

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

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In re:

MHA Nation Clean Fuels Refinery

NPDES Permit No. ND-0030988

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NPDES Appeal Nos. 11-02, 11-03, and 11-04

**MHA NATION'S MOTION TO INTERVENE  
AS A PARTY RESPONDENT**

Pursuant to the Environmental Appeals Board ("EAB") *Practice Manual* at Part IV.D.4 (2010) and established EAB precedent, the permittee, the Mandan, Hidatsa and Arikara Nation of the Fort Berthold Reservation ("MHA Nation"), moves to intervene in this action as a party respondent.

The grounds for this motion are as follows:

1. 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 MHA Nation Clean Fuels Refinery (the "NPDES permit"):

(1) James Stafslie; (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").

2. 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 MHA Nation. 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, known as the MHA Nation Clean Fuels Refinery (“Refinery”), for which the NPDES permit was issued.

3. The Petitioners claim, amongst other arguments, 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”) by not preparing a supplemental Environmental Impact Statement, and (3) EPA applied inappropriate standards to calculate the effluent limitations, thereby failing to adequately assess water quality impacts.

4. The current regulations governing NPDES permit appeals at 40 C.F.R. Part 124 do not explicitly provide for intervention. *In re USGen New England, Inc.*, NPDES Appeal No. 03-12, at 7 n.13 (Feb. 20, 2004). *See Rhode Island v. U.S. E.P.A.*, 378 F.3d 19, 21 (1st Cir. 2004). However, the EAB has discretion “to allow intervention and/or non-party briefing and ... typically allow[s] permittees to participate as intervenors when supported by an appropriate motion.” *In re USGen New England, Inc.*, NPDES Appeal No. 03-12, at 8 n.13 (Feb. 20, 2004) (citing, inter alia, *In re Phelps Dodge Corp.*, NPDES Appeal No. 01-07, slip op. at 15 (EAB, May 21, 2002) (permittee’s motion to intervene and file a response to the petition granted); *In re Aurora Energy, L.L.C.*, NPDES Appeal No. 03-11, at 1 (EAB, Oct. 21, 2003)(permittee’s motion for leave to intervene granted); *In re Haw. Elec. Light Co.* (“HELCO”), PSD Appeal Nos. 01-24 through 01-29, at 1 (EAB, Oct. 18, 2011) (permittee’s motion to intervene and file a response to petitions for review granted); *In re General Motors*, PSD Appeal No. 01-30, 10 EAD 360, 362 (Mar. 6, 2002)(permittee’s motion to intervene granted); *In re Seminole Electric Coop., Inc.*, PSD Appeal No. 08-09, slip op. at 13, n.16 (EAB, Sept. 22, 2009) (permittee’s motion to intervene granted).

5. MHA Nation will be substantially and specifically affected by the results of this proceeding. As the permittee under the NPDES Permit at issue in this case, MHA Nation has a definite and unique interest in the validity of the NPDES Permit and the outcome of this matter. The MHA Nation Clean Fuels Refinery, for which the NPDES Permit was issued, is nearing the final stages of development and is anticipated to be a major economic engine for the MHA Nation, its Tribal Members, and the nearby communities. The delay caused by these appeals and the challenges to the NPDES Permit are troublesome for and potentially injurious to the MHA Nation. Any relief afforded in this proceeding will directly and substantially affect MHA Nation by imposing new or modified legal obligations on MHA Nation under the NPDES Permit. If the relief requested is granted, MHA Nation may be forced to expend significant resources to comply with those new or modified legal obligations—in addition to the significant resources and the eight years MHA Nation has worked with EPA to obtain the issuance of the NPDES Permit.

6. 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 an Addendum to its *Air Quality Technical Report for the FEIS for the MHA Nation Proposed Clean Fuels Refinery Project* dated March 9, 2011 ("Addendum") an *Air Quality Modeling Analysis Update for the FEIS for the MHA Nation Proposed Clean Fuels Refinery Project* ("Air Quality Modeling Update") that MHA Nation provided EPA on June 6, 2011. In addition, EPA prepared a Supplemental Information Report dated July 29, 2011, 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.

7. 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, the Addendum, and the Supplemental Information Report prepared by MHA Nation's consultants; by requiring multiple revisions to the Air Quality Modeling Update that MHA Nation provided EPA on June 6, 2011, for which EPA worked in conjunction with MHA Nation regularly to ensure the update analyzed the new data fully and accurately; and, by preparing its own Supplemental Information Report, based in part on the Air Quality Modeling Update, in compliance with the standard for an agency decision whether to prepare a supplemental Environmental Impact Statement pursuant to the Council on Environmental Quality regulations at 40 C.F.R. § 1502.9(c).

8. Contrary to Petitioners' claims, EPA properly applied technology-based limits that are lawful pursuant to the Clean Water Act regulations, thereby establishing accurate and lawful effluent limitations. As a result, the correct process configuration value was applied, and EPA calculated accurate and appropriate limits for biological oxygen demand, total suspended solids, chemical oxygen demand, sulfide, and daily maximum chromium and incorporated them into the NPDES Permit. The NPDES Permit contains appropriate and lawful effluent limitations.

