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

In re: Buena Vista Rancheria Wastewater Treatment Plant NPDES Permit No. CA 0049675	NPDES Appeal Nos. 10-05 - 10-07 & 10-13 EPA Region IX's Opposition to Petitioner Amador County's Motion for Leave to File Reply Brief; and Motion for Leave to File Corrected Response Brief

As directed in the Environmental Appeals Board's (the "EAB" or the "Board") Order Granting Region 9's Motion for Extension of Time to Respond to Petitions for Review dated September 9, 2010, Region IX of the United States Environmental Protection Agency (the "Region") filed its Response to Petitions for Review ("Response Brief") on September 27, 2010. On October 7, 2010, the County of Amador (the "County") filed a Motion for Leave to File Reply Brief; and Reply Brief ("Motion"). In support of its Motion, the County asserts that in the Response Brief the Region raised new issues that the County did not previously have an opportunity to address. Specifically, the County asserts: (1) that the Region made material misrepresentations with respect to two EAB decisions addressing the scope of EPA's authority to implement the Clean Water Act National Pollutant Discharge Elimination System ("NPDES") permit program in Indian country which raises new issues; and (2) that the Region advanced a new argument regarding the Indian reservation status of the Buena Vista Rancheria, which the County argues is contrary to principles of federal Constitutional law. As explained below, the Region has not raised any new issues in its Response Brief and therefore urges the Board to deny the County's Motion. However, if the Board decides that further information regarding any of

the matters raised in the Motion would assist the Board in its deliberations, the Region respectfully requests an opportunity to provide additional briefing.

The Region also wishes to clarify the record regarding the County's first argument and correct an inadvertent error in a quotation contained in the Response Brief. The Region thus moves the Board for leave to file the proposed corrected Response Brief attached hereto. As described below, the sole revision occurs in footnote 39 of the Response Brief and relates to a well-settled legal principle, about which the parties may actually agree, regarding EPA's permitting authority in Indian country. The Region believes that its correction of the error contained in footnote 39 of the original Response Brief would resolve any issue relating to the County's first argument and thus render the County's Motion moot on this point.

I. Correction of the Response Brief's Citation to *Circle T Feedlot*

With respect to the County's first argument, the Region agrees that the language quoted in footnote 39 of the Response Brief – which the Region attributed to the EAB's decision in *In re Circle T Feedlot, Inc.*, NPDES Appeal Nos. 09-02 & 09-03 (EAB June 7, 2010) – was incorrectly cited. Although the Region intended to quote the EAB's decision, the quoted language was mistakenly taken from EPA's Response to Petitions for Review in the *Circle T Feedlot* matter, and not from the EAB's decision. The Region assures the Board that this error was one of inadvertence and regrets the confusion that has been created. The Region disputes any assertion by the County that this mistake in any way constitutes an intentional fabrication of information or material misrepresentation of the EAB's prior precedent. The Region would appreciate an opportunity to correct this inadvertent error and has thus moved the Board for leave to file the attached corrected Response Brief, which revises footnote 39 to accurately reflect the *Circle T Feedlot* decision. Apart from the revisions to footnote 39, a revised title

indicating that the brief has been corrected, and a new signature, there are no changes to the Response Brief.

The Region also notes that neither the mistakenly quoted language from footnote 39 of the Response Brief, nor the EAB's decision in *Circle T Feedlot*, raises any new issue not addressed during the NPDES permitting process. As described in the Response Brief, the County's Petition questions the Region's jurisdiction to issue a permit in this matter based on certain arguments that the location of the subject facility is not on an Indian reservation or otherwise within Indian country.[1] The County raised the same arguments during the public comment period on the draft NPDES permit, including an assertion that EPA's jurisdiction was lacking based on the fee-owned land status of the proposed facility location. In response, the Region cited the Board's decision in *In re Mille Lacs Wastewater Treatment Facility*, 11 E.A.D. 356 (EAB 2004), for the well-settled principle that EPA's permitting authority extends – in the absence of an EPA approved state or tribal NPDES program for such areas -- throughout "Indian lands" (the term used in EPA's regulations at 40 C.F.R. § 123.1(h)), and that EPA interprets "Indian lands" to be equivalent to "Indian country," which is defined to include all lands (fee-owned or otherwise) within Indian reservations.[2] See 40 C.F.R. § 122.2; 18 U.S.C. § 1151. It is unclear whether the County's Petition contested this well-settled principle of EPA's permitting authority in Indian country. The County did not explicitly argue that EPA lacks NPDES permitting authority on fee-owned lands within Indian reservation boundaries.[3] Instead, the County focused on an argument that the Buena Vista Rancheria did not constitute an Indian reservation in the first instance.[4] However, the County does take issue with the Region's

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[1] Response Brief at 15-18.
[2] AR at 76-77 (RTC at 30-31, Response to Comments 11a and 11b).
[3] County of Amador Petition at 2-4.
[4] Id.

