

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

In re:)	
)	
Town of Exeter Municipal)	NPDES Appeal No. 00-21
Wastewater Treatment Plant)	
)	
)	
Docket No. NH0100871)	

ORDER DENYING PETITION FOR REVIEW

On July 25, 2000, U.S. EPA, New England Region ("the Region") issued a final permit decision for NPDES Permit No. NH0100871 ("the Permit") to the Town of Exeter, New Hampshire ("the Town"). The Permit regulates discharge from the Town's wastewater treatment facility ("WWTF") and sewer system into the Squamscott River and Clemson Pond pursuant to Clean Water Act, § 402, 33 U.S.C. § 1342.¹

On August 17, 2000, the Town filed a two-page Appeal to NPDES Permit NH0100871 ("Petition").² The Region timely filed a

¹Under the Clean Water Act, discharges into waters of the United States by point sources such as the Town's WWTF must be authorized by a permit in order to be lawful. See 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. See 33 U.S.C. § 1342.

²"Documents are considered filed on the date they are received by the Board" *In re Puna Geothermal Venture,*

Response to Petition for Review ("Response") along with Exhibits containing portions of the administrative record in this matter ("Ex.>").³

Under the permitting regulations found at part 124 of title 40 of the Code of Federal Regulations, a petitioner must file his or her petition for review with the Board within the time period established by the regulations. See *In re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996); see also *In re Sutter Power Plant*, PSD Appeal Nos. 99-6 & 99-73, slip op. at 8 (EAB, Dec. 2, 1999), 8 E.A.D. __. "Uniform application of the requirement is necessary because of the various parties and permits that are subject to this provision and because important consequences flow from petitioning for review. See, e.g., § 124.15(b) (final permit decision is effective 30 days after service of notice unless review requested under § 124.19)." *In re Bethlehem Steel Corp.*, 3 E.A.D. 611, 613 n.9 (Adm'r 1991).

Section 124.19 of title 40 of the Code of Federal Regulations sets forth the procedural requirements for appeals of

UIC Appeal Nos. 99-2, 99-2A, 99-2B, 99-3, 99-4, & 99-5 (EAB, June 27, 2000), 9 E.A.D. __ (citing *In re Outboard Marine Corp.*, 6 E.A.D. 194, 196 (EAB 1995)). The Town's Petition was received by the Board on August 17, 2000.

³Within the time period provided by the regulations, the Region sought and was granted an extension of time. The Region's response was filed within this extended time.

NPDES permits. Section 124.19 states:

Within 30 days after a * * * NPDES * * * final permit decision * * * any person who filed comments on [a] draft permit or participated in the public hearing may petition the Environmental Appeals Board to review any condition of the permit decision. * * * The 30-day time 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.

40 C.F.R. § 124.19(a). Three days are added to this time period when service of notice is made by mail. 40 C.F.R. § 124.20(d).

The notice of the final permit decision was sent to the Town by certified mail on July 12, 2000. See Ex. 8. Under the time frame established by the regulations, since the notice was served by certified mail the Town had 33 days to file its petition for review with the Board. Therefore, unless, according to § 124.19(a), a later date was specified in the notice, the Town's petition for review was to have been received by the Board no later than August 14, 2000.

The notice of the final permit decision did, in fact, specify a date slightly different from that contemplated by 40 C.F.R. § 124.19(a). The notice stated, "If you wish to contest any of the provisions of this permit, you may petition the Environmental Appeals Board, (EAB), within thirty days of receipt of this letter." Ex. 8. The certified mail return receipt that

accompanied the final permit decision sent to the Town shows that the final permit decision was received by the Town on July 17, 2000. A calculation of the time frame under the alternate time frame set forth in the notice indicates that in order to be considered timely, the Board should have received the Town's petition for review no later than August 16, 2000.⁴ The Town, however, filed its appeal of the Region's final permit decision with the Board on August 17, 2000.⁵ The Town's appeal is, therefore, untimely.

⁴Section 124.20(d) of title 40 of the Code of Federal Regulations does not require the addition of three days to the prescribed time when, as here, the Region's instructions required the Town to act within 30 days following receipt of the notice of final permit decision. See *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 16 n.9 (EAB 1994) (citing *Bethlehem Steel*, 3 E.A.D. at 614 & n.11). Adding the three days would be inconsistent with the purpose of the rule. See *Bethlehem Steel*, 3 E.A.D. at 614 n.11. In *Bethlehem Steel*, the Administrator stated:

The purpose of the three extra days allowed under § 124.20(d) is to establish a uniform allowance for the time it customarily takes to deliver the final permit decision through the mail, so that the person receiving it is not unfairly deprived of any response time. When the Region specifies that the time period for response commences upon receipt, and not service, there is no need to account for the time it takes to deliver the final permit decision through the mail, as there is no danger that any response time shall be lost.

Id.

⁵The Town's appeal is dated August 16, 2000 and states that it was sent by certified mail. The United States Postal Service Express Mail shipment form that was attached to the envelope that contained the Town's appeal indicates that the appeal was mailed on August 16, 2000. As noted previously, the Town's Petition was received by the Board on August 17, 2000. See *supra* note 2.

