IN THE MATTER OF MINERS ADVOCACY COUNCIL

NPDES Appeal No. 91–23

ORDER DENYING REVIEW IN PART AND GRANTING REVIEW IN PART

Decided May 29, 1992

Syllabus

In 1991, U.S. EPA Region X issued a set of virtually identical NPDES permits to placer miners in Alaska. An industry trade group, the Miners Advocacy Council ("MAC") requested an evidentiary hearing on numerous conditions in the permit. MAC now appeals the Regional Administrator's decision to deny an evidentiary hearing with respect to eleven of those issues.

Held: Review is granted on the issue of whether 40 CFR § 125.3, 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 and authorizing discharges from one part of that process (sluicing) while not authorizing discharges from another part of that process (hydraulic removal of overburden). This is a legal issue and hence not suitable for an evidentiary hearing. It will be decided in accordance with the briefing schedule set forth in the order. Review is denied on the other issues raised in the petition.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Timothy J. Dowling (Acting).

Opinion of the Board by Judge Reich:

In 1991, U.S. EPA Region X issued a set of 31 virtually identical NPDES permits to individual placer miners in Alaska. The Miners Advocacy Council ("MAC") 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. Pursuant to 40 CFR § 124.75, the Regional Administrator denied an evidentiary hearing on many of those provisions and MAC now seeks review of the Regional Administrator's denial. As requested by the

Agency's Chief Judicial Officer, the Region filed a response to MAC's petition for review.[1]

I. *INTRODUCTION*

Placers are alluvial or glacial deposits of loose gravel, sand, soil, clay, or mud. To extract gold from placers, placer miners first remove surface materials, such as vegetation, non-gold-bearing gravel, organic-rich frozen material, and ice ("overburden"). They then excavate the gold-bearing material and typically place it in a sluice where the ore is separated from the rest of the material.

In 1988, the Agency promulgated national effluent guidelines for the gold placer mining industry at 40 CFR Part 440, Subpart M. The guidelines require as the best available technology economically achievable ("BAT") recirculation of all process water used in the gold recovery process and the use of settling ponds. 40 CFR § 440.143 (1990). *See also* 53 Fed. Reg. 18772 (May 24, 1988) (preamble to guidelines for gold placer mining industry). After water has been used in the beneficiation process (separation of gold from other materials), the water is channeled into a settling pond to allow particulate matter to settle to the bottom. Recirculation of process water is achieved by withdrawing from the settling pond water that has already been used in the beneficiation process, using the water in the beneficiation process again, and returning the process water to the same settling pond afterwards. While the guidelines require recirculation of all process water, they also recognize that stormwater and groundwater will drain into the placer mine area, so that more water will be in the system than can be recirculated in the beneficiation process. This excess water will cause "incidental" discharges. *Id.* For such discharges, the guidelines impose an effluent limitation of 0.2 ml/l for settleable solids. *Id.* The guidelines also impose certain best management practices. 40 CFR 440.148 (1990).

In accordance with the guidelines, the permits under consideration here incorporate an effluent limitation of 0.2 ml/l for settleable solids. They also contain effluent limitations of 0.05 mg/l for total arsenic, and site-specific limitations for turbidity, which limitations are required by state certification to ensure compliance with Alaska water quality standards for those two pollutants. 18 AAC 70.20.

[1] At that time, the Agency's Judicial Officers provided support to the Administrator in his review of permit appeals. Subsequently, effective on March 1, 1992, the position of Judicial Officer was abolished, and all cases pending before the Administrator, including this case, were transferred to the Environmental Appeals Board. *See* 57 Fed. Reg. 5321 (Feb. 13, 1992).