citation to *Mille Lacs*, arguing that the Board's decision in *Mille Lacs* relates solely to trust lands and, thus, does not support EPA's jurisdiction on fee-owned land.[5] The intent of footnote 39 of the Region's Response Brief was to address any potential implication in the County's argument that prior EAB precedent supports distinguishing – for purposes of EPA's permitting authority – land within Indian reservations based on fee-owned or trust status, and to add the Board's *Circle T Feedlot* decision as additional relevant precedent. Notwithstanding the Region's inadvertent quotation of language from EPA's brief in *Circle T Feedlot*, it nonetheless remains that the EAB's decision in that case unequivocally recognizes EPA's NPDES jurisdiction throughout Indian country, which by definition includes fee-owned land within Indian reservations. See *Circle T Feedlot*, slip op. at 23-29; see also *Mille Lacs*, 11 E.A.D. at 366-67. Notably, in *Circle T Feedlot* the petitioners explicitly argued that fee lands within the boundaries of an Indian reservation are not "Indian country" – and are thus outside of EPA's jurisdiction – for purposes of NPDES permitting. The EAB rejected that argument and held, in pertinent part, that EPA had neither erred nor abused its discretion in determining that the fee-owned properties at issue were within Indian country for purposes of the NDPES permitting regulations. *Circle T Feedlot*, slip op. at 25. As the Board observed, "the term 'Indian country' as used in EPA's regulations and 18 U.S.C. § 1151 clearly and explicitly includes within a reservation's boundaries that land for which a fee patent has been issued..." Id. at 26-27.

A similar issue had been raised in *Mille Lacs* but was ultimately eliminated by virtue of the relevant land having been taken into trust by the United States during the pendency of the initial permit appeal. See *Mille Lacs*, 11 E.A.D. at 359-62 (providing background on the permitting and appeal proceedings in that case). Following a remand, EPA Region 5 issued a

[5] Id. at 3.

new permit and included the trust status of the land as a new basis (upon which the Board ultimately based its decision) supporting the Indian country status of the land and EPA's NPDES permitting jurisdiction. However, the fact that the relevant area in *Mille Lacs* was taken into trust does not affect the Board's clear recognition that EPA's authority extends throughout Indian country, which is defined to include fee-owned lands within Indian reservations. Id. at 366-67. This is the point – and one that is well-settled – for which the Region cited *Mille Lacs* in its Response to Comments and *Circle T Feedlot* in its Response Brief. The Region's inadvertent quotation from a prior EPA brief in no way alters the EAB's clear precedent on the scope of EPA's NPDES authority throughout Indian country, including all lands within the boundaries of an Indian reservation regardless of ownership.[6]

Accordingly, contrary to the County's assertion, the error in footnote 39 of the Region's Response Brief does not raise any new issues, and the Region's correction of that error will resolve any questions raised in the County's first argument. For this reason the Region does not believe there are any grounds to grant the County's Motion with respect to its first argument. However, as noted above, if the Board decides that further information is needed or that other additional procedures to correct the error in the Response Brief are warranted, the Region respectfully requests an opportunity to submit further briefing.

II. The County's Second Argument Should Not be Considered Because the County Failed to Include it in the County's Petition for Review

The Board should also deny the County's Motion on its second argument. Although the County characterizes the Region's legal argument concerning the reservation and Indian country

[6] Although still somewhat uncertain, it appears that the County may not actually dispute the scope of EPA's permitting authority in Indian country (including fee-owned land within an Indian reservation). Instead, the Motion appears to more distinctly focus on an argument that EPA lacks jurisdiction because (as alleged by the County) the facility is both on fee-owned land and not within the boundaries of an Indian reservation. See Motion at 6. As noted above, it may therefore be the case that the parties agree on the point for which *Mille Lacs* and *Circle T Feedlot* are cited and that the principal disagreement relates instead to the issue of whether the Buena Vista Rancheria has Indian reservation status, which is the subject of the County's second argument in the Motion.

status of the Rancheria as a new issue, this is merely a veiled attempt by the County to itself raised, for the first time, an issue that it failed to include in its Petition for Review, and it should, therefore, be disallowed.

Among the comments submitted by the County during the public comment period on the draft permit was an assertion that the Buena Vista Rancheria does not qualify as an Indian reservation (or Indian country) and is thus outside the scope of the Region's NPDES permitting authority.[7] In its response to comments, the Region cited to valid federal court precedent – to which the County was a party – that unequivocally affirms the Indian country and Indian reservation status of the Rancheria. *Hardwick v. United States*, No. C-79-1710 SW (N.D. Cal. Dec. 22, 1987).[8] The Region also included in the record a determination by the National Indian Gaming Commission ("NIGC") that provides a helpful discussion regarding the land status history of the Rancheria and finds, based on the same federal court precedent, that the Rancheria is an Indian reservation.[9]

Nowhere in its Petition does the County address the Region's response to comment citing to the *Hardwick* adjudication determining the Indian reservation/Indian country status of the Rancheria.[10] The County's own failure to address the Region's response to comments or to

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[7] County Petition at 2-4.

