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 RESPONSE TO PETITIONS FOR REVIEW

Pursuant to the Order Granting Motion to Intervene entered by the Environmental Appeals Board ("Board") on November 23, 2011, the Mandan, Hidatsa, and Arikara Nation of the Fort Berthold Reservation ("MHA Nation") hereby files this Response in the above-captioned matter concerning the U.S. Environmental Protection Agency Region 8 ("EPA") issuance of a National Pollutant Discharge Elimination System ("NPDES") permit for the MHA Nation Clean Fuels Refinery ("Refinery").

I. STATEMENT OF FACTS

In this proceeding, the following individuals and organization have filed separate Petitions for Review in the above-captioned matter concerning the issuance of MHA Nation's NPDES Permit ND-0030988 for the Refinery (the "NPDES permit"): (1) James Stafslien; (2) Jodie White, Theodora Bird Bear, and Joletta Bird Bear of the Environmental Awareness Committee, through the Attorney for the Environmental Integrity Project Sparsh Khandeshi; and, (3) Pastor Elise Packineau (collectively "the Petitioners").

The MHA Nation is a federally recognized Tribe located on the Fort Berthold Reservation within the State of North Dakota. The federal government owes a trust responsibility to the MHA Nation. The MHA Nation has proposed and is preparing to construct

and operate a petroleum refinery with a capacity of 15,000 barrels per day on the Fort Berthold Reservation for which the NPDES permit was issued.

The Petitioners claim that (1) air quality impacts and emissions were underestimated, (2) EPA failed to take a "hard look" at the air quality and water quality impacts pursuant to the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370f, by not preparing a supplemental Environmental Impact Statement ("EIS"), and (3) EPA applied inappropriate standards to calculate the effluent limitations, thereby failing to adequately assess water quality impacts. Notably, on November 21, 2011, the EPA issued a formal notice to the Board withdrawing portions of NPDES permit number ND-00030988 that the EPA issued to the MHA Nation on August 4, 2011.

Specifically, the EPA withdrew the NPDES permit portions with respect to the effluent limitations listed in the NPDES permit Section 1.3.3 Effluent Limitations – Outfall 002 for: BOD (biochemical oxygen demand), COD (chemical oxygen demand), TSS (total suspended solids), total chromium, phenolic compounds, and oil and grease. After the revised permit limitations were calculated, EPA issued Supplemental Information Report II. This report outlined the changes that were made, and the potential impacts. Based on the plant flow assumptions made by the EPA in the Supplemental Information Report II, the MHA Nation Consultant, ARCADIS has determined that the process used to establish the revised permit effluent limits is accurate. MHA Nation Consultants verified the process and calculations for establishing the technology based effluent limits. MHA Nation Consultants verified the process and calculations for establishing the water quality based effluent limits. MHA Nation Consultants verified that the comparison between the technology based and water quality based limitations resulted in the correct effluent limits for each constituent.

The EPA will prepare new draft effluent limitations under 40 C.F.R. § 124.6, and the new effluent limitations will be subject to public notice and comment and may be appealed pursuant to 40 C.F.R. § 124.19. Based on the EPA's withdrawal of the effluent limitations portion of the NPDES permit, we will not address the third argument raised by the Petitioners. This response is limited to the remaining arguments raised by Petitioners.

By letter dated September 13, 2011, the Board instructed EPA staff to "prepare a response that addresses the Petitioner's [sic] contentions and whether Petitioner has [sic] satisfied the requirements for obtaining review under 40 C.F.R. § 124.19(a)" including "relevant portions of the administrative record with the response, together with a certified index of the entire administrative record." This response addresses whether the Petitioners have satisfied the requirements for obtaining review under 40 C.F.R. § 124.19(a) and the Petitioners' contentions.

