

IN RE MESABI NUGGET DELAWARE, LLC

NPDES Appeal Nos. 13-01, 13-02, and 13-03

ORDER DISMISSING PETITIONS FOR REVIEW

Decided March 19, 2013

Syllabus

In this appeal, petitioners – WaterLegacy, the Minnesota Center for Environmental Advocacy, the Fond Du Lac Band of Lake Superior Chippewa and the Grand Portage Band of Lake Superior Chippewa – challenged the U.S. Environmental Protection Agency Region 5’s approval of a water quality standards variance issued by the Minnesota Pollution Control Agency to Mesabi Nugget Delaware, LLC. Both the Region and Mesabi Nugget filed motions to dismiss these petitions on jurisdictional grounds, contending that the Board does not have the authority to review an Agency approval of a water quality standards variance issued under Clean Water Act section 303(c), 33 U.S.C. 1313(c), and 40 C.F.R. part 131. Petitioners subsequently agreed and did not object to dismissal of their petitions.

Held: The provisions of 40 C.F.R. part 124 do not expressly authorize the Board’s review of a water quality standards variance issued under CWA section 303(c). Moreover, the Board previously has determined that it lacks jurisdiction to review Agency decisions regarding water quality standards under CWA section 303(c). Thus, the Board concludes that it also lacks jurisdiction to review an agency decision to approve a variance to water quality standards that was issued pursuant to that same section. The Board dismisses these petitions with prejudice for lack of jurisdiction.

Before Environmental Appeals Judges Leslye M. Fraser, Catherine R. McCabe, and Kathie A. Stein.

Opinion of the Board by Judge Fraser:**I. INTRODUCTION**

On January 23, 2013, WaterLegacy filed a petition (NPDES Appeal No. 13-01) with the Environmental Appeals Board (“Board”) seeking review of U.S. Environmental Protection Agency Region 5’s (“Region’s”) approval of a water quality standard variance issued by the Minnesota Pollution Control Agency (“MPCA”) to Mesabi Nugget Delaware, LLC (“Mesabi Nugget”). On January 28, 2013, the Minnesota Center for Environmental Advocacy filed a petition for review of the same variance (NPDES Appeal No. 13-02), as did the Fond Du

Lac Band of Lake Superior Chippewa and Grand Portage Band of Lake Superior Chippewa (NPDES Appeal No. 13-03).

In response, the Region moved for dismissal of these petitions on jurisdictional grounds. *See* Motion to Deny Review for Lack of Jurisdiction (Feb. 13, 2013). Mesabi Nugget filed its own motion to dismiss on jurisdictional grounds on February 15, 2013. Both the Region and Mesabi Nugget contend that the Board has no jurisdiction to review the Region's approval of the water quality standards variance, which was issued under section 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c), and 40 C.F.R. part 131.

On February 22, 2013, the petitioners jointly filed a response to the motions to dismiss in which they state that they do not object to the dismissal of their petitions on jurisdictional grounds, but seek to have the Board include in its order certain findings and conclusions.¹ *See* Joint Response of All Petitioners to Pending Motions for Dismissal (Feb. 22, 2013) ("Joint Resp. to Motions to Dismiss").

For the reasons that follow, the Board dismisses with prejudice the above-captioned petitions for lack of jurisdiction.

¹ More specifically, petitioners seek to have the Board include in its order the following specific findings and conclusions:

1. 40 C.F.R. Part 124 states the limits of the Board's jurisdiction;
2. Where a state with delegated, Clean Water Act Section 303(c) [National Pollutant Discharge Elimination System or "NPDES"] authority issues a water-quality-standards variance in connection with its approval of a NPDES permit, even if EPA approves the water-quality-standards variance, it does not constitute an EPA "variance" decision covered by 40 C.F.R. Part 124;
3. EPA's approval of a water-quality-standards variance on a state-issued NPDES permit is instead properly characterized as a final agency action to approve a state water quality standard under Section 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c);
4. In the absence of other statutory authority, jurisdiction to hear appeals of final agency action is governed by the Administrative Procedures [sic] Act at 5 U.S.C. Section 704, and lies with federal district court; and
5. Because the claims in these appeals constitute challenges to EPA Region 5's approval of a variance the state of Minnesota issued to Mesabi Nugget, through the Section 303(c) authority delegated to the Minnesota Pollution Control Agency, the Board is without jurisdiction.

