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

In re:	)
Michigan CAFO General Permit	) NPDES Appeal No. 02-11
Permit No. MIG-440000	)

ORDER DENYING MOTION FOR RECONSIDERATION

I. *BACKGROUND*

On December 13, 2002, the Michigan Department of Environmental Quality ("MDEQ") issued National Pollutant Discharge Elimination System ("NPDES") general permit number MIG-440000 (the "Permit") for Concentrated Animal Feeding Operations ("CAFOs"). The Permit authorizes the operation of CAFOs in accordance with conditions set forth therein. On December 31, 2002, Sandra K. Yerman ("Petitioner") filed a timely petition for review of the Permit. Thereafter, the U.S. Environmental Protection Agency, Region V (the "Region") and MDEQ filed responses to the Petition. On March 18, 2003, the Environmental Appeals Board ("EAB" or "Board") issued its Order Dismissing Petition for Review ("Order") on the grounds that the Board lacks jurisdiction to review state-issued NPDES permits. The Board noted further that even if the permit were EPA-issued, the Board does not have jurisdiction to review EPA-issued NPDES general permits. *In re Michigan CAFO General Permit*, slip op., NPDES Appeal No. 02-11 (EAB, Mar. 18, 2003) (unpublished).

Before the Board at this time are (1) the Petitioner's Motion for Reconsideration, Clarification and Stay of Order (filed Apr. 15, 2003) ("Reconsideration Motion"), (2) the Region's Response to Petitioner's Motion (filed Apr. 29, 2003) ("Region Response"), (3) the MDEQ's Response to Petitioner's Motion (filed May 16, 2003) ("MDEQ Response"), and (4) Petitioner's Motion for Leave to Respond to the Region's and MDEQ's Response (filed May 16, 2003) ("Reply Motion").[1] For the reasons discussed below, Petitioner's Reconsideration Motion is denied.

[1] Upon consideration, Petitioner's request to file her Reply Motion is denied. Petitioner's Reply, attached to her motion, not only reiterates arguments raised in Petitioner's Reconsideration Motion, but also raises a new ground for appeal not previously raised. Petitioner's new argument alleges that MDEQ violated 40 C.F.R. § 123.25(a) ("Requirements for Permitting") by instituting a public participation policy that was more lenient than the federal requirements. *See* Reply Mot. at 4-6. Petitioner did not raise this issue either during the public comment period on the draft permit, or in her Petition for Review. Moreover, Petitioner's assertion that she only recently became aware of this regulation does not satisfy the test of whether the argument was "reasonably ascertainable" during the public comment period as required by 40 C.F.R. § 124.13. Thus, we will not pursue the issue further. *See, e.g., In re Phelps Dodge Corp.*, NPDES Appeal No. 01-07, slip op. at 82 (EAB May 21, 2002), 10 E.A.D. __ ("persons seeking review of a permit must demonstrate that any issues or arguments raised on appeal were previously raised during the public comment period on the draft permit, or were not reasonably ascertainable at that time") (citing 40 C.F.R. §§ 124.13, .19(a)). Furthermore, Petitioner is precluded from raising new legal arguments in motions for reconsideration. *See Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985) ("Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. * * * Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time." (citation omitted)); *see also In re Gary Development Co.*, slip op. at 3-4, RCRA (3008) Appeal No. 96-2 (EAB, Sept. 18, 1996) (Order Denying Motion for Reconsideration).

II. *DISCUSSION*

A. *Standards for Motions for Reconsideration*.

Motions for reconsideration are authorized by 40 C.F.R. Part 124, which provides that the motion shall be filed within ten (10) days after service of the final order and "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 124.19(g). Reconsideration is generally reserved for cases in which the Board is shown to have made a demonstrable error, such as a clearly erroneous mistake of law or fact. *See In re Arizona Municipal Storm Water NPDES Permits,* NPDES Appeal No. 97-3, at 2 (EAB, Aug. 17, 1998) (Order Denying Motion for Reconsideration); *In re Steel Dynamics, Inc.,* slip op. at 2, PSD Appeal No. 01-03 (EAB, May 7, 2001) (Order Denying Citizens Organized Watch, Inc.'s Motion for 5 Reconsideration and Stay of Decision); *In re Hawaii Electric Light Company, Inc.,* slip op. at 6, PSD Appeal Nos. 97-15 through 97-22 (EAB, Mar. 3, 1999) (Order Denying Motion for Reconsideration).

