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

In re:	)	
Hillman Power Company, L.L.C.	)	PSD Appeal Nos. 02-04, 02-05, & 02-06
PSD Permit No. 687-68G	)	

ORDER DIRECTING SERVICE OF PSD PERMIT DECISION ON PARTIES THAT FILED WRITTEN COMMENTS ON DRAFT PSD PERMIT, DENYING MOTIONS TO DISMISS, AND DIRECTING BRIEFING ON THE MERITS

On April 16, 2002, three parties -- Dr. Richard N. Olree Jr., the Michigan Environmental Council ("MEC"), and Ms. Donna Baranyai -- each filed with the Environmental Appeals Board a petition for review of a new Prevention of Significant Deterioration ("PSD") permit decision issued by the Michigan Department of Environmental Quality ("MDEQ" or "Department") on March 13, 2002.[1] The PSD permit authorizes Hillman Power Company, L.L.C. to increase the amount of tire-derived fuel ("TDF") it burns in a wood waste/TDF/natural gas-fired stoker boiler at its existing electric power generating facility in Hillman, Michigan. MDEQ and Hillman Power (to whom the Board hereby grants permission to intervene in these appeals) filed briefs asking the Board to dismiss the petitions as untimely. The Board subsequently ordered MDEQ to submit "postmarks, certificates of service, affidavits, or other

[1]Ms. Baranyai's petition, PSD Appeal No. 02-06, was actually filed with the Board on April 16, 2002, rather than April 19, 2002, as previously indicated. Ms. Baranyai had included her materials in Dr. Olree's mailing container, which the Board received on April 16, 2002. The Board received another copy of Ms. Baranyai's petition via United States mail on April 19, 2002, but that copy is a duplicate of the materials we received on April 16, 2002. Therefore, the earlier date is the proper filing date for Ms. Baranyai's petition.

such evidence indicating the date it mailed notice of the final PSD permit decision" to the petitioners. Order Directing MDEQ to Supplement Response 4 (May 8, 2002).

On May 15, 2002, MDEQ filed a response to the Board's order. In that response, the Department contends, first, that "[o]n March 13, 2002, the MDEQ notified Dr. Olree of its final PSD permit decision by first-class mail." Supplement to MDEQ's Response Seeking Summary Disposition at 2 ("MDEQ Supp."). The Department attaches the affidavit of Barbara Wilcox, an employee of MDEQ's Air Quality Division, and a mailing list that includes Dr. Olree's name, as proof that this notification occurred on the specified date. *See id*. ex. 1 (Wilcox affidavit) & ex. 1 attach. 2 (mailing list). Apparently, this mailing list contains the names of "interested parties who submitted attendance cards at the public hearing" MDEQ held on January 16, 2002, concerning the draft PSD permit. *Id*. at 2. MDEQ subsequently made the same argument, supported by another Barbara Wilcox affidavit, with respect to Ms. Baranyai, whose name also appears on the mailing list. *See* Response Seeking Summary Disposition of the MDEQ 1-2 & ex. 4 ¶ 3 & attach. 2 (filed May 22, 2002).

Second, the Department contends that it notified MEC of the final PSD permit decision "by 'posting'" the decision on the MDEQ's Internet website on March 14, 2002. MDEQ Supp. at 2 & ex. 2 ¶ 3 (affidavit of Karla Lowrie). The Department explains that although MEC submitted written comments on the draft PSD permit, it did not attend the public hearing and submit an attendance card, and thus MDEQ did not send the final PSD permit decision to MEC by first-class mail. *Id*. at 2. The Department argues that its "notice" to MEC by posting the final

PSD permit decision on its website was "reasonably calculated to notify MEC of the decision" because "MEC is an environmental organization that consistently monitors the MDEQ's permitting decisions and its website." *Id*. To support this argument, the Department contends that the relevant permitting regulations, 40 C.F.R. part 124, do not specify the method by which notice of a final permit decision must be served. The Department therefore claims:

> There are several methods of service other than by first-class mail that provide notice to interested parties of a final permit decision. Such methods include personal delivery, facsimile, or (as was done in this case) by posting the decision on a website. The regulations, by not specifying a method of service for notice of a final permit decision, implicitly acknowledge the numerous methods of serving notice.

MDEQ Supp. at 3 n.1.

