



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

APR 11 2007

U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Re: NPDES Appeal No. 07-05
NPDES Permit No. NE0040908
Village of Pender, Nebraska

Dear Ms. Durr:

Enclosed please find the original of Respondent's Motion to Dismiss Petition for Review in the above-captioned case, as well as a certificate of service. The motion and the certificate of service have also been mailed to Petitioners and the Facility today. In lieu of five additional paper copies for the Board, electronic copies of each document have been posted to the CDX system.

Sincerely,

A handwritten signature in cursive script that reads "Jane Kloeckner".

Jane Kloeckner
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7
913-551-7235
Fax: 913-551-7925

In re: Village of Pender, Nebraska
NPDES Appeal No. 07-05

CERTIFICATE OF SERVICE

I, Jane Kloeckner, hereby certify that copies of the foregoing Respondent's Motion to Dismiss Petition for Review were sent on this 11th day of April, 2007, to the following persons in the manner described below:

Original by Federal Express
Copy posted to the CDX electronic
system


U.S. Environmental Protection Agency
Clerk of the Board
Environmental Appeals Board
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Copy by Federal Express

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

To the Village of Pender
901 S. Slaughter
Pender, NE 68047

Dated: 4/11/07


Jane Kloeckner

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
U.S. ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:

NPDES Permit for Village of Pender
Waste Water Treatment Facility
Permit No. NE00409098

Appeal No. NPDES 07-05

MOTION TO DISMISS PETITION FOR REVIEW

The United States Environmental Protection Agency (the "EPA"), Region 7 (the "Region") requests that the Environmental Appeals Board (the "Board" or "EAB") dismiss the petition filed by Patrick and Joanne Hoyt, NESKA OIL CORP/the Little Mart, (the "Hoyt Petition").

The Board should dismiss this Petition for failure to meet the threshold procedural requirements specified in the EPA regulations at 40 C.F.R. Section 124.19(a).

Specifically, the Board should dismiss the Hoyt petition because the Petitioners did not submit comments or participate in the public hearings, and because the Petition fails to state with sufficient specificity the reasons supporting review, including a showing that the permit in question is based on a clearly erroneous question of law or fact or an important policy consideration. If the Board declines to grant this Motion to Dismiss, the Region requests that the Board grant 45-days from the date of notice of the Board's decision to submit a Response to Petition based on substantive issues as the Board directs.

I. INTRODUCTION

On January 16, 2007, the Region issued a final permit decision for a National Pollution Discharge Elimination System ("NPDES") permit to the Village of Pender, Nebraska, Waste Water Treatment Facility (the "Pender WWTP"), Permit No. NE00409098 (Exhibit A). This NPDES Permit authorizes a discharge of treated domestic wastewater from a community of 1,150 people to waters within the Omaha Reservation. The Region issued the Pender WWTP permit pursuant to Section 402 of the Clean Water Act ("CWA"), 33 U.S.C. § 1342, and regulations thereunder including 40 CFR Section 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.

Three petitions have been filed with the Environmental Appeals Board (the "Board") requesting review of the final permit. The Region is responding herein to the petition for review filed on February 12, 2007, by Patrick and Joanne Hoyt, NESKA OIL CORP/the Little Mart, Appeal No. NPDES 07-05 (the "Hoyt Petition").¹ For the reasons set forth below, EPA respectfully requests that the Board dismiss this petition for review.

¹ The other petitions were filed on February 20, 2007, Pamela F. French (Appeal No. NPDES 07-06) and on February 20, 2007, Gordon F. French (Appeal No. NPDES 07-07). The Region is responding to each of those petitions separately. The Region is filing a certified copy of the administrative record index for the Permit (Exhibit B). The Region is making a consolidated submittal of copies of Exhibits for all three petitions requesting appeal.

II. BACKGROUND

In the process of issuing this Permit, the Petitioners had three opportunities to comment on EPA's decision, yet did not do so. In 1997, the State of Nebraska proposed to issue the Pender WWTP permit. The Region objected on the grounds that the federal government should be the permitting authority because the State of Nebraska lacks authority to implement the NPDES program in Indian country. The Region held a public comment period and also held a Public Hearing at the Omaha Reservation on March 31, 1999. The Nebraska Department of Environmental Quality (NDEQ) and some citizens commented that the state should issue the permit. The Hoyt Petitioners did not make any comments at the public hearing and did not submit any written comments. After considering the record and the comments, the Regional Administrator issued a decision and a response to comments, affirming that EPA is the proper permitting authority for the Pender NPDES permit. See Administrative Record, Tab D-1.

The Region proposed a draft permit for the Pender WWTP in 2002, and provided a public comment period. Commenters suggested changes to the effluent limitations and requested that the state continue issuing permits. Again, the Hoyt Petitioners did not submit comments. The Region withdrew this draft permit in order to reconsider the proposed effluent limitations. The Region conducted site visits and analysis of the receiving water body, and revised the permit.

In 2006, the Region proposed a new Draft Permit for the Pender WWTP facility. The Region held a public comment period on the Draft Permit in September 2006. Only

one person, Ms. Teri Lamplot, County Supervisor, submitted comments on the Draft Permit during the public comment period in 2006. Ms. Lamplot commented that the state should issue the permit and questioned whether the Pender WWTP is within the boundaries of the Omaha Reservation. *See* Administrative Record, Tab F-3. (Exhibits C). Ms. Lamplot did not file a Petition for Review. Petitioners did not submit comments during the 2006 comment period on the Draft Permit.

The Region issued the Final Permit on January 16, 2007. (Exhibit A). At the same time, the Region issued a detailed response to Ms. Lamplot's comments, concluding that the Pender WWTP is within the boundaries of the Omaha Reservation. (Exhibit D, Response to Comments). The Region determined that Ms. Lamplot's comments did not warrant making any changes to the permit. The Final Permit and the draft Permit are identical. The Hoyt Petition was filed on February 12, 2007.

III. ARGUMENT

A. **Petitioners Mr. and Mrs. Hoyt, NESKA OIL CORP/the Little Mart, Lack Standing to Raise Any of the Issues in Their Petition Because They Did Not Submit Comments During the Comment Period and Did Not Participate in Any Public Hearing**

The regulation governing appeals of NPDES permit decisions clearly limits who may appeal:

Any 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.

40 C.F.R. Section 124.19(a). This appeal petition is the first instance that the Hoyt Petitioners have participated in the Pender WWTP Permit proceedings. The Hoyt

Petitioners made no comment during the Draft Permit comment period in September 2006, no comment during the draft permit comment period in 2002, and no comment during the March 31, 1999, comment period and Public Hearing on EPA's objection to the NDEQ's proposed permit.

The Environmental Appeals Board has consistently held that standing to appeal a final permit determination is limited under section 124.19(a) to those persons who participated in the permit process leading up to the permit decision, either by filing comments on the draft permit or by participating in the public hearing. See Avon Custom Mixing Services, Inc., 10 E.A.D. 700, 705 (EAB 2002); see also, In re American Soda LLP, 9 E.A.D. 280, 288-89 (EAB 2000); In re Envotech, L.P., 6 E.A.D. 260, 266-267 (EAB 1996); In re Beckman Prod. Serv., 5 E.A.D. 10, 16 (EAB 1994); and, In re Avery Lake Prop. Owners Ass'n., 4 E.A.D. 251, 253 (EAB 1992). This requirement is imposed in order to "ensure that the Region has an opportunity to address potential problems with the draft permit before the permit becomes final." See In re Beckman Production Services, 5 E.A.D. 10, 16 (citations omitted), quoted in In re Envotech L.P. (Milan, Michigan), 6 E.A.D. 260, 266-67 (EAB 1996)(seven petitions for appeal dismissed for lack of standing).

Although the regulations allow a person who failed to file comments on the draft permit to petition for review to the extent of the changes from the draft to final permit decision, this does not allow for review in this matter, as the Final Permit is identical to the Draft Permit.

Petitioners Hoyt failed to participate in the permit process until after the final decision was issued. Therefore, pursuant to 40 C.F.R. Section 124.19(a), they lack standing to appeal the decision. Accordingly, their Petition should be dismissed.

B. Petitioners Hoyt Fail to State With Sufficient Specificity a Basis for Review, Including a Showing that Their Permit is Based on Clearly Erroneous Findings of Fact or Conclusions of Law or Important Policy Consideration

In order to merit review by the Board, a petition for review must:

... include a statement of the reasons supporting that review, including a demonstration that any issues being raised were raised during the public comment period (including any public hearing) to the extent required by these regulations and when appropriate, a showing that the condition in question is based on:

- (1) a finding of fact or conclusion of law which is clearly erroneous, or
- (2) an exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.

