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	)	

REPLY AND OPPOSITION BY LEE RANCH COAL COMPANY TO REGION 6 RESPONSE TO PETITION AND MOTION TO DISMISS OR DENY PETITION

Craig A. Moyer
Peter R. Duchesneau
Manatt, Phelps & Phillips, LLP
(310) 312-4000
(310) 312-4224
cmoyer@manatt.com
pduchesneau@manatt.com
Attorneys for Petitioner,
Lee Ranch Coal Company

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. THE REGION HAS FAILED TO COMPLY WITH EAB PROCEDURES 1

III. THE EAB DOES NOT HAVE JURISDICTION TO RULE UPON THE REGION'S MOTION TO TERMINATE THE PERMIT 2

IV. THE REGION HAS NOT TERMINATED THE PERMIT 5

- A. No Basis Exists to Terminate the Permit 5
  - 1. EPA Is Authorized to Issue the Permit Due to Potential Discharges 5
    - a. The Mine May Potentially Have Discharges 6
    - b. EPA Is Authorized to Issue NPDES Permits Prior to a Discharge 7
  - 2. The Region's Attempt to Terminate the Permit Is Not Effective 8
    - a. Reasons for Terminating an NPDES Permit for Cause Are Strictly Limited 8
    - b. The Permit Has Yet to Be Terminated Under Any Procedure 9
      - (1) Termination by Notice 9
      - (2) Termination Pursuant to Procedures in Section 124.5 10
      - (3) Termination of the Permit as a Minor Modification Under Section 122.63 10
- B. The Permit Has Not Been Withdrawn 11

V. THE EAB SHOULD GRANT THE PETITION 12

VI. CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Arkansas Wildlife Federation v. Bekaert Corp.,
791 F. Supp. 769 (W.D. Ark. 1992)....................9

In re Encogen Cogeneration Facility,
8 E.A.D. 244 (EAB 1999)....................3

In re Federated Oil & Gas of Traverse City,
6 E.A.D. 722 (EAB 1997)....................3

In re Knauf Fiber Glass,
8 E.A.D. 121 (EAB 1999)....................3

In re Phelps Dodge Corp.,
10 E.A.D. 460 (EAB 2002)....................3

In re West Bay Exploration Co.,
NPDES Appeal No. 14-66 (EAB April 16, 2013)....................11

National Resources Defense Council v. EPA,
859 F.2d 156 (D.C.Cir. 1988)....................7

U.S. v. CPS Chemical Company, Inc.,
779 F. Supp. 437 (E.D. Ark. 1991)....................9

Waterkeeper Alliance v. EPA,
399 F.3d 486 (2d Cir. 2005)....................7

STATUTES

33 U.S.C. § 1342(b)(1)(C)....................8, 9

42 U.S.C. § 1362(14)....................7

Clean Water Act § 402(b)....................8

Clean Water Act § 402(b)(1)(C)....................8

OTHER AUTHORITIES

40 C.F.R. § 22.13....................10

40 C.F.R. § 22.44....................10

40 C.F.R. § 122.1(b)....................7

40 C.F.R. § 122.2....................7

40 C.F.R. § 122.4....................8

40 C.F.R. § 122.21(a)....................7, 8

TABLE OF AUTHORITIES
(continued)

Page

40 C.F.R. § 122.21(c)........8
40 C.F.R. § 122.21(e)........3
40 C.F.R. § 122.44(d)(1)(ii)........4
40 C.F.R. § 122.62(a)........9
40 C.F.R. § 122.63........10
40 C.F.R. § 122.64........9, 11
40 C.F.R. § 122.64(a)........10
40 C.F.R. § 122.64(b)........9, 10
40 C.F.R. § 124........9, 10
40 C.F.R. § 124.5........10
40 C.F.R. § 124.5(a)........8, 9
40 C.F.R. § 124.5(d)........11
40 C.F.R. § 124.5(d)(1)........10
40 C.F.R. § 124.5(d)(2)........10
40 C.F.R. § 124.5(d)(3)........9
40 C.F.R. § 124.6........10, 11
40 C.F.R. § 124.16........11
40 C.F.R. § 124.19(i)(3)........2
40 C.F.R. § 124.19(f)(2)........2
40 C.F.R. § 124.19(j)........11
40 C.F.R. § 434, Subpart B........6
40 C.F.R. § 434, Subpart D........6
40 C.F.R. § 434.80........13, 14
40 C.F.R. § 434.82........14
40 Fed. Reg. 3370 (2002)........13
40 Fed. Reg. 3375 (2002)........13
MPDES Permit No: MT-0000884
deq.mt.gov/wqinfo/MPDES/Minors/MT0000884per.pdf........13

