

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

In re:)	
)	
NPDES Permit for Wastewater)	NPDES Appeal No. 00-27
Treatment Facility of Union)	
Township, Michigan)	
)	
Docket No. MI-055808-1)	

ORDER DENYING PETITION 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 facility to the Chippewa River pursuant to the Clean Water Act, § 402, 33 U.S.C. § 1342.¹

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

On September 18, 2000, Frederick L. Brown ("Petitioner") filed a petition for review of certain conditions of the Township's NPDES permit.² The Region filed its Response to Petition for Review ("Response") along with a Consolidated Submittal of Exhibits ("Ex.") on November 3, 2000.³

For the reasons stated below, the petition for review filed by Frederick L. Brown is denied.

²Petitioner also raises some questions about the appeals process itself, which we will not address because they do not relate to any permit conditions. See 40 C.F.R. § 124.19(a); see also *In re Puna Geothermal Venture*, UIC Appeal Nos. 99-2, 99-2A, 99-2B, 99-3, 99-4 & 99-5, slip op. at 51 (EAB, June 27, 2000) (stating that the Board is without jurisdiction to review concerns regarding a permittee's past violations because petitioner failed to establish a link to a permit condition); *In re Laidlaw Env'tl. Servs.*, 4 E.A.D. 870, 882-83 (EAB 1993) (finding lack of jurisdictional basis to grant review where petitioner's concerns fail to establish a link to a condition of the permit). However, we note the questions are responded to in detail in the Region's Response.

³Two other petitions for review were received in this matter. The Township filed a petition (NPDES Appeal No. 00-26) on September 15, 2000. The Michigan Department of Environmental Quality ("MDEQ") filed a petition (NPDES Appeal No. 00-28) on September 18, 2000. Because the issues raised in Mr. Brown's petition do not overlap with those raised in the other petitions, the Township's and MDEQ's petitions shall be addressed separately in orders issued by the Board regarding those petitions.

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). In order to establish jurisdiction before the Board a petitioner must state his or her objections to a 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 *id.* at 770. Part 124 of Title 40 of the Code of Federal Regulations sets forth the procedures for "issuing, modifying, revoking and reissuing, or terminating all * * * NPDES

permits." 40 C.F.R. § 124.1(a). 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 Essex County (N.J.) Res. Recovery Facility*, 5 E.A.D. 218, 224 (EAB 1994); *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 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.

To preserve an issue for review, a petitioner bears the burden of demonstrating in his petition that "any issues 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/CSP Permit No. 0067-01-C, 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).

B. Issues Not Preserved for Review

Petitioner requests review of several conditions in the permit. In particular, Petitioner requests that the Michigan Department of Environmental Quality receive notification relative to "nine different circumstances under the permit." Petition at ¶ 1.a. Petitioner further asserts that Part I, Section B, Note 5 of the permit should incorporate into the permit a new method and quantification level for mercury. *Id.* at ¶ 2.a. He also asserts that Part I, Section C.2 of the permit should be amended to require the monthly submission of discharge monitoring reports, instead of quarterly. *Id.* at ¶ 2.b.

It is clear from the portions of the record submitted by Petitioner, as well as the comments and responses filed by the Agency, that although Petitioner did participate in the public

hearings and submitted comments during the public comment period, he has failed to establish that the foregoing issues were raised during the public comment period or at the public hearings in accordance with 40 C.F.R. § 124.13. See Ex. U; see also Petition at Exhibits 1-3. The issues were reasonably ascertainable at that time and Petitioner has not argued otherwise. Because the foregoing issues were not preserved for review, review is denied.

C. Michigan Critical Material Register

Petitioner raises concerns regarding the lack of reference to the Michigan Critical Materials Register (MCMR) in the permit. Petitioner asserts that a reference to the MCMR should be included in Part II, Sections D.1 and D.10 of the permit.⁴

⁴Both Sections D.1 and D.10 are found in the standard conditions portion of the permit. They address reporting requirements under the permit. Section D.1, which is titled "Change in Discharge," provides in part:

The permittee shall give notice to the Permit Issuing Authority, with a courtesy copy to the Saginaw Chippewa Tribe, as soon as possible, of any planned physical alterations or additions to the permitted facility. Notice is required only when:

a. The alteration or addition to a permitted facility may meet one of the criteria for determining whether a facility is a new source; or

Petitioner states:

The MCMR includes a long list of chemicals considered to be potentially hazardous and is a critical part of Michigan's protection net. Scrutiny of the MCMR in their consideration of influent and effluent * * * is an important part of the permittee's application and compliance.

