

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

In re:	)	
	)	
Mesabi Nugget Delaware, LLC	)	
Hoyt Lakes, Minnesota	)	
	)	NPDES Appeal Nos. 13-01, 13-02, and 13-03
NPDES/SDS Permit No. MN0067687	)	
	)	

**MOTION TO DENY REVIEW FOR LACK OF JURISDICTION**

Intervenor Mesabi Nugget Delaware, LLC (“Mesabi”) respectfully moves<sup>1</sup> the Environmental Appeals Board to deny review of the Petitions for Review filed in this matter, on the grounds that the Board has no jurisdiction over this appeal. Mesabi has consulted with the other parties in this matter. The parties for two of the Petitions for Review have advised that they oppose this Motion, while the party for the third Petition (WaterLegacy) did not respond to our February 14 request before the filing of this Motion. U.S. EPA Region V has already filed a motion seeking denial on similar jurisdictional grounds.

**INTRODUCTION**

The matter before the Board is a purely legal issue concerning the Board’s jurisdiction over the U.S. EPA’s approval of a variance from Minnesota’s water quality standards (“WQS”) granted by the Minnesota Pollution Control Agency (“MPCA”). The variance, like other WQS determinations, is outside of the Board’s jurisdiction as provided in applicable regulations. Therefore, the Board should deny review of the various Petitions for Review.

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<sup>1</sup> Mesabi is not aware of any requirement to seek leave before filing this Motion. However, to the extent leave is required, we apologize for the oversight and respectfully request that the Board treat this as a motion for leave and accept the Motion for filing and consideration.

Mesabi owns and operates a commercial scale iron nugget production facility in Hoyt Lakes, Minnesota. MPCA Findings of Fact, Conclusions of Law and Order at 3 (Oct. 24, 2012) (WaterLegacy Petition for Review Ex. 15, Rec. Doc. 1.13). Mesabi applied for and received a reissuance of NPDES/SDS Permit MN0067687 (“Permit”). *Id.* at 21. In conjunction with the Permit, the MPCA issued a variance to certain Minnesota water quality standards (“WQS Variance”). *Id.* at 20-21. The U.S. EPA reviewed and approved the WQS Variance. U.S. EPA Approval of Mesabi Variance (Dec. 27, 2012) (WaterLegacy Petition for Review Ex. 19, Rec. Doc. 1.18).

Petitioner WaterLegacy filed its Petition for Review of the WQS Variance on January 23, 2013 (Rec. Doc. 1). Petitioner Minnesota Center for Environmental Advocacy (“MCEA”) filed its Petition for Review on January 28, 2013 (Rec. Doc. 2). Petitioners Fond du Lac Band of Lake Superior Chippewa and Grand Portage Band of Lake Superior Chippewa (collectively, “Bands”) also filed their Petition for Review on January 28, 2013 (Rec. Doc. 3). Each of these Petitions generally claim that the U.S. EPA improperly approved the WQS Variance.<sup>2</sup>

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<sup>2</sup> Petitioners WaterLegacy and MCEA expressly contest only the WQS Variance. *See* WaterLegacy Petition at 1-2; MCEA Petition at 5. The Bands’ Petition refers to the “2012 Permit and Variance” at various locations. However, the only express conditions challenged by the Bands are those contained in the WQS Variance: “The Bands challenge the following seven aspects of the Variance as clear errors and as important policy matters the Board should review . . . .” Bands’ Petition at 4. *See also* Bands’ Petition at 11 (the only limits challenged were those contained in the variance). The Bands also cite only the WQS Variance in their argument for jurisdiction. *See* Bands’ Petition at 35 (“EPA variance decisions are appealable under the procedure in Part 124”).

The most obvious reading of the Bands’ Petition is that it is limited to challenging the WQS Variance. To the extent that the Bands’ Petition is construed to attack the Permit separate from the WQS Variance, it should be stricken for failure to specifically identify those portions of the Permit subject to review. *Environmental Appeals Board Practice Manual* § IV.D.(2)(c) (“a petition for review must specifically identify disputed permit conditions and demonstrate why review is warranted. *In re LCP Chemicals - N.Y.*, 4 E.A.D. 661, 665 n. 9 (EAB 1993)”). It would also be dismissed as outside the Board’s jurisdiction and an attack on a state-issued permit.

Mesabi moved to intervene in this matter on February 6, 2013 and noted that, if allowed to intervene, it would file a motion regarding lack of jurisdiction. Mot. for Leave to Intervene, NPDES Appeal Nos. 13-01, 13-02, and 13-03 (Feb. 6, 2013) (Rec. Doc. 5). The Board granted Mesabi leave to intervene by Order dated February 14, 2013.

