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Native Village of Kivalina IRA Council v. United States Environmental Protection Agency

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Native Village of Kivalina IRA Council v. United States Environmental Protection Agency, 687 F.3d 1216 (9th Cir. 2012).

Clare Hansen

ABSTRACT

In this case, the Ninth Circuit affirmed the United States Environmental Protection Agency Environmental Appeals Board's order denying review of petitioners' Native Village of Kivalina IRA Council (Kivalina)'s challenge of a permit issued to the mining company Teck Alaska, Inc. Teck's permit allows the company to discharge wastewater from the Red Dog Mine into the Wulik River in northwestern Alaska, near the Kivalina village. The Ninth Circuit held that Kivalina failed to address the United States Environmental Protection Agency's allegedly inadequate responses to Kivalina's public comments on the proposed permit. Thus, the United States Environmental Protection Agency Environmental Appeals Board properly denied Kivalina's request for review.

I. INTRODUCTION

In *Native Village of Kivalina IRA Council v. United States Environmental Protection Agency*,¹ the Ninth Circuit held that petitioners Kivalina failed to explain why the EPA's responses to public comments on the National Pollutant Discharge Elimination System (NPDES) permit for Teck Alaska, Inc's (Teck) Red Dog mine were clearly erroneous or otherwise warranted review pursuant to 40 C.F.R. § 124.19(a).² The court emphasized that merely repeating public objections or re-stating the Environmental Protection Agency's (EPA) authority over such matters is insufficient to meet the

¹ 687 F.3d 1216 (9th Cir. 2012).

² *Id.* at 1218.

petitioners' burden of showing that review is warranted.³ Due to this failure, the United States Environmental Protection Agency Environmental Appeals Board (EAB) properly denied to review Kivalina's challenge.⁴

II. FACTUAL AND PROCEDURAL BACKGROUND

Teck operates the Red Dog mine, an open pit zinc and lead mine, in northwestern Alaska.⁵ The mine's wastewater drains into the Wulik River which enters the Chukchi Sea near Kivalina's village.⁶ In 2009, the EPA released a Final Supplemental Environmental Impact Statement including responses to public comments.⁷ In 2010, the EPA issued the mine's NPDES permit.⁸ One month later, Kivalina filed a petition for review with the EAB challenging the permit.⁹ Subsequently, the EPA revised the permit, rendering three sections of Kivalina's petition moot and leaving only section II.C.3 pending before the EAB.¹⁰ The EAB denied review of the remaining section stating that Kivalina had failed to use sufficient detail under 40 C.F.R. § 124.19(a) to explain why the EPA's responses to public comments were irrelevant, erroneous, insufficient, or an abuse of discretion.¹¹ Kivalina appealed.¹²

III. ANALYSIS

The Ninth Circuit gave deference to the EAB when reviewing its order pursuant to the standard set forth in the Administrative Procedure Act.¹³ Petitions to the EAB for

³ *Id.* at 1219-1220.

⁴ *Id.* at 1222.

⁵ *Id.* at 1218.

⁶ *Id.*

⁷ *Native Village of Kivalina IRA Council*, 687 F.3d at 1218.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 1219.

¹² *Id.*

¹³ *Native Village of Kivalina IRA Council*, 687 F.3d at 1219 (citing 5 U.S.C. § 706(2)).

review of permits must include a statement of reasons supporting the review, especially issues raised by public comments.¹⁴ Petitions must also show that the condition in question is based on a clearly erroneous finding of fact or conclusion of law or is an important policy consideration the EAB should in its discretion review.¹⁵ The EAB has further interpreted these requirements to mandate both clear identification of the contested conditions in the permit and an argument that those conditions warrant review.¹⁶ The EAB has repeatedly emphasized the importance of an explanation of why the review is merited.¹⁷

Kivalina argued that its three specific challenges to the permit's monitoring conditions included in the petition were sufficient.¹⁸ The EAB found, and the Ninth Circuit agreed, that in the three challenges Kivalina never addressed the EPA's responses to public comments.¹⁹ Instead, Kivalina simply argued that the EPA had the authority to require additional monitoring and ensure compliance with water quality standards.²⁰ The court held that the proper inquiry was not whether the EPA had authority, but whether it properly exercised that authority.²¹ The EPA never denied it had the authority to hold Teck to a higher monitoring standard in its permit, but set forth many reasons why it chose not to do so in its responses to public comments.²² In order to meet the burden of

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 1220.

¹⁹ *Native Village of Kivalina IRA Council*, 687 F.3d at 1220-1222.

²⁰ *Id.* at 1221.

²¹ *Id.*

²² *Id.*

showing that review of the EPA's decision was warranted, Kivalina needed to address the reasoning in the EPA's responses.²³

IV. CONCLUSION

The Ninth Circuit affirmed the EAB's order denying review of Kivalina's petition challenging the EPA's NPDES permit for Teck's Red Dog mine.²⁴ Because Kivalina failed to address the EPA's responses to public comments, it failed to meet its burden of demonstrating that EAB review of the permit conditions was insufficient.²⁵ Procedural requirements mandate sufficient explanation regarding why EAB review of permit conditions is warranted.²⁶ This case serves to clarify that petitions for permit review must include sufficient explanation and reasoning addressing why the EPA's responses to public comments are inadequate; a mere restatement of the EPA's authority to do more will not suffice.

²³ *Id.* at 1222.

²⁴ *Id.*

²⁵ *Native Village of Kivalina IRA Council*, 687 F.3d at 1222.

²⁶ *Id.* at 1219.