Michigan rules include specific requirements for BCCs

b. The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. * * *

Permit at Part II, § D.1. Section D.10, which is titled "Changes in Discharges of Toxic Substances" provides in part:

The permittee shall notify the Permit Issuing Authority, with a courtesy notice to the Saginaw Chippewa Tribe, as soon as it knows or has reason to believe:

a. That any activity has occurred or will occur which would result in the discharge, on a routine or frequent basis, of any toxic substance(s) * * * which is not listed in the permit * * *

b. That any activity has occurred or will occur which would result in any discharge, on a non-routine or infrequent basis, of a toxic pollutant * * * which is not limited in the permit * * * .

Permit at Part II, § D.10.

[Bioaccumulative Chemicals of Concern]. The permittee should be alerted via the permit to these special classes of toxic compounds and the public should be assured via the permit that BCCs and compounds on the MCMR are given special attention.

Petition at ¶ 2.c.

In response to Petitioner's concern, the Agency states that the permit refers to a broad list of chemicals listed in Appendix D of 40 C.F.R. Part 122 in defining the Township's reporting obligations. See Response at 7. The Agency asserts that Union Township would be responsible for reporting the potential release of any chemical listed in Appendix D under the two permit provisions cited by Petitioner. See *id.* Appendix D is part of the nationally applicable regulations⁵ and, the Region asserts,

⁵ Section 122.21 of Title 40 of the Code of Federal Regulations sets forth the requirements that must be included in permit applications by persons required to obtain an EPA-issued NPDES permit. See 40 C.F.R. § 122.21. Subsection (g) of this regulation details the information required in applications from "existing manufacturing, commercial, mining, and silvicultural dischargers." 40 C.F.R. § 122.21(g). Appendix D to Part 122 contains a list of toxic and other pollutants for which each applicant is required to report quantitative data in accordance with 40 C.F.R. § 122.21(g)(7).

"was developed precisely to ensure that effluent characteristics are adequately described so that all known pollutants can be controlled under an NPDES permit." Response at 7-8. See Ex. U at 23, Comment 11.

Petitioner, while stating that he disagrees with the Region's response (as provided in the Response to Comments document), has not demonstrated why the Region committed clear error by utilizing the list in the Agency's regulations as its reference point rather than the MCMR. Review of this issue is therefore denied. See *Maui Elec.*, slip op. at 19, 8 E.A.D. at __ (rejecting petitioner's contentions because petitioner failed to discuss how the permit issuer's response to comments was inadequate and how the permit issuer's reliance on a particular report constituted clear error); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 780 (EAB 1997) (denying review where petitioner has "merely reiterated the comment made during the public hearing, without explaining why the State's response is clearly erroneous").

C. Mixing Zone

Another issue raised by Petitioner relates to the lack of a "defined mixing zone" in the permit. Petition at ¶ 2.d. We note that Petitioner's concern does not appear to be a challenge to the permit because of a lack of a mixing zone. It is instead framed as a request for clarification of a matter Petitioner believes is ambiguous in the permit, whether Michigan water quality standards will apply to protect non-tribal owners of property situated on the Reservation. See *id.* Petitioner states:

The lack of a defined mixing zone creates potential ambiguity. * * * Between the point of discharge from Union Township WWTP [wastewater treatment plant] and exiting the reservation the River weaves a tortuous course through nine sections in two townships. * * * Is '...ensurance [sic] of protection...' at point of discharge or at a point many miles downstream?

More specifically, are Michigan water quality standards protected for non-tribal owners of riparian property

between the point of discharge and the point of exiting the reservation? I suggest that this critical issue be clearly spelled out in the permit.

Petition at ¶ 2.d.

In its Response, the Region stated that, "though as a strict legal matter" it was only obligated to ensure that Michigan's water quality standards were met "at the point where the waters exit the Reservation," it had looked to the State's standards in developing and establishing the effluent limitations for the point of discharge as well. Response at 8-9. Thus, by insuring that State standards are met at the point of discharge, the Region has, through the permit, fully protected the interests of owners of riparian property such as the Petitioner.

We find that the Region's response adequately addresses Petitioner's request for clarification on this issue.

III. CONCLUSION

For the foregoing reasons, Frederick L. Brown's Petition

for Review of Union Township's NPDES permit is denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

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

Dated: 12/05/00

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Petition for Review in the matter of NPDES Permit for Wastewater Treatment Facility of Union Township, Michigan, NPDES Appeal No. 00-27, were sent to the following persons in the manner indicated:

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_____/s/_____
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Secretary