

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC**

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

MHA NATION’S MOTION TO DISMISS

COMES NOW Intervenor-Permittee, the Mandan, Hidatsa and Arikara Nation of the Fort Berthold Reservation (“MHA Nation”), by and through Fredericks Peebles & Morgan LLP, and hereby files this Motion to Dismiss (“Motion”) the Petition filed on April 9, 2012, by Tim Gray on behalf of the Plaza Township for Mountrail County, North Dakota, for the reasons set forth herein.

ARGUMENT

- I. THE GRAY PETITION MUST BE DISMISSED AS MR. GRAY AND THE PLAZA TOWNSHIP BOARD OF SUPERVISORS OF MOUNTRAIL COUNTY, NORTH DAKOTA, DID NOT FILE TIMELY COMMENTS OR PARTICIPATE IN THE PUBLIC HEARINGS DURING THE COMPMENT PERIOD AND THEREFORE LACK STANDING TO FILE A PETITION**

As a threshold matter, a petitioner must have standing to appeal a permit decision. In order to have standing to appeal a permit decision, the petitioner must satisfy several conditions.

Pursuant to 40 C.F.R. § 124.19(a),

[A] petitioner has ‘standing’ to pursue an appeal of the conditions of a final permit that are identical to the conditions of the draft permit only if the petitioner filed timely comments on the draft permit or participated in the public hearing on the draft permit. * * * A petitioner who failed to file timely comments on a draft permit or participate in the public hearing will only have standing to pursue an appeal to the extent that the conditions in the draft permit are changed in the final permit.

In re Am. Soda, L.L.P., 9 E.A.D. 280, 288-89 (EAB 2002) (citing *In re Beckman Production Services*, 5 E.A.D. 10, 16 (EAB 1994). See *In re Envotech, L.P.*, 6 E.A.D. 260, 266-267 (EAB 1996); *In re Avery Lake Property Owners Association*, 4 E.A.D. 251, 253 (EAB 1992)) (emphasis added).

Only 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, may appeal a permit decision. 40 C.F.R. § 124.19(a); accord *In re Christian Cnty. Generation, LLC*, 13 E.A.D. 449, 457-60 (EAB 2008); *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 704-05 (EAB 2002). As the EAB explained in its opinion in *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 63 n.9 (EAB 1997), a petitioner “has standing to seek review of [a] permit decision by virtue of its acknowledged participation in the public hearing on the permit.”

Neither Mr. Gray nor anyone affiliated with the Plaza Township Board of Supervisors participated in the comment period by filing comments on the draft permit or by participating in the public hearings. Mr. Gray’s Petition fails to demonstrate that the issues he has identified in his Petition were previously raised by Mr. Gray or anyone affiliated with the Plaza Township Board of Supervisors during the public comment period. See *Letter from Tim Gray to U.S. EPA*, EAB (April 9, 2012). The issues raised by Mr. Gray were not raised at any point during the public comment period. Although Mr. Gray acknowledges his awareness of the issues raised by Petitioner, James Stafslie, and admits that Mr. Stafslie requested input from the Plaza Township Board of Supervisors, Mr. Gray and persons affiliated with the Plaza Township Board of Supervisors elected not to participate in the public comment period as the “Township Board of Supervisors was under the impression that the MHA Refinery was not going to happen because of the change of tribal officials and their key geologist Horace Pipe.” *Id.* Mr. Gray and persons

affiliated with the Plaza Township Board of Supervisors were fully aware and notified of the pending NPDES permit and had every opportunity to participate during the comment period. As Mr. Gray and persons affiliated with the Plaza Township Board of Supervisors failed to participate in the comment period at that time, they now lack the necessary standing to assert the issues raised in Mr. Gray's Petition.

A person who has not filed comments or participated in a hearing on the draft permit may, however, petition for review with respect to the "changes from the draft to the final permit decision." 40 C.F.R. § 124.19(a) (emphasis added). This is the only instance in which a person who did not file comments or participated in a hearing on the draft permit may file a petition before the EAB. The issues raised in Mr. Gray's Petition do not address any changes from the draft to the final NPDES permit decision issued by the EPA. Therefore, Mr. Gray does not meet this exception to the requirement that petitioners have standing to file a petition before the EAB.

As neither Mr. Gray nor individuals affiliated with the Plaza Township Board of Supervisors filed timely comments or participated in the public hearings during the comment period concerning the NPDES permit, the EAB must dismiss Mr. Gray's Petition accordingly for lack of standing to file a Petition in this matter. However, should the EAB find that Mr. Gray does have standing; his Petition should nonetheless be dismissed for the following reasons.

