

**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**  
**)**       **& 13-03**  
**NPDES/SDS Permit No. MN0067687            )**

**MOTION (1) FOR LEAVE TO FILE MOTION TO DENY REVIEW FOR LACK  
OF JURISDICTION WITHOUT PREJUDICE TO SUBSEQUENTLY FILE A  
FULL RESPONSE ON THE MERITS AND (2) TO EXTEND DATE FOR  
RESPONSE UNTIL 45 DAYS AFTER RULING ON JURISDICTIONAL ISSUES**

The United States Environmental Protection Agency, Region 5, requests that the Environmental Appeals Board (1) grant Region 5 leave to file the attached “Motion to Deny Review for Lack of Jurisdiction” without prejudicing Region 5’s right to subsequently file a full response on the merits to the three petitions for review that have been filed in this matter and (2) extend the date for Region 5 to file its response on the merits to the three petitions and to file an index of the administrative record until 45 days after the Board rules on the Motion to Deny Review for Lack of Jurisdiction. Region 5 states the following in support of this motion.

1. Petitions for review were filed in this matter by WaterLegacy (“WL Petition”), the Minnesota Center for Environmental Advocacy (“MCEA Petition”), and the Fond du Lac Band of Lake Superior Chippewa and the Grand Portage Band of Lake Superior Chippewa (“FDL and GP Petition”).

2. On January 31, 2013, the Board sent Region 5 a letter requesting that Region 5 file its response to the petitions and a certified index to the administrative record by March 18, 2013.

3. As described in the attached Motion to Deny Review for Lack of Jurisdiction, the Board clearly lacks jurisdiction under 40 C.F.R. § 124.19 to consider the matters raised in the petitions because the petitions involve challenges to (1) EPA's approval under section 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c), and 40 C.F.R. § 131.21, of the State of Minnesota's revisions to water quality standards, and (2) a state discharge system permit issued by the State of Minnesota.

4. There are a several important policy reasons why the Board should resolve the jurisdictional issues before further briefing on the merits:

- Petitioners will benefit from learning as soon as possible if the Board lacks jurisdiction to consider these claims, so that they can take appropriate steps to timely pursue their claims in the proper venue(s).
- While this matter is pending before the Board, there could be uncertainty regarding the extent to which the "stay" provisions applicable to federally issued permits and described in 40 C.F.R. §§ 124.16 and 124.60 apply to the state permit at issue in this matter. It is in the public interest to clarify this uncertainty as soon as possible by deciding the jurisdictional issues: if the Board lacks jurisdiction for the reasons set forth in the attached motion, the "stay" provisions in §§ 124.16 and 124.60 would not apply.
- The central issue raised by all three petitions pertains to whether it was appropriate for EPA to approve revisions to the State of Minnesota's water quality standards under section 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c), and 40 C.F.R. § 131.21, resolution of which could have national implications for EPA's water quality standards program. Consequently, technical and legal staff and management in both Region 5 and EPA Headquarters could be involved in preparing and reviewing a full response to the petitions. If the Board lacks jurisdiction to consider the petitions, it would not be in the public interest to require the expenditure of taxpayer-funded resources to prepare a full response addressing matters that the Board lacks jurisdiction to review.

5. Region 5 is confident the Board will agree that it lacks jurisdiction.

Nevertheless, if Region 5 is not granted leave to file the attached Motion to Deny Review for Lack of Jurisdiction without prejudice to Region 5's ability to subsequently file a full

response on the merits, then Region 5 will need to wait to raise its jurisdictional claims until it files its full response, resulting in the harms outlined in the policy considerations set out in Paragraph 4.

6. The undersigned counsel has consulted with counsel for all of the petitioners about this motion; each of whom have stated that they do not object to Region 5's requests that the Board (1) grant Region 5 leave to file the Motion to Deny Review for Lack of Jurisdiction without prejudicing Region 5's right to subsequently file a full response on the merits to the three petitions for review and (2) extend the date for Region 5 to file its full response on the merits and the index to the administrative record until 45 days after the Board rules on the Motion to Deny Review for Lack of Jurisdiction.