1. *MEC Petition*

Our reading of the part 124 regulations, and our analysis of the process due an interested party such as MEC in this type of administrative proceeding, differ quite dramatically from MDEQ's. In our view, MDEQ did not adequately notify MEC of its final PSD permit decision for the Hillman facility. While the Department is correct in observing that the part 124

regulations do not specify the means by which notice should be given of final permit decisions, the regulations do state that:

> The [permit issuer] shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision. This notice shall include reference to the procedures for appealing a decision on a * * * PSD permit * * *.

40 C.F.R. § 124.15(a). Moreover, "[t]he 30-day period within which a person may request [Board] review under this section begins with the service of notice of the [permit issuer's] action unless a later date is specified in that notice." *Id*. § 124.19(a).

These provisions indicate very plainly that an integral relationship exists between a permit issuer's notification and the appeal rights of a party that has participated in the permitting proceedings. If notice is "served" by some indirect means on a date certain, i.e., by posting it on the Internet, there is no rational basis for concluding that the interested party was reasonably calculated to receive the notice on the date of the so-called "service." Indeed, it is not reasonable to assume that all persons who comment on permits will even have access to the Internet.

Moreover, this means of "serving" notice improperly puts the onus on the interested party to continually check for permit agency developments, lest some portion of the party's time to appeal be lost. For example, under MDEQ's chosen means of "serving" notice, a permitting

agency could post a permit decision on its website at 4:59 p.m. on the Friday before a long holiday weekend, and the interested party might not check the website until the following Tuesday morning. In such a circumstance, the party would have lost three (Saturday through Monday) of the thirty days it has to appeal the permit decision, and it also would presumably not have the benefit of the three additional days the regulations provide for service completed by mailing. *See* 40 C.F.R. §§ 124.19(a), .20(d). The regulations expressly provide three additional days when service is made by mail to account for the delay in an interested party's receipt of information on which his or her legal rights depend, thereby attempting to preserve the full 30-day period for exercising appeal rights. In contrast, here there is no built-in mechanism to account for delay between the time the agency "posts" its decision on its website and the time at which an interested party may, by chance, learn of the decision. There could easily be a considerable delay, for example if computers are not working, or if key personnel are out of the office.

This result unfairly penalizes the interested party by burdening that party with an obligation to continually check to see if a permit decision has been issued, rather than placing on the permitting agency the responsibility of providing personalized notice of the agency's decisions to persons who submitted written comments on a draft permit. We reject MDEQ's reasoning that a lack of specificity in the part 124 regulations means any form of "service" of notice, no matter how impersonal and indirect, is sufficient to fulfill the important task of alerting parties of final agency decisions. The U.S. Supreme Court has spoken to the issue of what constitutes "notice" in the context of due process:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citing *Milliken v. Meyer*, 311 U.S. 457 (1940)). In *Mullane,* the Court found that notice by newspaper publication to beneficiaries on the judicial settlement of accounts by the trustee of a common trust fund deprived certain beneficiaries, those whose addresses were known, of due process. "[W]ithin the limits of practicability notice must be such as is reasonably calculated to reach interested parties. Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318; *see Tulsa Professional Collection Serv., Inc. v. Pope*, 485 U.S. 478 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983).

In the instant case, MEC filed written comments on the draft permit and therefore should have been mailed a copy of the final permit decision or provided some other form of personal notification. As this did not happen, we find that MDEQ did not properly notify MEC. Consequently, we find MEC's petition to be timely.

In light of the less-than-thorough way in which MDEQ attempted to discharge its vital public participation responsibilities, we are concerned that other members of the public who

submitted written comments on the draft PSD permit but did not submit an attendance card at the public hearing may also have been "served" notice of the final permit decision only via posting of the decision on MDEQ's website. If any such persons fall into this category, MDEQ is hereby ordered to notify those parties promptly of the final PSD permit decision by mailing them or personally serving them with a copy of the decision, the response to comments document, and an explanation of their appeal rights.

