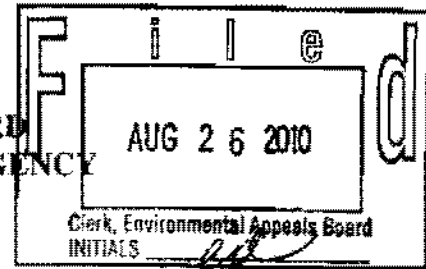


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



_____)
In re:)
)
Antrim Township) NPDES Appeal No. 09-14
)
Docket No. CWA-03-2009-0265DN)
_____)

**ORDER DISMISSING APPEAL
FOR LACK OF JURISDICTION**

On January 28, 2005, the Antrim Township in Greencastle, PA (“Township”) submitted documentation in the form of a “Notice of Intent for Coverage” or “NOI” to the Pennsylvania Department of Environmental Protection (“PA DEP”) seeking coverage under a general permit for the Township’s storm water discharges.¹ See Letter from William Kick, Martin & Martin, Inc., to Kirit Shah, PA DEP (requesting coverage under the General Permit and attaching the Township’s NOI) (Jan. 28, 2005). The Township’s NOI indicated that it discharged stormwater into unnamed tributaries of three water bodies: Conococheague Creek, Marsh Run West Branch, and Marsh Run. NOI at 2. On May 12, 2005, the PA DEP approved the Township’s coverage

¹ On December 6, 2002, the PA DEP, Bureau of Watershed Management, issued a general permit authorizing municipal separate storm sewer systems (“MS4s”) to discharge stormwater to surface waters in Pennsylvania upon approval of the PA DEP and pursuant to certain conditions. See Authorization to Discharge Under the National Pollutant Discharge Elimination System (NPDES), General Permit for Discharges of Stormwater from Small Municipal Separate Storm Sewer Systems (“General Permit”), at 2. Pursuant to the General Permit, MS4s seeking coverage for stormwater discharges must meet the permit’s eligibility requirements and must submit a timely Notice of Intent to the PA DEP. *Id.* As stated above, the Township submitted its NOI on January 28, 2005.

under the general permit. *See* Letter from James S. Spontak, PA DEP, to Teresa Schnoor, Township of Antrim, (attaching Approval of Coverage).

The General Permit under which the Township sought and received coverage requires, among other things, that dischargers submit annual reports on stormwater management activities performed during the previous year. On September 30, 2009, following a review of the Township's compliance, U.S. EPA Region 3 ("Region") issued a "Findings of Violation, Order for Compliance, and Information Request" ("Order and Request"), which directs the Township to submit annual stormwater reports for each of the past five years, along with copies of local stormwater ordinances and a certification to the truth and accuracy of these materials. No penalty was proposed, but the Region explicitly reserved the right to pursue administrative, civil, or criminal action to seek penalties, fines, or other relief should the Township not respond to its order. *See* Order and Request.

On October 30, 2009, the Township filed with the Environmental Appeals Board ("Board") a petition for review of the Region's order and/or the underlying NPDES permit. *See* Petition for Review ("Petition"). The Township does not cite a regulatory basis for invoking the Board's appellate authority. Instead, the Township asserts that it does not have an MS4 system and was wrongly advised to obtain an NPDES general permit by the PA DEP. Petition at 2. It explains that it has been in the process of gathering the necessary documents to apply for an exemption or waiver from the NPDES general permit requirement from the PA DEP. *Id.* The Township asserts further that all the stormwater runoff within its boundaries "is infiltrated onsite

and there is not one single point source discharge within the Township.” *Id.* Accordingly, because it has no “point sources” and does not “discharge” within the meaning of the Clean Water Act, the Township asserts that the Region erred in finding permit violations.

On December 10, 2009, the Region filed a motion to dismiss the Township’s appeal, contending that the Board lacks jurisdiction under 40 C.F.R. part 22 to adjudicate pre-enforcement administrative compliance orders, such as the one at issue here. Motion to Dismiss Petition for Review and Memorandum in Support Thereof (“Region’s Motion”) at 3-4. In the alternative, the Region argues that to the extent the Board considers this appeal to be a petition for review of the NPDES general permit itself, the Board lacks jurisdiction under 40 C.F.R. part 124 to review state-issued general permits, such as the one at issue in this matter. *Id.* at 5-6.

Upon consideration, the Region’s Motion is hereby **GRANTED**. As the Region rightly observes, the Board lacks jurisdiction to hear this appeal under the Consolidated Rules of Practice at 40 C.F.R. §§ 22.4(a), .29-.30, because the Order and Request is not an initial decision or interlocutory ruling or order of an administrative law judge or regional judicial officer.² Moreover, even if the Township’s appeal were construed as a petition for review of its NPDES general permit, the Board lacks jurisdiction to hear this appeal under 40 C.F.R. § 124.19(a),

² Section 22.4(a) states in part that “[t]he Environmental Appeals Board rules on appeals from the initial decisions, rulings and orders of a Presiding Officer in proceedings under these Consolidated Rules of Practice.” 40 C.F.R. § 22.4(a). Section 22.29 provides for appeals from interlocutory orders or rulings other than an initial decision of a presiding officer. 40 C.F.R. § 22.29(a). Section 22.30 provides for appeals to the Board from initial decisions of a presiding officer. 40 C.F.R. § 22.30(a).

which prohibits challenges to general permits in this forum.³ Accordingly, for good cause shown, the Township's appeal is hereby dismissed.⁴

So ordered.⁵

ENVIRONMENTAL APPEALS BOARD

Dated: 8/26/2010

By: Charles J. Sheehan
Charles J. Sheehan
Environmental Appeals Judge

³ Section 124.19(a) states, in part, as follows:

Persons affected by an NPDES general permit may not file a petition under this section or otherwise challenge the conditions of the general permit in further Agency proceedings. They may instead either challenge the general permit in court, or apply for an individual NPDES permit under § 122.21 as authorized in § 122.28 and then petition the Board for review as provided by this section.

40 C.F.R. § 124.19(a).

⁴ The Board makes no determination on the Township's assertion that the Township does not have a municipal storm sewer system and that it should not have obtained a permit. The Board leaves that determination to the PA DEP.

⁵ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, and Kathie A. Stein. See 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Dismissing Appeal for Lack of Jurisdiction** in the matter of *Antrim Township*, NPDES Appeal No. 09-14, were sent to the following persons in the manner indicated:

By First Class U.S. Mail, Return Receipt Requested:

Linus E. Fenicle, Esq.
Wayne S. Martin, Esq.
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2331 Market Street
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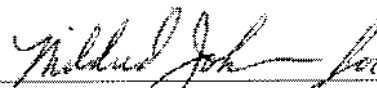
By EPA Pouch Mail:

Lori G. Kier
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By Inter-Office Mail:

Stephen J. Sweeney
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Office of General Counsel
1200 Pennsylvania Avenue, N.W.
Mail Code 2355A
Washington, D.C. 20460

Dated: AUG 26 2010



Annette Duncan
Secretary