For the reasons set forth above, Region 5 requests that the Environmental Appeals Board (1) grant Region 5 leave to file the attached Motion to Deny Review for Lack of Jurisdiction without prejudicing Region 5's right to subsequently file a full response on the merits to the three petitions for review and (2) extend the date for Region 5 to file its full response on the merits to the three petitions and to file an index of the administrative

record until 45 days after the Board rules on the Motion to Deny Review for Lack of Jurisdiction.

Respectfully submitted,

Dated: February 13, 2013

\_\_\_\_\_/s/\_\_\_\_\_  
Gary Prichard  
Associate Regional Counsel  
EPA Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604  
Telephone: (312) 886-0570  
Facsimile: (312) 582-5894  
Email: prichard.gary@epa.gov

Of counsel:

Barbara Wester  
Associate Regional Counsel  
EPA Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604  
Telephone: (312) 353-8514  
Email: wester.barbara@epa.gov

Heidi Nalven  
Office of General Counsel, EPA  
Room 7426W Ariel Rios North (MC2355A)  
1200 Pennsylvania Ave. N.W.  
Washington, D.C. 20460  
Telephone: (202) 564-3189  
Email: nalven.heidi@epa.gov

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**Hoyt Lakes, Minnesota                 )**     **NPDES Appeal Nos. 13-01, 13-02**  
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**MOTION TO DENY REVIEW FOR LACK OF JURISDICTION**

The United States Environmental Protection Agency, Region 5, requests that the Environmental Appeals Board deny review of the three petitions for review that have been filed in this matter because the Board lacks jurisdiction to consider the petitioners’ claims. Region 5 states the following in support of this motion.

1. Petitions for review were filed in this matter by WaterLegacy (“WL Petition”), the Minnesota Center for Environmental Advocacy (“MCEA Petition”), and the Fond du Lac Band of Lake Superior Chippewa and the Grand Portage Band of Lake Superior Chippewa (“FDL and GP Petition”).

2. The petitioners seek Board review of EPA’s December 27, 2012, decision to approve in accordance with section 303(c) of the CWA, 33 U.S.C. § 1313(c), and 40 C.F.R. § 131.21, a water quality standards variance<sup>1</sup> submitted to EPA by the State of

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<sup>1</sup> A water quality standards “variance is a time-limited change in the water quality standards. . . . Because a variance is a change in the water quality standard, the same requirements apply for a variance as for a new or revised standard, e.g., public review and comment, and EPA approval or disapproval.” Office of Water, U.S. EPA, EPA-833-R-01-002, *Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews* (July 31, 2001) at page 34, available at [http://www.epa.gov/npdes/pubs/wqs\\_guide\\_final.pdf](http://www.epa.gov/npdes/pubs/wqs_guide_final.pdf).

Minnesota.<sup>2</sup> However, as the Board explained in *In re City of Hollywood, Fla.*, 5 E.A.D. 157, 175-76 (EAB 1994),

[where a] water quality standard being challenged . . . was “established under section 303 of the CWA,” threshold issues pertaining to whether the Agency may have erred in approving the standard in the first instance are necessarily beyond our jurisdiction. . . . “The only recognized avenue for challenges to the substance of EPA’s actions taken with respect to state submissions [under CWA § 303] is a suit for judicial review under the Administrative Procedure Act.” *Scott v. City of Hammond, Indiana*, 741 F.2d 992, 995 (7<sup>th</sup> Cir. 1984).

Thus, consideration of such questions is beyond the jurisdiction of the Board.

3. Two of the petitions assert that 40 C.F.R. § 124.64 – which provides that “[v]ariance decisions made by EPA may be appealed under the provisions of § 124.19” – provides the Board with jurisdiction to review EPA’s approval of Minnesota’s revised water quality standard. MCEA Petition at 2; FDL and GP Petition at 35.

4. However, the term “variance” as used in 40 C.F.R. § 124.64(b) is defined at 40 C.F.R. § 122.2<sup>3</sup> as

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 timelines of CWA. This includes provisions which allow 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.

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<sup>2</sup> The statutory and regulatory bases for EPA’s action are specified in EPA’s December 27, 2012, letter informing the Minnesota Pollution Control Board of EPA’s decision to approve Minnesota’s revised water quality standards. A copy of the December 27, 2012, letter is attached to the FDL and GP Petition as “Bands Exhibit 8.”

