

IN RE INCORPORATED COUNTY OF LOS ALAMOS

NPDES Appeal No. 20-02

ORDER DISMISSING PETITION FOR REVIEW

Decided April 22, 2020

Syllabus

The Incorporated County of Los Alamos, New Mexico (“County”), filed a petition for review (“Petition”) with the Environmental Appeals Board (“Board”) under 40 C.F.R. § 124.19. The Petition seeks Board review of a designation decision by U.S. EPA Region 6 (“Region”) pursuant to section 402(p)(2)(E) of the Clean Water Act (“CWA”), 33 U.S.C. § 1342(p)(2)(E), and 40 C.F.R. § 122.26(a)(9)(i)(D), that stormwater discharges from certain small municipal separate storm sewer systems located in the Los Alamos Cluster and on the Los Alamos National Laboratory property require National Pollutant Discharge Elimination System (“NPDES”) permits. Under section 402(p) and applicable regulations, the Regional Administrator may, on a case-by-case basis, designate certain stormwater discharges as requiring NPDES permits where the Region determines that such discharges contribute to a violation of applicable water quality standards. In exercising this authority, the Region determined that certain of the County’s stormwater discharges are contributing to violations of New Mexico’s water quality standards.

The Region seeks dismissal of the Petition for lack of jurisdiction. The Region argues that the designation decision is not a final NPDES permit as defined in 40 C.F.R. § 124.15 and, as such, may not be appealed to the Board under 40 C.F.R. § 124.19(a), which only gives the Board jurisdiction to review final permit decisions. The Region’s position is that the final designation decision is a discrete decision subject to challenge in a different forum, the appropriate federal court. The Region emphasizes that no permit has been issued or denied in this matter.

The County asserts that the Region’s argument in support of dismissal for lack of jurisdiction is flawed because the designation decision constitutes a final permit decision under 40 C.F.R. § 124.15 and therefore meets the applicable requirements for Board jurisdiction under 40 C.F.R. §§ 124.15(a) and .19(a). According to the County, the Region’s assertion that the Board lacks jurisdiction is impractical and reflects a narrow view of the Board’s jurisdiction. The County states that the Region’s position precludes the Board from reviewing and correcting EPA’s course at what the County views to be the

beginning and most critical juncture of the permitting process and invites “an unnecessary detour” to the federal judiciary.

Held: The Board holds that the designation decision is not a final permit decision issued under part 124, but a decision issued under 40 C.F.R. § 122.26. And given the absence of a final individual federal NPDES permit in this case, the Board lacks jurisdiction under 40 C.F.R. § 124.19 to review this Petition. The Petition is therefore dismissed.

Before Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

Opinion of the Board by Judge Lynch:

I. BACKGROUND

On January 17, 2020, the Incorporated County of Los Alamos, New Mexico (“County”), filed a petition (“Petition”) seeking Environmental Appeals Board (“Board”) review under 40 C.F.R. § 124.19 of a designation decision U.S. EPA Region 6 (“Region”) issued on December 16, 2019. Petition for Review at 3-22 (Jan. 17, 2020) (“Pet.”). The decision, which the Region issued pursuant to section 402(p)(2)(E) of the Clean Water Act (“CWA”), 33 U.S.C. § 1342(p)(2)(E), and 40 C.F.R. § 122.26(a)(9)(i)(D), determined that stormwater discharges from certain small municipal separate storm sewer systems located in the Los Alamos Cluster and on the Los Alamos National Laboratory property require National Pollutant Discharge Elimination System (“NPDES”) permits.¹ See Region 6, U.S. EPA, *Designation Decision and Record of Decision in Response to Petition by Amigos Bravos for a Determination That Stormwater Discharges in Los Alamos County Contribute to Water Quality Standards Violations and Require Clean Water Act Permits*, 10-11, (Dec. 16, 2019) (“Designation Decision”). Under CWA section 402(p) and applicable regulations, the Regional Administrator may, on a case-by-case basis, designate certain stormwater discharges as requiring NPDES permits where the Region determines that stormwater discharges contribute to a violation of applicable water quality standards. See CWA §§ 402(p)(2)(E), (p)(6), 33 U.S.C. §§ 1342(p)(2)(E), (p)(6); 40 C.F.R. § 122.26(a)(9)(i)(D).² This authority is referred

¹ The NPDES program is one of the principal permitting programs under the CWA and NPDES permits are issued under section 402 of the CWA. 33 U.S.C. § 1342.

² Pursuant to section 122.26(a)(9)(i)(D):

to as the “residual designation authority.” In exercising its residual designation authority to require an NPDES permit in this matter, the Region determined that certain of the County’s stormwater discharges are contributing to violations of New Mexico’s water quality standards. *See* Designation Decision at 6-11. The County seeks Board review of the Region’s Designation Decision.

