

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

_____)	
In re:)	
)	
Tri-County Builders Supply)	
)	CWA Appeal No. 03-04
Docket No. CWA-9-2000-0008)	
_____)	

ORDER DISMISSING APPEAL

I. INTRODUCTION

Appellant, Tri-County Builders Supply ("Tri-County"), appeals an Initial Decision issued by the Administrative Law Judge Carl C. Charneski ("ALJ") imposing upon Tri-County a civil penalty of \$59,591 for violations of section 405(e) of the Clean Water Act ("CWA"), 33 U.S.C. § 1345(e), and its implementing regulations.¹ The ALJ found that Tri-County had violated some of the provisions of the sewage sludge regulations promulgated in part 503 of 40 C.F.R. In particular, the ALJ found Tri-County liable for violating 40 C.F.R. section 503.14(d) in that Tri-County applied sewage sludge (or "biosolids") to land in Rancho Canada Larga,

¹ The Complainant, U.S. Environmental Protection Agency Region IX (the "Region"), proposed that a civil penalty in the amount of \$137,500 be assessed against Tri-County.

leased by Tri-County and located in Ventura County, California, at a rate greater than the applicable agronomic rate.²

Tri-County claims on appeal that the application of biosolids did not exceed the agronomic rate for a reclamation site, and that no penalty should have been assessed.

For the reasons set forth below Tri-County's appeal is dismissed on procedural grounds.

II. DISCUSSION

Tri-County's appeal is untimely. The Initial Decision in the present case was served by mail on the parties on May 19, 2003. According to 40 C.F.R. § 22.30(a), parties seeking review of an order or ruling by the Presiding Officer have thirty (30) days after the initial decision has been served to file an appeal with the Environmental Appeals Board (the "Board"). Persons seeking to

² The Standards for the Use or Disposal of Sewage Sludge, 40 C.F.R. part 503, define the term "agronomic rate" as "the whole sludge application rate (dry weight basis) designed: (1) To provide the amount of nitrogen needed by the food crop, feed crop, fiber crop, cover crop, or vegetation grown on the land; and (2) To minimize the amount of nitrogen in the sewage sludge that passes below the root zone of the crop or vegetation grown on the land to the ground water." 40 C.F.R. § 503.11(b).

appeal an initial decision that has been served by mail have five (5) additional days to complete the filing. 40 C.F.R. § 22.7.

Under section 22.30(a), an appeal from an initial decision is perfected by filing a notice of appeal and an appellate brief with the Board. See 40 C.F.R. § 22.30(a). Section 22.30(a) provides further that a copy of any document *filed* with the Clerk of the Board shall also be *served* on the Regional Hearing Clerk, the Presiding Officer, and any other participant parties. 40 C.F.R. § 22.30(a).³ Also, the Initial Decision here included a paragraph citing to section 22.30 and indicating that an appeal of the initial decision needed to be taken to the Board.

³ Section 22.30 states: "Within 30 days after the initial decision is served, any party may appeal any adverse order or ruling of the Presiding Officer *by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board. * * ** One copy of any document filed with the Clerk of the Board shall also be *served* on the Regional Hearing Clerk." 40 C.F.R. 22.30(a)(1) (emphasis added). Also, section 22.27 reads in pertinent part:

The initial decision of the Presiding Officer shall become a final order 45 days after its service upon the parties and without further proceedings unless:

* * * *

(2) *A party appeals the initial decision to the Environmental Appeals Board*

40 C.F.R. § 22.27(c) (emphasis added).

Pursuant to sections 22.30(a) and 22.7, the Appellant in this case had until June 23, 2003, to *file* its notice of appeal and appeal brief with the Board, and to *serve* the same documents on the ALJ, Complainant, and the Regional Hearing Clerk. On June 17, 2003, the Appellant sent copies of the notice and appeal brief to the Complainant and the ALJ during the 30-day filing period, and filed the originals with the Regional Hearing Clerk. See Letter from Wendy Zimmerman-Taylor, McCord & Praver to Danielle Carr-Regional Hearing Clerk dated June 17, 2003 ("Enclosed for filing are the following documents * * *."). As per the Appellant's request, the Regional Hearing Clerk sent a stamped copy to Taylor, McCord & Praver, Tri-County's attorneys, which Taylor, McCord & Praver received on June 23, 2003, the last day for filing an appeal with the Board.⁴

It was not until July 17, 2003, however, that Tri-County filed its appeal with the Board, almost four (4) weeks after the deadline.⁵ In the cover letter accompanying the filing, the Appellant explains that the original notice of appeal and brief were filed with Danielle Carr, Region IX's Hearing Clerk, and that

⁴ We note at this juncture that the Regional Hearing Clerk is not authorized and never has been authorized to accept filings on behalf of the Board.

