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By Hand

January 20, 2010

Office of the Clerk
U.S. Court of Appeals for the First Circuit
Room 2500
John Joseph Moakley U.S. Courthouse
One Courthouse Way
Boston, MA 02210

Re: *City of Pittsfield, Massachusetts v. U.S. Environmental Protection Agency*, No. 09-1879

Dear Sir:

Enclosed for filing are nine copies of the Reply Brief of Petitioner City of Pittsfield, Massachusetts, which was filed electronically on January 14, 2010.

Thank you for your assistance.

Very truly yours,

COPY

Donald L. Anglehart

cc: Laurel Bedig, Department of Justice (by Fedex) (2 courtesy copies)
Ann Williams, EPA (by hand) (1 courtesy copy)
Charlotte Withey, EPA (by hand) (1 courtesy copy)
Erica Durr, Clerk, EPA EAB (by First Class Mail) (1 courtesy copy)

No. 09-1879

In The
United States Court of Appeals
for the First Circuit

CITY OF PITTSFIELD, MASSACHUSETTS

Petitioner

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent

On Petition For Review
Environmental Appeals Board
United States Environmental Protection Agency

REPLY BRIEF OF PETITIONER CITY OF PITTSFIELD, MASSACHUSETTS

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INTRODUCTION

In this case, the Environmental Appeals Board ("Board") of the U.S. Environmental Protection Agency ("EPA") effectively denies to the City of Pittsfield ("City") statutory permit appeal rights granted by Congress in section 509(b)(1)(F) of the Clean Water Act, 33 U.S.C. § 1369(b)(1)(F). It does so by cutting off at the starting gate, in violation of the controlling regulation, the opportunity for the City to develop the administrative record on its permit appeal. It does so by arguing that there has been a procedural default where none exists. It does so by deliberately closing its eyes to the actual content of the City's administrative petition for review, and by taking the position that the City's attachment to its petition for review can be ignored, as if not even included with the petition. It does so even while admitting that one of the permit conditions specifically challenged by the City in its petition for review was erroneous and needs to be corrected (the Board says that it is free to ignore that substantive issue because the EPA regional office promises it will take care of it).

EPA admits the City filed its permit appeal in a timely fashion, and at the proper place. The Board's view, however, is that the City did not, at the outset, plead and argue with sufficient particularity the basis for its petition.

Unfortunately, the Board has misread and misapplied the filing requirements set forth in the controlling regulation, 40 C.F.R. § 124.19(a).

The Board has misread the filing requirements because it has grafted onto them a mandatory "particularized pleading and argument" standard, to be applied in every instance, that does not exist in the plain language of subsection 124.19(a).

The Board has misapplied the filing requirements by refusing to grant the City's petition even though: (i) the City pointed out in its petition an example of clear factual error (i.e., the copper limitation); and, (ii) the City's petition set forth with particularity its detailed, specific and substantial concerns. In this case, because the EPA regional office rejected virtually all the City's objections to the draft permit, the City renewed and repeated them once the draft permit was issued as final. This was not a case in which EPA substantially modified the material terms of the final permit from those included in the objectionable draft permit. The City's view, expressly stated in its petition to the Board, is that EPA made no significant changes between the draft and final permits, so it filed its earlier comment letter as part of its petition and expressly refreshed its continuing objections. Further,even if one assumes the existence of a mandatory particularized pleading requirement, applicable in every instance under section 124.19(a), the City's petition to the Board meets it.

This is an extremely important case for the City, less so for EPA. To the City, it involves the potential incurrence of literally tens of millions of dollars of capital improvement costs and additional operating and personnel expenses, to be borne by local rate-payers, continuing far into the future. Such financial impacts

will be devastating to the City at a time when it is struggling to address the minimum needs of its citizens. And all of this will follow without the City having had the opportunity to further develop the administrative record of its permit appeal, or to brief the Board on the final permit conditions it has informed the Board it continues to find objectionable. The City believes it can show, through the very administrative permit appeal process that the Board has thus far denied to it, that the conditions it objects to are unnecessary to meet the requirements of the Clean Water Act.

The City also is concerned that EPA in the future could argue that all judicial review of Clean Water Act enforcement cases related to the contested permit conditions is waived by the City by operation of § 509(b)(2) of the Clean Water Act, 33 U.S.C. § 1369(b)(2) because it will be deemed by EPA to have failed to pursue its permit appeal rights.

