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

In re:	)	
Mille Lacs Wastewater Treatment Facility & Vineland Sewage Lagoons	)	NPDES Appeal No. 01-16
Permit Nos. MN 0064637-1 MN 0058629-2	)	

ORDER DENYING REVIEW IN PART AND REMANDING IN PART

On June 28, 2001, the Environmental Appeals Board ("Board") received a petition for review filed by Chairman Frank Corteau, Mille Lacs County Commissioner, individually and on behalf of Mille Lacs County, Minnesota ("Petitioner").[1] Petitioner seeks review of a National Pollutant Discharge Elimination System ("NPDES")[2] permit decision issued by the U.S. Environmental

[1] By order dated April 25, 2002, the Board denied review in six related petitions for review. *See In re Mille Lacs Wastewater Treatment Facility & Vineland Sewage Lagoons*, NPDES Appeal Nos. 01-17, 01-19, and 01-20 through 01-23 (EAB, April 25, 2002). The order is available for viewing on the Board's World Wide Web page at the following location: http://www.epa.gov/eab/orders/vineland1.pdf.

[2] Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources (discrete conveyances, such as pipes) into waters of the United States must have a permit in order for the discharge to be lawful. CWA § 301, 33 U.S.C. § 1311. The National Pollutant Discharge Elimination System is the principal permitting program under the CWA. CWA § 402, 33 U.S.C. § 1342.

Protection Agency, Region V ("Region") to ML Wastewater, Inc. (NPDES Permit No. MN-00664637-1) on May 31, 2001, authorizing a discharge from a proposed wastewater treatment facility ("WWTF"). Petitioner alleges that the Region does not have jurisdiction to issue the permit because the proposed WWTF, and the land on which the discharge will occur, is not located within an Indian reservation. Upon consideration and for the reasons discussed below, we remand NPDES Permit No. MN-00664637-1 to the Region for further proceedings consistent with this decision.[3]

[3] We note that, while the heading of the Petition also references both the WWTF permit and NPDES Permit No. MN 0058629-2 ("Lagoon Permit"), the body of the Petition makes no mention of the lagoons or Lagoon Permit, but repeatedly refers to the WWTF. *See* Pet. No. 01-16, ("this regional wastewater collection and treatment system," *id.* at 1; "proposed treatment plant," *id.* at 2); *see also* Pet. No. 01-16 Ex. 3, at 1. To the extent that the Petition can be read to raise challenges to the Lagoon Permit, we deny review. Accordingly, our consideration of NPDES Appeal No. 01-16 is limited to the proposed WWTF permit.

I. *BACKGROUND*

A. *Factual and Procedural Background*

On April 22, 1999, ML Wastewater, Inc.[4] submitted an NPDES permit application for a new WWTF to the Region.[5] The Region issued a draft permit for the WWTF on April 6, 2000, and subsequently issued a public notice of the draft permit on April 19, 2000. The public comment period was set for April 19 to May 24, 2000. The Region held an informational meeting in Garrison, Minnesota, on April 25, 2000, regarding the permit. On May 24, 2000, the Region held a public hearing to provide an opportunity for submission of information, public comments, or objections to the proposed decision to issue the permit.

The Region received many comments on the proposed permit, including comments submitted by Petitioner regarding the Region's jurisdiction to issue the permit. Petitioner attended the May 24, 2000, public hearing and submitted written comments on the WWTF permit. *See* Transcript of the Public Hearing Concerning

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[4] ML Wastewater Management, Inc. is a non-profit corporation wholly owned and operated by the Mille Lacs Band of Ojibwe Indians, a federally recognized Indian tribe (hereinafter collectively referred to as "the Band.")

[5] The Region also received an application to renew NPDES Permit No. MN 0058629-2, which authorizes discharges to a deciduous lowland to Lake Mille Lacs from the Vineland Sewage Lagoons. The Vineland Sewage Lagoon permit was issued concurrently with the WWTF permit.

Proposed Mille Lacs Band Wastewater Permit Hearing (May 24, 2000) ("Transcript" or "Tr.") at 57-60; Letter from Chairman Corteau to John A. Colletti (May 23, 2000) ("P Ex. 1").