II. DISCUSSION

The Board's jurisdiction is circumscribed by its governing regulations. *See* 40 C.F.R. § 1.25(e)(2) (providing that the Board shall exercise any authority expressly delegated to it, and any other matter as requested and deemed appropriate by the Administrator).² In this appeal, petitioners seek review of the Region's December 27, 2012 approval of a water quality standards variance that the MPCA issued to Mesabi Nugget in conjunction with a state-issued NPDES permit. *See* EPA Review of the [MCPA] Request for Approval of a Variance from Water Quality Standards, MN Permit No. MN0067687, WQSTS #2012-452 (Dec. 27, 2012) (WaterLegacy Pet., Ex. 19) (EAB Docket No. 1.18). The Region reviewed MPCA's water quality standards variance under CWA section 303(c), and 40 C.F.R. part 131, which provide for EPA review and approval of any new or revised state water quality standard. Regulations implementing CWA section 303(c) allow for discharger-specific time-limited changes in the water quality standards (i.e., water quality standard variances). *See* 40 C.F.R. §§ 131.13, 131.21; *see also* Office of Water, U.S. EPA, EPA-833-R-01-002, Guidance: Coordinating CSO Long-Term Planning with Water Quality Standards Reviews (July 31, 2001); *see also* U.S. EPA, EPA-823-B-12-002, Water Quality Standards Handbook: Second Edition § 5.3 (Mar. 2012). The question presented here is whether such a variance is reviewable by the Board. As explained above, all parties now agree that these petitions should be dismissed on jurisdictional grounds.

The Board's consideration of its jurisdiction to review these petitions concerns two components of the Clean Water Act ("CWA"): the designation of water quality standards under Section 303, 33 U.S.C. § 1313, which serves as the foundation of the water quality-based pollution control program of the CWA;³ and the National Pollutant Discharge Elimination System ("NPDES") permitting program,

² Although petitioners ask that the Board's order include a statement that 40 C.F.R. part 124 states the limits of the Board's jurisdiction, that statement is overly broad. Additional bases for the Board's jurisdiction exist. *See, e.g.*, 40 C.F.R. pt. 22 (authorizing appeals from administrative enforcement decisions); U.S. EPA Delegation of Authority 14-27, Petitions for Reimbursement (June 27, 2000) (authorizing Board review of "Petitions for Reimbursement" of costs incurred in complying with clean up orders issued under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601-9675); 40 C.F.R. § 1.25(e)(2) (providing for Board review as appropriate, at the Administrator's request); *see also* U.S. EPA, Environmental Appeals Board, *Practice Manual* at 58-62 (January 2013) (describing other categories of administrative appeals over which the Board has jurisdiction).

³ Water quality standards are "[s]tate adopted, or [f]ederally promulgated rules [that] serve as the goals for the water body and the legal basis for the water quality-based NPDES permit requirements under the CWA." *In re D.C. Water & Sewer Auth.*, 13 E.A.D. 714, 725 (EAB 2008) (citing 59 Fed. Reg. 18,868, 18,894 (Apr. 19, 1994); CWA § 303(c), 33 U.S.C. § 1313(c)). Water quality standards consist of a state's designated "uses" for its water bodies, "criteria to protect the uses, an antidegradation policy to protect the water quality improvements gained and other policies affecting the implementation of the standards." *Id.*

which regulates discharges of pollutants from point sources to waters of the United States, under Section 402 of the CWA, 33 U.S.C. § 1342.⁴ The water quality standards, generally speaking are determined by states, with the approval of EPA under CWA section 303. *See* 33 U.S.C. § 1313(c). NPDES permitting may be implemented by authorized state programs, such as Minnesota's, or by EPA, through the federal permitting program. *See* 33 U.S.C. § 1342. The distinction between these related components of the CWA is significant. *See In re Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 518 (2nd Cir. 1976) (analyzing the distinction between water quality standards and permitting effluent limitations in the context of considering its own jurisdiction and noting that, although these concepts are related, they are "entirely different").