<sup>3</sup> The definitions in 40 C.F.R. § 122.2 “apply to parts 122, 123 and 124.” 40 C.F.R. § 122.2 (first sentence).

5. The “mechanism[s] and provision[s]” referenced in the definition of “variance” at 40 C.F.R. § 122.2 pertain either to technology-based effluent limitations<sup>4</sup> or thermal discharges.<sup>5</sup> They do not pertain to state establishment or EPA approval of water quality standards under section 303(c) of the CWA, 33 U.S.C. § 1313(c). *See also* 40 C.F.R. § 124.62(b)-(e) (listing different types of variance decisions that can be made by EPA that potentially could be subject to the Board’s review under § 124.64; EPA decisions to approve revisions to water quality standards under section 303(c) of the CWA and 40 C.F.R. Part 131 *are not* included in that list).

6. Thus, 40 C.F.R. § 124.64(b) only provides the Board with jurisdiction to review variance decisions made by EPA in accordance with “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 timelines of CWA,” 40 C.F.R. § 122.2 (*i.e.*, variance decisions pertaining to certain technology-based and thermal-based effluent limitation requirements). No such

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<sup>4</sup> The CWA provisions referenced in the definition of “variance” at § 122.2 pertaining to technology-based effluent limitations allow for (1) “modification” of various technology-based effluent limitations (sections 301(g) and 301(h)), or timelines for achieving compliance with certain technology-based effluent limitations (sections 301(c) and 301(i)); (2) establishment of alternative effluent limits to certain otherwise applicable technology-based effluent limits based on “fundamentally different factors” (section 301(n)); and (3) flexibility allowed within an “effluent limitation guideline” (*i.e.*, EPA’s technology-based effluent limitation guidelines published in accordance with section 304(b)). 40 C.F.R. Part 125 contains EPA’s regulations for implementing these statutory “mechanisms and procedures” pertaining to technology-based requirements.

<sup>5</sup> The CWA provisions referenced in the definition of “variance” at § 122.2 pertaining to thermal discharges allow for establishment of alternative effluent limitations for thermal discharges (section 316(a)). 40 C.F.R. Part 125, Subpart H contains EPA’s regulations for implementing these statutory provisions for establishment of alternative effluent limitations for thermal discharges.

variance is at issue here. Instead, as explained above, the variance at issue here was approved as a revised water quality standard in accordance with section 303(c) of the CWA, 33 U.S.C. § 1313(c), and 40 C.F.R. Part 131, neither of which is included in the definition of “variance” at 40 C.F.R. § 122.2. To put this more simply: the variance decision at issue here is an EPA decision to approve the State of Minnesota’s revision to water quality standards under section 303(c) of the CWA; it is not an EPA variance decision pertaining to the types of technology-based or thermal-based effluent limitation requirements that are subject to the Board’s review under 40 C.F.R. § 124.64. Consequently, § 124.64 does not provide jurisdiction for the Board to consider the petitions for review.

7. All three petitions also assert that the Board has jurisdiction under 40 C.F.R. § 124.19. WL Petition at 1; MCEA Petition at 2; FDL and GP Petition at 1. 40 C.F.R. § 124.19(a) provides that, [w]ithin 30 days after a . . . NPDES . . . final permit decision . . . has been issued under § 124.15 of this part, [certain persons] may petition the Environmental Appeals Board to review any condition of the permit decision.” 40 C.F.R. § 124.15 addresses final permit decisions issued by “the Regional Administrator” (*i.e.*, EPA).<sup>6</sup> Because § 124.19 only allows for appeals of permits that have been issued under

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<sup>6</sup> The term “Regional Administrator” is defined at 40 C.F.R. § 124.2 as “[t]he Regional Administrator of the appropriate Regional Office of the Environmental Protection Agency or the authorized representative of the Regional Administrator.” If § 124.19 were intended to also allow for review of state permitting decisions, then the term “*Director*” – which encompasses both State Directors and the Regional Administrator – would have been used. *See* 40 C.F.R. § 124.2 (definition of “Director”). The fact that the term “Regional Administrator” was used in §124.19 is significant because, as explained in the definition of “Director” at § 124.2, “[t]he term *Regional Administrator* is used when the accompanying provision applies exclusively to EPA-issued permits.”