II. THE GRAY PETITION MUST BE DISMISSED FOR FAILURE TO FILE BEFORE SEPTEMBER 12, 2011, THE DEADLINE FOR FILING AN APPEAL OF THE NPDES PERMIT

The NPDES permit issued by the U.S. Environmental Protection Agency, Region 8 Office ("EPA") to the MHA Nation for the Refinery must comply with the applicable requirements of the Clean Water Act ("CWA") and the CWA implementing regulations. See 40

C.F.R. § 122.4(a). When appealing an NPDES permit before the Environmental Appeals Board (“EAB”), Petitioners must comply with 40 C.F.R. § 124.19(a), which states the following:

Within 30 days after a RCRA, UIC, NPDES, or PSD final permit decision (or a decision under 270.29 of this chapter to deny a permit for the active life of a RCRA hazardous waste management facility or unit) has been issued under § 124.15 of this part, any person who filed comments on that draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. Persons affected by an NPDES general permit may not file a petition under this section or otherwise challenge the conditions of the general permit in further Agency proceedings. They may, instead, either challenge the general permit in court, or apply for an individual NPDES permit under § 122.21 as authorized in § 122.28 and then petition the Board for review as provided by this section. As provided in § 122.28(b)(3), any interested person may also petition the Director to require an individual NPDES permit for any discharger eligible for authorization to discharge under an NPDES general permit. 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 decision. The 30-day period within which a person may request review under this section begins with the service of notice of the Regional Administrator's action unless a later date is specified in that notice. The petition shall 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) (emphasis added).

The regulation clearly states that a petition for review of any condition of a NPDES permit decision must be filed with the EAB within 30 days of issuance of the final permit decision. 40 C.F.R. § 124.19(a). The 30-day period begins with the service of notice of the permit decision, unless a later date is specified in that notice. 42 40 C.F.R. § 124.19(a). Petitions are deemed filed when received by the EAB, and the EAB will generally dismiss petitions for

review that are received after a filing deadline. *See, e.g., In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 329 (EAB 1999), *aff'd sub nom. Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000). “It is a petitioner’s responsibility to ensure that filing deadlines are met, and the Board will generally dismiss petitions for review that are received after a filing deadline.” *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 329 (EAB 1999), *aff'd sub nom. Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000).

The EPA issued NPDES Permit No. ND-0030988 on August 4, 2011, and notice was published in the Federal Register on August 12, 2011. The deadline to file an appeal of the NPDES permit was set for September 12, 2011. Tim Gray filed a Petition with the EAB on behalf of Plaza Township, Mountrail County, North Dakota, on April 9, 2012; nearly seven (7) months after the deadline. Although Mr. Gray attempts to reference the deadline of January 26, 2012, for filing his Petition; the deadline he refers to does not apply to his Petition. The deadline of January 26, 2012, is the deadline EPA set for comments on re-notice of the reevaluation of the technology based effluent limits. No other comments on the NPDES permit conditions were considered by the EPA. Mr. Gray does not reference any issues pertaining to the reevaluation of the technology based effluent limits in his Petition and therefore, his Petition (if other requirements of 40 C.F.R. § 124.19(a) were met) would apply to the deadline of September 12, 2011; which he failed to meet with the untimely filing of his Petition.

The EAB does not excuse a late-filed appeal unless it finds special circumstances to justify the untimeliness. *In re B&L Plating, Inc.*, 11 E.A.D. 183, 190 (EAB 2003); *see also In re Outboard Marine Corp.*, 6 E.A.D. 194, 196 (EAB 1995). The EAB may extend the deadline for filing the appeal brief if good cause is shown and there is no prejudice to opposing parties. *See In re B & B Wrecking and Excavating, Inc.*, 4 E.A.D. 16, 17 (EAB 1992); *see also In re Guam*

