



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Region 1

5 Post Office Square, Suite 100

Boston, MA 02109-3912

VIA ELECTRONIC FILING

November 30, 2016

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
U.S. EPA East Building, Room 3334
Washington, DC 20004

**RE: Town of Bridgewater Wastewater Treatment Plant
NPDES Permit Appeal No. 16-01; NPDES Permit No. MA0100641**

Dear Ms. Durr:

Please find EPA Region 1's Reply to the Town of Bridgewater's Opposition to the Region's Motion to Dismiss the Petition, and accompanying Certificate of Service, in connection with the appeal referenced above.

Sincerely,

Samir Bukhari
US Environmental Protection Agency
Office of Regional Counsel, Region I
5 Post Office Square - Suite 100
Mail Code: ORA 18-1
Boston, MA 02109-3912
Tel: (617) 918-1095
Fax: (617) 918-0095
Email: bukhari.samir@epa.gov

Enclosures

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

<hr/>)	
In the Matter of:)	
)	
Bridgewater Wastewater Treatment)	
Plant)	
)	
NPDES Permit No. MA0100641)	NPDES Appeal No. 16-01
<hr/>)	

**EPA REGION 1’S REPLY TO THE TOWN OF BRIDGEWATER’S OPPOSITION TO
EPA REGION 1’S MOTION TO DISMISS THE PETITION**

I. INTRODUCTION

On November 15, 2016, Region 1 of the Environmental Protection Agency (“Region 1” or “EPA”) filed a Motion to Dismiss the Petition as Untimely and to Stay the Filing of the Response to Petition and Certified Index of the Administrative Record. *See* Mot. to Dismiss, EAB Docket, NPDES 16-01, Doc. 2 (hereinafter “Mot. to Dismiss” or “Motion”). In an Order issued on November 22, 2016, the Environmental Appeals Board (“EAB” or the “Board”) directed the petitioner, the Town of Bridgewater (the “Town”) to file a response by Friday, December 2, 2016, and noted that Region 1 may file a reply pursuant to 40 C.F.R. § 124.19(f)(4). EAB Nov. 22 Order. In that same Order, the Board also granted Region 1’s request for a stay of certain deadlines associated with its Response to the Petition, pending further order of the Board. *Id.* at 1-2. Later that day, the Town filed its Opposition to EPA Region 1’s Motion to Dismiss the Petition. Opposition, EAB Docket, NPDES 16-01, Doc. 5 (hereinafter “Opposition”).

As outlined in the Region's Motion, the Town failed to file its Petition with the Board within the prescribed timeframe, and therefore the Petition is subject to dismissal on the grounds of timeliness. Region 1 reaffirms the arguments set forth in its initial Motion, which upon review of the Town's Opposition, remain unrefuted. The Town has failed to provide a full and cogent explanation of the sequence of events leading to the untimely filing of the Petition on November 17, 2016. Rather than provide clarification for why the Petition was not filed with the Board on November 7, 2016, as it was required to be, the Town's account has only precipitated more confusion, marked as it is by inconsistencies and ambiguities. Whatever unambiguous facts can be gleaned from the Opposition do not amount to a showing that the Petition was timely filed, or to a demonstration that special circumstances exist that would excuse a petition that was otherwise untimely filed. Rather, the facts as presented by the Town appear to undercut its own arguments, while bolstering Region 1's initial arguments for dismissing the Petition as untimely, as the Region explains below. Moreover, nowhere in the Opposition does the Town set forth any reasoned legal justification for the delay, nor does it explain why the Town failed to take steps to ensure that its Petition had been timely filed. Because the Town has failed to present facts or argument that would support a finding that its Petition was timely filed or that any exception to the normally applicable filing deadline is warranted, the Region's Motion should be granted and the Petition dismissed.

