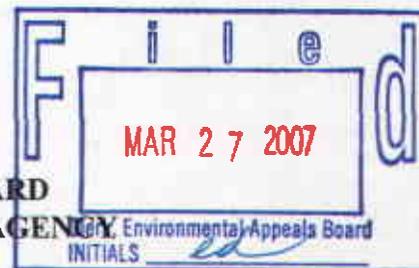


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:

Town of Marshfield, Massachusetts

Permit No. MA0101737

NPDES Appeal No. 07-03

ORDER DENYING REVIEW

I. *BACKGROUND*

On February 5, 2007, the Town of Marshfield, Massachusetts (the "Town") filed a petition in which it requested that the Environmental Appeals Board ("Board") review a final National Pollutant Discharge Elimination System ("NPDES")¹ permit decision issued by the U.S. Environmental Protection Agency, Region 1 (the "Region"), for the discharge of treated waters into the Massachusetts Bay in Marshfield, Massachusetts. The Town challenges one permit limitation in particular – the allowable fecal coliform level – and argues that in this case review is appropriate as a matter of policy. *See* Petition for Review (dated Feb. 1, 2007). Specifically, the Town argues that review is warranted because: (1) the Region assigned the fecal coliform limit based on incorrect information relative to the propriety of shellfishing in the area of the outfall pipe, *id.* at 1, 5-8; (2) the record does not support the Region's conclusion that the shellfish growing areas are

¹ Under the Clean Water Act ("CWA"), persons who discharge pollutants from point sources into waters of the United States must have a permit in order for the discharge to be lawful. *See* CWA § 301, 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. *See* CWA § 402, 33 U.S.C. § 1342.

impacted by high fecal coliform from the Town's discharges, *id.* at 8; (3) the Region incorrectly attributed the fecal coliform level to the state 401 certification,² *id.* at 1, 8-11; (4) even if the state certification could be interpreted as requiring the contested permit limitation, it omits relevant information mandated by federal regulations, causing at a minimum a waiver of the specified condition, *id.* at 11-12; (5) the procedural deficiencies in the state certification warrant the Board's setting aside the section 401 certification, *id.* at 2, 12-13; and (6) the Region did not adequately respond to comments pertaining to the reduced fecal coliform effluent limitation that were raised during the public comment period on the draft permit. *Id.* at 2, 13-14.

The Region, for its part, filed a motion on March 5, 2007, requesting that the Board dismiss the Town's petition on timeliness grounds and that the Board stay its requirement that the Region submit relevant portions of the administrative record and a certified index of the entire administrative record, pending the Board's decision on the request to dismiss the petition. *See* Respondent's Motion to Dismiss Petition for Review and to Stay Production of Administrative Record (dated March 5, 2007).

On March 20, 2007, the Town filed an opposition to the Region's motion to dismiss the petition and a motion for an extension of time. *See* Town of Marshfield's Opposition to

² Section 401(a)(1) of the CWA requires all NPDES permit applicants to obtain a certification from the state in which the discharge originates or will originate that the permit contains the conditions necessary to assure compliance with the federal and state water pollution control standards. *See* CWA § 401(a)(1), 33 U.S.C. § 1341(a)(1). Accordingly, EPA may not issue a permit until a certification is granted or waived by the state, and a final permit may not be issued unless it incorporates the conditions and limitations specified in the state certification. *See* 40 C.F.R. §§ 124.53(a), .55(a)(2).

Respondent's Motion to Dismiss Petition for Review and Motion for an Extension of Time (Mar. 20, 2007) [hereinafter "Petitioner's Opposition"]. The Town claims that principles of equity and due process justify the flexible application of the Board's rules and acceptance of the Town's petition (which the Town characterizes as equitable tolling or an extension of time). *Id.* at 5. Specifically, the Town argues that: (1) the 30-day period for the filing of an appeal before the Board is not jurisdictional, and therefore, the Board is not deprived of authority to review the Town's petition, *id.* at 2-3; (2) the contested permit condition is based on erroneous information,³ *id.* at 3-5; and (3) the Town did not waive a tolling or extension of time defense by not raising these arguments in the petition. *Id.* at 5.

On March 23, 2007, the Region filed a motion for leave to file a reply brief in response to the Town's opposition, accompanied by the corresponding brief. *See* Motion for Leave to File Reply and Opposition to Motion for an Extension of Time (Mar. 23, 2007); *see also* Respondent's Reply to Petitioner's Opposition to Respondent's Motion to Dismiss Petition for Review and Respondent's Opposition to Petitioner's Motion for an Extension of Time (Mar. 23, 2007) [hereinafter "Reply Brief"]. We hereby grant the Region's motion and accept the Reply Brief for consideration by the Board.

