

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

<p>In re:</p> <p>Mesabi Nugget Delaware, LLC —Hoyt Lakes, Minnesota</p> <p>Approval of a variance from water quality standards, Permit No. MN0067687</p>	<p>NPDES Appeal Nos. 13-01, 13-02, and 13-03</p>
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**JOINT RESPONSE OF ALL PETITIONERS TO PENDING MOTIONS FOR
DISMISSAL OF RESPONDENT U.S. ENVIRONMENTAL PROTECTION AGENCY
AND INTERVENOR MESABI NUGGET DELAWARE, LLC**

HERE COME all Petitioners hereto, including the Fond du Lac Band of Lake Superior Chippewa and the Grand Portage Band of Lake Superior Chippewa; the Minnesota Center for Environmental Advocacy; and WaterLegacy, through their respective undersigned attorneys, who offer the following joint response to Respondent U.S. Environmental Protection Agency’s (the “Agency’s”) Motion to Deny Review for Lack of Jurisdiction (dated February 13, 2013) and Intervenor Mesabi Nugget Delaware, LLC’s Motion to Deny Review for Lack of Jurisdiction (dated February 15, 2013) (collectively, the “Motions”).

Petitioners do not object to the Motions to dismiss without further proceedings. In order to address the lack of direct Board precedent regarding jurisdiction in a matter like this where a state has delegated NPDES authority and issues a variance that is then approved by the Agency, the Petitioners also ask that the Board include in its order granting those Motions the following findings and conclusions:

1. 40 C.F.R. Part 124 states the limits of the Board’s jurisdiction;
2. Where a state with delegated, Clean Water Act Section 303(c) NPDES authority issues a water-quality-standards variance in connection with its approval of a NPDES permit,

even if EPA approves the water-quality-standards variance, it does not constitute an EPA “variance” decision covered by 40 C.F.R. Part 124;

3. EPA’s approval of a water-quality-standards variance on a state-issued NPDES permit is instead properly characterized as a final agency action to approve a state water quality standard under Section 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c);
4. In the absence of other statutory authority, jurisdiction to hear appeals of final agency action is governed by the Administrative Procedures Act at 5 U.S.C. Section 704, and lies with federal district court; and
5. Because the claims in these appeals constitute challenges to EPA Region 5’s approval of a variance the state of Minnesota issued to Mesabi Nugget, through the Section 303(c) authority delegated to the Minnesota Pollution Control Agency, the Board is without jurisdiction.

The Petitioners respectfully ask the Board to dismiss the above-entitled actions, without costs and disbursements to any party.

Dated: February 22, 2013

Attorney for Petitioners the Fond du Lac Band of Lake Superior Chippewa and the Grand Portage Band of Lake Superior Chippewa

s/ Sara K. Van Norman

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Certificate of Service

I certify that on February 22, 2013, I electronically filed the foregoing document with the Clerk of the EAB, and served it on all other parties by first class mail and electronic mail:

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