

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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)	
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)	

**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”) respectfully requests that the Environmental Appeals Board (the “Board”) dismiss the Petition for Review (the “Petition”) filed by the Incorporated County of Los Alamos, New Mexico (“Petitioner”) for lack of subject matter jurisdiction. In the alternative, should the Board accept the Petition for review, the Region requests an additional 30 days from the date of the Board’s ruling to file its full response on the merits, including a certified copy of the Administrative Record.

Background

On June 30, 2014, Amigos Bravos, a river conservation organization in New Mexico, submitted to Region 6 "A Petition by Amigos Bravos for a Determination that Stormwater Discharges in Los Alamos County Contribute to Water Quality Standards Violations and Require a Clean Water Act Permit." Amigos Bravos' petition for designation called for a "determination, pursuant to 40 CFR § 122.26(a)(9)(i)(D), that non-de minimis, currently non-NPDES permitted stormwater discharges in Los Alamos County are contributing to violations of water quality standards in certain impaired waters throughout the area, and therefore require National Pollutant Discharge Elimination System (NPDES) permits pursuant to section 402(p) of the Clean Water Act and/or designation as a municipal separate storm sewer system."

CWA § 402(p)(2)(E) and (p)(6) and 40 CFR § 122.26(a)(9)(i)(D) provide the Administrator with authority to require NPDES permits when he determines that an unregulated stormwater discharge "contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States." This is often referred to as "residual designation authority." 40 CFR § 122.26(f)(2) provides that any person may petition EPA to require an NPDES permit for a discharge of stormwater that contributes to a violation of a water quality standard or is a significant contributor of pollutants to waters of the United States.

In response to Amigos Bravos' petition and based on its analysis of available information, Region 6 determined that stormwater discharges from small municipal separate storm sewer systems (MS4s) located in the Los Alamos Cluster and on Los Alamos National Laboratory (LANL) property are contributing to violations of NM WQS. Therefore, on December 16, 2019, under the authority of CWA § 402(p)(2)(E) and

(p)(6) and 40 C.F.R. § 122.26(a)(9)(i)(D), the Region issued a decision designating small MS4s located in the portion of Los Alamos County, New Mexico within the Los Alamos Urban Cluster as defined by the latest Decennial Census, and small MS4s located on LANL property located within Los Alamos County and Santa Fe County, New Mexico as small MS4s requiring NPDES permit coverage.

On January 17, 2020, Petitioner filed the Petition for review of the Region's designation decision with the Board. The Petition seeks review of the Region's residual designation decision to require NPDES permits pursuant to 40 C.F.R. § 124.19(a). 40 C.F.R. § 124.19(a) provides for the appeal from a RCRA, UIC, NPDES and/or PSD final permit decision through the filing of a petition for review with the Board.

Argument

The Petition should be dismissed because the Board does not have jurisdiction to review a decision by the Administrator to use his "residual designation authority" under CWA § 402(p)(2)(E) and (6), as well as regulations at 40 C.F.R. § 122.26(a)(9)(i)(D) to designate a discharge or discharges of stormwater as requiring one or more NPDES permits. The decision to designate a stormwater discharge as requiring a NPDES permit is not a final NPDES permit decision issued under 40 C.F.R. § 124.15 and thus cannot be appealed to the Board under 40 C.F.R. § 124.19(a). No NPDES permit has been issued or denied. The Region has only issued a residual designation determination that NPDES permits are required.

The Board's jurisdiction to consider an issue is limited by its governing regulations. Pursuant to 40 C.F.R. § 1.25(e)(2), the Board "shall exercise any authority expressly delegated to it in this title." Under 40 C.F.R. § 124.2(a), the Administrator has delegated "authority to the

Environmental Appeals Board to issue final decisions in RCRA, PSD, UIC, or NPDES permit appeals filed under this subpart, including informal appeals of denials of requests for modification, revocation and reissuance, or termination of permits under Section 124.5(b).” The Board itself has spoken to its limited jurisdiction on numerous occasions. In finding that its authority to review CWA NPDES permit decisions under 40 C.F.R § 124.19(a) does not extend to state-issued permits, the Board stated:

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 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). *See In re Mich. CAFO Gen. Permit*, NPDES Appeal No. 02-11, at 3 (Mar. 18, 2003) (Order Dismissing Petition for Review); *In re Carlton, Inc.*, 9 E.A.D. 690, 692 (EAB 2001); *see also* 57 Fed. Reg. 5320 (Feb. 13, 1992). The Board is authorized to hear appeals of individual permit decisions issued by EPA under the CWA 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 EPA-issued permits are in turn appealable to the Board under 40 C.F.R. § 124.19(a).

