



## **I. INTRODUCTION**

On August 3, 2011, the Region issued the Record of Decision (“ROD”) documenting the U.S. Environmental Protection Agency Region 8 (“Region”)’s decision to issue a Clean Water Act (“CWA”) National Pollutant Discharge Elimination System (“NPDES”) Permit (“Permit”) under CWA § 402, 33 U.S.C. §1342, to the Three Affiliated Tribes, Mandan, Hidatsa, and Arikara Nation (“MHA Nation” or “Tribes”) of the Fort Berthold Indian Reservation (“Reservation”) for wastewater discharges associated with the operation of an oil refinery. The Region issued the ROD pursuant to the National Environmental Policy Act (“NEPA”) 42 U.S.C. § 4321 et seq., the Council on Environmental Quality (“CEQ”) regulations, 40 C.F.R. Parts 1500-1508, and the EPA’s regulations implementing NEPA at 40 C.F.R. Part 6. EPA MHA-011387 to 011408. On August 4, 2011, the Region issued the NPDES Permit. The permit authorized the MHA Nation to discharge pollutants from a point source into waters of the U.S. in accordance with the conditions listed in the Permit. On November 22, 2012, EPA withdrew certain effluent limits, which EPA then revised and re-proposed for public comment. EPA has not yet finalized these re-proposed limits.

On April 9, 2012, Tim Gray, Plaza Township Supervisor, filed a Petition for Review (“Petition”) with the Environmental Appeals Board (“EAB” or “Board”) regarding the issuance of the NPDES permit and the sufficiency of the NEPA analysis prepared as part of the permit issuance. On April 13, 2012, in response to an April 12, 2012 inquiry from the Region regarding whether the Region should prepare a response to Mr. Gray’s petition, the Region received an electronic mail message from Ms. Eurika Durr, Clerk of the Board, stating “the Board would welcome a filing on the issue whether they are out of time and whether the rationale for filing late was adequate.” On April 17, 2012, in response to an April 16, 2012 inquiry from the Region

regarding a deadline for filing a response, the Region received an electronic mail message from Ms. Eurika Durr, Clerk of the Board, stating “[p]lease file a response no later than April 30, 2012.”<sup>1</sup>

Mr. Gray’s petition is not timely, and has failed to demonstrate special circumstances warranting delay. Moreover, to the extent that Mr. Gray’s petition is challenging the re-proposed effluent limits, the petition is not ripe for review, as EPA has not yet finalized such limits. Therefore, for the reasons set forth below, the Board should deny review of Mr. Gray’s petition.

## II. BACKGROUND<sup>2</sup>

From 2003 through 2009, the U.S. Department of the Interior (“DOI”) – Bureau of Indian Affairs (“BIA”) and the Region provided numerous opportunities for public involvement regarding a proposal by the MHA Nation to construct and operate an oil refinery on the Reservation through the NEPA and NPDES processes. *See* Section II of EPA Region 8’s Response to Consolidated Petitions for Review (Dec. 16, 2011). On August 3, 2011, the Region issued the ROD documenting the Region’s decision to issue the NPDES permit to the MHA Nation. EPA MHA-011387 to 011408. The Region issued the ROD after considering the analysis and information set forth in the NEPA documents and other information prepared by the Region and DOI/BIA. EPA MHA-011387. On August 4, 2011, the Region issued the final NPDES permit decision. EPA MHA-01 to 085.

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<sup>1</sup> The Region believes the Board requested briefing solely on the issue of timeliness of the filing. Should the Board choose to consider procedural or substantive issues relating to Mr. Gray’s petition, regarding the substance of the Petition, the Region respectfully requests the opportunity to submit an additional brief on those issues.

<sup>2</sup> This is an abbreviated background discussion regarding the refinery project. A full factual and procedural background discussion can be found in Section II of *EPA Region 8’s Response to Consolidated Petitions for Review* filed with the Board on December 16, 2011 in the consolidated cases NPDES 11-02, 11-03, and 11-04. All references to the administrative record in this response to Mr. Gray’s Petition for Review are to the administrative record filed in the consolidated cases.

Pursuant to 40 C.F.R. § 124.15(a), the Region mailed written notice of the final permit decision to the MHA Nation and the approximately 200 people who had submitted written comments or requested notification of the final permit decision. EPA MHA-011385 to 011386. The mailed written notice indicated that the NPDES permit appeal period for the petitions for review to the Board would begin upon publication of the notice in the Federal Register, which the Region anticipated would occur on August 12, 2011. *Id.* Notice in the Federal Register of the Region's action occurred on August 12, 2011, thus triggering the 30-day permit appeal period provided for by 40 C.F.R. §124.19(a). EPA MHA-010894. Pursuant to the EPA regulations, the permit appeal period closed on September 12, 2011. 40 C.F.R. § 124.20(c).