⁵ The Regional Hearing Clerk also forwarded the original filing to the Board, which the Board received on July 21, 2003.

"the failure to file the brief with [the Board] was a clerical error." Appellant provides no further explanation for the late filing nor does it elaborate on its "clerical error." We note in this regard that the certificate of service in the original appeal does not even include the Board on the service list.

The Board typically requires strict compliance with the time limits set forth in the rules of practice governing penalty appeals. *In re Roger Antkiewicz & Pest Elimination Prod. of Am., Inc.*, 8 E.A.D. 218, 220 n.2 (EAB 1999). The Board has stated on numerous occasions that it will not excuse a late-filed appeal unless it finds special circumstances to justify the untimeliness. *In re B&L Plating, Inc.*, slip. op at 11, CAA Appeal No. 02-08 (EAB Oct. 20, 2003), 11 E.A.D. ___ (dismissing late appeal; appeal did not provide explanation for the late filing and Board did not find any "special circumstance" warranting relaxation of the procedural deadline). See also *In re Gary Dev. Co.*, 6 E.A.D. 526, 529 (EAB 1996); *In re Outboard Marine Corp.*, 6 E.A.D. 194, 196 (EAB 1995); *In re Prod. Plated Plastics, Inc.*, 5 E.A.D. 101, 104 (EAB 1994); *In re B & B Wrecking & Excavating, Inc.*, 4 E.A.D. 16, 17 (EAB 1992).

Special circumstances have been found to exist, for example, where the Agency has given erroneous filing information in writing upon which a petitioner has relied. See, e.g., *In re BASF Corp.*

Chem. Div., 2 E.A.D. 925 (Adm'r Reilly 1989). This certainly is not the case here. In the instant case Appellant received clear notice regarding where to file its appeal. The Initial Decision clearly stated: "Unless the appeal is taken to the *Environmental Appeals Board* pursuant to 40 C.F.R. [§] 22.30, or unless a party acts pursuant to 40 C.F.R. [§] 22.27(c), this decision shall become a Final Order as provided in 40 C.F.R. [§] 22.27(c)." Initial Decision at 22 (emphasis added). The Initial Decision not only identified the Board as the entity to which appeals are to be taken, but also cited to the appropriate regulation, which in turn specifies that appeals need to be filed with the Board within thirty (30) days of service of the Initial Decision.

In *In re Genesee Power Station*, 4 E.A.D. 832 (EAB 1993), the Board accepted a late-filed appeal that, like the one at hand, had been filed with the Region, instead of the Board, within the thirty-day appeal period. That appeal, however, centered on an allegation of "environmental racism." In view of the nature of the allegation and the critical national policy issues it implicated, the Board found special circumstances warranting it to exercise its discretion to accept the appeal notwithstanding the filing error. It bears noting that, beyond the particular petition at issue, in *Genesee* a number of other petitions for review had been filed with the Board concerning the same permit. Thus, rejection of the late-

filed petition would neither have disposed of the case nor materially affected the Board's resource investment in the case.

On its face, the case before us presents no special circumstances of the kind the Board considered in *Genesee*. Indeed, Tri-County did not identify any national policy issues or other justification in its letter apologizing for the late filing.

The filing requirements specified in 40 C.F.R. §22.30 are not merely procedural niceties. Rather, they serve an important role in helping to bring repose and certainty to the administrative enforcement process. Further, they ensure that the Board's resources are reserved for those cases involving both important issues and serious and attentive litigants.

Tri-County, which we note is represented by counsel, is charged with knowledge of the regulations and the instructions in the Initial Decision clearly pointing to the relevant regulations and the appropriate venue for filing. In light of all the above, Tri-County's appeal is dismissed.

III. CONCLUSION

Tri-County has not identified any "special circumstance" justifying the untimely appeal; the only explanation provided by Tri-County -- a clerical error -- is neither extraordinary nor an adequate basis for accepting a late-filed appeal in a system that depends on and demands vigilance. Tri County's appeal is accordingly dismissed on timeliness grounds.

So ordered this 24 day of May 2004.⁶

ENVIRONMENTAL APPEALS BOARD

By: _____ /s/ _____

Scott C. Fulton
Environmental Appeals Judge

⁶ The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Edward E. Reich. See 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Appeal in the matter of Tri-County Builders Supply, CWA Appeal No. 03-04, were sent to the following persons in the manner indicated:

By First Class Mail Postage Prepaid:

Robert L. McCord Jr., Esq.
Taylor & McCord & Praver
721 East Main Street
P.O. Box 1477
Ventura, California 93002

By Pouch Mail:

Danielle Carr
Regional Hearing Clerk
Office of Regional Counsel
U.S. EPA Region IX
75 Hawthorne Street
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Judge Carl C. Charneski
Office of Administrative Law Judges (1900L)
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Dated: May 24, 2004

/s/
Annette Duncan
Secretary