

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

In re:)
)
Eagle Mine LLC (a Subsidiary of Lundin)
Mining Corporation))
)
Groundwater Discharge)
Permit No. GW1810162)
)

Appeal No: UIC 15-01

**MOTION TO DISMISS PETITION FOR LACK OF JURISDICTION AND
UNTIMELINESS AND MOTION FOR EXTENSION OF TIME**

The United States Environmental Protection Agency, Region 5, respectfully requests that the Environmental Appeals Board (Board) dismiss the petition filed by Petitioner, Save the Wild U.P., for lack of jurisdiction and untimeliness. Should the Board allow review of the petition, the Region requests an additional 30 days from the date of the Board’s ruling to file its response on the merits.

In support of its motion, Region 5 states the following:

1. On March 25, 2015, the Michigan Department of Environmental Quality (“MDEQ”) issued Permit No. GW1810162, effective April 1, 2015, in compliance with the provisions of Michigan’s Natural Resources and Environmental Protection Act 1994 P.A. 451, as amended (NREPA), Part 31, Water Resources Protection and Part 41, Sewerage Systems, to Eagle Mine LLC (a subsidiary of Lundin Mining Corporation). The final permit authorizes the

Eagle Mine to discharge 504,000 gallons per day of mine contact water, from the Eagle Mine Waste Water Treatment Facility to the groundwater of the State of Michigan.

2. In its Petition for Review, Petitioner, pursuant to 40 C.F.R. § 124.19(a), requests review of the issuance of “Groundwater Discharge Permit No. GW1810162.” This permit was issued by the State of Michigan, through MDEQ, to Eagle Mine LLC.

3. 40 C.F.R. Part 124 (“Part 124”) sets forth procedures that affect permit decisions issued by EPA under various statutes, including the Underground Injection Control (“UIC”) program under the Safe Drinking Water Act, 42 U.S.C. § 300h to 300h-7, and the National Pollutant Discharge Elimination System (“NPDES”) program under the Clean Water Act, 33 U.S.C. §1342.

4. The Petition should be dismissed because the Board does not have jurisdiction to review State-issued permits. To the extent the Board construes the petition as a challenge to the Groundwater Discharge Permit issued by MDEQ, the Board is not the appropriate forum for such review. 40 C.F.R. §124.19(a). *See also, In re Antrim Township*, NPDES Appeal No. 09-14 (August 26, 2010); *In re Michigan CAFO General Permit*, NPDES Appeal No. 02-11 (March 18, 2003). Indeed, review of a state groundwater discharge permit lies in the state forum. 40 C.F.R. § 123.30 Further, the Petitioner has engaged in the state public comment process. Any dissatisfaction with the outcome of the final state permit or challenge to provisions of that permit cannot now be resolved in the instant forum. As stated in the August 2013 EAB Practice Manual, Section IV.B, “(s)ection 124.19(a) authorizes appeals to the EAB from *federally-issued* RCRA, UIC, NPDES, and PSD permit decisions. This includes permits issued by states or other entities with delegated authority to issue the federal permit. The permit at issue here is a state issued permit, not issued pursuant to any delegated federal authority. The EAB generally does

not have authority to review state-issued permits pursuant to a state permitting program; such permits are reviewable only under the laws of the state that issued the permit. (footnote omitted) See *In re BP Cherry Point*, 12 E.A.D. 209, 214 (EAB 2005) (“[T]he Board lacks authority to review conditions of a state-issued permit that are adopted solely pursuant to state law.”); *In re Great Lakes Chem. Corp.*, 5 E.A.D. 395, 396 (EAB 1994) (EAB has no authority to review conditions imposed under a state RCRA program); see also *In re Gateway Generating Station*, PSD Appeal No. 09-02, at 10 n.6 (EAB Sept. 15, 2009).” (Emphasis in original).