For the reasons stated below, the Board denies review of the Town's petition.

³ In this regard, the Town argues further that it was deprived of notice and ability to participate in the State section 401 certification process. Petitioner's Opposition at 3.

II. DISCUSSION

Under the regulations governing permit appeals, a petition for review of a permit decision must ordinarily be filed with the Board within 30 days of service of notice of the final permit decision by the permitting authority. 40 C.F.R. § 124.19(a) (“Within 30 days after a[n] * * * NPDES * * * final permit decision * * * has been issued * * *, any person who filed comments on the 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 period within which a person may request review begins with the service of notice unless the permitting authority specifies a later date. *Id.* Where, as here, a final permit decision is served by mail, a petitioner has three additional days in which to file a petition for review. *Id.* § 124.20(d). In addition, if the filing day falls on a weekend or legal holiday, a petitioner has until the next working day to file the petition. *Id.* § 124.20(c). Documents are considered filed on the date the Board receives them. *See In re Puna Geothermal Venture*, 9 E.A.D. 243, 273 (EAB 2000) (“Documents such as petitions for review are considered filed on the date they are received by the Board.”). Failure to ensure that the Board receives a petition for review by the filing deadline will generally lead to dismissal of the petition on timeliness grounds as the Board strictly construes threshold procedural requirements, like the filing of a thorough, adequate, and timely petition. *Id.*; *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 328 (EAB 1999). *Cf. In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) (denying review of several petitions on timeliness and standing grounds and noting Board’s expectations of petitions for review); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999) (noting strictness of standard of review and Board’s expectation of petitions); *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996) (dismissing as untimely permit appeals received after the filing deadline).

The Board has, on limited occasions, entertained untimely petitions, where special circumstances have warranted it.⁴ *AES Puerto Rico*, 8 E.A.D. at 329 (“The Board will relax a filing deadline only where special circumstances exist”). Special circumstances have been found, *inter alia*, in cases where mistakes by the permitting authority have caused the delay or when the permitting authority has provided misleading information. *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-124 (EAB 1997) (delay attributable to permitting authority as it mistakenly instructed petitioners to file appeals with EPA’s Headquarter’s Hearing Clerk); *In re Hillman Power Co., L.L.C.*, 10 E.A.D. 673 (EAB 2002) (permit issuer failed to serve all parties that had filed written comments on the draft permit). Delays stemming from extraordinary events, such as natural disasters and response to terrorist threats, or from causes not attributable to the petitioner, such as problems with the delivery service, have also led the Board to relax the filing deadline. *See, e.g., In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002) (delay in reaching the Board attributable to EPA’s response to anthrax contamination concerns); *AES Puerto Rico*, 8 E.A.D. at 328 (extraordinary circumstances created by hurricane and its aftermath warranted relaxation of deadline); *id.* at 329 (EAB 1999) (delay attributable to aircraft problems experienced by FedEx).

With this as background, we will now proceed to analyze the issue at hand.

⁴ This is consistent with the well-settled principle that “it is always within the discretion of an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.” *See Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970).

In this case, the Region issued its final permit decision on November 9, 2006, and served the decision by mail on November 14, 2006.⁵ Therefore, the Town had until Monday, December 18, 2006, to file its petition.⁶ Nonetheless, the petition, which is dated February 1, 2007, was received by the Board on February 5, 2007, a month and a half after the filing date. Notably, the Town's petition offers no explanation for the delay.

In its motion, the Region points out that this is not a case where the permitting authority specified a later date for the beginning of the filing period. *See Respondent's Motion to Dismiss Petition for Review and to Stay Production of Administrative Record* at 2. Indeed, the record before us shows that the Region did not specify a different time for the filing of an appeal with the Board, and that the Town was made aware of the 30-day time period for petitioning review. A section entitled "Appealing an NPDES Permit," attached to the notice of the permit decision, states as follows: "If you wish to contest any of the provisions of this permit, you must petition the Environmental Appeals Board (EAB) within thirty (30) days." *See Petition for Review Exhibit 7A*. In its petition, the Town does not claim misrepresentation of the filing deadline, nor does it allege defects in the service of the final permit.

⁵ According to the Town, it received the final permit decision on November 16, 2006. *Petition for Review* at 4.

⁶ Because in this case notice of the final permit decision was served by mail, the Town had three additional days from the 30-day deadline, which fell on December 14, 2006, to file its petition. The deadline after adding the three additional days was December 17, 2006, which fell on a Sunday. Therefore, pursuant to 40 C.F.R. § 124.20(c), the Town had until the next working day, Monday, December 18, 2006, to file a timely appeal.

