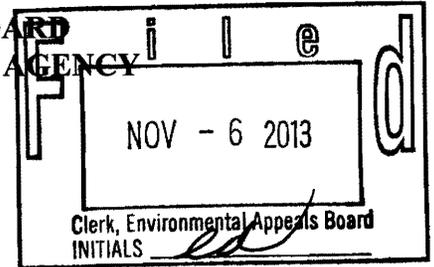


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



_____)
In re:)
)
State of Hawaii, Department of)
Transportation, Highways Division)
)
Permit No. HI S000001)
_____)

NPDES Appeal No. 13-11

ORDER DISMISSING PETITION FOR REVIEW

On October 28, 2013, the State of Hawaii, Department of Transportation, Highways Division (DOT), filed a petition with the Environmental Appeals Board pursuant to 40 C.F.R. § 124.19 for review of certain aspects of a National Pollutant Discharge Elimination System (NPDES) permit issued by the State of Hawaii, Department of Health (DOH).¹ The permit authorizes discharges from a DOT-operated Municipal Separate Storm Sewer System. In 1974, the U.S. Environmental Protection Agency authorized the State of Hawaii to administer the NPDES permit program for all discharges other than federal facilities in lieu of EPA. Letter from Russell E. Train, Adm'r, U.S. EPA, to John A. Burns, Governor, State of Haw. (Nov. 28, 1974). DOT states that, in addition to its petition for review of the permit before the Board, DOT is also seeking a contested case hearing on the permit before DOH pursuant to Hawaii Revised Statutes Chapter 342D and Hawaii Administrative Rules 11-55, -16, -21, and -36. Petition at 7. For the reasons set forth below, the petition is dismissed for lack of jurisdiction.

¹ Under the Clean Water Act (CWA), persons who discharge pollutants from point sources into waters of the United States must have a permit for the discharge to be lawful. CWA § 301, 33 U.S.C. § 1311. The NPDES program is the principal program under the CWA. CWA § 402, 33 U.S.C. § 1342.

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 Carlton, Inc.*, 9 E.A.D. 690, 692 (EAB 2001); *see also* 57 Fed. Reg. 5320 (Feb. 13, 1992). The statute relevant to the Board’s jurisdiction in this case is the Clean Water Act (CWA), and in particular the NPDES permitting requirements in section 402 of the Act. CWA § 402, 33 U.S.C. § 1342.

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 issued under section 124.15.

The Board’s authority does not extend to appeals of state-issued permits under the NPDES provisions of the Clean Water Act. *E.g.*, *In re Mesabi Nugget Del., LLC*, NPDES Appeal Nos. 13-01 through 13-03, slip op. at 5 (EAB Mar. 19, 2013), 15 E.A.D. ___; *In re Michigan CAFO General Permit*, NPDES Appeal No. 02-11, at 3-4 (EAB Mar. 3, 2003) (Order Dismissing Petition for Review); *In re Simpson Paper Co.*, 4 E.A.D. 766, 770 (EAB 1993); *see also In re Town of Seabrook*, 4 E.A.D. 806, 817 (EAB 1993) (denying petition for review of evidentiary hearing request denial for state-issued NPDES permit because it was not subject to Board permit review), *aff’d sub nom. Adams v. U.S. EPA*, 38 F.3d 43 (1st Cir. 1994). It therefore follows that because the permit at issue is a state permit issued by DOH, which administers a federally approved state NPDES program, the Board lacks jurisdiction to review the permit

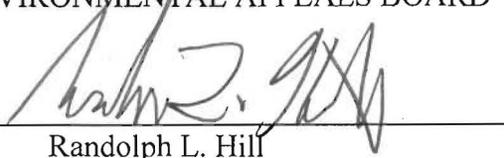
decision under 40 C.F.R. § 124.19. Although the permit program is federally approved, the permit at issue here is nonetheless a state permit issued under state law. Accordingly, nothing in the Clean Water Act or 40 C.F.R. part 124 gives the Board jurisdiction to consider this appeal.

Under these circumstances, the above-captioned petition for review is hereby dismissed with prejudice.

So ordered.

Dated: November 6, 2013

ENVIRONMENTAL APPEALS BOARD²

By: 

Randolph L. Hill
Environmental Appeals Judge

² The three-member panel deciding this matter consists of Environmental Appeals Judges Leslye M. Fraser, Randolph L. Hill, and Kathie A. Stein. 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Petition for Review in the matter of *In re State of Hawaii, Department of Transportation, Highways Division*, NPDES Appeal No. 13-11, were sent to the following persons in the manner indicated:

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Date: NOV - 6 2013



Annette Duncan
Secretary