UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

OFFICE OF
GENERAL COUNSEL

APR 12 1985

MEMORANDUM

TO: Regional Counsels

FROM: Colburn T. Cherney
Associate General Counsel
for Water (LE-132W)

SUBJECT: Judicial Officer's Decision on
Part 124 Proceedings

The Part 124 procedures on adjudicatory hearings do not clearly specify whether the Administrator or the administrative law judge decides issues of law when both issues of fact and law are raised in a request for an evidentiary hearing. When presented with this situation, Region 10 granted a hearing on material issues of fact but denied the request for a hearing on issues of law. On appeal the Judicial Officer decided that the administrative law judge should initially decide all issues of fact and law when both types of issues have been timely raised in the manner prescribed in EPA's regulations. The Judicial Officer found that it was error to exclude legal questions from consideration at the evidentiary hearing on the sole grounds that they are legal in nature, not factual.

Accordingly, when either issues of fact or issues of fact and law are raised, the hearing request should be granted for all material issues of fact or fact and law. The Regional Administrator may, however, exclude legal questions if they are not relevant or material to the permit decision. If the request raises only legal issues, it should be denied and referred to the Administrator.

Attachment

cc: Rebecca Hanmer
Glen Unterberger

BEFORE THE ADMINISTRATOR
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In the Matter of:	)	
	)	
446 Alaska Placer Mines more or less	)	NPDES Appeal No. 84-13
	)	
	)	
NPDES Permit No. AK0029467 et al.	)	
	)	

DECISION ON PETITIONS FOR REVIEW

On October 31, 1984, the Regional Administrator, Region X, U.S. Environmental Protection Agency (EPA), granted in part and denied in part the requests of Trustees for Alaska and G.M. Zemansky for an evidentiary hearing on the issuance in 1984 of several hundred NPDES permits for placer mining in Alaska. On November 30, 1984, the Regional Administrator also granted in part and denied in part the evidentiary hearing requests filed by some of the miners: Edward J. Armstrong, on behalf of Tri-Con Mining, Inc. and Silverado Mines (U.S.), Inc., and Ann Rhian, on behalf of 55 placer miners. Each of these parties is now appealing the Regional Administrator's decision insofar as it partially denies his own hearing request.

The hearing requests raised issues of fact and law. They were denied to the extent they raised issues of law; they were granted to the extent they raised issues of fact. In accordance with the Regional Administrator's reading of the rules governing

evidentiary hearings, 40 CFR Part 124 (Subpart E)(1984), legal issues are not eligible for consideration in an evidentiary hearing but would have to be appealed to the Administrator. The parties objected to the resulting bifurcation of the permit proceedings -- with factual issues being referred to an Administrative Law Judge for a hearing, and, simultaneously, legal issues being referred to the Administrator for consideration on appeal -- and argued that it is inconsistent with applicable regulations. I agree.

The pertinent provisions of the regulations governing requests for evidentiary hearings are as follows:

> §124.74 Requests for evidentiary hearing.
>
> * * * *
>
> (b)(1) In accordance with §124.76, such requests shall state each legal or factual question alleged to be at issue, and their relevance to the permit decision, together with a designation of the specific factual areas to be adjudicated and the hearing time estimated to be necessary for adjudication. Information supporting the requests or other written documents relied upon to support the request shall be submitted as required by §124.73 unless they are already part of the administrative record required by §124.18.
>
> NOTE: This paragraph allows the submission of requests for evidentiary hearings even though both legal and factual issues may be raised, or only legal issues may be raised. In the latter case, because no factual issues were raised, the Regional Administrator would be required to deny the request. However, on review of the denial the Administrator is authorized by §124.91(a)(1) to review policy or legal conclusions of the Regional Administrator. EPA is requiring an appeal to the Administrator even of purely legal issues involved in a permit decision to ensure that the Administrator will have an opportunity to review any permit before it will be final and subject to judicial review.

* * * *

§124.75 Decision on request for a hearing.

(a)(1) Within 30 days following the expiration of the time allowed by §124.74 for submitting an evidentiary hearing request, the Regional Administrator shall decide the extent to which, if at all, the request shall be granted, provided that the request conforms to the requirements of §124.74, and sets forth material issues of fact relevant to the issuance of the permit.

Contrary to Region X, I can find nothing in this language which compels the conclusion that evidentiary hearings are only to be granted for factual issues if the hearing request raises both legal and factual issues. Several years ago the rules governing evidentiary hearings for NPDES permits separated legal issues from factual issues by requiring the presiding officer to refer issues of law to the General Counsel for a decision; issues of law were expressly excluded from the adjudicatory hearing. 1/ These rules were superseded, however, by the current rules, which do not contain the provision for referral to the General Counsel or an express prohibition against considering legal issues in an evidentiary hearing. Compare 40 CFR Part 124 (Subpart H) (1979) with 40 CFR Part 124 (Subpart E)(1984). The absence of such a prohibition weighs heavily against reading the rules in the manner advocated by Region X, for bifurcation of legal and factual issues is clearly the exception rather than the rule.