In its opposition to the Region's motion, the Town first offers an explanation for the delay. The Town posits that it "embarked on a hunt to ascertain" why the Region applied the contested permit limitation to its facility and that "[t]his necessitated intensive legal research, significant consultation with a marine biologist, and the services of an engineer." Petitioner's Opposition at 4-5. The Town further states that it had no obligation to raise its desire for an extension or a tolling argument in the petition for review,⁷ and therefore, it is not barred from asserting these arguments now. *Id.* at 5-6.

We are not persuaded by the Town's arguments. The Town cites three Board cases as instances in which the Board has entertained petitions after the 30-day period. *Id.* at 2. These cases, however, are clearly distinguishable from the case at hand, and thus, provide no support for the Town's motion.⁸ Furthermore, the reasons the Town provides do not constitute the type of special circumstances that have led the Board, on other occasions, to relax the 30-day rule. As

⁷ According to the Town, "in the tolling context, the courts have recognized that a complaint need not contain an allegation of equitable tolling to be sustained and that summary judgment was the appropriate vehicle for a limitation period challenge." Petitioner's Opposition at 6 (quoting *Sitarski v. IBM Corp.*, 708 F.Supp. 889, 891 n.1 (N.D. Ill. 1989)). Thus, the Town reasons, "[a]s the Town had no obligation to raise these affirmative defenses in its Petition for Review, it is not barred from asserting them now." *Id.*

⁸ See *In re Indeck-Elwood, LLC*, PSD Appeal No. 03-04 (EAB Sept. 27, 2006), 13 E.A.D. ___ (Board allowed petitioners to amend their timely petition to include a new issue on appeal, that questioned the validity of the entire permit and involved important policy considerations (i.e., the interplay between the requirements of the Endangered Species Act and the Prevention of Significant Deterioration program)); *In re Weber # 4-8*, 11 E.A.D. 241 (EAB 2003) (vacating and remanding permit decision because permit issuer failed to base its decision on the administrative record); *In re Hillman Power Co., L.L.C.*, 10 E.A.D. 673 (EAB 2002) (rejecting motion to dismiss petition on timeliness grounds because permit issuer failed to serve all parties that had filed written comments on the draft permit).

noted earlier in this decision, the Board has only entertained untimely petitions when special circumstances have required it. Having to conduct legal and technical research in preparation for an appeal does not, without more, fall into the category of circumstances the Board would consider special. Rather, as the Region points out in its Reply Brief,⁹ these are the type of obstacles most petitioners ordinarily confront when preparing timely petitions. Moreover, the Town should have sought an extension of time in advance of the filing deadline if unusual circumstances necessitated additional time.¹⁰ Absent the type of special circumstance that would justify the filing of an untimely appeal, the Board will not deviate from its general practice of adhering to the 30-day period for the filing of an appeal, as set forth in 40 C.F.R. § 124.19.

In addition, the Town should have explained why it did not address the timeliness issue in its petition. If there are special circumstances that would justify a late filing, these should be laid out in the petition. We simply see no benefit to postponing to a later stage in the appeals process a threshold timeliness issue, like the one at hand.

⁹ Reply Brief at 3-4.

¹⁰ The Town could have filed a timely petition identifying all the issues on appeal and moved for an extension of time to file a supplemental brief to support the issues raised in the petition. The Board has, on occasion and for good cause shown, granted this kind of motion and entertained such supplemental briefs.

III. CONCLUSION

In light of all the above, the Board denies review of the Town's petition on timeliness grounds.¹¹

So ordered.¹²

ENVIRONMENTAL APPEALS BOARD

By: Kathie A. Stein

Kathie A. Stein
Environmental Appeals Judge

Dated: March 27, 2007

¹¹ In light of this decision, the Board's requirement that the Region submit relevant portions of the administrative record and a certified index of the entire administrative record is now moot; therefore, the Region is no longer required to meet such requirements.

¹² The three-member panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast. *See* 40 C.F.R. § 1.25(e)(1)(2005).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Review in the matter of Town of Marshfield, Massachusetts, NPDES Appeal No. 07-03, were sent to the following persons in the manner indicated:

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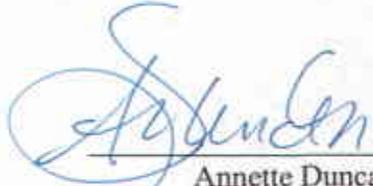
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Dated:

MAR 27 2007


Annette Duncan
Secretary