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

In re:	)	
Mercer and Atlantic Counties Resource Recovery Facility	)	PSD Appeal No. 96-7

REMAND ORDER

By petition dated September 28, 1996, the New Jersey Environmental Federation, the New Jersey Chapter of the Sierra Club, and the Mercer Citizens for Public Accountability (hereafter "petitioners") seek review of an extension and modification of a Prevention of Significant Deterioration permit issued by the New Jersey Department of Environmental Protection ("NJDEP") on August 29, 1996, for construction of the Mercer and Atlantic Counties Resource Recovery Facility. The original permit was issued on June 22, 1994, and was extended at the permittees' request.

The Board has stayed proceedings in this matter since November 22, 1996, to allow the parties to ascertain the status of the proposed facility following a November 7, 1996 vote by the Mercer County Board of Chosen Freeholders ("MCBCF"). In their original request for a stay dated November 15, 1996, petitioners informed the Board that the MCBCF voted to reject a proposed amendment to the Mercer County Solid Waste Plan, "which amendment

provided for the financing, construction and operation of the [facility]." Motion For Stay of Proceedings by the Petitioners, New Jersey Environmental Federation, The New Jersey Chapter of the Sierra Club, and the Mercer Citizens for Public Accountability ("Motion for Stay") at 1 (Nov. 15, 1996). With regard to this vote, petitioners stated:

> The clear purpose of the Freeholders' vote was to terminate the Facility. However, to the best of petitioners' knowledge, the vote has not yet been memorialized in a written decision, order or other document for submission to the Environmental Appeals Board * * *. Notwithstanding the lack of such memorialization, it was the express understanding and explicit purpose of the Freeholders and the [Mercer County Improvement Authority ("MCIA"), a co-permittee of the proposed facility,] that the November 7 vote of the Freeholders would determine the fate of the Facility. (For example, all newspapers and other mass media reported the vote and its declared effect as the termination of the Facility. * * *) Inasmuch as the Freeholders voted to reject the amendment which contained the Facility * * *, it seems beyond serious doubt that the Freeholders intended to and did terminate the facility.
>
> Accordingly, it appears to a virtual certainty that the PSD permit, as issued, and the petitioners' appeal of same, have been or shortly will be rendered moot for lack of a project either to build or dispute and, therefore, the matter should be dismissed.

Id.

In responding to the stay request, MCIA stated that:

> MCIA has no objection to a continuance of this matter pending a clear indication from the [MCBCF] as to whether the County will participate in the construction and operation of the subject resource recovery facility. Once the MCIA receives a clear directive from the Freeholder Board regarding the facility, the MCIA and its co-permittee, Ogden Martin Systems of Mercer, Inc., will be in a position to decide whether

> any party will pursue activities authorized by the subject PSD permit.

Letter from Michael G. Luchkiw, counsel for MCIA, to Eurika Stubbs, Clerk of the Board (Nov. 21, 1996).[1] By order dated November 22, 1996, the Board stayed the proceedings in this matter until February 21, 1997.

By letter dated February 20, 1997, MCIA requested that the stay be extended for an additional 30 days "to allow the parties to ascertain the status of the facility." Petitioners and NJDEP consented to the request. On February 20, 1997, the Board granted MCIA's request and extended the stay until March 24, 1997. On March 21, 1997, petitioners requested that the stay be extended for another 30 days. According to petitioners, the additional stay was necessary in order to allow the MCBCF to consider a resolution to terminate any further activity on the proposed facility. By letter dated March 24, 1997, MCIA opposed the request, stating as follows:

> MCIA does not concur with any further stay in this matter and respectfully requests that the Board render a decision based on the information that is currently before it. The MCIA will not be making any further submittal.

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[1]MCIA also stated that it objected "to the Petitioners' characterization of these proceedings and the PSD Permit itself as moot and maintains that the subject PSD Permit is presently in full force and effect due to petitioners' failure to timely file its Request For Administrative Review." Letter from Michael G. Luchkiw, counsel for MCIA, to Eurika Stubbs, Clerk of the Board (Nov. 21, 1996). MCIA did not provide any information relating to the potential effect of the MCBCF vote.

