EPA New England

Date: March 23, 2007

U.S. Environmental Protection Agency
Office of Regional Counsel
One Congress Street, Suite 1100
Boston, MA 02114-2023
Phone: (617) 918-1148
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PLEASE DELIVER TO:

Eurika Durr
Clerk, EPA Environmental Appeals Board
(202) 233-0121

From: **Samir Bukhari**
Attorney, Office of Regional Counsel
EPA, Region 1

Number of Pages to Follow: 7

Re: **Town of Marshfield, Massachusetts**
NPDES Appeal No. 07-03
NPDES Permit No. MA0101737

Motion for Leave to File Reply and Opposition to Motion for an Extension of Time, with an attached 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

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

March 23, 2007

VIA FIRST CLASS MAIL AND FACSIMILE

U.S. Environmental Protection Agency
Ms. Eurika Durr, Clerk of the Board
Environmental Appeals Board (MC 1103B)
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Re: NPDES Appeal No. 07-03
NPDES Permit No. MA0101737
Town of Marshfield, Massachusetts

Dear Ms. Durr,

Enclosed please find the original and five additional paper copies of a Motion for Leave to File Reply and Opposition to Motion for an Extension of Time, with an attached 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, and a certificate of service. The Motion, Reply and certificate of service have also been mailed to counsel of record today.

Sincerely,

SAMIR BOKHARI FOR

Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1
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617-918-1040
Fax: 617-918-0040

cc: Robert L. Marzelli, Esq.
P.O. Box 967
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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	
Town of Marshfield, Massachusetts	NPDES Appeal No. 07-03
Permit No. MA0101737	

MOTION FOR LEAVE TO FILE REPLY
AND OPPOSITION TO MOTION FOR AN EXTENSION OF TIME

The New England Region of the Environmental Protection Agency hereby moves the Environmental Appeals Board for leave to file the attached 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.

Respectfully submitted,

SAMIR BUKHARI FOR

Ronald A. Fein, Assistant Regional Counsel
U.S. Environmental Protection Agency Region 1
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617-918-1040
Fax: 617-918-0040

Of counsel:

Stephen J. Sweeney, Attorney
Office of General Counsel (2355A)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
202-564-5491

Date: March 23, 2007

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

In re:	
Town of Marshfield, Massachusetts	NPDES Appeal No. 07-03
Permit No. MA0101737	

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

BACKGROUND

On March 5, 2007, the New England Region of the Environmental Protection Agency ("Region") filed a Motion to Dismiss Petition for Review and to Stay Production of Administrative Record ("Motion to Dismiss") with the Environmental Appeals Board ("Board"), arguing that the Petition in this matter should be dismissed because it was filed well after the thirty day filing deadline. On March 21, 2007, the Region received the Town of Marshfield's Opposition to Respondent's Motion to Dismiss Petition for Review and Motion for an Extension of Time ("Opposition"). As explained below, the Opposition neither rebuts the arguments presented in the Motion to Dismiss, nor justifies granting this retroactive request (made more than three months after the original filing deadline) for an extension of time.[1]

[1] In the Opposition, Petitioner does not oppose the Region's request that, should the Board decline to dismiss the Petition as untimely, the Board grant the Region an additional 45 days to prepare a response to the Petition, nor the Region's motion to stay production of the administrative record pending the Board's decision on whether to dismiss the Petition as untimely. See Motion to Dismiss, Docket No. 5, at 3-4.

REPLY TO OPPOSITION TO MOTION TO DISMISS

Petitioner argues that the Board should waive the thirty-day deadline in 40 C.F.R. § 124.19(a) because of extenuating circumstances. The cases that Petitioner cites do not support this argument.

"The Board will relax a filing deadline only where special circumstances exist." In re AES Puerto Rico L.P., 8 E.A.D. 324, 329 (EAB 1999). This exception is applied sparingly. The Board has relaxed a filing deadline most often when the delay stemmed from the agency's procedural error or misrepresentation. See, e.g., In re Hillman Power Co., 10 E.A.D. 673, 680 n.4 (EAB 2002) (treating petition as timely because petitioner had not been served the final permit decision); In re Puna Geothermal Venture, 9 E.A.D. 243, 273 (EAB 2000) (treating petition as timely because regional office had given commenters incorrect advice regarding filing deadlines); see also Spitzer Great Lakes Ltd. v. United States EPA, 173 F.3d 412, 416 (6th Cir. 1999) (Board erred in dismissing untimely appeal because appellant "relied upon and complied with materially misleading information provided by the agency")[2]. The Board has also relaxed deadlines where the delivery service entrusted with the filing created the delay. See, e.g., In re Avon Custom Mixing Servs., Inc., 10 E.A.D. 700, 703 n.6 (EAB 2002) (U.S. Postal Service), In re AES

