IN THE MATTER OF SIMPSON PAPER COMPANY ET AL.

NPDES APPEAL NO. 92–26

ORDER DISMISSING APPEAL IN PART

Decided August 6, 1993

Syllabus

Petitioners, who are recreational users of Pacific Ocean waters in the vicinity of California's Samoa Peninsula, requested and were granted an evidentiary hearing before an EPA administrative law judge to contest certain provisions appearing in two federal Clean Water Act permits for pulp mills owned and operated by Simpson Paper Company and Louisiana-Pacific Corporation. The permits were issued under Section 301(m) of the Clean Water Act, 33 U.S.C. § 1311(m), which was enacted in 1983 exclusively for these two facilities. Clean Water Act civil enforcement actions brought in the U.S. District Court for the Northern District of California against these two permittees, concerning the same facilities and the same permits at issue in the evidentiary hearing, were resolved in March 1992 by that Court's approval of consent decrees executed by both permittees. Shortly thereafter, the ALJ issued an Initial Decision in which he incorporated the provisions of the two District Court consent decrees into the permits and also ordered the permits modified in other respects, such as by requiring the inclusion of permit provisions for acute toxicity testing of the mills' effluent.

Petitioners have appealed from the ALJ's Initial Decision. Among other things, they object to the ALJ's adoption of the terms and conditions of the consent decrees and maintain that he should have terminated the permits in their entirety. This Order addresses the appeal as it relates to the Louisiana-Pacific facility. The status of the appeal as it relates to the Simpson facility is addressed separately in an accompanying Order to Show Cause.

After the Initial Decision was issued, the original five-year term of the Louisiana-Pacific permit ended, and the District Court for the Northern District of California entered a modified consent decree in the Clean Water Act enforcement action involving Louisiana-Pacific. The modified decree required Louisiana-Pacific to surrender its federal Clean Water Act permit by withdrawing its application for renewal of that permit, and to apply, instead, to the State of California for a permit under the State's NPDES program. Louisiana-Pacific has done so, and currently operates its Samoa pulp mill solely under authority of State law.

Held: Petitioners' challenge to the Louisiana-Pacific permit is not properly before the Board and must be dismissed. The Board does not have jurisdiction to rule on that challenge because Louisiana-Pacific no longer holds an EPA-issued permit for

its Samoa pulp mill, and the existence of such a permit is an essential prerequisite to the Board's permit review authority.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

Petitioners Nancy K. Taylor *et al.*[1] have jointly appealed from a July 27, 1992 Initial Decision of Administrative Law Judge Thomas B. Yost, entered after an evidentiary hearing concerning certain provisions appearing in two Clean Water Act Section 301(m) permits, *see* 33 U.S.C. § 1311(m), issued by EPA Region IX. Permit Nos. CA0005282 and CA0005894 were issued in 1987 to Simpson Paper Company ("Simpson") and Louisiana-Pacific Corporation ("L-P"), respectively, pursuant to Section 301(m) of the Clean Water Act for discharges into the Pacific Ocean from pulp mills owned and operated by the permittees on the Samoa Peninsula in Humboldt County, California.

The permits expired in August 1992, but were continued in force by operation of 40 CFR § 122.6(a) when the permittees submitted timely applications for their renewal. Clean Water Act Section 301(m), which was enacted in 1983 exclusively for these two facilities, authorizes EPA to issue (and to renew for a single additional term) Clean Water Act permits for the L-P and Simpson mills containing less-stringent effluent limitations for biochemical oxygen demand and pH than would otherwise be required under the NPDES permit program.

These permit proceedings come before us in an unusual procedural posture, the effect of which is to require dismissal of the present appeal insofar as it challenges the provisions of the Louisiana-Pacific permit.[2] We have concluded that the petition for review of the ALJ's Initial Decision pertaining to the L-P permit must be dismissed for lack of jurisdiction, because L-P has withdrawn its

[1] The other petitioners are the Underwater Society of America, Mark Cortright, the Humboldt Skindivers, and the Central California Council of Diving Clubs.

[2] The present order relates *only* to petitioners' challenge to Louisiana-Pacific's Section 301(m) permit, which, as we discuss at length herein, has lapsed and is no longer in force. In a separate Order to Show Cause issued today, we call upon the Region to substantiate its suggestion of mootness with respect to the portion of this appeal that concerns Simpson Paper Company. As explained in the show cause order, the Region and Simpson have made representations to this Board to the effect that the Simpson facility would be closed in April 1993, but the Board has not received confirmation that that has in fact occurred.

federal permit renewal application and now operates solely under authority of State law. Thus, L-P no longer holds a federal Clean Water Act permit to which this Board's authority would extend. The background to this order of dismissal is as follows.

