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

In re:	
NPDES Permit for Wastewater Treatment Facility of Union Township, Michigan	NPDES Appeal Nos. 00-26 & 00-28
Docket No. MI-055808-1	

ORDER DENYING PETITIONS FOR REVIEW

I. FACTUAL AND PROCEDURAL BACKGROUND

On August 17, 2000, U.S. EPA Region V ("the Region") issued a final permit decision for NPDES Permit No. MI-0055808 ("the Permit") to Union Township, Michigan ("the Township"). The Permit regulates discharge from the Township's new wastewater treatment plant ("WWTP") to the Chippewa River pursuant to the Clean Water Act, § 402, 33 U.S.C. § 1342.[1]

[1]Under the Clean Water Act ("CWA" or "the Act"), discharges into waters of the United States by point sources such as the Township's WWTP must be authorized by a permit in order to be lawful. *See* 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. *See* 33 U.S.C. § 1342.

On September 15, 2000, the Township filed a Petition To Review Final Conditions Of Final Permit Decision ("Township's Petition"). On September 18, 2000, the Michigan Department of Environmental Quality ("MDEQ") filed a Notice of and Petition for Review to Preserve Administrative Rights Regarding USEPA's Decisions Claiming Authority and Exercising NPDES Final Permit Issuance Authority; and Request to Sever the Permitting Authority Issue and Allow the Subject NPDES Permit to Not Be Stayed and Remain Operative Until the Relief Requested Herein is Granted, Because Petitioner Does Not Contest Any of the Conditions Within the Contents of the Subject NPDES Permits ("MDEQ's Petition").[2] The Region filed a response to each Petition, along with a Consolidated Submittal of Exhibits ("Ex."), on November 3, 2000 ("Response to MDEQ's Petition" and "Response to the Township's Petition").

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[2] MDEQ and the Township both requested that the permit not be stayed pending the outcome of this appeal. On October 19, 2000, we issued Orders Denying Request Not to Stay Permit. We concluded that there was no regulatory authority that allows a new discharger to commence discharging while its NPDES permit is on appeal. *See* 40 C.F.R. § 124.16(a)(stating "if the facility involves a new facility or new injection well, new source, new discharger or a recommencing discharger, the applicant shall be without a permit for the proposed new facility, injection well, source or discharger pending final agency action"). *See also* 65 Fed. Reg. 30,899 (May 15, 2000) (preamble to changes to NPDES regulations eliminating a provision that allowed a new facility to commence discharging under certain circumstances during permit review, stating that EPA "acknowledges that new dischargers may not begin to discharge until the process of review is complete").

One other petition for review was received in this matter. Frederick L. Brown filed a petition (NPDES Appeal No. 00-27) on September 18, 2000. On December 5, 2000, we issued an Order Denying Mr. Brown's Petition for Review. In addition to the three petitions for review filed in this matter, the Board received, on November 6, 2000, a Motion of Saginaw Chippewa Indian Tribe of Michigan ("the Saginaw Tribe") to Intervene or Participate as Amicus Curiae ("Saginaw Tribe's Motion"). On November 21, 2000, we granted the Saginaw Tribe's Motion to intervene and accepted the memorandum of law filed with the Saginaw Tribe's Motion.

For the reasons stated below, we deny review of the Petitions filed by MDEQ and the Township.

II. DISCUSSION

A. Standard of Review

The burden of demonstrating that review is warranted rests with the petitioner. *See* 40 C.F.R. § 124.19(a); *see also In re City of Port St. Joe and Florida Coast Paper Co.*, 7 E.A.D. 275, 283 (EAB 1997); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997). A petitioner must state his or her objections to the permit and demonstrate that the permit condition(s) in question is based on "(1) A finding of fact or conclusion of law which is clearly erroneous, or (2) An exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review." 40 C.F.R. § 124.19(a). *See Commonwealth Chesapeake*, 6 E.A.D. at 769.

In addition, a petitioner is required to show that the issue for which review is being sought was properly preserved for review. *See Commonwealth Chesapeake*, 6 E.A.D. at 770 (quoting *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996)).