By motion filed with the Board on February 14, 2020, the Region seeks dismissal of the Petition for lack of jurisdiction. EPA Motion to Dismiss for Lack of Jurisdiction, or in the Alternative, Motion for Extension of Time (Feb. 14, 2020) (“Region’s Mot.”). The Region argues that the Designation Decision is not a final NPDES permitting decision as defined in 40 C.F.R. § 124.15 and, as such, may not be appealed to the Board under 40 C.F.R. § 124.19(a), which only gives the Board jurisdiction to review final permit decisions. *See* Region’s Mot. at 3-5. The Region cites to prior Board cases, including *In re Florence Copper, Inc.*, 17 E.A.D. 406 (EAB 2017), Region’s Mot. at 4-5, in which the Board declined to review a petitioner’s challenge to an EPA aquifer exemption determination under the Safe Drinking Water Act. In holding that the Board lacked jurisdiction to review the petitioner’s assertions in *Florence Copper*, the Board stated that “[a]quifer exemption decisions * * * are not themselves [Underground Injection Control (“UIC”)] permitting decisions or elements thereof within the meaning of 40 C.F.R. § 124.19(a).” 17 E.A.D. at 419. Rather, exemption decisions are “discrete final agency actions that are not part of UIC permitting decisions, are separately operable from any UIC permit, and are subject to challenge in” the appropriate federal court. *Id.* at 420. The Region argues that since designation decisions, like aquifer exemptions, are not permitting decisions within the meaning of 40 C.F.R. § 124.19(a), they fall outside the scope of the Board’s jurisdiction. Region’s Mot. at 5-6. The Region’s position is that the final Designation Decision is subject to challenge in a different forum, the appropriate federal court. *Id.* at 6; EPA Reply

On and after October 1, 1994, for discharges composed entirely of storm water, that are not [otherwise required] to obtain a permit, operators shall be required to obtain a[n] NPDES permit only if:

* * * *

(D) The Director, or in States with approved NPDES programs either the Director or the EPA Regional Administrator, determines that the discharge, or category of discharges within a geographic area, contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

40 C.F.R. § 122.26(a)(9)(i)(D).

to Incorporated County of Los Alamos' Response to Motion to Dismiss for Lack of Jurisdiction, or in the Alternative, Motion for Extension of Time 5 (Mar. 16, 2020) ("Region's Reply").

On March 5, 2020, the County filed a response to the Region's Motion. *See* Incorporated County of Los Alamos, New Mexico's Response to Motion to Dismiss for Lack of Jurisdiction, or in the Alternative, Motion for Extension of Time (Mar. 5, 2020) ("County's Resp."). The County asserts that the Region's argument in support of dismissal for lack of jurisdiction is flawed because the Designation Decision constitutes a final permit decision under 40 C.F.R. § 124.15 and therefore meets the applicable requirements for Board jurisdiction under 40 C.F.R. §§ 124.15(a) and .19(a). County's Resp. at 5. According to the County, the Region's assertion that the Board lacks jurisdiction is impractical and reflects an "extraordinarily narrow view of the Board's admittedly limited jurisdiction [that] defies the spirit, if not the letter," of the applicable regulations. *Id.* The County adds that the Region's position "precludes the Board from reviewing and correcting EPA's course at the most critical juncture of residual permitting (its inception), and invites the parties to bypass an administratively qualified authority by expending the time and resources of an unnecessary detour into the federal judiciary." *Id.* at 5-6. Although the County acknowledges prior Board decisions declining Board jurisdiction in the absence of a federally issued permit, *see id.* at 6-7 (citing *In re Coastal Energy Corp.*, NPDES Appeal No. 17-4 (EAB Sept. 12, 2017) (Order Dismissing Petition for Lack of Jurisdiction and Establishing Deadline); *In re Simpson Paper Co.*, 4 E.A.D. 766 (EAB 1993)), the County asserts that these decisions are distinguishable from the present case. *See id.* The County distinguishes those decisions on the basis that the petitions in those cases involved state-issued permits, and the instant case, according to the County, involves a final federal permit decision under 40 C.F.R. § 124.15. *Id.* With regard to the Board's decision in *Florence Copper*, the County asserts that the three factors supporting the Board's holding that it lacked jurisdiction in that case (i.e., aquifer exemption decisions are discrete final agency actions, are separately operable from the permit, and are subject to challenge in other fora) are not present in this case. *Id.* at 7.

In its reply to the County's response, the Region focuses on and contests the County's assertion that the factors supporting the Board's holding that it lacked jurisdiction in *Florence Copper* are not present in this case. Region's Reply at 2-5. First, the Region argues that the Designation Decision was a discrete final agency action separate from any subsequent final permit decision. *Id.* at 2-4. And, as a "precursor" to any permitting decision, it is not subject to review under 40 C.F.R. § 124.19. *Id.* Second, the Region argues that the Designation Decision is separately operable from the NPDES permitting process. *Id.* at 4-5. That is, the

decision on whether the County's discharges meet the criteria for permit issuance under the applicable regulations is distinct from a permit decision. *Id.* Finally, the Region states that the Designation Decision is reviewable in federal court. *Id.* at 5.

