

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

In re:)	
)	
MHA Nation Clean Fuels Refinery)	NPDES Appeal Nos. 11-02, 11-03, and 11-04
)	
NPDES Permit No. ND-0030988)	
)	

MHA NATION’S MOTION TO DISMISS APPEAL

COMES NOW Intervenor-Permittee, the Mandan, Hidatsa and Arikara Nation of the Fort Berthold Reservation (“MHA Nation”), by and through its undersigned counsel, and submits its Motion to Dismiss Appeal (“Motion”) due to the untimeliness of the Environmental Awareness Committee’s Petition, and, in support thereof, states as follows:

1. On September 12, 2011, the Environmental Awareness Committee filed an appeal with the Environmental Appeals Board (“Board”), seeking review of the above-captioned matter concerning the issuance of MHA Nation’s National Pollutant Discharge Elimination System Permit ND-0030988 for the MHA Nation Clean Fuels Refinery (the “NPDES permit”).

2. The U.S. Environmental Protection Agency Region 8 (“EPA”) issued the NPDES permit on August 4, 2011.

3. An appeal of an NPDES permit must be filed within thirty (30) days after the NPDES final permit decision has been issued, pursuant to EPA regulations governing appeals of NPDES permits at 40 CFR § 124.19.

4. Pursuant to the regulations governing computation of time when applying the EPA’s above-cited regulations, any time period scheduled to begin on the occurrence of an act or event shall begin on the day after the act or event. 40 CFR § 124.20(a). Thus, because the

NPDES permit was issued on August 4, 2011, the thirty (30) day time period for filing an appeal began on August 5, 2011.

5. Pursuant to the regulations governing computation of time, if the final day of the regulatory time period falls on a weekend or legal holiday, the time period shall be extended to the next working day. 40 CFR § 124.20(c). Therefore, here, the thirty-day period ended on Sunday, September 4, extending the final day of the thirty-day time period to Tuesday, September 6, to account for the final day falling on a weekend and then the Labor Day holiday.

6. As a result, pursuant to the regulations governing an NPDES permit appeal and computation of the thirty-day time period in which a petitioner may file an appeal, the Environmental Awareness Committee failed to file its petition within the regulatory thirty (30) day time period when it filed its appeal on September 12, 2011, six days after the thirty-day time period had closed.

7. Failure to ensure that the Board receives a petition for review by the filing deadline will generally lead to dismissal of the petition on timeliness grounds, as the Board strictly construes threshold procedural requirements, like the filing of a thorough, adequate, and timely petition. *See, In re: Town of Marshfield, Massachusetts*, 2007 WL 1221207 (E.P.A.) (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)).

8. The Board has, on limited occasions, entertained untimely petitions, where special circumstances have warranted. *Id.* (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, the petitioner should explain them in the petition. *Id.*

9. There are no such special circumstances here. Even if there were special circumstances justifying a late filing, the Environmental Awareness Committee did not address the petition's untimeliness in its petition and did not explain any special circumstances in the petition that could possibly justify a late filing.

10. Accordingly, the Board should dismiss the Environmental Awareness Committee's untimely petition. The petition was filed almost a week late, in violation of the regulatory requirements, which the Board strictly construes and applies. Such strict application upholds the regulatory requirements and equity. The Environmental Awareness Committee did not address or explain special circumstances for its late filing. EPA and MHA Nation should not be required to respond to an untimely petition. In light of these considerations, the Board should now dismiss the Environmental Awareness Committee petition.

For the foregoing reasons, MHA Nation's motion to dismiss should be granted.

Dated this 6th day of December, 2011.

MHA Nation
By its attorneys,



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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December, 2011, a copy of the foregoing **MHA NATION'S MOTION TO DISMISS APPEAL** was sent via U.S. Mail, postage paid, to the following parties:

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