

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

_____)	
In re:)	
)	
General Growth Properties)	CWA Appeal No. 02-01
)	
Permit No. CEMVR-OD-P0396520)	
_____)	

ORDER DISMISSING PETITION FOR REVIEW

On January 3, 2002, the Environmental Appeals Board ("EAB" or "Board") received an appeal entitled "Appeal of EPA Region VII's Failure to Act Regarding the Issuance of Clean Water Act Permit Number CEMVR-OD-P-396520 (West Des Moines, Iowa; General Growth Properties Mall)," on behalf of four interested parties: Merle Hay Mall, Valley West Mall, Michael P. McMurray, and Bobbye J. McMurray (the appeal will be referred hereinafter as "Petition" and the four parties collectively as "Petitioners"). For the reasons set forth below, the Petition is dismissed for lack of jurisdiction.

I. BACKGROUND

Petitioners assert they do not seek review of the permit for dredged or fill material issued by the Army Corps of Engineers ("Corps") under Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, to General Growth Properties ("GGP") for the construction of a shopping mall in West Des Moines, Iowa. Rather, Petitioners seek review of the United States Environmental Protection Agency, Region VII's ("Region") failure to comment on the Corps' proposed permit action "or to otherwise fulfill its mandatory duties." Petition at 1. Petitioners nonetheless argue that the Corps made several errors when it issued the permit to GGP and that EPA "has an affirmative duty under both [the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.*] and the Clean Water Act to participate in this decision-making process." *Id.* at 6. Petitioners further request "that the EPA administratively review and set aside this decision until a full and proper analysis is undertaken." *Id.* The Petition makes no reference, however, to any applicable regulatory or statutory authority granting the Board jurisdiction to hear its Petition.¹

¹ Petitioners make an allusion to appeal rights under 40 C.F.R. § 124.19 in footnote 2 of the Petition; however, no argument is made in the Petition as to how that provision should apply here.

On February 4, 2002, the Board issued to Petitioners an Order to Show Cause as to why the Petition should not be dismissed for lack of jurisdiction ("Order to Show Cause"). Specifically, in its Order to Show Cause, the Board pointed out that its authority to review permit decisions made by the Region is generally found in 40 C.F.R. Part 124. These provisions pertain to "EPA procedures for issuing, modifying, revoking and reissuing, or terminating all RCRA, UIC, PSD and NPDES² 'permits' * * *." 40 C.F.R. § 124.1(a). Of particular relevance here is the specific exclusion of "permits issued, modified, revoked and reissued or terminated by the Corps of Engineers," which permits are governed by procedures set forth in 33 C.F.R. parts 320-327. *Id.* Because the permit at issue is one issued by the Corps of Engineers under CWA § 404, the Board preliminarily concluded that it lacked jurisdiction to review the Corps' permit decision under 40 C.F.R. § 124.19. See Order to Show Cause at 2.

Petitioners responded to the Order to Show Cause on February 25, 2002. See Memorandum in Response to the Environmental

² National Pollutant Discharge Elimination System ("NPDES") permits are issued under section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342, and are separate from the dredge/fill permits issued under CWA § 404. 33 U.S.C. § 1342(a)(1) (specifically excluding section 404 provisions from the NPDES provisions).

Appeals Board's Show Cause Order ("Response").³ Petitioners' argument is essentially two-fold. First, Petitioners' concede that the Petition submitted to the Board "is not an appeal of the Corps' final permit decision * * * ." Response at 3. Second, Petitioners argue that section 309 of the Clean Air Act ("CAA"), 42 U.S.C. § 7609, imposes upon the Region "mandatory review responsibilities for proposed federal actions, including GGP's application for a Clean Water Act permit." *Id.*⁴ Petitioners contend that the Board or the Administrator has the "obligation to assure that [the] mandatory duty [under section 309] is fulfilled by [the Region]." *Id.* at 4. To bolster their argument Petitioners further rely on regulations outlining the

³ Also before the Board are two additional filings. The first was filed by General Growth Properties Jordan Creek, L.L.C. ("Permittee") on February 7, 2002. Permittee generally argues that Petitioners have failed to satisfy the Board's jurisdictional requirements. The second, filed by 1000 Friends of Iowa on February 25, 2002, expresses support for Petitioners, but does not address the question of the Board's jurisdiction to consider the Petition.

⁴ Section 309 of the CAA provides in relevant part:

The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administrator, contained in * * * any major Federal agency action * * * . Such written comment shall be made public at the conclusion of any such review.

42 U.S.C. § 7609(a).

Environmental Protection Agency's organization and general information. See 40 C.F.R. Pt. 1, subpt. B (2001). In particular, Petitioners' quote 40 C.F.R. § 1.25(e)(2) which provides:

The Environmental Appeals Board shall exercise any authority expressly delegated to it in this title. With respect to any matter for which authority has not been expressly delegated to the Environmental Appeals Board, the Environmental Appeals Board shall, at the Administrator's request, provide advice and consultation, make findings of fact and conclusions of law, prepare a recommended decision, or serve as the final decisionmaker, as the Administrator deems appropriate.

40 C.F.R. § 1.25(e)(2). Petitioners contend that the Board is required to "assure there is 'consistent application of national program policies by reinforcing existing administrative procedures and program policy mechanisms * * * ' including compliance with Section 309 and EPA's regulations and policies governing NEPA, the Clean Water Act, and Environmental Justice." Petition at 4 (quoting 40 C.F.R. § 1.27(b)).⁵

⁵ Section 1.27(b) provides, in relevant part, that the Office of Regional Operations is responsible for

[furthering] the consistent application of national program policies by reinforcing existing administrative, procedural, and program policy mechanisms as well as through initiation of reviews of significant Regional issues of interest to the Administrator.