[8] AR at 76-77 (RTC at 30-31, Response to Comments 11a and 11b) . In the RTC, the Region cited to May 14, 1987, the date the Stipulation for Entry of Judgment (Amador County) ("Stipulation") in the *Hardwick* adjudication was filed with the Clerk rather than December 22, 1987, the date the Order for Entry of Judgment as to Madera and Amador Counties ("Order for Entry") was signed. AR at 1293-1300 (copy of *Hardwick* Order for Entry; and Stipulation).

[9] AR at 1047-1058 (Letter dated June 30, 2005, from Penny J. Coleman, Acting General Counsel, NIGC, to Judith Kammins Albietz, Esq.).

[10] Instead, the County's Petition mistakenly argued that the Region's only support for the reservation status of the Rancheria is the Region's citation to the Board's *Mille Lacs* decision in the response to comment document. See County of Amador Petition at 3. Quite to the contrary, as described above the Region cited *Mille Lacs* for the unremarkable proposition that EPA's permitting authority extends throughout Indian lands, which the Agency treats as equivalent to Indian country. By contrast, the relevant precedent demonstrating that the Buena Vista Rancheria is both Indian country and an Indian reservation rests in the *Hardwick* judgment. It is notable that the County's Petition acknowledges the Region's citation to *Mille Lacs* and to the NIGC determination, but ignores the relevant dispositive authority – an adjudication to which the County was a party.

discuss the relevant precedent in its Petition cannot now be remedied by characterizing the Region's further discussion of this precedent in the Response Brief as a new issue warranting an opportunity for reply.[11]

Issues not clearly included in a Petition for Review should not be allowed to be raised in a reply brief. Indeed, the Board recently held, in a case where a petitioner's reply brief similarly claimed that it was responding to new arguments raised by the Region in that case, that "to the extent that some of these arguments [in a reply] raise substantive nuances that are not set forth in the petition..., they constitute, in essence, "late-filed appeals" because they could have been raised in the petition but were not so raised." *In re Keene Wastewater Treatment Plant*, NPDES Appeal No.07-18, slip.op. at 20 (EAB March 19, 2008).

Because the Response Brief raises no new issue on the Rancheria's reservation and Indian country status, the County's Motion should be denied on this point. However, should the Board feel that additional information would be helpful, the Region respectfully requests an opportunity to submit further briefing on this issue.

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[11] The Region also notes that the County's arguments in its Motion relating to principles of federal Constitutional law make little sense in the context of the Hardwick judgment. Although (as described in helpful detail in the NIGC determination) the Rancheria's history is complex, the relevant judgments in Hardwick are not. In its 1987 judgment (which follows on a prior 1983 judgment), the district court in Hardwick unequivocally held (upon stipulation of the parties) that the Buena Vista Rancheria was an Indian reservation and Indian country and that certain federal actions purportedly terminating the Rancheria and the reservation status of its lands were invalid. The district court was entirely competent to adjudge that the termination actions had failed to meet applicable requirements and to invalidate such actions, thus reinstating the reservation status of the Rancheria. This is precisely the role that federal courts play in reviewing a wide variety of federal actions, including actions relating to the status of Indian reservations. This is also precisely the process stipulated to by the parties (including the United States) to the 1983 judgment, as well as by the parties (including the County) to the 1987 judgment. Nowhere does the Region's Response Brief suggest that it was the district court (or, even more oddly, the County) that was establishing the Rancheria's land status in the first instance. The Rancheria was established as reservation land by Acts of Congress in the early part of the twentieth century. The court simply adjudicated that certain subsequent acts purporting to alter that status had failed to meet relevant requirements and were thus ineffective. As for the County's role, the fact that it explicitly stipulated to the court's judgment in Hardwick (and agreed in that judgment to the Rancheria's reservation status) is significant not for creating the legal status of the Rancheria – which the Region agrees the County has no power to do – but for the glaring inconsistency of those adjudicated commitments with the arguments advanced by the County in this appeal.

For the foregoing reasons, the Region respectfully requests that the EAB: (1) deny the County's Motion for Leave to File Reply Brief; and (2) grant the Region's Motion to File a Corrected Brief (as attached hereto).

Respectfully submitted,

Dated: October 18, 2010

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CERTIFICATE OF SERVICE

I hereby certify that the original EPA Region IX's Opposition to Petitioner Amador County's Motion for Leave to File Reply Brief and Motion for Leave to File Corrected Response Brief (signed copy) *In the Matter of Buena Vista Rancheria Wastewater Treatment Plant, NPDES Appeal No. 10-05 - 10-07 & 10-13*, were filed electronically with the Environmental Appeals Board and copies were e-mailed to:

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