

August 9, 2006

Cert: 70041350000296695878 EPA

Cert: 70041350000296695861 BIA

Mr. Robert Roberts  
EPA Regional Director, Region 8  
Environmental Protection Agency  
999 18<sup>th</sup> Street Suite 200  
Denver Co 80202-8917

Mr. William Benjamin  
Great Plains Regional BIA Director  
Bureau of Indian Affairs  
115 4<sup>th</sup> Avenue SE  
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Re: Executive Order 12898 failure to  
Implement, EJ analysis missing

Dear Mr. Roberts and Mr. Benjamin,

The public hearings held by EPA Region 8 and Great Plains Regional Bureau of Indian Affairs agencies to receive public comment on the proposed MHA Refinery and the draft NPDES publicly revealed the fact that the Environmental Justice Analysis, referenced on page 3-100 of the DEIS was missing, and therefore, unavailable for public review and public comment during this critical comment period of June 29 through August 29, 2006. Please respond to how and why the EPA Region 8 staff and the Great Plains Bureau staff would release the DEIS as a complete document for public review and comment when EPA staff and Bureau staff knew the DEIS was released without the EJ analysis being complete and or existent. Your agencies are charged with the responsibility to the public to disclose information to that public that may be impacted by this project. Your Environmental Justice staff at the EPA Region 8 and the Great Plains Bureau have failed to implement Executive Order 12898 and have failed the public, the people of Fort Berthold Reservation.

The proposed refinery will adversely impact not only the residents of the town of Makoti, but the 3500 plus tribal residents of the Fort Berthold Reservation for the refinery if approved will be sited on our collective tribal fee patent or tribal land. The area that would be affected by the proposed refinery is larger than the one mile radius from the project site, furthermore, it is greater than the 10 mile radius which someone at EPA and/or BIA selected "to provide a more conservative analysis." According to EPA: What is Environmental Justice fact sheet:

"An EJ community is any aggregated or dispersed population that (a) is a low income population based on the Bureau or Census Current population reports, (b) is over 50-percent minority, or (c) contains a minority population percentage meaningfully greater than the minority population percentage in the general population or other appropriate unit of geographic analysis. Federally recognized Indian tribes or groups within tribes, which are made up of minority individuals, may be EJ communities."

EXHIBIT

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As emphasized in the June 29<sup>th</sup> released DEIS, Executive Order 12898 directs your federal agencies, the co-lead agencies for this major project, to determine whether your activities have disproportionately high and adverse human health or environmental effects on minority populations and low income populations and, further, that these populations are to be provided by your agencies an opportunity to effectively participate in any actions affecting them.

Based upon the missing EJ analysis data of the released DEIS, I request that the process be halted in its entirety until such time as the two co-lead agencies are able to fully implement public participation by fully disclosing supporting information of this proposal and that a sufficient public comment period be re-established to incorporate public response to all the data associated with this major project. If the EJ analysis document is available after the June 29<sup>th</sup> DEIS release date, then I request a copy of that document as referenced in the DEIS and further request that the public comment period be extended to 90 days beyond the August 29<sup>th</sup> deadline and that public hearings be held once more to address this document.

For your information in a letter dated June 27, 2004, I sent a letter to EPA Region 8, to Jean Belile, Environmental Justice Coordinator, requesting her assistance in written form. I had met her in SD in June 2004 and made the verbal request at that time, as she was a presenter at a Protect the Earth conference and she requested of me that I write her a letter officially requesting her help. My request was to make certain with her help (EPA Region 8) that Environmental Justice was present in this entire process of the preparing for and reviewing the Scoping Analysis, the DEIS, and the final EIS, as well as the final decisions (RODs). As attested to by the comments at the public hearings the people of Fort Berthold do NOT support the proposal for the refinery and this was so from the beginning of the this proposal.

I look forward to your responses and the EJ document if it is available.

Sincerely,



Joletta Bird Bear  
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September 13, 2006

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Diane Mann-Klager  
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EPA Region 8 (8P-W-22)  
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RE: Comment on the Draft Environmental Impact Statement (EIS) for the Three Tribes proposed oil refinery in Makoti ND

Sir:

The Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations," states that:

"each federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."

In the publication, "Environmental Justice: Guidance Under the National Environmental Policy Act," published by the Council on Environmental Quality (CEQ), it notes on page 1 that "The Executive Order makes clear that its provisions apply fully to programs involving Native Americans."