The filing of a motion for reconsideration "should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions." *In re Hawaii Electric Light Co., Inc.*, at 6 (citing *Arizona Municipal,* at 2) (Order Denying Motion for Reconsideration); *In re Southern Timber Products, Inc.*, 3 E.A.D. 880, 889 (JO 1992). A party's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion to reconsider. *Arizona Municipal,* at 2 (Order Denying Motion for Reconsideration); *see also Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985).

B. *Timeliness*

Motions to reconsider a final order must be filed within 10 days after service of the final order. *See* 40 C.F.R. § 124.19(g). When the order is served by mail, an additional three days is added to the prescribed time. *See* 40 C.F.R. § 124.20(d). In this case, the Board's Order was served by mail on March 18, 2003, and thus the deadline for filing a motion for reconsideration was March 31, 2003, 13 days after the date of service. In this case, the Reconsideration Motion was filed on April 15, 2003, and, ordinarily, would be dismissed as untimely. However, Petitioner argues that her Reconsideration Motion is timely because of the special circumstances surrounding service of the Board's Order. *See* Motion at 1-2. In the interest of justice, we waive the procedural timeliness requirements in this case for the reasons discussed below. *See In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 763 n.11 (citing *American Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (Agency may relax procedural rules when the ends of justice so require it)); *see also In re Gary Development Co.*, 6 E.A.D. 526, 529 (EAB 1996) (procedural time limits will be strictly followed unless "special circumstances" warrant their relaxation (citations omitted)).

Based on the facts Petitioner points to, as well as the Board's further investigation into this matter, we conclude that on or about March 18, 2003, there were irregularities in the U.S. Environmental Protection Agency's mailroom ("Headquarters' Mailroom") procedures. These irregularities resulted in a substantial delay in Petitioner's receipt of the Board's Order as detailed in footnote 2 below.[2] Accordingly, we find that special circumstances exist such that

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[2] Generally the Board sends its certified mail packages to the Headquarters' Mailroom for mailing on the date reflected in the certificate of service attached to the underlying document being mailed. On the day the Headquarters' Mailroom receives the Board's packages, its

(continued...)

justice is served by a waiver of the time limits for filing Petitioner's Reconsideration Motion in this case, and Petitioner's Reconsideration Motion is accepted as timely filed.

C. *Petitioner Has Failed to Demonstrate Clear Error In The Board's Conclusion That It Lacks Jurisdiction In This Case*

1. *The Permit Is Not A Joint Federal/State-issued Permit*

In her Reconsideration Motion, Petitioner argues that the Board does have jurisdiction to

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[2](...continued)
personnel log in the Board's certified mail, postmark the mail using a partially automated Pitney-Bowes postage machine, and then deliver it to the U.S. Postal Service's post office located within the Ariel Rios building for mailing.

Several facts indicate that this mailing procedure was fraught with errors on or about March 18, 2003. First, Petitioner points out that the postage mark on the envelope enclosing Petitioner's copy of the Order appears to indicate a mailing date of April 10, 2003. Recons. Mot. at 1. This is clearly an error since not only was the Order issued on March 18, 2003, and mailed on such date as reflected in the certificate of service signed by the Board's secretary, but Petitioner personally received the Order on April 7, 2003 – three days prior to the postmark date.

