31 Schoosett Street (Rt 139)
Suite 207
Pembroke, MA 02359

Telephone 781 - 837 - 3636
Fax 781 - 826 - 5750

Robert L. Marzelli

Attorney At Law

By Overnight Mail
March 19, 2007

Ms. Eurika Durr, Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
1341 G Street, N.W., Suite 600
Washington, D.C. 2005

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

Dear Ms. Durr:

Please find enclosed the original of the Town of Marshfield's Opposition to the Region's Motion to Dismiss along with five copies.

Sincerely,

Robert L. Marzelli

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	

TOWN OF MARSHFIELD'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS PETITION FOR REVIEW AND MOTION FOR AN EXTENSION OF TIME

OVERVIEW

The Town of Marshfield, Massachusetts ("Marshfield") asks the Environmental Appeals Board ("Board") to deny the Environmental Protection Agency Region I's ("Region") request to dismiss its Petition for Review for the following reasons: (1) the thirty day appeal period referenced in the motion to dismiss is not jurisdictional and thus does not deprive the Board of the power of review where equity demands it; (2) the challenged permit condition is based upon incorrect information provided by the Massachusetts Department of Environmental Protection during the permitting process and the continued enforcement of the condition works a substantial injustice; and (3) the Town did not waive a tolling or extension of time defense by not raising it in the petition for review.

ARGUMENT

I. In the Past, the Board Has Willingly Entertained Petitions for Review Filed Beyond the Thirty-Day Appeal Period.

The Board's case law does not support the Region's contention that the thirty-day appeal period is jurisdictional. Time and time again, the Board has entertained petitions for review that are filed with the Board after the thirty-day period. Indeck-Elwood, LLC, (November 17, 2003 appeal of October 10, 2003 permit); In re Weber #4-8, 11 E.A.D. 241 (EAB 2003) (considering appeal filed on May 20, 2003 of decision issued on April 8, 2003); In re Hillman Power Company, LLC 10 E.A.D. 673 (EAB 2002) (reviewing April 16, 2002 petition for review of March 13, 2002 decision). To construe the regulation as making the appeal period jurisdictional in the absence of any evidence or precedent so indicating severely and unnecessarily limits the Board's right of review in instances such as this, where simple equity compels such review.

Further, at least one appellate court has recognized that the Board can construe the regulations liberally. Specifically, in considering the provisions of 40 C.F.R. 124.19, the Sixth Circuit held that the EPA "**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.**" Michigan Dept. of Envirnmtl. Quality v. U.S.E.P.A., 318 F.3d 705, 708 (6th Cir. 2003) (construing the requirements contained in 40 C.F.R. 124.19). As described in Section II below, this is clearly a case where the relaxation of the rules is warranted.

Contrary to the Region's assertion, the plain language interpretation of the regulation in fact *supports* the non-mandatory nature of the regulation's requirements. While the Region contends that the regulation, 40 C.F.R. 124.19(a), states that an appeal "must be filed "within 30 days. . .", in fact, the regulation itself does not contain such mandatory language. The regulation states, "Within 30 days after a . . .NPDES final permit decision. . .any person who filed comments on that draft permit or participated in the public hearing **may** petition the Environmental Appeals Board to review any condition of the permit decision." The use of the word "may" is clearly directory rather than mandatory, particularly when contrasted with the later section (b) allowing that the Board "may also decide on its own initiative to review. . ." but that the Board "must act under this paragraph within 30 days. . .". The Region cannot be permitted to read command language into the regulations that is simply not there.

II. Principles of Equity and Due Process Justify the Flexible Application of the Board's Rules and Acceptance of the Town's Petition.

The Town urges the Board to consider its Petition for Review for two reasons. First, the Town was completely deprived of the notice and ability to participate in the 401 Water Quality Certification ("State Certificate") process as required by both state and federal regulations. While the Board has consistently ruled that state permit condition challenges belong before the state agencies, the issue here is different, where the federal permit purports to incorporate state certificate conditions that simply do not exist. When the Massachusetts Department of Environmental Protection issued the State Certificate, on its face it contained no conditions or requirements for the Town to challenge. Yet, in

responding to the Town's public comment, the EPA wholly relied upon and cited to the State Certificate as establishing standards that it simply did not contain.