2. *Baranyai and Olree Petitions*

Turning to the petitions of Ms. Baranyai and Dr. Olree, the Board notes first that Ms. Baranyai submitted evidence that MDEQ mailed the final permit decision to her on March 14, 2002. *See* Letter from Donna Baranyai to U.S. EPA Environmental Appeals Board attach. 1 (filed May 22, 2002). This evidence -- which consists of a photocopy of a mailing envelope addressed to Ms. Baranyai from MDEQ, with a postmark of March 14, 2002 – must be weighed against MDEQ's assertions, supported with Ms. Wilcox's affidavit, that it mailed its decision to Ms. Baranyai on March 13, 2002.[2] *See* Response Seeking Summary Disposition of the MDEQ 1-2 & ex. 4 ¶ 3 (filed May 22, 2002). The part 124 regulations do not contain any provisions specifically addressing the topic of service of notice by mail, as do the Federal Rules of Civil

[2]With respect to Dr. Olree's petition, we have been presented with no argument that his notice was mailed by MDEQ on March 14, 2002. It therefore appears that Dr. Olree was in fact served notice on March 13, 2002, as MDEQ contends, and thus the Board received his petition thirty-four rather than thirty-three days after that service. We do not find his petition untimely, however, for the other reasons set forth in the text below.

Procedure.[3] *Compare* 40 C.F.R. pt. 124 *with* Fed. R. Civ. P. 5(b) ("Service by mail is complete upon mailing."). The federal courts have construed Rule 5(b) to mean "[s]ervice is deemed complete at the instant the documents are placed into the hands of the United States Post Office or a Post Office Box" (i.e., before a postmark is affixed). 1 James Wm. Moore et al., Moore's Federal Practice § 5.04[2][a][ii], at 5-28 (3d ed. 1997), *quoted in Greene v. WCI Holdings Corp.*, 136 F.3d 313, 315 (2d Cir.), *cert. denied*, 525 U.S. 983 (1998); *United States v. Kennedy*, 133 F.3d 53, 59 (D.C. Cir.), *cert. denied*, 525 U.S. 911 (1998); *accord Theede v. U.S. Dep't of Labor*, 172 F.3d 1262, 1266 (10th Cir. 1999); *Rivera v. M/T Fossarina*, 840 F.2d 152, 155 (1st Cir. 1988).

While the Board has looked to the Federal Rules of Civil Procedure for guidance on occasion when the Board's own procedural rules do not define proper procedure in particular circumstances, we need not do so in this instance. These two petitioners submitted their appeals on a *pro se* basis (i.e., without benefit of legal counsel). Dr. Olree argues that the appeal notice provided by MDEQ was misleading, suggesting that April 16, 2002, was the deadline for filing appeals. *See* Letter from Dr. Richard N. Olree Jr. to David Ulrich, Regional Counsel, EPA Region V (May 5, 2002); *cf.* Response of MEC in Opposition to Motion by Hillman Power Co., L.L.C. at 2 (arguing that "legalistic language contained in the notice sent out by MDEQ" was unclear and caused confusion about appeal deadline). The MDEQ notice stated:

[3]The part 22 rules applicable to EPA administrative enforcement proceedings also provide that service is complete upon mailing or when placed in the custody of a reliable commercial delivery service. *See* 40 C.F.R. § 22.7(c).

> The final permit decision shall become effective on April 16, 2002, pursuant to 40 CFR § 124.15, unless a petition for a review of this decision according to procedures contained in 40 CFR § 124.19 is filed.

MDEQ Supp. ex. 1, attach. 1, at 1 (Letter from Dennis M. Drake, Chief, Air Quality Division, MDEQ, to "Interested Party" (Mar. 13, 2002)). We can understand how a commenter, particularly one participating in the permit process *pro se*, might have been misled by this text. In view of this fact and the fact that we have decided in any case to accept the MEC petition, which appears to raise issues with at least some commonalities to those contained in the Olree and Baranyai petitions, we decline to find the Olree and Baranyai petitions untimely. *See Spitzer Great Lakes Ltd. v. U.S. EPA*, 173 F.3d 412, 415 (6th Cir. 1999) (reversing dismissal of petition as untimely on ground that notice of appeal rights was misleading). Therefore, we will consider Dr. Olree's and Ms. Baranyai's petitions, as well as the MEC petition, on the merits.

For the foregoing reasons, we deny the motions to dismiss filed by MDEQ and Hillman Power Company. MDEQ is hereby ordered to file responses to the merits of the three petitions on or before Friday, June 14, 2002. Intervenor Hillman Power Company is also directed to file responses to the petitions, if it so chooses, on or before that same date.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: May 24, 2002

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

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Directing Service of PSD Permit Decision on Parties That Filed Written Comments on Draft PSD Permit, Denying Motions to Dismiss, and Directing Briefing on the Merits in the matter of Hillman Power Company, L.L.C., PSD Appeal Nos. 02-04 to 02-06, were sent to the following persons in the manner indicated:

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/s/
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