[2] Petitioner does not cite Spitzer Great Lakes directly, but rather a later case, Michigan Department of Environmental Quality v. United States EPA ("MDEQ"), 318 F.3d 705, 708 (6th Cir. 2003). In MDEQ, the court affirmed the Board's strict application of another threshold requirement of 40 C.F.R. § 124.19(a). However, Petitioner cites MDEQ's quotation of Spitzer Great Lakes for the more general proposition that the agency "has the discretion 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." 318 F.3d at 708 (quoting Spitzer Great Lakes, 173 F.3d at 415 n.3) (itself quoting prior cases). This case more closely resembles MDEQ, where the Sixth Circuit upheld the Board's strict application of a threshold requirement, than Spitzer Great Lakes, where it did not.

Puerto Rico L.P., 8 E.A.D. at 329 (Federal Express). When the fault is the petitioner's, however, the Board imposes regulatory deadlines strictly, even if the petition is filed late due to an innocent mistake. See, e.g., id. at 329-30 (dismissing another petition that was received late because petitioner had sent his petition to regional office, not Board).[3]

Here, Petitioner does not allege defects in service of the final permit decision, misrepresentations regarding the filing deadlines, a failure of mail delivery, or anything of that nature. To the contrary, Petitioner concedes that it was properly served with the final permit decision, and does not dispute that an attachment included with the final permit decision correctly stated the filing deadline. See Motion to Dismiss, Docket No. 5, at 2. Nor was there a mail problem; the Petition was sent well after the filing deadline had lapsed, and the Board received it four days later. See id.

The only reason Petitioner offers for filing its petition a month and a half late – a delay far longer than the Board allowed in the cases Petitioner cites – is that, after receiving the final permit and response to comments, Petitioner "embarked on a hunt" requiring "intensive research" such that Petitioner could not file even a concise petition by the deadline. See Opposition at 4-5. These circumstances are not "special," but rather characterize the obstacles ordinarily confronted by petitioners preparing timely petitions

[3] Petitioner also two cases where the Board allowed, without explanation, petitions apparently filed more than thirty days after permit issuance. See In re Indeck-Elwood, LLC, PSD Appeal No. 03-04 (EAB Sept. 27, 2006), slip op. at 13, 17 (thirty-eight days), and In re Weber #4-8, 11 E.A.D. 241, 243 (EAB 2003) (forty-one days). Nothing can be concluded from these unadorned procedural histories. Regional offices may specify a later filing date than the default, see 40 C.F.R. § 124.19(a), and this issue might not be mentioned in a given Board decision unless there were a dispute regarding timeliness.

for review of regional permit decisions.[4] Relaxing the filing deadline here would allow the exception to devour the rule.

OPPOSITION TO MOTION FOR AN EXTENSION OF TIME

The Region opposes Petitioner's request for a retroactive extension of time for the reasons stated above and in the Motion to Dismiss.

CONCLUSION

The Region continues to request the relief prayed for in the Motion to Dismiss, namely, that the Board dismiss the Petition as untimely, or, if the Board declines to dismiss the petition, the Board grant the Region 45 days from the date of notice of the Board's decision to prepare a response to the Petition and submit relevant portions of the administrative record and a certified index of the entire administrative record.

Respectfully submitted,

Samir Bukhari For

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617-918-1040
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Of counsel:

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Office of General Counsel (2355A)
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
202-564-5491

Date: March 23, 2007

[4] Cf. In re AES Puerto Rico L.P., 8 E.A.D. at 328 ("In light of the extraordinary circumstances created by [a] hurricane [in Puerto Rico] and its aftermath, the Board granted a rare [one-month] extension of the appeals deadline.").

In re: Town of Marshfield, Massachusetts
NPDES Appeal No. 07-03

CERTIFICATE OF SERVICE

I, Samir Bukhari, hereby certify that copies of the foregoing Motion for Leave to File Reply and Opposition to Motion for an Extension of Time, with an attached 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, were sent on this 23d day of March 2007 to the following persons in the manner described below:

Original by First Class Mail
Copy by facsimile

Eurika Durr, Clerk of the Board
Environmental Appeals Board (MC 1103B)
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-0001

Copy by first class mail, postage prepaid

Robert L. Marzelli, Esq.
P.O. Box 967
Marshfield, MA 02050

Fax: (781) 826-5750

Dated: March 23, 2007