The CEQ publication notes that the Executive Order 12898 identifies four (4) issues "that are pertinent to the NEPA process" and states that the Executive Order:

1. "requires the development of agency-specific environmental justice strategies." According to the CEQ publication on environmental justice, "**Early and meaningful public participation in the federal agency decision-making process is a paramount goal of NEPA. CEQ regulations require agencies to make diligent efforts to involve the public throughout the NEPA process.**" CEQ goes on to note that, "for this participation to be meaningful, the public should have access to enough information so that it is well informed and can provide constructive input."
2. "recognizes the importance of research, data collection and analysis, particularly in respect to multiple and cumulative exposures to environmental hazards for low-income populations, minority populations, and Indian tribes. Thus data on these exposure issues should be incorporated into NEPA analyses as appropriate."
3. "provides for agencies to collect, maintain, and analyze information on patterns of subsistence consumption of fish, vegetation, and wildlife. Where an agency action may affect fish, vegetation, or wildlife, that agency action may also affect subsistence patterns of consumption and indicate the potential for disproportionate high and adverse human health or environmental effects on low-income populations, minority populations, and Indian tribes."
4. "requires agencies to work to ensure public participation and access to information."

According to CEQ's environmental justice publication, "agencies should...acknowledge and seek to overcome linguistic, cultural, institutional, geographic, and other barriers to meaningful participation, and should incorporate active outreach to affected groups."



The BIA and EPA, lead agencies responsible for NEPA and the tribal government of the Three Affiliated Tribes, as participating sovereign nation, failed to assure minimal or adequate NEPA compliance in the draft Environmental Impact Statement (EIS) for the proposed oil refinery, in regard to the above pertinent issues. This is a substantive deficiency by the lead agencies and the tribal government. In the scoping and draft EIS process and documents.

- The Environmental Justice offices of both Region 8 EPA and the EPA Headquarters failed to assure public participation in all stages, including the scoping and draft Environmental Impact Statement. Until pointed out in a public hearing for the current draft EIS document in August, both lead agencies and the tribal government of the Three Affiliated Tribes failed to acknowledge that their draft EIS and 'environmental justice' analysis document was incomplete and unfinished. The draft EIS, published in June 2006, had listed the environmental justice document as completed and implied it was available.

Despite a letter in June 2004 requesting her assistance, the Region 8 Environmental Justice Office representative, Jean Belile, was unresponsive and unavailable to members of the Environmental Awareness Committee of Fort Berthold until just prior to a November 2004 public hearing on the oil refinery. This limited the input of concerned tribal members into the scoping hearing and ultimately on the draft EIS. Despite telephone calls and conversations with Dan Gogol, EPA Headquarters Environmental Justice, Region 8 has failed to assure public participation strategies to assure constructive input. Both EPA Region 8 and EPA Headquarters have compromised their mission to protect the environment for the benefit of the tribal government's proposed oil refinery and to the detriment of individual tribal members.

In this process, the lead federal agency, the BIA, has also neither identified nor utilized its agency environmental justice plan to benefit the individual tribal members of the Three Affiliated Tribes. As a result, neither agency nor the tribal government of the Three Affiliated Tribes has provided adequate information to tribal members and other concerned low-income communities on the potential environmental and health impacts of the refinery and has further limited or denied constructive and meaningful input by tribal members and other members of the public, in both the Scoping and draft EIS.

- There are seven coal-fired power plants on the southeast corner of the Fort Berthold Indian Reservation. The BIA, EPA, and tribal government of the Three Affiliated Tribes failed to incorporate data on multiple and cumulative daily exposures to the individual tribal members of Fort Berthold Indian Reservation from the power plants in the draft EIS for the proposed oil refinery.

Using the EPA's own standard methodology, Clear The Air, a national public education campaign to improve air quality by reducing emissions, analyzed data and determined that, on average, people exposed to power plant toxic emissions "lost an average of 14 years, dying earlier than they otherwise would."

Premature deaths from lung cancer, cardiovascular diseases including heart attacks, asthma and respiratory conditions requiring emergency room visits are among other serious health impacts from coal-fired power plants. The health of Fort Berthold tribal members have been similarly impacted. Indian Health Services, the primary healthcare provider on Fort Berthold, is only able to meet 40% of the actual medical need of Fort Berthold tribal members. With 63% unemployment on Fort Berthold, a majority of tribal members must utilize Indian Health Services for routine and urgent care.

In 2004, over 140,000 tons of sulfur dioxide was emitted by ND power plants on or near Fort Berthold. The same ND plants released over 75 tons of oxides of nitrogen. Over 2,200 tons of mercury was also emitted on or near Fort Berthold Indian Reservation by the power plants in 2004. These toxic emissions are only for one (1) year. These power plants have been in place for over twenty years. Because of the location of the seven power plants across the river from the Fort Berthold Indian Reservation, the health of tribal members has been impacted. The emissions from the proposed oil refinery will further cause further deterioration of the health of tribal members and contribute to further pollution of the environment.

