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ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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IN THE MATTER OF

EXXON MOBILE OIL CORPORATION.

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ORIGINAL

ENVIRONMENTAL APPEALS BOARD
JUL 21 2009
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AUG 4

NPDES Permit No. MA0000833

NPDES Appeal No. 08-23

Washington, D.C.

Tuesday, July 21, 2009

The proceeding in the above-captioned matter was held, pursuant to notice, at EPA East Building, 1201 Constitution Avenue, NW, Washington, DC, before Natasha Kornilova of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at 10:00 a.m., before the Honorable CHARLES J. SHEEHAN.

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A P P E A R A N C E S

2

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1 P R O C E E D I N G S

2 EUREKA DURR: Environmental Appeals Board of
3 the United States Environmental Protection Agency is
4 now in session for a status conference, In Re: Exxon
5 Mobile Oil Corporation, Permit No. MA0000833. Appeal,
6 NPDES Appeal No. 08-23, the Honorable Judge Charles
7 Sheehan residing.

8 THE COURT: Good morning all. Could
9 counselors introduce themselves for the record?

10 MR. BUKHARI: My name is Samir Bukhari; I'm
11 representing Region 1 in this matter.

12 MS. PHILLIPS: My name is Dianne Phillips, I'm
13 a partner with Holland & Knight in Boston and I
14 represent Exxon Mobile Oil Corporation in this matter.

15 THE COURT: Thank you. Please feel free to
16 take seats if you're more comfortable that way.

17 I appreciate your time this morning. Let me
18 first do a little review of where the case stands, at
19 least as far as we can glean it from the files today
20 and then proceed with some questions. The petition was
21 filed back in October 2008 so a number of months have
22 certainly passed, three motions for extensions of time

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1 granted during that period. In the last most recent
2 status report of I believe June 2, the parties indicate
3 the drafts of the revised permit would be circulated
4 three weeks, for the Region to get it to Exxon and
5 three weeks back for Exxon to get it to the Region.

6 Can you tell us first if those transmissions occur on
7 time so that the 14 is met?

8 MR. BUKHARI: They did, Your Honor.

9 THE COURT: Okay, that's good. The reason I
10 ask is because I think it's important before we go too
11 far to make clear that the early threshold steps have
12 transpired.

13 And I needed to mention with me on the bench
14 here is Senior Counsel David Heckler, who may have
15 questions as well.

16 Mr. Bukhari, can you tell us about your sense
17 of the status today with negotiations?

18 MR. BUKHARI: Your Honor, first of all we'd
19 like to thank the Board for their patience in allowing
20 the parties to forte negotiated settlement of this
21 dispute that has entailed complicated issues, technical
22 issues, legal issues, as well as logistical issues, as

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1 well as a significant bedding process at each stage.
2 I'll answer your question by describing what's
3 transpired since the filing of Region's June 2, the
4 parties' June 2 status report --

5 THE COURT: Okay.

6 MR. BUKHARI: -- as well as what we see the
7 immediate next steps as being and the time necessary to
8 complete those steps. Shortly following the submission
9 of the parties' status report on June 2, in mid-June
10 the Region submitted a revised draft permit reflecting
11 the parties' discussions to date to Exxon Mobile for
12 their review and comment. The schedule was for Exxon
13 to review that permit modification language in return
14 it was a markup as well as a draft M.O.U. some weeks
15 later. And we received that submission from the
16 company late last week.

17 We have since then reviewed the documents and
18 held internal discussions and our review is ongoing,
19 although we can report that we've identified one
20 technical issue that will require an unavoidable
21 consultation with our Region 1 in Shomburg(ph), but we
22 don't expect that to be a significant issue.

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1 We've also identified several marginal issues
2 that we based on conversations with counsel we believe
3 to be addressed through drafting adjustments. We --
4 at this point I would add we only just received these
5 documents and we are moving through them as quickly as
6 possible and there is the possibility of coming across
7 an issue of more significance but we're optimistic
8 given the common goal I think that accounted for Exxon
9 Mobile attached and the common goal of reaching a
10 negotiated agreement here, that we have confidence that
11 we can work through any issues that do come up.

12 So that's where we stand --

13 THE COURT: Let me ask if I may about your
14 mysterious reference to an M.O.U. to memorialize
15 certain aspects of the settlement. What does that
16 mean?

17 MR. BUKHARI: The M.O.U. will address timing
18 of the issuance of the -- it will address development
19 of the draft permit modification and it says what we'll
20 be trying to do is to agree on the terms of a proposed
21 current modification which we'll issue for public
22 comment. Once we arrive at that, once we arrive and

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1 agree on the terms of that permit modification, we will
2 essentially attach that to this M.O.U. which will
3 describe the role that, in essence of the draft, as
4 well as the timing of issuance of the finding and the
5 interim step conditions that need to occur prior to
6 issuing that final permit modification.

