

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



_____))
In re:))
Missouri Permit No. MO-G491369)) NPDES Appeal No. 17-04
Coastal Energy Corporation))
_____))

**ORDER DENYING MOTION FOR
RECONSIDERATION OR CLARIFICATION**

I. INTRODUCTION

On September 25, 2017, the Environmental Appeals Board (“Board”) issued an order (“Order”) dismissing the above-referenced petition for review and appeal for lack of jurisdiction. The petition for review and appeal, filed by Ms. Jill Bailey (“Petitioner”), sought review of Permit Number MO-G491369, which, based on the documents before the Board, is a State General Operating Permit that the Missouri Department of Natural Resources (“MDNR”) issued under its authorized State National Pollutant Discharge Elimination System (“NPDES”) Permit Program. Petitioner filed a Motion for Reconsideration or Clarification (“Motion”), and neither the permittee nor the permit issuer filed a response. As explained below, the Board denies Petitioner’s Motion because it fails to identify any error in the Board’s conclusion that it lacks jurisdiction to review the challenged permit decision.

II. DISCUSSION

A. Standard for Motions for Reconsideration¹

A motion for reconsideration “must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors.” 40 C.F.R. § 124.19(m). The Board reserves reconsideration for cases in which the Board has made a demonstrable error, such as a mistake on a material point of law or fact. *In re Mich. CAFO Gen. Permit*, NPDES Appeal No. 02-11, at 3 (EAB July 8, 2003) (Order Denying Motion for Reconsideration); *In re Ariz. Mun. Storm Water NPDES Permits*, NPDES Appeal No. 97-3, at 2 (EAB Aug. 17, 1998) (Order Denying Motion for Reconsideration); *see also In re Steel Dynamics, Inc.*, PSD Appeal No. 01-03, at 2 (EAB May 7, 2001) (Order Denying Motion for Reconsideration and Stay of Decision); *In re Haw. Elec. Light Co.*, PSD Appeal Nos. 97-15 to -22, at 6 (EAB Mar. 3, 1999) (Order Denying Motion for Reconsideration). A motion for reconsideration is not an opportunity for a party “to reargue the case in a more convincing fashion.” *In re Town of Newmarket*, NPDES Appeal No. 12-05, at 2 (EAB Jan. 7, 2014) (Order Denying Motion for Reconsideration) (citing *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 to -20, at 2-3 (EAB Feb. 4, 1999) (Order on Motions for Reconsideration)); *see also In re Russell City Energy*

¹ Although Petitioner’s Motion is styled as one seeking reconsideration or clarification, the Motion does not appear to seek any clarification of the Board’s Order; rather, it seeks reconsideration of the Board’s disposition in the Order. In any event, a “[m]otion[] for clarification must set forth with specificity the portion of the decision for which clarification is being sought and the reason clarification is necessary.” 40 C.F.R. § 124.19(m). Nothing in Petitioner’s Motion meets that standard.

Ctr., PSD Appeal Nos. 10-1 to -05, at 2-3 (EAB Dec. 17, 2010) (Order Denying Motion and Supplemental Motion for Reconsideration and/or Clarification and Stay).

Federal courts employ a similar standard. *See, e.g., Arnold v. ADT Sec. Servs.*, 627 F.3d 716, 721 (8th Cir. 2010). As the U.S. Court of Appeals for the Eighth Circuit has explained, “[m]otions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence.” *Id.* (citations omitted). And motions for reconsideration “are not to be used to ‘introduce new evidence that could have been adduced during pendency’ of the motion at issue” or to “tender new legal theories for the first time.” *Id.*

B. *Petitioner Has Failed to Demonstrate Error in the Board’s Conclusion That It Lacks Jurisdiction Over the Challenged Permit*

The Board explained in its Order that it is a tribunal of limited jurisdiction and, though it has authority to review federal Clean Water Act (“CWA”) NPDES permits, it lacks authority to review state NPDES permits. Order at 3 (citing Board orders and the *Federal Register* at 57 Fed. Reg. 5320 (Feb. 13, 1992)). The Board therefore dismissed the petition because the challenged permit is not a federal permit. Instead, MDNR, which is authorized to administer and implement the CWA’s NPDES program in the State of Missouri, issued the challenged permit. In the Order, the Board further explained that even though the MDNR permit program is federally approved, the permit here is still a state permit issued under state law, and the Board does not have jurisdiction to hear an appeal of a state-issued NPDES permit simply because a petitioner seeks to challenge compliance with a federal law. Lastly, the Board noted that even if the general permit at

issue here were a federal permit, which it is not, 40 C.F.R. § 124.19(o) explicitly bars anyone from appealing general permits to the Board.