Before EPA imposes permit conditions that create such adverse effects, the City should at least be afforded the statutory permit appeal rights granted by Congress in the Clean Water Act.

To EPA, this case involves whether the Board will be required, in this specific instance, to grant the City's administrative petition for review so that the issues can be fully briefed by all parties, and the administrative record developed further, according to the informal process followed under the Board's permit appeal procedures. The City is not seeking a formal evidentiary hearing, which it

understands is not available. See *Dominion Energy Brayton Point, LLC v. Johnson*, 443 F.3d 12, 16 (1st Cir. 2006).

It is not necessary for the City to win for this Court to establish any dangerous legal precedent that could undermine EPA's authority. It is enough to rule that, on the particular facts involved, the City's administrative petition for review was legally adequate as a matter of law and should have been granted by the Board.

ARGUMENT

The City's main brief has addressed the critical issues. This section replies to the salient aspects of EPA's brief.

I. EPA MAY NOT RELY ON THE PRACTICE MANUAL OF THE BOARD TO DEFEND THE BOARD'S DENIAL OF THE CITY'S PETITION FOR REVIEW. THE PRACTICE MANUAL IS IRRELEVANT, AS ARE THE REFERENCES TO THE REGULATORY PREAMBLE FOR 40 C.F.R. 124.19(a), AND THE STRING CITATIONS TO PREVIOUS BOARD DECISIONS.

A. The Practice Manual of the Board Is Irrelevant To This Case

EPA includes the Board's practice manual in the addendum to its brief (at ADD001-ADD022), but the practice manual is entirely irrelevant to the resolution of the issues in this case. Indeed, the cover of the practice manual states:

> **This document is solely intended as guidance. The policies and procedures in this guidance do not constitute rulemaking by the Agency, and may not be relied on to create a substantive or procedural right or benefit enforceable at law by any person.**

Respondent's Brief, at ADD001 (emphasis in original).

EPA cannot seriously contend that the practice manual trumps the applicable published EPA regulations, particularly where the stakes for third parties are so high and the manual is characterized as non-binding.

B. EPA's Brief Conflates and Muddles the Procedures Applicable to the City's Administrative Petition For Review

EPA's brief deflects attention from the specific and narrow issues in this case to a more generalized argument citing various procedural paths, some of which don't apply at all. The process under the regulations is straightforward. Under 40 C.F.R. § 124.19(c), if the Board grants a petition for review, the Board sets a schedule for further development of the factual record through briefing by all parties on the issues; if the Board denies a petition for review, no briefing occurs:

> (c) Within a reasonable time following the filing of the petition for review, the Environmental Appeals Board shall issue an order granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action. Public notice of any grant of review by the Environmental Appeals Board...shall be given as provided in § 124.10. Public notice shall set forth a briefing schedule for the appeal and shall state that any interested person may file an amicus brief. Notice of denial of review shall be sent only to the person(s) requesting review.

The next stop for one whose petition for review is denied is the appropriate federal circuit court of appeals.

C. EPA Cannot Bootstrap Its Position By Continuing to String-Cite Prior Decisions of the Board

The City's position on the proclivity of the Board and EPA to string-cite the decisions of the Board is adequately covered in the City's main brief.

D. The Regulatory Preamble for 40 C.F.R. 124.19(a) Is Irrelevant To This Case

It is not necessary to consult the preamble to EPA's consolidated permit regulations, included in the addendum to EPA's brief at ADD024-ADD033, to conclude that the City's petition for review to the Board was adequate as a matter of law. EPA and the Board attempt to rely on the preamble because they want to morph the filing requirements of 40 C.F.R. § 124.19(a) into a form of pleading and standard that does not exist on the face of the regulation itself.

