

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

In the Matter of: )  
 )  
CH2M HILL PLATEAU ) Appeal No. NPDES 09-08  
REMEDICATION COMPANY, LLC )  
HANFORD NUCLEAR )  
RESERVATION )  
 )  
NPDES Permit No. WA-002591-7 )  
\_\_\_\_\_ )

**MOTION TO DISMISS PETITION FOR REVIEW**

Region 10 of the United States Environmental Protection Agency files this motion to dismiss the petition for review filed by CH2M Hill Plateau Remediation Company (CHPRC) in the above-captioned matter. CHPRC does not oppose this motion, but seeks clarification from the Environmental Appeals Board regarding subsequent appeal rights, as set forth in its separate filing. Under the specific circumstances presented by this case, the Region agrees that CHPRC's petition for review may be appropriately dismissed as moot.

**BACKGROUND**

The Region reissued NPDES Permit No. WA-002591-7 to the U.S. Department of Energy's contractor CHPRC on June 23, 2009. CHPRC filed a petition for review of the reissued permit on July 23, 2009. On July 30, 2009, the Board notified the Region that CHPRC had filed the petition and set a September 15, 2009 deadline for the Region's response. By letter

dated August 20, 2009, the Region identified the following contested condition as stayed until final agency action under 40 C.F.R. § 124.19(f):

Part I.B.2: Discharges of process water such as dust suppression water and stormwater from Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Cleanup actions are prohibited from Outfall 004.

That letter further stated the Region's intent to withdraw the contested condition pursuant to 40 C.F.R. § 124.19(d) and to seek public comment on deleting the condition from the permit. The remaining permit conditions were uncontested and severable from the contested condition and, in accordance with 40 C.F.R. §§ 124.16(a)(2) and 124.20(d), became fully effective and enforceable on September 22, 2009.

On August 27, 2009, the Region and CHPRC filed a joint motion to stay the proceedings until November 30, 2009 to accommodate the public comment process. The motion stated the Region's intent to finalize a permit modification deleting Part I.B.2 from the permit "unless public comment raises significant issues that lead the Region to reconsider the modification." On September 2, 2009, the Board issued an order staying the proceedings until October 1, 2009 and requiring the parties to show cause why the petition should not be dismissed as moot upon withdrawal of the contested condition. Alternatively, the Region could move for dismissal. The Region files this motion to dismiss in response to the Board's order.

### DISCUSSION

In some cases, dismissal of a petition may be appropriate if and when all contested conditions have been withdrawn. See *In re Cavenham Forest Indus.*, 5 E.A.D. 722, 728 & n.10 (EAB 1995) (declining to reinstate appeal where each contested permit condition had been remanded; no contested conditions from original petition remained for Board to review); *In re*

*City of Port St. Joe*, 5 E.A.D. 6, 9 (EAB 1994) (holding appeal was mooted by Region's withdrawal of permit under predecessor to 40 C.F.R. § 124.19(d) despite petitioner's objection to new draft permit proposed as replacement); *In re City of Haverhill Wastewater Treatment Facility*, NPDES Appeal No. 08-01, Order Dismissing Petition for Review at 2 (EAB, Feb. 28, 2008) (granting motion to dismiss petition as moot after Region withdrew sole contested condition). Dismissal may not be appropriate in all cases, however, and each case should be examined individually.

Here, the Region and CHPRC agree that Part I.B.2 of the permit is the sole contested condition in the petition for review. In addition, as stated in the parties' joint motion for stay, CHPRC has agreed that deleting this condition from the permit would address the concerns raised in its petition. By notification filed with the Board this same day, the Region has withdrawn Part I.B.2 pursuant to 40 C.F.R. § 124.19(d). See Exhibit A. No other petitions for review have been filed and the parties do not dispute the scope of contested conditions or the effect of withdrawal. Moreover, EPA assumes that CHPRC may file a new appeal under 40 C.F.R. § 124.19 if the modification process produces a permit condition that CHPRC finds objectionable. Dismissing this petition would therefore not leave CHPRC without an appeal opportunity in case of an unanticipated result following public comment. See *In re: San Jacinto River Authority*, NPDES Appeal No. 07-19, 2008 WL 869683 (EAB 2008). Under these specific circumstances, the Region agrees that CHPRC's petition for review may be dismissed as moot.