Upon closer inspection of the postmark on a copy of the envelope provided by Petitioner, the date appears to be April *18*, 2003 -- not April *10*, 2003. Thus, given that the Board's certificate of service indicates that the Order was mailed *March* 18, 2003, the clerical error that occurred in the Headquarters' Mailroom appears to be an incorrect selection of the month -- "April" rather than "March" -- when the mailroom personnel operated the Pitney-Bowes postage meter to postmark the Board's mail to Petitioner.

However, this does not explain why the Order did not arrive at Petitioner's post office until April 4, 2003 – more than two weeks after the Order was presumably mailed with an incorrect postal date. On our instruction, the Clerk of the Board inquired with the Headquarters' Mailroom about this unusually long period of time. Upon inspection of the Headquarters' Mailroom logbook, there was inexplicably no record of the certified mail number for this piece of certified mail. Thus, there is simply no record of the date that the Order was actually placed into the U.S. Postal Service's possession by the Headquarters' Mailroom personnel. Without this information, there is substantial uncertainty about when the Order was actually mailed such that Petitioner's opportunity to seek reconsideration under 40 C.F.R. § 124.19(g) began to run in accordance with 40 C.F.R. § 124.20(d) (computation of time).

review the Permit at issue because the permit is "a joint Federal/State-issued permit, under the CWA - a Federal program." Recons. Mot. at 2. Petitioner points to an October 31, 2002, draft document entitled, "Proposal Under the Joint EPA/State Agreement to Pursue Regulatory Innovation: Alternative Permitting Approach for Concentrated Animal Feeding Operations" ("EPA/State Agreement"), as proof that the Permit is not, as the Board concluded in its Order, a state-issued NPDES permit. *Id.*

The Region and MDEQ argue that Petitioner misunderstands the status of the Permit and Michigan's proposal under the EPA/State Agreement. Reg.'s Resp. at 2; MDEQ's Resp. at 1. They point out that the Permit is a state-issued permit under an approved state program, signed by Richard A. Powers, Chief, Water Division, MDEQ. Reg.'s Resp. at 2; MDEQ Resp. at 1. The Region asserts that the EPA/State Agreement represents "a voluntary effort at cooperation between the States and EPA to encourage new approaches to improve the nation's environment. [citation omitted] This voluntary effort is carried out under MDEQ's current authority, [and] does not revise the State's NPDES program* * * ." Reg.'s Resp. at 2.

Upon consideration, we conclude that Petitioner has failed to demonstrate clear error in the Board's conclusion that the Permit was a state-issued NPDES permit. The EPA/State Agreement does not revise Michigan state NPDES laws and regulations, and the permit is signed only by the MDEQ's Water Division Chief. Thus, the Reconsideration Motion is denied on this basis.

2. *The Region's and MDEQ's "Defense" of the Permit Does Not Transform a State-issued Permit Into a Federal Permit*

Petitioner also argues that the Permit is not a state-issued permit because both the Region and MDEQ responded to the Reconsideration Motion. *See* Recons. Mot. at 2. Petitioner places improper weight on this fact. The Clerk of the Board, as a general rule, informs the affected Region and the permit issuer (in this case, MDEQ) by letter of the Petition for Review. Each decides whether and how to file responses to the Petition for Review, as well as to any subsequent motions. In this case, the Region and MDEQ both filed responses to the Petition for Review and the Reconsideration Motion. This fact has no bearing on the issue of whether or not the Permit is a state-issued permit. Irrespective of whether or not the permit was issued by EPA, EPA may have a view it chooses to express about an issue pending before the Board. Petitioner's argument points to no rule of law, and we are unable to find any, that would transform a state-issued permit into a federally-issued permit by virtue of the fact that a federal agency chose to file a brief with the Board in response to a challenge of the state-issued permit. Accordingly, reconsideration is denied on this basis.

3. *Central Wayne Energy Recovery Ltd. Partnership Is Not Controlling*

Petitioner argues that the Board in *In re Central Wayne Energy Recovery Ltd. Partnership*, slip op., PSD Appeal No. 98-1 (EAB, Feb. 26, 1998) (unpublished order), did not deny the petition for review in that case on the ground that the permit was state-issued. *See* Recons. Mot. at 5-6. Accordingly, Petitioner urges the Board to follow its reasoning in *Central Wayne Energy*, and assert jurisdiction over the instant state-issued Permit. *Id.* at 6. We

conclude, as explained below, that Petitioner's argument lacks merit.