II. THE SIXTH CIRCUIT'S DECISION IN *MICHIGAN DEPT. OF ENVIRONMENTAL QUALITY* DOES NOT JUSTIFY THE BOARD'S DENIAL OF THE CITY'S PETITION

EPA concedes that the underlying facts in *Michigan Dept. of Environmental Quality v. EPA*, 318 F.3d 705 (6th Cir. 2003), differ from those in the instant case, but EPA contends that the ultimate legal question before the Court is identical. The underlying facts in *Michigan Dept. of Environmental Quality* so diverge from the circumstances in the instant case, however, that the decision has no value as precedent. The underlying question on the merits in *Michigan Dept. of Environmental Quality* was whether the State of Michigan or the EPA was the

appropriate authority to issue wastewater discharge permits on the Saginaw Chippewa Isabella Reservation. Unlike the City, the State of Michigan did not operate a wastewater facility subject to federal permitting under the Clean Water Act. Nor was it a current holder of a federal wastewater discharge permit issued by EPA. It was not faced with the prospect of millions of dollars of forced capital improvements and operating expenses to be borne by local rate-payers. It was not looking at any potential waiver of legal arguments to which it might avail itself in future enforcement cases brought by EPA.

The Sixth Circuit held only that the Board's interpretation and application of § 124.19(a) in that case was not an abuse of discretion. In the instant case, under the specific facts and circumstances surrounding the City's permit appeal, it is the City's position that the Board's denial does constitute an abuse of discretion, and is otherwise violative of the Administrative Procedure Act, for the reasons set forth in our main brief.

In addition, the legal analysis of § 124.19(a) in the Sixth Circuit's opinion in *Michigan Dept. of Environmental Quality* is suspect. The most glaring problem is that the opinion misleadingly and inaccurately summarizes the language of § 124.19(a). The main text of the opinion quotes § 124.19(a) in piecemeal fashion and out of context:

> The Environmental Appeals Board has the authority to enforce rules of procedural regularity in cases before it. One such rule is found at 40 C.F.R. § 124.19 of the EPA's regulations and governs the content of petitions to obtain Board review of decisions of the Administrator. That rule provides that the petition must "show" that the challenged actions of the Regional Director were based on a "finding of fact or conclusion of law which is clearly erroneous" or the "exercise of discretion or important policy consideration" that should, in the Board's discretion, be reviewed.2

318 F.3d at 707 (footnote in original).

In the quoted passage, the Sixth Circuit omits critical language from § 124.19, with the effect of making it appear that certain important showings relating to facts or conclusions of law are mandatory. The quote omits the critical phrase "when appropriate" from its synopsis of the regulation, which alters the *mandatory* versus *permissive* tone of the regulation's actual wording, as will be demonstrated more clearly below.

Note 2 accompanying the quoted passage from the opinion, 318 F.3d, at 707, n. 2, which more fully sets forth the language of § 124.19(a), also materially misquotes the subsection, by omitting the words "by these regulations" from § 124.19(a):

> The petition shall include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required **[by these regulations]** and *when appropriate*, a showing that the condition in question is based on:
>
> (1) A finding of fact or conclusion of law which is clearly erroneous, or
>
> (2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

318 F.3d at 707, n.2 (bolding and italics added).

The bolded words "by these regulations" in the above passage appear in § 124.19(a), but were not included in the Sixth Circuit's rendering of § 124.19(a) at note 2. The italicized words "when appropriate" were not discussed at all by the Sixth Circuit in its opinion in *Michigan Dept. of Environmental Quality.*

The effect of the phrase "by these regulations" is that each petitioner must demonstrate in its petition that during the comment period it timely commented on the issues of concern to it, if explicitly required to do so by EPA permitting regulations. There is no assertion by any party in this case that the City failed to comment as required by the permitting regulations, so that is not an issue in the instant case.

The phrase "and when appropriate" is simply, and impermissibly, ignored by the Sixth Circuit in *Michigan Dept. of Environmental Quality,* and by the Board

generally. The proper, literal interpretation of § 124.19(a), giving due weight to the phrase "and when appropriate" is that it makes a "showing" under § 124.19(a)(1) of a clearly erroneous finding of fact or conclusion of law permissive, not mandatory.

CONCLUSION

The Board seeks an order from this Court directing the Board to grant the City's administrative petition for review so that the administrative record in this permit appeal can be fully briefed, and further developed if necessary, according to the normal procedures followed for administrative petitions for review granted by the Board under 40 C.F.R. § 124.19(a).

Respectfully submitted.

s/ Donald L. Anglehart
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January 14, 2010

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2010, two true and correct copies of the foregoing REPLY BRIEF OF PETITIONER CITY OF PITTSFIELD MASSACHUSETTS were served upon the following counsel of record by first class mail addressed to the following:

Laurel A Bedig

U.S. Dept. of Justice
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Dated: January 14, 2010