9. MHA Nation seeks to intervene and respond to the Petitioners' claims, including but not limited to the aforementioned claims. MHA Nation's track record of hiring qualified experts to advise them on design and environmental issues and taking significant affirmative steps to work with EPA throughout the eight-year process to work toward issuance of the NPDES Permit supports its intervention in this proceeding. MHA Nation also conducted its own

analyses throughout the eight-year time period, further underscoring the justification for MHA Nation to intervene in this proceeding to protect its economic interests, its environmental interests, its sovereign governmental interests, and its due process interests to be heard in a matter directly and substantially affecting its legal rights and economic viability.

10. As a result, there is good cause to allow MHA Nation to intervene in this matter. The disposition of this matter without MHA Nation's involvement will, as a practical matter, impair MHA Nation's ability to protect its interests. The respondent EPA cannot be expected to represent MHA Nation's interests adequately in this proceeding, notwithstanding the federal government's trust responsibility owed to MHA Nation, because EPA is the permit-granting, regulatory, and enforcement authority whose interests differ substantially from those of MHA Nation as permittee. In any event, MHA Nation has valid defenses to the NPDES Permit appeal, and intervention would promote a just resolution of this case.

11. MHA Nation's intervention in this matter is timely. Since the EAB granted EPA Region 8's Motion for Extension for Time, EPA's response addressing the petitions is not due until December 16, 2011. *See*, EAB Order Consolidating Appeals and Granting Motion for Extension of Time to File Response (Sept. 30, 2011). No substantive proceedings have occurred in this case, and MHA Nation's participation will not delay this proceeding in any way.

12. Thus, by analogy to well established judicial principles for intervention, MHA Nation's motion satisfies both the "by right" and the "permissive" intervention requirements of Federal Rules of Civil Procedure Rule 24.<sup>1</sup> Although the Federal Rules of Civil Procedure do

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<sup>1</sup> Federal Rules of Civil Procedure Rule 24 provides as follows:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

not apply to EPA administrative proceedings, the EAB looks to them for guidance. *See, e.g., In re Zaclon, Inc.*, 7 E.A.D. 482, 490 n.7 (EAB 1998). ("[T]he Federal Rules do not directly apply to EPA's administrative proceedings"); *In re Lazarus, Inc.*, 7 E.A.D. 318, 330 n.25 (EAB 1997); *Puerto Rico Aqueduct & Sewer Auth. V. E.P.A.*, 35 F.3d 600, 608 (1st Cir. 1994) (stating EPA's view that federal rules "may inform administrative practice in appropriate situations"). *See generally, EAB Practice Manual* at (III)(A).

13. Assuming it is allowed to intervene as a party respondent in this action, MHA Nation will defend the factual and legal integrity of NPDES Permit ND-0030988 and the conditions imposed in the NPDES Permit. MHA Nation will file timely and appropriate pleadings addressing procedural and substantive matters at issue in this proceeding. MHA Nation will oppose any effort by the Petitioners seeking to impose stricter legal obligations on MHA Nation under the NPDES Permit. MHA Nation will otherwise participate as a full party with all the rights of and subject to all limitations imposed upon a party.

14. Without limitation, MHA Nation is aware that, by letter dated September 13, 2011, the EAB has instructed EPA Region 8 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." In the event MHA Nation's motion to intervene as a party respondent is allowed, MHA Nation is

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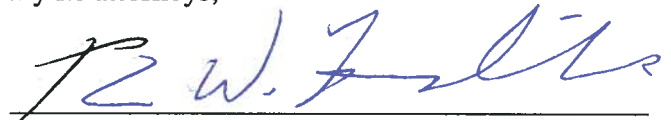
(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

prepared to file a timely response by December 16, 2011, EPA's deadline to respond, that addresses the Petitioners' contentions and whether the Petitioners have satisfied the requirements for obtaining review under 40 C.F.R. § 124.19(a).

For the foregoing reasons, MHA Nation's motion to intervene in this action as a party respondent should be allowed.

Dated this 11<sup>th</sup> day of November, 2011.

MHA Nation  
By its attorneys,

A handwritten signature in blue ink, appearing to read "T. W. Fredericks", is written over a horizontal line.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on this 11<sup>th</sup> day of November, 2011, a copy of the foregoing **MHA NATION'S MOTION TO INTERVENE AS A PARTY RESPONDENT** was sent via U.S. Mail, postage paid, to the following parties:

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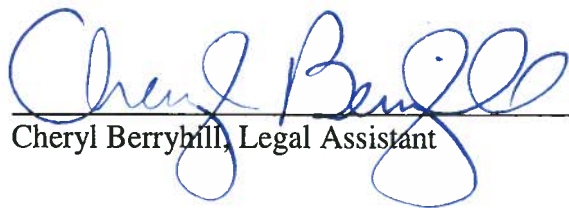
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