II. ANALYSIS

This is the first petition the Board has considered challenging a Regional Administrator's residual designation determination pursuant to CWA sections 402(p)(2)(E) and (p)(6) and 40 C.F.R. section 122.26(a)(9)(i)(D). As the Board has stated on prior occasions, the Board is a tribunal of limited jurisdiction. *See* 40 C.F.R. § 1.25(e)(2) (providing that Board shall exercise any authority expressly delegated to it, and any other matter as requested and deemed appropriate by Administrator); *Florence Copper*, 17 E.A.D. at 419; *Simpson Paper*, 4 E.A.D. at 771. The Board's authority is "limited by the statutes, regulations, and delegations that authorize and provide standards for review." *Coastal Energy*, NPDES Appeal No. 17-4, at 3 (quoting *In re State of Haw., Dep't of Transp., Highways Div.*, NPDES Appeal No. 13-11, at 2 (EAB Nov. 6, 2013) (Order Dismissing Petition for Review)). In this case, the County has sought review under 40 C.F.R. part 124, pursuant to which the Board is authorized to hear appeals of individual NPDES permit decisions issued by the EPA regions. Specifically, this part provides "EPA procedures for issuing, modifying, revoking and reissuing, or terminating all * * * NPDES 'permits.'" 40 C.F.R. § 124.1(a); *see also id.* § 124.2 (delegating to Board authority to issue final decisions in NPDES permit appeals). Under section 124.15, the Regional Administrator issues a final permit decision, defined as "a final decision to issue, deny, modify, revoke and reissue, or terminate a permit." *Id.* § 124.15(a). This section states further that the Regional Administrator will issue the final permit decision after the close of the comment period on a draft permit and will then notify the permit applicant and each person that submitted comments on the draft permit or requested notification of the final permit decision. *Id.* And under section 124.19, the Board has jurisdiction over an "[a]ppel from a[n] * * * NPDES * * * final permit decision issued under § 124.15." *Id.* § 124.19(a). The Board's authority to review NPDES-related permitting disputes, however, is not unbounded.

The County asserts that the Designation Decision is a "key permit-related decision" that should be considered a final permit decision under section 124.15(a). County's Resp. at 5. The County, however, provides no support for this assertion either in the applicable regulatory language or in any prior Board cases. The County's attempt to distinguish the *Simpson Paper* and *Coastal Energy* cases as well as the Board's decision in *Florence Copper* falls short. The County argues that *Simpson Paper* and *Coastal Energy* are distinguishable on the grounds that

those cases involved state-issued permits and this case involves a final federal permitting decision. *See id.* at 6-7. However, at the same time the County argues that the Designation Decision should be classified as a final permit decision, it states that the Decision does not result in a final permit, but rather represents the “inception” of the permitting process. *Id.* at 5. The fact remains that no federal permit yet exists. Moreover, as the Region noted in its reply, the type of permit ultimately issued, e.g., individual or general, is yet to be determined.³ Region’s Reply at 5. And contrary to the County’s assertion, the Designation Decision is not a final permit decision issued under 40 C.F.R. § 124.15; instead it is a decision issued under 40 C.F.R. § 122.26. The County has not provided a basis for review other than part 124.

With respect to the parties’ discussion of the Board’s decision in *Florence Copper*, the Board does not find either party’s arguments to be on all fours with that case. While there are relevant similarities between an aquifer exemption determination and a residual designation determination, there are also relevant differences. For example, a residual designation is often more closely aligned, both temporally and operationally, with the process that leads to a final decision to issue a permit than an aquifer determination. However, key to both the aquifer determination at issue in *Florence Copper* and to the Designation Decision in this case is that neither constitutes the issuance of a final individual federal permit under part 124.

A line of Board cases that addresses the premature filing of petitions also bear note. *See, e.g., In re Sierra Pac. Indus.*, PSD Appeal No. 12-03 (EAB Dec. 21, 2012) (Order Dismissing Petition for Review Without Prejudice as Prematurely Filed). In *Sierra Pacific*, the petitioner filed an appeal seeking review under 40 C.F.R. § 124.19 before the completion of the comment period on a *proposed* permit. PSD Appeal No. 12-03, at 3. Because the Region had not yet responded to public comments and a final permit had not yet issued, the Board dismissed the petition as prematurely filed. *Id.* at 5-6. In this case, there is not even a proposed federal permit issued under 40 C.F.R. § 124.15. Thus, the County’s pending petition before the Board filed under section 124.19 could also be considered as prematurely filed.

³ The Board does not have jurisdiction to review cases involving EPA-issued NPDES general permits. 40 C.F.R. § 124.19(o) (“Persons affected by an NPDES general permit may not file a petition under this section or otherwise challenge the conditions of a general permit in further Agency proceedings.”).

In sum, the County has appealed the Designation Decision as a final permit decision under part 124. The Designation Decision, however, is not a final permit decision issued under part 124, but a decision issued under 40 C.F.R. § 122.26. And given the absence of a final individual federal NPDES permit in this case, the Board lacks jurisdiction under section 124.19(a) to review this Petition.

III. *ORDER*

The Board dismisses the petition for review.

So ordered.