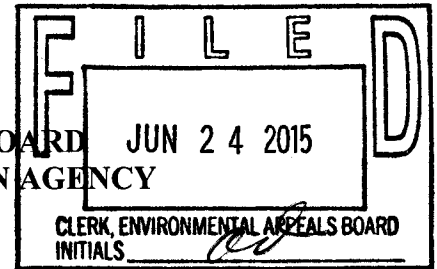


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



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

ORDER SCHEDULING ORAL ARGUMENT

Currently pending before the Environmental Appeals Board ("Board") is a petition from Lee Ranch Coal Company ("LRCC") requesting that the Board review a National Pollutant Discharge Elimination System ("NPDES") renewal permit, Permit No. NM0030996 ("Permit"), that U.S. Environmental Protection Agency ("EPA") Region 6 ("Region") issued to LRCC pursuant to section 402 of the Clean Water Act, 33 U.S.C. § 1342. The Permit authorizes LRCC to discharge water from specified point sources at the El Segundo Mine into the Kim-meni-oli Valley Tributary in New Mexico. In its petition, LRCC challenges two permit conditions the Region added to the renewal permit that were not in the original permit: (1) a total dissolved solids effluent limit of 2,000 lbs/day, which the Region imposed under the Colorado River Salinity Control Program; and (2) a requirement to submit a Sediment Control Plan within six months of the Permit's issuance, which the Region imposed under the Western Alkaline Coal Mining Rule. Petition at 1, 4, 13.

On November 26, 2014, the parties requested that the Board stay the case to allow for settlement negotiations. Stipulation and Joint Motion to Stay Proceedings at 1. The parties also stipulated that pursuant to 40 C.F.R. § 124.16, the two contested conditions of the permit

would be stayed and that any conditions of the prior permit that corresponded to the contested conditions would remain in place. *Id.* at 2. The Board granted the stay request and later extended the stay until April 15, 2015. On that date, the parties reported that they had reached “an impasse” and were unable to informally resolve the matter. Joint Third Status Report at 2. The Board therefore issued an order scheduling response and reply brief due dates.

On May 6, 2015, the Region sent Petitioner and the State of New Mexico a letter stating that it was both terminating the NPDES permit and unilaterally withdrawing it. *See* Letter from Richard Wooster, Acting Assoc. Dir., Planning and Analysis Branch, EPA Region 6, to Brian P. Dunfee, Dir., LRCC, at 1 (May 6, 2015). Mr. Wooster also asserted in the letter that the permit was void. *See id.* Based on this letter, the Region also filed a response and motion requesting that the Board dismiss the case and/or deny the petition, citing several alternative legal grounds in support of its motion. EPA Region 6’s Response to Lee Ranch Coal Co.’s Petition for Review and Motion to Dismiss or Deny (“Motion”) at 2, 9-10.

The Region first contends that the Board should grant its motion because the Region has issued a notice to terminate the permit relying on several alternate legal grounds. *See id.* at 4-7. The Region further argues that because of its action terminating the permit, the termination processes outlined in EPA’s regulations govern now, rather than the regulations pertaining to petitions filed with the EAB to review a permit. *Id.* at 8. Second, the Region describes two separate, distinct, alternate processes it may follow, suggesting that it has not yet determined the precise basis for the permit’s termination. *See id.* (stating the Region may follow processes under part 22 or under part 124). Finally, the Region argues that its unilateral withdrawal of the permit pursuant to 40 CFR § 124.19(j) has rendered the case before the Board moot. *Id.* at 9-10.

In response to the May 6, 2015 letter, Petitioner sent the Region a letter objecting to the “notice of termination” and the Region’s plan to terminate LRCC’s permit. Letter from Randolph S. Lehn, Dir., Env’tl. Servs. SW, Peabody Energy, to William K. Honker, Dir., Water Quality Protection Div., EPA Region 6 (May 20, 2015). LRCC also filed a reply brief with the Board objecting to both the dismissal and the denial requests. *See generally* Reply and Opposition by LRCC to Region 6 Response to Petition and Motion to Dismiss or Deny Petition (May 21, 2015).