According to the October 2004 Dakota Resource Council publication, Dakota Counsel, the North Dakota power plants emitted over 3 tons of toxic arsenic and 3 tons of lead. Over 4 million pounds of chromium were also released on or near Fort Berthold. Chromium damages the respiratory tracts of humans and other living animals. According to CEQ's publication on environmental justice, "Agencies should consider these multiple or cumulative effects, even if certain effects are not within the control or subject to the discretion of the agency proposing the action." The human cumulative and multiple exposures to current pollution and a "new source" of pollution, namely the oil refinery, has been omitted in the draft EIS and environmental justice analysis.

- The BIA and EPA have determined that no Clean Air Act permit is required for the proposed oil refinery. No other refinery in the United States is exempt from air emissions monitoring. Lack of an air monitor permit means that the proposed oil refinery in Makoti may release an unlimited and unmonitored amount of toxic air emissions.

Despite this, the Region 8's environmental justice analysis for the draft EIS limits the scope of environmental justice to a ten mile radius around the site of the proposed oil refinery. No information was provided in the environmental justice analysis to justify this conclusion.

This analysis excludes the majority of individual tribal members of Fort Berthold who reside within a 30-mile radius from the refinery site in Makoti. Tribal members fish, do subsistence hunting on Fort Berthold, and also gather and eat wild plums, chokecherries, juneberries, wild turnips, and buffalo Berries. The intake of heavy metals emitted by the refinery into the air, water, ground, and plant life will add or exacerbate health problems of tribal members.

As an example, cadmium, a toxic chemical from refining, is taken up into plant life. The tribal government proposes to feed its buffalo from the forage around the refinery site. Buffalo meat provided at pow-wows and other tribal gatherings will become a conveyor of toxic chemicals to tribal members. This will disrupt the integrity of a long-held social and cultural practice.

According to a Defenders of Wildlife report, more than 225 bird species have been recorded at the Lostwood Wildlife Refuge. In October 2004, the Lostwood Refuge was identified as one of America's Ten Most Endangered National Wildlife Refuges. 4,000 glaciated lakes dot the refuge proving prime Habitats for ducks, geese, and other breeding waterfowl. Besides human health, birds and other wildlife will be negatively impacted by the unlimited and unmonitored air emissions of toxic chemicals from the proposed oil refinery in Makoti.

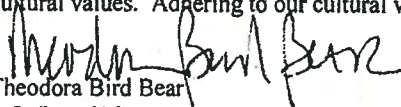
The Fox Hills-Hell Creek aquifer is under the site of the proposed oil refinery. This same aquifer underlies the entire Fort Berthold Indian Reservation. The EPA, BIA, and tribal government of the Three Affiliated Tribes propose injecting treated waters used to process both hazardous and non-hazardous chemicals from the refinery into the ground on the refinery site. The BIA, EPA, and current tribal government of the Three Affiliated Tribes will endanger the aquifer under the entire Fort Berthold Reservation.

Due to the drought throughout the entire western United States, including Fort Berthold, the Volume of water in the Missouri River continues to slowly diminish each year. Putting the aquifers underneath Fort Berthold in jeopardy will potentially strain the future water resources for Fort Berthold and will potentially affect human, wildlife, and vegetation on Fort Berthold. The BIA's acquiescence in this project is a failure to uphold its trust responsibilities to the individual tribal members who will be affected by this agency action.

- The BIA is also failing its trust responsibilities to the individual tribal members of Fort Berthold by proposing an incomplete and inadequate draft Environmental Impact Study as satisfying its responsibility as lead agency. According to CFR 151.10, the BIA Regional Director must make a **conclusive statement regarding jurisdictional problems, potential land use conflicts, and must include an independent assessment of the impact on the BIA should the land be acquired in trust.**
  - a. According to a 2004 letter from the EPA to the tribal government of the Three Affiliated Tribes, **“Leaks and spills over time will eventually contaminate surficial groundwater and soil under and near the refinery.”** Further, the letter reiterates that **“it is inevitable that leaks and spills will occur.”** **Does the Fort Berthold BIA have adequate staff to carry out the additional responsibilities to monitor, address, and manage contamination by the oil refinery on trust land?**
  - b. The Cobell lawsuit over the BIA mismanagement of IIM accounts of individual Indians is currently projected to be an \$8 billion settlement by the federal government. If Aberdeen BIA allows the land taken into trust for the refinery, **how will the added responsibilities of emergencies, environmental concerns, roads, traffic, and other aspects of the oil refinery affect the capability of the present BIA staff to manage its existing trust responsibilities?**
  - c. According to the draft EIS, (Page 4-51), **“If the waste water is not properly treated prior to irrigation, the irrigated land parcel could potentially become a RCRA hazardous waste land treatment unit (LTU). Such a designation would significantly change the nature of the proposal under this alternative, as there would be greater likelihood of releases to soils, ground water and surface water, and there would be additional requirements related to human food chain considerations.”** **Does the BIA have adequate staff and resources to address the ‘human food-chain issues from this potential superfund site?**
  - d. Under Alternative 4 in the draft EIS (Page 4-50), **“...there would be no RCRA permitting requirements for ground water monitoring and correction action.”** Further, **“...there would be no requirement for financial assurance under EPA’s RCRA regulations. Without the funding available through financial assurance, cleanup activities and other remedial actions may be delayed or may not be implemented.”** **Is the BIA ready to assume financial assurance for corrective actions, cleanup activities, and other remedial actions which will not otherwise be assured at the refinery site, in Alternative 4?**

