

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

_____)	
In re:)	
)	NPDES APPEAL No. 14-04
Lee Ranch Coal Company,)	
El Segundo Mine)	
)	
NPDES Permit No. NM0030996)	
_____)	

**RESPONDENT EPA REGION 6'S RESPONSE TO LEE RANCH COAL
COMPANY'S PETITION FOR REVIEW AND MOTION TO DIMISS OR DENY
THE PETITION**

The United States Environmental Protection Agency Region 6 (EPA Region 6) respectfully submits to the Environmental Appeals Board (EAB) this Response and Motion to Dismiss or Deny.

EPA Region 6 issued the above-referenced NPDES permit to Lee Ranch Coal Company (LRCC) on September 30, 2014, based on a permit application submitted by LRCC for its El Segundo mine in central New Mexico pursuant to the Clean Water Act, 33 U.S.C. §1251 *et seq.* (CWA). *See* 33 U.S.C. §1342, CWA §402; Administrative Record document number (hereinafter, the Administrative Record will be abbreviated "AR") 7. LRCC filed its Petition for Review with the EAB on November 3, 2014. AR 8. On April 20, 2015, the EAB filed an Order Scheduling Briefing, ordering the EPA Region 6 to file a response to the petition, a certified index of the administrative record,

and the relevant portions of the administrative record on or before Wednesday, May 6, 2015. AR 9. On May 6, 2015, EPA Region 6 sent a letter to LRCC notifying it that EPA Region 6 is terminating the above-referenced permit that is the subject of this petition.

AR 10.

EPA Region 6 moves the EAB to dismiss or deny the petition pursuant to the CWA, CWA regulations, or as moot.

I. ALLEGED FACTS BY THE LRCC PETITION

EPA Region 6 is terminating the permit because of the facts alleged by LRCC in its petition. The facts as alleged by LRCC are that it has not discharged ever in the entire duration of its activities for which it requests permit coverage and that, even if there were a discharge, there is no evidence in the administrative record that there ever would be a discharge from the facility that would reach a water of the United States as defined by the CWA and thus be subject to CWA jurisdiction.

According to LRCC's petition:

To date, no discharges have occurred from the El Segundo Mine. AR 8, at 2.

* * *

[T]he relevant receiving waters are the Kim-me-ni-oli Valley Tributary, thence into Chaco River, a tributary of San Juan River (about 100 miles northwest of EJ Segundo Mine) and to Inditos Draw, a tributary of Vought Draw, which flows into Arroyo Chico, then to Rio Puerco (about 60 miles southeast of the mine area), a tributary of the Rio Grande River. Kim-me-ni-oli Valley and Inditos Draw are ephemeral (unclassified) receiving waters pursuant to 20.6.4.97 NMAC. AR 8, at 2 (emphasis added).

* * *

The record, however, does not demonstrate that the Region conducted a reasonable potential assessment in accordance with 40 C.F.R. § 22.44(d)(1)(ii) to determine whether discharges from the mine, 100 miles from the San Juan River by the Region's own account, "cause, has the reasonable potential to cause, or contribute to" an exceedance of Colorado River salinity standards. AR 8, at 4 (emphasis added).

* * *

The Region clearly erred as a matter of law and fact and abused its discretion since it has not set forth any data or support to justify a reasonable potential that discharges from Outfalls Nos. 1-41 will cause any salt loading to the Colorado River. The Permit flatly imposes a total TDS limit of 2,000 lbs (one ton) per day for all subject outfalls without the Region having first determined there is a reasonable potential that the TDS discharge could cause or contribute to any salt loading in the Colorado River via the Kimme-ni-o-li Valley Tributary, Chaco River and the San Juan River - located 100 miles away from the El Segundo Mine. AR 8, at 7.

* * *

According to the Pact Sheet, the Region merely indicated that . . . the . . . limit will be established for outfalls leading to the San Juan River, without any documentation of a reasonable potential determination that such discharges will . . . reach the Colorado River . . . AR 8, at 8-9 (emphasis added).

The petitioner alleges that there has never been a discharge from the facility, but also alleges that EPA has no evidence in the administrative record that LRCC has a "reasonable potential" to cause or contribute to an exceedance of water quality standards. The allegation that there is no evidence of a reasonable potential analysis is equivalent to an allegation that there is no evidence that LRCC has a discharge that reaches a 'water of the United States' for purposes of the CWA. "Limitations must control all pollutants or pollutant parameters . . . which the Director [Regional Administrator] determines are or

may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard” 40 CFR 122.44(d)(1)(i) (emphasis added); 40 C.F.R. §124.2 (Definitions) (for purposes of these regulations, “*Director* means the Regional Administrator”). “*Discharge* when used without qualification means the “discharge of a pollutant.”” 40 C.F.R. 122.2 (emphasis in original). “*Discharge of a pollutant* means . . . [an] addition of any “pollutant” . . . to “waters of the United States”” *Id* (emphasis in original). EPA Region 6 at this time is neither admitting nor denying any of the facts alleged in the petition. EPA Region 6 admits, however, that its current administrative record does not contain evidence of a reasonable potential to discharge any pollutant to a water of the United States, a point that LRCC makes numerous times in its petition.