TABLE OF AUTHORITIES
(continued)

Page

NPDES Permit No. NN0022179
http://www.epa.gov/region9/water/npdes/pdf/navajo/PeabodyWesternCoal-NpdesPermit-2010.pdf);.....13

NPDES Permit No. NN0028193
http://www.epa.gov/region9/water/npdes/pdf/navajo/bhp-navajo-final-Permit-02-13-08.pdf.....13

NPDES Permit No. NN0029386
http://www.epa.gov/region9/water/npdes/pdf/navajo/McKinleyMineFinalPermit2009.pdf); 13

NPDES Permit Writers' Manual (September 2010).....9

I.
INTRODUCTION

Lee Ranch Coal Company ("LRCC") hereby replies to the *Response to Lee Ranch Coal Company's Petition for Review and Motion to Dismiss or Deny the Petition* ("Response") by the United States Environmental Protection Agency ("EPA") Region 6 (the "Region").[1] The Response fails to respond to or to refute any of the contentions of LRCC's petition in this appeal (the "Petition") and concedes that the Administrative Record ("AR") is insufficient to impose the two challenged conditions in the National Pollutant Discharge Elimination System ("NPDES") permit (No. NM0030996) (the "Permit") for LRCC's El Segundo Mine. Accordingly, LRCC respectfully requests that the Environmental Appeals Board ("EAB") grant the Petition.

Conceding that its Administrative Record does not support the imposition of the two challenged conditions, Region 6 has decided to "take its ball and go home" by improperly moving to terminate the Permit in its entirety. Apparently having no interest in constructively resolving the matter, the Response goes to great lengths to grossly misstate the contentions set forth in the Petition. Such overstatements speak for themselves, including the Region's absurd claim that it "views the LRCC petition as a request by LRCC to EPA Region 6 to terminate its permit (a notice of termination)." Response, fn. 1. This statement is obviously contrary to the plain language of the Petition and irreconcilable with the fact that this proceeding arises out of LRCC's timely application to renew the Permit.

LRCC objects to the termination of the Permit and has served a notice of objection on the Region. Attachment 1. The Region's motion that the EAB find that the Permit has been properly terminated should be denied, as the EAB does not have jurisdiction to so rule in this proceeding and, in any event, the Region has not properly terminated or withdrawn the Permit.

II.
THE REGION HAS FAILED TO COMPLY WITH EAB PROCEDURES

Despite the unprecedented move to terminate the Permit and the significant consequences that would result, the Region wholly ignored important EAB procedural requirements before and

[1] Given the Region's response and motion were asserted in the same pleading and are intertwined, LRCC hereby replies in this consolidated pleading and will refer to the Region's response and motion as the "Response."

after filing the Response. As a preliminary matter, while the Region attempts to clothe its actions as part of its response to the Petition, it is perplexing as to why the Region was not forthcoming with its intention to seek to terminate the Permit when the parties jointly moved to lift the six-month stay and set a schedule for these proceedings. Moreover, despite more than ample time, given the six-month stay, the Region did not attempt to ascertain whether Petitioner concurred or objected to its motion, as required. 40 C.F.R. § 124.19(f)(2). Only at 3:14 p.m. (Central time) on May 6, 2015, the day that the Response was due, did counsel for the Region belatedly attempt to contact counsel for Petitioner by email and also leave a telephone message. Neither message explained the nature of the motion or the Region's intention to terminate the Permit.[2] Despite counsel for the Petitioner promptly returning the call and emailing counsel an hour later with a cell phone number, the Region never responded.

On top of its failure to contact Petitioner prior to filing its motion, after filing its Response, the Region failed to serve Petitioner as required under the rules and contrary to the Region's written agreement to serve its Response via email. 40 C.F.R. § 124.19(i)(3); Joint Third Status Report. Only after counsel for Petitioner inquired with counsel for the Region on May 8, 2015, as to its failure to serve the Response did the Region serve its brief on May 8. Not until May 11, five days after the filing deadline, did the Region serve the remainder of its Response and the AR.

