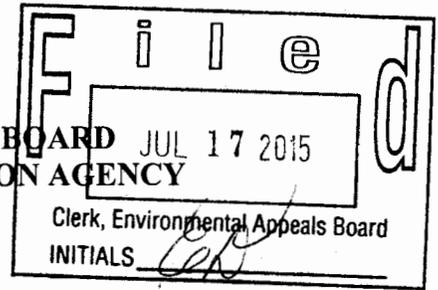


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



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In re: )  
)  
)  
Lee Ranch Coal Company )  
(El Segundo Mine) )  
)  
NPDES Permit No. NM0030996 )  
\_\_\_\_\_ )

NPDES Appeal No. 14-04

**ORDER DENYING REGION'S MOTION TO STAY THE PROCEEDING,  
POSTPONING ORAL ARGUMENT, AND SCHEDULING STATUS CONFERENCE**

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. 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 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. On April 20, 2015, the Board issued an order scheduling response and reply brief due dates.

On May 6, 2015, the Region filed its Response with the Board, which stated that the Region was both terminating and withdrawing the renewal permit it had issued to LRCC. *See* Region 6's Response to LRCC's Petition for Review and Motion to Dismiss or Deny the Petition. The Response requested several alternatives as "Requested Relief" from the Board: an order stating the permit had been terminated properly and dismissing or denying the petition with

prejudice, or an order that the permit had been properly withdrawn and dismissing or denying the petition as moot. Response at 10. The Region further stated in its Response that “[t]he attorney for EPA Region 6 has attempted to contact the attorney for LRCC via phone and email and has not been able to reach him as to the filing of these documents.” *Id.*

In a letter to the Region and its Reply to the Board, Petitioner objected to all of these requests. LRCC further stated that “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. \* \* \* [Nor did the Region] attempt to ascertain whether Petitioner concurred or objected to its motion, as required [by 40 C.F.R. § 124.19(f)(2)].” Reply at 2. LRCC averred that the Region only attempted to contact LRCC at 3:14 pm Central Time on the day the Region’s Response was due, and that the Region “failed to serve [LRCC] as required under the rules and contrary to the Region’s written agreement to serve its Response via email.” *Id.* Only after LRCC’s counsel inquired on May 8, 2015, did the Region serve LRCC its brief. *Id.*

On June 24, 2015, the Board issued an Order Scheduling Oral Argument in this matter for Tuesday, July 21, 2015, at 1:30 pm Eastern Time, and specified six questions regarding NPDES permitting, withdrawal, and termination processes the Board wanted the parties to address at the oral argument. Order Scheduling Oral Argument (June 24, 2015). The Order also required the Region to consult with EPA’s Office of General Counsel and Office of Water to ensure it was representing the Agency’s views regarding permit termination and withdrawal processes in its responses on July 21<sup>st</sup>. On July 15, 2015, the Region filed a motion to stay the above-captioned matter, “including specifically a stay of the oral argument for 44 days until the

Region files a status report” and the Board decides how the matter should proceed. EPA Region 6’s Motion to Stay (July 15, 2015) (“Motion”).

In support of its motion, the Region avers that it needs more time to complete consultation with EPA’s Office of Water and EPA’s Office of General Counsel. Motion at 1. Specifically, the Region avers that staff and management in EPA’s Office of General Counsel, “*who to date have not been involved in this matter,*” require more time to become familiar with “the complicated facts of the case and ensure that any views presented to the Board reflect the well-considered views of EPA regarding *what appear to be several matters of first impression.*” *Id.* (emphases added). The Region further states that “the Parties have reactivated settlement discussions and [the Region] is optimistic that settlement may be reached,” and that a stay would allow it to further assess possible settlement between the parties, with consultation from EPA’s Office of Water and EPA’s Office of General Counsel (“EPA Headquarters”). *Id.* Finally, the motion states that the Region maintains its requests for relief contained in its Response, and that the Region had contacted the attorney for LRCC, but “does not at this time know LRCC’s position on this motion.” *Id.*

On July 16, 2015, LRCC filed a response objecting to the Region’s motion to stay this proceeding. Response by Petitioner Lee Ranch Coal Company to EPA Region 6’s Motion to Stay (July 16, 2015) (“Motion Response”). Although LRCC opposes the stay requested by the Region, LRCC does not object to continuing the date of oral argument by 30 days to provide EPA Headquarters the opportunity to consider this matter in light of the Board’s order scheduling oral argument, which requested EPA Headquarters’ input on NPDES permitting, withdrawal, and termination proceedings. *Id.* at 2. LRCC’s response to the Region’s motion makes clear that while it is frustrated with the length of time its petition has been pending before

the Board, and that it considers the Region's need for any additional time "self-inflicted," LRCC nonetheless would appreciate the input of EPA Headquarters at oral argument. *Id.* at 1-2. In addition, LRCC requested that the Board expedite its order on the Region's motion and LRCC's response because counsel for LRCC are scheduled to fly from Los Angeles, California, to Washington, DC, on Sunday, July 19, 2015, to participate in the oral argument. *See id.* at 1.