II. FIRST ARGUMENT—TERMINATION UPON EPA REGION 6 NOTICE (CWA §402(b), 40 C.F.R. §124.5(a), and PERMIT TERMS)

The following CWA provisions and federal regulations allow EPA Region 6 to terminate a permit during its term by notice to the permittee.

For clarification of the regulations, pursuant to the CWA §402(a)(3), “[t]he [NPDES] permit program of the Administrator . . . shall be subject to the same terms, conditions, and requirements as apply to a state permit program and permits issued thereunder under subsection (b) of this section.” Section 402(b) of the CWA states that “[s]tate permit programs [thus, including a permit program of the Administrator] has the authority “(1) [t]o issue permits which . . . (C) can be terminated for cause.” 33 U.S.C. §1342(b)(1)(C).

Permits can be terminated for “cause,” “including, but not limited to,” a number of reasons. *Id.* The process for such a permit termination is provided for in the federal regulations. “Permits . . . may be . . . terminated either at the request of any interested person (including the permittee) or upon the Director’s [Regional Administrator’s] initiative . . .” 40 C.F.R. §124.5(a). EPA Region 6 has taken the “initiative” to terminate LRCC’s NPDES permit subject to this case and provided notice to LRCC of this termination. AR 10. There is no evidence in the administrative record of a discharge subject to the CWA jurisdiction. A lack of jurisdiction under the CWA to issue a permit to LRCC is “cause” for permit termination, even though it is not one of the explicitly enumerated “causes” listed as examples in the CWA because permit termination under the CWA is “not limited to” the enumerated causes. As a result, the LRCC NPDES permit challenged here is terminated by EPA Region 6.

III. SECOND ARGUMENT—TERMINATION OF PERMIT DUE TO THE ELIMINATION OF ANY DISCHARGE (40 C.F.R. §122.64(a))

The associated federal regulations also provide for the termination of permits for cause. The regulations (Termination of permits) provide certain enunciated reasons for “cause:”

- (a) The following are causes for terminating a permit during its term, or for denying a permit renewal application:

* * *

- (4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).

40 CFR §122.64(a)(4).

Section 122.64(b) provides a procedural process for EPA Region 6 to terminate the permit for cause,

(b) The Director [Regional Administrator] shall follow the applicable procedures in part 124 or part 22 of this chapter, as appropriate . . . in terminating any NPDES permit under this section, except that if the entire discharge is permanently terminated by elimination of the flow . . . , the Director [Regional Administrator] may terminate the permit by notice to the permittee. Termination by notice shall be effective 30 days after notice is sent, unless the permittee objects within that time. If the permittee objects during that period, the Director [Regional Administrator] shall follow part 124 of this chapter . . . for termination.

40 C.F.R. §122.64(b); *See also* discussion *supra*, regarding termination pursuant to 40 C.F.R. §124.5(a).

This ability to terminate the permit for the elimination of any discharge is also provided for in §(b)(4):

(b) The following are causes for terminating a permit during its term, or for denying a permit renewal application:

* * *

(4) A change in any condition that requires either a temporary or permanent reduction or elimination of any discharge or sludge use or disposal practice controlled by the permit (for example, plant closure or termination of discharge by connection to a POTW).

40 CFR §122.64(b)(4).

An additional process for permit termination is found in §124:

In the case of EPA-issued permits [i]n addition, termination of an NPDES permit for cause pursuant to 122.64 [*supra*] of this chapter may be accomplished by providing written notice to the permittee, unless the permittee objects. Termination by notice shall be effective 30 days after notice is sent, unless the permittee objects within that time If the permittee objects during that period, the Director [the Regional Administrator] shall follow part 124 of this chapter [C.F.R. Title 40, Chapter I—“Environmental Protection Agency”]. . . .

40 C.F.R. §124.5(d)(3).

EPA Region 6 has the authority to terminate this permit because of, in the view of EPA, the ‘elimination’ of any previous presumed potential discharge by the permittee.¹ And, there currently is no evidence in the administrative record otherwise. 40 C.F.R. §122.64(b). As a result, because EPA Region 6 has notified LRCC, by letter and through this reply and motion, the LRCC NPDES permit challenged here is terminated by EPA Region 6.

This elimination of a discharge, and associated termination of the permit, is also with the “Permit Modification and Reopener” provision in the permit itself. The permit states:

This permit authorizes the discharge of wastewater from over 52 outfalls in 3 distinct subcategories. Throughout the permit term, as mine operations continue in a linear fashion, new outfall locations may NPDES PERMIT NO. NM0030996 Page 2 of PART II become necessary to treat runoff and other outfalls may need to be authorized under a different subcategory. Therefore, EPA may modify the list of Outfalls in the Attachments during the permit term to add, terminate or reclassify a discharge that occurs during the anticipating course of the existing mining activities. This will be accomplished thru a minor modification of the permit in accordance with 40 CFR Part 122.63.