7 THE COURT: So the M.O.U. then relates
8 merely to timing, is that right?

9 MR. BUKHARI: It's a timing process oriented
10 document, yes.

11 THE COURT: And is that still up in the air
12 as well, the M.O.U.?

13 MR. BUKHARI: Well, we received the M.O.U.
14 from the company late last week and we have had
15 internal discussions over it but several of the issues
16 raised are easily addressed through drafting
17 adjustments and we've had discussions over these points
18 with counsel for Exxon. And we are now focusing in on
19 the interim steps or the time associated with the
20 interim steps that will precede final permit issuance.
21 So that's the next point that we're considering, we
22 expect to move to that by mid-week.

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1 THE COURT: Okay, let me ask you at this
2 point, Ms. Phillips, do you have anything to add by the
3 way of clarification or supplementation to what's just
4 been said.

5 MS. PHILLIPS: Thank you, Your Honor. No, that
6 summarizes it pretty well. I just would add I guess
7 that with the summer months and the vacations and the
8 management levels of approval it did take us a little
9 bit longer than we had hoped to get the documents out.
10 But we do agree that we are very, very close in
11 substance and most issues are drafting related.
12 There's still, you know, it's never done until it's
13 done but we feel very confident and have put a lot of
14 work into and come a long way since last fall,
15 including a significant investment in design work to
16 redesign the facilities to achieve a better water
17 quality result.

18 THE COURT: So how high up has the document
19 or the tentative agreements to date been seen by Exxon
20 management?

21 MS. PHILLIPS: They have been seen by, because
22 of Exxon's approach, they have actually been seen in a

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1 preliminary basis by the person who needs to see them,
2 the highest level, and that's what took the extra time.

3 THE COURT: And what about, Mr. Bukhari,
4 what about in the Region, how high has the approval
5 gone or the review gone to date?

6 MR. BUKHARI: Your Honor, the chief of the
7 initial permitting branch, David Webster, and who is
8 here today and has been intimately involved in all
9 stages of this negotiation, so we feel comfortable that
10 we are on the correct side of the track, the corporate
11 management side, and I will obviously brief my regional
12 counsel and my immediate superior so we are --

13 THE COURT: So is the level of review at the
14 Regions -- on the Regions side at the same level as
15 that on Exxon's to date; the same level of authority
16 having giving an eye to this on both sides?

17 MR. BUKHARI: We have not yet briefed our
18 active regional administrator on this matter. We don't
19 believe that will be a controversial issue, we believe
20 the environmental results here and the resolution of
21 the current appeal is a development to be (inaudible)
22 so we feel confident that those approvals will come.

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1 THE COURT: So standing here today, how soon
2 would you think you would have an agreement that you
3 could take forward that's been signed off on by all the
4 right people because that seems like the first step we
5 need to address before we talk about more time.

6 MR. BUKHARI: Your Honor, let me just describe
7 exactly what the next steps are from our prospective
8 and then I'll try to give a sense of how much time it
9 will take to implement these actions.

10 We -- the immediate next steps entailed are
11 coming to terms of the O.E.D., exact form of the
12 proposed current modification and the M.O.U. Once that
13 happens and we expect to submit our comments, the
14 Region's comments on those two operative settlement
15 documents by Friday to the company, we then expect a
16 reasonably expeditious, if not corresponding
17 expeditious review by the company of our suggestions
18 and proposals and then to come to final agreement on
19 any open issues we would hope by the following week.

20 THE COURT: Excuse me, by what time?

21 MR. BUKHARI: By two weeks.

22 THE COURT: Two weeks from now?

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1 MR. BUKHARI: Two weeks from Friday.

2 THE COURT: From this Friday? So let me
3 just make sure I understand, it's a little hard to
4 hear. Two weeks from this Friday you think you'd have
5 a final agreement; is that what I understood, clarify
6 if that's not correct.

7 MR. BUKHARI: I would say that that would be
8 aspirational and that's what we're shooting for. The
9 other steps that need to occur are the -- and I think
10 it's reasonable to assume that we can come to agreement
11 on some of the terms of the documents. The other
12 pieces that need to happen prior to actually resolving
13 the appeal include drafting and execution and filing of
14 the notice of withdrawal of contested conditions, the
15 drafting and filing of a notice of voluntary dismissal
16 by the company, as well as internal briefings for our
17 management, our acting regional administrator will sign
18 the notice of withdrawal so we think that that's a good
19 opportunity to bring him up to speed on exactly what's
20 happening here and Ms. Phillips has agreed that needs
21 to occur on the Exxon Mobile side.

22 And the reason I'm pushing somewhat, Your

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1 Honor, is that both counsel for the Region and Exxon
2 Mobile have vacations long planned for mid-August so
3 we're doubling our efforts to wrap this up within the
4 next two weeks.

5 With that said, given the level of (inaudible)
6 that's occurred today and that we fully expect to, you
7 know, occur even in this type of push, we can't be sure
8 that we can wrap this up within the next two weeks. So
9 we would like some additional leeway to take us through
10 the month of August and with the understanding that the
11 parties will be pushing as they have today as quickly
12 as possible to reach a final resolution of this matter.