In her Motion, Petitioner dismisses Board precedent and asserts that the challenged permit is, or should be considered, a federal permit. And while Petitioner claims that the Board is not bound by its precedent, she mistakenly argues that two federal court decisions are binding precedent supporting the Board's jurisdiction here.

The federal court cases cited by Petitioner do not call the Board's precedent into question and, in any event, are inapposite. First, Petitioner cites to the U.S. Court of Appeals for the Second Circuit's decision in *Constitution Pipeline Co. v. New York State Department of Environmental Conservation*, 868 F.3d 87 (2d Cir. 2017). That citation is misplaced for a number of reasons, including the facts that federal courts have different and broader jurisdiction than the Board, and *Constitution Pipeline* involved a state CWA section 401 certification of an application for a *federal* permit (not a state permit) pending before the U.S. Army Corp of Engineers.

Second, Petitioner cites the U.S. Court of Appeals for the Ninth Circuit's decision in *High Country Resources v. Federal Energy Regulatory Commission*, 255 F.3d 741 (9th Cir. 2001), to support her argument. In that case, the Ninth Circuit exercised its jurisdiction to adjudicate a matter in which the petitioner challenged a permit denial issued by a federal agency – the Federal Energy Regulatory Commission's ("FERC") – under *federal* law (not state law) based on the Commission's application of restrictions in the Wild and Scenic Rivers Act on FERC licenses. *See id.* In short, neither of the cases Petitioner cites, nor any of the arguments presented in the Motion, demonstrate that the

Board committed error in concluding that the permit issued here – by the MDNR under state law – is a state permit that the Board lacks jurisdiction to review.

Petitioner’s other arguments that the challenged permit is, or should be considered, a federal permit reviewable by the Board is also unavailing. For example, Petitioner points to 33 U.S.C. § 1342(b)(3), which governs state NPDES permit programs, and notes that this provision does not specifically identify which decisionmaker has “authority over the appeals of state[-]issued NPDES permits.” Motion at 2. Further, Petitioner observes that “[t]he Clean Water Act gives states authority to issue NPDES permits but is silent on states hearing appeals of NPDES permits***.” *Id.* Section 1342(b)(3) does not convert state-issued permits into federal ones, nor does it call into question EPA’s regulations limiting the Board’s jurisdiction to review federal but not state-issued NPDES permits. Instead, and as required by federal regulations governing NPDES state programs (which direct states to provide for state judicial review of state-issued permit decisions, *see* 40 C.F.R. § 123.30), Missouri state law provides for both state administrative and judicial review of state permitting decisions. *See* Mo. Rev. Stat. §§ 644.051(6), 621.250, 644.071; Mo. Code Regs. tit. 10, §§ 20-1.020, -6.020.

Petitioner also appears to argue that the word “National” in the title “National Pollutant Discharge Elimination System” in 33 U.S.C. § 1342 automatically renders the permit in this case a federal NPDES permit. *See* Motion at 2. Moreover, Petitioner erroneously suggests that EPA’s involvement in an enforcement action concerning the State of Missouri and Coastal Energy provides the Board with authority to adjudicate this appeal. *Id.* It appears to the Board that Petitioner misunderstands the status of the permit in this case. There are state NPDES permits and federal NPDES permits. The Board only

has jurisdiction to hear appeals of federal NPDES permits, and the permit at issue here is not a federal NPDES permit. The fact that EPA may have separate enforcement authority does not change the scope of the Board's jurisdiction or somehow transform a state NPDES permit into a federal NPDES permit. The fact remains that the permit in this case is a state-issued permit under an approved state program over which the Board does not have jurisdiction. None of Petitioner's arguments demonstrate error warranting Board reconsideration.

Beyond the arguments discussed above, Petitioner makes generalized assertions regarding violations of federal law; expresses discontent with the State of Missouri's NPDES program, inspection program, and EPA's oversight; and states that because MDNR indicated to her that it does not have authority to implement the Wild and Scenic Rivers Act, it may not have authority to implement the CWA. Whatever merit there is to those assertions, for which jurisdiction may lie in other fora, they do not provide a basis for the Board having jurisdiction to review the challenged permit decision.

Accordingly, and upon consideration of Petitioner's Motion, the Board concludes that Petitioner fails to demonstrate that, in its Order, the Board made a demonstrable error on a material point of law or fact that warrants reconsideration.

III. *CONCLUSION*

For the reasons set forth above, the Board denies Petitioner's Motion for Reconsideration or Clarification.

So ordered.²

ENVIRONMENTAL APPEALS BOARD

Dated: 11/2/17

By: Mary Kay Lynch
Mary Kay Lynch
Environmental Appeals Judge

² The three-member panel deciding this matter is composed of Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Mary Beth Ward.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Denying Motion for Reconsideration or Clarification* in the matter of Coastal Energy Corporation, NPDES Appeal Nos. 17-04, were sent to the following persons in the manner indicated:

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