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 these regulations." 40 C.F.R. § 124.19(a).[3] *See In re Maui Elec. Co.*, PSD Appeal No. 98-2, slip op. at 9 (EAB, Sept. 10, 1998), 8 E.A.D. __; *In re Essex County (N.J.) Res. Recovery Facility*, 5 E.A.D. 218, 223-24 (EAB 1994). Under 40 C.F.R. § 124.13, any person who believes that any condition of a draft permit is inappropriate "must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period." 40 C.F.R. § 124.13. Adherence to this requirement is necessary to ensure that the Region has an opportunity to address potential problems with the draft permit before it becomes final, thereby promoting the Agency's longstanding policy that most permit issues should be resolved at the Regional level. *See In re Florida Pulp and Paper Assoc.*, 6 E.A.D. 49, 53 (EAB 1995); *see also In re Broward County, Florida*, 4 E.A.D. 705, 714 (EAB 1993); *In re Sequoyah Fuels Corp.*, 4 E.A.D. 215, 218 (EAB 1992). This

[3] Part 124 of title 40 of the Code of Federal Regulations sets forth the procedures for "issuing, modifying, revoking and reissuing, or terminating all RCRA, UIC, PSD, and NPDES 'permits.'" 40 C.F.R. § 124.1(a).

also affords the permit issuer the opportunity to make revisions it deems appropriate to the permit or provide an explanation as to why no such revisions are necessary. *See Florida Pulp and Paper*, 6 E.A.D. at 53-54.

B. Procedural History of Issuance of NPDES Permits to the Township's WWTP

Under the CWA, a State may submit to EPA a proposed permit program governing sources discharging to the navigable waters within that State's borders, demonstrating that it will apply and enforce the CWA's effluent limitations and other requirements in the permits it issues. *See* 33 U.S.C. § 1342(b). *See also Ames, Iowa v. Reilly*, 986 F.2d 253, 254 (8th Cir. 1993); *Save the Bay, Inc. v. EPA*, 556 F.2d 1282, 1285 (5th Cir. 1977). Once a State has received approval for its program, EPA ceases issuing permits to sources discharging to navigable waters subject to the State's jurisdiction, *see* 33 U.S.C. § 1342(c)(1), but maintains oversight responsibilities for State-issued permits. *See Save the Bay*, 556 F.2d at 1285. In 1973, Michigan applied for and received permitting authority under the CWA. *See* Exhibits to MDEQ's Petition,

Appendix 2, Exhibit A.

The procedural history of the present matter is slightly complicated. On April 23, 1999, MDEQ publicly noticed a draft permit for a new facility, the Township's WWTP. *See* Ex. A, Document 35. In response to MDEQ's permitting actions, the Region filed objections to the permit. *See* Ex. O. The Region's objection to the State-issued permit was premised on the State's alleged lack of jurisdiction over the Township facility. First, the Region stated that the discharge from Union Township's WWTP is "located within the exterior boundaries of the Saginaw Chippewa Reservation and thus in Indian Country." *See id.* at 1. The Region then stated that Michigan may not implement its NPDES program on the Reservation because the State did not explicitly seek, and EPA did not grant, such authorization. *See id.* at 2. Finally, the Region stated that because it believed Michigan was not the proper permitting authority, the Region would issue a permit. *See id.*

Pursuant to MDEQ's request, a public hearing was held by the Region on the Region's objections on December 1, 1999. *See* Ex. T at 1; Exhibits to MDEQ's Petition, Appendix 2 at 2.

On July 12, 2000, the Region sent a letter to MDEQ reaffirming its earlier objection. *See* Ex. T at 1. Along with its letter, the Region enclosed a reaffirmation of objections statement, as well as a decision document explaining the Region's decision to reaffirm its objections and response to comments. *See* Ex. T.

