

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

In re:)
)
Incorporated County of Los Alamos,)
New Mexico)
)
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)
)
)

NPDES Appeal No. 20-02

**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**

Introduction

Pursuant to 40 C.F.R. §124.19(f)(3) and the Environmental Appeals Board's ("Board") February 18, 2020 Scheduling Order, the Incorporated County of Los Alamos New Mexico ("County" or "Petitioner"), by and through its counsel, Modrall, Sperling, Roehl, Harris & Sisk, P.A. (Stuart R. Butzier, Christina C. Sheehan, and Sarah M. Stevenson), hereby responds in opposition to the Environmental Protection Agency, Region VI's ("Region VI" or "Region") Motion to Dismiss for Lack of Jurisdiction, or in the Alternative, Motion for Leave for Extension of Time ("Motion"). As explained fully below, the Board has jurisdiction to review the decision by the U.S. EPA VI, Regional Administrator, dated December 16, 2019, as the decision is a permit decision that is subject to review pursuant to 40 C.F.R. 124.19 and therefore falls within this tribunal's limited jurisdiction. Accordingly, the Petitioner respectfully requests the Board deny the Region's request to dismiss the Petition for Review. The Petitioner takes no position on the Region's request for an additional time for it to file its full response on the merits.

Background

Congress passed the Federal Water Pollution Control Act Amendments (commonly known as the Clean Water Act ("CWA")) in 1972 to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To promote these goals, CWA Section 301(a), *id.* § 1311(a), prohibits "the discharge of any pollutant" unless that discharge complies with other specified provisions of the statute, including the National Pollutant Discharge Elimination System ("NPDES") permitting program set forth in Section 402, *id.* § 1342. In 1987, Congress enacted the Water Quality Act, Pub. L. No. 100-4, 101 Stat. 7 (1987), adding Section 402(p), 33 U.S.C. § 1342(p), to the CWA. Section 402(p) established a two-phase approach to regulating stormwater discharges. Congress initially imposed a moratorium on requiring permits

for “discharges composed entirely of stormwater.” 33 U.S.C. § 1342(p)(1). However, the Section 402(p) amendments identified five categories of stormwater that were not subject to the moratorium, including discharges that the agency “determines ... contribute[] to a violation of a water quality standard.” 33 U.S.C. § 1342(p)(2)(E).

Congress also required the agency to promulgate additional stormwater management regulations, widely known as “Phase I” and “Phase II” regulations. *See* 33 U.S.C. § 1342(p)(4), (6). As part of the Phase II regulations, EPA promulgated a residual clause, which granted authority to regulate miscellaneous stormwater discharges—in effect, a catchall provision. Specifically, “for discharges composed entirely of storm water, that are not required by paragraph (a)(1) of this section to obtain a permit, operators shall be required to obtain a NPDES permit only if,” among other circumstances, the EPA Regional Administrator (or State NPDES program director, if applicable) “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). This provision is commonly referred to as “Residual Designation Authority.”

Since the adoption of these regulations, a number of petitions have been filed requesting the EPA to use its Residual Designation Authority to require NPDES permit coverage. The County is only aware of two such petitions that have resulted in a determination that permit coverage was warranted, one of which is the decision to designate for NPDES permitting small municipal separate storm water sewer systems (“MS4s”) located in portion of Los Alamos County, New Mexico within the Los Alamos Urban Cluster (“Final Designation Decision”). The Final Designation Decision is the subject of the County’s Petition for Review.

The County filed its timely Petition for Review of the Administrator’s Final Designation Decision with the Board on January 17, 2020, pursuant to 40 C.F.R. §124.19(a). The Petition seeks review of the Administrator’s Final Designation Decision, which designated MS4s located in Los Alamos County, New Mexico as small MS4s requiring NPDES permit coverage. This decision was issued approximately five years and five months after Amigos Bravos, a non-governmental river conservation organization, submitted a petition to the Region VI Administrator under 33 U.S.C.S. §1342(p)(2) and 40 C.F.R. §122.26(a)(9)(i)(D).¹

On February 14, 2020 the Region filed its Motion, seeking dismissal of the Petition based on a flawed argument that the Board does not have jurisdiction to review the Administrator’s final designation decision. As evidenced below, the Administrator’s designation decision is a final NPDES permit decision that is subject to Board review under 40 C.F.R. § 124.19(a).