40 C.F.R. § 124.19(a). As the Board has previously noted, the petitioner bears the burden of demonstrating that review is warranted. See In re Environmental Waste Control, Inc., 5 E.A.D. 264, 266, RCRA Appeal No. 92-39 (EAB, May 13, 1994); In re Amoco Oil Company Mandan North Dakota Refinery, 4 E.A.D. 954, 957, RCRA Appeal 92-21 (EAB November 23, 1993). The Board has further noted that “this power of review should be only sparingly exercised” and “most permit conditions should be finally determined at the Regional level.” See In re Environmental Waste Control, Inc., 5 E.A.D. 264, 266 quoting 45 Fed. Reg. 33412 (May 19, 1980). See also, In re Ross Incineration Services, Inc., 5 E.A.D. 813, 816, RCRA Appeal No. 92-3 (EAB April 21, 1995). The Board has also recognized that “a petition for review must specifically * * * demonstrate why review is warranted.” See In re LCP Chemicals-New York, 4 E.A.D. 661, 665 n.9 (EAB 1993), quoted in EAB Practice Manual, 32 (2004).

1. Lack of Specificity

The Hoyt Petition consists of one paragraph, which reads as follows:

To whom it may concern:

We object to the Federal Governmental Agency of EPA issuing Wastewater Permits and well monitoring in Pender, NE.

The Nebraska State DEQ should again have priority over it's [sic] citizens. The town of Pender, NE. Is NOT located on any reservation as stated in the 1882 Act of Congress Land cession as listed in the U.S. Serial Set, Number 4015, 56th Congress, 1st Section. This Act supersedes all original treaties and maps. Please revise and return our governing back to the State.

That is the entire petition. It contains no statement or explanation of reasons supporting review. It contains no reference to comments submitted during the public comment period. It fails to explain how any issue in the Petition was also raised during the public comment period (including any public hearing) as required by 40 C.F.R. Section 124.19(a). In sum, the bald allegations in this one paragraph petition are not sufficiently specific or substantiated to warrant review by the Board. See Avon Custom Mixing Services, Inc., 10 E.A.D. 700, 708 (EAB 2002).

Although the Board endeavors to construe objections broadly, particularly when filed by persons unrepresented by legal counsel, the Hoyt Petition is so lacking in specificity that the Petitioners have simply provided the Board with no basis to review. Thus, the Hoyt Petition should be dismissed. See In re Envotech L.P. (Milan, Michigan), 6 E.A.D. at 268-69 (petitions for appeal dismissed for lack of specificity).

2. Failure to Demonstrate Clearly Erroneous Findings of Fact or Conclusions of Law or Important Policy Considerations

The Petition does not assert, much less demonstrate, that the permit at issue is based on a clearly erroneous question of law or fact, or an important policy consideration, as required by 40 CFR 124.19(a)(1) and (2). Petitioners Hoyt assert without any

substantiation that, “[T]he town of Pender, NE. is NOT located on any reservation as stated in the 1882 Act of Congress Land cession...” The Region fully considered this issue, which was raised during the comment period. (Exhibit C). The Region responded in detail to that question in the Response to Comments finding that Pender is within the boundaries of the Omaha Reservation. (Exhibit D). The Hoyt Petition contains no discussion whatsoever as to why Petitioners believe that the Region’s finding is erroneous or otherwise warrants review. Bald statements that merely reiterate comments raised during the public comment period do not meet the requirements of 40 C.F.R. § 124.19(a). As the Board has previously stated in In re Essex County (N.J.) Resource Recovery Facility,

Ironbound “merely repeats comments it made on the draft permit without explaining how or why [the permit issuer’s] responses to the comments are inadequate, and thereby fails to comply with the requirements of 40 C.F.R. § 124.19.” In the Matter of Hadson Power 14 - Buena Vista, PSD Appeal Nos. 92-3, 92-4 and 92-5, at 46 n.59 (EAB, Oct. 5, 1992).

* * *

It is not enough for a petitioner to rely on previous statements of its objections, such as comments on a draft permit; a petitioner must demonstrate why the Region’s response to those objections (the Region’s basis for its decision) is clearly erroneous or otherwise warrants review (citations omitted) (emphasis added).

5 E.A.D. 218, 227 PSD Appeal No. 93-10 (EAB April 18, 1994). See In re NPDES Permit for Wastewater Treatment Facility of Union Township, slip op. at 11-13, (“It is well established that ‘in order to establish that review of a permit is warranted, § 124.19(a) requires a petitioner to both state the objections to the permit that are being raised for review, and to explain why the Region’s previous response to those objections * * * is clearly erroneous or otherwise warrants review.’ *Puerto Rico Elec.*, 6 E.A.D. at 255

(emphasis added). Such an explanation is essential to a meaningful evaluation of whether the permitting authority, in considering the body of information before it -- including the response to comments -- was clearly erroneous in rendering its decision.”)

Petitioners’ failure to meet the threshold procedural requirement to demonstrate any clearly erroneous finding of fact or conclusion of law or important policy considerations in the Region’s response to someone else’s comments requires denial of their petition for review. This Petition provides no discussion whatsoever as to why the Region’s decision not to change the Draft Permit in response to comments raised during the public comment period is erroneous or otherwise warrants review.

Petitioner Hoyt’s sole basis for this Permit appeal is an issue that was previously raised by another commenter and considered and fully responded to by the Region as part of the final Permit decision. Since Petitioners Hoyt have offered no explanation whatsoever as to why or how the Region’s decision constitutes a clearly erroneous finding of fact or conclusion of law or important policy considerations, Petitioners Hoyt have failed to meet the threshold requirement necessary to merit review of EPA’s permit decisions by the Board. Thus, the Board should decline to review this petition. *See* 40 C.F.R. Section 124.19(a)(1) and (2); In re Essex County, 5 E.A.D. at 218.

IV. CONSOLIDATED EXHIBITS

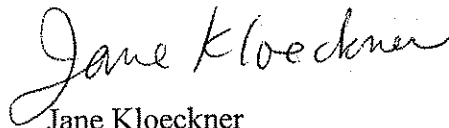
All Exhibits referred to in this Response to Petition for Review, as well as those cited in the other Responses to Petition for Review being filed today (referenced in Footnote 1 above) are found in the “Responses to Petitions for Review Consolidated Submittal of Exhibits.” A separate binder being filed concurrently with this Response to Petition for Review.

V. REQUEST FOR RELIEF

Based on the foregoing reasons, we respectfully request that the Hoyt Petition for review be dismissed. If the Board declines to do so, the Region requests 45 days from the date of notice of the Board's decision to prepare a Response to the Petition and seek the direction of the Board as to substantive concerns for said Response. Nevertheless, the Region has submitted with this Motion to Dismiss the relevant portions of the administrative record and a certified index of the entire administrative record to assist the Board in making its decision on the Region's procedural arguments.

Dated: April 11, 2007

Respectfully submitted,



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List of Exhibits:

- A. NPDES Permit for Village of Pender, Waste Water Treatment Plant
- B. Certified Administrative Record Index for Pender WWTP Final Permit
- C. Comments from Teri Lamplot on Draft Permit
- D. EPA's Response to Comments on Draft Permit

EXHIBIT A

**NPDES PERMIT FOR VILLAGE OF PENDER,
WASTE WATER TREATMENT PLANT**

Village of Pender, NE
Appeal No. NPDES 07-05
Appeal No. NPDES 07-06
Appeal No. NPDES 07-07

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

AUTHORIZATION TO DISCHARGE UNDER THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Village of Pender
Wastewater Treatment Facility
Pender, (Thurston County), Nebraska
NPDES Permit No. NE0040908

In compliance with the provisions of the Clean Water Act, as amended, (33 U.S.C. § 1251, et. seq.; the "Act"), authorization is given to:

Village of Pender
P.O. Box S
Pender, Nebraska 68047

to discharge from an activated sludge wastewater treatment facility located at:

Village of Pender
In Thurston County, Nebraska
Latitude (FLAT) = 42°06'22.3"
Longitude (FLON) = 96°41'37.8"
USGS Hydrologic Basin Code (FHBC) = 10220004
Standard Industrial Code (SIC2) = 4952,

to receiving waters named:

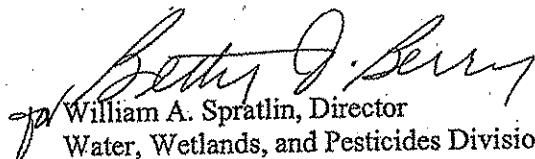
Logan Creek Dredge

in accordance with the discharge points, effluent limitations, monitoring requirements, and other conditions set forth herein. Authorization for discharge is limited to those outfalls specifically listed in this permit.

This permit shall become effective on March 1, 2007.

This permit and the authorization to discharge shall expire at midnight, February 29, 2012.

Signed this 11th day of January, 2007.