Following its initial objection letter to MDEQ's permitting authority, the Region publicly noticed a draft permit for the Township's WWTP on September 14, 1999. *See* Ex. P. MDEQ and the Saginaw Tribe, among others, filed comments on the draft permit. *See* Ex. A, Documents 71, 86. The Region issued its final permit on August 17, 2000, along with a response to comments. *See* Ex. V.

C. MDEQ's Challenge to the Region's Permitting Authority

Initially we note that MDEQ states in this appeal that the Region's objections to MDEQ's permitting authority for the Township's WWTP were based on the wrong provisions of the CWA and further amounted to an attempt to "revise [Michigan's] previously delegated authority to administer the NPDES permit program." *See* MDEQ's Petition at 3.

MDEQ's challenges to the Region's objections with respect to the State's permit are not properly before the Board. Our jurisdiction is limited to review of federal permit decisions. *See* 40 C.F.R. § 124.19(a) (limiting federal administrative review of NPDES permit decisions to those issued under § 124.15 by Regional Administrators). Our jurisdiction generally does not extend to review of State-issued permits or a Region's actions as part of a State permitting proceeding.[4] *See In re Town of Seabrook, N.H.*, 4 E.A.D. 806, 817 (EAB 1993). 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, we will interpret MDEQ's objections as encompassing a challenge to the Region's authority to issue its own permit, an issue appealable to this Board. But, as discussed below, MDEQ failed to demonstrate in its Petition

[4] There is an exception to this general rule for a program not relevant here. Clean Air Act Prevention of Significant Deterioration ("PSD") permits issued by a State pursuant to federally delegated PSD authority are considered federal permits, and thus are reviewable by the Board under 40 C.F.R. § 124.19. *See In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 109 n.1, 135 (EAB 1997).

why the Region's previous response to the same objections now raised on appeal was clearly erroneous or otherwise warranted review. In the absence of such a showing, review is denied.

As stated previously, petitioners bear the burden of demonstrating that review of a permit is warranted. *See* 40 C.F.R. § 124.19(a); *see also In re City of Port St. Joe and Florida Coast Paper Co.*, 7 E.A.D. 275, 283 (EAB 1997); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (EAB 1997). In order 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. *See In re Steel Dynamics, Inc.*, PSD Appeal Nos. 99-4 & 99-5, slip op. at 30 (EAB, June 22, 2000), 9 E.A.D. __ (citing *Hawaii Elec. Light Co.*, PSD Appeal Nos. 97-15 to -23, slip op. at 8 (EAB, Nov. 25, 1998), 8 E.A.D. __); *see also Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997); *In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995) (citing *In re SEI Birchwood, Inc.*, 56 E.A.D. 25, 27 (EAB 1994); and *In re Genesee Power Station L.P.*, 4 E.A.D. 832, 866 (EAB 1993)).

MDEQ fails to support its jurisdictional challenge to the Region's permitting authority with any degree of specificity. In challenging the Region's permitting actions, MDEQ states in its Petition, "The supporting reasons that the subject USEPA determinations are based upon clearly erroneous findings of fact and conclusions of law, and are also improper exercises of USEPA discretion and policy * * * are identified in two sets of materials, both enclosed." MDEQ's Petition at 3. If, by including this statement in its Petition, MDEQ's intent was to raise for review all of the issues addressed in the documents it submitted with its Petition, its efforts fall short. This statement alone simply does not meet the requirements of 40 C.F.R. § 124.19(a). It is not enough for MDEQ to rely on a mere reference to previous statements of its objections, such as comments on the draft permit to satisfy the pleading requirements of 40 C.F.R. § 124.19(a). *See In re LCP Chems. - New York*, 4 E.A.D. 661, 664 (EAB 1993) (citing *In re Adcom Wire*, 4 E.A.D. 221, 228-29 (EAB 1992), *remanded in part*, 5 E.A.D. 84 (EAB), *and clarified*, 1994 WL 276872 (EAB 1994) (stating that in order to establish that review is warranted "it is not enough for Adcom to include in its petition for review a mere reference to comments made during the comment period on the draft permit")).