Standard of Review

“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 March 18, 2003). The statute relevant to the Board’s jurisdiction in this case is the CWA, specifically the NPDES permitting requirements in Section 402 of the Act. 33 U.S.C. §1342. “The Board’s authority to review NPDES permit decisions is found generally 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). 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.” *In*

¹The full factual and statutory background giving rise to the Petition for Review is set forth therein.

Re: State of Haw. Dep't of Transp., Highways Div., NPDES Appeal No. 13-11, at 2 (EAB Nov. 6, 2013).

Argument

I. The County's Petition is within the Board's jurisdiction for review.

The Final Designation Decision is a final NPDES permitting decision issued under 40 C.F.R. §124.15 and is therefore subject to appeal, and this Board's review, pursuant to 40 C.F.R. 124.19(a). In accordance with 40 C.F.R. §124.15(a), and as set forth fully in the Petition, following the close of the public comment period, which in this instance was the publication of the Administrator's preliminary determination in the Federal Register on March 17, 2015, *see* 80 FR 13852, the Regional Administrator issued a final permit decision in the form of the Final Designation Decision. This permit decision therefore properly meets the statutory and regulatory requirements to invoke this Board's limited jurisdiction.

The Region asserts EPA's Final Designation Decision is not final, yet necessarily acknowledges it is a key permit-related decision. In essence, the Region argues that although EPA's formal decision--culminating a full public process under the regulations--has the force of requiring parties to obtain Section 402 permits for MS4s that otherwise would be beyond EPA's Clean Water Act permitting jurisdiction, the Board cannot review the propriety of that decision unless and until lengths have been gone, and expenses incurred, to apply for, vet and actually issue the permits. This impractical and extraordinarily narrow view of the Board's admittedly limited jurisdiction defies the spirit, if not the letter, of 40 CFR 124.15(a) and 124.19. More importantly, it 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. Reading the scope of the Board's role and responsibilities so narrowly is unjustified under the CWA, the pertinent regulations, and orderly common sense.

The Region's Motion is based on false comparisons to Board decisions that are misplaced and misconstrue the case at hand. The Region cites *In re: Missouri Permit No. MO-G49136*, NPDES Appeal No-17-04 (EAB Sept. 12, 2017) in support of its argument that the Board is a tribunal of limited jurisdiction. Motion, p. 4. As stated above, the County recognizes the Board's limited jurisdiction; however the *In Re: Missouri* decision involved wholly distinct facts and is not instructive to the Board's jurisdictional determination in this instance. The *In Re: Missouri* decision involved a petition seeking review of a state permit issued by the Missouri Department of Natural Resources. In noting its jurisdictional limitations, the Board dismissed the petition for review because it requested review of a *state* permit issued under *state* law. *Id.* at p.2. The Board properly denied review in that instance as "nothing in the Clean Water Act or 40 C.F.R. part 124 gives the Board jurisdiction to consider this appeal." *Id.* The County is not requesting the Board review a state permit decision; rather, as set forth in the County's Petition for Review, it seeks the Board's review of the Administrator's final NPDES issued decision designating MS4s in Los Alamos County, New Mexico for NPDES permitting.

Similarly, the Region's citation to *In the Matter of: Sampson Paper Co.*, 4 E.A.D. 766 (EAB 1993) for the proposition that "the Board's jurisdiction to review NPDES permit decision under the CWA depends on the existence of an EPA-issued permit," is misleading. *See* Motion, p. 4. That decision concerned an appeal of an ALJ initial decision regarding two NPDES permits for pulp mills owned by two separate entities, Simpson Paper Company and Louisiana-Pacific Corporation ("LPC"). Following the ALJ's initial decision, the NPDES permit to LPC expired and, pursuant to a consent decree, it applied to the State of California for a state NPDES permit.