III.
THE EAB DOES NOT HAVE JURISDICTION TO RULE UPON THE REGION'S MOTION TO TERMINATE THE PERMIT

The Region's motion for the EAB to order that the Permit has been properly terminated pursuant to the Clean Water Act ("CWA") and its regulations should be denied. The EAB does not have jurisdiction to decide the issue. As explained below, the termination will need to follow

[2] Likewise, the Region only sent its purported notice of termination of the Permit on May 6, 2015 ("Termination Letter"), the same day it filed the Response. AR 10. Notably, the Termination Letter was not sent by or on behalf of the Director of the Water Quality Protection Division or even from anyone in the NPDES Permits & TMDLs Branch, but rather from the Planning and Analysis Branch. *Id.*

proper procedures. Only after such process has been completed might it then find its way before the EAB.

The EAB's review in this proceeding is limited to the Permit conditions that are claimed to be erroneous in the Petition. *In re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 725 (EAB 1997). The EAB is "not at liberty to resolve every . . . claim brought before [it] in a permit appeal but must restrict [its] review to conform to [its] regulatory mandate." *In re Phelps Dodge Corp.*, 10 E.A.D. 460, 514 (EAB 2002) (citing *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 259 (EAB 1999); *In re Knauf Fiber Glass*, 8 E.A.D. 121, 127 & 161-172 (EAB 1999)).

In this proceeding neither LRCC nor anyone else has filed a Petition challenging the issuance of the Permit in its entirety. LRCC, the only petitioner, has made no such claims before the EAB and does not now bear the burden to demonstrate the sufficiency of the record for issuing the Permit. The Petition asserts only that two newly imposed conditions by the Region in the Permit are erroneous: (1) the imposition of a Total Dissolved Solids ("TDS") effluent limitation of 2,000 lbs/day from outfalls Nos. 1 to 41 under the Colorado River Salinity Control Program (Permit, Part I.A.5), and (2) the submission of a Sediment Control Plan ("SCP") under the Western Alkaline Coal Mining ("WACM") Rule within six months of the Permit's effective date (Permit, Part I.A.6). Petition, at 1, 4-18. Numerous other new and prior conditions are set forth in the Permit. As to whether the Administrative Record supports the remaining terms of the Permit, LRCC fulfilled its obligations by submitting a complete permit application, which the Region had to deem complete prior to issuing the Permit. 40 C.F.R. § 122.21(e).

Contrary to the contentions of the Region in the Response, the Petition never asserts there can be no discharge to any waters of the United States from the mine, which was irrelevant for the Petition. The Response overstates the contentions of the Petition, claiming that it "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." Response, p. 3. In reality, the Petition only asserted that the Region had not conducted a reasonable potential analysis – which

it was required to do for a state water quality-based effluent limit under 40 C.F.R. 122.44(d)(1)(ii) – ***as to whether a discharge of TDS from the mine would be in sufficient amounts that could cause salt loading to the Colorado River resulting in an in-stream excursion above the Colorado River salinity standards***. Petition, at 4, 7.

The Petition makes clear, as does the Application and the Permit, that the receiving waters subject to the Permit are the Kim-me-ni-oli Valley Tributary and the Inditios Draw. AR 1 (Application Form 2C, Section D, Table I.A); AR 7 (Permit Cover and Attachments A and B); Petition, at 2. Nowhere does the Petition allege that there could never be a discharge of any type of pollutant to these receiving waters. Indeed, as explained below, LRCC has instituted numerous measures to manage mine drainage in light of such a potential.

The quotes from the Petition cited in the Response do not indicate that no pollutant of any type could ever reach the Kim-me-ni-oli Valley Tributary and the Inditios Draw. Rather, such quotes concern only the potential (or lack thereof) for TDS reaching the Colorado River. For instance, the Response quotes the Petition, in part: "The Region clearly erred . . . 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 ***salting loading to the Colorado River***." Response, at 3 (quoting Petition, at 7).[3] (Emphasis added.) Similarly, the Response highlights that the Petition indicates the TDS "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." Response, at 2 (quoting Petition, at 8-9). Elsewhere the Petition explains that "[t]he Region does not indicate and provides no support to demonstrate that discharges of TDS from the El Segundo Mine outfalls could cause or contribute to an instream excursion above the criteria of the Colorado River salinity standards." Petition, at 8.