MDEQ makes a general assertion that, by its action, EPA is effectively revising the 1973 and 1978 delegations to Michigan of the NPDES permit program. *See* MDEQ's Petition at 3. Notably, MDEQ does not directly challenge on appeal EPA's assertion that the Township's WWTP is located in "Indian Country."[5] Rather, it challenges the Region's authority to issue a permit pertaining to Indian Country in the face of EPA's delegation to the State. The record, however, indicates that even on this point MDEQ's Petition is inadequate.

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[5] Beyond its arguments relating to the delegations of permitting authority, MDEQ raises only two specific issues. First, it states, "MDEQ draws particular attention to the question of whether Michigan's title to and sovereign power over all waters in the state, originally vested in the state upon Statehood under the Equal Footing Doctrine, has ever been divested from the state." MDEQ's Petition at 3-4. MDEQ does not assert and we do not find that this argument was raised during the public comment period. *See* 40 C.F.R. § 124.19(a); *Maui Elec. Co.*, PSD Appeal No. 98-2, slip op. at 9 (EAB, Sept. 10, 1998), 8 E.A.D. __. Accordingly, review on this issue is denied.

MDEQ also asserts that there are "questions involving the location of the 'discharge' versus the location of the regulated 'facility' that may need to be reviewed." MDEQ's Petition at 4. MDEQ's statement is vague and unsupported by any analysis or argument. Accordingly, MDEQ has not demonstrated that review of this issue is warranted. *See In re GMC Delco Remy*, 7 E.A.D. 136, 141 & n.14 (EAB 1997) (stating that petitioner has burden of raising its claim before the Board in "clear and specific terms") (citing *In re Envt'l Waste Control, Inc.*, 5 E.A.D. 264, 269 (EAB 1994)).

MDEQ did raise comments on the Region's proposed permit setting forth MDEQ's position that the Region lacked permitting authority over the Township facility. *See* Ex. U, ¶¶ N, O; *see also* Ex. T, ¶¶ 10, 16, 17. The Region, however, then provided a detailed response to MDEQ's comments. *See id.* On appeal, MDEQ does not explain why the Region's response to comments was erroneous. It is well established that "in order to establish that review of a permit is warranted, § 124.19(a) 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*." *Puerto Rico Elec.*, 6 E.A.D. at 255 (emphasis added). Such an explanation 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. Given that MDEQ's Petition is inadequate in this regard, we decline review of this issue.

D. Notification to the Saginaw Chippewa Tribe

The Township objects to the inclusion, in the final permit, of conditions that require it to provide courtesy copies to the Tribe of various reports and notices that it is required to provide to EPA.[6] The Township asserts that these conditions exceed the scope of EPA's authority, and are therefore unlawful.[7] *See* Township's Petition at 4.

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[6] As an initial matter, we note that in accordance with 40 C.F.R. § 124.17(a)(1) the Region issued a Response to Comments document with the final permit. *See* Ex. U. The opening paragraph of the Region's Response states, "The following changes have been made to the permit to require the permittee to provide notification to the Saginaw Chippewa Tribe for various circumstances. These changes were requested by the Tribe and *agreed to by the permittee*." *Id.* (emphasis added). Neither party in this matter addresses the significance of this statement. Although the record does contain a copy of the Tribe's comments on the draft permit requesting notification under various permit provisions, *see* MDEQ's Petition, Exhibit H at 4, without further evidence in the record of agreement by the permittee (The Township) to the notification provisions at issue in this matter, we are unable to discern the basis for the Region's statement.

[7] The contested permit provisions are Part I, Section C.2 (Reporting), Part I, Section C.5 (information regarding nondomestic users), Part II, Section B.3.c(1) (anticipated bypass), Part II, Section D.1 (change in discharge), Part II, Section D.2 (anticipated noncompliance), Part II, Section D.3.a (transfer of ownership or control), Part II, Section D.7 (compliance schedules), Part II, Section D.8 (twenty-four hour reporting), Part II, Section D.9 (other noncompliance), Part II, Section D.10 (changes in discharge of toxic substances), and Part III, Section A.4 (planned sewage sludge disposal).

