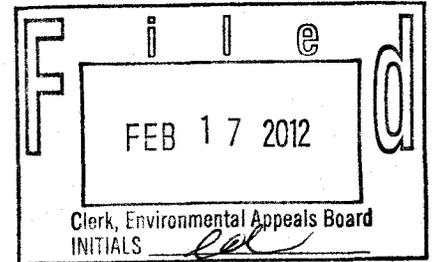


**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)
)
MHA Nation Clean Fuels) NPDES Appeal Nos. 11-03
Refinery)
)
NPDES Permit No. ND-0030988)



ORDER DISMISSING PETITION IN PART

On September 12, 2011, Petitioners in the above-captioned matter, the Environmental Awareness Committee, Ms. Jodie White, Ms. Theodora Bird Bear, and Ms. Joletta Bird Bear (collectively referred as "EAC"), filed a petition seeking review of a National Pollutant Discharge Elimination System ("NPDES") permit decision (the "Permit") issued by U.S. Environmental Protection Agency Region 8 (the "Region") to The Three Affiliated Tribes, Mandan, Hidatsa, and Arikara Nation (collectively known as "MHA Nation"). EAC's petition challenges parts of the National Environmental Policy Act ("NEPA") review the Region conducted, pursuant to CWA § 511(c)(1), 33 U.S.C. § 1371(c)(1), and its implementing regulations codified at 40 C.F.R. § 122.29(c)(1), and some of the effluent limitations established in the Permit. *See* Petition for Review by Environmental Awareness Committee, Ms. Jodie White, Ms. Theodora Bird Bear, and Ms. Joletta Bird Bear ("EAC Petition") at 8-17 (NEPA challenges); 17-21 (challenges to NPDES permit conditions).

Among other objections to the permit, EAC challenges certain permit limits for Outfall 002, and requests that the Board remand the permit to "allow the [A]gency to correct these permit limits." EAC Petition at 20-21. Specifically, EAC challenges the effluent limitations for biological oxygen demand (BOD), total suspended solids (TSS), chemical oxygen demand

(COD), oil and grease, and total chromium¹ applicable to Outfall 002.

On November 22, 2011, the Region informed the Board of the withdrawal of portions of the permit. *See* Letter from James B. Martin, Regional Administrator EPA Region 8, to Eurika Durr, Clerk of Environmental Appeals Board, (Nov. 21, 2011). Specifically, the Region withdrew the effluent limitations for BOD, COD, TSS, phenolic compounds, oil and grease, and total chromium applicable to Outfall 002. *See id.* In its response to the petitions the Region explains that the withdrawal of the effluent limitations “was published in a public notice in the New Town News and Dickinson Press on November 2, 2011; and in the Williston Herald, Bismarck Tribune, and Minot Daily News on November 28, 2011.” EPA Region 8’s Response to Consolidated Petitions for Review (“Region’s Response”) at 10. The Region also explains that it prepared a new draft permit with the new effluent limitations, and made it available for public review and comments. *Id.* The public comment period for this modification was scheduled to end January 26, 2012. *Id.*

Section 124.19 authorizes the Regional Administrator, to withdraw a permit or portions of a permit at any time prior to the rendering of a decision to grant or deny review. 40 C.F.R. § 124.19(d) (“The Regional Administrator, at any time prior to the rendering of a decision under paragraph (c) of this section to grant or deny review of a permit decision, may, upon notification to the Board and any interested parties, withdraw the permit and prepare a new draft permit under § 124.6 addressing the portions so withdrawn.”). The withdrawal of a contested permit condition has the effect of rendering moot any challenges to such condition. *See, e.g., In re Powertech*

¹ EAC also argues that the Region failed to include an effluent limitation for sulfides. *See* EAC Petition at 20-21. This order does not address this particular challenge.

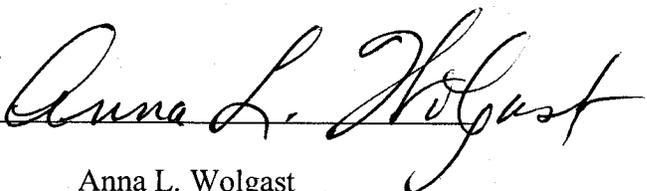
(USA) Inc., UIC Appeals No.11-01 & 11-02 (EAB Feb. 9, 2011) (Order Dismissing Petitions for Review) (concluding that permit issuer's withdrawal of the permit rendered the petitions challenging the permit moot); *In re City of Twin Falls Wastewater Treatment Plant*, NPDES Appeal No. 09-13 (EAB Mar. 10, 2010) (Order Dismissing Petition) (dismissing petition as moot after withdrawal of challenged permit condition); *In re City of Marlborough Westerly Wastewater Treatment Facility*, NPDES Appeal Nos. 10-01, 10-02 & 10-03 (EAB Mar. 2, 2010) (Order Dismissing Petitions for Review) (same).

In light of the above, with the challenged permit conditions now withdrawn, the Board dismisses, on mootness grounds, the portions of the EAC petition that relate to such conditions. Still pending for Board resolution are the challenges EAC raises to the NEPA analysis and any other challenge to the NPDES permit that does not relate to the withdrawn permit conditions.

So Ordered.²

ENVIRONMENTAL APPEALS BOARD

By:



Anna L. Wolgast
Environmental Appeals Judge

Dated:

February 17, 2012

² The panel deciding this matter is comprised of Environmental Appeals Judges Charles J. Sheehan, Kathie A. Stein, and Anna L. Wolgast.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **Order Dismissing Petition in Part** in the matter of *MHA Nation Clean Fuels Refinery*, NPDES Appeal No. 11-03, were sent to the following persons in the manner indicated:

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Dated: FEB 17 2012



Annette Duncan
Secretary