William A. Spratlin, Director
Water, Wetlands, and Pesticides Division

PART I - EFFLUENT LIMITATIONS AND MONITORING REQUIREMENTS

A. FACILITY DESCRIPTION

The facility is an activated sludge system, which treats domestic wastewater from 1150 people. Sanitary wastewater generated is collected and flows by gravity into the system. The activated sludge system is operated with a continuous discharge to Logan Creek Dredge. The design flow of the system is 0.165 million gallons per day (MGD). The average flow through the facility is 0.141 MGD.

B. DESCRIPTION OF DISCHARGE POINTS

The authorization to discharge provided under this permit is limited to the outfalls specifically designated below as discharge locations. Discharge at any location not authorized under an NPDES permit is a violation of the Clean Water Act and could subject the person(s) responsible for such discharge to penalties under Section 309 of the Act. Knowingly discharging from an unauthorized location or failing to report an unauthorized discharge within a reasonable time from first learning of an unauthorized discharge could subject such person to criminal penalties as provided under the Clean Water Act.

| <u>Outfall Serial Number(s)</u> | <u>Description of Discharge Point(s)</u> |
|-------------------------------------|--|
| 001 | The discharge is from the activated sludge system to Logan Creek Dredge. Monitoring will be done at the discharge point located after the disinfection system. |

C. SPECIFIC EFFLUENT LIMITATIONS AND SELF-MONITORING REQUIREMENTS FOR OUTFALLS 001

The Permittee is authorized to discharge from Outfall 001 as specified in this permit. The effluent limitations below shall be met on the effective date of this permit.

Outfall 001 - Effluent Limits and Monitoring Requirements:

1. There shall be no discharge of floating solids or visible foam in other than trace amounts.
2. The Permittee shall submit quarterly discharge monitoring reports (DMRs) to EPA as required under Part II, Standard Condition D.4. of this permit. The initial reporting period shall begin upon permit issuance. Monitoring reports shall be submitted on or before the 28th day of January, April, July, and October. In the event no discharge occurs during the quarter, written notification is still required and will consist of an entry of "NO DISCHARGE DURING THIS REPORTING PERIOD" on the DMR. Influent monitoring and reporting requirements identified in Table 2 remain in effect during non-discharging periods.
3. The Permittee shall comply with the effluent limitations and monitoring requirements in Table 1 and the influent monitoring requirement in Table 2, below.
4. All sample collection and analysis under this permit shall be consistent with methods approved under 40 CFR Part 136.

Effluent Limits and Monitoring Requirements

| TABLE 1 - EFFLUENT POLLUTANT PARAMETERS AND MONITORING FREQUENCY | | | |
|--|---|-----------------------|--------------------|
| Effluent Parameter(s) | Limit | Measurement Frequency | Sample Type* |
| Five Day Biochemical Oxygen Demand (BOD ₅) PCS Code = 00310 PCS Unit Code = 19 | Monthly Average -30 mg/L Weekly Average - 45 mg/L | Monthly | Grab |
| Five Day Biochemical Oxygen Demand (BOD ₅) PCS Code = 00310 PCS Unit Code = 26 | Monthly Average -41 lbs/day Weekly Average - 62 lbs/day | Monthly | Grab |
| Total Suspended Solids (TSS) PCS Code = 00530 PCS Unit Code = 19 | Monthly Average - 30 mg/L Weekly Average - 45 mg/L | Monthly | Grab |
| Total Suspended Solids (TSS) PCS Code = 00530 PCS Unit Code = 26 | Monthly Average - 41 lbs/day Weekly Average - 62 lbs/day | Monthly | Grab |
| pH- Standard Units PCS Code = 00400 PCS Unit Code = 12 | 6.5 - 9.0 Standard Units | Monthly | Grab |
| <i>E. coli</i> PCS Code = 51040 PCS Unit Code = 3Z (CFU) | Single Sample Max. 298 cfu/100mL May - September (b) | Monthly | Grab |
| Nitrogen, Ammonia Total as N PCS Code = 00610 PCS Unit Code = 19 | Daily Maximum - 8.2 mg/L Monthly Average - 4.1 mg/L March - October | Monthly | Grab |
| Nitrogen, Ammonia Total as N PCS Code = 00610 PCS Unit Code = 26 | Daily Maximum - 11.3 lbs/day Monthly Average - 5.6 lbs/day March - October | Monthly | Grab |
| Nitrogen, Ammonia Total as N PCS Code = 00610 PCS Unit Code = 19 | Daily Maximum - 25.7 mg/L Monthly Average - 12.8 mg/L November - February | Monthly | Grab |
| Nitrogen, Ammonia Total as N PCS Code = 00610 PCS Unit Code = 26 | Daily Maximum - 35.4 lbs/day Monthly Average - 17.6 lbs/day November - February | Monthly | Grab |
| Total Residual Chlorine PCS Code = 50060 PCS Unit Code = 19 | Monthly Average - 0.009 mg/L Daily Maximum Limit - 0.019 mg/L (c) | Monthly | Grab |
| BOD ₅ Percent Removal PCS Code = 81010 PCS Unit Code = 23 | Monthly Average Minimum of 85% removal | Monthly | Calculation (a) |
| TSS Percent Removal PCS Code = PCS Unit Code = 23 | Monthly Average Minimum of 85% removal | Monthly | Calculation (a) |
| Effluent Flow PCS Code = 50050 PCS Unit Code = 7 | Monitor and Report Gallons per Day | Daily | Flow meter |

*If the facility wishes to submit data from 24-hour composite samples, that would be acceptable.

- a. The Permittee shall use the results of influent and effluent monitoring for BOD₅ during periods of discharge to calculate and report % removal.
- b. A test method has not been approved by EPA for E. Coli in wastewater. Until the permittee receives written notice from EPA to determine compliance based on E. coli, the permittee shall determine compliance with the bacteria limits in this permit by monitoring for fecal coliform. The permittee is limited to a single sample maximum of 400 cfu/100 mL fecal coliform bacteria.
- c. These limits are not accurately measurable within the effluent matrix, a default number of 100 µg/L will be used as the lowest reportable, meaningful quantification number and any sampling result above this number will be in violation of this permit. If the permittee chooses a means of disinfection other than chlorination/dechlorination, the permittee may petition to have the chlorination limits removed from the permit.

| TABLE 2 - INFLUENT MONITORING | | | |
|---|--|-----------------------|-------------|
| Pollutant Parameter(s) (PCS parameter code) | Measurement Units | Measurement Frequency | Sample Type |
| Influent Flow PCS Code = 50050 PCS Unit Code = 07 | Monitor and Report Average Flow in Million Gallons per day (MGD) | Daily | Flow meter |
| Five Day Biochemical Oxygen Demand (BOD ₅) PCS Code = 00310 PCS Unit Code = 19 | Monitor and Report – mg/L | Once per quarter | Grab |
| Total Suspended Solids (TSS) PCS Code = 00530 PCS Unit Code = 19 | Monitor and Report – mg/L | Once per quarter | Grab |

D. SUPPLEMENTAL CONDITIONS

1. Facility Maintenance.

The Permittee shall maintain the facility to ensure the integrity of the components of the treatment system and the site around these facilities in a manner appropriate to allow adequate inspection and oversight of the facilities.

2. Sewage Sludge Handling and Disposal Requirements.

- a) The permittee shall dispose of sludge generated at its wastewater treatment plant in accordance with 40 CFR Part 503.
- b) The permittee shall develop and submit to EPA for review of a sludge management plan (SMP) 180 days prior to any planned application of sludge. After review, EPA may require modification of the SMP. The SMP must include a description of the following information:
 - i. sludge treatment processes including processes used to significantly reduce pathogens;
 - ii. sludge storage (type of storage and number of days of storage);
 - iii. transportation and reuse/disposal method(s);
 - iv. sludge application site data (to include legal site descriptions, owners name, number of acres, a site map);
 - v. sludge site management;

- vi. calculation of agronomic sludge application rates or the permittee may elect to apply sludge to agricultural land at a rate of two (2) or less dry tons per acre per year;
 - vii. process for record keeping in accordance with 40 CFR § 503.17;
 - viii. process or method of meeting the vector attraction reduction requirements in accordance with 40 CFR § 503.33; and
 - ix. sludge monitoring frequency which shall be in accordance with 40 CFR § 503.16.
- c) The permittee shall give notice to EPA prior to any change in the permittee's sludge reuse/disposal practice and/or SMP.
 - d) When new sludge sites (not included in the original SMP) are added, a report identifying the new site shall be completed and submitted to EPA with the same level of detail as for those sites in the original SMP. This report is due to EPA thirty (30) days prior to using the new site.
 - e) Prior to using a new site for sludge application and each year prior to application of sludge, soil sampling must be done for available nitrates and nitrogen, phosphorus (PO₄), Potassium (K₂O) and pH. If the permittee is applying sludge at a rate of less than two dry tons per acre per year this sampling shall be performed prior to the initial use of the site but need not be done annually. EPA may require additional or more frequent soil sampling if deemed necessary.
 - f) An "Annual Sludge Summary Report" shall be submitted to EPA by February 19th of each year. The Permittee preparing and/or applying sewage sludge shall develop all of the information required in 40 CFR § 503.17 and include this information in its "Annual Sludge Summary Report." An annual report form may be provided by EPA if requested.
 - g) Sludge storage at a mechanical wastewater treatment plant shall not exceed two (2) years.
 - h) Sludge management and reuse/disposal shall be in accordance with the SMP.
 - i) After the sludge parameters have been monitored for two years, the permittee may request a reduction in the sludge parameter monitoring frequency. EPA will evaluate the request and consider whether or not to modify the monitoring frequency.
 - j) Sewage sludge shall not be applied to agricultural land within a one hundred (100) foot radius of a public or private drinking water well.