II. *DISCUSSION*

Under the rules governing this proceeding, there is no appeal as of right from the Regional Administrator's decision. 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 Environmental Appeals Board. *See IT Corporation (Ascension Parish Louisiana),* NPDES Appeal No. 83–2 (July 21, 1983); *Boston Edison Company,* NPDES Appeal No. 78–7 (August 28, 1978); *E.I. du Pont de Nemours & Company,* NPDES Appeal No. 78–2 (March 16, 1978); 44 Fed. Reg. 32887 (Preamble to 40 CFR Part 124). The petitioner has the burden of demonstrating that review should be granted. *See* 40 CFR § 124.91(a) (1990).

MAC requested an evidentiary hearing on numerous conditions in the permits. Some of those evidentiary hearing requests were denied by the Regional Administrator. In its petition for review, MAC argues that the Regional Administrator should have granted an evidentiary hearing on the eleven issues discussed below.

Mixing Zones: As noted above, the national effluent guidelines for gold placer mining impose a technology-based effluent limitation for settleable solids. MAC argues that when the Region incorporated this effluent limitation into the permit, it failed to take into account mixing zones. MAC has apparently confused technology-based effluent limitations with water quality standards. Water quality standards apply after pollutants have been discharged into the water. A mixing zone comes into play only when compliance with a water quality standard is being determined. A mixing zone allows a person testing the effluent's effect on the receiving waters to collect samples downstream of the facility where some dilution of the effluent has occurred. By contrast, technology-based effluent limitations, like the one under consideration here, apply prior to or at the point of discharge, thus precluding a person testing for compliance with a technology-based limitation from factoring in dilution when measuring pollutant concentrations in the effluent. *See* 40 CFR § 125.3(e). Thus, technology-based effluent limitations have nothing to do with mixing zones.

In the brief supporting MAC's Notice of Appeal, MAC refers to an agreement between it and the Region, in which the Region agreed to incorporate mixing zones provided by Alaska in amended certifications. That agreement has no application to this issue since State certifications relate only to water quality standards and not

to technology-based effluent limitations. In light of these considerations, we conclude that the Region was not required to consider a mixing zone when it incorporated the technology-based effluent limitation for settleable solids into the permit. Accordingly, review of this issue is denied.

Turbidity: An Alaska water quality standard restricts the allowable level of turbidity in receiving waters attributable to placer mining. 18 AAC 70.20. To meet this water quality standard, the permit contains an effluent limitation which directly limits the turbidity of the effluent as it leaves the mine-site and enters the receiving waters. MAC argues that an effluent limitation that directly limits turbidity is unnecessary because the limitation on settleable solids will control turbidity sufficiently to meet the water quality standard. This argument was raised and rejected recently in *In re 539 Alaska Placer Miners, more or less, and 415 Alaska Placer Miners, more or less,* NPDES Appeal No. 90–10, 90–11, at 13–14 (CJO, December 19, 1991), and MAC has presented no reason for departing from that precedent. Accordingly, review of this issue is denied.

Monitoring for Arsenic: Part I(A)(2)(d) of the permit, governing arsenic monitoring, requires that "[m]onitoring shall be conducted in accordance with accepted analytical procedures (Standard Methods, 16th Edition, 1985)." Such procedures have been approved under 40 CFR Part 136. Part II.C. of the permit, however, authorizes the use of monitoring procedures that have not been approved under Part 136. Pursuant to Part II.C., the Region has attached to the permit a sampling protocol governing the collection of arsenic samples, which has not been approved under Part 136. (AR 000446.) Apparently assuming that Part I(A)(2)(d) applies to the entire monitoring process, MAC argues that the two conditions are inconsistent. We disagree. The two permit sections are not in conflict because Part I(A)(2)(d) only prescribes how arsenic samples should be analyzed and where arsenic samples should be taken, while the sampling protocol only prescribes how arsenic samples should be taken and how they should be prepared for laboratory analysis. We note that the rules give the Region discretion to deviate from procedures approved under Part 136.[2] The Region has exercised that discretion

[2] 40 CFR § 122.41(j)(4) provides as follows:

> Monitoring results must be conducted according to test procedures approved under 40 CFR part 136 or, in the case of sludge use or disposal, approved under 40 CFR part 136 unless otherwise specified in 40 CFR part 503, unless other test procedures have been specified in the permit.

here by specifying procedures not approved under Part 136 with respect to one part of the monitoring process, while adhering to procedures approved under Part 136 with respect to the other part of the monitoring process. Petitioners have not offered any reason why the Region's exercise of discretion in this case should be reviewed. Accordingly, review of this issue is denied.

