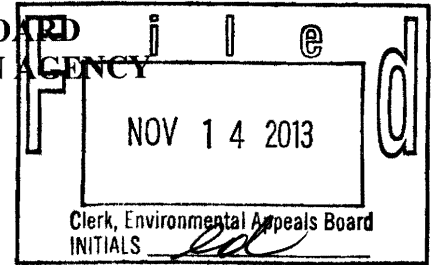


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)

Stericycle Inc.)

Utah Title V Permit No. 1100055002)

CAA Appeal No. 13-01

ORDER DISMISSING APPEAL FOR LACK OF JURISDICTION

I. BACKGROUND

On August 15, 2013, Concerned Salt Lake City Area Residents Against the Stericycle Incinerator and Greenaction for Health and Environmental Justice (“Petitioners”) filed an appeal with the Environmental Appeals Board (“Board”) requesting “expedited consideration” of a “Petition for Review” that they had filed more than four years ago¹ with the United States Environmental Protection Agency (“EPA” or “Agency”). *See* Appeal of the Title V Permit Issued by Utah Division of Air Quality to Stericycle Inc. at 1 (“Appeal”). The “Petition for Review” is in fact a 2009 petition that Greenaction for Health and Environmental Justice and Cindy King filed with EPA pursuant to section 505(b)(2) of the Clean Air Act (“Act” or “CAA”), 42 U.S.C. § 7661(d)(b)(2), requesting that the Administrator object to a Title V operating permit that the Utah Division of Air Quality had issued for the Stericycle Medical Waste Incinerator.²

¹ According to Petitioners, on March 31, 2009, the Agency sent them a letter acknowledging receipt of their appeal. Appeal at 1.

² The CAA requires that EPA promulgate regulations governing the minimum elements of a Title V operating permit program. *See* CAA § 502(b), 42 U.S.C. § 7661a(b). The regulations establishing these requirements are found at 40 C.F.R. parts 70 and 71. The part 70 regulations establish requirements for approval of state operating permits programs implementing the Title V permit program requirements. Part 71 establishes the federal operating permits program administered in the absence of
(continued...)

See Appeal of Title V Permit Issued by Utah Division of Air Quality to Stericycle Inc. (Mar. 16, 2009). Because Petitioners' appeal raises an issue of first impression, the Board asked the Agency to respond to the appeal. *See generally* Letter from Eurika Durr, Clerk of the Board, to Janet McCabe, Acting Assistant Adm'r, Office of Air and Radiation ("OAR"), U.S. EPA (Sept. 13, 2013).

In addition to Petitioners' appeal, several motions are currently pending before the Board. The Board rules on these pending motions first, in the following section of this decision. The Board then considers the appeal and, for the reasons described in Part III, dismisses it for lack of jurisdiction.

II. *OUTSTANDING MOTIONS*

On October 15, 2013, Stericycle Inc. ("Stericycle"), the permittee in this matter, filed several motions in this matter, including: (1) a Motion to Intervene or, in the Alternative, to Participate as an Amicus of the Board and (2) a Motion to Dismiss the Appeal for Lack of Jurisdiction or, in the Alternative for an Extension of Time ("Stericycle Motion to Dismiss"). For good cause shown, the Board hereby GRANTS Stericycle's motion to participate in this matter.

²(...continued)

an approved State program for the area in which the source is located. Pursuant to part 70, EPA fully approved the State of Utah's Title V operating permit program in 1995. *See* 40 C.F.R. pt. 70 app. A; 60 Fed. Reg. 30,192 (June 8, 1995).

On October 28, 2013, OAR requested leave to file a motion to dismiss the appeal for lack of jurisdiction and attached the referenced motion to dismiss. For good cause shown, the Board hereby GRANTS OAR's request for leave to file a motion to dismiss.³

III. CONSIDERATION OF APPEAL

A. Parties' Assertions

In their motions to dismiss, OAR and Stericycle both contend that the Board lacks jurisdiction to hear this appeal. OAR Motion to Dismiss the Appeal for Lack of Jurisdiction ("OAR Motion to Dismiss") at 1, 6-8; Stericycle Motion to Dismiss at 1, 3-4. OAR argues that, while the Board has jurisdiction to hear appeals in certain types of CAA matters, the current appeal, which challenges a Title V operating permit issued by a state under part 70, does not fall within any of these categories. OAR Motion to Dismiss at 5. Stericycle likewise argues that the Board lacks jurisdiction, citing the Board's Practice Manual and 40 C.F.R. parts 70 and 71. Stericycle Motion to Dismiss at 1, 3-4. Petitioners fail to cite any applicable statutory or regulatory provision in their petition as the basis for the Board's jurisdiction to review their appeal. In their reply to the motions to dismiss, however, Petitioners cite to a Board case, *In re Indeck-Niles Energy Ctr.*, PSD Appeal No. 04-01 (EAB Sept. 30, 2004) (Order Denying Review), as evidence that the Board does have jurisdiction to consider their appeal. Petitioners' Response to Motion to Dismiss Our Appeal at 4. The permittee, in its reply to Petitioners'

³ OAR also requested that the due date for its response to the appeal be extended until 45 days after the Board rules on the jurisdictional issues raised by the motion to dismiss. This portion of OAR's motion is rendered moot by today's decision.

response, contends that *Indeck-Niles* is “plainly distinguishable and inapplicable” to this matter. Reply Brief in Support of Stericycle’s Motion to Dismiss the Appeal for Lack of Jurisdiction at 2.