1/ 40 CFR §125.36(m)(1978) contained the relevant provisions of the former rules:

> (m) Decision of . . . General Counsel on Questions of Law. (1) Issues of law, including questions relating to the interpretation of provisions of the Act, and the legality and interpretation of regulations promulgated pursuant to the Act, shall be decided [by the General Counsel] in accordance with this subsection and shall not be considered at the adjudicatory hearing.

Except for the superseded NPDES rules, I know of no similar procedures at EPA. See, e.g., 40 CFR Part 22 (1984)(consolidated civil penalty hearing rules); 40 CFR Part 164 (1984) (pesticide cancellation/suspension hearing rules); 40 CFR Part 85 (Subpart S)(1984)(automobile recall hearing rules).

Region X claims that its position is supported by general principles of administrative law as set forth in the case law:

> It has been held repeatedly that adjudicative administrative hearings such as NPDES evidentiary hearings are for the determination of facts and not the determination of legal or policy issues. See Bi-Metallic Inv. Co. v. State Board of Equalization, 239 U.S. 441 (1915); Mothers' and Children's Rights Organization v. Sterrett, 467 F.2d 797, 800 (7th Cir. 1972); Connecticut State Department of Public Welfare v. Department of HEW, 448 F.2d 209, 212 (2d Cir. 1971); See also, K. Davis, Administrative Law Treatise 409, §12.2 (2d ed. 1979). For legal issues, due process requires only an opportunity to submit some written argument, not a full hearing. Id. These general rules of administrative law are reflected generally in the regulations governing NPDES evidentiary hearings, 40 CFR Part 124 Subpart E, and specifically in the standard for granting a hearing found at 40 CFR §124.75. Agency review of legal issues is governed by §124.91 which gives a requestor the opportunity to appeal to the Administrator after denial of a hearing on legal issues. (Region X Response to Petition for Review at 5.)

The problem with this characterization of the case law is that it leaves the impression that legal questions should never be decided in an evidentiary hearing. Nothing could be further from the truth. An examination of the cited cases discloses that they stand for a narrower principle and simply do not address the concerns raised here, that is, should legal issues be considered in an evidentiary hearing along with factual issues? The cited authorities on the other hand deal with the constitu-

tional issue of whether due process requires a formal (evidentiary) hearing if legal but not factual issues are raised. The answer appears to be that a full evidentiary hearing need not be held when there are no disputed facts; "[i]n such circumstances due process does not require a full evidentiary hearing but only adequate opportunity for argument." Connecticut State Department of Public Welfare, supra at 212. But if legal or policy issues are intertwined with fact questions, a formal hearing is required. Mothers' and Children's Rights Organization, supra at 800. And of course a formal hearing is required if factual issues alone are raised. Id. In other words, according to the authorities cited by Region X, the circumstances where a formal hearing should not be held are limited to those where questions of law only are raised. That, of course, is not the case here where factual issues have been raised as well.

As a final matter, Region X also claims that its position is supported by policy considerations. Having the Administrator decide the legal issues, according to Region X, will ensure nationwide consistency and will avoid unnecessary delay at the hearing level. This argument is not very compelling. Consistency is already assured because decisions rendered in an evidentiary hearing are subject to review by the Administrator. 40 CFR §124.91 (1984). Therefore, rejection of Region X's position does not pose any problems as far as legal consistency

is concerned. Also, in my opinion, rejection does not foreshadow any significant concern about delay at the hearing level, as Region X alleges. Region X does not give reasons to support this claim, and I am in no position to speculate what they are, for, if anything, I would assume that some cases might be delayed while others might be expedited; in other words, it would probably depend on the unique circumstances of each case. Therefore, I conclude that legal consistency and delay are not valid policy considerations.

Based on the foregoing, I conclude that Region X erred when it excluded legal questions from consideration at the evidentiary hearing. The issues to be considered at the hearing include all legal and factual questions that are relevant to the permit decision, provided they are raised in a timely fashion and in the manner prescribed in the regulations; it is error to exclude legal questions from consideration at such a hearing on the sole grounds that they are legal in nature, not factual. The Regional Administrator may, however, exclude legal questions if they are not relevant or material to the permit decision, just as irrelevant and immaterial factual questions may be excluded. [2/] And, of course, regardless of whether or

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2/ An example of an irrelevant legal question would be one which becomes moot by reason of a modification to the permit decision after the question is first raised. In its response to the Trustees of Alaska's petition, the Region points to two such examples where the permit decision has been modified in response to a recent court decision, Trustees for Alaska v. EPA, _____ F.2d ___, Civ. No. 83-7764 (9th Cir., December 10, 1984).

not the legal questions are relevant to the permit decision, the Regional Administrator must deny a hearing request if only legal questions are raised.

Conclusion

The matters raised by the Petitioners on appeal to the Administrator are hereby remanded to Region X for action consistent with this decision.

So ordered.

Ronald L. McCallum
Chief Judicial Officer (A-101)

Dated: APR 2 - 1985

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision on Petitions for Review in the matter of: 446 Alaska Placer Mines, NPDES Appeal No. 84-13, were sent to the following by 1st Class Mail, postage prepaid:

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Dated: MAR 2 - 1985

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