

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

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In re:)
)
Mille Lacs Wastewater Treatment)
Facility & Vineland Sewage)
Lagoons)
)
Permit Nos. MN 0064637-1)
	MN 0058629-2)
)
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NPDES Appeal Nos. 01-17 &
01-19 through 01-23

Decided April 25, 2002

ORDER DENYING PETITIONS FOR REVIEW

The Environmental Appeals Board ("Board") has received seven petitions seeking review of two National Pollutant Discharge Elimination System ("NPDES")¹ permits issued by the U.S. Environmental Protection Agency, Region V ("Region") to the Mille Lacs Band of Ojibwe Indians (NPDES Permit No. MN-0058629-2) and

¹Under 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.

ML Wastewater, Inc. (NPDES Permit No. MN-00664637-1) on May 31, 2001.² The permit issued to the Mille Lacs Band of Ojibwe Indians (the "Band") would renew authorization to discharge from three 7-acre water treatment lagoons ("Lagoons Permit") that have been in operation since 1988, while the permit issued to ML Wastewater, Inc., a wholly owned, non-profit subsidiary of the Band's Corporate Commission, authorizes operation of and discharge from a proposed regional wastewater treatment facility ("WWTF Permit"). Each of the petitions argues in one respect or another, as described in more detail below, that the Region lacks jurisdiction to issue the WWTF Permit and oversee the facility because the WWTF is not located on an existing Indian reservation. Two of the petitions

²A June 22, 2001 letter from the Mille Lacs Lake Watershed Management Group ("MLLWMG") was docketed by the Clerk of the Board as NPDES Appeal No. 01-18, and the Region was notified by letter that such a petition for review had been filed by the MLLWMG. On August 24, 2001, the Board received a letter from the MLLWMG stating that "it was not the intent of [the MLLWMG] to appeal the issuance of the subject permits." Letter from Paul L. Andrews, Pres. MLLWMG to U.S. Environmental Protection Agency, Environmental Appeals Board (Aug. 21, 2001). By letter dated August 30, 2001, Counsel to the Board informed MLLWMG that the June 22, 2001 letter would not be treated as an appeal, that the Clerk of the Board was closing the file, and that the letter had been forwarded to the Region for consideration as comments on the subject permits. Letter from Richard L. Albores, Counsel to the Board, to Paul L. Andrews, Pres. MLLWMG (Aug. 30, 2001). As a result, only seven petitions for review remain (NPDES Appeal Nos. 01-16, -17, -19, -20, -21, -22, and -23).

also seek review of other issues related to the Lagoon and WWTF Permits.

This order addresses six of the seven petitions. The remaining petition will be addressed separately.³ Of the six petitions addressed by this decision, four, as explained below, are untimely, and therefore review is denied and the petitions are dismissed. The other two petitions considered herein fail to demonstrate how the Region's findings were clearly erroneous, or an exercise of discretion requiring review, and thus review is denied. Below, we discuss each of the six petitions and our reasons for denying review.

I. BACKGROUND

A. Factual Background

The Region issued an NPDES permit for the Vineland Sewage Lagoons on September 30, 1988. The Vineland Sewage Lagoons are

³Petitions 01-17, and 01-19 through 01-23 are consolidated herein for consideration by the Board. Petition 01-16 will be considered separately by the Board.

located in the southeast quarter of Section 20, Township 43N, Range 27W, on Tribal trust lands held by the United States. The lagoons consist of a series of ponds with synthetic liners discharging into deciduous lowlands, also on Tribal trust lands, which are adjacent to Mille Lacs Lake. The Lagoons service some, but not all, Band residences in the Vineland community, as well as a Band-owned casino and hotel constructed over the past decade. The Lagoon system is reaching capacity, thus limiting the Band's ability to provide housing for its members. On September 9, 1992, the Band submitted an application to the Region to renew the Lagoon Permit, and the Region issued a draft permit on June 30, 1993. However, no further processing of the draft permit occurred due to the consideration of alternative wastewater treatment options. The Band has continued to operate the Vineland Sewage Lagoons under the terms of the 1988 lagoon permit pursuant to 40 C.F.R. § 122.6.