Upon review of the Petition, the Motion, LRCC’s reply brief, and the attachments to these filings, the Board has determined that oral argument will assist it in its deliberations on this matter. *See* 40 C.F.R. § 124.19(h) (authorizing oral argument at the Board’s discretion). The Board is especially interested in hearing the parties’ views about the issues listed below. The Board orders the Region to consult with EPA’s Office of Water and EPA’s Office of General Counsel as it prepares for oral argument, as it expects the views represented to the Board will reflect the Agency’s views, not just those of the Region, regarding the NPDES permitting, withdrawal, and termination processes.

Issues to be Discussed at Oral Argument

The Board orders the parties to address the following issues:

(1) For the Region: What termination process is the Region planning to follow given LRCC’s objection to the Region’s May 6, 2015 termination letter? For LRCC: What termination process do you believe governs if the Region proceeds with its stated intent to terminate the permit?

(2) What NPDES permit is currently in effect pending completion of the termination process? In other words, what is the current status of: the renewal permit; the original NPDES permit; the contested provisions of the renewal permit; the uncontested provisions of the renewal permit?

- (3) What is the legal relationship between simultaneously pursuing withdrawal and termination of a permit?
- (4) Has the Region met the requirements for “unilateral withdrawal” of the permit under 40 C.F.R. § 124.19(j), given the Region’s statements to the Board that it does not intend to prepare a new draft permit?
- (5) In light of the stipulations made by the Region identifying only the two contested provisions of the renewal permit as stayed (*see* Stipulation and Joint Motion to Stay Proceedings at 2), and the provisions in 40 C.F.R §§ 124.15 and 124.16, what is the legal basis for the Region’s May 6, 2015 letter stating it is unilaterally withdrawing the permit in its entirety?
- (6) Should the Board find that the Region properly withdrew the permit, what NPDES permit is currently in effect pending completion of the withdrawal process? In other words, what is the current status of: the renewal permit; the original NPDES permit; the contested provisions of the renewal permit; the uncontested provisions of the renewal permit?

Schedule and Order

The parties are hereby ordered to participate in an oral argument beginning at 1:30 p.m. Eastern Time on July 21, 2015, in the Administrative Courtroom, U.S. Environmental Protection Agency, William Jefferson Clinton East Building, Room 1152, 1201 Constitution Avenue, N.W., Washington, D.C. At this oral argument, the Board will not expect the parties to provide opening statements and/or arguments. Instead, the Board will ask the parties questions related to the issues listed above. The Board has allocated ninety (90) minutes for oral argument, with 45 minutes for each side. LRCC may reserve up to 10 minutes of its time if it chooses for rebuttal.¹

¹ The part 124 regulations state that the permit issuer may not unilaterally withdraw a permit after the Board holds oral argument. 40 C.F.R. § 124.19(j). The Board does not intend this order scheduling

The parties must notify the Clerk of the Board in writing by July 2, 2015, of the names of counsel who will present argument. If counsel for either of the parties wishes to participate in this oral argument using the videoconferencing equipment in the Administrative Courtroom instead of appearing in person, counsel must contact the Clerk of the Board at (202) 233-0122 no later than July 2, 2015, to make arrangements for use of such equipment.

So ordered.²

Dated: *June 24, 2015*

ENVIRONMENTAL APPEALS BOARD

By: *Leslye M. Fraser*
Leslye M. Fraser
Environmental Appeals Judge

oral argument to foreclose the Region's authority to unilaterally withdraw the renewal permit under section 124.19(j) should the Board find that the Region has authority to do so in this case. The Region's letter and Motion asserting it has unilaterally withdrawn the permit predates the date of this order scheduling oral argument. Moreover, the primary purpose of the relevant provisions in 40 C.F.R. § 124.19 (j) is to allow the Board to manage its docket efficiently.

² The panel of judges presiding over this matter is comprised of Leslye M. Fraser, Mary Kay Lynch, and Kathie A. Stein.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Scheduling Oral Argument in the matter of Lee Ranch Coal Co., NPDES Appeal No. 14-04, were sent to the following persons in the manner indicated:

By Pouch Mail:

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Michael Shapiro
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Office of Water
MC 4101M
U.S. EPA

Dated: JUN 24 2015



Annette Duncan
Secretary to the Board