II. ARGUMENT

a. The Town Premises Its Arguments on a Legally and Factually Flawed Calculation of Filing Deadlines

Throughout its Opposition, the Town repeatedly emphasizes that the Board of the Water and Sewer Commission only received the Final Permit on October 11, 2016, and implies that this

date of receipt somehow altered the operative due date for its Petition. The Town's argument disregards, or at the very least misconstrues, the method required to calculate deadlines for filing a petition for review under 40 C.F.R. § 124.19. Federal regulations governing NPDES permit appeals clearly provide, "[a] petition for review must be filed with the Clerk of the Environmental Appeals Board within 30 days after the Regional Administrator serves notice of the issuance of . . . NPDES . . . final permit decision." 40 C.F.R. § 124.19(a)(3). And, if notice is provided by mail, the notice of issuance of a NPDES final permit decision is deemed to be completed when notice is *placed in the mail*, not when it is received by the permittee. *See* Environmental Appeals Board, U.S. EPA, Practice Manual at 42 (August 2013). To account for delay caused by mailing, the 30-day deadline is extended by three (3) days when the permittee is served notice by mail. 40 C.F.R. § 124.20(d). Finally, a petition for review is deemed filed when it is received by the Clerk of the Board, at the address specified for the appropriate method of delivery. 40 C.F.R. §§ 124.19(a)(3), (i)(2).

As outlined in Region 1's Motion, the Region served notice of issuance of the Town's final NPDES permit by placing the final permit package in the mail on October 3, 2016. *See* Mot. to Dismiss, at 3. The Town, in its Opposition, does not dispute that service was perfected on this date, nor does it dispute that the calculation methodology described above is both accurate and applicable. In fact, the Town specifically submits: "To the best of the Town of Bridgewater's knowledge, Region 1 mailed the Final NPDES Permit on or about October 3, 2016." Opposition, at 2. Therefore, regardless of when the final permit package was actually received by the Town, the relevant triggering date for calculation of the Town's final deadline for submitting a Petition for Review is October 3, 2016. Because the Region effected service on October 3, 2016, the Town's filing deadline, as calculated pursuant to federal regulation, would

be November 7, 2016. *See* Mot. to Dismiss, at 3 (step-by-step explanation of deadline calculation). While the Town highlights and repeats the assertion that the Board of the Water and Sewer Commission did not receive the Final Permit until October 11, 2016,¹ this has no bearing on the calculation of the Town's deadline and does not affect the timeliness of the Town's Petition, even if the assertion were accurate.

It is not. As described in the Region's Motion to Dismiss, the Town received the Final Permit via two mailing packages, both placed in the custody of the United States Postal Service on October 3, one received Mr. Jonas Kazlauskas on October 6 and the other received by Mr. Charles Kane on October 11, 2016. The Region sent the packages after confirming the appropriate address for the Board of the Water and Sewer Commission with Mr. Kazlauskas. Mot. to Dismiss, at 3. The Town does not dispute that the Region effectuated service to the proper person at the proper address. Furthermore, the Town has not presented any valid reason why service of notice on the Town through Mr. Kazlauskas, the superintendent of the Wastewater Treatment Plant and the representative from the Town with whom the Region had been corresponding over the permit, was inadequate to put the Town on legal notice of final permit issuance as of October 6, 2016 (or indeed why it was insufficient to place the Town on actual notice of Final Permit issuance as of that date).²

b. The Town's Arguments Are Factually Unsupported

When Region 1 initially filed its Motion to Dismiss, it noted that "as yet, the Town has offered no explanation for its late filing." Mot. to Dismiss, at 4. Even after filing its Opposition,

¹ *See* Opposition, at 2, 4; Opposition, Att. A, at 1.

² Assuming for the sake of argument that October 11, 2016 was used as the date that Region 1 effected service of the Final Permit, 33 days from such date would lead to a filing deadline of November 14, 2016. The Board, however, did not receive the Petition for Review until November 17, 2016, and, as such, the Petition would still have been filed after the alternate November 14 deadline and thus would be untimely.

the Town has yet to adequately explain its delay in filing the Petition with the Board. The Town does present some facts that relate to the chain of events between receipt of the Final Permit and the ultimate November 17, 2016 filing of the Petition; however, these facts are confusing and at times internally inconsistent. Indeed, there are numerous discrepancies within the evidence provided by the Town, specifically related to the mailing shipping dates, delivery dates, and notice dates. In the end, they only serve to demonstrate that the Town failed to comply with the regulatory deadlines, but as importantly, they fail to justify the Town's delay.