II. STANDARD OF REVIEW

An agency decision that an EIS does not need supplementation because of alleged new information is proper where it is not arbitrary and capricious and is reached after a reasoned evaluation of the information. *See* 39A C.J.S. Health & Environment § 126 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989)). In fact, where the agency has been presented with new information, courts have upheld the agency's decision to forego a supplemental EIS so long as the record demonstrates the agency reviewed the proffered supplemental information, evaluated the significance-or lack of significance-of the new information, and provided an explanation for its decision not to supplement the existing analysis. *Trout Unlimited v. U.S. Dept. of Agriculture*, 320 F.Supp.2d 1090, 1111 (D. Colo. 2004) (citing *Colorado Environ. Coalition v. Dombeck*, 185 F.3d 1162, 1179 (10th Cir. 1999) (emphasis added)).

III. LEGAL ARGUMENT

A. PETITIONERS FAILED TO SATISFY REQUIREMENTS OF 40 C.F.R. § 124.19(a) AND, THEREFORE, PETITIONERS' APPEAL SHOULD BE DISMISSED

The Clean Water Act permit issued by EPA to the MHA Nation for the Refinery must comply with the applicable requirements of the Clean Water Act ("CWA") and its implementing regulations. *See* 40 C.F.R. § 122.4(a). When appealing an NPDES permit, 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).

Based on conversations the MHA Nation had with EPA regarding the timeliness of receipt of the petitions filed by Petitioners, the MHA Nation defers to the EPA and finds that the Petitioners have met the thirty (30) day requirement for filing an appeal pursuant to 40 C.F.R § 124.19(a).

However, 40 C.F.R. § 124.19(a) also states that petitions for appeals must also 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), and a showing that the condition in question is based on a finding of fact or conclusion of law which is clearly erroneous, or an exercise of discretion or an important policy consideration which the Board should, in its discretion, review.

Petitions submitted by Petitioners, James Stafslien and Pastor Elise Packineau, failed to include a statement of the reasons supporting Board review, failed to include a demonstration that any issues being raised were raised during the public comment period (including any public hearing), and failed 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 Board should, in its discretion, review. *See Letter from James Stafslien to U.S. EPA, EAB*, attached hereto as Exhibit 1; *see Letter from Pastor Elise Packineau to U.S. EPA, EAB* dated September 13, 2011, attached hereto as Exhibit 2. Rather the petitions submitted by James Stafslien and Pastor Elise Packineau contain very general assertions that public notice was not provided regarding the change in feedstock and that the potential water discharge could flow back into a large slough affecting property located south of the Refinery site. *Id.*

Neither of these petitions demonstrated that these issues were previously raised during the public comment period. There is also no showing 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 Board should review.

The petition submitted by Petitioners, Jodie White, Theodora Bird Bear, and Joletta Bird Bear of the Environmental Awareness Committee, through the Attorney for the Environmental Integrity Project Sparsh Khandeshi, also failed to include a statement of the reasons supporting Board review, demonstrating that any issues being raised were raised during the public comment period (including any public hearing). *See Petition for Review by Environmental Awareness Committee, Jodie White, Theodora Bird Bear and Joletta Bird Bear* (September 12, 2011), attached hereto as Exhibit 3. The statement of reasons mentioned in the petition asserted violations of NEPA due to the EPA's determination that a supplemental EIS was not necessary following the change in feedstock for the Refinery and that EPA failed to take a hard look at air emissions data. *Id.* Although Petitioners reference several letters received during the public comment period of the draft and final EIS, none of the letters attached to the petition mention the concerns regarding violations of NEPA or failure to adequately take a hard look at air emissions data. *Id.*

Rather, the letters attached to the petition discuss the need to conclude the environmental justice analysis, the failure of EPA to comply with the publication entitled, *Environmental Justice: Guidance Under the National Environmental Policy Act*, published by the Council on Environmental Quality, and discussion regarding the support for various Alternatives presented in the draft EIS. *See Letter from Joletta Bird Bear, member of the Environmental Awareness*