AR 7 (NPDES PERMIT NO. NM0030996 PART II (C)). Federal regulation §122.63 states that: “Upon the consent of the permittee, the Director [Regional Administrator] may modify a permit . . . without following the procedures of part 124 [40 C.F.R. §124].” 40 C.F.R. §123.63 (“Minor modifications of permits”); *See* footnote 1.

¹ EPA Region 6 also views the LRCC petition as a request by LRCC to EPA Region 6 to terminate its permit (a notice of termination) because of the lack of jurisdiction under the Clean Water Act, or because of the elimination of any discharges. While LRCC requests relief from a portion of its NPDES permit, its allegations in the petition are that no discharges subject to the Clean Water Act have occurred and that there is no evidence in the administrative record that they will occur. Again, without a discharge, there is no need for a permit under the Clean Water Act. Likewise, EPA Region 6 views the petition as consent for eliminating any discharges subject to the CWA and thus, consent for permit termination under the terms of its permit.

IV. PERFECTING TERMINATION THE PERMIT

If the termination of the permit by EPA Region 6 is subject to 40 C.F.R. §122.64(b), and LRCC objects within 30 days after EPA Region 6's notice, EPA Region 6 is prepared to follow 40 C.F.R. Part 124, and commence a proceeding with the Regional Hearing Clerk (RHC) pursuant to 40 C.F.R. §22.13 by filing a complaint with the RHC pursuant to 40 C.F.R. §22.14.

If EPA Region 6 is required to follow the draft permit process in 40 C.F.R. §124 for termination of the permit, EPA Region 6 will assemble the appropriate documents and provide public notice and comment for the permit termination. Therefore, regardless of whether LRCC objects to EPA's decision to terminate, or whether procedures in 40 C.F.R. §22 or §124 are necessary, any future permit termination proceedings will be conducted within the procedures followed by the RHC or pursuant to the draft permit procedures--not pursuant to the EAB process for a petition for review of a permit.

V. APPLICABILITY OF THE CWA

EPA Region 6's termination upon notice, termination upon request by LRCC, and LRCC's allegations that there is no evidence in the administrative record of a discharge subject to the CWA jurisdiction justifies permit termination.² The CWA regulates the "discharge of any pollutant" 33 U.S.C. §1342, CWA §402. The term "discharge of a pollutant" means any addition of any pollutant to navigable waters" 33 U.S.C. §1362, CWA §502. The reason EPA Region 6 is terminating the permit is because there

² EPA Region 6 notes that the termination of the permit is also appropriate for the Western Alkaline Coal Mining Subcategory Effluent Limitations terms that are in the permit.

is no evidence in the administrative record that there would be a discharge that is subject to the CWA. *See, e.g., National Resources Defense Council v. EPA*, 273 U.S. App. D.C. 180, 859 F.2d 156, at 170 (D.C. Cir. 1988) (noting that “the [Act] does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants”); *See also, e.g., Waterkeeper Alliance Inc. v. EPA*, 399 F.3d 486, at 504 (2nd Cir. 2005) (“Thus, in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges”) (EPA cannot impose obligations on activities “regardless of whether or not they have, in fact, added any pollutants to the navigable waters, i.e. discharged any pollutants no permit is needed because there is no potential to discharge.”). Accordingly, EPA Region 6 is moving the EAB to dismiss or deny this petition.

VI. THIRD ARGUMENT—THE PERMIT IS WITHDRAWN AND THE PETITION IS MOOT

The petition also should be dismissed or denied as moot. EPA Region 6, by way of this response is hereby unilaterally withdrawing, in its entirety, the above-referenced permit that is the subject matter of this petition. EPA Region 6 has also provided notice of this withdrawal in the letter of permit termination to LRCC and the New Mexico Environment Department. AR 10; 40 C.F.R. §124.19(j); *In re: West Bay Exploration Co.*, NPDES Appeal No. 14-66 (EAB April 16, 2013) (Order Dismissing Petitions for Review as Moot). In the *West Bay* case, the EAB held:

Generally, a Regional Administrator is allowed, upon notification to the Board and any interested parties, to withdraw a permit unilaterally if such action is taken prior to 30 days after the Region files its response to the petition for review. The reason for limiting the period as to when permits may be *unilaterally* withdrawn is "to ensure that unilateral withdrawal of a permit will occur before the Board has devoted significant resources to the substantive consideration of an appeal." Revisions to Procedural Rules to Clarify and Applicable Appeals Before Environmental 5281, 5282 (Jan. 2013).

In re: West Bay Exploration Co., NPDES Appeal No. 14-66 (EAB April 16, 2013).

VII. REQUESTED RELIEF

EPA Region 6's first preference is its request that the EAB order that the permit has been properly terminated pursuant to the CWA and CWA regulations and to order that the petition is dismissed or denied with prejudice. EPA Region 6's second preference is its request that the EAB order that the permit has been withdrawn in its entirety and order that the petition is dismissed or denied with prejudice as moot. The attorney for EPA Region 6 has attempted to contact the attorney for LRCC via phone and email and has not been able to reach him as of the filing of these documents.

Respectfully submitted this 6th day of May, 2015.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 6**



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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May, 2015, copies of the foregoing were served upon the following via E-Filing.



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