

## ***EPA: MDEQ Not Authorized To Issue NPDES Permits In Michigan Indian Lands***

The U.S. Environmental Protection Agency's (EPA) Environmental Appeals Board (EAB) has rejected challenges by the Michigan Department of Environmental Quality (MDEQ) and Union Township, Michigan (Township) to EPA's issuance of an NPDES permit for the Township's wastewater treatment plant (WWTP).

On April 23, 1999, MDEQ posted a draft permit for the Township's new WWTP for public comment. In response, EPA Region 5 filed objections to the permit. EPA's objection to the MDEQ-proposed permit was based on MDEQ's alleged lack of jurisdiction over the Township's WWTP. EPA first observed that the discharge from the Township's WWTP is "located within the exterior boundaries of the Saginaw Chippewa Reservation and thus in Indian Country." EPA stated that Michigan may not implement its National Pollution Discharge Elimination System (NPDES) program on the reservation because, when Michigan had requested delegation of the NPDES program under the federal Clean Water Act (CWA), Michigan did not seek, and EPA did not grant, such authorization. Thus, because Michigan was not the proper permitting authority, EPA stated that it would issue the permit.

EPA posted a separate draft permit for the Township's WWTP for public comment on September 14, 1999. MDEQ and the Saginaw Tribe (Tribe), among others, filed comments on the draft permit. Despite MDEQ's and the Tribe's objections, EPA Region 5 issued a final permit on August 17, 2000, along with responses to MDEQ's and the Tribe's comments. In September 2000, the Township filed a petition challenging the permit's conditions, and MDEQ filed a petition challenging EPA's authority to issue the permit.

***MDEQ's Challenge.*** In its petition, MDEQ claimed that EPA's denial of MDEQ's permitting authority for the Township's WWTP was based on the wrong provision of the CWA and that EPA's action amounted to an improper attempt to revise Michigan's previously delegated authority to administer the NPDES permit program.

In response, the EAB found that "MDEQ's challenges to [EPA's] objections with respect to the State's permit are not properly before the Board." The EAB stated that its "jurisdiction is limited to review of federal permit decisions" and "generally does not extend to review of State-issued permits or a Region's

actions as part of a State permitting proceeding.” Thus, “whether the Region cited the proper statutory authority or followed the appropriate procedure in challenging the State’s issuance of its own permit is not subject to this Board’s review.”

However, the EAB was willing to “interpret MDEQ’s objections as encompassing a challenge to the Region’s authority to issue its own permit, an issue appealable to this Board.” Regardless, the EAB found that “MDEQ failed to demonstrate in its Petition why the Region’s” reason for claiming authority to issue the permit “was erroneous or otherwise warranted review. In the absence of such a showing, review is denied.”

The EAB stated that petitioners bear the burden of demonstrating that review of a permit is warranted. To establish that review is warranted, a petitioner “may not merely reiterate issues raised during the public comment period without demonstrating why the Region’s response to its comments was inadequate.” The EAB found that, in its petition challenging the permit, MDEQ had simply repeated its prior comments. This, the EAB held, did not meet the pleading requirements of EPA’s regulations.

The EAB admitted that MDEQ did raise two specific points. However, MDEQ had not raised one of the issues during the public comment period. Thus, MDEQ was barred by EPA regulation from raising the issue on appeal. Review of the other issue was denied because MDEQ’s statement on it was “vague and unsupported by any analysis or argument.”

In response to MDEQ’s claim that EPA’s action improperly revised the prior EPA delegation to Michigan of the NPDES permit program, the EAB noted that “MDEQ does not directly challenge on appeal EPA’s assertion that the Township’s WWTP is located in ‘Indian Country.’” Rather, MDEQ “challenges the Region’s authority to issue a permit pertaining to Indian Country in the face of EPA’s delegation to the State.”

However, the EAB concluded that MDEQ’s petition on this point was “inadequate.” The EAB acknowledged that during the public comment period MDEQ had argued that EPA lacked permitting authority over the Township WWTP. EPA, however, had then “provided a detailed response to MDEQ’s comments,” and, in its petition, “MDEQ does not explain why the Region’s response to comments was erroneous.” Citing prior EAB precedent, the EAB held that “it is well established that ‘in order to establish that review of a permit is warranted, [an EPA regulation] requires a petitioner to both state the objections to

the permit that are being raised for review, and to explain why the Region’s previous response to those objections . . . is clearly erroneous or otherwise warrants review.” (Emphasis omitted.) “Such an explanation,” the EAB continued, “is essential to a meaningful evaluation of whether the permitting authority, in considering the body of information before it – including the response to comments – was clearly erroneous in rendering its decision.” In the absence of such an explanation, the EAB denied review of this issue.

***The Township’s Challenge.*** The Township challenged EPA’s requirements that it provide courtesy copies to the Tribe of various reports and notices that it is required to provide to EPA. The Township asserted that these conditions exceeded the scope of EPA’s authority and were, therefore, unlawful.

The EAB rejected the Township’s arguments, finding that EPA’s reporting regulations grant EPA “broad discretion to establish reporting requirements in NPDES permits.” Although the regulations specified that the reports must be sent to EPA, they did not expressly reject the idea of requiring courtesy copies. Because providing courtesy copies of permit reports to the Tribe would not be unduly burdensome for the Township, and because of the importance of respecting the legitimate interests of the Tribe in receiving such reports, the EAB held, EPA “has stated a reasonable basis for the reporting conditions that is consistent with the regulations and the stated objectives of the [CWA].”

The Township also objected to EPA’s inclusion in the permit of a condition that stated that the permit did not “preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any State/Tribal law or regulation under authority preserved by Section 510 of the [CWA].”

Section 510 of the CWA provides that, except as otherwise expressly provided, the CWA does not interfere with the rights of “any State or political subdivision thereof or interstate agency” to adopt or enforce equally or more stringent requirements than imposed by EPA under the CWA. The Township argued that the inclusion of the reference to “Tribal law” was improper because Section 510 of the CWA does not reference tribal laws.

The EAB stated that, “to preserve an issue for review, a petitioner bears the burden of demonstrating in his petition that ‘any issues being raised were raised during the public comment period

(including any public hearing) to the extent required by” EPA’s regulations. Because the Township “has failed to demonstrate that the issue it now raises ... was in fact raised during the public comment period,” the EAB denied review of this issue.

In a footnote, the EAB offered that, even if this issue had been properly preserved for review, it would have found that, even though Indian tribes are not expressly included in CWA Section 510, Indian tribes have sovereign powers that exist independently of Section 510 and those powers could not be denied “absent an express statutory elimination of those powers.” (Citation and emphasis omitted.)

As a result, the EAB affirmed the NPDES permit issued by EPA.

***In re NPDES Permit for Wastewater Treatment Facility of Union Township, Michigan***, NPDES Appeal Nos. 00-26 & 00-28, EAB, Jan. 24, 2001.

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