

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

_____)	
In re:)	
)	
Carlota Copper Company)	
)	NPDES Appeal No. 00-24
Docket No. NPDES AZ0024112)	
_____)	

ORDER DENYING THE HOPI TRIBE PETITION FOR REVIEW

On July 24, 2000, Region IX ("the Region") issued a National Pollution Elimination Discharge System ("NPDES") permit to Carlota Copper Company ("Carlota") pursuant to Section 402(a) of the Clean Water Act ("CWA"), 33 U.S.C. § 1342. The permit authorizes the discharge of storm water and ground water into Pinto Creek, Powers Gulch and Haunted Canyon, Arizona. See the Region's Response to Petition for Review filed October 13, 2000 at 1 ("Region's Response").

The Environmental Appeals Board ("EAB" or "Board") has received two petitions seeking review of the Carlota permit. Petitioners are the Hopi Tribe (NPDES Appeal No. 00-24) and Friends of Pinto Creek, et al. (NPDES Appeal No. 00-23). This order considers only the Hopi Tribe petition for review of the permit.¹

¹At the request of the Region, the Board has stayed its consideration of the Friends of Pinto Creek, et al. petition for review until certain conditions of the permit undergo public notice and comment. See December 5, 2000 Order Staying Proceedings In Part.

(continued...)

On October 13, 2000, the Region filed its response to the Hopi Tribe petition. The Region argues that the Hopi Tribe has not satisfied the requirements for obtaining review of a final NPDES permit decision under 40 C.F.R. § 124.19. Party-intervenor Carlota Copper Company, in its November 27, 2000 response to our Order to Show Cause, also contends that the Hopi Tribe does not have standing in this matter. We agree and accordingly, the Hopi Tribe petition for review is denied, as discussed further below.

Under the applicable rules governing NPDES permit appeals, a person may petition for review of a final NPDES permit decision if he or she (1) filed comments on that draft permit or participated in the public hearing for that permit; or, if he or she did not submit comments or participate at the public hearing, he or she may petition for review (2) "only to the extent of the changes from the draft to the final permit decision." See 40 C.F.R. § 124.19. Thus, in order to have standing to challenge a final NPDES permit decision, the petitioner must meet either of these requirements, as well as additional requirements set forth in 40 C.F.R. § 124.19.

As the Region points out, the Hopi Tribe has failed to meet either of the standing requirements for appealing this final

¹(...continued)

The Region's decision to provide an opportunity for public comment on certain permit conditions will provide the Hopi Tribe an opportunity to submit, if it so chooses, comments to the Region regarding those permit conditions during the public comment period.

NPDES permit decision. In its response, the Region demonstrates that the Petitioner Hopi Tribe did not participate in either of the two public hearings or submit comments on the draft permit during the public comment period.² See Region's Response at 4.

In its petition, the Hopi Tribe cites to a May 31, 2000 letter to the Region to demonstrate it has standing to appeal the final permit. See Hopi Tribe Petition at 1. This letter, however, does not satisfy the standing requirements of 40 C.F.R. 124.19, since the Petitioner sent this letter to the Region approximately 17 months after December 31, 1998, the close of the public comment period.

Having examined the relevant portions of the administrative record for this matter, the Board can find no documentation that the Hopi Tribe either submitted comments during the public comment period or participated in either of the public hearings. Moreover, the issues raised by the Hopi Tribe petition concern EPA's alleged lack of consultation with the Hopi Tribe, which according to the Petitioner, resulted in a number of statutory violations. See Hopi Tribe Petition at 1-5. These issues raised in the Hopi Tribe petition were clearly ascertainable at the time the draft permit was issued and,

²To support its assertion, the Region included with its response the transcripts of both public hearings and the administrative record index which includes a list of all comments received by the Region. See Region's Response, Excerpts of Record ("E.R.") 3-4; Certified Index to the Administrative Record.

therefore, should have been raised with the Region during the public comment period,³ which ran from October 20, 1998 to December 31, 1998. Further, the matters raised in the Hopi Tribe petition do not relate to any changes in the permit that took place after the issuance of the draft permit. In finding that Petitioner Hopi Tribe has failed to demonstrate that it has met the requirements for challenging the final permit decision under 40 C.F.R. § 124.19, we deny review of its petition.

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: _____/s/_____
Ronald L. McCallum
Environmental Appeals Judge

Dated: 12/5/00

³See Region's Response at 4; Region's Response, E.R. 1-2.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying The Hopi Tribe Petition for Review in the matter of Carlota Copper Co. (NPDES Appeal No. 00-24), were sent to the following persons in the manner indicated:

By Facsimile and Pouch Mail:

Elizabeth La Blanc.
Assistant Regional Counsel
U.S. EPA, Region IX
Office of Regional Counsel
75 Hawthorne Street
San Francisco, CA 94105
(415) 744-1041

By Facsimile and Certified Mail,
Return Receipt Requested:

Roger Flynn
Western Mining Action Project
2260 Baseline Rd., Suite 101A
Boulder, CO 80302
(303) 786-8054

Kimberly J. Graber
National Wildlife Federation
2260 Baseline Ave., Suite 100
Boulder, CO 80302
(303) 786-8911

Terry Mogart
Leigh J. Kuwanwisiwma
The Hopi Tribe Cultural
Preservation Office
P.O. Box 12378
Kykolsmovi, AZ 86039
(520) 734-2331

Dean Massey, Esq.
David A. Bailey, Esq.
Massey and Semenov, Stern &
Schwartz
730 17th Street, Suite 330
Denver, CO 80202
(303) 893-1829

Dated: 12/5/00

_____/s/
Annette Duncan
Secretary