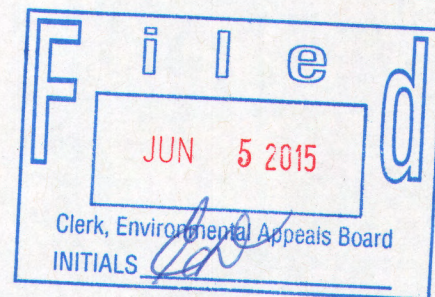


**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, DC**

\_\_\_\_\_) )  
In re: ) )  
Eagle Mine LLC ) )  
Permit No. GW1810162 ) )  
\_\_\_\_\_ ) )

UIC Appeal No. 15-01



**ORDER DISMISSING PETITION FOR REVIEW**

On April 24, 2015, Save the Wild U.P. filed with the Environmental Appeals Board (“Board”) a petition for review of the above-captioned groundwater discharge permit (“Permit”) that the Michigan Department of Environmental Quality (“MDEQ”) issued to Eagle Mine LLC (“Eagle Mine”) on March 25, 2015. The Permit authorizes discharge of mine contact water from the Eagle Mine Wastewater Treatment Facility (“Facility”) to groundwaters of the State of Michigan. Petition at 2. On May 27, 2015, the U.S. Environmental Protection Agency (“EPA”), Region 5 (“Region”), filed a motion to dismiss the petition on grounds that the Board lacks jurisdiction.<sup>1</sup> On June 1, 2015, the Keweenaw Bay Indian Community filed a letter in support of the petition.

Petitioner’s primary argument in this appeal is that the issued groundwater Permit “is the wrong tool with which to regulate Eagle Mine’s wastewater discharges.” Petition at 26.

Petitioner contends that the appropriate permit for the discharge is a National Pollutant Discharge

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<sup>1</sup> The Region simultaneously sought an extension of time in which to file its full brief on the merits, should the Board deny the motion to dismiss. Because the Board is dismissing the petition for review, the Region’s motion for an extension of time is moot.



Elimination System (“NPDES”) permit issued pursuant to Clean Water Act section 402, 33 U.S.C. § 1342. *See generally* Petition at 2-3, 16, 20, 23, 26. Petitioner cites 40 C.F.R. § 124.19(a) as the basis for the Board’s authority to review this petition.

Petitioner also argues that a letter from the Region to Jeffrey Loman, a supporter and former advisory board member of Save the Wild U.P., stating that wastewater discharges from the Facility are not subject to the NPDES permitting program is a basis for the Board’s review.

*Id.* at 7. In the letter, the Region stated:

An NPDES permit is needed for a discharge to groundwater where there is a direct hydrologic connection between groundwater and waters of the United States. We have considered the potential applicability of the Clean Water Act’s NPDES program to the process wastewater being generated by the Eagle Mine and discharged to groundwater. We do not believe that there is evidence of a direct discharge from this treatment unit to surface waters at this time. Further, MDEQ has taken steps through the groundwater permitting process to protect surface water by including limits in the groundwater permit based on surface water standards.

Letter from Tinka G. Hyde, Director, Water Division, Region 5, U.S. EPA, to Jeffrey Loman (Feb. 21, 2014) (Pet. attach. 8) (“February 2014 Letter”). Petitioner characterizes the Region’s letter as “equivalent to a final agency action” but also states that “even if this letter does not serve as a final agency action, a final agency action is not a proper prerequisite for review since this is [a] ‘failure to act’ petition.” Petition at 7. Petitioner requests that the Board “exercise its authority under 40 C.F.R. § 124.2(a)” and either order “MDEQ to require Eagle Mine to obtain an NPDES permit \* \* \* or [order] EPA to intervene and do so itself in accord with 40 C.F.R. § 122.” *Id.*