E. STANDARD CONDITIONS

In addition to the Effluent Limitations and Monitoring Requirements specified in this Permit, the Permittee shall comply with the Standard Conditions incorporated into this Permit as Attachment A.

F. COMPLIANCE SCHEDULE

Within nine (9) months from the effective date of this permit, the Village of Pender shall submit to EPA for review and approval a plan detailing measures, including a schedule for construction, if needed, to achieve compliance with bacteria limits in this permit as soon as possible but no later than two years from the effective date of the permit.

Upon approval of the bacteria compliance plan by EPA, the Village of Pender WWTP shall implement the measures described in the approved plan and achieve compliance with the bacteria limits set forth in this permit.

Until construction, as may be necessary is complete, and compliance with the bacteria limits of this permit is achieved, the Village of Pender shall submit a brief written report to EPA

describing progress under the approved plan to achieve compliance with bacteria limits with each quarterly submittal of discharge monitoring results.

All written notice shall be sent to:

Chief of Water Enforcement Branch
U. S. Environmental Protection Agency Region 7
901 N. 5th Street
Kansas City, KS 66102

ATTACHMENT I - STANDARD CONDITIONS

A. GENERAL CONDITIONS

1) Duty to Comply

The Permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Clean Water Act (CWA) and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

2) Toxic Pollutants And Sewage Sludge

The Permittee shall comply with effluent standards or prohibitions established under the CWA Section 307(a), 33 U.S.C. § 1317(a), for toxic pollutants and with standards for sewage sludge use or disposal established under the CWA Section 405(d), 33 U.S.C. § 1345(d), within the time provided in the regulations that establish those standards or prohibitions, or standards for sewage sludge use or disposal, even if the permit has not yet been modified to incorporate the requirement.

3) Penalties for Violations of Permit Conditions

The Act provides that any person who violates Sections 301, 302, 306, 307, 308 or 405 of the Act, or any permit condition or limitation implementing such Sections in a permit issued under Section 402 of the Act, is subject to civil penalties not to exceed \$32,500 per day for each violation under Section 309 of the Act. Any person who willfully or negligently violates Sections 301, 302, 306, 307, or 308 of the Act, or any permit condition or limitation implementing such Sections, may be subject to a fine or imprisonment pursuant to Section 309(c) of the Act. Except as provided in sections II-B-3, Bypass of Treatment Facilities, and II-B-4, Upset, of this permit, nothing in this permit shall be construed to relieve the Permittee of civil or criminal liability for noncompliance.

4) Duty to Reapply

- a) If the Permittee wishes to continue an activity regulated by this permit after the expiration date of this permit, the Permittee must apply for and obtain a new permit. The Permittee shall submit a new application to the U. S. Environmental Protection Agency, Region 7, at least 180 days before the expiration date of this permit.
- b) The terms and conditions of this permit continue in force under 5 U.S.C. § 558 (c) until the effective date of the new permit (or permit denial) only if the Permittee has submitted a timely and complete application under 40 C.F.R. § 122.21 for a renewal permit and the Permitting Authority, through no fault of the Permittee, does not issue a new permit (or deny the permit) before the expiration date of this permit. The permit continued under 5 U.S.C. § 558(c) remains fully effective and enforceable, subject to the actions set forth in 40 C.F.R. § 122.6(c).

5) Duty to Mitigate

The Permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit that has a reasonable likelihood of adversely affecting human health or the environment.

6) Permit Actions (Modifications, Revocation and Reissuance, or Termination)

- a) This permit may be modified, revoked and reissued, or terminated for causes (as described in 40 C.F.R. §§ 122.62, 122.63, and 122.64), including, but not limited to: violation of any terms or conditions of this permit; obtaining this permit by misrepresentation or failure to disclose fully all relevant facts; or a change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge. The filing of a request by the Permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance, does not stay any permit condition.
- b) Notwithstanding Part II-A-6-(a), above:
 - (i) If a toxic effluent standard or prohibition (including any schedule of compliance specified in such effluent standard or prohibition) is established under the CWA Section 307(a) for a toxic pollutant that is present in the discharge and such standard or prohibition is more stringent than any other limitation for such pollutant in this permit, this permit may be modified or revoked and reissued to conform to the toxic effluent standards or prohibition; and
 - (ii) If more stringent water quality standards become effective pursuant to CWA Section 303(c), 33 U.S.C. § 1313 (c), than the water quality standards in effect upon issuance of this permit, this permit may be modified or revoked and reissued to conform with the such new water quality standard.

7) Effect of Permit/Other Laws

- a) Issuance of this permit does not convey any property rights of any sort, or any exclusive privileges, nor does it authorize any injury to persons, or property, or invasion of other private rights, or any infringement of federal, state, or local laws or regulations.
- b) Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the Permittee from any responsibilities, liabilities, or penalties established pursuant to any applicable federal law or regulation under authority preserved by the CWA Section 510.
- c) Nothing in this permit shall be construed to preclude the institution of any legal action or relieve the Permittee from any responsibilities, liabilities, or penalties to which the Permittee is or may be subject to under the CWA Section 311 or the Comprehensive Environmental Responses, Compensation and Liability Act (CERCLA) of 1998 Section 106.
- d) Except as provided in permit conditions on Upsets, Part II-B-4, below, nothing in this permit shall be construed to relieve the Permittee from civil or criminal penalties for noncompliance with a permit condition.
- e) Pursuant to the CWA Section 509(b)(2), 33 U.S.C. § 1369(b)(2), a challenge to the validity of permit conditions, including the effluent limitations in Part I-A of this permit, shall not be a defense to an enforcement action under the CWA Sections 309 or 505, 33 U.S.C. § 1319 or 1365. Each any every violation of a permit condition is subject to an enforcement action.
- f) Compliance with the terms of this permit does not constitute a defense to any action brought under the CWA Section 504, 33 U.S.C. § 1364, or any other law governing protection of

public health or welfare, for any imminent and substantial endangerment to public health or welfare.

8) **Inspection and Entry**

The Permittee shall allow the Permitting Authority, or an authorized representative, upon the presentation of credentials and other documents as may be required by law, to:

- a) Enter upon the Permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of this permit;
- b) Have access to and copy, at reasonable times, any records that must be kept under the conditions of this permit;
- c) Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under this permit; and
- d) Sample or monitor at reasonable times, for the purpose of ensuring permit compliance or as otherwise authorized by the CWA, any substances or parameters at any location.

9) **Severability**

The provisions of this permit are severable, and if any provision of the permit, or application of any provision of this permit to any circumstances, is held invalid; the application of such provision to other circumstances, and the remainder of this permit, shall not be affected thereby.

B. OPERATION AND MAINTENANCE OF POLLUTION CONTROLS

1) **Proper Operation and Maintenance**

The Permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) that are installed or used by the Permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. This provision requires the operation of back up or auxiliary facilities or similar systems that are installed by a Permittee only when the operation is necessary to achieve compliance with the conditions of the permit.