After the Region's issuance of Section 301(m) permits to L-P and Simpson in July 1987, the present petitioners requested and were granted an evidentiary hearing with respect to their contentions that (1) the permits did not adequately protect recreational uses of the receiving water, and (2) the permits' effluent toxicity testing provisions did not call for the use of sufficiently sensitive test organisms.[3] With the exception of certain permit provisions that were stayed or modified pursuant to 40 CFR § 124.60 (owing to the *permittees'* attempt to secure an evidentiary hearing as to certain issues not otherwise relevant here), the Section 301(m) permits became effective during 1987.[4] Subsequently, a pair of Clean Water Act civil enforcement actions were commenced against the permittees in the United States District Court for the Northern District of California[5] alleging, among other things, violations of the Section 301(m) permits. The enforcement actions were resolved by the execution and entry (in March 1992) of consent decrees requiring the permittees to pay civil fines, to comply with specified chronic toxicity testing protocols, to implement specified remedial measures for, *inter alia,* the protection of recreational and other beneficial uses of the receiving water, and to achieve full compliance with the Section 301(m) permits and with the decrees themselves by June 1994.

The ALJ issued his Initial Decision approximately three months after the District Court's entry of the consent decrees. In the Initial Decision, the ALJ observed that, to a substantial extent, the rec-

[3] The Regional Administrator also denied petitioners' request for an evidentiary hearing in part, and petitioners appealed that partial denial to the Chief Judicial Officer. In an opinion and order dated March 19, 1990, the Chief Judicial Officer reversed the denial of petitioners' evidentiary hearing request with respect to one issue, and affirmed as to the remaining issues. *In re Simpson Paper Company and Louisiana-Pacific Corporation,* NPDES Appeal No. 87–14 (CJO, Jan. 4, 1990). The Region subsequently modified the permits in accordance with the decision of the Chief Judicial Officer.

[4] Petitioners are therefore mistaken when they suggest that, during the course of their challenge to the permits before the ALJ and before this Board, the Section 301(m) permits have never become "final" and have instead remained "draft federal permit[s]." Underwater Society of America et al. Motion for Leave to Submit Additional Filing in Opposition to Declaratory Relief (April 9, 1993), at 3.

[5] *United States* v. *Louisiana-Pacific Corporation,* Civil Action No. 78–0567 (MHP) and *Surfrider Foundation and United States* v. *Simpson Paper Company,* Civil Action No. 89–1738 (MHP) (consolidated for purposes of pretrial proceedings).

reational use issues litigated at the evidentiary hearing had been anticipated and effectively mooted by various provisions of the consent decrees entered in the parallel enforcement litigation. Generally speaking, the Initial Decision ordered the Section 301(m) permits modified so as to incorporate the contents of the District Court consent decrees—except for certain chronic toxicity testing requirements, which the ALJ ordered to be implemented sooner than the consent decrees alone would have required. In addition, the ALJ ordered that the permits be amended to include an acute toxicity testing requirement that was not addressed in the consent decrees.

Petitioners appealed to this Board, arguing that the ALJ erred by (1) failing to revoke the Section 301(m) permits *in toto,* (2) failing to rule on all of the issues designated by the Regional Administrator to be decided at the evidentiary hearing, and (3) modifying the Section 301(m) permits so as to incorporate many of the remedial provisions of the District Court consent decrees.

After the administrative appeal was filed, the District Court for the Northern District of California entered an order modifying L-P's consent decree in the enforcement litigation. The modified consent decree required L-P to withdraw its application for reissuance of its federal Section 301(m) permit and to apply to the State of California for a standard NPDES permit. L-P has fulfilled these obligations. On December 14, 1992, L-P applied for a California NPDES permit, and on February 9, 1993, the State of California's North Coast Regional Water Quality Control Board adopted, pursuant to 40 CFR § 122.6(d)[6] and applicable California law, the terms and conditions of L-P's Section 301(m) permit as an enforceable State-issued permit pending issuance of the State NPDES permit.[7] Thereafter, on February 10, 1993, L-P withdrew its federal Section 301(m) permit renewal application.

[6] Section 122.6(d) provides, in relevant part:

> An EPA-issued permit does not continue in force beyond its expiration date under Federal law if at that time a State is the permitting authority. States authorized to administer the NPDES program may continue either EPA or State-issued permits until the effective date of the new permits, if State law allows.

[7] As a matter of California law, "[t]he terms and conditions of an expired permit are automatically continued pending issuance of a new permit if all requirements of the federal NPDES regulations on continuation of expired permits are complied with." Cal. Code Regs. tit. 23, § 2235.4. It is undisputed that, as of February 9, 1993, L-P was in compliance with the federal regulation pertaining to continuation of expired permits (*i.e.,* 40 CFR § 122.6(a)) by virtue of having timely filed an application for reissuance of its Clean Water Act permit with EPA Region IX.

