BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTON AGENGY
WASHINGTON, D.C.

In re:	)	
Incorporated County of Los Alamos, New Mexico	)	NPDES Appeal No. 20-02
DESIGNATION DECISION AND RECORD OF DECISION IN RESPONSE TP 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	)	

EPA REPLY TO INCORPORATED COUNTY OF LOS ALAMOS' RESPONSE TO MOTION TO DISMISS FOR LACK OF JURISDICTION, OR IN THE ALTERNATIVE, MOTION FOR EXTENSION OF TIME

The Environmental Protection Agency, Region 6 ("Region 6" or the "Region") hereby replies to Incorporated County of Los Alamos, New Mexico's ("Petitioner's") Response to the Region's Motion to Dismiss for Lack of Jurisdiction, or in the Alternative, Motion for Extension of Time ("Response") filed in the above-referenced matter ("Designation Decision"). On January 17, 2020, Petitioner filed a Petition for review of the Region's Designation Decision with the Board. The Region filed its Motion to Dismiss for Lack of Jurisdiction, or in the Alternative, Motion for Extension of Time ("Motion to Dismiss") with

the Environmental Appeals Board ("the Board") on February 14, 2020. The Petitioner filed its Response on March 5, 2020.

The Region files this Reply to speak to arguments made by Petitioner that the Region has not previously addressed and to point out inaccuracies in Petitioner's Response. Specifically, in attempting to distinguish the Board's finding that it lacked jurisdiction to review a Safe Drinking Water Act ("SDWA") Underground Injection Control ("UIC") aquifer exemption decision as part of an UIC permit appeal in *In re Florence Copper, Inc.,* UIC Appeals No. 17-01 & 17-03, at 419 (Sept. 22, 2017), Petitioner points to the Board's reliance on three primary factors in denying review. Response, p. 7. Petitioner accurately quotes the Board's finding that it is not the proper forum to resolve aquifer exemption decisions "because 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.*, quoting *In re Florence Copper, Inc., at 420.* However, Petitioner inaccurately alleges that none of these three factors exist in this case. *Id.*

A. The Final Designation Decision is a discrete final agency action that is not part of the NPDES permit issuance process.

Contrary to Petitioner's statement that "[t]he Region asserts EPA's Final Designation Decision is not final, yet necessarily acknowledges it is a key permit-related decision" (Response, p. 5), the Final Designation Decision is not a permitting decision but a precursor to any permitting decision. To the extent that Petitioners can challenge it, they must do so in federal court. "Permit-related" is insufficient to confer jurisdiction on the Board under 40 C.F.R. § 124.19. As pointed out by the Petitioner, "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 under section 124.15." Response, p. 4, quoting *In re State of Haw. Dep't of Transp. ... Highways Div.*, NPDES Appeal No. 13-11, at 2 (EAB Nob. 6, 2013).

A residual designation decision issued pursuant to 40 C.F.R. § 122.26(a)(9)(i)(D) is not "a final permit decision issued under 40 C.F.R. §124.15." Although Petitioner argues that "the Regional Administrator issued a final permit decision in the form of the Final Designation Decision" (Response, p. 5), 40 C.F.R. § 124.15(a) forecloses such an expansive interpretation of "final permit decision" by precisely and narrowly defining the term to mean "a final decision to ***issue, deny, modify, revoke and reissue, or terminate*** a permit." (emphasis added) Because a residual designation decision made under CWA §§ 402(p)(2)(E), (p)(6), and 40 C.F.R. § 122.26(a)(9)(i)(D) is not one of the actions listed, it is not a final permit decision reviewable under 40 C.F.R § 124.19(a)(1). It is also not a "contested permit condition" or "other specific challenge to the permit decision" reviewable under 40 C.F.R. § 124.19(a)(4)(i).

Because a residual designation decision is not a matter for which Board review is expressly authorized under Part 124, the Board does not have jurisdiction to review it.[1] As set forth in 40 C.F.R. § 1.25(e)(2), the Board does not have authority to rule on matters for which there is no express delegation. The 1992 rule that created the Environmental Appeals Board

[1] *See, e.g.,* In re: Federated Oil & Gas of Traverse City, 6 E.A.D. 722, 725-26 (EAB 1997)(holding that EAB's authority is limited to reviewing specific permit terms that are alleged to violate the statute or regulations at issue and EAB's authority is limited to issues within the confines of the EAB's jurisdiction).

provided "***express delegations*** of authority from the Administrator to the Board to hear and decide appeals."[2] More specifically, 40 C.F.R. § 1.25(e)(2) provides the following:

> The Environmental Appeals Board shall exercise any authority ***expressly delegated*** to it in this title. With respect to any matter for which authority has not been ***expressly delegated*** to the Environmental Appeals Board, the Environmental Appeals Board shall, at the Administrator's request, provide advice and consultation, make findings of fact and conclusions of law, prepare a recommended decision, or serve as the final decisionmaker, as the Administrator deems appropriate. (emphasis added).

The plain language of 40 C.F.R. § 124.19(a) is limited to appeals of contested permit conditions or other challenges to the final permit decision. Where the Board's jurisdiction is extended to review of Regional actions that are outside the scope of its 40 C.F.R. § 124.19(a) authority, the regulations expressly provide for that review. For example, 40 C.F.R. § 124.5 sets forth a process whereby the Regional Administrator's denials of requests for modification, revocation and reissuance, or termination of NPDES, UIC and RCRA permits can be "informally appealed to the Environmental Appeals Board by a letter briefly setting forth the relevant facts." 40 C.F.R. § 124.5(b).

B. The Final Designation Decision is separately operable from any NPDES permit.

The Final Designation Decision is a distinct agency action, independent of the NPDES permit issuance process. EPA's Final Designation Decision determined that several entities, including Petitioner, and their stormwater discharges are subject to NPDES permitting requirements. However, the specific permit conditions applicable to these entities and their

[2] 57 Fed. Reg. 5320, 5320 (Feb. 13, 1992) (citing regulation creating the EAB. The delegation was done through a rulemaking as opposed to by an internal delegation: "Under the old scheme, the rules of practice governing Agency adjudications did not actually delegate authority to the Judicial Officers . . . By contrast, under the rule promulgated herein, the rules of practice actually effect the delegation of the Administrator's authority."

discharges, or indeed even the type of permit ultimately issued, e.g., individual or general, are yet to be determined. The permitting process has yet to begin, as no entity with designated discharges has submitted a permit application, nor has EPA issued a proposed permit, whether individual or general. Simply stated, the NPDES permitting process for these entities is separate and distinct from the residual designation decision at issue here.

C. The Final Designation Decision is subject to challenge in a different forum.

Both the CWA and the Federal Question Statute provide forums for review of final agency actions under the CWA. See CWA Section 509(b), 33 U.S.C § 1369(b), and 18 U.S.C. § 1331. Under either provision, the standard of review for the Region's designation decision would be the familiar APA standard of review: whether the action is "arbitrary, capricious, an abuse of discretion, or contrary to law." APA § 706(2)(A), 5 U.S.C. § 706(2)(A). The Final Designation Decision is a final agency action reviewable in the appropriate federal court.

CONCLUSION

For the reasons set forth above, the Region respectfully requests that its Motion to Dismiss for Lack of Jurisdiction be granted.

Dated: March 16, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *EPA Reply to Incorporated County of Los Alamos' Response to Motion to Dismiss for Lack of Jurisdiction, or in the Alternative, Motion for Extension of Time* in the matter of Incorporated County of Los Alamos, New Mexico, NPDES Appeal No. 20-02, was sent to the following persons on March 16, 2020, in the manner indicated:

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