In its Notice of Appeal, MAC also states that, with respect to the arsenic limitation in the permits, "the question of whether or not a background measurement is needed and whether or not a mixing zone is authorized must be addressed." In its brief supporting the Notice of Appeal, however, MAC did not include any discussion whatsoever on these issues. Accordingly, we conclude that MAC has not met its burden of identifying a clear factual or legal error or a policy consideration or exercise of discretion that warrants review. Review of these issues is therefore denied.

Takings Clause: MAC argues that a permit requiring total recycle is a taking of a valuable property right for which the permittee must be compensated under the Fifth Amendment of the U.S. Constitution. A similar challenge was made in the case of *Rybachek* v. *EPA*, 904 F.2d 1276 (9th Cir. 1990). In its decision, the U.S. Court of Appeals for the Ninth Circuit rejected the claim for two reasons. First, the court concluded that no takings claim was ripe because the Rybacheks had not claimed that a particular piece of their property had been taken as a result of the promulgation of national effluent guidelines for gold placer mining. *Id.* at 1300. Second, the court concluded that a U.S. Court of Appeals was not the appropriate forum for such a takings claim since Congress has specified that takings claims be brought in the United States Claims Court or in certain cases the United States District Courts. *Id.* at 1300–01.

The Ninth Circuit's reasoning in *Rybachek* as it applies to the appropriate forum for takings claims would similarly apply to MAC's takings claim in this case. Any individual takings claim must be brought in the U.S. Court of Claims or the United States District Court. Section 124.91, governing NPDES permit appeals, does not authorize the Environmental Appeals Board to entertain individual takings claims. Accordingly, review of this issue is denied.

Stay of State Certification: The permit requires that reasonable measures be taken to intercept and divert groundwater around the plant-site. The language was required by State certification. Both parties agree that the Commissioner of the Alaska Department of

Environmental Conservation later stayed this requirement. MAC argues that, because the requirement has been stayed, it should be removed from the placer mining permits. The Region responds that, under 40 CFR § 124.55(b), the Region may not remove the condition until the Region receives either a modified certification or a notice of waiver from the State. The Region represents that it has received neither of these. 40 CFR § 124.55(b) provides as follows:

> If there is a change in the State law or regulation upon which a certification is based, or if a court of competent jurisdiction or appropriate State board or agency stays, vacates, or remands a certification, a State which has issued a certification under § 124.53 may issue a modified certification or notice of waiver and forward it to EPA. If the modified certification is received before final agency action on the permit, the permit shall be consistent with the more stringent conditions which are based upon State law identified in such certification. If the certification or notice of waiver is received after final agency action on the permit, the Regional Administrator may modify the permit on request of the permittee only to the extent necessary to delete any conditions based on a condition in a certification invalidated by a court of competent jurisdiction or by an appropriate State board or agency.

Whether the Region must receive a modified certification or notice of waiver from the State before it may remove a state-certified condition from the permit is a legal issue that does not involve a genuine issue of material fact. Accordingly, it is not suitable for an evidentiary hearing. Nevertheless, we must still determine whether, as a legal or policy matter, the issue should be reviewed.[3] The language of

[3] 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 Administrator even of purely legal issues involved in a permit decision to ensure that the Envi-

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Section 124.55(b) clearly suggests that a mere stay of a certified permit requirement does not authorize the Agency to remove that requirement from the permit. To undo a State certification, Section 124.55(b) requires the Agency to wait until the State takes a second step by forwarding a modified certification or notice of waiver to the Agency. As a matter of policy, this provision makes sense because the Agency should not undo a State certification unless it gets a clear authorization from the State. Because the State did not forward a notice of waiver or modified certification in this case, we conclude that the Region was not clearly erroneous in refusing to remove the certified condition from the permit. Accordingly, review of this issue is denied.