In his written comments, Petitioner stated:

> The property in question is off reservation (see *United States v. Mille Lacs Band of Chippewa Indians*, 229 U.S. 498, 503 (1913). Clearly the opinion of the United States Supreme Court controls over any offered by BIA or EPA on any question concerning reservation status, a criteria considered important when evaluating fee to trust applications. BIA and EPA have both previously failed to even mention the [C]ourt's decision in the aforementioned case while concluding the former 61,000 acre Mille Lacs Indian Reservation, as established by the Treaty of 1855, continues to exist today as originally established. It does not.

P Ex. 1, at 1-2. Petitioner's oral testimony at the May 24, 2000 public hearing echoed his written comments. *See* Tr. at 59-60.

The Region responded to the comments and issued a final permit on May 31, 2001. The Region's response to the issue raised by Petitioner stated that:

> * * * EPA is the designated permitting authority for the facility because the facility and discharge are located on the Reservation. Federal determinations regarding Tribal Reservation boundaries are made by the U.S. Department of the Interior. * * * In the case of the Mille Lacs Band, the Office of the Solicitor, U.S. Department of the Interior, made a specific determination in a letter dated February 28, 1991, that, in terms of the Mille Lacs Band, 'the boundaries established by the 1855 treaty remain intact and that the reservation has not been diminished.'

> With regard to [*United States v. Mille Lacs Band of Chippewa Indians*]. That case did not address the precise issue of whether the Nelson Act disestablished the boundaries of the Mille Lacs Reservation.

Resp. Ex. T, at ¶ 37.

1. *The Petition*

In his petition, Petitioner characterizes his comments on the draft permit and states the issue on appeal as follows:

> whether EPA's tentative conclusion that the area in question was a reservation was premature. The decision of EPA to recognize the 1855 Mille Lacs Reservation was arbitrary and capricious, clearly erroneous, and contrary to established case law.
>
> In this respect, the decision also conflicts with nearly a century and a half of practice that had uniformly recognized and administered the area as if the 1855 Mille Lacs Reservation no longer existed.

See Petition at 3.

Petitioner also suggests that the Region should have "deferred to the Minnesota Pollution Control Agency ["MPCA"]" until the reservation status was resolved. *Id.* at 3 (citing a Letter of Gordon E. Wegwart, P.E., MPCA Asst. Comm. To Jo-Lynn Traub, Dir., Region V Water Div. (June 18, 1999)).[6]

[6] Notably, Petitioner's oral and written comments on the draft permit neither mentioned nor referred to the 1999 letter from MPCA to the Region cited in the Petition.

2. *The Response of the Region and Amicus Curiae, Mille Lacs Band of Ojibwe Indians*

At the request of the Board, the Region filed a response to the Petition on August 20, 2001. *See* Response to Petition for Review (Aug. 17, 2001) ("Region's Response"). The Region argues that Petitioner fails to demonstrate how the Region's response to Petitioner's comments was clearly erroneous. *See* Region's Response at 16, 23. The Region also asserts that Petitioner makes a number of new arguments that were not raised during the public comment period. *Id.* at 16-18.

On August 21, 2001, the Band filed a motion for leave to file a response to the Petition or to participate as *amicus curiae*. *See* Motion of [the Band] to Intervene and for Leave to File Response to Petitions for Review of Two NPDES Permits, or to Participate as Amicus Curiae (Aug. 20, 2001). The Board granted the motion and accepted the Band's *amicus* brief for filing on August 23, 2001. *See* Order Granting Leave to Intervene (Aug. 23, 2001). The Band argues that there is no basis on which to review the Region's authority to issue the permit because: 1) the Region's authority to issue NPDES permits on Indian lands (including lands within a Federal Indian reservation and all tribal trust lands) is undisputed; 2) the Region reasonably relied on a DOI opinion concluding that the Mille Lacs Reservation continues to exist; and 3) the Region's response to

comments adequately addressed the issues raised by Petitioner. *See* Amicus Brief at 9-11, 14-33. Furthermore, the Band argues that Petitioner's new arguments do not demonstrate that review is warranted. *Id.* at 34-41.