For a number of years, the Band has been exploring the feasibility of developing a regional wastewater treatment facility ("WWTF") with non-Indian municipalities in the area. An inter-governmental task force, including representatives of the Band, the City of Garrison, the Garrison Township, and Kathio Township developed the proposal for a regional WWTF. Construction and

operation of the WWTF, which would discharge wastewater outside of the Mille Lacs Lake watershed, would provide both human health benefits and environmental benefits, including the protection of the Mille Lacs Lake Confined Drift Aquifer and of Mille Lacs Lake's water quality. As currently planned and permitted, the WWTF will be built by the Band's non-profit corporation, ML Wastewater, Inc. ("MLWI"), and the construction of the collection system will be undertaken by the Garisson, Kathio, West Mille Lacs Lake Sanitary Sewer District ("Sanitary District"). The MLWI will also be responsible for building a force main from the existing lagoon system to the WWTF and entering into service agreements with the Band and the Sanitary District to provide wastewater treatment services.

The site where the WWTF will be built is located in the northeast quarter of the southwest quarter of Section 30, Township 43N, Range 27W, and is owned in fee by the Band.⁴ The Band is

⁴In April 2000, the Band proposed to transfer the land on which the WWTF will be built to the United States to hold in trust on behalf of the Band. The Bureau of Indian Affairs ("BIA") and the Region jointly prepared an environmental assessment on the effects of the fee-to-trust transfer and the Region's administration of a \$6.7 million congressional appropriation to build the WWTF. The BIA and Region jointly issued a Finding of No Significant Impact ("FONSI") in January 2001. The Superintendent of BIA's Cass Lake Agency approved the transfer of the property to the United States in trust, but the property remains in Band fee-ownership pending resolution of administrative and possible judicial appeals of the Superintendent's decision.

leasing the land to the MLWI. This land's current status, which is within the boundaries of the Mille Lacs Indian Reservation as established by an 1855 Treaty, is at the heart of the petitions seeking review of the WWTF Permit.

On April 22, 1999, the Band submitted an NPDES permit application for the WWTF to the Region. The Region issued a draft permit for the WWTF on April 6, 2000, and a revised draft Lagoon Permit on April 13, 2000. The Region issued a public notice of the two draft permits 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 permits. 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 permits. The Region received many comments on the proposed permits. The Region responded to these comments and issued the final permits on May 31, 2001.

B. *The Petitions for Review*

The six petitions considered in this order principally challenge the Region's jurisdiction to issue the WWTF permit because the land upon which the WWTF will be located is allegedly not within an Indian reservation.

1. *The Lake Mille Lacs Association, Inc. Petition (NPDES Appeal No. 01-17)*

The Lake Mille Lacs Association, Inc. ("LMLA"), filed a petition for review on June 26, 2001. See Pet. No. 01-17. Petitioner LMLA asserts the Region is "wrong in stating that the Mille Lacs Reservation still exists." *Id.* at 2. LMLA relies on "[t]he Nelson Act and the U.S. Supreme Court decisions of 1913 and 1998" as well as a "U.S. Geological Survey * * * [letter stating], 'In fact, very little land remains as part of the original reservation.'" *Id.* In addition, LMLA questions the Region's calculation of the location of an unnamed tributary, and asserts the Region should require a flow dispersion device because it believes "625,000 [gallons per day] flow will result in

channelization in the wetlands." *Id.* at 1-2.

2. *The Danielson Petition (NPDES Appeal No. 01-19)*

On June 29, 2001, Ken Danielson filed a petition with the Board which addressed Ms. Rebecca Harvey, Chief, NPDES Support and Technical Assistance Branch, in its salutation. Mr. Danielson, citing the New Testament, Luke 6:37-39, accuses Ms. Harvey of "[condemning] us voting/tax paying U.S. Citizens to a reservation," and "blindly [accepting statements that the land at issue] is a reservation." Pet. No. 01-19, at 2 (filed June 29, 2001).

