

IN RE TOWN OF HAMPTON, NEW HAMPSHIRE

NPDES Appeal No. 01-15

ORDER DENYING REVIEW

Decided July 26, 2001

Syllabus

U.S. EPA Region I (the "Region") issued to the Town of Hampton, New Hampshire (the "Town") a National Pollution Discharge Elimination System ("NPDES") permit. The notice of the Region's final permit decision, which the Town received by certified mail, instructed the Town that it had thirty days from the receipt of the notice to appeal any final permit conditions. The Town filed a Petition for Review ("Petition") seeking review of various permit conditions.

Held: The Town's Petition is denied as untimely.

Consistent with the governing regulations at 40 C.F.R. part 124, the Region specified a "later date" (i.e., the receipt date) as an alternative to the service of notice date (i.e., the mailing date) for initiating the thirty-day time period within which parties may request review of NPDES final permit decisions. *See* 40 C.F.R. § 124.19(a). Because the Town's Petition arrived at the Board four days after the filing deadline established in accordance with this alternative time frame, the Petition must be denied as untimely.

In this regard, the Board concludes that under the Region's alternative time frame, the Town was not entitled to additional time to appeal the final permit decision pursuant to 40 C.F.R. § 120(d), which adds three days for mailing when a party is "required to act within a prescribed time after * * * service." Technically, this provision only applies when the thirty-day appeal period follows *service of notice* by mail, not *receipt* by mail as was directed by the Region in this case. Furthermore, adding three days in this context would be inconsistent with the purpose of this provision, which is to account for the time that a final permit decision is in transit after mailing and thus unavailable for a party's response. Thus, this provision has no purpose in the current setting, where the thirty-day appeal period begins to run on the *date of receipt*. Although the Region's alternative time frame yielded an earlier filing deadline than the one derived by beginning the appeal period on the date when notice was served (and then adding three mailing days), this time frame nonetheless amply protects the Town's thirty-day appeal period in support of the purpose of 40 C.F.R. part 124.

Before Environmental Appeals Judges Scott C. Fulton, Ronald L. McCallum, and Kathie A. Stein.

Opinion of the Board by Judge McCallum:

On April 2, 2001, U.S. Environmental Protection Agency Region I (the “Region”) reissued a National Pollutant Discharge Elimination System (“NPDES”) permit, No. NH0100625, to the Town of Hampton, New Hampshire (the “Town”). The permit regulates the Town’s municipal wastewater discharge.¹

The Town received the permit on April 4, 2001, according to the certified mail return receipt. On May 8, 2001, the Town, pursuant to 40 C.F.R. § 124.19(a), filed with the Environmental Appeals Board (“Board” or “EAB”) a Petition for Review (“Petition”) seeking review of various permit conditions.² On June 11, 2001, the Region filed a motion seeking dismissal of the Petition along with exhibits containing portions of the administrative record in this matter. The Region’s motion seeks dismissal of the Petition on the basis of untimeliness.

Under the permitting regulations found at part 124 of title 40 of the Code of Federal Regulations, a petitioner must file his or her petition for review with the Board within the time period established by the regulations. *See In re Envotech, L.P.*, 6 E.A.D. 260, 264 (EAB 1996); *see also In re Sutter Power Plant*, 8 E.A.D. 680, 686 (EAB 1999). “Uniform application of the requirement is necessary because of the various parties and permits that are subject to this provision and because important consequences flow from petitioning for review. *See, e.g.*, § 124.15(b) (final permit decision is effective 30 days after service of notice unless review requested under § 124.19).” *In re Bethlehem Steel Corp.*, 3 E.A.D. 611, 613 n.9 (Adm’r 1991).

Section 124.19 of title 40 of the Code of Federal Regulations sets forth the procedural requirements for appeals of NPDES permits. Section 124.19 states:

Within 30 days after a * * * NPDES * * * final permit decision * * * has been issued, * * * any person who filed comments on [a] draft permit or participated in the public hearing may petition the Environmental Appeals

¹ Under the Clean Water Act, discharges into waters of the United States by point sources such as the Town’s municipal wastewater facility must be authorized by a permit in order to be lawful. *See* 33 U.S.C. § 1311. The NPDES is the principal permitting program under the CWA. *See* 33 U.S.C. § 1342.

² “Documents are considered filed on the date they are received by the Board * * *.” *In re Puna Geothermal Venture*, 9 E.A.D. 243, 273 (EAB 2000) (citing *In re Outboard Marine Corp.*, 6 E.A.D. 194, 196 (EAB 1995)). The Town’s Petition was received by the Board on May 8, 2001.