3. *Petitioner's Reply*

On September 24, 2001, Petitioner filed a motion for leave to file a reply to the responses of the Region and the Band.[7] *See* Reply to U.S. Envt'l Prot. Agency's Response to Petition for Review and Memorandum of Intervenor Mille Lacs Band of Ojibwe Indians and ML Wastewater Mgmt. Inc., in Opposition to Petitions for Review ("Reply"). The Region and the Band filed motions opposing the Board's acceptance of the Reply. On May 2, 2002, the Board accepted the Petitioner's Reply as filed and gave the Region and the Band leave to file a surreply on or before May 17, 2001. *See* Order Granting Leave to File Reply and Scheduling Oral Argument (May 2, 2002). The Board also scheduled an oral

[7] Petitioner's Reply argues: (1) the Region's reliance on an opinion issued by the Field Solicitor's Office in the Department of Interior was "misplaced" because the Interior Department "routinely accepts, *carte blanc* [sic], the arguments of Indian tribes attempting to resurrect Indian reservation boundaries," Reply at 4; (2) the Supreme Court has recognized a "presumption[ ] of reservation disestablishment when cession agreements like those at Mille Lacs are at issue," *id.* at 5-6; (3) the Region's exercise of direct federal permitting authority over the proposed WWTF was "in contravention of the EPA-MPCA MOU," *id.* at 13; and (4) "the exercise of [the Region's] direct NPDES permitting authority is invalid because of the lack of the predicate § 401 certification." *Id.*

argument for May 30, 2002. *Id.*

4. *The Region's Surreply and Motion to Take Notice of Administrative Action*

On May 17, 2002, the Region filed a motion suggesting that this case had become moot by virtue of intervening events. *See* Motion to take Notice of Administrative Action by the Department of Interior and Suggestion of Mootness or in the Alternative Motion to Remand. The Region informs the Board that in accordance with Department of Interior ("DOI") regulations (25 C.F.R. Part 151), the land at issue was conveyed into trust by the Bureau of Indian Affairs ("BIA") on behalf of the Band on May 8, 2002. *See id.* at 3. The Region argues that because tribal trust lands are considered reservations by the courts, and the land at issue is now in trust status, the Petition is now moot "since EPA's permitting authority is established irrespective of the 1855 Treaty." *Id.* at 5. Alternatively, the Region argues that this matter should be remanded to the Region to supplement the administrative record on this issue. *Id.* at 1, 7.

On May 21, 2002, the Board issued an order postponing the oral argument scheduled for May 30, 2002, directing Petitioner to submit a response to the Region's May 17, 2002 motion, and allowing for the Band to file a brief. *See* Order Postponing Oral Argument and Directing Further Briefing (EAB, May 21, 2002). On

June 18, 2002, Petitioner submitted his response. *See* Petitioner's Response to Agency's Motion to Take Notice of Administrative Action by the Department of the Interior and Suggestion of Mootness or in the Alternative Motion to Remand. Petitioner asserts that the Region's claim that tribal trust lands are by definition "Indian Country" is erroneous. *Id.* at 2-3. Petitioner argues that the definition of "Indian Country" in 18 U.S.C. § 1151 does not include trust land held for the benefit of a tribe. *Id.* at 3. Petitioner also argues that the determination of whether the trust lands at issue here are "Indian Country" is controlled by the Eighth Circuit's opinion in *United States v. Stands*, 105 F.3d 1565 (8th Cir. 1997), rehearing and suggestion for rehearing en banc denied (Mar. 17 & 20, 1997), *cert. denied* 522 U.S. 841 (1997). Petitioner's Response at 4. Finally, Petitioner also points out that the Region's initial decision was premised not upon its new trust theory, but rather upon the continued existence of the 1855 Mille Lacs Reservation. *Id.* at 5. Petitioner urged the Board to deny the Region's motion and renewed his request for oral argument. *Id.* at 7-8.

For the reasons discussed below, we remand the permit for further proceedings consistent with this decision.

II. *DISCUSSION*

A. *Standard of Review*

In appeals under 40 C.F.R. Part 124, the Board will not grant review unless it appears from the petition that the condition in question is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that warrants review. 40 C.F.R. § 124.19(a). The Board exercises its authority to review permits sparingly, in recognition of Agency policy favoring resolution of most permit disputes at the Regional level. *In re New England Plating Co.*, NPDES Appeal No. 00-7, slip op. at 7 (EAB, Mar. 29, 2001), 9 E.A.D. __; *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, slip op. at 9-10 (EAB, Feb. 26, 2001), 9 E.A.D. __; *In re Town of Hopedale, Bd. of Water & Sewer Comm'rs*, NPDES Appeal No. 00-4, slip op. at 8-9 n.13 (EAB, Feb. 13, 2001), 9 E.A.D. __. The burden of establishing grounds for review rests with the petitioner. 40 C.F.R. § 124.19(a)(1)-(2) (2000).