2) **Need to Halt or Reduce Not a Defense**

It shall not be a defense for a Permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

3) **Bypass of Treatment Facilities**

a) Definitions

- (i) "Bypass" means the intentional diversion of waste streams from any portion of a treatment facility.
- (ii) "Severe property damage" means substantial physical damage to property, damage to the treatment facilities that renders them inoperable, or substantial and permanent loss of

natural resources that can reasonably be expected to occur in the absence of a bypass. Severe property damage does not mean economic loss caused by delays in production.

b) Bypass Not Exceeding Limitations

The Permittee may allow any bypass to occur that does not cause effluent limitations to be exceeded, but only if it also is for essential maintenance to ensure efficient operation. These bypasses are not subject to the provisions of Parts c and d of this section.

c) Notice

- (i) Anticipated bypass. If the Permittee knows in advance of the need for a bypass, it shall submit prior notice, if possible at least 30 days before the date of the bypass; including an evaluation of the anticipated quantity, quality and effect of the bypass.
- (ii) Unanticipated bypass. The Permittee shall submit notice of an unanticipated bypass as required in Part II-D-6, (24-hours notice).

d) Prohibition of Bypass

- (i) Bypass is prohibited and the Permitting Authority may take enforcement action against a Permittee for bypass, unless:
 - (1) Bypass was unavoidable to prevent loss of life, personal injury, or severe and extensive property damage;
 - (2) There were no feasible alternatives to the bypass, such as maintenance of sufficient reserve holding capacity, the use of auxiliary treatment facilities, retention of untreated wastes, waste hauling, or maintenance during normal periods of equipment downtime. This condition is not satisfied if adequate back up equipment should have been installed in the exercise of reasonable engineering judgment to prevent a bypass that occurred during normal periods of equipment downtime or preventive maintenance; and
 - (3) The Permittee submitted notices as required under Part c (Notice) of this section.
- (ii) The Permitting Authority may, within its authority, approve an anticipated bypass, after considering its adverse effects, if the Permitting Authority determines that it will meet the three conditions listed in Part d(i), above.

4) Upset

- a) "Upset" means an exceptional incident in which there is unintentional and temporary noncompliance with technology-based permit effluent limitations because of factors beyond the control of the Permittee. An upset does not include noncompliance to the extent caused by operational error, improperly designed treatment facilities, inadequate treatment facilities, lack of preventive maintenance, or careless or improper operation.
- b) An upset constitutes an affirmative defense to an action brought for noncompliance with such technology-based permit limitations if the requirements of 40 C.F.R. § 122.41(n)(3) are met. In any enforcement proceedings the Permittee seeking to establish the occurrence of an upset has the burden of proof. No determination made during administrative review of claims that

noncompliance was caused by upset, and before an action for noncompliance, is final administrative action subject to judicial review (i.e., Permittee will have the opportunity for a judicial determination on any claim of upset only in an enforcement action brought for non-compliance with technology-based permit effluent limitations).

5) Schedule of Maintenance

Any maintenance of facilities, which might necessitate unavoidable interruption of operation and degradation of effluent quality, shall be scheduled during noncritical water quality periods and carried out in a manner approved by the Permitting Authority.

6) Removed Substances

This permit does not authorize discharge of collected screenings, grit, solids, sludge, filter backwash, or other pollutants removed in the course of treatment or control of wastewaters to waters of the United States unless specifically limited in Part I.

C. MONITORING AND RECORDS

1) Representative Sampling

Samples and measures taken for the purpose of monitoring shall be representative of the volume and nature of the monitored activity.

2) Sampling Points

All samples shall be taken at the monitoring points specified in this permit and, unless otherwise specified, before the effluent joins or is diluted by any other waste stream, body of water, or substance. Monitoring points shall not be changed without notification to and the approval of the Permitting Authority.

3) Flow Measurements

Appropriate flow measurement devices and methods consistent with accepted scientific practices shall be selected and used to ensure the accuracy and reliability of measurements of the volume of monitored discharges. The devices shall be installed, calibrated, and maintained to ensure that the accuracy of the measurements is consistent with the accepted capability of that type of device. Devices selected shall be capable of measuring flow with a maximum deviation of less than + 10 percent from the true discharge rates through the range of expected discharge volumes. Guidance in selection, installation, calibration, and operation of acceptable flow measurement devices can be obtained from the following references:

- a) "A Guide of Methods and Standards for the Measurement of Water Flow," U.S. Department of Commerce, National Bureau of Standards, NBS Special Publication 421, May 1975, 97 pp. (Available from the U.S. Government Printing Office, Washington, D.C. 20402. Order by SD Catalog No. C13.10:421.)
- b) "Water Measurement Manual," U.S. Department of Interior, Bureau of Reclamation, Second Edition, Revised Reprinted, 1974, 327 pp. (Available from the U.S. Government Printing Office, Washington, D.C. 20402. Order by Catalog No. 127.19/2:W29/2, Stock No. S/N 24003-0027.)

- c) "Flow Measurement in Open Channels and Closed Conduits," U.S. Department of Commerce, National Bureau of Standards, NBS Special Publication 484, October 1977, 982 pp. (Available in paper copy or microfiche from National Technical Information Service [NTIS], Springfield, VA 22151. Order by NTIS No. PB-273 535/5ST.)
- d) "NPDES Compliance Flow Measurement Manual," U.S. Environmental Protection Agency, Office of Water Enforcement, Publication MCD-77, September 1981, 135 pp. (Available from the General Services Administration [GSA], Centralized Mailing Lists Service, Building 41, Denver Federal Center, Denver, CO 80225.)

4) **Test Procedures**

Test procedures for the analyses of pollutants must be conducted according to test procedures approved under 40 C.F.R. Part 136, unless other test procedures have been specified in this permit.

5) **Calibration**

The Permittee shall periodically calibrate and perform maintenance on all monitoring and analytical equipment used to monitor the pollutants discharged under this permit, at intervals that will ensure the accuracy of measurements.

6) **Testing Variability Not a Defense**

If the Permittee believes or has reason to believe that monitoring or sampling results reflect an analytical variability so as to render the results inaccurate, he may monitor or sample more frequently than required by this permit. The validity of the testing results, whether or not the Permittee has monitored or sampled more frequently, shall not be a defense to an enforcement action under the CWA Sections 309 or 505, 33 U.S.C.-§§ 1319 or 1365.

7) **Penalties for Tampering**

The CWA provides that any person who falsifies, tampers with, or knowingly renders inaccurate, any monitoring device or method required to be maintained under this permit shall, upon the first conviction, be punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than two years per violation, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this Part, punishment is a fine of not more than \$20,000 per day of violation, or by imprisonment of not more than four years, or both.

8) **Retention of Records**

The Permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least three years from the date of the sample, measurement, report, or application except that records relating to sewage sludge shall be retained for at least five years. This period may be extended by the Permitting Authority at any time.

9) **Monitoring Records**

Records of monitoring information shall include:

- a) The date, exact place, and time of sampling or measurements;
- b) The initials or name of the individual(s) who performed the sampling or measurements;
- c) The date(s) analyses were performed;
- d) The initials or name of the individual(s) who performed the analyses;
- e) The analytical techniques or methods used; and
- f) The results of all required analyses, including the bench sheets, instrument readouts, computer disks or tapes, etc., used to determine compliance.

10) Additional Monitoring by The Permittee

If the Permittee monitors any pollutant more frequently than required by this permit, using test procedures approved under 40 C.F.R. Part 136 or as specified in this permit, the results of this monitoring shall be included in the calculation and reporting of the data submitted in the Discharge Monitoring Report (DMR). Such increased frequency shall also be indicated.

11) Averaging of Measurements

Calculations for limitations that require averaging of measurements shall utilize an arithmetic mean unless otherwise specified by the Permitting Authority in the permit

D. REPORTING REQUIREMENTS

1) Change in Discharge

The Permittee shall give notice to the Permitting Authority as soon as possible of any planned physical alternations or additions to the permitted facility. Notice is required only when:

- a) The alteration or addition to the permitted facility may meet one of the criteria for determining whether a facility is a new source in 40 C.F.R. § 122.29(b);
- b) The alteration or addition could significantly change the nature or increase the quantity of pollutants discharged. This notification applies to pollutants that are subject neither to effluent limitations in the permit, nor to notification requirements under 40 C.F.R. § 122.42(a)(1); or
- c) The alteration or addition results in a significant change in the Permittee's sludge use or disposal practices, and such alteration, addition, or change may justify the application of permit conditions that are different from or absent in the existing permit, including notification of additional use or disposal sites not reported during the permit application process or not reported pursuant to an approved land applications plan.

2) Anticipated Noncompliance

The Permittee shall give advance notice to the Permitting Authority of any planned change in the permitted facility or activity that may result in noncompliance with permit requirements. Any maintenance of facilities, which might necessitate unavoidable interruption of operation and degradation of effluent quality, shall be scheduled during noncritical water quality periods and carried out in a manner approved by the Permitting Authority.

3) **Transfer of Ownership Or Control**

A permit may be automatically transferred to another party if:

- a) The Permittee notifies the Permitting Authority of the proposed transfer at least 30 days in advance of the proposed transfer date;
- b) The notice includes a written agreement between the existing and new Permittee containing a specific date for transfer of permit responsibility, coverage, and liability between them; and
- c) The Permitting Authority does not notify the existing Permittee of its intent to modify or revoke and reissue the permit. If this notice is not received, the transfer is effective on the date specified in the agreement mentioned in Part b., above.

4) **Reporting of Monitoring Results**

Monitoring results are to be reported **quarterly**. Monitoring results obtained during each **quarterly** must be reported on a Discharge Monitoring Report (DMR) Form (EPA No. 3320-1), postmarked no later than the 28th day of the month following the completed reporting period. These reports, and all other reports required by this permit, shall be submitted to EPA at the address below.