[3] The TDS effluent limitation at issue in the Petition does not apply to all outfalls, since the Inditios Draw is a tributary to the Rio Grande River, which is outside the Colorado River Basin and not potentially subject to the Colorado River Salinity Standards. AR 7 (Permit I.A.5).

For the reasons set forth above, the motion to terminate the Petition is outside the scope of the Petition and the motion for the EAB to find the Permit terminated should therefore be denied.

IV.
THE REGION HAS NOT TERMINATED THE PERMIT

Aside from the lack of EAB jurisdiction to determine the termination of the Permit in this proceeding, it cannot be reasonably disputed that the Permit remains valid and has yet to be terminated. The Region has no basis to terminate the Permit, has not completed any process to terminate the Permit, and has run afoul of the required process to do so. As a result, the Petition is not moot.

The Response fails to make clear the exact basis pursuant to which the Region seeks to terminate the Permit. The Response throws out a smorgasbord of rules and improperly leaves it up to the EAB to choose a basis that may be appropriate for terminating the Permit. Regardless, there is no basis to terminate the Permit, as there has not been a permanent termination of the discharge and the procedures required to terminate the Permit will need to run their course.

A. No Basis Exists to Terminate the Permit

Contrary to the Response, while there has not been a discharge to date at the facility, the Petition never asserts that there is no potential for a discharge of any pollutant to reach waters of the United States or that there has been a permanent cessation of discharges. The lack of a discharge to date is emblematic of LRCC's diligent management of the facility.

1. EPA Is Authorized to Issue the Permit Due to Potential Discharges

The mere lack of a discharge does not prevent Petitioner from possessing an NPDES Permit under the law. The Region's claim that there is no evidence in the AR that there would ever be a discharge from the facility that would reach a water to the United States is erroneous. LRCC obtained the Permit given the potential for a discharge to occur from the facility.

a. **The Mine May Potentially Have Discharges**

Prior to its issuance of the Permit, it was fully understood by the Region that no discharge had occurred at the facility. AR 5 (Fact Sheet, Section III ("Since operation began in 2008, there has been no discharge from the permitted outfalls.")); AR 1 (Cover letter for LRCC Permit Application ("No discharges have occurred at any of the outfalls associated with El Segundo NPDES Permit (NM0030996) as of this submittal date.")) Due to LRCC's careful management of its operations and the drought plaguing the Southwest, no discharge has occurred to date at the facility. This, however, is far from a permanent elimination of a discharge as claimed in the Response. As set forth in the Permit Application, LRCC made it clear that there is a potential to discharge from the facility and therefore sought a permit to avoid a discharge occurring without an NPDES Permit. AR 1.

As explained in the Petition, runoff at the mine is controlled through the use of ditches, berms, and impoundments to control discharges. Petition, at 2. Sediment ponds are the primary measures used to control and treat disturbed area runoff generated from storms and mining-related sources. As explained in the Petition, sediment ponds are required and approved under the mine's New Mexico Surface Coal Mining Permit and necessary to comply with effluent limitations under the NPDES permit requirements. Petition, at 17-18. These measures are carefully located, designed and managed to collect drainage in watersheds to control runoff at designated outfalls. The Permit authorizes the discharge from 52 outfalls subject to various effluent limitations, including technology-based standards under the Alkaline Mine Drainage Rule, 40 C.F.R. § 434, Subpart D, and Coal Preparation Plants and Coal Preparation Plant Associated Areas, 40 C.F.R. § 434, Subpart B. AR 7 (Permit, Part I, A. and Attachments A and B). While these measures have prevented discharges to date, discharges could still occur. For instance, despite a regional drought, given the semi-arid precipitation patterns typical of the area with high intensity rain over short durations, a single storm could result in a discharge. To that end, the Permit carries with it conditions for precipitation evens, such as for a discharge as a result of precipitation events less than or equal to a 10-year, 24-hour precipitation event to the

receiving waters. AR7 (Permit, Part I.A.4). Discharges could also occur as a result of controlled pumping, such as in the event that the water level in active mining pits or sediment ponds needs to be lowered or emptied as a result of reaching capacity or conditions requiring maintenance.