Most notably, the Town attaches to its Opposition a FedEx Express Shipment Invoice. *See* Opposition, Att. B. The Invoice, dated November 10, 2016, outlines certain details that relate to the mailing of the Town's Petition. The Town, however, fails to point out several facts that are material to the disposition of the Motion. First, the Town sent the Petition to the wrong address: when sending documents to the Board through FedEx, the proper address is 1201 Constitution Avenue, NW, but the Invoice demonstrates that the Town sent its appeal to 1200 Pennsylvania Avenue. *Id.*; *see also* 40 C.F.R. § 124.19(i)(2)(iii); Environmental Appeals Board, U.S. EPA, Practice Manual at 16 (August 2013) (clearly stating that the mailing address for hand deliveries and non-USPS carriers is 1201 Constitution Avenue, NW).

Second, the Town relies on the Invoice for its claim that "on or about November 10, 2016," the Town's counsel received "formal notice that the package had been delivered to the Clerk of the Board." Opposition, at 3. While the invoice, dated November 10, 2016, states that the package was "Delivered Nov 07, 2016 22:18," it also includes notations that indicate: "Incorrect recipient address" and "Undeliverable Package." Opposition, Att. B. Therefore, on November 10, 2016, the Town had information indicating that its Petition was sent to the incorrect address and was therefore "undeliverable." Despite being in possession of this

information, the Town did not make any further inquiry regarding the delivery status of the package. In fact, the Invoice also included a FedEx tracking ID (808902704900), which would enable the Town to easily track the status of delivery through FedEx's online tracking tool. Region 1 inputted the tracking ID number into the online tracking tool, and the FedEx record indicates that the package was deemed undeliverable on November 7, 2016, and was immediately sent back to the Town. *See* Attachment 1 (FedEx Tracking Details). The Town does not explain why it failed to take even rudimentary steps to ensure that the Petition was properly received by the Board, either before November 10, 2016, or afterwards. While the Town in its Opposition seems to suggest that it had no knowledge of the package being returned until it received the undelivered package on November 15, 2016, this is clearly belied by the Town's own evidence. Opposition, at 3; Opposition, Att. A, ¶ 8. The details included in the Invoice in addition to those available through the online tracking record put the Town on notice, as of November 7, 2016, that the package was sent to the incorrect address and was returned as undeliverable, well before November 15, 2016. The Town, however, fails to address this information in its Opposition, and fails to discuss why it did not take the necessary steps to track and verify shipment of the Petition and otherwise ensure proper service of the Petition with the Board.

c. The Town Has Not Demonstrated That “Special Circumstances” Are Applicable Under the Present Facts

Finally, the facts of this case do not constitute the type of “special circumstances” that the Board has previously found to warrant an untimely filing, nor do the precedents cited to in the Town's Opposition support the relief requested by the Town. As stated in the Region's Motion to Dismiss, at 4, there are limited circumstances under which the Board will entertain a petition for review that is untimely. The cases cited by the Region generally involve situations where the

petition for review was delayed and untimely due to an element beyond the control of the petitioner (*i.e.* storms, anthrax, or permit issuer mistakes), which the Board may in its discretion consider in light of the importance of the merits at stake in the underlying petition.

Here, however, the delay is caused by the Town's use of an incorrect address, and failure to take basic steps to ensure timely delivery of its Petition. While the Town argues that special circumstances do exist, it does not explain why this is so. Instead, the Town simply asserts, "[t]he Environmental Appeals Board will excuse a late-filed appeal if it finds that special circumstances existed to justify the delay," and then cites two EAB decisions in support. Opposition, at 3. The first decision, *In re B&L Plating, Inc.*, outlines the principle that special circumstances may warrant acceptance of an untimely petition. 11 E.A.D. 183, 191 (E.P.A. 2003). The Board identified several examples of special circumstances, which overlap or are consistent with those summarized in the Region's Motion. All involve circumstances where events were out of the petitioner's control. The Board does discuss one unique circumstance, stating that "an attorney's illness may, in some circumstances, serve as a basis for excusing a party from timely compliance with procedural requirements. If an attorney is so ill as to be incapacitated at the time of service and does not have the opportunity to change the address for service of process or notify his or her client before service is made, then a late filing may be excusable." *In re B&L Plating, Inc.*, 11 E.A.D. 183, 191 n.15 (E.P.A. 2003). However, the circumstances at issue here do not involve illness on the part of the Town's counsel. While Region 1 is sensitive to Commissioner Charles Kane's sudden passing on October 29, 2016, *see* Opposition, at 2, this situation is not analogous to the examples of special circumstances listed previously (including illness of counsel), and further the Town has not demonstrated or even mentioned any connection between Mr. Kane's passing and the untimely filing.