3. *The Fitz Petition (NPDES Appeal No. 01-20)*

Clarence R. Fitz filed a petition for review with the Board on July 5, 2001. The Fitz petition also informs Ms. Harvey that "THERE IS NO MILLE LACS INDIAN RESERVATION! Therefore, the EPA should not be involved in the permitting process." Pet. No. 01-20, at 1. In support of his petition, Mr. Fitz encloses a copy of *U.S. v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913); a letter from the Minnesota Governor to Duane Windahl, Pres., LMLA (Nov. 27, 1995) indicating that the Governor's position is "that

the Mille Lacs Reservation was disestablished through later federal treaties and laws * * * "; a letter from Mike Hatch, Minnesota Attorney General, to R.D. Corteau, M.D. (Aug. 9, 1999) stating that "the MPCA, the [Department of Natural Resources] and the Governor's Office have taken the position that the Mille Lacs reservation boundaries are limited to Indian trust land. * * * "; and a February 2, 1999, resolution of the Mille Lacs County Board of Commissioners adopting the position of the Governor of Minnesota with respect to the Mille Lacs Reservation.

4. *The Beaudry Petition (NPDES Appeal No. 01-21)*

Alfreda and Carl Beaudry filed their petition for review with the Board on July 5, 2001. Like the Danielson petition, the Beaudry petition addresses Ms. Harvey, and asserts that the Region is "dead wrong in [its] assumption that an Indian reservation of any kind exists * * * ." Pet. No. 01-21, at 1 (filed July 5, 2001). Petitioner Beaudry claims to "have a letter saying there is no Indian Reservation in Mille Lacs County from the U.S. Geological Survey."⁵ *Id.* The Beaudry petition also raises a number of non-

⁵The referenced letter is not attached to the petition.

specific questions related to Regional oversight of the WWTF, the high cost of connecting homes to the WWTF, and the reason that the Lagoon Permits took so long to be reissued.

5. *The Skogman Petition (NPDES Appeal No. 01-22)*

Don and Bev Skogman ("Petitioners Skogman") filed a petition for review with the Board on July 5, 2001, also addressing Ms. Harvey. Pet. No. 01-22 (filed July 5, 2001). The single-page petition indicates that Petitioners Skogman "have had a [h]istorical study done by an Attorney and the findings say there is no Reservation in Mille Lacs County." *Id.* The Skogmans do not provide the alleged study, but do include a copy of the U.S. Geological Survey letter referenced in the Beaudry petition. The letter is from George Garklave, Dist. Chief, to Darrel R. Douglas informing Mr. Douglas that the reservation "boundary shown in the report is for reference only, and is not meant to imply that all land within the boundary is under any jurisdiction of, or part of, the Mille Lacs Indian Reservation." Skogman Pet. Ex. 1.

6. *The Jevne Petition (NPDES Appeal No. 01-23)*

On July 10, 2001, Mary E. Jevne filed a petition for review with the Board. Pet. No. 01-23. The Jevne petition dated July 2, 2001, suggests that, "[t]he Mille Lacs Reservation was disestablished and no longer exists. EPA should again take a look at the Treaty of 1864, the Nelson Act, the Supreme Court ruling of 1913, the Indian Claims Commission, and the long history of the area." *Id.* at 1. Ms. Jevne also questions the Region's estimate of tribal and non-tribal usage of the proposed WWTF. *Id.* The Jevne petition also challenges the Region's explanation for a sewage spill on the ice of Mille Lacs Lake during the 1991-92 winter. Ms. Jevne claims to "know the real explanation for the sewage flow was that valves allowing the fall drainage of the lagoons were left open * * * ." *Id.*

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

At the request of the Board, the Region filed responses to these petitions on August 20, 2001. On August 21, 2001, the Mille Lacs Band of Ojibwe Indians, a federally recognized Indian tribe,

and ML Wastewater Management, Inc., a wholly owned, non-profit, subsidiary of the Band's Corporate Commission (collectively referred herein as the "Band") filed a joint motion for leave to file a response to the petitions or to participate as *amicus curiae*. The Board granted the motion and accepted the Band's *amicus* brief for filing on August 23, 2001.

We now turn to our analysis of these six petitions and delineate our rationale for denying review in all respects.