b. EPA Is Authorized to Issue NPDES Permits Prior to a Discharge

Merely because a discharge has yet to occur and has been controlled does not mean that the Region lacks jurisdiction to issue an NPDES permit or has the authority to terminate it. The NPDES program requires permits for discharges of pollutants from any point source into waters of the United States. 40 C.F.R. § 122.1(b). A "point source" is defined, in part, as "any discernible, confined, and discrete conveyance . . . ***from which pollutants*** are or ***may be discharged***."[4] 40 C.F.R. § 122.2; 42 U.S.C. § 1362(14). (Emphasis added.) Under the NPDES program, "any person who discharges or ***proposes to*** discharge pollutants" into waters of the United States is required to apply for an NPDES permit. 40 C.F.R. § 122.21(a). (Emphasis added.)

The Region misapplies *Waterkeeper Alliance v. EPA*, 399 F.3d 486 (2d Cir. 2005).[5] In *Waterkeeper*, the court struck down EPA regulations mandating concentrated animal feeding operations ("CAFOs") to either apply for NPDES permits or otherwise demonstrate that they have no potential to discharge. *Waterkeeper*, 399 F.3d at 504-06. The court found that "unless there is a 'discharge of any pollutant,' there is no violation of the [Clean Water Act] and point sources are . . . neither statutorily obligated to comply with EPA regulations for point source discharges, nor are they statutorily obligated to seek or obtain an NPDES permit." *Id*.

Although EPA cannot require someone to apply for a permit without a discharge or place the burden upon him or her to demonstrate there is no potential to discharge, the inverse is far from true. The fact that a discharge has not occurred is not among the enumerated reasons set

---

[4] Similarly, "new source" is defined as "any building, structure, facility, or installation from which there is ***or may be*** a 'discharge of pollutants,' . . ." 40 C.F.R. § 122.2. (Emphasis added.)

[5] *National Resources Defense Council v. EPA*, 859 F.2d 156, 170 (D.C.Cir. 1988), cited by the Region, is of no consequence either as it merely provides that the CWA does not empower EPA to regulate point sources themselves, but only the discharge of pollutants through effluent limits. As explained above, LRCC applied for and obtained the Permit due to the potential to discharge pollutants from the mine's outfalls.

forth in the regulations as to when an NPDES permit may not be issued. 40 C.F.R. § 122.4. The NPDES regulations set forth a duty to apply for an NPDES permit prior to a discharge. 40 C.F.R. § 122.21(a) ("any person who discharges or proposes to discharge pollutants . . .") (Emphasis added). An application must be submitted at least 180 days before the discharge and is encouraged to be submitted well in advance of the 180-day requirement to avoid delay. 40 CFR § 122.21(c). In truly *non sequitur* fashion, the Region's Termination Letter recognizes this and provides that LRCC must "file a new NPDES permit application ***at least 180 days in advance*** of the proposed discharge." (Emphasis added.) Needless to say, if a discharge were to occur at the facility without a permit, LRCC could be found in violation of the CWA.

2. **The Region's Attempt to Terminate the Permit Is Not Effective**

The Permit has not been terminated and therefore the Petition is not moot. Aside from the invalid bases relied upon by the Region to attempt to terminate the Permit, it cannot be disputed that the Region will need to follow a lengthy process before the Permit would be terminated. This has not happened.

a. **Reasons for Terminating an NPDES Permit for Cause Are Strictly Limited**

The Region misconstrues its authority for terminating Permits for cause by claiming it can terminate permits for reasons other than those enumerated in Section 124.5(a). The Region wrongly claims that Section 402(b) of the CWA provides it with authority to determine additional reasons to terminate a permit for cause beyond those enumerated in the regulations. 33 U.S.C. § 1342(b)(1)(C). However, Section 402(b)(1)(C) does not provide the Region with *carte blanche* to determine additional cause for terminating a permit. *Id.* Section 402(b)(1)(C) only concerns the minimum requirements for approving state NPDES programs, including the necessary state authority to terminate a permit.[6]

---

[6] "The Administrator shall approve each submitted program [by a state] unless he determines that adequate authority does not exist . . . [t]o issue permits which . . . can be terminated or modified for cause including, but not limited to, the following:
(i) violation of any condition of the permit;
(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