Inspection and Entry Requirements: Section 122.41(i) of the NPDES regulations contains inspection and entry requirements that must be included in all NPDES permits. The permits at issue here contain inspection and entry requirements identical to those required in 40 CFR § 122.41(i). Section 122.41(i) essentially provides that the permittee must allow the Region to inspect the facility "at reasonable times."

MAC is concerned that the inspection and entry provisions in the permits will allow inspectors to visit a mine-site when no miners are present. MAC believes that a miner should be present during any inspection to ensure that the inspection is conducted in a safe manner and in accordance with regulations issued by the Mine Safety and Health Administration. MAC argues that it is not challenging the regulation itself, but the manner in which the regulation has been applied in the permit.

The Region responds that MAC has not preserved this issue for review because, although it was raised during the comment period, MAC did not request an evidentiary hearing on the issue. The Region also argues that a challenge to the permit condition is tantamount to a challenge to the regulation requiring its inclusion in the permit. The Region points out that the time for challenging the regulation has long since passed. The Region further asserts that MAC's real concern appears to be the manner in which the Region might implement the permit condition in the future, and that such concerns do not present an actual controversy ripe for review.

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ronmental Appeals Board will have an opportunity to review any permit before it will be final and subject to judicial review.

We agree with the Region. A review of MAC's evidentiary hearing request reveals that MAC failed to request an evidentiary hearing on the issue and thus failed to preserve the issue for appeal. *See* 40 CFR § 124.91(a) (authorizing appeals of initial decisions or denials of hearing requests). Accordingly, review of this issue is denied.

Constitutionality of the Reporting Requirements: In its Notice of Appeal, MAC lists as an issue on appeal whether the reporting requirements in the permit constitute compulsory self-incrimination in violation of the Fifth Amendment of the U.S. Constitution. In its brief supporting the Notice of Appeal, however, there is no discussion whatsoever concerning this issue. Under the rules governing this appeal, this naked assertion that a permit provision violates the Constitution is not sufficient to warrant review. We conclude that, with respect to this issue, MAC has not carried its burden of identifying a clear legal or factual error or an important policy matter or exercise of discretion that should be reviewed. Accordingly, review of this issue is denied.

Oil Spill Plan: The permit imposes the following requirement:

> The operator shall maintain fuel handling and storage facilities in a manner which will prevent the discharge of fuel oil into the receiving waters or adjoining shoreline. A Spill Prevention Control and Countermeasure Plan (SPCC Plan) shall be prepared in accordance with provisions of 40 CFR Part 112 for facilities storing 600 gallons in a single container above ground, 1320 gallons in the aggregate above ground, or 42,000 gallons below ground.

In challenging this provision, MAC asserts that "since placer mining is not a petroleum related industry", it is inappropriate to apply this provision to placer miners.

Section 112.1(b) applies to owners and operators of non-transportation-related onshore and offshore facilities engaged in "drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil and oil products" which, due to their location "could reasonably be expected to discharge oil in harmful quantities * * * into or upon the navigable waters of the United States or adjoining shorelines." Thus MAC's assertion that placer mining is not "a petroleum related industry" does not directly address the applicability of § 112.1(b).

The permit requirement for an SPCC plan applies only to facilities actually storing oil in quantities in excess of the exceptions provided for in § 112.1(d)(2),[4] and "storing" is an activity which can trigger the applicability of § 112.1(b). Therefore, the application of § 112.1(b) to placer miners is appropriate if their facilities could reasonably be expected to discharge oil in harmful quantities into or upon the navigable waters of the United States or adjoining shorelines.

