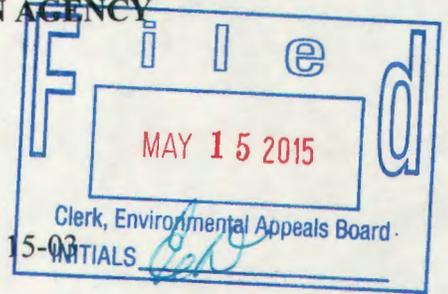


**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**



In re: Tewa Women United,)
Dr. Maureen Merritt, and Concerned)
Citizens for Nuclear Safety)
)
New Mexico Title V Operating Permit)
No. P100-R2)
)

CAA Appeal No. 15-03

ORDER DISMISSING PETITION FOR LACK OF JURISDICTION

I. BACKGROUND

On April 2, 2015, Tewa Women United, Dr. Maureen Merritt, and Concerned Citizens for Nuclear Safety (collectively “Petitioners”) filed an appeal with the Environmental Appeals Board (“EAB”) seeking review of permit number P100-R2, which is a Title V operating permit issued by the New Mexico Environment Department.¹ The permit authorizes the U.S. National Nuclear Safety Administration to operate regulated air pollutant emitting sources from its National Laboratory Facility located in Los Alamos, New Mexico. The appeal requests that the

¹ Title V operating permits are permits issued under Title V of the Clean Air Act (“CAA”), 42 U.S.C. §§ 7661-7661f. Title V requires that certain facilities that emit regulated air pollutants obtain a permit to operate. Most Title V permits, like the one here, are issued by State and local permitting authorities. *See* 40 C.F.R. pt. 70. These permits also are referred to as “part 70 permits” because the regulations that establish minimum standards for State permit programs are found in the U.S. Code of Federal Regulations at 40 C.F.R. part 70. The EPA also issues Title V permits under 40 C.F.R. part 71, but mainly in Indian country. *Id.* pt. 71. EPA-issued Title V permits also are referred to as “part 71 permits.” *Id.*

EAB review certain permit conditions as well as the environmental justice analysis conducted in connection with the permit decision. Petition for Review (“Pet.”) at 6-16 (Apr. 2, 2015). As authority for filing this appeal Petitioners cite to part 70 of the Code of Federal Regulations, specifically, section 70.8(d). *Id.* at 2, 5 (citing 40 C.F.R. § 70.8(d)).

For the reasons explained below, the EAB dismissed the appeal because it lacks jurisdiction.

II. ANALYSIS

A. *The EAB Has Not Been Delegated Authority to Review Title V Permits Issued by States Under Part 70*

The EAB is “a tribunal of limited jurisdiction.” *In re Stericycle Inc.*, CAA Appeal No. 13-01, at 4-5 (EAB. Nov. 14, 2013) (Order Dismissing Appeal for Lack of Jurisdiction) (quoting *In re Hess Newark Energy Ctr.*, PSD Appeal 12-02, at 4 (EAB Nov. 20, 2012) (Order Dismissing Petition). Its authority to review permit decisions is “limited by the statutes, regulations, and delegations that authorize and provide standards for such review.” *In re DPL Energy Montpelier Elec. Generating Station*, 9 E.A.D. 695, 698 (EAB 2001) (quoting *In re Carlton, Inc. N. Shore Power Plant*, 9 E.A.D. 690, 692 (EAB 2001)); *see* 40 C.F.R. § 1.25(e)(2) (listing functions of the EAB). As relevant to the instant appeal, the EAB has been delegated authority to consider appeals involving two specific types of permits issued under the Clean Air Act (“CAA”), 42 U.S.C. §§ 7401-7671q, and EPA’s implementing regulations: appeals challenging Title V operating permits issued pursuant to 40 C.F.R. part 71, and appeals challenging federally-issued Prevention of Significant Deterioration (“PSD”) permits issued pursuant to 40 C.F.R. § 52.21. *See, e.g.*, 40 C.F.R. § 71.11(l)(1) (authorizing EAB review of

petitions challenging part 71 permit decisions); § 124.19 (authorizing EAB review of petitions challenging PSD permit decisions). The EAB, however, has not been delegated authority to review Title V operating permits issued by states pursuant to 40 C.F.R. part 70. *Stericycle Inc.*, at 4-5 (explaining scope of EAB's authority to consider appeals of CAA-related permits and noting that "nothing in the CAA or in part 70 grants the [EAB] jurisdiction to review" state-issued Title V operating permits).