Waterworks Auth., NPDES Appeal Nos. 09-15 & 09-16, at 4 (EAB Nov. 3, 2009) (Order Granting Motion in the Alternative to Timely File Summary Petitions with Extension of Time to File Supplemental Briefs); *In re City & Cnty. of Honolulu*, NPDES Appeal No. 09-01, at 2-3 (EAB Feb. 2, 2009) (Order Granting Alternative Motion for Extension of Time to File Petitions for Review). The EAB has, on limited occasions, entertained untimely petitions, where special circumstances have warranted. *See, In re: Town of Marshfield, Massachusetts*, NPDES Permit Appeal No. 017-03, 2007 WL 1221207 (E.P.A. Mar. 27, 2007), available at [http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Unpublished~Final~Orders/D97C468FE656917F852572AC004E357E/\\$File/Denying...11.pdf](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Unpublished~Final~Orders/D97C468FE656917F852572AC004E357E/$File/Denying...11.pdf) (citing *AES Puerto Rico*, 8 E.A.D. at 329). Special circumstances have been found in cases where mistakes by the permitting authority have caused the delay or when the permitting authority has provided misleading information. *Id.* (citing *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-124 (EAB 1997) and *In re Hillman Power Co., L.L.C.*, 10 E.A.D. 673 (EAB 2002)). If there are special circumstances that would justify a late filing in this case, Mr. Gray should have explained them in his Petition. *Id.* There are no such special circumstances here. Even if there were special circumstances justifying a late filing, Mr. Gray did not address the Petition's untimeliness in his Petition and did not explain any special circumstances in the Petition that could possibly justify a late filing.

Failure to ensure that the EAB receives a petition for review by the filing deadline will generally lead to dismissal of the petition on timeliness grounds, as the EAB strictly construes threshold procedural requirements, like the filing of a thorough, adequate, and timely petition. *See, In re: Town of Marshfield, Massachusetts*, NPDES Permit Appeal No. 017-03, 2007 WL 1221207 (E.P.A. Mar. 27, 2007), available at http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/Unpublished~Final~Orders/D97C468FE6569

17F852572AC004E357E/\$File/Denying...11.pdf (denying NPDES permit appeal on grounds of timeliness, citing *In re Puna Geothermal Venture*, 9 E.A.D. 243, 273 (EAB 2000); *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 328 (EAB 1999), *aff'd sub nom. Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *Cf. In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) (denying review of several petitions on timeliness and standing grounds and noting Board's expectations of petitions for review); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999) (noting strictness of standard of review and Board's expectation of petitions); *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996) (dismissing as untimely permit appeals received after the filing deadline)).

Accordingly, the EAB should dismiss Mr. Gray's untimely Petition. The Petition submitted by Mr. Gray was not timely. Mr. Gray's Petition was filed nearly seven (7) months late, in violation of the regulatory requirements, which the EAB strictly construes and applies. Such strict application upholds the regulatory requirements and equity. Mr. Gray does not address or explain special circumstances for his late filing. EPA and the MHA Nation should not be required to respond to an untimely petition. In light of these considerations, the EBA must dismiss Mr. Gray's Petition for failure to file a timely Petition.

III. THE GRAY PETITION MUST BE DISMISSED FOR FAILURE TO COMPLY WITH THE PETITION CONTENT REQUIREMENTS OF 40 C.F.R. § 124.19(a)

The petitioner bears the burden of demonstrating that the EPA based the permit decision on a clearly erroneous finding of fact or conclusion of law or that the EBA should exercise its discretion to review an important policy matter or an exercise of discretion by the permit issuer. 40 C.F.R. § 124.19(a); *see, e.g., In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 10 (Sept. 15, 2009), 14 E.A.D. _____. According to Section IV(D)(2)(b) of the EAB Practice Manual:

The petition should contain all supporting argumentation. Petitioners should be aware that “[a] petition for review under § 124.19 is not analogous to a notice of appeal that may be supplemented by further briefing. Although additional briefing may occur in the event formal review is granted, the discretion to grant review is to be sparingly exercised, and therefore, * * * a petition for review must specifically identify disputed permit conditions and demonstrate why review is warranted.” *In re LCP Chemicals - N.Y.*, 4 E.A.D. 661, 665 n.9 (EAB 1993). Petitions for review must meet a minimum standard of specificity. To meet this requirement, “a petitioner must demonstrate with specificity in the petition why the Region’s prior response to those objections is clearly erroneous or otherwise merits review.” *In re Westborough*, 10 E.A.D. 297, 305 (EAB 2002). A petitioner must support its allegations with solid evidence that the permit issuer clearly erred in its decision, as “the Board will not entertain vague or unsubstantiated claims.” *In re City of Attleboro*, NPDES Appeal No. 08-08, slip op. at 61 (Sept. 15, 2009), 14 E.A.D. _____. The EAB has held that “mere allegations of error” are not enough to warrant review. *See Attleboro*, slip op. at 32, 45, 61, 74, 14 E.A.D. ____; *In re Arecibo & Aguadilla Reg’l Wastewater Treatment Plants*, 12 E.A.D. 97, 136 n.71 (EAB 2005) (quoting *In re New Eng. Plating Co.*, 9 E.A.D. 726, 737 (EAB 2001)); *In re Carlota Copper Co.*, 11 E.A.D. 692, 720 (EAB 2004).