Committee to Robert Roberts, EPA Regional Director Region 8 and William Benjamin, Great Plains Regional Bureau of Indian Affairs (BIA) Director (Aug. 9, 2006); *Letter from Theodora Bird Bear to William Benjamin, Great Plains Regional BIA Director* (Sept. 13, 2006); *Letter from Residents of Mandaree to Robert Roberts, EPA Regional Director Region 8 and William Benjamin, Great Plains Regional BIA Director* (Sept. 13, 2006), attached hereto as Exhibit 4. There is nothing in the petition nor in the letters attached to the petition to demonstrate that any issues being raised in the petition were raised during the public comment period (including any public hearing).

After reviewing the petitions submitted by the Petitioners, the MHA Nation has determined that the petitions submitted by the Petitioners failed to satisfy the requirements of 40 C.F.R. § 124.19(a), and, therefore, the petitions should be dismissed.

B. EPA DID NOT VIOLATE NEPA BY CONCLUDING THAT A SUPPLEMENTAL EIS WAS UNNECESSARY AND, THEREFORE, THE NPDES PERMIT SHOULD BE UPHELD

The National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370f, requires federal agencies to consider the environmental impacts of their actions, disclose those impacts to the public, and then explain how their actions will address those impacts. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983). NEPA requires federal agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 40 U.S.C. § 4332(2)(C). This requirement serves a dual role: "It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision." *Robertson v. Methow Valley*

Citizens Council, 49 U.S. 332, 349 (1989). NEPA's purpose is to ensure that "the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989).

The primary purpose of an EIS is to serve as an action-forcing device to insure that the policies and goals defined in the NEPA are infused into the ongoing programs and actions of the federal government. 40 C.F.R. § 1502.1. The EIS must provide full and fair discussion of significant environmental impacts and must inform decision makers and the public of the reasonable alternatives, which would avoid or minimize adverse impacts or enhance the quality of the human environment. *Id.* Agencies are required to focus on significant environmental issues and alternatives and to reduce paperwork and the accumulation of extraneous background data. *Id.* Statements should be concise, clear, and to the point, and must be supported by evidence that the agency has made the necessary environmental analyses. *Id.*

1. Supplemental EIS Requirements: General Overview

In view of the purpose for an EIS, an agency that has prepared an EIS cannot simply rest on the original document. The agency must be alert to new information that may alter the results of its original environmental analysis, and continue to take a "hard look at the environmental effects of [its] planned action, even after a proposal has received initial approval." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989). An agency is required to prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes *substantial changes* in the proposed action that are relevant to environmental concerns; or

(ii) There are *significant new circumstances* or *information relevant to environmental concerns and bearing on the proposed action or its impacts*.

40 C.F.R., § 1502.9(c)(1) (emphasis added). Therefore, if "there remains major Federal action to occur, and the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared." *See* 39A C.J.S. Health & Environment § 126 (June 2009) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989)). The agency must "ma[ke] a reasoned decision based on...the significance-or lack of significance-of the new information," and prepare a supplemental EIS when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." *Id.* at 378; 40 C.F.R. § 1502.9(c)(1)(ii). A new or revised impact statement is not necessary, however, if environmental issues have previously been considered or if no new information or developments have intervened since the last major action. *See* 39A C.J.S. Health & Environment § 126 (citing *Loveless v. Yantis,* 83 Wash. 2d 754 (1973)).

The EPA has adopted the requirements of 40 C.F.R. § 1502.9(c)(1)(ii) in the EPA's NEPA Environmental Review Procedures, which states in pertinent part as follows:

> If there has been *substantial change* in the proposed action that is relevant to environmental concerns, *or if* there are *significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts*, the *Responsible Official must conduct a supplemental environmental review of the action* and complete an appropriate NEPA document.

