

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

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In the Matter of:	)	
	)	
Weaver's Cove Energy, LLC	)	
	)	NPDES Appeal No. 13-05
	)	
NPDES Permit No. MA0004871	)	
	)	
_____	)	

**REGION 1'S MOTION SEEKING A CLARIFYING DETERMINATION FROM  
THE ENVIRONMENTAL APPEALS BOARD AS TO REGION 1'S DEADLINE  
FOR FILING A RESPONSE TO PETITIONER'S PETITION FOR REVIEW**

EPA Region 1 respectfully requests that this Board issue a determination clarifying the due date for Region 1's response to Ms. Scofield's ("Petitioner") petition for review of the National Pollutant Discharge Elimination System ("NPDES") permit referenced above. The Region believes that the due date should be thirty (30) days from April 24, 2013, meaning that the Region's response would be due by May 24, 2013. Region 1's request stems solely from the fact that Petitioner has failed to comply with the procedural requirement contained in 40 C.F.R. §124.19(i)(3) requiring service of a petition for review on the Regional Administrator. Although the petition for review was stamped on April 18, 2013 as having been received by the Board, Region 1's Regional Administrator was not served and the appropriate Region 1 personnel only obtained actual notice of the filing of the petition on April 24, 2013 when Petitioner's filing was discovered that day on the Board's website by a Region 1 staff member. Consequently, if the Board were to deny Region 1's motion, the purpose of the thirty (30) day time period

contemplated by EPA's regulations-to allow EPA adequate time to prepare a response to assist the Board in its deliberations-would be frustrated.

For the reasons explained below, EPA seeks a determination from the Board clarifying that Region 1's response to Petitioner's petition for review is due on May 24, 2013.

### **ARGUMENT**

EPA's regulations at 40 C.F.R. §124.19(b)(2) require the Regional Administrator to file a response (along with associated administrative record information) to a petition seeking review of an NPDES permit "within 30 days after the filing of a petition." Those regulations also provide in relevant part, at 40 C.F.R. §124.19(a)(3), that "[a] petition is filed when it is received by the Clerk of the Environmental Appeals Board . . ."

Additionally, a "[petitioner] must serve the petition for review on the Regional Administrator and the permit applicant (if the applicant is not the petitioner)." 40 C.F.R. §124.19(i)(3). Furthermore, 40 C.F.R. 124.19(i)(4) requires that "[a] certificate of service [] be appended to each document filed stating the names of the persons served, the date and manner of service, as well as the electronic, mailing, or hand delivery address, or facsimile number, as appropriate."

Petitioner's petition for review (dated April 8, 2013) is now posted on the Board's website containing a date stamp indicating the Board received the petition at 12:19 pm on April 18, 2013.<sup>1</sup>

To the best of EPA's knowledge, Petitioner's petition for review has not, as of the date of this motion, been served on the Regional Administrator.<sup>2</sup> Finally, the petition for

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<sup>1</sup> Region 1 also notes that one or more exhibits to the petition were not posted to the Board's website until April 22, 2013.

review filed with the Board and posted on the Board's website does not have appended to it the certificate of service required by 40 C.F.R. §124.19(i)(4). Thus, it appears that Petitioner has not complied with EPA's regulations governing service on the Regional Administrator of a petition for review for the NPDES permit in question. Petitioner has also not complied with the "proof of service" requirements of those regulations. Petitioner's failure to comply with the applicable procedural requirements identified above will result in prejudice to Region 1 by materially shortening the time period provided by EPA's regulations for a response to a petition for review. Such a result would, moreover, hinder the Region's efforts to prepare a full and adequate response that provides the Board with the information it needs in its deliberations.