5. Petitioner’s attempt to create jurisdiction of the Board to review a state permit through reliance on a letter from the Region 5 Water Division Director to a citizen is inadequate. As a basis for jurisdiction in its Petition, Petitioner relies on a February 21, 2014 letter from Tinka Hyde, Water Division Director, to Mr. Jeffery Loman, a citizen, as being equivalent to a “final agency decision.” Yet, Petitioner subsequently argues that even if the letter were not a final agency action, Petitioner would not be foreclosed from bringing this appeal. Petition, at page 7. The Agency disagrees, pursuant to the Administrative Procedures Act, the right to judicial review does not arise until there has been final Agency action on a matter. 5 U.S.C. § 704. See also EAB Practice Manual, Section III.C. As such, the Board has no jurisdiction to review the Petition.

6. Even if the Board had jurisdiction, Petitioners would be required to file an appeal within 30 days of any final agency action, as required under 40 C.F.R. § 124.19(a)(3), with an additional three days if petitioner had received the letter by mail (per 40 C.F.R. § 124.20(d)). Petitioner filed its petition on April 24, 2015, well beyond the 33 day time limit. Therefore, because the petition is untimely, it does not satisfy the requirements of 40 C.F.R. § 124.19 and should be dismissed. *In re Maralex Disposal, LLC*, SDWA Appeal No. 13-01, at 3 (EAB Sept.

3, 2013)(Order Dismissing Appeal as Untimely) (citing *In re B & L Plating*, 11 E.A.D. 183, 189-90 (EAB 2003)); *see also*, *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 328 (EAB 1999), *aff'd sub nom Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996); *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 15-16 (EAB 1994).

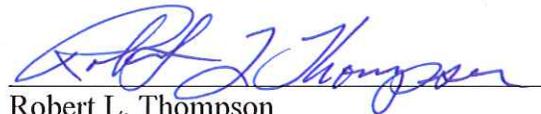
7. While the Board considers this threshold jurisdictional matter, the Region requests an extension of time to allow EPA to file a full response on the merits of the petition and coordinate with EPA Headquarters on its response should the Board not grant this motion to dismiss. An extension of time of 30 days from the date of the Board's ruling on this motion will not prejudice Petitioner.

8. In accordance with 40 C.F.R. § 124.19(f)(2), the undersigned counsel contacted Petitioner via email on May 27, 2015, to ascertain whether Petitioner consents or objects to this motion. Petitioner responded, and objects to this motion.

For the reasons set forth above, EPA, Region 5, respectfully requests that its Motion to Dismiss Petition for Lack of Jurisdiction and Untimeliness, or alternatively, its Motion for Extension of Time be granted.

Dated: May 27, 2015

Respectfully Submitted,



Robert L. Thompson
Associate Regional Counsel
United States Environmental Protection Agency
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604
Telephone: 312-353-6700
Facsimile: 312-385-5464
Email: Thompson.robertyl@epa.gov

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

In re:)	
Eagle Mine, LLC (a Subsidiary of Lundin Mining Corporation))	Appeal No. UIC 15-01
)	
Underground Injection Control (UIC) Permit No. GW1810162)	
)	

CERTIFICATE OF SERVICE

I hereby certify that today I served the foregoing Motion to Dismiss Petition for Lack of Jurisdiction and Untimeliness and Motion for Extension of Time; and this Certificate of Service on the Environmental Appeals Board via the EAB eFiling system (https://yosemite.epa.gov/OA/EAB/EAB-LJ_Upload.nsf/EAB%20eFiling%20Homepage?open).

I further certify that today I mailed paper copies identical to the electronically filed documents via United States Postal Service first class mail to the following:

Kathleen Heideman, President
Alexandra Maxwell, Interim Director
Save the Wild U.P.
P.O. Box 562
Marquette, MI 49855

Dan Wyant, Director
Michigan Department of Environmental Quality
P.O. Box 30473
Lansing, MI 48909-7973

Paul Conibear, President & CEO
Lundin Mining Corporation
150 King Street West
Suite 1500
P.O. Box 38
Toronto, ON M5H 1J9
Canada

27 May 2015
Dated



Donald E. Ayres
Paralegal Specialist, MM2-4, ORC5
U.S. Environmental Protection Agency
77 W. Jackson Boulevard
Chicago, IL 60604-3590
(312) 353-6719
ayres.donald@epa.gov