Board to review any condition of the permit decision.
* * * The 30-day time period within which a person may request review under this section begins with the service of notice of the Regional Administrator's action *unless a later date is specified in that notice.*

40 C.F.R. § 124.19(a) (emphasis added). Three days are added to this time period when service of notice is made by mail. 40 C.F.R. § 124.20(d).

Here, the Region mailed the notice of the final permit decision on April 2, 2001. *See* Region's Exhibit ("R Ex") 3. Consistent with decisions by the Board and its predecessors, April 2 therefore marked the date of service of notice. *See In re Beckman Prod. Servs.*, 5 E.A.D. 10, 15 (EAB 1994) ("When the Region serves a final permit decision by mail, service occurs upon mailing"); *accord Bethlehem Steel*, 3 E.A.D. at 614 n.11. Since the notice was served by mail, the Town would ordinarily have had thirty-three days after the above date to file its Petition for Review with the Board, thus making the last day for filing May 7, 2001 (after adjusting for the due date falling on a weekend).³

In its final permit decision, however, the Region, consistent with 40 C.F.R. § 124.19(a), specified a *later* date (as an alternative to the service date) for initiating the thirty-day appeal period. A brief set of instructions attached to the NPDES permit, entitled "Appealing/Contesting Permits," stated that "[i]f you wish to contest any of the provisions of this permit, you may petition the Environmental Appeals Board * * *, within thirty days of *receipt* of this letter." R Ex 5 (emphasis added). Because receipt of a document necessarily occurs after service (i.e., mailing), the Region effectively specified a *later* date for initiating the appeals period. Since the Town received the final permit decision on April 4, 2001 (two days after the service date), the above receipt date initiated the running of the thirty-day time period. Thus, under the alternative time frame chosen by the Region, the Board should have received the Town's Petition for Review no later than May 4, 2001.

Although following the alternative time frame yielded an earlier filing deadline than one derived by adding three additional days for service by mail, the Board nonetheless concludes that May 4, 2001, is the appropriate filing deadline. Consistent with the regulations, the Region provided that the thirty-day period would not begin to run on the date of *service*, but rather on the date of *receipt* — in this case two days later. Therefore, § 124.20(d), which adds three days for

³ Under 40 C.F.R. § 124.20(c), "[i]f the final day of any time period falls on a weekend or holiday, the time period shall be extended to the next working day." Accordingly, since the final day of the time period in the instant proceeding would have fallen on Saturday, May 5, 2001, the time period for filing the Petition would have been extended to Monday, May 7, 2001, the next working day.

mailing when a party “is required to act within a prescribed period after * * * service,” technically does not apply. 40 C.F.R. § 124.20(d); *see Beckman Prod. Servs.*, 5 E.A.D. at 16 n.9 (citing *Bethlehem Steel*, 3 E.A.D. at 614 & n.11) (emphasis added).

Indeed, adding three days in this setting would be inconsistent with the purpose of the rule. *See Bethlehem Steel*, 3 E.A.D. at 614 n.11.⁴ The paramount purpose of the timing requirements governing appeals at 40 C.F.R. part 124 is to preserve for parties a thirty-day time period within which to request review of final permit provisions. *See* 40 C.F.R. § 124.19(a) (“the 30-day time period within which a person may request review”). In support of this objective, the regulations add three days to the response period in the event a final permit decision is served by mail, to account for the time that a final permit decision is in transit and not available for a party’s response. However, this three-day time period has no purpose in a setting in which the thirty-day appeal period begins to run on the *date of receipt*, as directed in the Region’s instructions here.

Accordingly, the Board concludes that May 4, 2001, was the correct deadline for filing an appeal in this proceeding. As noted above, use of the timing formula in the Region’s instructions amply protects the Town’s thirty-day time period for appeal in support of the applicable regulations. Since the Town here filed its appeal of the final permit decision on May 8, 2001, *see supra*, the Town’s appeal is untimely.

Because the Town failed to meet timeliness requirements in filing its Petition for Review, the Town’s Petition is hereby denied.

So ordered.

⁴ In *Bethlehem Steel*, the Administrator stated:

The purpose of the three extra days allowed under § 124.20(d) is to establish a uniform allowance for the time it customarily takes to deliver the final permit decision through the mail, so that the person receiving it is not unfairly deprived of any response time. When the Region specifies that the time period for response commences upon receipt, and not service, there is no need to account for the time it takes to deliver the final permit decision through the mail, as there is no danger that any response time shall be lost.

3 E.A.D. at 614 n.11.