See Environmental Appeals Board, *Practice Manual*, p. 41 (Sept. 2010), available at [http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/9078614ff32275d08525797b00720789/\\$FILE/practice%20manual%202010.pdf](http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/8f612ee7fc725edd852570760071cb8e/9078614ff32275d08525797b00720789/$FILE/practice%20manual%202010.pdf) (emphasis added).

Mr. Gray’s Petition fails to specifically identify disputed permit conditions and demonstrate why review is warranted. Mr. Gray’s Petition alleges that the EIS for the MHA Refinery does not take into account how the winter months (freezing) will affect the effluent discharge. Specifically, Mr. Gray states:

...the amount of water being discharged is significant (12.6 – 58 million gallons per year). This drainage path has numerous culverts under the roadways and railways to pass though [sic] in township alone, as well as others along the way. When this discharge water will not flow because of frozen culverts it will back up onto area landowners, farmers and ranchers property. This backup of water due to freezing will affect Mr. Stafliens [sic] land as well as others just south of the refinery the most. When it does start to thaw out so the water flows, it will cause a big problem in our township (the first six miles of the drainage path), the roadways will be flooded or washed out due to so much discharge water accumulated behind the first few culverts in the drainage path, just like they were this past spring due to heavy snow accumulation in our area.

See Letter from Tim Gray to U.S. EPA, EAB (April 9, 2012). Mr. Jerry Koblitz, EIS Consultant for the MHA Nation acknowledges that this was not addressed in the EIS, but notes that the EIS does disclose that some characteristics of downstream channels may change due to the introduced water flows. Although Mr. Gray's concerns were not addressed in the EIS, they cannot be raised at this time as Mr. Gray's Petition failed to meet the requirements set forth by 40 C.F.R. § 124.19(a).

Mr. Gray's Petition fails to include a statement of the reasons supporting EAB review and fails to show that the condition in question is based on a finding of fact or conclusion of law which is clearly erroneous, or that the condition in question is based on an exercise of discretion or an important policy consideration which the EAB should, in its discretion, review. *See Letter from Tim Gray to U.S. EPA, EAB (April 9, 2012).* Rather the Petition submitted by Mr. Gray contains very general assertions that public notice was not provided directly to the Plaza Township for Mountrail County, North Dakota. In fact, Mr. Gray states, "[o]ur Board feels that we should have been better notified by the tribe or the EPA about this NPDES Permit considering our township will be the most adversely affected by the discharge water (first six miles of drainage path)." *Id.* However, in the next paragraph, Mr. Gray asserts that the "Township Board of Supervisors was under the impression that the MHA Refinery was not going to happen because of the change of tribal officials and there key geologist Horace Pipe." *Id.*

For permit challenges based on technical issues, the EAB expects a petitioner to present "references to studies, reports, or other materials that provide relevant, detailed, and specific facts and data about permitting matters that were not adequately considered by a permit issuer." *Attleboro*, slip op. at 32, 14 E.A.D. ___ (citing *In re Env'tl. Disposal Sys., Inc.*, 12 E.A.D. 254,

291 (EAB 2005)). Mr. Gray fails to reference any studies, reports or other materials that provide relevant, details, and specific facts and data about permitting matters that were not adequately considered by the EPA. As the EAB will not entertain vague or unsubstantiated claims, the EAB must dismiss Mr. Gray's Petition accordingly for failure to comply with the requirements of 40 C.F.R. § 124.19(a).

IV. THE GRAY PETITION MUST BE DISMISSED FOR FAILURE TO RAISE ISSUES PREVIOUSLY RAISED DURING THE PUBLIC COMMENT PERIOD, INCLUDING THE PUBLIC HEARINGS

The petitioner has the obligation to demonstrate that any issues raised in the petition were previously raised by someone (either petitioner or another commenter) during the public comment period (including any public hearing), provided that they were "reasonably ascertainable" at that time. 40 C.F.R. § 124.13; *see* 40 C.F.R. § 124.19.

