

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

In re:)
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)
Central Wayne Energy Recovery) PSD Appeal No. 98-1
Limited Partnership)
Dearborn Heights, Michigan)
)
)

ORDER DENYING MOTION FOR RECONSIDERATION

By order dated February 26, 1998, the Board dismissed a petition for review filed by Ms. Sandra Yerman in the above-captioned matter on the ground that the petition was not received by the Board by the December 29, 1997 filing deadline. See Order Dismissing Appeal. In reaching this conclusion, the Board relied on a representation by the Michigan Department of Environmental Quality ("MDEQ") that notice of the final permit determination was served no later than November 26, 1997. See Response of the Michigan Department of Environmental Quality Regarding the Timeliness of Ms. Sandra Yerman's Appeal Petition, PSD Appeal No. 98-1 at 5 (Feb. 20, 1998) and Order Dismissing Appeal at 1. If notice of the final permit determination was served no later than November 26, 1997, the deadline for filing a petition for review with the Board was no later than December 29, 1997 (30 days + 3 days for service by mail). See 40 C.F.R. §§ 124.19(a) & 124.20(d). Thus, as Ms. Yerman's petition was not received at

the EPA Headquarters' mailroom until January 2, 1998, the appeal was dismissed as untimely.¹

In a timely motion for reconsideration, Ms. Yerman presented information she did not previously make available to the Board in her response to the Board's Order to Show Cause why Petition Should not be Dismissed as Untimely -- a copy of the envelope in which she claims MDEQ served notice of its November 24, 1997 final permit determination. The outside of the envelope contains a metered stamp showing the date: November 29, 1997. If this were the correct date on which the notice was served, Ms. Yerman's appeal would be timely. That is, the 33-day period would expire on Thursday, January 1, 1998 (a federal holiday), and would then be extended to the next working day, January 2, 1998. See 40 C.F.R. § 124.20(c). As previously stated, Ms. Yerman's appeal was received at the EPA Headquarters' mailroom on January 2, 1998.

Based on this additional information, the Board ordered MDEQ to submit a response to the motion for reconsideration no later than March 20, 1998. In its response, MDEQ acknowledges that the envelope in which Ms. Yerman received notice of the final permit determination was stamped with the date November 29, 1998. MDEQ

¹Although the appeal was not physically received at the Board's offices until January 5, 1998, the Board treats the receipt of the appeal at the EPA Headquarters' mailroom on January 2 as the operative date for determining if the appeal was timely.

states, however, that the November 29, 1997 date was incorrect, and that the notice was actually stamped and served on November 26. In support of this assertion, MDEQ has provided the Board with three affidavits indicating that the public notices were taken to the State of Michigan's mailing office on November 26, and that the notices were then meter stamped and delivered to the U.S. Post Office on that date. In particular, the response includes the affidavits of Randal S. Telesz, a Senior Engineering Specialist in the MDEQ Air Quality Division; Alice Hickling, Mail Metering Supervisor for the State of Michigan Mail and Delivery Services; and Barry Miller, an employee in the Mail Metering Unit in the State of Michigan's mailing office. Mr. Telesz's affidavit states, in part:

The copies of the service of notice were placed into envelopes on November 26, 1997.

I personally brought the service of notice packages to the State of Michigan Mailing Office on November 26, 1997.

At approximately 2:00 p.m. on November 26, 1997, I delivered the packages to Alice Hickling, Mail Metering Supervisor. I told Ms. Hickling that the packages had to be metered and sent out that day. Ms Hickling assured me that there was ample time for that to occur.

Affidavit of Randal S. Telesz at ¶¶ 5-7. Ms. Hickling's affidavit states:

On November 26, 1997, Mr. Randal Telesz of the Air Quality Division brought a large number of packages to me for metering and mailing. He arrived at approximately 2:00 pm. Mr. Telesz indicated that the packages had to be delivered to the US Postal Service that day. I told Mr. Telesz that it could be done.

On November 26, 1997, I personally assigned the metering of the Air Quality Division packages to Barry Miller, lead worker in metering. I understood the importance of the mailing. *All materials metered on November 26, 1997 were delivered to the U.S. Postal Service that same day.*

The State of Michigan Mail and Delivery Services office was closed on Saturday, November 29, 1997.

On March 16, 1998, I became aware that the 202 packages that were metered and mailed were dated November 29, 1997. I can confirm that the date on the 202 packages was incorrect. Attached is a copy of the daily meter record for Mr. Miller's meter and the card assigned to these 202 packages processed on November 26, 1997. It is my opinion that someone inadvertently advanced the meter date prior to metering the packages.