The Township states:

> [N]either the Clean Water Act or the regulations authorize EPA to require submission of required reports and notices to any entity other than EPA as the "permit issuing authority" or to any person other than the EPA Regional Director. 40 C.F.R. 122.41 governs NPDES permit conditions and reporting requirements. That section expressly provides that the permittee shall give notice and provide reports "to the Director."

Id. at 3-4.[8]

The Region responds that CWA §§ 308(a) and 402(a) provide the Administrator with broad powers with respect to reporting and information sharing. *See* Response to the Township's Petition at 4-5. Clean Water Act § 402(a)(2) requires the Administrator to prescribe conditions for NPDES permits to assure compliance with the requirements of the CWA, "including

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[8] The Township does not assert that the issues it raises regarding the permit provisions that direct it to provide courtesy copies of reports to the Tribe were in fact raised during the public comment period. As noted by the Region, however, each of the final notification permit conditions objected to by the Township were added to the final permit after the public notice and comment period. The Township is, therefore, entitled to challenge them in accordance with 40 C.F.R. § 124.19(a). *See In re Chemical Waste Mgmt. of Indiana, Inc.*, 6 E.A.D. 144, 159 (EAB 1995) ("To preserve an issue for appeal * * * petitioner must demonstrate that it could not have raised the issue [during the comment period] because the issue was not reasonably ascertainable."); *see also In re Masonite Corp.*, 5 E.A.D. 551, 559 n.9 (EAB 1994).

conditions on data and information collection, reporting, and other such requirements as he deems appropriate." 33 U.S.C. § 1342(a)(2). Section 308 is referenced in § 402. Section 308 further describes the reporting and recordkeeping requirements under the Act. It requires the Administrator "[w]henever required to carry out the objective of [the CWA]" to "require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports * * * and (v) provide such other information as he may reasonably require." 33 U.S.C. § 1318(a)(4)(A).

The Region further asserts that "it is appropriate, and within the discretion of the Region, to share information with the Tribe as a government which has an interest in activities which may effect the Reservation environment."[9] *See* Response to the Township's Petition at 6. In addition, the Region states that such information sharing is consistent with the EPA's 1984 Indian Policy, as well as overall federal policy. *See id.* at 6-7.

[9] While the Township stated that nothing in its Petition should be construed as an admission that its facility is located in Indian Country, *see* Township's Petition at 2, n.1, since it did not challenge that finding on appeal, we will assume for purposes of the appeal that the facility is, as the Region found, on the Isabella Reservation.

The Township has not objected to the requirement that it submit to EPA the information and reports required under the permit provisions it contests. Nor does it appear that the Township objects to the Tribe receiving the information in the notices and reports. *See* Township's Petition at 4, n.5. The Township is, however, objecting to having the "burden" of providing that information to the Tribe. *See id.*

The NPDES permitting regulations contain several provisions that implement CWA §§ 308 and 402. Most significantly, 40 C.F.R. § 122.41 contains reporting requirements that are required to be included in all NPDES permits. In addition to the conditions required in all permits under 40 C.F.R. § 122.41, 40 C.F.R. § 122.43(a) states that "the Director shall establish conditions, as required on a case-by-case basis, to provide for and assure compliance with all applicable requirements of CWA and regulations." This includes conditions under 40 C.F.R. § 122.48. Section 122.48 states the requirements for recordkeeping and reporting monitoring results. It provides, "All permits shall specify: * * * (c) Applicable reporting requirements based upon the

impact of the regulated activity and as specified in § 122.44."[10]

It is clear from the language of CWA §§ 308 and 402(a)(2) and 40 C.F.R. § 122.48 that the Administrator has broad discretion to establish the reporting requirements in NPDES permits. The requirements contained in the permit to provide copies of various notifications to the Tribe are not expressly rejected by the Act or its implementing regulations. We do not believe it is dispositive that for some of the provisions challenged by the Township, the regulations require submission to "the Director" without mentioning the possibility of courtesy copies.[11] *See United States v. Hartz Constr. Co.*, 2000 WL 1220919, at *4-5 (N.D. Ill. Aug. 17, 2000) (rejecting

[10] Section 122.44 sets forth a lengthy list of requirements that provide the basis for conditions that, when applicable, must be included in an NPDES permit.