Three parties filed Petitions for Review of the Permit with the Board in the consolidated petitions numbered NPDES 11-02, 11-03, and 11-04. On November 22, 2011, in accordance with 40 C.F.R. § 124.19(d), the Region provided notice to the Board and interested parties that the Region was withdrawing the effluent limitations for the six parameters for Outfall 002 in the MHA Nation NPDES permit: BOD (biochemical oxygen demand), COD (chemical oxygen demand), TSS (total suspended solids), total chromium, phenolic compounds, and oil and grease. The Region's withdrawal of the effluent limitations was published in a public notice in several area newspapers on November 25, 2011 and November 28, 2011. *See Exhibit B to Region 8's Response to Consolidated Petitions for Review.* The Region prepared new draft effluent limitations for the listed parameters<sup>3</sup> and, as noted in the public notice, made them available at various locations around the project areas and on the Region's website for a 45-day public

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<sup>3</sup> The Region also completed a supplemental information report ("SIR II") which evaluated the significance of the environmental impacts associated with the change in effluent limitations and assessed whether additional compliance with NEPA was required. The Region determined that additional NEPA documentation was not required in light of the change in effluent limitations. *See Exhibit C to Region 8's Response to Consolidated Petitions for Review.*

comment period.<sup>4</sup> *Id.* Initially, the public comment period for the six proposed revised effluent limitations was to end on January 13, 2012. *Id.* At the request of one of the petitioners, the public comment period was extended two weeks until January 26, 2012. Notice of this extension was posted on the Region's website. *See* <http://www.epa.gov/region8/compliance/nepa/mharefinery.html> and <http://www.epa.gov/region8/compliance/nepa/mharefinery.html#renotice>. The Region has not yet finalized the revised effluent limitations.

As noted above, on April 9, 2012, Mr. Gray filed his petition for review with the Board and the Region is filing this response per the Board's request.

### III. SCOPE AND STANDARD OF REVIEW

Pursuant to 40 C.F.R. § 124.19(a), the Board must receive a petition for review within thirty days after a permit decision or at a later date specified in the notice of the permit decision. 40 C.F.R. §124.19(a); *In re. Envotech, L.P.*, 6 E.A.D. 260, 265 (EAB 1996). The petitioner has the responsibility to ensure the filing deadlines are met and the Board must receive the petition within the filing deadline to be timely. *In re. AES Puerto Rico L.P.*, 8 E.A.D. 324, 328-329 (EAB 1999); *In re. Kawaihae Cogeneration Project*, 7 E.A.D. 107, 124 (EAB 1997). The Board considers documents filed on the date it receives them. *In re. Town of Marshfield, Massachusetts*, NPDES Appeal No. 07-03, Order Denying Review (March 27, 2007) at 4 (citing *In re. Puna Geothermal Venture*, 9 E.A.D. 243, 273 (EAB 2000)).

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<sup>4</sup> On December 16, 2011, the Region filed its response to the consolidated petitions in NPDES 11-02, NPDES 11-03, and NPDES 11-04. On February 17, 2012, the Board issued an Order Dismissing in Part the Petition filed in NPDES permit appeal number NPDES 11-02 regarding the challenges to the effluent limitations for BOD, COD, TSS, total chromium, and oil and grease based on the Region's withdrawal and re-notice of these effluent limitations.

Generally, the Board strictly construes threshold procedural requirements and relaxes a filing deadline only when special circumstances exist. *In re. Town of Marshfield, Mass.* at 4-5. “Special circumstances have been found, *inter alia*, in cases where mistakes by the permitting authority have caused the delay or when the permitting authority has provided misleading information. Delays stemming from extraordinary events, such as natural disasters and response to terrorist threats, or from causes not attributable to the petitioner, such as problems with the delivery service, have also led the Board to relax the filing deadline.” *Id.* at 5 (internal citations omitted).

#### IV. ARGUMENT

The Board should deny review of the Petition because it was filed untimely and does not demonstrate special circumstances warranting review in light of its untimely filing. Moreover, if the Petition were challenging the repropose effluent limits (which it is not), the Petition would not be ripe for review, as EPA has not yet finalized these effluent limits.