The Region, in responding to comments on the proposed permits, concluded that "because most placer miners are located near rivers or streams it is reasonable to expect that discharges of fuel could enter waters of the United States." *Response to Comments Placer Mining NPDES Permits 1991* at 6. MAC has not provided any information challenging this conclusion.

We note that a determination that a facility could not reasonably be expected to discharge oil into or upon navigable waters or adjoining shorelines must be made based on "the geographical, locational aspects of the facility (such as proximity to navigable waters or adjoining shorelines, land contour, drainage, etc.)" 40 C.F.R. § 112(d)(l)(i). This is clearly a site-specific determination. Where, as here, there is a reasonable basis for the SPCC-related permit provision, it is incumbent upon any person who believes that that provision is inapplicable to a particular site to challenge that provision of that particular permit and make a demonstration consistent with § 112(d)(l)(i).[5] We have no such challenge before us. Review of this issue is therefore denied.

Definitions of Certain Permit Terms: MAC wants certain permit terms defined in the permit, specifically: "waters of the United States," "reasonable steps," "diversion," "discharge," "surface waters," and "groundwater." The Region responds that MAC failed to preserve this issue for review because it did not request or suggest such

[4] As noted in footnote 7 of the Region's response, there is a slight difference between the regulations and the permit as applied to facilities precisely at the designated cut off points. For the reasons discussed in that footnote, we agree that the permit is not defective on this account. *EPA Response to Notice of Appeal and Petition for Review by Miners Advocacy Council* at 15.

[5] As noted in a prior appeal, *In the Matter of Kenneth H. Manning,* NPDES Appeal No. 87–19, at 4 (CJO, March 3, 1989), MAC's participation in permit appeal proceedings is not as a permit applicant; instead, it is a trade association which presents views on issues of common interest to its membership. MAC's general challenge to the permits does not substitute for challenges to individual permits where the challenges require site-specific determinations. While MAC could attempt to make such a site-specific demonstration, it has not attempted to do so in this case.

definitions during the comment period and MAC has not shown good cause for failing to raise them at that time. *See* 40 CFR § 124.76 ("No issues shall be raised by any party that were not submitted to the administrative record required by § 124.18 as part of the preparation of and comment on a draft permit unless good cause is shown for the failure to submit them."). MAC contends that it did raise them during the comment period by incorporating by reference the comments it made during an earlier comment period for a different set of placer mining permits issued in 1989. The Region, however, contends that the definitions requested during the earlier comment period were not for the same terms as those for which definitions have been requested here. This assertion is not entirely correct. A review of the file for the 1989 permit appeals discloses that Lela Bouton requested a definition of "surface waters" during the comment period for the 1989 permits. (Letter dated April 2, 1989 from Lela Bouton to Joe Roberto, at 3.) Nevertheless, it does not appear that the other terms for which definitions are now requested were raised during the comment period for the 1989 permits, and in any event, MAC has not offered any reasons why the Region's failure to define these terms constitutes a clear factual or legal error or involves a policy consideration or exercise of discretion that warrants review. Review of this issue is therefore denied.

Sampling Procedures: The permit contains sampling procedures that were developed by the permit writer. MAC charges that these procedures may not be placed in the permit because they are not based upon a regulation or statutory provision. MAC apparently is concerned that leaving such procedures to the discretion of the permit writer might lead to abuses of that discretion. MAC does not, however, argue that the procedures at issue here are unreasonable or inappropriate or that such discretion was otherwise abused in this case. 40 CFR § 122.41(j) provides that the permit writer may deviate from sampling procedures prescribed in the rules:

> Monitoring results must be conducted according to test procedures approved under 40 CFR part 136 * * * *unless other test procedures have been specified in the permit.*

(Emphasis added.) This provision gives the Region a large measure of discretion in selecting test procedures. Accordingly, procedures are not invalid simply because they were developed by the permit writer in an exercise of discretion. An exercise of discretion, of course, could be challenged as unreasonable or inappropriate, but MAC has not raised such a challenge. Accordingly, review of this issue is denied.

