EARTHJUSTICE

November 20, 2009

VIA ELECTRONIC MAIL

Mr. Jack Broadbent
Air Pollution Control Officer
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109

Mr. Gerard Rios
Chief, Permits Office
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA

Re: Lehigh Southwest Cement Company Title V Permit

Dear Mr. Broadbent and Mr. Rios:

I am writing on behalf of QuarryNo and West Valley Citizens Air Watch to request immediate clarification of the relevant permit review deadlines for the above-referenced permit. The public has been receiving inconsistent information regarding the timing of formal review by the U.S. Environmental Protection Agency ("EPA") and therefore the associated deadlines for petitioning EPA to object under section 505(b)(2) of the Clean Air Act.

The public comment period on the draft permit commenced on August 12, 2009 and closed on October 1, 2009. The District held a public hearing on the draft permit on September 17, 2009. Through the course of this process, the District has received numerous and substantial comments raising a variety of issues including underreporting of hazardous air pollutant emissions, potential air emission increases from a fuel switch from coal to petroleum coke, the facility's lack of a central stack, and the inadequacy of emissions testing, monitoring, and reporting.

During the public comment period on the draft permit, the District apparently also sent a copy to EPA for review. On September 25, 2009, EPA submitted significant comments demanding revisions to the permit. Many of EPA's comments identified similar defects to those raised by public commenters.

The confusion comes because the District has erroneously labeled the draft permit with the heading "proposed" and, as a result, EPA and others have referred to the draft permit as the

proposed permit. Despite this label, on several occasions District staff members have told interested members of the public that the current version of the permit out for review is a "draft" permit. Similarly, EPA's September 25 comments to the District suggest that the recommended changes will be incorporated into a forthcoming "proposed permit." *See, e.g.*, Letter from Gerardo Rios, EPA to Barry Young, BAAQMD, encl. at 2 (Sept. 25, 2009) ("The District has agreed to include the suggested language into the statement of basis for the proposed permit."). Moreover, given the significance of EPA's comments, there is no basis for claiming that the current version of the permit is "the version of [the] permit that the permitting authority proposes to issue . . . ." *See* 40 CFR § 70.2 (defining "proposed permit").

To the extent the District believes EPA's formal review has in fact ended and the clock for petitioning EPA under section 505(b)(2) of the Clean Air Act has commenced, such an interpretation of the statutory and regulatory provisions governing public review has been rejected as illegal in *Sierra Club v. Whitman*, Case No. 01-01991 (ESH) (D.D.C Jan. 30, 2002) (enclosed). As the court explained, the draft permit released for public comments cannot also be treated as the proposed permit as defined in the federal regulations: "Because a permitting authority must afford an opportunity for public comment on permits it intends to issue, 40 C.F.R. § 70.7(h), the document submitted to EPA the day after it was made available to the public . . . could not have been a candidate for a 'final permit.'" *Id.* at 17. Such an approach calls into question the adequacy of the title V permitting program as a whole. As the *Sierra Club* court concluded:

> A procedure that allows for simultaneous permit review by the public and the EPA provides little time to address public comments that may raise serious questions about a draft permit. Such a process also signals the irrelevance of public input, which clearly contravenes the intent of Title V.

Id. at 17-18.

While the use of such concurrent review might be excused in situations where there is no public participation, it is a gross abuse of the process in cases such as this where public opposition is significant and the draft permit suffers from serious defects. We ask that the District and EPA confirm in writing that the current version of the permit, for which the District received extensive public comments *after* EPA's September 25, 2009 letter, is, in fact, only the "draft" version, that the District will prepare a revised "proposed" version for review before issuing the final permit, and that EPA's formal review period on the "proposed" permit will commence upon receipt of this revised version of the permit. We also ask that when EPA's formal review period does commence that the public be given timely notice detailing EPA's process for review of the proposed permit, opportunities for public participation, and deadlines for petitioning EPA.

Thank you for your prompt attention to clearing up this matter. If you have any questions, please feel free to contact me or Sarah Jackson at (510) 550-6725.

Sincerely,

Paul Cort
Staff Attorney

encl.: *Sierra Club v. Whitman*

cc: Kara Christenson, EPA
Thu Bui, BAAQMD
Adan Schwartz, BAAQMD
Honorable Barbara Boxer
Assemblymember Paul Fong
Assemblymember Ira Ruskin

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED
JAN 3 0 2002
NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

SIERRA CLUB,

Plaintiff,

v.

CHRISTINE T. WHITMAN, in her official capacity as Administrator, United States Environmental Protection Agency,

Defendant.

Civil Action No. 01-01991 (ESH)

MEMORANDUM OPINION

Plaintiff and defendant have filed cross-motions for summary judgment. Plaintiff has brought suit to compel the United States Environmental Protection Agency ("EPA") to respond to its petition objecting to a permit issued under Title V of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. §§ 7661-7661f ("Title V"). Plaintiff claims that EPA did not respond to its petition within 60 days as required by statute. *See* 42 U.S.C. § 7661d(b)(2). Defendant counters that plaintiff did not file its petition in timely fashion, as required by 42 U.S.C. § 7661d(b)(2), and therefore no agency response was required. Whether plaintiff filed a timely petition depends on whether the doctrine of equitable estoppel applies to Title V, and if so, whether its application is warranted in this case. The Court answers both questions in the affirmative.