##### **A. Mr. Gray’s Petition was Filed More Than Seven Months After the Deadline and Cannot Be Considered Timely**

Mr. Gray filed the Petition nearly seven months after the September 12, 2011 deadline for issues related to the Final NPDES permit and NEPA analysis. This cannot be considered timely. Mr. Gray had the responsibility to ensure the filing deadline was met and the Board must receive the petition within the filing deadline to be timely. *In re. AES Puerto Rico L.P.*, 8 E.A.D. 324, 328-329 (EAB 1999); *In re. Kawaihae Cogeneration Project*, 7 E.A.D. 107, 124 n. 23 (EAB 1997). Although Mr. Gray suggests in his petition that the filing deadline was a more recent date (January 26, 2012) – which would still render his petition untimely – this was in fact the deadline for the public comment period on the repropose effluent limits which have not yet been finalized. The deadline for filing a petition with the Board on the NPDES permit (i.e. the

portions that were not withdrawn and repropoed) and the accompanying NEPA analysis was September 12, 2011 and therefore Mr. Gray's Petition was filed untimely. *See In re, Carlota Copper Company*, 11 E.A.D. 692, 735-736 (EAB 2004).

**B. Mr. Gray Has Not Demonstrated Special Circumstances Warranting Late Filing of the Petition**

In addition, the Petition does not demonstrate special circumstances warranting late filing of the Petition. Although the Petition makes reference to Mr. Gray being unaware that the MHA Nation continued to pursue the project, this does not rise to the level of special circumstances that would warrant the Board to grant review of the Petition. Ordinarily, such special circumstances would include a truly significant event such as a hurricane preventing delivery of a petition in a timely manner. Mistakes by the permitting authority may also be considered special circumstances, however that did not occur in the instant case. *See e.g. In re. Town of Marshfield, Mass.* at 5; *In re. AES Puerto Rico L.P.*, 8 E.A.D. at 328-329.

Moreover, the Region has provided ample notice regarding the permit issuance and filing deadlines – and thus any lack of awareness on Mr. Gray's part should not constitute special circumstances warranting late filing. The Region complied with all procedural requirements and over a several year period provided multiple opportunities for public involvement regarding the project. This included informational meetings held by the MHA Nation, public hearings held by the Region and DOI/BIA as well as opportunities for providing written comments on the project, the NPDES permit and the NEPA documentation over a several year period. *See* Section II of EPA Region 8's Response to Consolidated Petitions for Review (Dec. 16, 2011). Mr. Gray's apparent lack of awareness of the issuance of the NPDES permit and ROD does not constitute special circumstances warranting late filing.

**C. To The Extent that Mr. Gray's Petition Challenges the Reproposed Effluent Limits, the Petition is Not Ripe for Review, as EPA Has Not Yet Finalized These Limits**

As discussed above, the Petition points to the January 26, 2012 date as the relevant deadline at issue – which is actually the date for the end of the comment period for the repropose effluent limits. The Petition is not a challenge to these repropose limits. Rather, the Petition raises concern regarding the NEPA analysis accompanying the final NPDES permit. Specifically, Mr, Gray's petition raises issues involving the Environmental Impact Statement and water quantity issues – and specifically indicates that his concern is not with water quality, which is what is addressed by the repropose effluent limits. The Region did not reopen the NEPA analysis or any other portion of the NPDES permit for public comment. Therefore, because the petition involves a challenge to the final NPDES permit – and not the repropose effluent limits – it is subject to the September 12, 2011 deadline for filing a petition for review.

Moreover, even if Mr. Gray's petition were a challenge to the repropose effluent limits – which it is not – the Board should deny review of the petition because it is not ripe for review, as EPA has not yet finalized these repropose effluent limits. *See* 40 C.F.R. § 124.19(a) (permit appeal to Board limited to EPA Region's final permit decision).

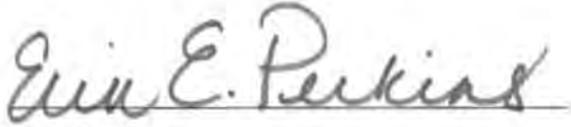
**V. CONCLUSION**

For the reasons described above, the Board should deny the Petition.

4/30/12

Date

Respectfully submitted,



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**Certificate of Service**

I, Tina Artemis, hereby certify that a true and correct copy of the EPA Region 8 Response to Petition of Tim Gray, Plaza Township Supervisor was sent to the persons listed below on April 30, 2012.

Via the Central Data Exchange and U.S. Certified Mail Return Receipt to:

Clerk of the Board  
United States Environmental Protection Agency  
Environmental Appeals Board  
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Via Electronic Mail in PDF Format to:

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April 30, 2012  
Date

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Office of Regional Counsel, EPA Region 8