As a general matter, section 124.19 authorizes appeals from final permit decisions issued by EPA under 40 C.F.R. § 124.15. *See* 40 C.F.R. § 124.19. Section 124.19 does not provide authority to review NPDES appeals from state-issued NPDES permits. *See In re Simpson Paper Co.*, 4 E.A.D. 766, 770 (EAB 1993); *In re Michigan CAFO General Permit*, NPDES Appeal No. 02-11, at 4 (Mar. 18, 2003) (Order Dismissing Petition for Review).⁵ Nor does section 124.19 provide any express authority to review an EPA approval of a water quality standards variance issued under CWA section 303(c) or 40 C.F.R. part 131. *See generally* 40 C.F.R. § 124.19. Thus, as all parties agree, 40 C.F.R. § 124.19 does not expressly authorize the Board's review of an Agency decision to approve a water quality standards variance issued pursuant to CWA § 303(c) and 40 C.F.R. part 131.

Similarly, the provision in 40 C.F.R. § 124.64(b), which provides that "[v]ariance decisions" made by EPA may be appealed under the provisions of section 124.19, also does not provide the Board with jurisdiction over the variance at issue. The term "variance" as used in section 124.64(b) is limited by the definition provided in 40 C.F.R. section 122.2. *See* 40 C.F.R. § 122.2 (defining the term "variance" as applicable to part 124). The definition is as follows:

Variance means any mechanism or provision under section 301 or 316 of the CWA or under 40 C.F.R. part 125, or in the applicable 'effluent limitations guidelines' which

⁴ The CWA prohibits the discharge of pollutants into the waters of the United States, except in cases where an NPDES or other permit authorizes such discharge. *See* CWA §§ 301(a), 402, 33 U.S.C. §§ 1311(a), 1342. NPDES permits contain effluent limitations and conditions that ensure compliance with established water quality standards. *See* CWA §§ 301-302, 401(a)(1), 33 U.S.C. §§ 1311-1312, 1341(a)(1).

⁵ To the extent that petitioners seek review of the NPDES permit that MPCA issued to Mesabi in connection with this variance, that permit is a state-issued permit which the Board would lack jurisdiction to review.

allows modification to or waiver of the generally applicable effluent limitation requirements or time deadlines of the CWA. This includes provisions which allow the establishment of alternative limitations based on fundamentally different factors or on sections 301(c), 301(g), 301(h), 301(j), or 316(a) of CWA.

40 C.F.R. § 122.2. The term “variance”, as used in part 124, refers generally to modifications of effluent limitations, and specifically refers to “any mechanism or provision under section 301 or 316 of the CWA or under 40 C.F.R. part 125,” but does not reference CWA section 303(c) or a water quality standards variance. As such, based on the express language of the regulations, the Board concludes that 40 C.F.R. § 124.64 does not authorize the Board’s review of the Agency’s approval of a water quality standards variance issued pursuant to CWA § 303(c) and part 131. *See In re Howmet Corp.*, 13 E.A.D. 272 (EAB 2007) (explaining when construing an administrative regulation, the Board looks first to the regulation’s plain language), *aff’d*, 656 F.Supp. 2d 167 (D.D.C. 2009).

As stated above, the Region’s decision to approve the water quality standards variance at issue was made pursuant to CWA § 303(c) and 40 C.F.R. part 131. The Board previously has determined that it lacks jurisdiction to review Agency decisions regarding water quality standards under CWA § 303(c). *See In re City of Hollywood, Fla.*, 5 E.A.D. 157, 175-76 (EAB 1994). Rather, appeals from those provisions have been brought in federal district court pursuant to the Administrative Procedure Act. *Id.* (citing *Scott v. City of Hammond, Ind.*, 741 F.2d 992, 995 (7th Cir. 1984)); *see also Bethlehem Steel Corp.*, 538 F.2d at 518 (distinguishing between the framework under the CWA for implementing water quality standards and for imposing effluent limitations, and determining that the latter was reviewable in federal district court under the Administrative Procedure Act). The Board concludes that its lack of jurisdiction over Agency decisions regarding water quality standards under CWA § 303(c) applies to variances issued under that provision as well.

III. CONCLUSION

Based on the foregoing, the Board concludes that it lacks jurisdiction to review the Region’s decision to approve the water quality standards variance that MPCA issued to Mesabi Nugget. Accordingly, the Board dismisses with prejudice the above-captioned petitions for review for lack of jurisdiction.

So ordered.