Citing the foregoing chronology, the Region contends that U.S. EPA now lacks jurisdiction over L-P's permit. The Region points out that L-P's federal permit expired by its terms on August 18, 1992, and that L-P withdrew its application for reissuance of the federal permit (as required by the modified District Court consent decree) on February 10, 1993. According to 40 CFR § 122.6(a), an expired federal permit can continue in force only if the permittee has submitted a timely and complete application for a new federal permit. The Region therefore concludes that as soon as L-P's application for renewal of its Section 301(m) permit was withdrawn, the permit lapsed and there no longer existed an effective federal permit for this Board to review. Since that time, according to the Region, L-P's mill has operated without a federal permit, under authority of the California regulation carrying forward (as a State permit) the terms and conditions of the former federal permit until such time as a new California NPDES permit is issued.

We agree with the Region that L-P no longer holds a federal permit for its Samoa facility. The conclusion is inescapable that, in the absence of an EPA-issued permit, there is no jurisdictional basis upon which this Board might rule on the merits of petitioners' contentions with respect to that facility. L-P's federal Section 301(m) permit expired by its terms in August 1992, and was administratively extended by L-P's timely filing of a federal permit reissuance application with EPA Region IX. *See* 40 CFR § 122.6(a). In accordance with the terms of the modified consent decree entered in the District Court enforcement action, L-P has filed an application with the State of California for an NPDES permit. On February 9, 1993, the State notified L-P that its NPDES permit application was complete and, further, that the State would administratively extend L-P's Section 301(m) permit under State law until such time as the new permit can be prepared, issued, and made effective. Having received the State's notice, L-P withdrew its application for reissuance of its federal permit on February 10, 1993. The withdrawal of that application resulted in the lapse of the EPA-issued permit, and in the loss of this Board's jurisdiction to review that permit.

This Board's jurisdiction to review permit decisions under the federal Clean Water Act depends on the existence of an EPA-issued permit. *See generally* 40 CFR Part 124, Subpart E ("Evidentiary Hearings for EPA-Issued NPDES Permits"), and Section 124.74 therein. Here, there is no longer an EPA permit for the Board to review. When L-P withdrew its federal permit renewal application, our authority to review the contents of that permit ended. The permitting

authority for this facility is now the appropriate Regional Water Quality Control Board of the State of California. The facility is currently permitted under State law, and the State is in the process of developing a new permit for the facility under its State NPDES program. Therefore, to the extent that petitioners object to the State's interim adoption of the terms and conditions of L-P's former federal Section 301(m) permit, they must seek relief at the State level.[8]

Although this result will surely be unsatisfying to the petitioners, who have pressed their concerns strenuously before the ALJ and this Board,[9] the result is a necessary consequence of our limited authority under the federal environmental laws and regulations. *See* 40 CFR § 1.25 ("The Environmental Appeals Board shall decide each matter before it in accordance with applicable statutes and regulations."). Petitioners must now direct their concerns to the State, regarding either the terms of the current L-P permit that the State has adopted or the State's development of a new NPDES permit for the L-P facility.[10] This federal permit proceeding, however, must be, and hereby is, dismissed for lack of jurisdiction insofar as it challenges the L-P facility's expired federal Section 301(m) permit.

So ordered.

[8] We would hope and expect that the State will be mindful of the issues raised by these petitioners now that the State is administering this facility's Clean Water Act permit. *Cf. In re Shell Oil Company (Martinez, California),* RCRA Appeal No. 90–16, at 2 (EAB, Sept. 18, 1992) (Dismissal Order).

[9] In this connection, we note that Region IX has conceded, in papers filed with the Board, that petitioners are the prevailing parties in this matter. *See* Region IX's Supplementary Response to Petition for Review Filed by Nancy K. Taylor, et al. (March 26, 1993), at 1.

[10] In their most recent submission to this Board, while petitioners contend that we have not lost jurisdiction over the L-P permit, they suggest that our jurisdiction now rests upon 40 CFR § 123.44, which provides that any new NPDES permit issued by the State will have to be presented to the EPA Regional Administrator for approval. Thus, the petitioners apparently concede that the Board can no longer grant any meaningful relief with respect to the original Section 301(m) permit. Instead, they suggest that we issue a prospective order requiring that the new State permit (not yet in existence even in draft form) contain specified terms and conditions that petitioners deem necessary. *See* Petitioners' Motion for Leave to Submit Additional Filing in Opposition to Declaratory Relief (April 3, 1993), at 3–4. Needless to say, we are unwilling and unauthorized to render such a decision. Such an undertaking would require us to render an advisory opinion with respect to a hypothetical permit, which is inconsistent with EPA's permit review authority.