§ 124.15, and § 124.15 only addresses issuance of federal permits by EPA, § 124.19(a) only provides jurisdiction for this Board to consider appeals from federally-issued permits; a truism reflected in the Board's Practice Manual:

Section 124.19(a) authorizes appeals to the EAB from *federally-issued* RCRA, UIC, PSD, and NPDES permit decisions. The EAB generally does not have authority to review state-issued permits; such permits are reviewable only under the laws of the state that issued the permit.

Environmental Appeals Board Practice Manual at 36 (June 2012) (footnotes omitted), available at [http://yosemite.epa.gov/oa/EAB\\_Web\\_Docket.nsf/8f612ee7fc725edd852570760071cb8e/889f7aab01cf481c85257afd0054d515/\\$FILE/Practice%20Manual%20June%202012.pdf](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/889f7aab01cf481c85257afd0054d515/$FILE/Practice%20Manual%20June%202012.pdf).

8. There are no federally-issued permits at issue here. Instead, the only permit that is at issue in this matter is a state discharge system permit that was issued to Mesabi Nugget Delaware, LLC, by the Minnesota Pollution Control Agency. *See* WL Petition at 1; MCEA Petition at 3; FDL and GP Petition at 1. Consequently, 40 C.F.R. § 124.19 does not provide jurisdiction for the Board to consider the petitions for review.

9. The FDL and GP Petition at 51-55 also includes an argument pertaining to the National Historic Preservation Act. Neither 40 C.F.R. § 124.19 nor § 124.64 provides the Board with jurisdiction to review this argument.

For the reasons set forth above, the Board lacks jurisdiction to consider any of the petitioners' claims and so Region 5 respectfully requests that the Board deny review of the three petitions for review that have been filed in this matter.

Respectfully submitted,

Dated: February 13, 2013

\_\_\_\_\_/s/\_\_\_\_\_  
Gary Prichard  
Associate Regional Counsel  
EPA Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604  
Telephone: (312) 886-0570  
Facsimile: (312) 582-5894  
Email: prichard.gary@epa.gov

Of counsel:

Barbara Wester  
Associate Regional Counsel  
EPA Region 5  
77 West Jackson Boulevard  
Chicago, Illinois 60604  
Telephone: (312) 353-8514  
Email: wester.barbara@epa.gov

Heidi Nalven  
Office of General Counsel, EPA  
Room 7426W Ariel Rios North (MC2355A)  
1200 Pennsylvania Ave. N.W.  
Washington, D.C. 20460  
Telephone: (202) 564-3189  
Email: nalven.heidi@epa.gov

## CERTIFICATE OF SERVICE

I certify that this motion was sent on February 13, 2013, to the following persons  
in the manner specified below:

By electronic filing to:

U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board  
1341 G Street, N.W., Suite 600  
Washington, DC 20005

By electronic and first class mail to:

Paula Goodman Maccabee  
Just Change Law Offices  
1961 Selby Avenue  
St. Paul, Minnesota 55104  
pmaccabee@justchangelaw.com  
Counsel for WaterLegacy

Kathryn M. Hoffman  
Minnesota Center for Environmental Advocacy  
26 E. Exchange St., Suite 206  
Saint Paul, Minnesota 55105  
khoffman@mncenter.org  
Counsel for Minnesota Center for Environmental Advocacy

Sara K. Van Norman  
Jacobson, Buffalo, Magnuson, Anderson & Hogen, P.C.  
335 Atrium Office Building  
1295 Bandana Blvd.  
Saint Paul, Minnesota 55108  
svannorman@jacobsonbuffalo.com  
Counsel for Petitioners the Fond du Lac Band of Lake Superior Chippewa  
and the Grand Portage Band of Lake Superior Chippewa

David Hatchett  
Thomas W. Baker  
111 Monument Circle, Suite 301  
Indianapolis, Indiana 46204-5124  
Counsel for Mesabi Nugget Delaware, LLC

Dated: February 13, 2013

\_\_\_\_\_/s/  
Gary Prichard  
U.S. EPA, Region 5