Section 124.13 provides that a person "must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period (including any public hearing) under section 124.10." 40 C.F.R. § 124.13. The EAB has construed this requirement in several cases. *See, e.g., In re Christian Cnty. Generation, LLC*, 13 E.A.D. 449, 457-60; *In re Shell Offshore, Inc.*, OCS Appeal Nos. 07-01 & 07-02, slip op. at 52-53 & n.55 (EAB Sept. 14, 2007), 13 E.A.D. ___; *In re Sierra Pac. Indus.*, 11 E.A.D. 1, 6-8 (EAB 2003); *In re City of Phoenix*, 9 E.A.D. 515, 524-25 (EAB 2000).

The purpose of this requirement is to give the permitting authority the opportunity to hear and respond to objections to permit conditions before the permit is issued. *See In re Ash Grove Cement Co.*, 7 E.A.D. 387, 431 (EAB 1997) ("The purpose of the response to comments and any supplementation of the administrative record at that time is to ensure that interested parties have full notice of the basis for final permit decisions and can address any concerns regarding the final

permit in an appeal to the Board pursuant to 40 C.F.R. section 124.19”); *see also In re Sierra Pac. Indus.*, 11 E.A.D. 1, 8 (EAB 2003); *In re City of Phoenix*, 9 E.A.D. 515, 526 (EAB 2000) (“In NPDES proceedings, as well as other permit proceedings, the broad purpose behind the requirement of raising an issue during the public comment period is to alert the permit issuer to potential problems with a draft permit and to ensure that the permit issuer has an opportunity to address the problems before the permit becomes final”).

As thoroughly discussed in Part III of this Motion, Mr. Gray fails to demonstrate that any issues being raised were raised during the public comment period, with the filing of public comments and during public hearings. *See Letter from Tim Gray to U.S. EPA*, EAB (April 9, 2012). The issues raised by Mr. Gray were not raised at any point during the public comment period. Rather the Petition submitted by Mr. Gray contains very general assertions that public notice was not provided directly to the Plaza Township for Mountrail County, North Dakota. In fact, Mr. Gray states, “[o]ur Board feels that we should have been better notified by the tribe or the EPA about this NPDES Permit considering our township will be the most adversely affected by the discharge water (first six miles of drainage path).” *Id.* However, in the next paragraph, Mr. Gray asserts that the “Township Board of Supervisors was under the impression that the MHA Refinery was not going to happen because of the change of tribal officials and their key geologist Horace Pipe.” *Id.* Mr. Gray’s also admits that the issues he is raising in his Petition were not addressed in the EIS. Mr. Jerry Koblitz, EIS Consultant for the MHA Nation also acknowledges that the issues raised in Mr. Gray’s Petition were not addressed in the EIS.

The issues raised by Mr. Gray were also reasonably ascertainable during the comment period as Mr. Gray admits that he was fully aware of the issues raised by Petitioner, James Stafslie. In fact, Mr. Gray states in his Petition that Mr. Stafslie requested input from the Plaza

Township Board of Supervisors concerning the NPDES permit during the comment period. *See Letter from Tim Gray to U.S. EPA, EAB (April 9, 2012)*. However, Mr. Gray and persons affiliated with the Plaza Township Board of Supervisors elected not to participate in the public comment period because they did not believe that the MHA Refinery Project would progress as it has. Mr. Gray and persons affiliated with the Plaza Township Board of Supervisors had every opportunity to raise these issues during the comment period, but elected not to.

Accordingly, the EAB must dismiss Mr. Gray's Petition for failure to raise issues previously raised during the public comment period as such issues were reasonably ascertainable during the comment period.

CONCLUSION

Mr. Gray's Petition fails to satisfy the requirements of 40 C.F.R. § 124.19(a). In addition, Mr. Gray does not have standing to bring his petition before the EAB as he failed to participate during the public comment period. Therefore, this Court must dismiss Mr. Gray's Petition with prejudice.

The MHA Nation is willing to work directly with Mr. Gray in an effort to address his concerns outside of the EAB review. Mr. Jerry Koblitz, EIS Consultant for the MHA Nation had a telephone conversation with Mr. Gray on April 20, 2012, explaining additional information about the nature of the Refinery discharge and indicated that the MHA Nation would work with Plaza Township to address issues that may develop with water discharges under winter weather conditions. The MHA Nation is willing to provide the Plaza Township Board of Supervisors a written commitment to mitigate situations that may develop under these conditions.

For the foregoing reasons, MHA Nation's Motion to Dismiss should be granted.

Dated this 30th day of April, 2012.

MHA Nation
By its attorneys,



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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of April, 2012, a copy of the foregoing **MHA NATION'S MOTION TO DISMISS** was sent via Email or U.S. Mail, postage paid, to the following parties:

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