The second decision cited by the Town involves an untimely appeal where the Board found that appeal by EPA Region 5 was untimely because it was filed one day after the deadline. The case turned upon the date on which the Regional Hearing Clerk effected service on Region 5 (which triggers the clock to begin to run for appeal). Region 5 claimed that it received the Regional Hearing Clerk's initial decision when the decision was *received* by Regional Counsel, instead of the day when the decision was placed in Region 5's interoffice mail (one day earlier). *In re Outboard Marine Corp.*, 6 E.A.D. 194, 195 (E.P.A. 1995). The Board found that, contrary to Region 5's argument, service was perfected when the decision was placed in interoffice mail, and, therefore, Region 5's filing was untimely. Because Region 5 failed to demonstrate any "extraordinary circumstances" justifying acceptance of an untimely appeal," the Board dismissed the appeal as untimely. *Id.* at 196. The opinion does not expand upon the definition of "extraordinary circumstances," but rather characterizes Region 5's actions as *not* extraordinary. Therefore, this case does not provide any support to the Town's argument that "special circumstances" exist. In fact, this case further bolsters the general rules that threshold procedural requirements are strictly construed by the Board, and that failure to satisfy such requirements warrants dismissal.³ See *In re Town of Marshfield*, 2007 EPA App. LEXIS 11 (E.P.A. Mar. 27, 2007).

³ The Town also includes the following statement: "the Environmental Appeals Board may grant an extension for filing the appeal brief if good cause is shown and there is no prejudice to the opposing parties." Opposition, at 3 (citing *In re B & B Wrecking and Excavating, Inc.*, 4 E.A.D. 16, 17 (EAB 1992)). The Town does not provide any explanation for how this principle applies to the instant appeal. There is no discussion of "good cause" and whether "good cause" exists under the circumstances; it is the Town's burden to make such a showing and it has failed to do so. See also Mot. to Dismiss, at 5 (discussing how there is no good cause under the circumstances). Furthermore, other than the above-cited statement, the Town has not made any efforts to request an extension of time. Even if this Opposition were to constitute a request for extension of time, EPA regulations require that parties seeking review of a permit issuance "must file motions for extensions of time sufficiently in advance of the due date to allow other parties to have a reasonable opportunity to respond to the request for more time and to provide the Environmental Appeals Board with a reasonable opportunity to issue an order." 40 C.F.R. § 124.19(g); see also Environmental Appeals Board, U.S. EPA, Practice Manual at 52 (August 2013). Here, insofar as the Town's Opposition might be construed as a request for an extension of time to file its Petition of Appeal, it too is untimely.

Finally, as Region 1 described in its Motion, if “special circumstances” did indeed exist, the Town likely would have brought these issues to the attention of the Board at an earlier time, and it would not have taken the Region’s motion to highlight the filing insufficiencies. The facts presented in the Town’s Opposition highlight the amount of time between when the package was returned as undeliverable and then re-submitted to the Board (from November 7 to November 17, 2016), and clearly show that the Town took no steps during that time to notify or communicate with the Board that special circumstances existed and that the Petition would be filed late.

III. CONCLUSION

In light of the foregoing, and for the reasons set forth in the Region’s Motion to Dismiss, the Board should dismiss the Petition with prejudice.

Respectfully submitted,

Samir Bukhari
Cayleigh Eckhardt
Assistant Regional Counsels
EPA Region 1
5 Post Office Square
MC: ORA 18-1
Boston, MA 02109-3912
Tel: (617) 918-1095
Fax: (617) 918-0095
Email: bukhari.samir@epa.gov

Dated: November 30, 2016

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply, in the matter of Town of Bridgewater Wastewater Treatment Plant, NPDES Appeal No. 16-01, was served on the following persons in the manner indicated:

By Electronic Mail and U.S. Mail:

Mark C. Gildea, Esq.
Clark, Balboni & Gildea
72 Main Street
Bridgewater, MA 02324

Dated: November 30, 2016

Samir Bukhari