40 C.F.R. § 1.27(b).

II. DISCUSSION

Upon consideration, the Board concludes that it lacks jurisdiction to hear this appeal. First, we conclude that we lack jurisdiction under 40 C.F.R. Part 124. As we pointed out previously in our Order to Show Cause, the Board's jurisdiction under part 124 extends only to "all RCRA, UIC, PSD and NPDES 'permits' (including 'sludge-only' permits issued pursuant to § 122.1(b)(2) of this chapter.)" Order to Show Cause at 2, quoting 40 C.F.R. § 124.1. "Permits issued, modified, revoked and reissued or terminated by the Corps of Engineers" are expressly excluded from the Board's review authority. *Id.* Petitioners concede that they are not appealing any permit decision, including the "Corps' final permit decision." Response at 3. Since Petitioners concede that they do not challenge the Corps' permit in this proceeding, or any permit for that matter, we lack jurisdiction under 40 C.F.R. § 124.19 to hear this Petition.

The Board has previously held that its general authority to review certain permit decisions under Part 124 does not grant it jurisdiction to consider all disputes that arise out of or relate to permits. Thus, for example, the Board has held that its jurisdiction "does not extend to review of * * * the Region's

actions as part of the State's permitting proceeding." *In re NPDES Permit for Wastewater Treatment Facility of Union Township, Michigan*, NPDES Appeal Nos. 00-26 & 00-28, slip op. at 9 (EAB, Jan. 23, 2001) (Order Denying Petitions for Review). Similarly, here we hold that the Board's authority under Part 124 does not extend to a review of the Region's alleged inaction with respect to the Corps' permit.

Next we examine Petitioners' argument that the Board's jurisdiction is predicated on an alleged duty to assure the Region's compliance with "Section 309 [of the Clean Air Act] and EPA's regulations and policies governing NEPA, the Clean Water Act, and Environmental Justice." Response at 4 (footnote omitted). Petitioners assert that this "obligation" lies with the Board based on the language of 40 C.F.R. §§ 1.25 and 1.27, quoted above. We disagree and conclude that jurisdiction is not conferred upon the Board by these sections.

As 40 C.F.R. section 1.25 makes eminently clear, the Board is a body of limited jurisdiction. Section 1.25 provides first that the Board's authority encompasses that which is "expressly delegated to it in [Title 40]." 40 C.F.R. § 1.25(e)(2). Petitioners make no credible argument that the authority to review this Petition has been expressly delegated to the Board in

Title 40. The Administrator has delegated certain of the review responsibilities for environmental impact statements under CAA § 309 to the Assistant Administrator for Enforcement and Compliance Assurance and Regional Administrators. See EPA Delegation No. 7-57, Section 309 Review Process ¶3(a)-(b) (May 11, 1994).⁶ We need not decide the question of the applicability of section 309 review authority to this proceeding. Whatever the scope of such review authority, it has not been delegated to the Board.⁷ We are therefore without authority to exercise any such

⁶ The Administrator has retained authority to refer actions to the Council on Environmental Quality ("CEQ") for resolution where there is a dispute. *Id.* at ¶3(c); see also 40 C.F.R. § 1504 (2001) (CEQ regulations implementing the requirements of section 309).

⁷ We note that Petitioners also refer the Board to "environmental justice" issues raised during the Corps' permit proceedings as reasons necessitating Board review in this case. See Petition at 4-5; Petition Exs. 5 & 6; Response at 4. While Executive Order 12898, mandates that:

To the greatest extent practicable and permitted by law, * * * each Federal agency shall make achieving environmental justice part of its mission * * * ,

59 Fed. Reg. 7629 (Feb. 16, 1994), the Executive Order does not expand the Board's jurisdiction to include the Corps' permit. Rather, the Board has jurisdiction to review the environmental justice issues implicated in permits over which the Board otherwise has jurisdiction. The Board has held that where the Region is the permit issuer, it should

exercise its discretion * * * to include within its health and environmental impacts assessment an analysis focusing particularly on the minority or low income community whose health or environment is alleged to be threatened by the facility. In this fashion the Region
(continued...)

review authority.

Finally, section 1.25(e)(2) does provide the Board with authority to review other matters which are not expressly delegated to the Board, upon the Administrator's request. Petitioners make no showing that the Administrator has made such a request of the Board in this case. Since no such request has been made, we conclude that section 1.25(e)(2) does not confer jurisdiction on the Board to review the Region's actions in this case. Furthermore, we rule that section 1.27(b), quoted by Petitioners as a basis for the Board's exercise of jurisdiction, is inapplicable because it defines the role of the Office of Regional Operations, not the Environmental Appeals Board.

⁷(...continued)

may implement the Executive Order within the constraints of RCRA and its implementing regulations.

In re Chemical Waste Mgmt. of Indiana, Inc., 6 E.A.D. 66, 75 (EAB 1995). Because the Board is without jurisdiction to review the Corps' permit, the alleged environmental justice issues related to the permit are also outside of our jurisdiction.

III. CONCLUSION

For the foregoing reasons, we dismiss the Petition for lack of jurisdiction.

So ordered.⁸

ENVIRONMENTAL APPEALS BOARD

Dated: 03/11/02

By: _____/s/_____
Kathie A. Stein
Environmental Appeals Judge

⁸ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein. See 40 C.F.R. § 1.25(e)(1) (2001).