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 permit 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.⁶ 40

⁶Prior to the Amendments to Streamline the NPDES Program Regulations, 65 Fed. Reg. 30,886 (May 15, 2000), the rules governing petitions for review of NPDES permitting decisions were set out in 40 C.F.R. § 124.91 (1998). Even though these amendments have eliminated the evidentiary hearing requirement in favor of direct appeal to the Board, the standard of review under 40 C.F.R. § 124.91 is essentially identical to that of 40 C.F.R. § 124.19. See, e.g., *In re New England Plating Co.*, NPDES Appeal No. 00-7, (continued...)

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 that review should be granted rests with the petitioner. 40 C.F.R. § 124.19(a)(1)-(2) (2000).

The petitions for review are considered in light of this framework. For the reasons set forth below, all six petitions for review are denied in their entirety.

(...continued)

slip op. at 6 n.10 (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 n.11 (EAB, Feb. 26, 2001), 9 E.A.D. __.

B. *The Fitz, Beaudry, Skogman and Jevne Petitions Are Untimely*

Under the permitting regulations found at part 124 of title 40 of the Code of Federal Regulations, a petitioner must file his or her petition for review with the Board within the time period established by the regulations. See *In re Town of Hampton*, NPDES Appeal No. 01-15, slip op. at 2 (EAB, July 26, 2001), 10 E.A.D. ___; *In re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996); see also *In re Sutter Power Plant*, 8 E.A.D. 680, 686 (EAB 1999). "Uniform application of the requirement is necessary because of the various parties and permits that are subject to this provision and because important consequences flow from petitioning for review. See, e.g., § 124.15(b) (final permit decision is effective 30 days after service of notice unless review requested under § 124.19)." *In re Bethlehem Steel Corp.*, 3 E.A.D. 611, 613 n.9 (Adm'r 1991).

Section 124.19 of title 40 of the Code of Federal Regulations sets forth the procedural requirements for appeals of NPDES permits. Section 124.19 states:

Within 30 days after a * * * NPDES * * * final permit decision * * * has been issued, * * * any person who filed comments on [a] draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. * * * The 30-day time period within which a person may request review under this section begins with the service of notice of the Regional Administrator's action unless a later date is specified in that notice.

40 C.F.R. § 124.19(a) (2000). Three days are added to this time period when service of notice is made by mail. 40 C.F.R. § 124.20(d) (2000).

Here, the Region mailed the notice of the final permit decisions on May 31, 2001. See Region's Exhibit ("R Ex") A (Index to Administrative Record). Consistent with decisions by the Board and its predecessors, May 31, 2001, therefore marked the date of service of notice. See *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 15 (EAB 1994) ("When the Region serves a final permit decision by mail, service occurs upon mailing"); accord *Bethlehem Steel*,

3 E.A.D. at 614 n.11. Since the notice was served by mail, a petitioner would ordinarily have thirty-three days after the above date to file a petition for review with the Board, thus making the last day for filing July 3, 2001. Since the Fitz, Beaudry, and Skogman petitions were filed with the Board on July 5, 2001, and the Jevne petition was filed on July 10, 2001, these petitions are untimely. Accordingly, review of the Fitz, Beaudry, Skogman and Jevne petitions is denied on this ground.

C. *The LMLA Petition Lacks Specificity*

As described above, LMLA raises the following issues on appeal. First, LMLA asserts the jurisdictional issues that it raised during the comment period in its comments on the draft permit. Second, LMLA questions the Region's calculation of the location of an unnamed tributary. Pet. No. 01-17, at 1. Lastly, LMLA asserts the Region should require a flow dispersion device because it believes "625,000 [gallons per day] flow will result in channelization in the wetlands." *Id.* at 2. In each case, LMLA has simply reiterated comments that it made during the public comment period, failing to indicate clearly and with specificity why the Region's response to these issues in its response to comments was

deficient.