40 C.F.R. § 6.200(h). The Responsible Official must prepare a supplemental EIS when appropriate, consistent with 40 C.F.R., § 1502.9. 40 C.F.R. § 6.207(e). This provision, however, has limits, for "an agency need not supplement an EIS every time new information comes to light after the EIS is finalized." *Mid States Coalition for Progress v. Surface Transp. Bd.,* 345 F.3d 520, 544 (8th Cir. 2003) (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989) ("To require otherwise would render agency decision-making intractable,

always awaiting updated information only to find the new information outdated by the time a decision is made.")). Rather, a supplemental EIS is only required if the new information shows the proposed action will affect the quality of the human environment in a significant manner or to a significant extent not already considered. *Trout Unlimited v. U.S. Dept. of Agriculture*, 320 F.Supp.2d 1090, 1111 (D. Colo. 2004).

A number of courts have emphasized that NEPA does not require perfection in the EIS. 61B Am. Jur. 2d Pollution Control § 112 (May 2009) (citing *Envt'l. Defense Fund, Inc. v. Corps of Engineers of U.S. Army*, 470 F.2d 289 (8th Cir. 1972), application denied, 409 U.S. 1072 (1972) and *cert. denied*, 412 U.S. 931 (1973)). Rather, the adequacy of the EIS must be determined through use of a "rule of reason"; that is, does the impact statement contain a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposed action. 61B Am. Jur. 2d Pollution Control § 112 (citing *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976); *Defenders of Wildlife v. Administrator, E.P.A.*, 882 F.2d 1294 (8th Cir. 1989)).

Thus, an EIS is adequate if it has been completed in good faith, and it sets forth sufficient information to enable the decision-maker to consider fully the environmental factors involved and to make a reasoned decision after balancing the risks and harms to the environment against the benefits to be derived from the proposed action, as well as to make a reasoned choice between alternatives. 61B Am. Jur. 2d Pollution Control § 112 (citing *Envt'l. Defense Fund, Inc. v. Corps of Engineers of U.S. Army*, 470 F.2d 289 (8th Cir. 1972), application denied, 409 U.S. 1072 (1972) and *cert. denied*, 412 U.S. 931 (1973)). There is no requirement that the impact statement be exhaustive, or that it be scientifically perfect, or free from controversy. 61B Am. Jur. 2d Pollution Control § 112 (citing *Sierra Club v. Froehlke*, 534

F.2d 1289 (8th Cir. 1976); *Envt'l. Defense Fund, Inc. v. Corps of Engineers of U.S. Army*, 470 F.2d 289 (8th Cir. 1972), *cert. denied,* 412 U.S. 931 (1973)). Also, there is no requirement that all federal agencies, or all experts in the field agree with the conclusion contained in the EIS or with the agency's decision. 61B Am. Jur. 2d Pollution Control § 112.

2. Supplemental Information Reports (SIRs) May Be Used to Determine Whether a Supplemental EIS is Needed

The EPA's NEPA Environmental Review Procedures do not provide any further guidance to determine whether a substantial change has occurred or what factors constitute significant new circumstances or information triggering the need for a supplemental EIS. However, other agencies often prepare Supplemental Information Reports ("SIRs") or other environmental evaluation procedures to determine whether a proposed action has substantially changed or if there are significant new circumstances or information necessitating the preparation of a supplemental EA or EIS. Although SIRs are nowhere mentioned in NEPA or in the regulations implementing NEPA promulgated by the Council on Environmental Quality ("CEQ"), courts nonetheless have recognized a limited role within NEPA's procedural framework for SIRs and similar "non-NEPA" environmental evaluation procedures. *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d 562, 565-566 (9th Cir. 2000) (citing, *e.g., 40 C.F.R. § 1508.10* (defining the term "environmental document" as including Environmental Assessments, Environmental Impact Statements, Findings of No Significant Impact, and Notices of Intent)).

