

BEFORE THE WATER QUALITY APPEALS BOARD

DEPARTMENT OF ADMINISTRATION

IN AND FOR THE STATE OF ARIZONA

PATAGONIA AREA
RESOURCE ALLIANCE,

APPELLANT,

V.

STATE OF ARIZONA, DEPARTMENT
OF ENVIRONMENTAL QUALITY

RESPONDENT,

SOUTH32 HERMOSA, INC. D/B/A
ARIZONA MINERALS, INC.

INTERVENOR

DECISION AND ORDER:

WQAB CASE NO. 23-001

RE: DENIAL OF MOTION FOR REVIEW
FILED SEPTEMBER 6, 2023.

Pursuant to proper notice, on September 26, 2023, a meeting of the Arizona Water Quality Appeals Board convened to consider the “Motion for Review of the Board’s August 17, 2023, Decision” (“Motion”) filed by the Patagonia Area Resource Alliance (“PARA”). PARA was represented by Adriane J. Hofmeyr, Esq. of Hofmeyr Law, PLLC. The Arizona Department of Environmental Quality was represented by Arizona Assistant Attorney General James Olson, Esq. South 32 Hermosa Inc. was represented by Christopher Thomas, Esq. of Perkins Coie LLP. The Board was advised by Arizona Assistant Attorney General James H. Rolstead.

In the meeting, the Arizona Water Quality Appeals Board voted unanimously, and respectively, to deny the Motion, adopt amended Findings of Facts, and adopt Conclusions of Law. Therefore, having reviewed and considered the Motion and response provided by the parties, the Board enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. South32 was granted its original Arizona Pollutant Discharge Elimination System (“AZPDES”) permit on January 8, 2018 (the “Original Permit”), as AZPDES Permit AZ0026387 (granted under South32’s prior name, Arizona Minerals Inc.). This Original Permit authorized discharge of treated water to Alum Gulch, provided that the water met all relevant treatment standards including those standards applied to new sources. PARA Notice of Appeal, Ex. C (Original Permit), June 28, 2023.
2. PARA filed comments on the Original Permit, which the Arizona Department of Environmental Quality (“ADEQ”) rejected. PARA filed a notice of appeal that it later abandoned. The Original Permit is not at issue in this appeal.
3. The Original Permit was amended effective August 12, 2021 (the “Amended Permit”). The Amended Permit reaffirmed South32’s authorization to discharge water treated by water treatment plant 1 to Alum Gulch via Outfall 001. The Amended Permit also authorized discharge of treated water through a second outfall, 002, into Harshaw Creek, subject to the most stringent among applicable numeric water quality–based effluent limitations and technology-based effluent limits. PARA Notice of Appeal, Ex. D (Amended Permit), June 28, 2023.
4. PARA made comments to ADEQ on the Amended Permit but did not challenge the amendment. The 2021 amendments are not at issue in this appeal.
5. The Amended Permit was set to expire on January 7, 2023. On July 11, 2022, South32 applied to renew the Amended Permit. PARA Notice of Appeal, Ex. E (July 11, 2022 AZPDES Renewal Appl.), June 28, 2023.
6. ADEQ was unable to make a determination on the renewal by January 7, 2023, and South32’s Amended Permit automatically continued pursuant to A.A.C. R18-9-B904(C)(2).