Letter from Michael G. Luchkiw, counsel for MCIA, to Eurika Stubbs, Clerk of the Board (March 24, 1997). MCIA made no reference to the actions of the MCBCF, nor did it provide the Board with any useful information regarding the current status of the facility. Notwithstanding MCIA's objection, the Board once more extended the stay until April 25, 1997, and, as with previous orders, directed the parties to promptly inform the Board of any changes in circumstances that would affect the Board's consideration of this matter. Neither party, however, provided the Board with any further information on the status of the facility.

By order dated May 2, 1997, the Board ordered MCIA to provide by May 16, 1997, a "detailed and complete statement assessing the current status of the proposed facility and whether or not the facility will be constructed." Order to Show Cause at 4. In addition, the order required petitioners to show cause by May 23, 1997 "why the appeal should not be dismissed as moot or proceed forthwith." *Id*. at 5. MCIA and NJDEP were given until May 30, 1997, to file a response. *Id*. The Board took this action because it appeared from the parties' representations that the facility may not be built, thereby making it unnecessary for the Board to resolve the issues raised in the notice of appeal. All submissions required by the May 2 order have now been received.

In its submission dated May 15, 1997, MCIA concedes that the MCBCF action effectively "prohibits the MCIA from being involved with the construction activities associated with the" proposed facility. Letter from Michael G. Luchkiw, counsel for MCIA, to Kathie A. Stein, Environmental Appeals Judge at 2. Nevertheless, MCIA contends that the Board should proceed with this matter because MCBCF's action "does not prohibit another party from constructing a resource recovery facility." *Id*. MCIA states that although it will not be constructing the facility, MCIA "is not precluded from transferring its permits, including the PSD permit, to another party that would assume obligations imposed under the permits and go forward with the construction and operation of a resource recovery facility * * *." *Id*. To this end, MCIA states that it has been negotiating with various entities interested in constructing the facility.

In petitioners' response to the Board's May 2, 1997 Order to Show Cause, they argue that MCIA "has not provided the Board with adequate or useful information from which the Board can determine whether this is a 'real' project or merely a speculative or hypothetical one." Letter from R. William Potter, counsel for petitioners, to Kathie A. Stein, Environmental Appeals Judge at 4-5 (May 23, 1997). Petitioners argue that the Board should order discovery on this issue and, if necessary, schedule an evidentiary hearing. Petitioners also request that the Board

continue the stay in this matter "until these fundamental questions are suitably resolved." *Id*. at 5.

On May 30, 1997, NJDEP filed a response to MCIA's submission. The response states, in part:

> [The permit] is transferrable to another operator upon administrative amendment of the PSD Permit requiring Federal Register notice. To date, there has been no request for such a transfer. Any changes to the facility or its operation, however, would likely require a permit modification necessitating corresponding review and approval of the [NJDEP].
>
> Notwithstanding the above, the [NJDEP] notes that the [MCBCF] has determined not to amend its Solid Waste Management Plan to provide for a voluntary system for delivery of solid waste -- "economic wasteflow" -- to the [facility]. With judicial action prohibiting "mandatory wasteflow," such an amendment would be necessary before resource recovery facility construction.

Letter from Howard Geduldig, Deputy Attorney General of New Jersey, to Kathie A. Stein, Environmental Appeals Judge at 2 (May 30, 1997).

It is clear from the above-quoted submissions that MCIA will no longer be constructing the facility. Although MCIA states that it seeks to transfer the permit to a private entity, it is unclear when and if such a transfer will ever take place. Moreover, as the above-quoted portion of NJDEP's May 30, 1997 submission indicates, even if MCIA can find an interested party, that party must be approved by the NJDEP before the permit can be transferred. Such approval is by no means guaranteed. Furthermore, NJDEP has indicated that further amendment of the

permit would likely take place should the permit be transferred to another party. Thus, the Board has substantial doubts as to the future status of facility and whether it will ever be constructed under the permit currently on appeal to the Board.