Specifically, courts have upheld agency use of SIRs and similar procedures for the purpose of determining whether new information or changed circumstances require the preparation of a supplemental EA or EIS. *Idaho Sporting Congress, Inc.*, 222 F.3d, at 566 (citing *Price Rd. Neighborhood Ass'n. v. United States Dep't. of Transp.,* 113 F.3d 1505, 1510

(9th Cir. 1997) (holding that when faced with a project change, the Federal Highway Administration may conduct an environmental "reevaluation" "to determine the significance of the new design's environmental impacts and the continuing validity of its initial EA"); *see also Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 383-85 (1989) (upholding the Army Corps of Engineers' use of a SIR to analyze significance of new reports questioning the environmental impact of a dam project); *Friends of the Bow v. Thompson,* 124 F.3d 1210, 1218-19 (10th Cir. 1997) (upholding use of SIR to evaluate significance of new survey of area to be logged); *Laguna Greenbelt, Inc. v. United States Dep't. of Transp.,* 42 F.3d 517, 529-30 (9th Cir. 1994) (upholding use of "Memorandum of Record" to assess significance of recent wildfires in project area); *California v. Watt,* 683 F.2d 1253, 1267-68 (9th Cir. 1982), *rev'd on other grounds sub. nom., Secretary of the Interior v. California,* 464 U.S. 312, 78 L. Ed. 2d 496, 104 S. Ct. 656 (1984) (upholding use of "Secretary Issue Document" to evaluate significance of new size estimates for off-shore oil and gas deposits)). Courts have permitted agencies to use SIRs for this purpose, in part, because NEPA and the CEQ regulations are silent on the issue of how agencies are to determine the significance of new information. *Idaho Sporting Congress, Inc.*, 222 F.3d, at 566 (citing *Price Rd. Neighborhood Ass'n.,* 113 F.3d, at 1510).

3. EPA Took a Hard Look at the Air Emissions Data

Contrary to Petitioners' claims, EPA took a hard look at the air emissions data and the change in air impacts resulting from the change to refining Bakken crude. As a result, EPA complied with its obligations pursuant to NEPA and adequately assessed air emissions data by utilizing the Bakken Crude Assay prepared by CORE Laboratories on March 29, 2010, attached hereto as Exhibit 5, the Addendum (to the Air Quality Technical Report for the FEIS for the MHA Nation proposed Clean Fuels Refinery Project dated March 9, 2011 ("Addendum")),

attached hereto as Exhibit 6, and the MHA Supplemental Information Report ("MHA SIR") prepared by MHA Nation's consultants dated April 20, 2010, attached hereto as Exhibit 7; by requiring multiple revisions to the Air Quality Modeling Analysis Update for the FEIS for the MHA Nation Proposed Clean Fuels Refinery Project ("Air Quality Modeling Update") dated June 6, 2011, attached hereto as Exhibit 8, for which EPA worked in conjunction with the MHA Nation regularly to ensure the update analyzed the new data fully and accurately; and, by preparing its own SIR ("EPA SIR"), dated July 29, 2011, attached hereto as Exhibit 9, based in part on the Air Quality Modeling Update, in compliance with the standard for an agency decision whether to prepare a supplemental EIS pursuant to the Council on Environmental Quality regulations at 40 C.F.R. § 1502.9(c).

MHA Nation Air Quality Consultants and EPA's Air Quality Staff exchanged information concerning changes in the project as a result of changing the crude source from Canadian oil sands crude to local Bakken crude. Through these exchanges and the documentation referenced in the formal reports issued to EPA, it was determined that the impact analyses were consistent and fell within the regulatory permitting requirements as originally applied to the project.

