNTARY DISMISSAL OF APPEAL

In a petition for review filed on February 8, 2002, BHP Copper, Inc., Pinto Valley Operations (“BHP”) sought review of the National Pollutant Discharge Elimination System (“NPDES”) permit decision made by the Director, Water Division, United States Environmental Protection Agency Region IX (“Region IX”) on January 11, 2002. The decision approved the issuance of NPDES permit^{1/} No. AZ 0020401 (the “Permit”) to BHP. *See* Permit.

BHP objected to the Permit provisions (1) establishing a new outfall at a natural seep (section A.2); and (2) designating other seeps and springs as “process-related” (section B.5.b). BHP objected to both Permit provisions and sought their elimination from the Permit on the basis that they were predicated on findings of fact and/or conclusions of law that were clearly

^{1/} Under the Clean Water Act (“CWA”), persons who discharge pollutants from point sources into waters of the United States must obtain a permit in order for the discharge to be lawful. 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. 33 U.S.C. § 1342.

erroneous, or concerned an exercise of discretion or an important policy consideration that the Board should, in its discretion, review. *See* Petition at 2-10.

By joint motion filed on March 14, 2002, Region IX and BHP requested an extension of the briefing schedule from the previous deadline of April 1, 2002, to May 1, 2002, for Region IX to respond to BHP's Petition. *See* Joint Motion to Extend Briefing Schedule (Mar. 14, 2002). The parties represented that an extension would assist them in their efforts to resolve the matter without the need for the Board to determine the merits of the Petition. *Id.* By order dated March 18, 2002, the Board granted the parties' joint motion, directing Region IX to respond to BHP's Petition on or before May 1, 2002. *See* Order Granting Extension of Time (Mar. 18, 2002).

By a second joint motion filed on April 23, 2002, Region IX and BHP requested another extension of the briefing schedule from the previous deadline of May 1, 2002, to June 28, 2002, as the date by which Region IX should file its response to BHP's Petition. *See* Joint Motion to Extend Briefing Schedule (Apr. 23, 2002). The parties asserted that they were engaged in settlement discussions in an effort to resolve the matter upon consent and without the need for a determination by the Board. *See id.* at 2. In addition, the parties explained that the requested June 28, 2002 deadline was necessary because successful settlement negotiations would likely require a major modification to the Permit in order that changes agreed to by both parties could be incorporated; and because a major permit modification would require a 30-day public notice and comment period. *Id.* at 2-3. The Board granted the second joint motion by order dated April 25, 2002. *See* Order Granting Extension of Time (Apr. 25, 2002).

On June 10, 2002, Region IX notified the Board and BHP, as required by 40 C.F.R. § 124.19(d), that it would withdraw the two contested provisions of the Permit, and that it “prepared a new draft permit to incorporate changes to the two withdrawn conditions and to conform the terminology affected by changes throughout the permit.” (Letter from Strauss to Durr, Bingham, and Potts of 6/7/02, at 1). Region IX also stated that, pursuant to 40 C.F.R. § 124.16(a), it had identified the uncontested and severable conditions of the Permit, and it agreed with BHP that those conditions^{2/} became effective on February 10, 2002, and continue to be effective and enforceable. *See id.* at 1-2. Finally, Region IX announced its intention to provide the requisite notice, and to make the new permit available for public comment. *Id.* at 2-3.

On June 19, 2002, BHP requested that its appeal in the above-captioned matter be stayed until the noticing of a draft revised permit for public comment pursuant to 40 C.F.R. § 124.6, and the issuance of a revised permit. (Letter from Potts to Durr of 6/18/02, at 1). BHP stated that upon completion of this process, it would notify the Board and voluntarily dismiss its appeal. The Board granted BHP’s request for a stay and directed the parties to provide the Board with a status report of their efforts to resolve the matter if BHP’s appeal was not withdrawn within three months of the issuance of the Board’s June 20, 2002 order. *See Order Granting Stay of Appeal* (June 20, 2002).

^{2/} These conditions included all provisions and requirements in the final Permit, except for the two provisions to which BHP objected: (1) section A.2 of the final permit regarding discharge limitations for outfall 003b; and (2) section B.5 regarding seeps and springs. (Letter from Strauss to Durr, Bingham, and Potts of 6/7/02, at 1).

BHP withdrew its appeal by motion dated August 16, 2002. *See* Voluntary Dismissal (Aug. 16, 2002). Accordingly, BHP's Petition for Review is dismissed with prejudice.

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: _____ /s/ _____
Edward E. Reich
Environmental Appeals Judge

Dated: 08/21/02

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Granting Motion For Voluntary Dismissal of Appeal in the matter of BHP Copper, Inc., Pinto Valley Operations, NPDES Appeal No. 02-05 were sent to the following persons in the manner indicated:

By Certified Mail

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Dated: 08/21/02

/s/
Annette Duncan
Secretary