### **ARGUMENT**

Regardless of the merits of the decision, the U.S. EPA's approval of Minnesota's issuance of the WQS Variance references only Clean Water Act ("CWA") sections and regulations relating to WQS, and not any other variance framework. A WQS variance is excluded from the scope of decisions reviewable by the Board.

#### **I. THE BOARD'S JURISDICTION TO REVIEW "VARIANCES" IS LIMITED TO SPECIFIC TYPES OF VARIANCES ENUMERATED IN REGULATIONS.**

While the Board has authority to review certain federally-issued permits and U.S. EPA determinations, the Board's jurisdiction is circumscribed by applicable regulations. Specifically, variances to WQS related to state-issued permits are not included in any jurisdictional statement of the Board. Instead, such decisions fit into the authority of the WQS laws and regulations. The Board is without authority to review WQS decisions or variances.

The Board's jurisdiction is set by 40 CFR 124.19(a), which reads:

Within 30 days after a[n] . . . NPDES . . . final permit decision . . . has been issued under § 124.15 of this part, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision.

40 CFR § 124.15 concerns when and how "the Regional Administrator shall issue a final permit decision." The Permit itself, having been issued by the State of Minnesota, is not reviewable before the Board. The Board "is empowered to review only permit conditions stemming from a federal exercise of authority, and not the decisions of States exercising permitting authority under authorized State programs." *In re Great Lakes Chem. Corp.*, 5 E.A.D. 395, 396 (EAB 1994) (the

Board could only review the federally-issued terms of a RCRA permit issued jointly by EPA and a state). See also *Environmental Appeals Board Practice Manual* § IV.B. (“Section 124.19(a) authorizes appeals to the EAB from federally-issued RCRA, UIC, PSD, and NPDES permit decisions.”).

While the Permit itself is not reviewable by the Board, the Petitioners have contended that the WQS Variance is reviewable as a separate EPA action under 40 CFR 124.64(b) (“Variance decisions made by EPA may be appealed under the provisions of [40 CFR] 124.19.”). However, the term “variance” is specifically defined in the applicable regulations to include only specific types of variances that the U.S. EPA might issue or otherwise approve. Thus, the “variances” that are reviewable by the Board are limited to those explicitly listed in the regulation, which does not include WQS variances approved under 40 CFR Part 131.

This limitation on the Board’s jurisdiction is found in the plain language of 40 CFR Part 124, setting forth the decisions that are subject to review by the Board. 40 CFR Part 124.2, which outlines the definitions that “apply to this part[,]” expressly incorporates the “variance” definition contained in 40 CFR 122.2:

*Variance* means any mechanism or provision under section 301 or 316 of CWA or under 40 CFR part 125, or in the applicable “effluent limitations guidelines” which allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(i), or 316(a) of CWA.

40 CFR 122.2 also provides that its definitions “apply to parts 122, 123, and 124.” Thus, the regulations twice state that the above definition of “variance” governs the scope of 40 CFR 124.64(b) – “Appeals of Variances.”

A WQS variance is authorized by CWA § 303 and 40 CFR Part 131, *see* U.S. EPA Approval of Mesabi Variance at 1, 11-21 (Dec. 27, 2012) (WaterLegacy Petition for Review

Ex. 19, Rec. Doc. 1.18), and is not included within the scope of the term “variance” as it is used in 40 CFR Part 124. It is plainly not “any mechanism or provision under section 301 or 316 of CWA or under 40 CFR part 125.” Further, a WQS (and the availability of review of a WQS) is distinct from an effluent limitation. *Bethlehem Steel Corporation v. EPA*, 538 F.2d 513, 516, 518 (2d Cir. 1976) (“water quality standards and effluent limitations are . . . entirely different concepts” and judicial review at the court of appeals is available for the latter, but not the former). Additionally, the basis for review of a WQS variance is the framework in 40 CFR 131, and not the “fundamentally different factors” analysis or the standards of various provisions of CWA §§ 301 or 316. *See* 40 CFR § 131.13; *Water Quality Standards Handbook* § 5.3 (“State variance procedures, as part of State water quality standards, must be consistent with the substantive requirements of 40 CFR 131.”) (excerpt<sup>3</sup> attached as Ex. A).