The Region further notes that it has consulted with the Office of Regional Counsel for Region 1 and the Office of General Counsel regarding the relationship between this case and *Town of Wayland Wastewater Management District Commission*, NPDES Appeal Nos. 08-26 and 08-27. Unlike *Wayland*, this case does not involve a potential dispute regarding whether all

contested conditions have in fact been withdrawn or a settlement agreement requiring the Region to fulfill certain conditions before petitioner would withdraw its petition. The Agency therefore views the two cases as distinguishable, and the appropriate result here may not apply to the particular facts and circumstances presented in *Wayland*. Indeed, as Region I described in its Response to Order to Show Cause Why Petitions Should Not Be Dismissed, any given case may present complicated procedural or jurisdictional issues and/or prudential concerns that counsel against dismissal. Accordingly, the Agency urges the Board to continue to assess each case individually when contested conditions are withdrawn, and does not here seek to establish general propositions or suggest that dismissal would be appropriate in any other case.

4

**RELIEF REQUESTED**

Given the specific circumstances presented here, *i.e.*, only one party has petitioned for appeal, the sole contested condition has been withdrawn pursuant to 40 C.F.R. § 124.19(d), and the parties do not dispute the scope or effect of that withdrawal, the Region requests that the Board dismiss CHPRC's petition for review as moot.

Dated this 29<sup>th</sup> day of September, 2009.

Respectfully submitted,

Attorney for the Region



**KIMBERLY A OWENS**  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
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Of Counsel to the Region:

Poojah Parikh  
Attorney Advisor  
Water Law Office  
Office of General Counsel  
(202) 564-0839

# Exhibit A



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue, Suite 900  
Seattle, WA 98101-3140

SEP 29 2009

OFFICE OF  
WATER AND WATERSHEDS

**VIA Electronic Submission and Federal Express**

Ms. Eurika Durr, Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
Colorado Building, Suite 600  
1341 G Street, N.W.  
Washington, D.C. 20005

**VIA Electronic and First Class Mail**

Mr. Moses Jaraysi, Vice President  
Environmental Programs and Regulatory Management  
CH2M Hill Plateau Remediation Company  
P.O. Box 1600  
Richland, Washington 99352

Re: NPDES Appeal No.09-08  
NPDES Permit No. WA-002591-7  
Notification of Withdrawal of Permit Condition

Dear Ms. Durr and Mr. Jaraysi:

The above-referenced National Pollutant Discharge Elimination System (NPDES) permit was reissued to CH2M Hill Plateau Remediation Company, LLC (CHPRC) on June 23, 2009. On July 30, 2009, the Environmental Appeals Board notified Region 10 that CHPRC had filed a petition for review of the permit. By letter dated August 20, 2009, the Region identified those permit conditions that were stayed as a result of CHPRC's petition. The following contested condition was identified as stayed until final agency action under 40 C.F.R. § 124.19(f):

Part I.B.2: "Discharges of process water such as dust suppression water and stormwater from Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Cleanup actions are prohibited from Outfall 004."

The remainder of the June 23, 2009 NPDES permit conditions were uncontested and severable from the contested condition and, in accordance with 40 C.F.R. §§ 124.16(a)(2) and 124.20(d), became fully effective and enforceable on September 22, 2009.

Pursuant to 40 C.F.R. § 124.19(d) the Region hereby withdraws Part I.B.2 from NPDES Permit No. WA-002591-7. As of the date of this notification, Part I.B.2 is no longer in effect as a permit condition. The Region intends to issue a public notice and seek comments on removing Part I.B.2 from the permit. Those permit conditions that are not withdrawn, which include the entire permit except Part I.B.2, continue to remain in effect.

If you have any questions regarding this correspondence, please feel free to contact Kim Owens, Office of Regional Counsel, at (206) 553-6052, or John Drabek, Office of Water and Watersheds, at (206) 553-8257.

Sincerely,



Michael A. Bussell, Director  
Office of Water and Watersheds

cc: Mr. Raymond Takashi Swenson, CHPRC

**CERTIFICATE OF SERVICE**

I certify that the foregoing "Motion to Dismiss Petition for Review" and attached supporting materials were sent to the following persons, in the manner specified, on the date below:

Original by electronic submission and Federal Express, to:

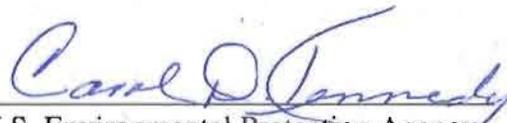
Ms. Eurika Durr, Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
Colorado Building, Suite 600  
1341 G Street, NW  
Washington, D.C. 20005

One copy, by electronic and first class U.S. mail, to:

Raymond Takashi Swenson  
Senior Counsel, CHPRC  
P.O. Box 1600, MS H8-66  
Richland, Washington 99532  
Fax: (509) 376-0334

Dated:

Sept. 29, 2009

  
U.S. Environmental Protection Agency  
Office of Regional Counsel

MOTION TO DISMISS  
Appeal No. NPDES 09-08

U.S. ENVIRONMENTAL PROTECTION AGENCY  
1200 Sixth Avenue  
Seattle, Washington 98101  
(206) 553-1037