With regard to EPA-issued NPDES permits, the reasons for termination for cause have been established in EPA regulations and are strictly limited under Section 122.64. "[P]ermits may ***only*** be modified, revoked and reissued, ***or terminated*** for the reasons specified in 122.62 or 122.64." 40 C.F.R. §124.5(a). (Emphasis added.) *See also U.S. v. CPS Chemical Company, Inc.,* 779 F. Supp. 437, 441 (E.D. Ark. 1991)(NPDES permits can be modified only for the reasons specified in 40 C.F.R. § 122.62(a)). Nor can the Region use additional "causes" to terminate a permit as a means to skirt the prescribed regulatory procedures for terminating a permit. *See Arkansas Wildlife Federation v. Bekaert Corp*., 791 F. Supp. 769, 782 (W.D. Ark. 1992) (Changes in Permits may result only after certain regulatory procedures are followed and then only for certain reasons).

b. The Permit Has Yet to Be Terminated Under Any Procedure

(1) Termination by Notice

The Termination Letter sent by the Region the day of its Response is insufficient to terminate the Permit. It fails to even identify under which provision of Section 122.64 or otherwise the Region is moving to terminate the Permit. To the extent that the Region seeks to rely upon an exception to the formal Permit termination process under Sections 122.64(b) and 124.5(d)(3) by issuing a termination by notice, it is inapplicable. Termination by notice is only allowed if the entire discharge is permanently terminated by elimination of flow or by connection to a POTW. As explained above, this has not occurred here. Moreover, contrary to the Termination Letter's claim that the Permit "has been discontinued and is now void," termination by notice is not effective for 30 days. 40 C.F.R. § 122.64(b). If the permittee objects during that period, the Region must follow the procedures in Part 124.[7] *Id.* Despite the Termination Letter

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge." 3 U.S.C. § 1342(b)(1)(C).

[7] "The regulations at § 122.64(b) do provide one exception to the more formal permit termination process described above. Where the entire discharge is permanently terminated by elimination of the flow or by connection to a POTW (but not by land application or disposal into a well) the permit can be terminated by notice to the permittee, and the Part 124 administrative process is not required. However, if the permittee objects to such an expedited termination, the Permitting Authority must then proceed in accordance with the administrative procedures described above." NPDES Permit Writers' Manual (September 2010), at 11-20.

failing to advise LRCC of its right to object to the termination within 30 days, LRCC served an objection to the Termination Letter on May 20, 2015. Attachment 1. As such, even if it was potentially applicable, such an expedited termination process does not apply in light of LRCC's objection and one of the processes set forth in Part 124 must be followed by the Region to terminate the Permit. In the meanwhile, the Permit remains valid.

(2) **Termination Pursuant to Procedures in Section 124.5**

Sections II, III and IV of the Response cite to multiple provisions as authority for terminating a permit, including Sections 122.64(a), 122.64(b), and 124.5, each of which have unique requirements and apply under specific circumstances. Yet, the Region fails to explain which procedure it is following or intends to follow with regard to terminating the Permit.

In any case, the process to terminate the Permit has not been initiated, let alone completed as of yet. Should the Region seek to terminate the Permit under Section 122.64(a), which would not be at the request of LRCC (the permittee), then the Region must prepare a complaint under 40 C.F.R. Sections 22.13 and 22.44. 40 C.F.R. § 124.5(d)(2). If the Region seeks to terminate the Permit under Section 122.64(b), which would be objected to by LRCC, then the Region must issue a notice of intent to terminate, which is a type of draft Permit that follows the same procedures as a draft Permit prepared under Section 124.6. 40 C.F.R. § 124.5(d)(1). The Region concedes that it has neither filed a complaint nor issued a notice of intent to terminate under the draft permit process. Response, Section IV.

(3) **Termination of the Permit as a Minor Modification Under Section 122.63**

To the extent that the Region is also attempting to rely upon the "Permit Modification and Reopener" provision in the Permit to terminate it, it is entirely off base. AR 7 (Permit, II.C). Such provision only pertains to minor modifications, not a permit termination, and minor modifications to an NPDES permit still require the consent of the permittee, which has not been obtained from LRCC. 40 C.F.R. § 122.63. As set forth in the same provision of the Permit, other permit modifications shall follow the regulations listed at Section 124.5. AR 7 (Permit, II.C).