Absent special circumstances, the Board adheres to the procedural requirements set forth in the regulations. See *AES Puerto Rico, L.P.*, PSD Appeal Nos. 98-29, 98-30 & 98-31, slip op. at 7 (EAB, May 27, 1999), 8 E.A.D. ___ (finding that a hurricane and demonstrated difficulties with commercial delivery service constituted special circumstances warranting a relaxing of the timeliness requirements, but that failure to properly address petition did not); see also *In re Outboard Marine Corp.*, 6 E.A.D. 194 (EAB 1995) (dismissing petition on timeliness grounds in a penalty case where petition was received by the Board one day beyond the filing deadline); *In re Georgetown Steel Corp.*, 3 E.A.D. 607, 609-10 (Adm'r 1991). The Town does not allege any special circumstances that warrant a relaxing of the regulatory requirements.

Even if the Town's Petition had been timely received by the Board, it would fail to satisfy other regulatory threshold requirements. The five objections to the Region's final permit decision raised in the Town's Petition (requirements for continuous discharge, ammonia and copper limits prior to outfall improvements, comparison testing of total coliform by the MPN method and membrane filtration method, requirements for outfall improvements, and sampling time period for CSO discharges) do not meet the specificity requirements of 40 C.F.R. § 124.19. Our reasons follow.

Regarding CSO sampling, the Town has not included in its Petition "a statement of the reasons supporting * * * review, including a demonstration that [the issue] being raised [was] raised during the public comment period." 40 C.F.R. § 124.19(a). See *Envotech*, 6 E.A.D. at 267-68 (quoting *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 18 (EAB 1994)); see also *Sutter Power Plant*, slip op. at 9-10, 8 E.A.D. at __. In its Response, the Region contends that the Town failed to comment on the provision of the permit regarding CSO sampling during the public comment period. Response at 11-12. The Town does not assert otherwise, and a review of the comments on the draft permit, as well as the Region's Response to Comments, Ex. 7, demonstrates that this issue was not raised during the comment period. Under 40 C.F.R. § 124.19(a), this is fatal to the Town's challenge to this permit requirement.

With respect to the objections raised to the permit provisions that address the "requirements for continuous discharge" and "the comparison testing of total coliform by the MPN method and membrane filtration method," the Town has not shown that its challenge to these conditions 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 [EAB] should, in its discretion, review." 40 C.F.R. § 124.19(a). See *Envotech*, 6 E.A.D. at 267-68; see

also Sutter Power Plant, slip op. at 9-10, 8 E.A.D. at ___.

Indeed, the Town has stated nothing further than the fact that it is appealing those two permit provisions. Without more, the Board must deny review of these issues.

Finally, with respect to the Town's challenge to the "ammonia and copper limits prior to outfall improvements" and the "requirements for outfall improvements," the Town has failed to demonstrate why the Region's responses to objections raised by the Town during the public comment period were "'clearly erroneous or otherwise warrant[] review.'" *Envotech*, 6 E.A.D. at 268 (quoting *In re LCP Chems. - New York*, 4 E.A.D. 661, 664 (EAB 1993)); see also *In re KnauF Fiber Glass, GmbH*, PSD Appeal No. 99-8 through 99-72, slip op. at 7-8 (EAB, Mar. 14, 2000), 8 E.A.D. ___.

In its Petition, the Town listed four "uncontrollable" factors that it believes could cause a delay in the completion of the construction of the outfall improvements. During the comment period, the Town raised concerns regarding two of the factors - time needed to secure necessary permits and meeting the construction window allowed by New Hampshire Fish and Game Department. See Exs. 4, 7. In response to the Town's comments, the Region modified the schedule set forth in the draft permit. Compare Ex. 3 at 15 with Ex. 2 at 15. The Town has not shown how

the schedule developed by the Region in the final permit is clearly erroneous or otherwise warrants review. The other two delay factors raised by the Town in its Petition (construction contractor's availability and weather) were not raised during the comment period. On this basis alone, review of these issues must be denied.⁶ See 40 C.F.R. § 124.19(a).

Based on the foregoing, the Board denies review of the Town of Exeter's Petition in its entirety.

So ordered.

ENVIRONMENTAL APPEALS BOARD

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

Dated: 3/7/2001

⁶The Board notes that in its Response, the Region invited the Town to contact the Region if it is interested in a modification of the permit to include a clause that would allow completion of the improvements to be postponed upon a showing that severe weather caused the delays. See Response at 11. The Board is unaware if the Town has contacted the Region in this regard.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Petition for Review in the matter of Town of Exeter Municipal Wastewater Treatment Plant, NPDES Appeal No. 00-21, were sent to the following persons in the manner indicated:

By U.S. Mail:

George Olson
Town Manager
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Exeter, NH 03833-2792

By U.S. EPA Pouch Mail:

Ann H. Williams
Senior Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, New England Region
1 Congress Street, Suite 1100
Boston, MA 02114-2023

Date: 3/8/2001

_____/S/
Annette Duncan
Secretary