An independent analysis of the emissions from the Bakken crude source was completed and submitted to EPA in the updated air quality emissions analysis. *See generally*, Addendum, attached hereto as Exhibit 6 and Air Quality Modeling Update, attached hereto as Exhibit 8. Except for the backup Sulfur Recovery Unit ("SRU"), additional units to process Bakken crude were assumed to operate simultaneously with other units in the SIR analysis. These additional units include:

- Vacuum Crude Heater
- Decant Oil Tank Heater 1

- Decant Oil Tank Heater 2

EPA SIR at 4, attached hereto as Exhibit 9. The flare loading is based on the SRU capacity and an assumption that both SRUs are shut down. Addendum at 2-3, attached hereto as Exhibit 6 and Air Quality Modeling Update at 7, attached hereto as Exhibit 8. The backup SRU was not added because of the switch to Bakken crude. *Id.* This unit was added to prevent excessive SO_2 emissions in the event of an SRU shutdown. Air Quality Modeling Update at 7.

The elevated flare emissions have been estimated to occur 100 hours per year. Addendum at 2-4, attached hereto as Exhibit 6 and Air Quality Modeling Update at 7, attached hereto as Exhibit 8. This assumes that both SRU units will be shut down for this same period, which is a very conservative assumption. *Id.* The standards would be maintained in the event of upset operational conditions. With the best available information about the Refinery design, EPA took a hard look at the emissions associated with the switch from Canadian oil sands crude to Bakken crude. *See generally*, EPA SIR, attached hereto as Exhibit 9. As stated above, specifications of new processing units were determined and associated emissions were calculated for specific parameters as indicated in the discussion below. *See generally*, EPA SIR, attached hereto as Exhibit 9 and Air Quality Modeling Update, attached hereto as Exhibit 8.

i. SO_2 Emissions

Flaring emissions of SO_2 from upset events were calculated and presented in the Addendum. These are related to 100 hr/yr of SRU shut down which is very conservative since there will be a redundant SRU system. Addendum at 2-4, attached hereto as Exhibit 6 and Air Quality Modeling Update at 7, attached hereto as Exhibit 8.

The Bakken crude sulfur content is quite similar to what was proposed for the Canadian oil sands crude. Data from the North Dakota Geological Survey has 41 separate analyses for crude from the Bakken formation (MBK). *See* North Dakota Geological Survey, Catalog of Oil

Analyses (March 7, 2002), *available at* https://www.dmr.nd.gov/ndgs/Extractable_Files/oilanalys.asp (last visited December 16, 2011). The average of these 41 analyses is 0.18 percent sulfur. *Id.* At a production rate of 15,000 barrels per day, this is equal to 3 long-tons of sulfur, which is the capacity of each SRU. Since there are 2 SRUs, the sulfur recovery capacity is redundant, thus minimizing sulfur emissions from SRU upsets. *See generally*, Addendum, attached hereto as Exhibit and Air Quality Modeling Update at 7, attached hereto as Exhibit 8. *See also*, EPA SIR at 7, attached hereto as Exhibit 9.

The sulfur loading rate to the flare is based on the 3 long-tons per day released during upsets; this is equivalent to 280 lb/hr of sulfur or 560 lb/hr of SO_2. Addendum at 40, Appendix B, Flare Startup Emissions, attached hereto as Exhibit 6.

During normal operations, total exhaust flow of all constituents from the flare is estimated to be 500 lb/hr. Addendum at 2-3 to 2-4, attached hereto as Exhibit 6. This is the flow rate for all constituents and not the sulfur loading rate during upsets. Addendum at 2-4, attached hereto as Exhibit 6.

ii. NOx Emissions

EPA confirmed the emission calculations from the Refinery to be less than the 100 tpy limit for minor sources. EPA SIR at 7, Table 3 and at 8, Table 4, attached hereto as Exhibit 9. Low NOx burners are included in the engineering design and will be installed as the Refinery is constructed. Addendum at 5, attached hereto as Exhibit 6.

iii. VOC Emissions

VOC emissions were not included in the modeling update since VOCs are not modeled for near-field ambient air quality impacts. *See generally*, Air Quality Modeling Update, attached

hereto as Exhibit 8. VOC emissions were included in the emissions inventory for the Refinery and are in compliance with regulatory limits. EPA SIR at 7, Table 3, attached hereto as Exhibit 9.