The Board denies the Region's motion to stay this proceeding. As an initial matter, the timing of the Region's request blatantly flies in the face of the procedural regulations set forth at 40 C.F.R. part 124 that govern NPDES permit appeals before the Board. It is incumbent on any party that files a motion for an extension of time to file it "sufficiently in advance of the due date to allow other parties to have a reasonable opportunity to respond to the request for more time and to provide the Environmental Appeals Board with a reasonable opportunity to issue an order." 40 C.F.R. § 124.19(g). This requirement also helps to ensure that both the opposing party and the Board have ample to time to review any such motions in light of their other workload, and to manage their respective workloads effectively and efficiently. In this instance, while the Region did not file a motion for an extension of time per se and rather requested a stay, the timing of its request left only three business days for both LRCC and the Board to respond before oral argument is scheduled to commence. In essence, the Region's request for a stay amounts to an open-ended extension of time, and it has required the Board and counsel for LRCC to halt other activities, including planned vacation for Board staff and judges, to review and decide the Region's late-in-time motion. The Board is dismayed at the Region's blatant disregard for the Board's procedural rules, and does not expect to encounter this behavior again from the Region in future proceedings.

The Board also is deeply troubled by the Region's selective recitation of facts to the Board in support of its motion. In LRCC's Motion Response, LRCC states that on July 2, 2015 – two weeks before the Region filed its motion – LRCC had declined the Region's request to jointly request a continuation of the date the Board had scheduled for oral argument. Motion Response at 1. Thus, the Region's statement that it did "not at this time know LRCC's position on this motion," Motion at 2, is disingenuous at best, and at minimum, should have been included in the facts cited by the Region as to the status of this case. If the Region was contemplating a request for a stay two weeks before filing its motion, there is no reason the Region could not have filed its motion sufficiently in advance of the scheduled oral argument to allow LRCC and the Board adequate time to respond pursuant to 40 C.F.R. § 124.19(g).

Secondly, the Board rejects the first and second arguments the Region offers to support its request for a stay (the Region needs time to coordinate with EPA Headquarters given the issues of first impression raised in this case). Longstanding Agency policy states that any coordination or consultation with EPA Headquarters typically is to occur during the 30-day period that is provided before the Region's response to a petition for review of a NPDES permit is due. *See Procedures for Coordination OE-OGC-Regions Environmental Appeals Board* (Jan. 25, 1993) ("It is important for the Regions to coordinate as early as possible with all Headquarters offices on the issues raised in permit appeals \* \* \* so that EPA will be advancing consistent positions. Some of this coordination needs to be initiated by the program offices and some by [the Office of Regional Counsel]."); *see also* 40 C.F.R. § 124.19(b). The Board underscored this point in *In re Sierra Pacific Industries*, PSD Appeal Nos. 13-01 through 13-04 (Order Granting Extension of Time for Supplemental Briefing) (May 28, 2013), at 2 n.2.

In the instant case, the Region had ample time to consult and coordinate with EPA Headquarters prior to filing its response brief, particularly given the previous four-month stay in this case. Notwithstanding the settlement negotiations that the parties engaged in for over four months through April 15, 2015, the Region inexplicably chose not to enlist the assistance of EPA Headquarters once the parties had reached an “impasse” and further agreed to a proposed briefing schedule. *See* Joint Third Status Report at 2 (Apr. 15, 2015).<sup>1</sup> Thus, the Region’s statement that EPA Headquarters, and the Office of General Counsel in particular, requires more time at this juncture to become familiar with the facts of the case falls short. In every case, the Board expects that the views presented by an EPA Region to the Board will reflect the well-considered views of EPA as a whole, and particularly in cases such as this one, where the Region notes there “appear to be several issues of first impression.” Motion at 1. The onus rested squarely on the Region to inform EPA Headquarters of its intended course of action, and to ensure that the Region’s position was consistent with the Agency’s views prior to filing its response to the petition for review.