B. *The Effect of BIA's Action on This Appeal*

The Region argues in the first instance that, as a matter of law, DOI's placement of the land at issue into trust status on behalf of the Band renders the land "Indian Country" subject to EPA jurisdiction. *See* Motion to Take Administrative Notice at 4-

5. This action, the Region argues, renders moot Petitioner's challenge to the Region's authority to issue the permit. *Id.* at 6-7. The Region argues, in the alternative, that the Board should remand the permit to the Region so that the record can be supplemented with the new information. *Id.* at 7.

On the other hand, Petitioner argues that trust lands are not per se "Indian Country"; rather, tribal trust lands falling outside reservation boundaries are generally not considered "Indian Country." *See* Response to Motion to Take Administrative Notice at 3. In any case, according to Petitioner, the issue is fact dependent and should not be summarily determined by the Board. *Id.* at 4.

We do not consider dismissal of the petition on mootness grounds to be an appropriate resolution in this case. While the issue of whether the facility for which the permit is being issued is in "Indian Country" has been present throughout this proceeding, and while we recognize that DOI's recent action may be highly relevant to this question, to resolve the question based on the theory the Region is now advancing would require us to entertain a basis for the Region's jurisdiction that was not before the permit-issuer at the time of the permit decision. To do so would, in effect, allow the Region to amend during the pendency of an appeal the very decision that is the subject of appeal.

Because our review is concerned with the adequacy of the decisions actually rendered rather than decisions that might have been, the more appropriate course under the circumstances is to remand the permit to the Region so that, if the Region intends to rely on a new basis for its jurisdiction to issue the permit, the permit can be reissued on that basis. *In re Government of the District of Columbia Municipal Separate Storm Sewer System*, NPDES Appeal Nos. 00-14 & 01-09, slip op. at 27-28 (EAB, Feb. 20, 2002), 10 E.A.D. ___ (remand appropriate to supplement record support for Region's determination); *see also In re Beckman Prod. Services*, 8 E.A.D. 302, 313 (EAB 2000) (where the Region appears to have changed its rationale for its determination, remand for further proceedings to clarify rationale is appropriate), citing *In re Austin Powder Co.*, 6 E.A.D. 713, 719 (EAB 1997); *In re GSX Services of South Carolina, Inc.*, 4 E.A.D. 451, 454 (EAB 1992) (administrative record must reflect the "considered judgment" necessary to support the Region's permit determination).

We do not at this juncture offer a view on the merits of the Region's new theory for jurisdiction. To do so before the Region has actually relied on the theory in issuing the permit would, in effect, be offering an advisory opinion. *See In re Cavenham Forest Industries, Inc.*, 5 E.A.D. 722, 31 n.15 (EAB 1995) (declining to provide advisory opinion). Likewise, we do not believe that now is the proper occasion for holding oral argument

on the issue, as requested by Petitioner.

Rather, we will consider the Region's new theory on its merits only if there is an appeal from the reissued permit raising the issue. In this regard, our remand of the permit is without prejudice to Petitioner's right to seek review before this Board of the Region's jurisdiction to issue any reissued permit for the WWTF.[8]

III. *CONCLUSION*

For the foregoing reasons, the NPDES Permit No. MN-0064637-1 is remanded for further proceedings consistent with this decision.

So ordered.[9]

ENVIRONMENTAL APPEALS BOARD

Dated: 09/03/02

By: /s/
Scott C. Fulton
Environmental Appeals Judge

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[8] Petitioner's right to appeal, subsequent to the Region's supplementation of the record and permit issuance, is limited, consistent with our conclusion *supra* note 3, to the WWTF permit.

[9] The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein. *See* 40 C.F.R. § 1.25(e)(1) (2001).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Remand Order, in the matter of Vineland Sewage Lagoons, Mille Lacs Wastewater Treatment Facility, NPDES Appeal No. 01-16, were sent to the following persons by the method indicated:

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