iv. Hydrogen Sulfide

Data presented above for Bakken crude shows that the sulfur level is similar to Canadian synthetic crude. EPA SIR at 4, attached hereto as Exhibit 9.

v. Ambient Air Quality

The air pollutant emissions are consistently based on conservative assumptions and the estimate of potential emissions for the ambient air quality modeling results in conservative emission estimates. *See generally*, Addendum, attached hereto as Exhibit 6. EPA confirmed the assumptions and the model results in making the determination that the Refinery would be a minor source of pollutant emissions and would comply with ambient air quality standards. EPA SIR at 7 and 9, attached hereto as Exhibit 9.

C. EPA DECISION THAT A SUPPLEMENTAL EIS WAS UNNECESSARY WAS NOT ARBITRARY AND CAPRICIOUS AND, THEREFORE, EPA DECISION TO ISSUE THE NPDES PERMIT MUST BE UPHELD

An agency decision that an EIS does not need supplementation because of alleged new information is proper where it is not arbitrary and capricious and is reached after a reasoned evaluation of the information. *See* 39A C.J.S. Health & Environment § 126 (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360 (1989)). In fact, where the agency has been presented with new information, courts have upheld the agency's decision to forego a supplemental EIS so long as the record demonstrates the agency reviewed the proffered supplemental information, evaluated the significance-or lack of significance-of the new information, and provided an explanation for its decision not to supplement the existing

analysis. *Trout Unlimited v. U.S. Dept. of Agriculture*, 320 F.Supp.2d 1090, 1111 (D. Colo. 2004) (citing *Colorado Environ. Coalition v. Dombeck*, 185 F.3d 1162, 1179 (10th Cir. 1999)); (emphasis added).

The Eighth Circuit in particular has given due deference to an agency's discretion recognizing that, ultimately, it is the agency's choice in deciding which opinions to value and take into consideration as they apply to a project and the agency's decision of those opinions to reject. *Arkansas Wildlife Federation v. U.S. Army Corps of Engineers*, 431 F.3d 1096 (8th Cir. 2005).

Agency decisions not to supplement an EIS or EA will only be reversed if the agency decision is found to have been arbitrary and capricious. *Id.* (citing *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 376, 109 S.Ct. 1851, 1860 (1989). In making the factual inquiry concerning whether an agency decision was "arbitrary or capricious," the reviewing court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 1861 (1989). "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Id.* Although, a court should review the record to satisfy itself that the agency has made a reasoned decision based on its evaluation of the significance—or lack thereof—of the new information. *Id.*

Contrary to Petitioners' claims, air quality impacts and emissions were accurately, even conservatively, estimated by MHA Nation and EPA. At EPA's request, MHA Nation prepared and provided the Addendum to its *Air Quality Technical Report,* attached hereto as Exhibit 6,

and an *Air Quality Modeling Update*, attached hereto as Exhibit 8. In addition, EPA prepared an EPA SIR, attached hereto as Exhibit 9, to document EPA's evaluation and consideration of the change in feedstock for the Refinery. These analyses were based on accurate and, in some cases, conservative emissions calculations.

The SIR summarizes EPA's analysis of whether the impacts associated with refining Bakken crude, beyond the refinery-related impacts already analyzed in the final EIS, were significant enough to warrant preparing a supplemental EIS. EPA SIR at 3 and 15, attached hereto as Exhibit 9. EPA considered the following criteria:

- Are there any new, substantial environmental impacts from the project?
- Are there any new resources or issues with significant impacts to the human environment which were not considered in the EIS?
- Do the proposed project changes substantially change the environmental impacts or the methodologies needed to analyze the environmental impacts?