In re: Missouri Permit No. MO-G49136, NPDES Appeal No. 17-04, at 2 (EAB Sept. 12, 2017) (Order Dismissing Petition for Lack of Jurisdiction). *See also Simpson Paper Co.*, 4 E.A.D. 766, 770 (EAB 1993) (noting that the Board’s jurisdiction to review NPDES permit decision under the CWA depends on the existence of an EPA-issued permit).

In addition, the Board has specifically addressed its lack of authority to review designation-type decisions in the context of aquifer exemptions under the Safe Drinking Water Act (SDWA) Underground Injection Control (UIC) program. In its order dismissing an appeal of a UIC permit issued to Florence Copper, Inc., the Board noted:

the Board has jurisdiction over petitions for review appealing a UIC permit decision under the Agency’s permitting regulations. *See* 40 C.F.R. § 124.19(a). The Board’s authority to review UIC-related permitting disputes, however, is not unbounded. *In re*

Envtl. Disp. Sys., Inc., 12 E.A.D. 254, 266-67 (EAB 2005) (collecting cases). Generally, the Board's jurisdiction in these kinds of cases is limited to evaluating specific UIC permit provisions and permit issuer compliance with the SDWA and UIC permitting regulations.

In re Florence Copper, Inc., UIC Appeals No. 17-01 & 17-03, at 419 (Sept. 22, 2017). Stating that the petition for review of Florence's permit was "based on one overarching contention that the Region clearly erred, abused its discretion, or made inappropriate policy choices when the Region relied on the 1997 Aquifer Exemption in issuing the Permit," *id.* at 418, and that the petitioner did "not challenge any Permit term or condition," *id.*, the Board found it lacked jurisdiction to hear the petition.

Aquifer exemption decisions, though made using criteria set forth in the UIC implementing regulations at 40 C.F.R. § 146.4, are not themselves UIC permitting decisions or elements thereof within the meaning of 40 C.F.R. § 124.19(a). Aquifer exemption decisions are, instead, discrete 'final agency actions' that delineate the boundaries of USDWs, are subject to public notice, and must be challenged in the appropriate federal circuit court of appeals within forty-five days or later if based solely on grounds arising after that deadline. *See* SDWA § 1448(a)(2), 42 U.S.C. § 300j-7(a)(2) (petition for review of 'any other final action of the Administrator *** may be filed in the circuit in which the petitioner resides or transacts business [that] is directly affected by the action').

Id. at 419.

Like aquifer exemption decisions under the SDWA, residual designation decisions made by EPA pursuant to CWA § 402(p)(2)(E) and (6) and 40 C.F.R. § 122.26(a)(9)(i)(D) are not themselves NPDES permitting decisions or elements thereof within the meaning of 40 C.F.R. § 124.19(a). Like an aquifer exemption decision under SDWA, EPA's residual designation determination that an unregulated stormwater discharge "contributes to a violation of a WQS or is a significant contributor of pollutants to WOTUS" and therefore requires an NPDES permit is

instead a discrete decision that falls outside the purview of the Board's jurisdiction under the governing regulations¹.

Conclusion

The Petition should be dismissed for lack of jurisdiction. The Petition does not challenge a final NPDES permit decision under 40 C.F.R. § 124.19(a). As with the petitioner in *In re Florence Copper, Inc.*, the Petitioner here does not challenge any permit term or condition. There is no permit, only a residual designation determination that NPDES permits are required. Such a determination is not within the Board's jurisdiction to review. Instead, the Region's determination that discharges from small MS4s located in the portion of Los Alamos County, New Mexico within the Los Alamos Urban Cluster as defined by the latest 2010 Decennial Census and small MS4s located on LANL property within Los Alamos County and Santa Fe, County, New Mexico are subject to NPDES permitting requirements must be challenged in the appropriate federal court.

Request for Relief

The Region respectfully requests that the Board dismiss the Petition for lack of subject matter jurisdiction. In the alternative, should the Board accept the Petition for Review, the Region requests an additional 30 days from the date of the Board's ruling to file its full response on the merits, including a certified copy of the Administrative Record. The additional 30 days

¹ This position, however, does not leave Petitioner without avenue for redress. They could, for example, seek to challenge any final action in federal court as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Whatever the appropriate forum may be, under EPA's regulations, jurisdiction over Petitioner's claims does not lie with the Board.

would not prejudice the Petitioner and would be needed to in order to allow the Region time to coordinate with EPA Headquarters and prepare its response to the Petition.

In accordance with 40 C.F.R. § 124.19(f)(2), the undersigned counsel contacted Petitioner's attorney on February 11, 2020 to ascertain whether Petitioner consents or objects to this motion. Petitioner's attorney responded that Petitioner objects to this motion.

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

Dated: February 14, 2020

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *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 in the manner indicated:

By First Class Mail (with courtesy copy by email):

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Dated: February 14, 2020