The Board disagrees with all of the above arguments. 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 Michigan CAFO General Permit*, NPDES Appeal No. 02-11, at 3 (EAB Mar. 18, 2003) (Order Dismissing Petition for Review) (quoting *In re Carlton, Inc.*, 9 E.A.D. 690, 692 (EAB 2001) (internal quotations omitted)); *see also* Changes to Regulations to Reflect the Role of the New Environmental Appeals Board in Agency Adjudications, 57 Fed. Reg. 5,320, 5,320-21 (Feb. 13, 1992). Under 40 C.F.R. part 124, the Board is authorized to review final Resource Conservation and Recovery Act, Underground Injection Control, Clean Water Act NPDES, and Clean Air Act Prevention of Significant Deterioration permit decisions issued under 40 C.F.R. § 124.15. 40 C.F.R. § 124.19(a)(1).

Petitioner concedes that the Permit authorizes groundwater discharge to waters of the State of Michigan and was not issued pursuant to the Clean Water Act NPDES program. *E.g.*, Petition at 2, 7, 8. Nor is the Permit one of the other aforementioned types of final permit decisions the Board is authorized to review under part 124.19. *See* 40 C.F.R. § 124.19(a)(1). Moreover, Petitioner does not identify any other document that served as such a permit decision.

The Board need not determine whether the Region’s letter is, as Petitioner argues, a final agency action. The Board declines review of both the letter and the permit on two grounds. First, neither document constitutes a final permit decision under section 124.15. Second, the Board is also not the appropriate forum for considering the Region’s alleged failure to act. *See* CWA § 505(a), 33 U.S.C. § 1365 (discussing jurisdiction for civil actions alleging failure to perform a nondiscretionary act or duty under the Clean Water Act).<sup>2</sup>

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<sup>2</sup> Any argument that Petitioner is seeking review of an NPDES permit decision also would fail, as MDEQ administers the NPDES permits program in lieu of EPA. Discharges of Pollutants to Navigable Waters, 39 Fed. Reg. 26,061 (July 16, 1974); *see also* Approval of



For the foregoing reasons, the Board dismisses the Petition for lack of jurisdiction.

So ordered.

Dated: *June 5, 2015*

ENVIRONMENTAL APPEALS BOARD<sup>3</sup>

By: *Leslye M. Fraser*

Leslye M. Fraser  
Environmental Appeals Judge

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Modifications to Michigan's Approved Program to Administer the NPDES Permitting Program Resulting from the Reorganization of Michigan Environmental Agencies, 62 Fed. Reg. 61,170 (Nov. 14, 1997) (approving modification transferring program authority from the Michigan Department of Natural Resources to the Department of Environmental Quality). Although the Michigan NPDES permit program is federally approved, even if MDEQ had issued the Permit as an NPDES permit, it nonetheless would be a state permit issued under state law and not within the Board's authority to review. *See, e.g., In re Michigan CAFO General Permit*, NPDES Appeal No. 02-01 (Mar. 18, 2003) (Order Dismissing Petition for Review); *In re Town of Seabrook*, 4 E.A.D. 806, 817 (EAB 1993).

<sup>3</sup> The two-member panel deciding this matter consists of Environmental Appeals Judges Leslye M. Fraser and Kathie A. Stein. 40 C.F.R. § 1.25(e)(1).



## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Petition for Review in the matter of *In re Eagle Mine LLC*, UIC Appeal No. 15-01, were sent to the following persons in the manner indicated:

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

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**By U.S. First Class Mail:**

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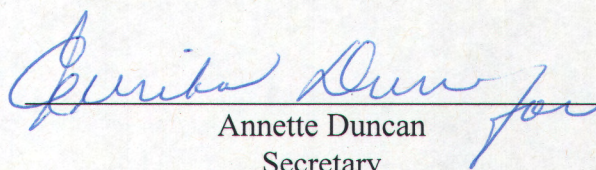
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**By EPA Pouch Mail:**

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Date:

June 5, 2015

  
Annette Duncan  
Secretary