As noted above, the permit Petitioners challenge is a part 70 permit.² The New Mexico Environment Department issued the permit pursuant to New Mexico Administrative Code of Rules Title 20, Chapter 2, Part 70, which is New Mexico's EPA-approved Title V operating permit program. N.M. Code R. § 20.2.7; 40 C.F.R. pt. 70, App. A (listing the New Mexico Environment Department as having a state-approved operating permit program). Consequently, the permit falls outside the body of federal permits subject to EAB review and the EAB has not been delegated authority to review it. *See, e.g., In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 135 & n.36 (EAB 1997) (declining to review the Title V portion of a permit because that part was "a State permit" issued pursuant to Hawaii's approved Part 70 program); *In re Alcoa-Warrick Power Plant*, PSD Appeal No.02-14, at 8 (EAB Mar. 5, 2003) (similar).

B. *The EAB Lacks Authority to Consider Petitions Requesting that the Administrator Object to a Title V Permit Issued Under Part 70*

In addition, the EAB lacks authority to review section 70.8(d) petitions. As noted above, Petitioners cite to 40 C.F.R. § 70.8(d) as authority for filing this appeal before the EAB. Pet. at

² Operating Permit No. P100-R2 (issued Feb. 27, 2015) can be found at https://www.env.nm.gov/aqb/permit/aqb_draft_permits.html.

2, 5. This provision provides an opportunity to members of the public to petition the EPA Administrator and request that she object to a part 70 permit. 40 C.F.R. § 70.8(d) (“[I]f the Administrator does not object in writing * * *, any person may petition the Administrator within 60 days after the expiration of the Administrator’s 45-day review period to make such objection.”). Section 70.8(d) petitions must be filed with the Administrator or her designee, not the EAB, as the EAB has not been delegated the authority to consider this type of petitions. *See Stericycle*, at 5-6 (noting that the EAB is not the right forum for section 70.8(d) petitions, and dismissing appeal for lack of jurisdiction); 40 C.F.R. § 70.2 (defining the Administrator as “the Administrator of the EPA or his[/ her] designee”).³

Accordingly, the EAB dismisses Petitioners’ appeal for lack of jurisdiction. So ordered.⁴

ENVIRONMENTAL APPEALS BOARD

Dated: May 15, 2015

By: Leslye M. Fraser

Leslye M. Fraser
Environmental Appeals Judge

³ For additional information about the opportunity to file a petition requesting that the Administrator object to a part 70 permit see U.S. EPA, *The Proof is in the Permit, How to Make Sure a Facility in Your Community Gets an Effective Title V Air Pollution Permit* (June 19, 2000) at 90-91, and its appendix B (listing contact information for U.S. EPA and state and local agencies), available at <http://www.epa.gov/oar/oaqps/permits/partic/proof.html>.

⁴ The two-member panel deciding this matter is composed of Environmental Appeals Judges Leslye M. Fraser and Kathie A. Stein.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Order Dismissing Petition for Lack of Jurisdiction* in the matter of Tewa Women United, Dr. Maureen Merritt, and Concerned Citizens for Nuclear Safety, CAA 15-03, were sent to the following persons in the manner indicated:

BY U.S. First Class Mail, Return Receipt Requested:

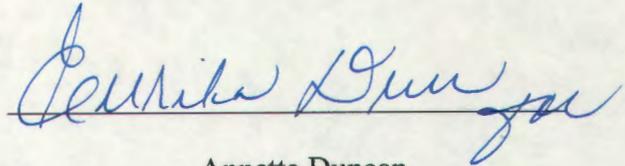
Joni Arends, Executive Director
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Date:

May 15, 2015



Annette Duncan
Secretary