The Board also rejects the Region’s third argument in support of its motion to stay this proceeding, namely to allow the parties to further assess possible settlement with the assistance of EPA Headquarters. LRCC avers that on May 27, 2015, counsel and representatives for LRCC flew from Los Angeles, California, to Dallas, Texas, to meet with the Region in an attempt to resolve this matter informally. Motion Response at 2. Although LRCC states that it “remains interested in reaching a mutual resolution if possible,” LRCC further avers that “it has

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<sup>1</sup> The Board notes that the Region could have asked LRCC to agree to a longer briefing schedule to accommodate extra time for the Region to confer with EPA Headquarters once the parties concluded that informal settlement was not possible. The Board accepted the parties’ proposed briefing schedule without modification, in which the Region acquiesced to a briefing schedule that allowed three weeks to file its response brief. *See* Joint Third Status Report at 2 (containing the filing date of the joint third status report, April 15, 2015, and the proposed due date for the Region’s response, May 6, 2015).

lost confidence in the Region's willingness to do the same," given that LRCC promptly submitted on June 2, 2015, a proposal for settlement following that in-person meeting that "has since languished at the Region." *Id.* The Region's statement in its current motion before the Board that "the [p]arties have reactivated settlement discussions and EPA Region 6 is optimistic that settlement may be reached," seems, at best, less than transparent given that LRCC avers its settlement proposal has been with the Region for six weeks without any further action.

The Board also is perplexed at the Region's request for relief in its most recent motion, which asks the Board to grant the relief the Region initially requested in its response to the petition for review. Motion at 2; *see also* Region 6's Response to LRCC's Petition for Review and Motion to Dismiss or Deny the Petition at 10 (May 6, 2015). Specifically, the Region's current motion before the Board, despite asking for a stay and stating that it is optimistic it may reach settlement with LRCC, also requests that the Board either "order that the permit has been properly terminated pursuant to the CWA" or "that the permit has been withdrawn in its entirety," and in any event order that LRCC's petition for review is dismissed or denied with prejudice. Region 6's Response to LRCC's Petition for Review and Motion to Dismiss or Deny the Petition at 10 (May 6, 2015). The Board declines to grant the Region's request for relief, in part because the Board's purpose for scheduling oral argument was to allow the parties to further expound on the Region's "several alternative legal grounds" in support of its Requested Relief that the Board dismiss or deny LRCC's petition. Order Scheduling Oral Argument at 2 (June 24, 2015). Accordingly, while the Board strongly encourages the parties to continue their settlement discussions, the Board does not believe a stay is warranted while those discussions continue.

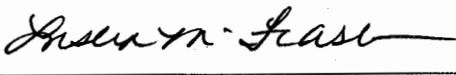
Prior to receiving LRCC's response to the Region's motion to stay these proceedings, the Board was poised to issue an order denying the Region's motion and proceeding with oral argument on Tuesday, July 21, 2015. Over the past few weeks, the Board has spent a significant amount of its own limited resources reviewing the materials in this case and preparing for oral argument and is ready to move forward with deciding this case. Given LRCC's willingness to postpone oral argument to ensure that the Region and the Board can best benefit from the considered view of EPA Headquarters Offices, the Board is postponing oral argument to a date (to be determined) in late August or September.

For the reasons stated above, the Board denies the Region's motion to stay this matter. The oral argument scheduled to take place on Tuesday, July 21, 2015, at 1:30 p.m. Eastern Time is hereby postponed. In lieu of oral argument, the Board orders the parties, as well as a representative from EPA's Office of General Counsel, to participate in a telephone status conference on Tuesday, July 21, 2015, at 1:30 p.m. Eastern Time. The Clerk of the Board shall notify the parties via email on Monday, July 20<sup>th</sup> of the conference line information to use for the status conference. During the call, the Board will determine the date for the rescheduled oral argument.

So ordered.

Dated: *July 17, 2015*

ENVIRONMENTAL APPEALS BOARD

By: 

Leslye M. Fraser  
Environmental Appeals Judge

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order Denying Region's Motion to Stay the Proceeding, Postponing Oral Argument, and Scheduling Status Conference in the matter of Lee Ranch Coal Co., NPDES Appeal No. 14-04, were sent to the following persons in the manner indicated:

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Dated: JUL 17 2015

  
Annette Duncan  
Secretary to the Board