[11] The following regulatory provisions specify that notice shall be given to the Director: 40 C.F.R. § 122.41(l)(1) (planned changes); 40 C.F.R. § 122.41(l)(2) (anticipated noncompliance) and 40 C.F.R. § 122.41(l)(3) (transfers). These other regulatory provisions do not specify to whom the report shall be given: 40 C.F.R. § 122.41(l)(4) (monitoring reports); 40 C.F.R. § 122.41(l)(5) (compliance schedules); 40 C.F.R. § 122.41(l)(6) (24-hour reporting); 40 C.F.R. § 122.41(l)(7) (other noncompliance) and 40 C.F.R. § 122.41(l)(8) (other information).

a challenge to a request for delineation of a site and holding that "[t]he court discerns no reasonable basis * * * for limiting the EPA's discretion to requesting only that information that is expressly called for by regulation, rather then simply making reasonable requests, as the statute itself provides."). The question, rather, is whether the Region has stated a reasonable basis for the reporting conditions that is consistent with the regulations and the stated objectives of the Act. *See id.* at *5 (stating that "EPA is given discretion to request information from [owners or operators of point sources] that is reasonably required to carry out the purposes of the Act").

The Region states that the requirement to provide courtesy copies of the reports to the Tribe is supported by the government-to-government relationship that exists between the United States government and Indian Tribes. *See* Response to the Township's Petition at 6. The Region argues that although the Tribe is not presently authorized to carry out the NPDES program within the borders of the Reservation, it has the right to seek such authorization if it desires. *See id.*; *see also* 33 U.S.C. § 1377(e). The Region further asserts that the information to be submitted by the Township would be

relevant to the Tribe for the purpose of monitoring "the conduct of the NPDES program within its reservation" and for purposes related to the protection of the environment of the Reservation as well as the health and welfare of tribal members that live there. *See* Response to the Township's Petition at 6-7. Finally, the Region states that providing information under the permit to the Tribe is consistent with EPA policy that provides for the consideration of Tribal concerns and interests anytime EPA's decisions or actions may affect Indian Country. *See id.* at 7.

In light of the governmental status of the Tribe and its legitimate interests in the health and welfare of the tribal people and land affected by the discharge from the Township's wastewater treatment facility, and in monitoring the conduct of the NPDES program within the Reservation, we find that notification to the Tribe is within the scope of regulations as a reporting requirement "based upon the impact of the regulated activity." 40 C.F.R. § 122.48(c). Where, as here, the discharge authorized by a permit may have an impact on tribal people and land, it is not unreasonable to require courtesy copies of reports to be sent to the tribal government.

Balanced against these legitimate interests is the Township's statement that the permit's notification provisions are unduly burdensome. *See* Petition at 7, n.5. Aside from making this general statement, the Township fails to demonstrate how the notification requirements in the permit are unduly burdensome. As noted by the Region, these reports are already required to be submitted to EPA, and certain of the reports will also be provided to MDEQ. *See* Response to the Township's Petition at 7, n.7; *see also In re Midwest Steel Div., Nat'l Steel Corp.*, 3 E.A.D. 835, 838 & n.6 (Adm'r 1992) (finding that permittee failed to provide support for its assertion that the reporting requirements in its permit were unduly burdensome where Region maintained that such reports were required by the State). Based on the record before it, the Board does not believe that the permit's reporting requirements of making an additional copy of the subject reports and sending it to the Tribe place an undue burden on the Township.

The Township has not shown that the Region made a clear error of fact or law or abused its discretion by requiring the Township to provide copies of reports to the Tribe. Accordingly, review of this issue is denied.