B. *Analysis*

As the Board has noted on several occasions, it is “a tribunal of limited, not general, jurisdiction.” *In re Hess Newark Energy Ctr.*, PSD Appeal No. 12-02, at 4 (EAB Nov. 20, 2012) (Order Dismissing Petition); *accord In re State of Hawaii*, NPDES Appeal No. 13-11, at 2 (EAB Nov. 6, 2013) (Order Dismissing Petition for Review); *In re Stevenson*, CWA Appeal No. 11-02, at 4 (EAB Apr. 19, 2011) (Order Dismissing Appeal for Lack of Jurisdiction). Its authority to review permit decisions is “limited by the statutes, regulations, and delegations that authorize and provide standards for such review.” *In re DPL Energy Montpelier Elec. Generating Station*, 9 E.A.D. 695, 698 (EAB 2001) (quoting *In re Carlton, Inc. N. Shore Power Plant*, 9 E.A.D. 690, 692 (EAB 2001)). The Board may not assert jurisdiction over a matter simply because it has jurisdiction over other types of appeals under the same statute. *See Hess*, at 4-5; *cf. In re Sutter Power Plant*, 8 E.A.D. 680, 688 (EAB 1999); *In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692, 704 (EAB 1996).

Under the CAA and its implementing regulations, the Board has been granted authority to consider appeals in certain specified CAA-related matters. For example, part 124 of title 40 of the Code of Federal Regulations provides for Board review of Prevention of Significant Deterioration (“PSD”) permits issued under the federal PSD program, such as the permit at issue

in the *Indeck-Niles* case that Petitioners cite.⁴ In addition, the part 71 regulations grant the Board authority to review petitions challenging *federal* Title V operating permit decisions issued by EPA (or its delegate). 40 C.F.R. § 71.11(l)(1); *see, e.g., In re Peabody W. Coal Co.*, 12 E.A.D. 22, 28-29 (EAB 2005); *see also* EAB Practice Manual at 59 (Aug. 2013). Part 71 also grants the Board authority to review informal appeals of an EPA decision denying a request to revise, revoke and reissue, or terminate a part 71 federal Title V operating permit. 40 C.F.R. § 71.11(n)(2); *see also* EAB Practice Manual at 59 (Aug. 2013). Importantly, however, nothing in the CAA or in part 70 grants the Board jurisdiction to review Title V permits issued by states pursuant to part 70. *See* 40 C.F.R. pt. 70; *compare* 40 C.F.R. § 71.11(l), (n)(2) (providing various appeals to the Board) *with* 40 C.F.R. § 70.8(d) (providing no corresponding appeal provisions to the Board). The Board, therefore, has no authority to consider appeals of Title V permits issued under part 70, nor does it have authority to consider petitions requesting that the Administrator object to a Title V permit issued under part 70. *Cf. In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 135 & n.36 (EAB 1997) (declining to review the Title V portion of a permit because that part was “a State permit” issued pursuant to Hawaii’s approved program); *In re Alcoa-Warrick Power Plant*, PSD Appeal No. 02-14, at 8 (EAB Mar. 5, 2003) (Order Denying Petition for Review) (concluding Board lacked jurisdiction where appeal sought review of Title V operating permit issued by an approved state under part 70); *In re Geon Co.*, CAA

⁴ Significantly, in that case, the Michigan Department of Environmental Quality issued the final permit pursuant to a delegation agreement between it and EPA Region 5. *Indeck-Niles*, at 1. Under the agreement, the delegated state issued a *federal* PSD permit, and thus the Board had authority to consider an appeal of that federally-issued permit. *See id.*; *see also In re Seminole Elec. Coop., Inc.*, PSD Appeal No. 08-09, slip op. at 8-10 (EAB Sept. 22, 2009), 14 E.A.D. ___ (explaining the difference between approved state programs and delegated federal programs, where delegates “stand in the shoes of EPA”); *Hess*, at 3 & n.5 (same).

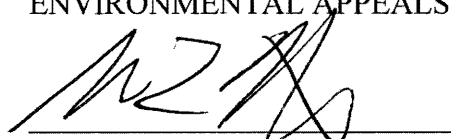
Appeal No. 00-7, at 4-5 (EAB June 1, 2000) (Order Dismissing Petition for Review) (same). Furthermore, as OAR points out, the Act explicitly grants “jurisdiction over claims that EPA has failed to meet a mandatory duty under the CAA,” to the United States District Courts, not the Board. OAR Motion to Dismiss at 8 (citing CAA § 304, 42 U.S.C. § 7604); *see also Sierra Club v. Johnson*, 500 F. Supp.2d 936, 938 (N.D. Ill 2007) (noting that the district court had considered a challenge to the Administrator’s failure to grant or deny petition to object to a Title V part 70 permit). So while Petitioners may have a forum available to them to seek the relief they desire, that forum is not the Board.

IV. CONCLUSION AND ORDER

As explained above, the Board lacks jurisdiction to hear this appeal. This matter is therefore dismissed.

So ordered.⁵

ENVIRONMENTAL APPEALS BOARD



Randolph L. Hill

Environmental Appeals Judge

Date: November 14, 2013

⁵ The three-member panel deciding this matter is composed of Environmental Appeals Judges Randolph L. Hill, Catherine R. McCabe, and Kathie A. Stein.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Order Dismissing Appeal for Lack of Jurisdiction* in the matter of Stericycle Inc., CAA Appeal No. 13-01, were sent to the following persons in the manner indicated:

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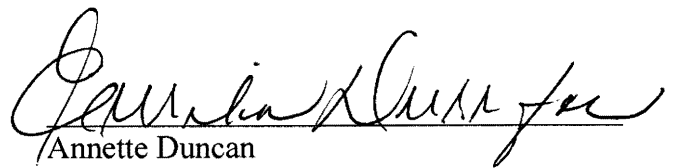
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