In light of the foregoing, Region 1 believes that it would serve the Board's interest in the fair, expeditious and accurate resolution of petitions for review, and would also be equitable, to commence the thirty (30) day response period on the date Region 1 obtained (on its own) actual knowledge that the petition for review had been filed with the Board. In cases such as this one, where a Petitioner has not served the Regional Administrator in accordance with the applicable procedural requirements of EPA's regulations, EPA believes that the Board's legal precedent provides a sufficient basis for the Board to find that the time period for EPA's response to a petition should commence on the date that EPA obtained actual notice of the filing of a petition and that the response period should extend for a period of thirty days. *In re AES Puerto Rico, L.P.*, 8 E.A.D. 324, 329 (EAB 1999)(*aff'd sub nom. Sur Contra la Contaminacion v EPA*, 202 F.

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<sup>2</sup> On April 25, 2013, EPA Region 1 legal counsel in this matter, Gregory Dain, spoke by telephone with Petitioner. Petitioner stated during that call that she mailed a copy ("bcc") of the petition to EPA Region 1's Office of Environmental Stewardship ("OES"), which is an enforcement office within Region 1 but is not a part of the Regional Administrator's Office. In addition, Petitioner's follow-up e-mail of the same date indicates that she mailed that copy of the petition to an address that EPA Region 1 no longer occupies.

3d 443 (1<sup>st</sup> Cir. 2000) ( the Board “will relax a filing deadline only where special circumstances exist.”) In particular, the Board has found “special circumstances” to exist in cases where the permitting authority has made mistakes or provided misleading information that directly led to delays. *See e.g., In re Hillman Power Co., LLC*, 10 E.A.D. 673, 680 n.4 (EAB 2002) (final permit decision not served properly). Petitioner Scofield’s failure to serve the Regional Administrator is analogous to the facts in *Hillman Power*, and the holding in that case should therefore apply in this case and in cases like it where procedural service requirements have not been met.<sup>3</sup> *See also In re Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03 to 08-06, slip. op. at 19 (EAB 2009) (“As a general matter, the Board typically grants a motion where the movant shows good cause for its request and/or granting the motion makes sense from an administrative or judicial efficiency standpoint.”).

For all of the reasons identified above, Region 1’s motion should be granted.

In accordance with 40 C.F.R. §124.19(f)(2), EPA Region 1 has made an attempt to ascertain whether Petitioner concurs with or objects to this motion. During Region 1’s April 25, 2013 telephone conversation with Petitioner, and in Petitioner’s follow-up e-mail to that conversation, Petitioner indicated her assent to Region 1’s request that the thirty (30) day time period for EPA’s response to the Petition commence on April 24, 2013, as set forth in this motion.

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<sup>3</sup> In instances where a Petitioner has properly served the Regional Administrator, and that service is by mail, EPA requests that the Board apply the provisions at 40 C.F.R. §124.20(d) when calculating due dates for responses to petitions for review to account for the delay in mail. The Board has discretion to relax or modify procedural rules to facilitate an orderly decision making process. *See e.g., Am. Farm Lines v. Black Ball Freight Serv.*; *see also In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 763 n. 11 (EAB 1995), *aff’d* 81 F.3d 1371 (5<sup>th</sup> Cir. 1996); *In re Genesee Power Station*, 4 E.A.D. 832, 827 n.6 (EAB 1993).

**REQUESTED RELIEF**

Region 1 respectfully requests that this Board issue a determination clarifying that May 24, 2013 is the due date for Region 1's response (along with a certified index of the relevant administrative record and relevant portions of the administrative record) to the petition for review in question .

Dated: April 26, 2013

\_\_\_\_\_/s/\_\_\_\_\_  
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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion seeking a clarifying determination from the Environmental Appeals Board as to Region 1's deadline for filing a response to Petitioner's petition for review in connection with NPDES Appeal No. 13-05 were sent to the following persons in the manner indicated:

By Electronic Filing:

Clerk of the Board  
U.S. Environmental Protection Agency  
Environmental Appeals Board  
1200 Pennsylvania Avenue, NW  
Mail Code 1103M  
Washington, DC 20460-0001

By First Class U.S. Mail:

Cecile T. Scofield  
609 HWY. 466-1132  
Lady Lake, Florida 32159

Dated: April 26, 2013

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