The interpretation of a regulation “begins with the regulation’s plain language.” *Solis v. Summit Contrs., Inc.*, 558 F.3d 815, 823 (8th Cir. 2009). When provided, definitions should control any interpretation. *Sierra Club v. Clark*, 755 F.2d 608, 613 (8th Cir. 1985); *see also Fabi Constr. Co. v. Sec. of Labor*, 508 F.3d 1077, 1087 (D.C. Cir. 2007) (setting aside an agency’s interpretation of a regulation when it conflicted with a definition contained therein). “[T]he canon that identical terms or phrases in the same statute have the same meaning surely carries a great deal of force when dealing with such a highly technical and defined term . . . .” *State Farm Mut. Automobile Ins. Co. v. IRS*, 698 F.3d 357, 371 (7th Cir. 2012). “[T]he best evidence . . . in defining the scope of an agency’s authority . . . is found . . . in the language establishing the authority. Where, as here, that language unambiguously uses a statutorily defined term, that

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<sup>3</sup> The complete *Water Quality Standards Handbook* can be found on the U.S. EPA’s website at <http://water.epa.gov/scitech/swguidance/standards/handbook/>.

definition controls the scope of authority.” *Wolverine Power Co. v. FERC*, 963 F.2d 446, 451 (D.C. Cir. 1992).

The authority granted to the Board in 40 CFR 124.64 uses the term “variance” as defined in 40 CFR § 122.2. It is a “highly technical term” specifically defined to include and omit different variance authorities utilized by the U.S. EPA and States. The plain language of the regulation must be read to evaluate the scope of the Board’s jurisdiction. As the defined term “variance” excludes WQS variances, the express language of the applicable regulations precludes the Board from reviewing this WQS Variance.

Other conditions surrounding the genesis of the regulations at issue only reinforce their express directive that WQS variances are not within the Board’s jurisdiction. The predecessor to today’s WQS regulations were developed at the same time that 40 CFR parts 122 and 124 were “extensively” revised and the 40 CFR part 122 definition of “variance” was adopted. 44 Fed. Reg. 30016, 30040 (May 23, 1979) (adopting guidelines for State WQS and procedures for EPA review); 44 Fed. Reg. 32854, 32902 (June 7, 1979) (adopting the definition of “variance”). At the time this limited definition of “variance” was developed and adopted, the concept of a WQS variance was well-established within the agency. *Id.*; U.S. EPA General Counsel Ruling No. 58 at 7-10 (Mar. 29, 1977) (attached as Ex. B) (confirming the legality of a WQS variance). The availability and U.S. EPA’s acknowledgment of WQS variances during development of the “variance” definition is confirmation that the exclusion from 40 CFR 122.2 was not a mere oversight. Finally, 40 CFR 124.62, setting out the procedure for making decisions on variances, also lists several legal bases for variances, and CWA § 303 and 40 CFR Part 131 are not included among them. Read in conjunction with the plain language of the regulation, these factors confirm that WQS variances were never meant to be a part of the 40 CFR Parts 122 and 124 scheme, and never meant to be part of the Board’s jurisdiction.

## II. THE CHALLENGED U.S. EPA ACTION IS A WQS VARIANCE, WHICH IS OUTSIDE OF THE BOARD'S JURISDICTION.

The WQS Variance is subject to the provisions of 40 CFR Part 131. The U.S. EPA approval of Mesabi's WQS Variance was expressly done "[u]nder Section 303(c) of the Clean Water Act." EPA Approval of Mesabi Variance at 1 (Dec. 27, 2012) (WaterLegacy Petition for Review Ex. 19, Rec. Doc. 1.18). Further, the U.S. EPA applied the same standards in 40 CFR Part 131 that are used to review WQS. EPA Approval of Mesabi Variance at 11-21 (Dec. 27, 2012) (WaterLegacy Petition for Review Ex. 19, Rec. Doc. 1.18); *see also Water Quality Standards Handbook* § 5.3 (excerpt attached as Ex. A) ("State variance procedures, as part of State water quality standards, must be consistent with the substantive requirements of 40 CFR 131") (emphasis added). Additionally, the review of policies related to WQS are subject to review in the same manner as WQS themselves. *Northwest Environmental Advocates v. EPA*, 855 F. Supp. 2d 1199, 1207-13 (Dist. Ore. 2012). Without exception, the U.S. EPA has treated the WQS Variance as a variance to the WQS and not under any other CWA section.

The Petitions seem to acknowledge that this WQS Variance is indeed subject to review as a WQS. "Section 303(c)(2)(A) of the CWA requires the EPA to review and either approve or disapprove any new or revised state water quality standards before they can become effective, which equally applies to consideration of variances for a specific permit." Bands' Petition at 36 (emphasis added). "EPA reviews a state-approved variance as a change-in-use designation under 40 C.F.R. § 131.10." MCEA Petition at 11. The WaterLegacy Petition applies the factors of 40 CFR Part 131 to review the WQS Variance. WaterLegacy Petition at 15-17, 25-28. The applicable statutes, regulations, guidance and even the Petitions all concur that the challenged action is a WQS variance.