B. <u>The Permit Has Not Been Withdrawn</u>

Last, to the extent that the Region is also asserting that it is withdrawing the Permit pursuant to Section 124.19(j), that too has not been accomplished. Withdrawing the Permit and proposing a new draft permit are entirely inconsistent with and at odds with seeking to terminate the Permit. The Region cannot propose a revised draft of the Permit under the withdrawal procedures to revise its conditions, while simultaneously following the draft permit process to terminate the Permit. Moreover, it would be improper to withdraw the Permit in its entirety when only two permit conditions are subject to an appeal.

In any event, the Region has not sent proper notice that it is withdrawing the Permit and proposing a new draft permit, as required. 40 C.F.R. § 124.19(j). Nowhere in its unorthodox Termination Letter does Region 6 reference the authority pursuant to which it is acting, nor does the letter or the Response indicate that it will be proposing a new draft permit pursuant to Section 124.6, as required under Section 124.19(j). Contrary to the Region's action in this matter, EPA Region 5 indicated its intent to prepare a new draft permit in *In re West Bay Exploration Co.*, NPDES Appeal No. 14-66 (EAB April 16, 2013), as reflected in footnote 3 of the decision. In this matter, the Termination Letter strongly implies that a new draft permit will not be proposed given its statements that the Permit "has been discontinued and is now void" and the admonishment that ***LRCC will need to file a new permit application*** at least 180 days in advance of a proposed discharge. As such, the Petition is not moot.

For the reasons set forth above, the Permit remains valid, unless and until it is terminated through a process meeting the requirements of Sections 122.64 and 124.5(d). In the meanwhile, the Permit remains in effect, minus the two challenged conditions pending a ruling by the EAB.[8] 40 C.F.R. § 124.16.

---

[8] The Region also stipulated in the Joint Motion to Stay that "[i]n accordance with 40 C.F.R. § 124.16, the Parties further agree and hereby stipulate that the Contested Conditions will be stayed."

V.
THE EAB SHOULD GRANT THE PETITION

The Region's motion to dismiss the Petition should be denied. Nowhere in the Response does it set forth a valid basis why the Petition should be dismissed or even attempt to refute the claims of the Petition. LRCC therefore requests that the EAB grant its Petition, striking the TDS effluent limitation and requiring that an SCP need only be submitted within a reasonable time of 100 percent of drainage to an outfall becoming subject to the WACM Rule, rather than premised on the effective date of the Permit.

The Region "admits . . . that its current administrative record does not contain evidence of a reasonable potential to discharge any pollutant to a water of the United States." Response, at 4. This admission plainly concedes that the Region has failed to demonstrate that there is a reasonable potential to cause or contribute to an exceedance of the salinity standards of the Colorado River, which is a water of the United States. In particular, the silence of the AR plainly demonstrates that the Region has not exercised considered judgment and never determined that a reasonable potential exists for a discharge from the mine to cause an instream excursion in the Colorado River above its salinity standard or that the imposed TDS effluent limit in the Permit is necessary to ensure compliance with a state water quality standard.

The Region's admission also concedes that the administrative record is insufficient to impose the Permit's condition under the WACM Rule. The Response specifically points out that the lack of evidence in the administrative record of a discharge subject to the CWA equally applies to the WACM Subcategory effluent limitation terms in the Permit. Response, pp. 8-9, fn. 2. In doing so, the Region concedes that the record is insufficient as to finding the existence of any discharges subject to the WACM Rule, which is necessary to impose the Permit's condition for requiring an SCP under such rule to be submitted within six months of the Permit's issuance.

Further, with regard to the WACM Rule, neither the Response nor the AR demonstrates that the Region exercised considered judgment or otherwise supported its application of the WACM Rule as a matter of law, let alone refutes the WACM Rule's application as contended by

LRCC. Nowhere in the Response, Administrative Record or elsewhere has the Region ever explained the legal basis supporting its application of the WACM Rule in the Permit. This includes failing to explain why the Region has decided to deviate from its own prior application of the WACM Rule in the NPDES permit issued for the Lee Ranch Mine (No. NM0029581), requiring 100 percent of drainage to an outfall to exist for it to be subject to an SCP under the WACM Rule, or how it disagrees with the explanation by EPA in the Federal Register (40 Fed. Reg. 3370, 3375 (2002)) as to the application of the WACM Rule where commingled waste streams exist with active mining subject to the Alkaline Mining Rule. Petition, at 14, 16-17.