In the permitting context, our review focuses on the rationality of the decision to issue the permit, and we are informed in this regard by the administrative record below, which includes, most notably, comments that were made regarding the draft permit and the Region's response to those comments. We have repeatedly held, that when a Region responds to comments when it issues a final permit, a petitioner must, in order to meaningfully question the rationality of the permit issuer's decision, demonstrate with specificity in the petition why the Region's prior response to those objections is clearly erroneous or otherwise merits review. *In re Ashland Wastewater Treatment Facility*, NPDES Appeal 00-15, slip op. at 11 (EAB, Feb. 26, 2001), 9 E.A.D. ___; *In re NPDES Permit for Wastewater Treatment Facility of Union Township*, NPDES Appeal Nos. 00-26 & 00-28, at 11 (EAB, Jan. 23, 2001), 9 E.A.D. ___; *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996); see also *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 250 (EAB 1999) ("The effective, efficient and predictable administration of the permitting process demands that the permit issuer be given the opportunity to address potential problems with

draft permits before they become final.”), citing *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997). In light of this framework, LMLA has failed to demonstrate that review is warranted. The Region responded to these issues fully, see Response Ex. T at ¶¶ 2, 17, 42, 45, and LMLA has simply reiterated comments made during the public comment period without explaining why the Region’s response to those comments was deficient.⁷

D. *The Danielson Petition Lacks Specificity*

As stated above, to sustain a petition for review, a petitioner must demonstrate with specificity why the Region’s response to the petitioner’s comments was clearly erroneous. See, e.g., *Ashland Wastewater Treatment Plant*, slip op. at 11 (A

⁷We note further that with respect to LMLA’s challenge to the Region’s calculation of the distance between the discharge and Bradbury Brook, the distance to Bradbury Brook from the sources of wastewater loadings does not appear to relate specifically to any condition of the permits issued by the Region. The Board’s jurisdiction extends to review of permit conditions. 40 C.F.R. § 124.19(a); see *In re City of Irving, Texas*, slip op. at 19-20, NPDES Appeal No. 00-18 (July 16, 2001), 9 E.A.D. ____ (“the regulations authorizing appeals to the Board contemplate review of conditions of permits, not review of the statutes and regulations which are predicates for such conditions.”). LMLA has not shown how this alleged error affects any condition in the permits. Accordingly review of this issue is denied on this basis as well.

petitioner in an NPDES appeal must demonstrate with specificity why the Region's response to its comments is clearly erroneous or otherwise merits review).

Mr. Danielson's accusations that the Region has "condemned" residents of the area to a reservation fails this test. Mr. Danielson's statement does not indicate how the Region's response to comments related to the status of reservation boundaries was clearly erroneous. See Response Ex. T at ¶ 37. Accordingly, Mr. Danielson's petition for review is denied in its entirety.

III. CONCLUSION

For the foregoing reasons, the petitions for review 01-17, and 01-19 through 01-23 are denied in all respects.

So ordered.⁸

ENVIRONMENTAL APPEALS BOARD

Dated: 04/25/02

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

⁸The 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 Order Denying Petitions for Review in the matters of Vineland Sewage Lagoons/Mille Lacs Wastewater Treatment Facility, NPDES Appeal Nos. 01-17, and 01-19 through 01-23, were sent to the following persons in the manner indicated:

By Certified Mail,
Return Receipt Requested:

Barbara L. Wester
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection
Agency, Region V
77 West Jackson Boulevard (C-14J)
Chicago, IL 60604

Marc D. Slonim
Anastasia M. Telesetsky
Ziontz, Chestnut, Varnell
Berley, and Slonim
2101 4th Avenue, Suite 1230
Seattle, WA 98121

Tom D. Tobin
Attorney
Milles Lacs County
P.O. Box 730
422 Main Street
Winner, SD 57580

Clarence R. Fitz
11332 Twilight Road
Onamia, MN 56359

Don & Bev Skogman
9912 385th Street
Onamia, MN 56359

Frank Courteau
Chairman
Mille Lacs County Commission
10654 390th Street
Onamia, MN 56359

Alfreda & Carl Beaudry
P.O. Box 216
10542 390th Street
Onamia, MN 56359

Paul L. Andrews
Chair, Environmental Committee
Lake Mille Lacs Association, Inc.
P.O. Box 205
Wahkon, MN 56386

Mary E. Jevne
7238 Blair Way
Wahkon, MN 56386

Ken Danielson
6834 State Highway 27
Wahkon, MN 56386-2512

Dated: 04/26/02

_____/s/
Annette Duncan
Secretary