My response is affiliated with the letter from the Center on Race, Poverty, & the Environment, dated August 30, 2006, and also the letter by Julia May, through the Environmental Integrity Project, dated August 29, 2006, in response to your offices on the substantive deficiencies in the draft EIS and environmental justice analysis.

I support sustainable energy development as an alternative to a fossil fuel oil refinery and a centerpiece to the tribal government’s economic plan.. I remain opposed to the transfer of the land into trust status for the proposed oil refinery at Makoti or any other location. Historically, the Mandan, Arikara, and Hidatsa have resided along the Grand, Heart, and Knife rivers of the Missouri River. As agricultural tribes, we recognized, understood, and prayed to spiritual entities linked to land, water, sky, and plants. Our identity as tribal people was with the earth. Non-polluting sustainable energy development is reflective of our cultural values. Adhering to our cultural values remains our true strength. Anything else will weaken us.

  
Theodora Bird Bear  
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September 13, 2006

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MR. Robert Roberts  
United States Environmental  
Protection Agency Region 8  
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Denver CO 80202-8917

Re: DEIS response on MHA  
Proposed Refinery

Dear Mr. Benjamin and Mr. Roberts,

In response to the Draft Environmental Impact Statement of the Proposed Mandan, Hidatsa, and Arickara Refinery Project to be sited upon land recently purchased, we submit the following comments:

1. From the alternatives presented in the DEIS we support Alternative 2--Accept the land into trust WITHOUT CONSTRUCTION OF THE PROPOSED REFINERY and we support Effluent discharge alternative D--NO ACTION, UNDER THIS ALTERNATIVE, EPA WOULD NOT ISSUE AN PERMITS FOR THE DISCHARGE OF EFFLUENTS FROM THE PROPOSED REFINERY.
2. We are concerned and believe that Alternative 1 (construction of a refinery, land into trust, and the granting of pollution permits) and Alternative 4 (construction of a re-designed refinery) will present legal conflicts with the state over taxation, zoning, and jurisdiction that will lead to erosion of our tribal sovereignty.
3. We believe that Alternative 1 and Alternative 4 presents an immediate material threat of many hazardous and toxic substances generated by the proposed refinery. The release of these hazardous materials and toxic substances will be present in any structures of the proposed refinery and workers will be directly and adversely impacted. These hazardous materials and toxic substances will damage the air, soil, sediment, surface water, and ground water of the MHA nation.
4. Under Alternative 1 and Alternative 4 we challenge the designated affected area; of the Environmental Analysis (EA) which limits the population of residents to within a 10-mile radius of the project site and we maintain that the affected area is at least a 30-mile radius from the project site, according to the DEIS the refinery will release at least 207 TONS of hazardous pollutants

of nitrogen oxides (NOx), carbon Monoxides (CO), non-methane-ethane volatile organic compounds (VOCs), sulfur dioxide (SO 2), particulate matter (PM 10 and PM 25) and toxic carcinogens (HAPS) which will contaminate our air and water and become a pathway for increased diseases and increased mortality affecting tribal members and families of the MHA nation. Already, the air we breath contains more than 140 tons of nitrogen oxides and more than 70 tons of sulfur dioxides per year released from the gasification plants in close proximity to our communities and homes as reported in the Minot Daily or Bismarck Tribune (August 2006).

5. We believe that Alternative 1 and Alternative 4 attempts to change the stringent Tribally adopted Water Quality Standards (WQS) to lesser WQS of the EPA, and, therefore, diminishes our high standards and tribal sovereignty, "Where the EPA Criteria are more or less stringent than the Tribally adopted WQS and/or state WQS, the EPA Criteria have been redesignated as the applicable value in anticipation of adoption of the EPA Criteria by the State or Tribes," (Summary of Tribally Adopted WQS and State WQS and EPA 3049a) Criteria)
6. We believe and are concerned that Alternative 1 and Alternative 4 will create great potential environmental liability against the Bureau of Indian Affairs local agency and against the MHA nation and its membership, and that the additional acquired costs of a high risk industry will adversely impact the funding of services we receive through the current funding level of PL 93-639 federally funded programs of Fort Berthoud.
7. We believe in sustainable economic development such as solar powered energy or wind generated energy and submit this as a viable alternative to this proposal.

We request that our names be withheld from publication.

Sincerely,