7. On March 9, 2023, ADEQ granted the renewal of AZPDES Permit Number AZ0026387 (the “Renewed Permit”).
8. On April 7, 2023, PARA appealed the permit renewal (the “Renewal Appeal”). Notice of Appeal, April 7, 2023.
9. In light of the Arizona Court of Appeals’ recent decision in *San Carlos Apache Tribe v. State*, 254 Ariz. 179 (Ct. App. 2022) *review granted* (Aug. 22, 2023), ADEQ determined that it needed to revisit the Amended Permit and public comments and thus withdrew the renewal on June 9, 2023, and moved to dismiss the Renewal Appeal as moot.
10. On June 20, 2023, Administrative Law Judge (“ALJ”) Sondra J. Vanella dismissed the Renewal Appeal as moot and remanded the matter to the Water Quality Appeals Board (“WQAB” or “the Board”). Order Vacating Hr’g, 2-3.
11. On June 28, 2023, PARA filed Appellant’s Notice of Appeal and Request for Hearing, appealing ADEQ’s June 9, 2023, decision to withdraw the Renewed Permit (the “Withdrawal Appeal”).
12. On August 7, 2023, at WQAB’s regular meeting, the Board voted to 1) accept the ALJ’s order dismissing the Renewal Appeal as moot, and 2) dismiss the Withdrawal Appeal due to the Board’s lack of jurisdiction.
13. On August 17, 2023, WQAB issued written orders concerning its August 7 decisions. Orders: Re: WQAB Case No. 23-001 and Re: Appeal Dated June 28, 2023.
14. On August 28, 2023, PARA withdrew its Withdrawal Appeal.
15. On September 6, 2023, PARA filed PARA’s Motion for Review of the Board’s August 17, 2023 Decision, requesting that the Board review and reverse its decision to dismiss the Renewal Appeal.

CONCLUSIONS OF LAW

1. It is well established that administrative agencies have only the powers given to them by their enabling statutes. *See Ariz. State Bd. of Regents ex rel. Ariz. State Univ. v. Arizona State Pers. Bd.*,

195 Ariz. 173, 175 (1999) (“Administrative agencies have no common law or inherent powers—their powers are limited by their enabling legislation”); *Schwartz v. Maricopa Cnty. Super. Ct.*, 186 Ariz. 617, 619 (Ct. App. 1996) (“State administrative agencies have no inherent powers; their powers are limited to those granted by statute”); *Corella v. Pima Cnty. Super. Ct.*, 144 Ariz. 418, 420 (Ct. App. 1985) (citation omitted) (“[A]dministrative powers are limited to those granted by a constitution or statute. No administrative agency can give itself powers not expressly granted it by legislation.”).

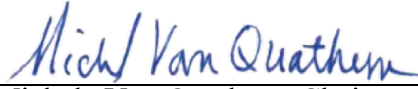
2. Additionally, “[a] case is moot when it seeks to determine an abstract question which does not arise upon existing facts or rights.” *Contempo-Tempe Mobile Home Owners Ass’n v. Steinert*, 144 Ariz. 227, 229 (Ct. App. 1985). Generally, courts will not decide a controversy which “by a change in a condition of affairs has become moot.” *Id.* at 229.
3. WQAB’s enabling statute permits the Board to hear appeals from the “grant, denial, modification or revocation” of a permit. *See* A.R.S. § 49-323. Here, when the Renewed Permit was withdrawn, the appeal became moot because there was no longer a renewed permit to contest, and WQAB lost its statutory authority to hear the appeal. *See Friends of Animals v. Bernhardt*, 961 F.3d 1197, 1203 (D.C. Cir. 2020) (stating that the government withdrawal of “findings” meant that these “findings” could no longer injure appellants, rendering the challenges to such findings “classically moot”). When ADEQ grants or denies the renewal application, there will again be a live issue that can come before the Board.

ORDER

THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law,
IT IS HEREBY ORDERED that the Motion for Review is DENIED.

DATED this 28th day of September 2023.

WATER QUALITY APPEALS BOARD



Michele Van Quathem, Chairman

NOTICE OF APPEAL RIGHTS

Pursuant to A.R.S. § 49-323, final decisions of the board are subject to appeal to superior court pursuant to title 12, chapter 7, article 6. This is a final decision of the Water Quality Appeals Board, made according to A.R.S. § 49-323. You may file a motion with the Board for rehearing or review under A.A.C. R2-17-126. If you file a motion for rehearing or review, you shall file your motion within 30 days after service of this decision. You are not required to file a motion for rehearing or review before seeking judicial review. This decision may be reviewed by the Superior Court in accordance with A.R.S. § 49-323(B).

A copy of the foregoing was e-mailed and mailed via U.S. Mail
this 29th day of September, 2023.

WATER QUALITY APPEALS BOARD:

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A copy of the foregoing was mailed via inter-agency mail
this 29th day of September 2023.

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By: *Connie Castillo*
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Clerk, Water Quality Appeals Board