13 MS. PHILLIPS: Your Honor, if I could --

14 THE COURT: Yeah, go ahead, I'm sorry.

15 MS. PHILLIPS: Excuse me, sir. The only other
16 addition I would add to that, I agree with what counsel
17 has said is that because it's a jointly issued state
18 and federal permit, Exxon Mobile also appealed the
19 state permit and we do need to resolve the state
20 administrative appeal process which is a sort of follow
21 on process, but has a little bit more logistics as
22 well. And in that regard the state hearing officer has

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1 given the DEP and Exxon Mobile until September 10 or 8,
2 until September 8 as a stay of that proceeding to try
3 to resolve it. I think we would be looking for a
4 similar, if possible, amount of time so that the
5 proceedings could be resolved in parallel.

6 THE COURT: You indicated you need to
7 September 2 to file necessary papers to resolve the
8 appeal that was what you represented in your June 2
9 filing status report. Would that be a good day to
10 shoot for to get everything wrapped up we just
11 discussed here, the -- everything carried through, the
12 terms of the permit released and then motion to
13 withdraw contested conditions, et cetera, could follow.
14 But at least to nail down that first tip of the step;
15 would September 2 still work?

16 MS. PHILLIPS: I believe it would, Your Honor.

17 THE COURT: With DEP as well as Region 1,
18 Ms. Phillips?

19 MS. PHILLIPS: I'm optimistic, Your Honor, that
20 it would work and we have a conference scheduled for
21 tomorrow with the DEP counsel to nail that procedure
22 down and barring any unforeseen circumstances from

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1 that, Your Honor, I would expect that should be fine as
2 well.

3 THE COURT: Okay, well based on
4 representations a few moments ago about approximately
5 two weeks from this Friday to wrap up the terms of the
6 permit, it seems like September 2 would be more than
7 generous under that scenario for getting to that point;
8 is that your sense?

9 MS. PHILLIPS: Yes, sir.

10 MR. BUKHARI: Yes, sir.

11 MS. PHILLIPS: Yes, Your Honor. The two weeks
12 from Friday deadline is really key towards both of our
13 impending vacations, we want that done before we leave
14 on vacation. So -- and I think we're optimistic that
15 we can, you know, use our vacation leverage as a way to
16 get it done but -- but then, for example, Your Honor,
17 I'm going to Ecuador and the Galapagos for two weeks
18 and will really -- although my Blackberry does work,
19 it really is not that convenient. So that's a week --
20 so internal processes can be handled by the in-house
21 Exxon Mobile lawyer and hopefully it'll be all set up
22 for that, but if there's a few quirks that's what we'll

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1 try to build in that couple extra time due to the
2 vacation.

3 THE COURT: Meaning to early September, late
4 August, early September?

5 MS. PHILLIPS: Yes.

6 THE COURT: All right.

7 MS. PHILLIPS: Yes, Your Honor.

8 THE COURT: Okay, let me ask Mr. Heckler if
9 he has any questions?

10 MR. HECKLER: No I don't.

11 THE COURT: Okay, as you can tell I think by
12 the thrust of the questions I'm most concerned about
13 getting the first but crucial step behind us before we
14 talk about more time to withdraw the conditions and the
15 voluntary dismissal papers and other procedural
16 wrinkles that inevitably kick in at that point. So
17 let's take it step by step. It sounds like your
18 efforts have been vigorous and largely successful to
19 this point and we have no interest in stopping the
20 train if the train is moving so quickly. So we'll get
21 out an order soon reflecting the fruits, I think, of
22 this conversation with you. Would you like to add

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1 anything more before we conclude, either of you?

2 MS. PHILLIPS: Just thank you.

3 MR. BUKHARI: Thank you, no, Your Honor.

4 THE COURT: Okay, thank you both. We stand
5 adjourned.

6 EUREKA DURR: This session of the
7 Environmental Appeals Board now stands adjourned.

8 (Whereupon at 10:17 a.m. the hearing
9 was concluded.)

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1 CERTIFICATE OF COURT REPORTER

2 I, Natalia Kornilova, the officer before whom the
3 foregoing hearing was taken, do hereby certify
4 that the testimony was taken by me in stenotypy
5 and thereafter reduced to typewriting by
6 me; that said hearing is a true record of the
7 testimony given; that I am neither counsel
8 for, related to, nor employed by any of the
9 parties to the action in which this hearing was
10 taken; and, further, that I am not a relative or
11 employee of any counsel employed by the
12 parties hereto, nor financially or otherwise
13 interested in the outcome of this action.

14
15 *Natalia Kornilova*

16 Natalia Kornilova

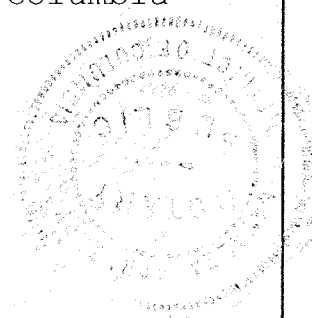
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18 The District of Columbia

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