Original to: Chief, Water Enforcement Branch
Water, Wetlands and Pesticides Division
U. S. Environmental Protection Agency
901 North 5th Street
Kansas City, Kansas 66101

5) **Compliance Schedules**

Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date. Any reports of noncompliance shall include the cause of noncompliance, any remedial actions taken, the date completion of the scheduled item is anticipated, and the probability of meeting the next scheduled requirement. Reporting as required under this provision does not relieve the Permittee of the responsibility to timely complete all requirements of a compliance schedule.

6) **Twenty-four Hour Reporting**

- a) The Permittee shall orally report any noncompliance that may endanger health or the environment as soon as possible, but no later than 24 hours from the time the Permittee becomes aware of the circumstances. The oral report shall be made to the Chief Water Enforcement Branch, at phone number (800) 223-0425. Reports of noncompliance under this paragraph may be made to the EPA Spill Hotline at (913) 281-0991 if such noncompliance is discovered after regular business hours or on a weekend or holiday and response assistance from EPA is requested.
- b) The following violations shall be included in the 24-hour notice:
 - (i) Any unanticipated bypass that exceeds any effluent limitation in the permit;
 - (ii) Any upset that exceeds any effluent limitation in the permit; and

- c) A written submission shall also be provided within 5 days of the time the Permittee becomes aware of the circumstances. The written submission shall be submitted to the Chief, Water Infrastructure Management Branch, at the addresses indicated in Part II-D-4, and shall contain a description of the noncompliance, its cause, and the period of noncompliance, including exact dates and times. If the noncompliance has not been corrected, the written submission shall also include the anticipated time it is expected to continue, and steps taken or planned to reduce, eliminate, and prevent reoccurrence of the noncompliance. The Permitting Authority may verbally waive the written report, on a case-by case basis, when the oral report is made.

7) Other Noncompliance

The Permittee shall report, in narrative form, all instances of noncompliance not previously reported under Parts 1 through 6 of this Section at the time monitoring reports are submitted. Reporting noncompliance under this provision does not relieve the Permittee of the duty to comply with all requirements of this permit.

8) Other Information

When the Permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information on a permit application or in any report to the Permitting Authority, it shall promptly submit such facts or information.

9) Duty to Provide Information

The Permittee shall furnish to the Permitting Authority, within a reasonable time, any information that the Director may request to determine whether cause exists for modifying, revoking and reissuing, or terminating this permit, or to determine compliance with this permit. The Permittee also shall furnish to the Permitting Authority, upon request, copies of records required to be kept by this permit.

10) Signatory Requirements

All applications, reports, or information submitted to the Permitting Authority shall be signed and certified.

- a) All permit applications shall be signed as follows:

- (i) For a corporation: by a responsible corporate officer. For the purpose of this section, a responsible corporate officer means: (1) a president, secretary, treasurer or vice president of the corporation in charge of a principal business function, or any other person who performs similar policy or decision making functions for the corporation; or (2) the manager of one or more manufacturing, production, or operating facilities, provided the manager is authorized to make management decisions which govern the operation of the regulated facility including having the explicit or implicit duty of making major capital investment recommendations, and initiating and directing other comprehensive measures to assure long term environmental compliance with environmental laws and regulations; the manager can ensure the necessary systems are established or actions taken to gather complete and accurate information for permit application requirements; and where authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

- (ii) For a partnership or sole proprietorship: by a general partner or the proprietor, respectively; or
 - (iii) For a municipality, state, federal, other political subdivision, public agency/agents thereof: by either a principal executive officer or ranking elected official.
- b) All reports required by permit and other information requested by the Permitting Authority shall be signed by a person described above or by a duly authorized representative of that person. A person is a duly authorized representative only if:
- (i) The authorization is made in writing by a person described above:
 - (ii) The authorization specifies either an individual or a position having responsibility for the overall operation of the regulated facility or activity, such as the position of plant manager, operator of well or a well field, superintendent, position of equivalent responsibility, or an individual or position having overall responsibility for environmental matters for the company. (A duly authorized representative thus may be either a named individual or any individual occupying a named position.); and
 - (iii) The written authorization is submitted to the Permitting Authority.
- c) Changes to authorization. If an authorization under Part b of this section is no longer accurate because a different individual or position has responsibility for the overall operation of the facility, a new authorization satisfying the requirements of Part b of this section must be submitted to the Permitting Authority prior to or together with any reports, information, or applications to be signed by an authorized representative.
- d) Certification. Any person signing a document under Parts a or b of this section shall make this following certification:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

11) Availability of Reports

Except for data determined to be confidential under 40 C.F.R. Part 2, all reports prepared in accordance with the terms of this permit shall be available for public inspection at the offices of the Permitting Authority. As required by the Act, permit applications, permit, and effluent data shall not be considered confidential.

12) Penalties for Falsification of Reports

The CWA provides that any person who knowingly makes any false statement, representation, or certification in any record or other document submitted or required to be maintained under this permit, including monitoring reports or reports of compliance or noncompliance, shall, upon the conviction, be

punished by a fine of not more than \$10,000 per violation, or by imprisonment for not more than six months per violation, or by both.

E. REOPENER PROVISIONS

1) Reopener Provision

This permit may be reopened and modified (following proper administrative procedures) to include the appropriate effluent limitations (and compliance schedule, if necessary), or other appropriate requirements if one or more of the following events occurs:

- a) Water Quality Standards: The water quality standards of the receiving water(s) to which the Permittee discharges are modified in such a manner as to require different effluent limits than contained in this permit.
- b) Wasteload Allocation: A wasteload allocation is developed and/or approved by EPA for incorporation in this permit.
- c) Water Quality Management Plan: A revision to the current water quality management plan is approved and adopted which calls for different effluent limitations than contained in this permit.
- d) Biological Sludge: There have been substantial changes (or such changes are planned) in sludge use or disposal practices; applicable management practices or numerical limitations for pollutants in sludge have been promulgated which are more stringent than the requirements in this permit; and/or it has been determined that the Permittee's sludge use or disposal practices do not comply with existing applicable state or federal regulations.

F. DEFINITIONS

- 1) "Weekly average" is the arithmetic average of all samples collected over calendar week.
- 2) The "30-day (and monthly) average," other than for *E. coli* bacteria and bacteria, is the arithmetic average of all samples collected during a calendar month. Geometric means shall be calculated for *E. coli* bacteria.
- 3) "Daily Maximum" ("Daily Max.") is the highest allowable discharge during a calendar day or any 24-hour period that reasonably represents the calendar day for purposes of sampling. For pollutants with limitations expressed in units of mass, the daily discharge is calculated as the total mass of pollutants discharged over the calendar day. For pollutants with limitations expressed in other units of measurement, the daily discharge is calculated as the average measurement of the pollutant over the calendar day. If only one measurement or sample is taken during the calendar day, that will be considered the average for the calendar day.
- 4) "Composite samples" shall be flow proportioned. The composite sample shall, as a minimum, contain at least four (4) samples collected over the compositing period. Unless otherwise specified, the time between the collection of the first sample and the last sample shall not be less than six (6) hours nor more than 24 hours. Acceptable methods for preparation of composite samples are as follows:

- a) Constant time interval between samples, sample volume proportional to flow rate at time of sampling;
 - b) Constant time interval between samples, sample volume proportional to total flow (volume) since last sample. For the first sample, the flow rate at the time the sample was collected may be used;
 - c) Constant sample volume, time interval between samples proportional to flow (i.e., sample taken every "X" gallons of flow); and,
 - d) Continuous collection of sample, with sample collection rate proportional to flow rate.
- 5) A "grab" sample, for monitoring requirements, is defined as a single "dip and take" sample collected at a representative point in the discharge stream.
 - 6) An "instantaneous" measurement, for monitoring requirements, is defined as a single reading, observation, or measurement.
 - 7) "Director" means the Director, Water, Wetlands, and Pesticide Division of EPA Region VII.
 - 8) The "Permitting Authority" for this permit is the Director, Water, Wetlands, and Pesticide Division of EPA Region VII.
 - 9) "EPA" means the United States Environmental Protection Agency.
 - 10) "Biological Sludge" for the purposes of this permit is any solid, semi-solid or liquid residue generated during the biological treatment of wastewater at this facility (e.g., waste activated sludge) or removed from the biological treatment system..
 - 11) "Act" or "CWA" means the Clean Water Act, as amended, (formerly referred to as the Federal Water Pollution Control Act) 33 U.S.C. 1251 et seq.
 - 12) A "calendar day" is defined as the period from midnight of one day until midnight of the next day. However, for purposes of this permit, any consecutive 24-hour period that reasonably represents the calendar day may be used for sampling.
 - 13) A "hazardous substance" means any substance(s) designated under 40 C.F.R. Part 116 pursuant to the CWA Section 311, 33 U.S.C. § 1321.
 - 14) A "toxic" or "priority" pollutant is one of 126 substances listed as toxic under the CWA Section 307(a)(1), 33 U.S.C. § 1317(a)(1).