The Region's silence is only more deafening considering EPA Region 9 also requires, consistent with the application of the WACM Rule sought by LRCC, that "***100% of the drainage area to an outfall*** that has been disturbed by mining must meet the definition of 'western alkaline reclamation, brushing and grubbing, topsoil stockpiling, and regraded areas' (as defined at 40 CFR § 434.80) ***to be considered for coverage***" under an SCP pursuant to the WACM Rule.[9] (Emphasis added.) Similarly, the Montana Department of Environmental Quality has utilized the same provision as Region 9 for the WACM Rule.[10] The Region is well aware of Region 9's application of the WACM Rule since it initially included Region 9's provision in the Draft Permit as to when revisions to the SCP would be required to incorporate new outfalls. AR 5 (Draft Permit, Part I.A.6.d). However, apparently realizing that Region 9's provision was inconsistent with the disputed condition in the Permit requiring an SCP within six months of the Permit's issuance (regardless of whether any outfall existed that received 100% of its drainage from the defined areas under the WACM Rule), the Region changed the condition for revising the SCP to eliminate the reference to an outfall, after the comment period. AR 7 (Response to

[9] *See, e.g.*, NPDES Permit No. NN0022179, p. 5 (http://www.epa.gov/region9/water/npdes/pdf/navajo/PeabodyWesternCoal-NpdesPermit-2010.pdf); NPDES Permit No. NN0029386, p. 4 (http://www.epa.gov/region9/water/npdes/pdf/navajo/McKinleyMineFinalPermit2009.pdf); and NPDES Permit No. NN0028193, p. 4 (http://www.epa.gov/region9/water/npdes/pdf/navajo/bhp-navajo-final-Permit-02-13-08.pdf).
[10] MPDES Permit No: MT-0000884, p. 9 (deq.mt.gov/wqinfo/MPDES/Minors/MT0000884per.pdf).

Comments, No. 6). The Permit now ambiguously provides that "Revisions to the SCP must meet all requirements contained at 40 CFR § 434.82, and 100% of the drainage area(s) that meet the definition of 'western coal mining operation . . . (as defined at 40 CFR § 434.80)' to be considered for coverage." AR 7 (Permit, Part I.A.6.d).

VI.
CONCLUSION

For the reasons set forth above, LRCC respectfully requests that the EAB grant the Petition and deny the Region's motion to terminate or dismiss the Petition or to find it moot.

/s/ Peter Duchesneau
Craig A. Moyer
Peter R. Duchesneau
Manatt, Phelps & Phillips, LLP
(310) 312-4000
(310) 312-4224
cmoyer@manatt.com
pduchesneau@manatt.com
Attorneys for Petitioner,
Lee Ranch Coal Company

Date: May 21, 2015

LIST OF ATTACHMENTS

Reply and Opposition By Lee Ranch Coal Company To Region 6 Response To Petition and Motion To Dismiss or Deny Petition

ATTACHMENT 1	Letter from R. Lehn, Peabody to W. Honker, U.S. EPA Region 6, re Objection to EPA Region 6 Notice to Terminate Permit, May 20, 2015.

STATEMENT OF COMPLIANCE WITH WORD LIMITATIONS

I hereby certify that this petition for review, including all relevant portions, contains less than 7,000 words.

/s/ Peter Duchesneau
Craig A. Moyer
Peter R. Duchesneau
Manatt, Phelps & Phillips, LLP
(310) 312-4000
(310) 312-4224
cmoyer@manatt.com
pduchesneau@manatt.com
Attorneys for Petitioner,
Lee Ranch Coal Company

Date: May 21, 2015

CERTIFICATE OF SERVICE

I, Peter R. Duchesneau, hereby certify that on this 21st of May, 2015, I served a copy of the foregoing Reply and Opposition By Lee Ranch Coal Company To Region 6 Response To Petition and Motion To Dismiss or Deny Petition on the parties identified below by email.

David Gillespie
Assistant Regional Counsel
U.S. EPA, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202
(214) 665-7467
gillespie.david@epa.gov

/s/ Peter Duchesneau
Peter R. Duchesneau

314514069.2