

## ***MDEQ CHALLENGE TO EPA PERMITTING AUTHORITY ON INDIAN RESERVATIONS REJECTED***

The Sixth Circuit Court of Appeals (Court) rejected the State of Michigan's (State) challenge to the U.S. Environmental Protection Agency's (EPA) authority to issue a wastewater discharge permit to a facility on a Native American reservation.

EPA issued a National Pollutant Discharge Elimination System wastewater control permit to a wastewater treatment facility located on the Saginaw Chippewa Isabella Reservation. The State filed a petition for review to the U.S. EPA Environmental Appeals Board (Board), claiming that the Michigan Department of Environmental Quality (MDEQ), not EPA, is the appropriate authority to issue such permits on the reservation. The Board dismissed MDEQ's petition, holding that MDEQ did not identify with sufficient clarity and specificity its objections to U.S. EPA's action in issuing the permit.

On the State's appeal, the Court first noted that EPA had promulgated rules to ensure the orderly conduct of business before the Board. One such rule, the Court noted, governs the content of petitions to obtain Board review of EPA decisions. The rule provides that the petition must "show" that the challenged actions of EPA were based on a "finding of fact or conclusion of law which is clearly erroneous" or the "exercise of discretion or important policy consideration" that, in the Board's discretion, should be reviewed. The Board had dismissed the State's petition for failure to comply with this rule. The Board's denial also cited several prior Board decisions that "a petitioner may not simply restate or refer to its original comments in order to be granted review."

The Court stated that it would overturn the Board's decision only if it was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."

The Court noted that the Board had “consistently held that a petitioner must satisfy the pleading requirements set out in the regulation in order to meet its burden of showing that review is warranted.” One such requirement was the need for “a petitioner to both state the objections to the permit that are being raised for review, and to explain why the [EPA’s] previous response to those objections (i.e., the [EPA’s] basis for the decision) is clearly erroneous or otherwise warrants review.” The Court found that the “Board has consistently applied this rule in denying petitions for review.”

In this case, the State’s petition for review merely declared that EPA’s actions were unauthorized and referred the Board to two appendices. The appendices contained the challenged permit, the State’s comments objecting to the proposed permit along with the original attachments to the comments, and EPA’s responses to the comments.

The Court upheld the Board’s dismissal of MDEQ’s petition, holding that it was not an abuse of discretion. The Court noted that “[i]nstead of explaining to the Board why the Region’s detailed responses to its comments were clearly erroneous, Michigan simply repackaged its comments and the EPA’s response as unmediated appendices to its petition to the Board. This does not satisfy the burden of showing entitlement to review.”

Although EPA has the discretion to relax or modify its procedural rules “when in a given case the ends of justice require it,” the Court stated that “its decision not to relax or modify its rule in this case was not an abuse of discretion.” The Court found that the Board’s rule against “the unmediated resubmission of comments and subsequent responses” was not a “hidden” rule, as it “has been stated and restated throughout Board decisions.” Therefore, the Court declined “to review on the merits the petitioners’ challenge to the EPA’s authority to issue the permit.”

As a final argument, the State asserted that, aside from the Court's jurisdiction to review the Board's decision, the Court also had jurisdiction to review procedures used by EPA to prevent *the State's* issuance of discharge permits to facilities located on the reservation. However, the Court held that the State had "procedurally defaulted" its chance for judicial review of this issue by failing to meet its burden to submit a proper petition to the Board on the EPA-issued permit.

*Michigan Dept of Env Quality v US EPA*, 318 F.3d 705 (6<sup>th</sup> Cir. 2003).

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