EXHIBIT B

**CERTIFIED INDEX OF THE ADMINISTRATIVE RECORD
FOR THE PENDER WWTP FINAL PERMIT**

Village of Pender, NE
Appeal No. NPDES 07-05
Appeal No. NPDES 07-06
Appeal No. NPDES 07-07

**NPDES PERMIT NO. NE0040908
Pender WWTF
Pender, Nebraska**

INDEX TO THE ADMINISTRATIVE RECORD FOR THE PERMIT AND STATEMENT OF BASIS

SECTION A - BACKGROUND DOCUMENTS AND GENERAL CORRESPONDENCE

| Tab | Date | From / Source | To | Document |
|------------|-------------|------------------------------|--------------|---|
| 1 | 05/22/02 | Mary Tietjen Mindrup, EPA | mailing list | Cover letter, draft Village of Pender NPDES permit, Statement of Basis and Public Notice |
| 2 | 06/2002 | Various | permit file | Table with copies of written comments received by EPA in response to May 2002 Public Notice for draft NPDES permits for Villages of Pender and Walthill, Nebraska |
| 3 | 07/19/02 | Mary Tietjen Mindrup, EPA | mailing list | Letter deferring issuance of draft NPDES permits for Walthill and Pender, Nebraska |
| 4 | 08/2006 | EPA | permit file | Response to public comments received regarding May 2002 draft NPDES permits for the Villages of Pender and Walthill, Nebraska |

SECTION B - PERMIT APPLICATION AND RELATED CORRESPONDENCE

| | | | | |
|---|----------|---------------------------------|-------------|--------------------------------------|
| 1 | 09/21/01 | Robert Fendrick, Pender WWTF | permit file | Application for Permit No. NE0040908 |
|---|----------|---------------------------------|-------------|--------------------------------------|

SECTION C - EFFLUENT GUIDELINES AND WATER QUALITY INFORMATION AND CALCULATIONS

| | | | | |
|---|----------|------------------------------------|---------------------|---|
| 1 | 03/06/02 | Royce Kemp, EPA | Mike Turvey, EPA | Memorandum regarding "Applicable WQS Standards for Pender, NE" |
| | 11/07/03 | Gary Welker and Ann Jacobs, EPA | Harold Owens, EPA | Memorandum regarding "Point Source Stream Evaluation: Logan Creek Dredge, Omaha Reservation (Pender, Nebraska)" |
| 3 | 03/29/05 | John Dunn, EPA | Permit Writers, EPA | Memorandum regarding "Secondary Treatment Requirements in NPDES Permits for POTWs" |
| 4 | 06/21/05 | Royce Kemp, EPA | Pradip Dalal, EPA | Memorandum regarding "Early Life Stage Periods for Tribal Lands in Region 7" |
| 5 | 08/03/05 | Jodi Bruno, EPA | Harold Owens, EPA | Memorandum regarding "Waste Load Allocation: Village of Pender, Omaha Tribe" |

SECTION D - SUPPLEMENTAL INFORMATION

| | | | | |
|---|----------|---|---|--|
| 1 | 04/13/01 | Gale Hutton, EPA | Michael Linder, NE Dept of Environmental Quality | Cover letter; Reaffirmation of Objections to State Issued Permits for the Villages of Pender and Walthill, Nebraska; Index to the Administrative Record for the Walthill/Pender Decision Document; and Item D - 5 - Written Transcript of the Public Hearing |
| 2 | 04/23/01 | Michael Linder, NE Dept of Environmental Quality | Gale Hutton, EPA | Letter regarding NPDES Permits for the Villages of Pender and Walthill, Nebraska |

| Tab | Date | From / Source | To | Document |
|------------|-------------|--|---|---|
| 3 | 06/15/01 | Gale Hutton, EPA | Michael Linder, NE Dept of Environmental Quality | Letter regarding NPDES Permit for the Villages of Pender and Walthill, Nebraska |
| 4 | 10/03/01 | Annette Kovar, NE Dept of Environmental Quality | Gale Hutton, EPA | Letter regarding NPDES Permit for the Villages of Pender and Walthill, Nebraska |
| 5 | 12/21/01 | Michael Turvey, EPA | Wally Jobman, Dept. of the Interior | Letter regarding Threatened and Endangered Species |
| 6 | 12/31/01 | John Cochnar, Dept of the Interior | Michael Turvey, EPA | Letter regarding Threatened and Endangered Species |
| 7 | 9/02 | US Bureau of Reclamation | | Needs Assessment |
| 8 | 9/05 | NE Department of Revenue | | Fuel Tax agreement between Omaha Tribe and NE |
| 9 | 9/22/05 | Janet Lake, Dept. of Revenue | Benjamin Thompson | Signed agreement for collection and dissemination of motor fuel tax |
| 10 | 5/12/06 | Tammie Poitra, Bureau of Indian Affairs | Jane Kloeckner, EPA | Omaha Reservation boundaries |

SECTION E - PUBLIC NOTICE AND DECISION MAKING PROCEDURES

| | | | | |
|---|---------|----------|--|---|
| | Current | C.F.R. | | 40 C.F.R. Part 25 - Public Participation in Programs Under the Resource Conservation and Recovery Act, the Safe Drinking Water Act, and the Clean Water Act |
| 2 | Current | C.F.R. | | 40 C.F.R. Part 124 - Procedures for Decision Making |
| 3 | | U.S. EPA | | Public Notice Text for draft NPDES Permit |

SECTION F - DOCUMENTS FOR FINAL PERMIT

| | | | | |
|---|---------|----------------------------------|--------------------|--|
| 1 | 9/7/06 | Terri Lamplot | EPA | Comment on draft NPDES permit for the Village of Pender |
| 2 | 9/7/06 | Terri Lamplot | EPA | Comment on draft NPDES permit for the Village of Walthill |
| 3 | 1/07 | EPA | Permit file | EPA's Response to Comments |
| 4 | 1/11/07 | Betty Berry, U.S. EPA | | EPA Section 401 Water Quality Certification under the CWA |
| 5 | 1/11/07 | EPA | | Final Permit |
| 6 | | EPA | | Final Statement of Basis |
| 7 | 1/11/07 | William A. Spratlin, U.S. EPA | Robert Fendrick | Letter forwarding permit, fact sheet, and response to comments |
| 8 | 1/19/07 | William A. Spratlin, U.S. EPA | Interested Parties | Letter forwarding permit, fact sheet, and response to comments |

EXHIBIT C

COMMENTS FROM TERI LAMPLIT ON DRAFT PERMIT

Village of Pender, NE
Appeal No. NPDES 07-05
Appeal No. NPDES 07-06
Appeal No. NPDES 07-07

**PUBLIC COMMENTS RE: NPDES PERMIT
for THE VILLAGE of PENDER-THURSTON
COUNTY, NEBRASKA
NE0040908**

Prepared by Teri Lamplot, Thurston County Supervisor

September 7, 2006

Region 7 EPA, in error, has assumed jurisdiction to issue permit NE0040908 for the Village of Pender, when this permit should be issued by the State of Nebraska, based on the following reasons:

- a) The village of Pender is NOT located in "Indian Country."
 1. Pender was removed from the Omaha Indian Reservation by an Act of Congress, August 7, 1882. (22 Stat., 341)
 2. As established in the *State of Michigan, DEQ v. The Environmental Protection Agency* (2001), "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation'. Rather, we ask whether the area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government.'" (Quoted *United States v. John*, 437 U.S. 634, 648-49(1978).
 3. Land in the Village of Pender is taxed by the County and the State government only.
 4. EPA has claimed jurisdiction on behalf of an Indian tribe to issue NPDES permits to wastewater treatment facilities that discharge on "Omaha Tribal lands in Nebraska." 33 U.S.C. § 1377 states that Indian tribes may be treated as States ONLY IF:
 - i. The Indian tribe has a governing body carrying out substantial governmental duties and powers (this does NOT occur in the Village of Pender).
 - ii. The function to be exercised by the Indian tribe pertain to the management and protection of water resources which are held by an Indian tribe, held by the United States in trust for Indians, held by a member of an Indian tribe if such property interest is subject to a trust restriction on alienation.