Hydraulic Removal of Overburden: According to MAC, many miners remove overburden hydraulically, i.e., with pressurized water. Either stage of the mining process—sluicing or hydraulic removal of overburden—could cause a discharge of pollutants into waters of the United States. The permits issued to placer miners, however, only authorize discharges caused during the sluicing phase of the process. Part I(E)(3) of each placer mining permit specifically provides that discharges from hydraulic removal of overburden are not authorized under the permit. MAC challenges this condition as an unreasonable prohibition of hydraulic removal of overburden in violation of 40 CFR § 125.3.

> Section 125.3(c)(3) provides that, [w]here promulgated effluent limitations guidelines only apply to certain aspects of the discharger's operation, or to certain pollutants, other aspects or activities are subject to regulation on a case-by-case basis in order to carry out the provisions of the Act.

In this case, the sluicing process is covered by the national effluent guidelines for gold placer mining, but hydraulic removal of overburden is not covered. *See Rybachek* v. *EPA,* 904 F.2d 1276, 1298 (9th Cir. 1990). Thus, discharges resulting from hydraulic removal of overburden must be regulated through permit limitations that are established on a case-by-case basis. *Id.* Under Section 125.3(c)(2), when setting effluent limitations for activities or processes that are not covered by national effluent guidelines, the permit writer must apply the appropriate factors listed in Section 125.3(d). Section 125.3(d), in turn, provides that, in setting BPT and BAT limitations on a case-by-case basis pursuant to § 125.3(c), the permit writer must consider, inter alia, the "process employed." 40 CFR §§ 125.3(d)(1)(ii) and 125.3(d)(3)(iii).

MAC contends that the Region violated Section 125.3 by not authorizing discharges caused by hydraulic removal of overburden, since that method is the "process employed" by many placer miners. The Region responds that, under the permit, a miner is free to use hydraulic removal of overburden to uncover ore-bearing material as long as it recycles all water used for that purpose, so that none of it causes a discharge of pollutants into waters of the United States. The Region states that, if miners cannot totally recycle the water used in hydraulic removal of overburden, they must obtain a separate permit for discharges of pollutants into waters of the United States caused by that activity.

Whether the permits issued to placer miners who use hydraulic removal of overburden should authorize and set limitations for discharges caused by that activity is a legal issue that does not involve a genuine issue of material fact. Hence, it would not be suitable for an evidentiary hearing. Nevertheless, we must still determine whether, as a legal or policy matter, the issue should be reviewed. In the fact sheet for the 1989 placer mining permits, the Agency describes overburden removal as one of the "[e]ssential components" of placer mining. (Fact Sheet for 1989 Permits, at 2.) If removal of overburden is an essential component of placer mining, the question arises whether it is permissible for the Agency to divide up the integrated placer mining process and authorize discharges from only one part of the process, while specifically declining to authorize discharges from another part of the process. We conclude that review should be granted on this issue to further explore this question. A briefing schedule is set out in the conclusion below.

III. *CONCLUSION*

In sum, we conclude that one of the issues raised in MAC's appeal should be reviewed. This issue relates to the hydraulic removal of overburden.

Section 124.91(g), 57 Fed. Reg. 5337 (Feb. 13, 1992), governing NPDES permit appeals, provides that:

> [t]he petitioner may file a brief in support of the petition within 21 days after the Environmental Appeal Board has granted a petition for review. Any other party may file a responsive brief within 21 days of service of the petitioner's brief. The petitioner then may file a reply brief within 14 days of service of the responsive brief.

MAC is hereby invited to file a brief on the issue for which review has been granted in the foregoing discussion. The brief must be filed by June 22, 1992. The Region may then file a responsive brief and MAC may file a reply brief in accordance with the schedule provided in § 124.91(g). As for the rest of the issues raised by MAC, review is denied.

So ordered.