The Board found that because LPC had withdrawn its federal NPDES permit, it did not have jurisdiction over the appeal concerning that permit. *Id.* at 777. Specifically, the Board stated that the “conclusion is inescapable that, in the absence of an EPA-issued permit, there is no jurisdictional basis upon which this Board *might rule on the merits of petitioners contentions with respect to that facility.*” *Id.* at 770 (emphasis added). Similar to *In re: Missouri*, this decision involved a petition concerning a state issued NPDES permit, for which the Board did not have jurisdiction. In this instance, the Final Designation Decision concerns a federal NPDES permit for which the Board has jurisdiction.

The Region’s attempt to situate its Final Designation Decision as similar or equivalent to the aquifer exemptions under the Safe Drinking Water Act (“SDWA”) Underground Injection Control (“UIC”) program also fails. For this false comparison, EPA cites to *In re Florence Copper, Inc.*, UIC Appeals No. 17-01 & 17-03 (Sept. 22, 2017). Motion, pp. 4-5. In that case, EPA issued an UIC permit that authorized Florence Copper to engage in in-situ copper mining; at the same time, EPA relied on a 1997 aquifer exemption when issuing the permit. Two petitioners requested review of EPA’s aquifer exemption. The Board denied review of the aquifer exemption related issues for the following three primary reasons, none of which exist in this case, “aquifer 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 a different forum under the SDWA.” *Id.* at 12.

The Region’s argument that its Final Designation Decision is a “designation-type decision” that was similar to the aquifer exemption in *In re: Florence* is baseless for myriad reasons. First, as the Board noted in the *Florence* decision, the aquifer exemption provision of the SDWA is not part of UIC permitting decisions. In contrast, the Administrator’s use of the Residual Designation

Authority to designate the County as a MS4 for NPDES permitting is an essential part of NPDES permitting. The Final Designation Decision is determinative of regulatory jurisdiction over the County for NPDES permitting and therefore is part of the NPDES permitting program, unlike the aquifer exemption provision of the SDWA. Second, unlike aquifer exemptions, the Final Designation Decision is not separately operable from a NPDES permit. EPA's Residual Designation Authority is part of the same regulatory framework for all NPDES storm water discharges. *See* 40 C.F.R. 122.26. Finally, the petitioners in the *In re: Florence* decision had a clear statutory right to appeal to a federal circuit court for the discrete aquifer exemption decision pursuant to 40 C.F.R. 144.7(b)(3)² and 42 U.S.C. §300j-7(a)(2).³ The Final Designation Decision is not separately governed by different procedural statutory rules or regulations. Rather, it is properly within the NPDES statutory framework, and the County properly brought this petition in accordance with the regulatory requirements applicable to the EPA determination, 40 C.F.R. 124.19(a).

Conclusion

For the reasons set forth above, Petitioner respectfully requests the Board deny EPA Region VI's Motion to Dismiss.

² 40 C.F.R. 144.7(b)(3) provides, in relevant part, "subsequent to program approval or promulgation, the Director may, after notice and opportunity for a public hearing, identify additional exempted aquifers... Any disapproval by the Administrator shall state the reasons and shall constitute final Agency action for purposes of judicial review."

³ 42 U.S.C. §300j-7(a)(2) states "any other final action of the Administrator under this chapter may be filed in the circuit in which the petitioner resides or transacts business which is directly affected by the action."

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Response to Motion to Dismiss for Lack of Jurisdiction, or in the Alternative, Motion for Extension of Time* in the matter of the Incorporated County of Los Alamos, New Mexico, NPDES Appeal No. 20-02, was served on the following persons by United States First Class Mail and by electronic mail on the 5th day of March, 2020:

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