EPA SIR at 15, attached hereto as Exhibit 9. After considering the above criteria and the regulation at 40 C.F.R. § 1502.9(c), EPA concluded that a supplement to the final EIS was not warranted. After a thorough interdisciplinary review, EPA concluded that a change in feedstock to Bakken crude as compared to the Refinery using synthetic crude would not significantly change the proposed action or its impacts. *Id.*

As noted above, the MHA Nation provided an Addendum and Air Quality Modeling Update to EPA. Ambient air modeling presented in the Air Quality Modeling Update showed compliance for all criteria pollutants and averaging periods. *See generally*, Air Quality Modeling Update, attached hereto as Exhibit 8. For 1-hour SO_2, this modeling was performed following the March 1, 2011, EPA 1-hour NO_2 guidance that allows intermittent sources to be modeled as annual averages. U.S. Environmental Protection Agency, Additional Clarification Regarding Application of Appendix W Modeling Guidance for the 1-hour NO_2 National

Ambient Air Quality Standard (March 1, 2011). Using the 1-hour NO_2 guidance for 1-hour SO_2 modeling is supported by the September 22, 2011, EPA draft 1-hour SO_2 modeling guidance. U.S. Environmental Protection Agency, Guidance for 1-hour SO_2 NAAQS SIP Submissions, Public Review Draft (Sept. 22, 2011). Elevated SO_2 flaring events would be intermittent events; therefore this modeling followed EPA guidance for 1-hour modeling.

EPA subsequently requested running the dispersion model assuming continuous SRU upsets for the entire five-year period. This modeling evaluated both 24-hour and 1-hour SO_2 impacts. The results showed that the 24-hour NAAQS would still not be exceeded. EPA SIR at 7-8, attached hereto as Exhibit 9. Although the model did predict that the 1-hour NAAQS would be exceeded, the impacts were near the fence line and dropped below the NAAQS within 100 meters of the fence line. *Id.* at 8. In addition, assuming continuous upset events is not the generally accepted method for determining NAAQS compliance for a 99th percentile 1-hour standard. *Id.* This is because of the low statistical probability of the upset events and worst-case meteorological conditions occurring at the same time.

Despite Petitioners assertions that the switch from Bakken crude will likely make the Refinery a major source of air pollution, the increases mentioned in the petition are not substantial. In general, the emissions increased because additional sources were added to the emission inventory, and additional conservatism was added to the emission estimates to support the minor source status. Increases in estimated emissions were not significant since these did not trigger any additional regulatory applicability. EPA SIR at 7 and 9, attached hereto as Exhibit 9.

Furthermore, although Petitioners assert that the switch to Bakken crude will threaten or impair the NAAQS, during the analysis of potential emissions from the Refinery, it was determined that a redundant SRU would be included in the design of facilities to ensure

compliance with emission standards. The design information and analysis of impacts were submitted for EPA's determination that the Refinery would be a minor source and in compliance with applicable NAAQS. EPA SIR at 7 and 9, attached hereto as Exhibit 9. Based on EPA's SIR, the change in feedstock does not constitute a substantial change triggering the need for a supplemental EIS.

EPA's decision to forego a supplemental EIS should be upheld as the record demonstrates that EPA reviewed the proffered supplemental information, evaluated the significance-or lack of significance-of the new information, and provided an explanation for its decision not to supplement the existing analysis. EPA's decision was based on a consideration of the relevant factors. Petitioners failed to offer any evidence to prove that EPA's judgment was clear error. As a result, EPA's decision to issue the NPDES permit was neither arbitrary nor capricious, and therefore, EPA's decision must be upheld.

IV. CONCLUSION

For the foregoing reasons, EPA's decision to approve and issue the NPDES permit for the MHA Nation Refinery should be upheld. EPA did not violate the NEPA process and therefore, EPA's action is valid.

Dated this 16th day of December, 2011.

MHA Nation
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of December, 2011, a copy of the foregoing **MHA NATION'S RESPONSE TO PETITIONS FOR REVIEW** was sent via U.S. Mail, postage paid, to the following parties:

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