As we have previously stated "[i]t would be a waste of both the Board's and the parties' time and resources to review this matter if the facility will no longer be built." Order to Show Cause at 2. Furthermore, there is a substantial possibility that the issues raised in the petition for review may be moot, and a likelihood that further permit modifications would in any event take place before the facility could be constructed. After careful consideration of the parties' submissions, the Board has decided to remand this matter to NJDEP.[2] On remand, NJDEP should make an on-the-record determination as to whether, given the fact that MCIA is no longer authorized to construct the facility, the August 29, 1996 permit extension should be reconsidered. That is, given the change in circumstances since the permit extension was granted, NJDEP should determine whether the extension is still "justified" within the meaning of 40 C.F.R. § 52.21(r)(2). That section states, in part, that "[a]pproval to construct shall

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[2] *Cf. In re New York Power Authority*, 1 E.A.D. 825, 826-27 (Adm'r 1983) (Order Remanding Permit for Denial) (declining to review the merits of petition for review and remanding permit to the permit issuer for denial where there was no realistic prospect that construction would commence within 18 months after issuance of a final PSD permit decision and the proposed facility had no reasonable prospect of completion).

become invalid if construction is not commenced within 18 months after receipt of such approval * * *. The Administrator may extend the 18-month period upon a satisfactory showing that an extension is justified." Although we are hesitant to impose a deadline, we see no reason why NJDEP should not make its determination on remand within six (6) months of the date of this order.[3, 4]

So ordered.[5]

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[3]If NJDEP should conclude that the extension is still "justified," the Board will not entertain a petition for review of that determination unless a transfer of the permit has occurred and has been formally approved by NJDEP, together with any modifications of the permit deemed necessary or appropriate by NJDEP. Under those circumstances, petitioners would be free to file a petition with the Board at that time seeking review of NJDEP's determination in accordance with the rules for filing petitions for review set forth in 40 C.F.R. § 124.19.

[4]As previously stated, petitioners, in addition to seeking a continuation of the stay in this matter, have requested that the Board order MCIA to submit to discovery regarding the current status of the facility. Petitioners' request for discovery is denied. Although we agree with petitioners that the status of the facility is far from certain, we are not convinced that a discovery order is necessary or appropriate at the present time. Petitioners' request that we continue the stay is also denied. Under the circumstances, we believe that a remand will both preserve petitioners' rights and conserve the Board's and the parties' time and resources.

[5]As previously stated, MCIA has asserted that the appeal was not filed in a timely manner. Although the petition for review was not received by the Board within 30 days of the date the permit was issued as required by 40 C.F.R. § 124.19(a), we nevertheless consider it to have been timely filed. Although the

(continued...)

ENVIRONMENTAL APPEALS BOARD

Dated: 6/24/97

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

[5](...continued)
Board ordinarily requires strict compliance with filing deadlines, we make an exception in the present case because Bill Wolfe, then the Policy Research Director for the New Jersey Environmental Federation, one of the petitioners in this matter, has submitted an affidavit stating he was given and relied upon incorrect information by the Clerk of the Board. In particular, although the petition for review was due on September 30, 1996, Wolfe states under oath that during a telephone conversation with the Clerk of the Board, he was told that an overnight package sent on September 30, 1996, would constitute timely filing. The Clerk of the Board has confirmed the substance of this conversation. The petition was not received by the Board until October 3, 1996. Although Wolfe did not disclose to the Clerk of the Board the method by which the final permit decision was served, the Clerk of the Board apparently believed that the decision had been served on petitioners by mail, in which case 3 days are added to the prescribed time period for filing a petition for review. 40 C.F.R. § 124.20(d). However, because the final permit was served on petitioners on August 30, 1996, by hand delivery, the petitioners were not entitled to this additional time. Under these very narrow and unusual circumstances, we consider the petition to have been timely filed. *See American Farm Lines v. Black Ball Freight Services*, 397 U.S. 532, 539 (1970) (Agency may relax procedural rules if the ends of justice so require); *In re Genessee Power Station Limited Partnership*, 4 E.A.D. 832, 837 n.6 (EAB 1993) (excusing failure to comply with filing requirements of 40 C.F.R. § 124.19); *In re BASF Corp*, 2 E.A.D. 925, 926 n.3 (Adm'r, 1989) (where a petitioner relies on erroneous filing information from the Region, a petition for review will not normally be rejected as untimely).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Remand Order in the matter of Mercer and Atlantic Counties Resource Recovery Facility, PSD Appeal No. 96-7, were sent to the following persons in the manner indicated:

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Dated: 6/24/97

/s/
Mildred T. Johnson
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