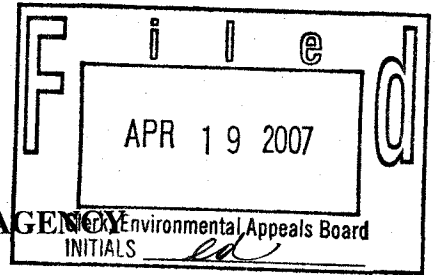


**ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**



_____)
In re:)
)
Village of Pender) NPDES Appeal Nos. 07-05, 07-06,
Waste Water Treatment Facility) & 07-07
)
NPDES Permit No. NE00409098)
_____)

ORDER DISMISSING PETITIONS FOR REVIEW

By motions dated April 12, 2007, United States Environmental Protection Agency (“EPA”) Region 7 (the “Region”) requests that the Environmental Appeals Board (the “Board”) dismiss three petitions for review (the “Petitions”) of the above-captioned National Pollution Discharge Elimination (“NPDES”) permit (the “Permit”). These Petitions were filed by Patrick and Joanne Hoyt, NESKA OIL CORP/the Little Mart;¹ Pamela F. French;² and Gordon F. French³ (collectively, the “Petitioners”).⁴ The Region argues that the Board should dismiss the Petitions because the Petitioners failed to meet the threshold procedural requirements specified in 40 C.F.R. § 124.19(a). Specifically, the Region alleges that the Petitioners did not submit

¹ NPDES Appeal No. 07-05

² NPDES Appeal No. 07-06

³ NPDES Appeal No. 07-07. As to this “petition,” filed by Gordon French, it is highly questionable whether it even constitutes a petition for review, since it is nothing more than an envelope enclosing a newspaper article with no accompanying letter or comments whatsoever. However, we will treat it as a petition for purposes of this Order.

⁴ Although the Region filed three separate Motions to Dismiss Petition for Review (“Motions to Dismiss”), because the Motions to Dismiss each request dismissal on the same grounds in largely identical terms, the Board addresses all three Motions to Dismiss in this Order.

comments or participate in public hearings on the Permit, and that the Petitions fail to state with sufficient specificity the reasons supporting review. *See* Motions to Dismiss at 1; *see also* 40 C.F.R. § 124.19(a).⁵

As background, the Region explains the history of the issuance process for this Permit. First, according to the Region, the State of Nebraska proposed to issue a permit to the Village of Pender, Nebraska, Waste Water Treatment Plant (“Pender”), in 1997. The Region objected, and, after a public comment period and public hearing, the Regional Administrator issued a decision and response to comments, affirming that EPA, not the State of Nebraska, is the proper permitting authority for the Pender NPDES permit. The Region made this determination pursuant to Section 402 of the Clean Water Act (“CWA”), 33 U.S.C. § 1342, and the regulations thereunder, particularly 40 C.F.R. § 123.1(h), which authorizes EPA to administer the NPDES program on Indian lands if a state (or Indian Tribe treated as a state) does not seek or have authority to regulate CWA activities on Indian lands.

The Region proposed a draft permit for Pender in 2002, and provided a public comment period. Based on public comments, the Region withdrew the draft permit in order to reconsider

⁵ Only persons who filed comments on a draft permit or participated in the public hearing may petition the Board to review a condition of a permit decision. Persons who failed to file comments or participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit. Moreover, petitions must include a statement of the reasons supporting review, including, when appropriate, a showing that the condition in question is based on a clearly erroneous finding of fact or conclusion of law, or an exercise of discretion or an important policy consideration which the Board should, in its discretion, review. 40 C.F.R. § 124.19(a).

its proposed effluent limitations. In 2006, the Region proposed a new Draft Permit for Pender, and held a public comment period. The Region subsequently issued the final Permit on January 16, 2007. The Permit authorizes a discharge of treated domestic wastewater from a community of 1,150 people to waters within the Omaha Reservation.

Also on January 16, 2007, the Region issued a detailed response to the one set of comments received on the Draft Permit, and determined that the comments did not warrant making any changes to the Draft Permit. Accordingly, the final Permit and the Draft Permit are identical. At no point in the permitting process, according to the Region, did the Petitioners file comments or participate in a public hearing. Moreover, nothing in the Petitions indicates that any of the Petitioners previously filed comments or participated in a public hearing.


The rules governing this proceeding limit who may appeal a final permit. Under 40 C.F.R. § 124.19(a), “[a]ny person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent of the changes from the draft to the final permit.” The Board has explained that this requirement is imposed to “ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final.” *In re Envotech L.P.*, 6 E.A.D. 260, 266-67 (EAB 1996) (quoting *In re Beckman Prod. Serv.*, 5 E.A.D. 10, 16 (EAB 1994)). In this case, the Petitioners have not claimed that they provided comments during the public comment period or participated in a public hearing, and, as the Region points out, the record rather indicates that Petitioners did not participate as required. Further, there were no changes from the draft to the

final Permit decision. Accordingly, Petitioners do not have standing to file the instant Petition. Therefore, the Petitions are dismissed with prejudice.⁶

So ordered.⁷

ENVIRONMENTAL APPEALS BOARD

Dated: April 19, 2007

By: 
Edward E. Reich
Environmental Appeals Judge

⁶ As mentioned previously, the Region also argues that the Petition should be dismissed because Petitioners fail to state with sufficient specificity a basis for review. Because Petitioners do not have standing to bring this appeal, the Board does not reach this argument.

⁷ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Anna L. Wolgast. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER DISMISSING PETITIONS FOR REVIEW in the matter of Village of Pender Waste Water Treatment Facility, NPDES Permit No. NE00409098 , NPDES Appeal Nos. 07-05, 07-06, and 07-07 were sent to the following persons in the manner indicated.

By Certified U.S. Mail,
Return Receipt Requested

Patrick and Joanne Hoyt
Neska Oil Corp./The Little Mart
4th and Witney Sts.
Pender, NE 68047

Pamela F. French
847 17rd
Pender, NE 68047

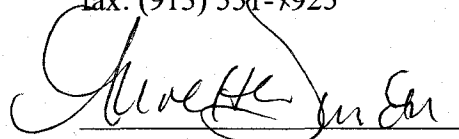
Gordon F. French
847 17rd
Pender, NE 68047

Village of Pender
901 S. Slaughter
Pender, NE 68047

By EPA Pouch Mail
(and facsimile)

Jane Kloeckner
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7
901 North 5th St.
Kansas City, KS 66101
fax: (913) 551-7925

Dated: APR 19 2007


Annette Duncan
Secretary