E. References to Tribal Law in the Permit

The Township also raises an objection to the inclusion of a reference to "tribal law" in Part II, Section A.8 of the permit.[12] *See* Township's Petition at 6. The Township asserts that although EPA is authorized to treat Indian tribes as states for "specified limited purposes," those purposes do not include § 510 of the Clean Water Act, 33 U.S.C. § 1370.[13] *Id.*

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[12] Section A.8, titled "State/Tribal Laws," states, "Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable State/Tribal law or regulation under authority preserved by Section 510 of the Act." Ex. V.

[13] Clean Water Act § 510 provides:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; except that if an effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance which is less stringent than the effluent limitation, or other limitation, effluent standard, prohibition, pretreatment standard, or standard of performance under this chapter; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the

The Region responds by asserting that it is appropriate for the savings provision in the permit to refer to both state and tribal law. *See* Response to the Township's Petition at 7. The Region cites *City of Albuerque v. Browner*, 97 F.3d 415 (10th Cir. 1996), for the proposition that, contrary to the Township's position, § 510 preserves the inherent authority of Indian tribes. *See id.* at 8.

We begin our consideration of this issue by noting that Section A.8 was included in the draft permit in a form identical to that in the final permit.[14] *Compare* Ex. P with Ex. V. Therefore, we must first determine whether it is

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waters * * * of such States.

33 U.S.C. § 1370.

[14] The Region states, "The Township did not comment on the draft permit. However, each of the conditions objected to by the Township were added to the final permit after the public hearing, hence the Township is entitled to petition the Board with respect to the changes." Response to the Township's Petition at 2, n.2. While this statement is accurate with respect to the provisions of the permit that provide for notification to the Tribe, it incorrectly applies to Section A.8 of the permit, the savings provision that addresses state and tribal law. This provision was, in fact, included in the draft permit. *See* Ex. P.

appropriate for the Board to review this claim consistent with the requirements of 40 C.F.R. § 124.19(a).

As stated in Part II, Subsection A of this Order, 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 these regulations." 40 C.F.R. § 124.19(a). *See In re Maui Elec. Co.*, PSD Appeal No. 98-2, slip op. at 9 (EAB, Sept. 10, 1998), 8 E.A.D. __; *In re Essex County (N.J.) Res. Recovery Facility*, 5 E.A.D. 218, 223-24 (EAB 1994).

The Township has failed to demonstrate that the issue it now raises regarding Section A.8, was in fact raised during the public comment period. Our review of the record finds no indication that this issue was raised, and yet it was reasonably ascertainable. Therefore, review of this issue is denied.[15]

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[15] Even if this issue had been properly preserved for review, it is far from clear that, in including the reference to Tribes in Section A.8 in the permit, the Region made a clear error of fact or law or abused its discretion. Notwithstanding that Indian tribes are not expressly included in CWA § 510, the Tenth Circuit Court of Appeals has held that CWA § 510 shall not be viewed as constraining tribes' sovereign authority. *See City of Albuquerque v. Browner*, 97

III. CONCLUSION

For the foregoing reasons, we deny review of both MDEQ's Petition and the Township's Petition in their entirety.

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: /s/
Edward E. Reich
Environmental Appeals Judge

Dated: 01/23/2001

F.3d 415, 423 (10th Cir. 1996). In *City of Albuquerque*, the Tenth Circuit stated that *"Indian tribes have residual sovereign powers that already guarantee the powers enumerated in § [510], absent an express statutory elimination of those powers." Id.* at 423 (emphasis added) (citing *United States v. Wheeler*, 435 U.S. 313, 323 (1978)). *See also Montana v. EPA*, 137 F.3d 1135, 1141 (9th Cir. 1998). Section A.8 of the permit would thus appear to reflect the authority enjoyed by the Tribe.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Petitions For Review in the matter of NPDES Permit for Wastewater Treatment Facility of Union Township, Michigan, NPDES Appeal Nos. 00-26 & 00-28, were sent to the following persons in the manner indicated:

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/s/
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