

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

_____))
In re:))
Michigan CAFO General Permit) NPDES Appeal No. 02-11
Permit No. MIG-440000))
_____))

ORDER DISMISSING PETITION FOR REVIEW

On December 31, 2002, the Environmental Appeals Board ("EAB" or "Board") received a handwritten appeal entitled "MI CAFO NPDES PERMIT # MIG440000 (incl. DEQ Policy Procedure No. 09-007, & MAEAP Exemption)," filed by Sandra K. Yerman ("Petitioner"). Petitioner seeks to appeal the above-referenced general permit issued by the Michigan Department of Environmental Quality ("MDEQ") for Concentrated Animal Feeding Operations ("CAFOs"), "MDEQ Policy Procedure No. 09-007," as well as a so-called "MAEAP Exemption." Petition at 1.

Petitioner's appeal raises five issues. First, Petitioner asserts that MDEQ's Policy and Procedure No. 09-007 violates the "right to appeal to the EAB under Title 40." *Id.* Second, Petitioner seeks to add language to the draft general permit requiring that challenges to the permit be filed "within 90 days of the effective date of the certificate of coverage." *Id.* at 2-

3. Third, Petitioner asserts her belief that all CAFOs should be required to obtain individual National Pollutant Discharge Elimination System¹ permits because general permits are "not sufficient." *Id.* at 3. Fourth, Petitioner contends that CAFOs should not be permitted to discharge to "waters that are currently prohibited" and should be required to "monitor discharges for pathogens (E. Coli), antibiotics and hormones." *Id.* at 3-4. Finally, Petitioner asserts that humane considerations regarding the treatment of animals should be included in the general permit. *Id.* at 4-5.

On February 19, 2003, the U.S. Environmental Protection Agency Region V ("Region") filed a response to the Petition, in which it contended the Board lacks jurisdiction to review the permit both because the permit is a state-issued permit and because the permit at issue is a general permit. By letter dated February 24, 2003, MDEQ also argued that the Board lacks jurisdiction to review the general permit. See MDEQ Response at 1. For the reasons set forth below, the Petition is dismissed for lack of jurisdiction.

¹ National Pollutant Discharge Elimination System permits are issued under section 402 of the Clean Water Act, 33 U.S.C. § 1342.

II. DISCUSSION

The Board is a tribunal of limited jurisdiction and its authority to review permit decisions is "limited by the statutes regulations, and delegations that authorize and provide standards for such review." *In re Carlton, Inc. North Shore Power Plant*, 9 E.A.D. 690, 692 (EAB 2001); *see also* 57 Fed. Reg. 5,320 (Feb. 13, 1992). In this case the statute relevant to our jurisdiction is the Clean Water Act ("CWA"), and in particular the National Pollutant Discharge Elimination System ("NPDES") permitting requirements in section 402 of the Act. CWA § 402, 33 U.S.C. § 1342. The regulations relevant to our jurisdiction are the consolidated permitting regulations at 40 C.F.R. Part 124.

The Board's authority to review NPDES permit decisions is generally found at 40 C.F.R. Part 124. This part provides "EPA procedures for issuing, modifying, revoking and reissuing, or terminating all * * * NPDES 'permits' * * *." 40 C.F.R. § 124.1(a) (emphasis added). Under Part 124, the EPA Regional Administrator issues a final permit decision, 40 C.F.R. § 124.15(a), and such permits are in turn appealable to the Board. Section 124.19(a) governs appeals of permit decisions issued under section 124.15. *See* 40 C.F.R. § 124.19(a).

The Board's authority, however, does not extend to appeals of state-issued permits under the NPDES provisions of the Clean Water Act. See e.g., *In re Town of Seabrook, N.H.*, 4 E.A.D. 806, 817 (EAB 1993) (concerns pertaining to a state-issued permit are not subject to NPDES permit review by the Board). It therefore follows that because the permit at issue is a state permit issued by MDEQ, which administers a federally approved state NPDES program,² the Board lacks jurisdiction to review the permit decision under 40 C.F.R. § 124.19. Although the permit program is federally approved, the permit at issue here is nonetheless a state permit issued under state law.³ Accordingly, nothing in the Clean Water Act or 40 C.F.R. Part 124 gives the Board jurisdiction to consider this appeal.

Furthermore, even if the permit at issue were a federally issued permit, i.e., an EPA-issued permit (which it is not), section 124.19(a) explicitly bars anyone from appealing general permits to the Board. The regulation provides that:

Persons affected by an NPDES *general* permit *may not*

² The State of Michigan received authorization to administer the NPDES general permits program in lieu of EPA on November 29, 1993. See 62 Fed. Reg. 61,170 (Nov. 14, 1997).

³ We note that MDEQ informed Petitioner of her rights to seek review of the permit under state law by letter dated January 23, 2003. MDEQ Response at 1.

file a petition under this section or otherwise challenge the conditions of the general permit in further Agency proceedings.

40 C.F.R. § 124.19(a) (emphasis added). Thus, the Board is also without jurisdiction to review cases involving EPA-issued NPDES general permits.

III. CONCLUSION

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

So ordered.⁴

ENVIRONMENTAL APPEALS BOARD

Dated: 03/18/03

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

⁴ 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).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Petition for Review, in the matter of Michigan CAFO General Permit, NPDES Appeal No. 02-11, were sent to the following persons by the method indicated:

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Dated: 03/18/03

_____/s/_____
Annette Duncan
Secretary