Second, the foundation for the Region's approval of the 90 percent reduction in bacterial effluent is based upon a crucial mistake of fact. Specifically, the Region was under the impression that the outfall pipe discharged into an area approved for shellfishing. This appears to be the case only because of an error in designation by the Massachusetts Department of Marine Fisheries. Marine Fisheries clearly depicts an area **prohibited** for shellfishing where it anticipated the outfall pipe diffused. However, this area does not match the location of the actual outfall pipe, it lies a substantial distance some number of feet to the south of the pipe's actual location. As a result, the final permit incorporated bacterial limits based on an area approved for shellfishing, when clearly, based upon federal shellfishing standards as well as the state's own Marine Fisheries Division, shellfishing is not anticipated in the area of a sewage outfall pipe.

As to why the Town did not present these arguments within the period suggested by 40 C.F.R. 124.19, the answer is quite simply that it did not know the issue even existed at that point. During the public comment period, the Town questioned the 90% reduction in allowable effluent levels and the Region's only response was that those levels were required by the State Certificate. When the Town looked to the State Certificate (which it received for the first time as part of the final permit), the State Certificate contained no condition relative to bacterial limits, or any other condition for that matter. Aware of its obligation under Board case law as well as the Board's Manual to present every issue and argument for appeal in its Petition for Review, the Town embarked on a hunt to ascertain why these numbers were in fact applied to its outfall pipe

and where they came from. This effort necessitated intensive legal research, significant consultation with a marine biologist, and the services of an engineer to determine where the outfall pipe was located vis-a-vis the state's designated "prohibited" and "approved" area for shellfishing. Armed only with a vague and ambiguous State Certificate, and a Region response which relied wholly upon that Certificate, the intensive research required by the Town exceeded the thirty day period set forth in the regulation. However, under these extenuating circumstances, the Town contends that equity warrants a flexible reading of the appeal period, be it characterized as equitable tolling or an extension of time.

III. The Region's Contention That Any Tolling or Extension of Time Claim Should Have Been Made in the Petition for Review is Without Support.

No case law or regulation exists that supports the Region's contention that the Town had the obligation to raise a claim for an extension of time or tolling in its Petition for Review. The Region cites to In re Prairie State Generating Co., PSD Appeal No. 05-05, slip op. at 137 (EAB Aug. 24, 2006), for the principal that the Town had to raise procedural arguments in its Petition. The case does not support this proposition. In that case, the Board stated the well-known principle that any substantive issue a party wishes to pursue on appeal must be raised in the Petition for Review. Id. There, the issue the petitioner failed to preserve for review concerned whether further Sulfur Dioxide modeling should have been performed before the standard was established in the permit. Id. Nowhere in the decision are procedural concerns raised or required to have been raised at that early stage.

Similarly, the Town had no obligation to raise its desire for an extension or a tolling argument in the petition for review. 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 limitations period challenge. Sitarski v. IBM Corp., 708 F.Supp. 889, 891 fn.1 (N.D.Ill 1989). As the Town had no obligation to raise these affirmative defenses in its Petition for Review, it is not barred from asserting them now.

CONCLUSION

For all of the foregoing reasons, the Town requests that the Board deny the Region's Motion to dismiss and, if it deems necessary, grant the Town's Motion for an Extension of Time.

Respectfully Submitted,
TOWN OF MARSHFIELD
By Its Attorney,

Robert L. Marzelli, BBO#323220
P.O. Box 967
Marshfield, MA 02050
(781) 837-3636

Certificate of Service

I, Robert L. Marzelli, hereby certify that copies of the foregoing Town's Opposition to Respondent's Motion to Dismiss were sent on this 19th day of March by overnight mail to the following persons.

Ronald A. Fein, Asst. Regional Counsel
U.S. Environmental Protection Agency Region I
One Congress Street, Suite 1100 (RAA)
Boston, MA 02114