In *Central Wayne Energy*, the Board was presented with a petition for review regarding a state-issued Prevention of Significant Deterioration ("PSD") permit. *Central Wayne Energy*, slip op. at 1. Our ruling in that case was that the petition for review was untimely, and we dismissed the petition for review on those grounds. *Id.* at 5-6. If the petition had been timely, we would have had jurisdiction over the state-issued PSD permit because MDEQ has a delegated, rather than State Implementation Plan ("SIP") approved PSD program. MDEQ is authorized to make PSD permitting decisions for new and modified stationary sources of air pollution in the State of Michigan pursuant to a delegation agreement with the Region delegating EPA's PSD permitting authority to MDEQ. *See* 40 C.F.R. § 52.21(u); 45 Fed. Reg. 8348 (Feb. 7, 1980). Because MDEQ acts as EPA's delegate under the PSD program, MDEQ's PSD permits are considered EPA-issued permits, and appeals of the permit decisions are heard by the Board pursuant to 40 C.F.R. § 124.19. *In re Hillman Power Co., L.L.C.,* PSD Appeal Nos. 02-04, 02-05 & 02-06, slip op. at 3-4 (EAB July 31, 2002) 10 E.A.D. ___ ; *see also In re Tondu Energy Co.*, PSD Appeal Nos. 00-05 & 00-07, slip op. at 3 n.1 (EAB Mar. 28, 2001), 9 E.A.D. ___; *In re Steel Dynamics, Inc.*, PSD Appeal Nos. 99-04 & -05, slip op. at 5-6 (EAB June 22, 2000), 9 E.A.D. ___.

In contrast, PSD permits issued under SIP-approved programs are considered state permits and are not appealable to the Board. 40 C.F.R. § 124.1(e) ("Part 124 does not apply to PSD permits issued by an approved State."); *see In re Milford Power Plant*., 8 E.A.D. 670, 676 (EAB 1999) (Denying Board review of Best Available Control Technology issues on the ground that they were part of Connecticut's approved PSD program).

The case before us does not involve a permit issued by a state exercising EPA's federally

delegated authority. Rather, as we explained in our Order, MDEQ "administers a federally approved state NPDES program" and permits issued by that program are issued under state law. Order at 4-5. Specifically, we noted in our Order that the State of Michigan received authorization to administer the NPDES general permits program in lieu of EPA on November 29, 1993. *See* 62 Fed. Reg. 61,170 (Nov. 14, 1997). *See id.* at 4 n.3. Accordingly, Petitioner's Reconsideration Motion is denied on this ground.[3, 4]

III. *CONCLUSION*

For the reasons set forth above, Petitioner's Reconsideration Motion is denied.

So ordered.[5]

ENVIRONMENTAL APPEALS BOARD

Dated: 7/8/03

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

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[3] Petitioner also appears to argue that if the Permit was issued under a delegated NPDES program, the regulation prohibiting appeals of NPDES general permits by persons "affected by" such permits would not bar her from filing an appeal before the Board because she is "not affected by" the Permit. Recons. Mot. at 3-4. Because we conclude that the Permit is a state-issued permit under an approved state NPDES permit, we need not consider this issue.

[4] As noted in our Order, Petitioner was advised of her right to appeal the permit under state law on January 23, 2003. *See* Order at 4 n.8.

[5] The three-member panel deciding this matter is comprised of Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Kathie A. Stein. *See* 40 C.F.R. § 1.25(e)(1) (2001).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Reconsideration in the matter of Michigan CAFO General Permit, NPDES Appeal No. 02-11, were sent to the following persons by the method indicated:

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Dated: 7/9/03

/s/
Annette Duncan
Secretary