Affidavit of Alice Hickling at ¶¶ 2-5 (emphasis added). Barry Miller's affidavit confirms that on November 26, 1997, he received and metered 202 packages from the MDEQ Air Quality Division. Affidavit of Barry Miller at ¶ 2.

Under 40 C.F.R. § 124.19(g), a motion for reconsideration "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." Reconsideration is generally reserved for cases where the Board is shown to have made a "demonstrable error" of law or fact in the challenged decision. *In re Gary Development Co.*, RCRA (3008) Appeal No. 96-2 at 2 (EAB, Sept. 18, 1996) (Order Denying Motion for Reconsideration); *In re Mayaguez Regional Sewage Plant*, NPDES Appeal No. 92-23 at 2 (EAB, Dec. 17, 1993) (Order Denying Reconsideration and Stay Pending Appeal). Upon review of petitioner's arguments in the motion for reconsideration and

MDEQ's response, we conclude that petitioner has failed to demonstrate that any such factual or legal error affected the Board's decision dismissing the petition.

Petitioner's motion for reconsideration is based for the most part on her discovery of the envelope in which she received notice of the final permit determination and the fact that the envelope is dated November 29, 1997.² However, based on the statements in the affidavits submitted by MDEQ, particularly Mr. Telesz's and Ms. Hickling's statements that the notice of the final permit determination was served on November 26, 1997, and Ms. Hickling's statement that the State of Michigan's Mail and Delivery Services office was closed on November 29, 1997, we conclude that notice of the final permit determination was served on Ms. Yerman no later than November 26, 1997, and that the November 29, 1997 stamp on the envelope containing the notice is not the correct service date. Since the time for filing a petition for review with the Board runs from the date of service of the notice (see 40 C.F.R. § 124.19), Ms. Yerman's petition was indeed untimely.³ Accordingly, Ms. Yerman's motion for

²As to the other arguments raised in Ms. Yerman's motion for reconsideration, these arguments do not come close to meeting the standard for granting reconsideration and are therefore rejected.

³We note that the petitioner has not asserted, and the record does not reflect, that petitioner relied in any way on the November 29, 1997 meter stamp on the envelope containing notice of the final permit determination in determining the applicable deadline for filing her petition for review.

reconsideration is denied, the stay of the Board's February 26, 1998 Order Dismissing Appeal is lifted, and the petition for review is hereby dismissed.⁴ See, e.g., *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996) (dismissing petitions for review filed two days after the filing deadline); *In re Outboard Marine Corp.*, 6 E.A.D. 194 (EAB 1995) (dismissing as untimely an appeal filed

⁴As the EPA Administrator has previously stated:

[G]enerally a petition [for review of a permit] will be granted only if it "is in strict compliance with regulatory requirements." Proper filing is more than a mere procedural formality. A request for review under § 124.19 affects the effective date of the permit (see § 124.15(b)(2)), and the Agency requires scrupulous compliance with filing procedures so that it may readily determine whether and when a permit is effective and enforceable. Moreover, the Agency's limited resources are best reserved for addressing the concerns of petitioners who are diligent enough to adhere to the filing requirements, particularly given the large number of permit appeals filed annually under § 124.19 * * *. Requiring conscientious compliance with the Agency's appeal procedures is also consistent with EPA's oft-expressed policy that its review authority is to be "sparingly exercised" and that permit conditions will ordinarily be established at the Regional [State] level. 45 Fed. Reg. 33412 (May 19, 1980).

In re Georgetown Steel Corp., 3 E.A.D. 607, 609 (Adm'r 1991) (citation omitted).

In a reply to MDEQ's response to the motion for reconsideration, Ms. Yerman asserts that although MDEQ originally argued that notice of the final permit was served sometime between November 24 and November 26, 1997, MDEQ now states that the notice was served on November 26. Ms. Yerman argues that the Board should review this alleged inconsistency and consider the merits of her petition. However, because the petition would be untimely whether it was served on November 24 or November 26, we need not address this issue.

by U.S. EPA Region V because the appeal was received by the Board one day after the filing deadline).

So ordered.

Dated: 3/26/98

ENVIRONMENTAL APPEALS BOARD

By: _____/s/_____
Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Reconsideration in the matter of Central Wayne Energy Recovery Limited Partnership, Dearborn Heights, Michigan, PSD Appeal No. 98-1, were sent to the following persons in the manner indicated:

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Postage Prepaid
and Facsimile:

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Dated: 3/26/98

/s/
Annette Duncan

Secretary