- I. As determined by *Michigan v. EPA*, the EPA cannot implement a federal program in the absence of clear state or tribal authority. Prior to implementing any federal operating permits program EPA must determine the scope of state and tribal jurisdiction.
 - II. 42 U.S.C. § 7601 (d) and 7661 grants EPA the authority to “promulgate and administer and enforce a federal operating permit program FOR a State or tribe IF, AND ONLY IF, (1) the state or tribe fails to submit an operating program or (2) the operating program is disapproved by EPA or (3) EPA determines the state or tribe is not adequately administering and enforcing a program. Congress has not delegated authority to the agency to act beyond these statutory parameters.
- b) It is questionable that the “point of discharge” for the Village of Pender is located in “Indian Country”.
1. Due to the natural effects of nature and the erosion of the Logan Creek Dredge banks, the point of discharge is now on the west side of the east side of the railroad right-of-way. The railroad right-of-way is the current western boundary of the Omaha reservation as described in the Act of August 7, 1882.
- c) Region 7 has erred in it’s assumption that it has “sole authority to issue NPDES permits” as presented in EPA’s Statement of Basis, drafted July 13, 2006.
1. 33 U.S.C. § 1342 does not include Indian tribes or tribal governments; it only provides for the permitting authority of a State.
 2. An Indian tribe can be treated as a State as provided by 33 U.S.C. § 1377, which describes the qualifications that a tribe needs to meet to be treated as a State.
 3. 40 CFR § 123.31 et seq. outline the procedure by which an Indian tribe can attain Treatment as a State. The Omaha tribe has not met the procedural requirement to receive such status.
 4. The State of Nebraska has the authority to issue the Pender NPDES permit per 33 U.S.C. § 1342.
 5. EPA is undermining the sovereignty of the State of Nebraska by acting in direct contrast to Supreme Court decisions. In the *Nevada v. Hicks* (2001) a unanimous decision was issued solidifying State’s authority within Indian Country. “Indians’ right to make their own laws and be governed by them does not exclude all state regulatory authority on the reservation. State sovereignty does not end at a reservation’s border... Ordinarily, it is now clear an Indian reservation is considered part of the territory of the State.”

6. There is simply no suggestion in the legislative history that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. Indeed, throughout the congressional debates, allotment of Indian land was consistently equated with the dissolution of tribal affairs and jurisdiction. It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government. *Montana v. United States*, 450 U.S. 544 (1981)

Please consider the comments submitted, and make a clear determination that the Village of Pender is not Indian Country, and the NPDES permits should be issued by the State of Nebraska.

Sincerely,



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402-385-2452
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Lamplot@starband.net

Cc: Mike Linder, Nebraska NDEQ
Congressman Jeff Fortenberry
Senator Ben Nelson
Senator Chuck Hagel

EXHIBIT D

EPA'S RESPONSE TO COMMENTS ON DRAFT PERMIT

Village of Pender, NE
Appeal No. NPDES 07-05
Appeal No. NPDES 07-06
Appeal No. NPDES 07-07

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

Village of Pender, Nebraska – Draft NPDES Permit No. NE0040908
and
Village of Walthill, Nebraska – Draft NPDES Permit No. NE0021211

Response to Comments
January 2007

On August 17, 2006, the United States Environmental Protection Agency (EPA) provided public notice of draft National Pollutant Discharge Elimination System (NPDES) permits for the Villages of Pender and Walthill, Nebraska Wastewater Treatment Facilities discharging to waters located within the Omaha Indian Reservation. At the same time EPA also provided public notice of proposed certifications under Section 401 of the Clean Water Act that EPA's draft NPDES permits for the Villages of Pender and Walthill was protective of applicable water quality standards. EPA received written comments from one (1) individual concerning the draft permits. (*See*, Tab F. of the Administrative Record.) The public comment is summarized below with EPA's response. Additional information regarding the limitations and conditions for the proposed NPDES permit are contained in the Statement of Basis and Administrative Record.

Comment made by an individual concerning both permits:

Comment:

The commenter asserts that the Clean Water Act (CWA) National Pollutant Discharge Elimination System (NPDES) program as directly implemented by Region 7 should not apply to the Village of Walthill Waste Water Treatment Plant and the Village of Pender, Waste Water Treatment Plant, both located within the Omaha Indian Reservation, because they are not, the commenter claims, within Indian country. The commenter further argues that EPA has no authority to issue these permits.

RESPONSE:

EPA has authority to issue this permit because 1) these facilities are within the Omaha Indian Reservation, 2) EPA has not approved the State or Tribe to implement the NPDES program within the Omaha Reservation; and 3) EPA is authorized to issue NPDES permits in Indian country (or "Indian lands" – EPA uses these terms interchangeably) where no State or Tribe has been authorized, *see* 40 C.F.R. § 123.1(h). Indian country includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151(a).

The commenter has not shown, and the State of Nebraska has not asserted, that Walthill and Pender are not within the borders of a federal Indian Reservation. Region 7 has determined that the WWTPs for the Village of Walthill and the Village of Pender are within the exterior boundaries of the Omaha Indian Reservation, as established by the Treaty of 1854. Region 7 received information from the Department of the Interior, Bureau of Indian Affairs, Realty Division, including a map of the Omaha Reservation describing the exterior boundaries. See Administrative Record, Tab D.7. This information and map show that Walthill and Pender WWTPs are within the reservation boundaries. The map also refutes the commenter's allegation that alleged erosion of Logan Creek moved the Pender WWTP point of discharge outside the reservation. The outfall pipe is east of the western boundary of the reservation – and therefore within the reservation – regardless of any alleged erosion. Moreover, the State of Nebraska has acknowledged that the Pender outfall pipe, which is the point of discharge from the treatment plant, lies within the reservation. See Administrative Record, Tab D1, Written Transcript of Public Hearing, March 31, 1999, page 15. Erosion will not change this fact. See also Administrative Record Tab D.8, 2005 Motor Fuel Tax Agreement between Nebraska and the Omaha Tribe and 2002 Needs Assessment, Water and Wastewater Systems for the Omaha Indian Reservation. Under §1151 (a), all land that is within a reservation, including non-member owned fee land, is Indian country. See *Seymour v. Superintendent*, 368 U.S. 351, 358-59 (1962).

EPA issues NPDES permits in Indian country where no state or tribe has an EPA-approved NPDES program there. See 40 CFR. § 123.1(h). Neither the Tribe nor the State has an approved program for the Omaha Reservation.

The Tribe has not requested EPA approval of eligibility to administer an NPDES permit program for the reservation under CWA Section 518. See 40 CFR Part 123 and 58 Fed. Reg. 67966 (December 22, 1993), *Treatment of Indian Tribes as States*, for certain sections of the CWA (1993 TAS rule). Similarly, Nebraska has never requested EPA approval and Region 7 has not approved the Nebraska NPDES program for implementation within Indian country. See 40 CFR § 123.23(b).

Nebraska issued a discharge permit to the Walthill and Pender WWTPs prior to the 1993 TAS rule even though Region 7 had not authorized and Nebraska had never requested approval to operate an NPDES program on federally recognized Indian reservations. This state-issued permit was for a five-year period. After 1993, this permit came up for renewal. EPA's practice has been "to reissue and exercise Federal jurisdiction when previous state permits expire (if the state does not have the requisite jurisdiction and authorization on Federal Indian reservations)." See 1993 TAS rule, 58 Fed. Reg. at 67977. Thus, consistent with CWA regulations, Region 7 is now issuing this NPDES permit for the Walthill and Pender WWTPs.

The commenter also contends that the scope of an NPDES program for a Tribe under Section 518(e) must be determined prior to issuing federal NPDES permits for the Walthill and Pender WWTPs. CWA Section 518 applies to tribal applications for

treatment in the same manner as a state for purposes of certain CWA programs. However, the Tribe has not applied to implement the NPDES program, and it is, therefore, not necessary for EPA to make a determination regarding *Tribal* authority in order for *EPA* to issue the permit in Indian country.

The commenter cites *Michigan v. EPA*, 268 F.3d 1075 (DC Cir. 2001) and argues that it means that "EPA cannot implement a federal program" without first determining "the scope of state and tribal jurisdiction." That case, however, involved the Clean Air Act, not the Clean Water Act, under which EPA is proposing to issue this permit. And the primary issue in *Michigan* was whether EPA could issue a permit on land whose status as Indian country was in question. That is not relevant in this case, because Walthill and Pender WWTPs are within a reservation, and, by virtue of that fact, are in Indian country. *Michigan* expressly recognizes the Indian country status of land within a reservation. *Michigan*, 268 F.3d at 1079, citing *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998) (construing 18 U.S.C. § 1151(a)).

Finally, the commenter cites *Nevada v. Hicks*, 533 U.S. 353 (2001), and argues that Nebraska's NPDES authority extends into the Omaha Reservation because "state sovereignty does not end at a reservation's border." That case, however, involved tribal, not federal civil authority. The *Hicks* opinion is not relevant in this case because these permits are issued under federal authority. *Hicks* did not address federal authority on reservations, or change the settled general rule that "primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the State." *Venetie*, 522 U.S. at 527 n 1 (1998).