TITLE V OF THE CLEAN AIR ACT

The Clean Air Act's Title V permitting program requires all major stationary sources of air pollution, as well as other sources identified in the Act, to have a Title V operating permit. 42 U.S.C. § 7661a(a). These permits include enforceable emissions limitations and other conditions necessary to assure CAA compliance. 42 U.S.C. §§ 7661a(a), 7661c(a). EPA may authorize a state program to serve as the Title V permitting authority. *See* 42 U.S.C. § 7661(4). On June 8, 2000, EPA approved Georgia's Title V operating permit program, and the Georgia Environmental Protection Division ("Georgia EPD"), a division of the Georgia Department of Natural Resources, became the permitting authority responsible for issuing Title V operating permits in Georgia. (Defendant's Cross-Motion for Summary Judgment [hereinafter Def.'s Mot.] at 2-3.)

The statute and regulations, 40 C.F.R. Part 70, provide a timeline for state and federal action, as well as public comment on the permit. The permit process begins when, based upon application materials submitted by a regulated facility, the permitting authority issues a draft permit. *See* 42 U.S.C. § 7661b(c). After issuance of the draft permit, regulations require the permitting authority to provide the public at least 30 days to review and comment on the permit, and 30 days advance notice are required prior to any public hearing. 42 U.S.C. § 7661a(b)(6); 40 C.F.R. § 70.7(h). After providing an opportunity for public comment, before a permit becomes final, the permitting authority must submit the proposed permit to the Administrator of the EPA (the "Administrator"). 42 U.S.C. § 7661d(a); 40 C.F.R. § 70.8(a). Upon receipt of the proposed permit, the Administrator has 45 days to object to final issuance of the permit for failure to

comply with Title V. 42 U.S.C. § 7661d(b)(1); 40 C.F.R. § 70.8(c).[1]

At the end of EPA's 45-day review period, if the Administrator has not objected in writing to the issuance of a permit, "any person" may petition the Administrator to object to the permit. 42 U.S.C. § 7661d(b)(2). The petition must be brought within 60 days of the end of the EPA's 45-day review period and, with certain exceptions, must be based on objections raised during the public comment period. *See* 42 U.S.C. § 7661d(b)(2); 40 C.F.R. § 70.8(d). The EPA must object to the permit if the petitioner demonstrates that it does not comply with Title V. 42 U.S.C. § 7661d(b)(1). In any case, the Administrator must either grant or deny the citizen petition within 60 days after it is filed. 42 U.S.C. § 7661d(b)(2).

Even after the permit has been issued, the Administrator possesses the authority to terminate, modify, or revoke and reissue a permit for cause. 42 U.S.C. § 7661d(e). Neither statute nor regulation sets forth deadlines for reconsideration of a final permit. A permit may be reconsidered at the agency's own initiative or upon petition. (Def.'s Mot. at 4.)

FACTUAL BACKGROUND

On July 12, 1999, Caldwell Tanks Alliance, LLC ("Caldwell Tanks") applied to the Georgia EPD for a Title V operating permit. Caldwell Tanks is located in an area of Georgia that has failed to meet ambient air quality standards for ground level ozone. (Plaintiff's Motion for Summary Judgment [hereinafter Pl.'s Mot.] at 3.) According to plaintiff, Caldwell Tanks

[1] Defendant has raised, but does not answer, a question as to whether the EPA's 45-day statutory review period begins at the beginning or at the close of the public comment period when the state permitting agency transmits a copy of the draft permit to EPA at the same time the permit is made available to the public for review and comment. (Def.'s Mot. at 6-7.) This Court concludes that the EPA's review period commences *after* public comment. *See* Part III, *infra.*

contributes ground level ozone in the area. (*Id.*)

On October 31, 2000, the Georgia EPD issued public notice of a proposed Title V permit for Caldwell Tanks, commencing the 30-day public comment period. The next day, Georgia EPD transmitted the proposed permit to EPA's Region 4 office, the agency's regional office in Georgia. On the last day of the public comment period, November 30, 2000, plaintiff faxed its comments on the permit to Georgia EPD. During the EPA's 45-day statutory review period, which commenced on December 1, 2000 and ended no later than January 16, 2001,[2] the Administrator did not object to the Caldwell Tanks permit. From this date, the 60-day period for petitions objecting to the Caldwell Tanks permit would have ended on March 19, 2001. (Def.'s Mot. at 7.) Plaintiff filed its petition on May 9, 2001.

However, sometime between November 30, 2000 and March 22, 2001, plaintiff claims that Georgia EPD informally communicated the state authorities' intention to re-propose the Caldwell Tanks permit. (Pl.'s Mot. at 5.) On March 22, 2001, plaintiff's counsel received an email from Jimmy Johnston, head of the Georgia EPD's Stationary Source Permitting Program. (Pl.'s Mot. at 5.) Johnston's email states that the Caldwell Tanks permit "was reproposed to EPA on March 12, 2001." (Pl.'s Mot., Ex. 3.) The text of the email indicates that a modified permit and permit narrative were attached to the communication. (*Id.*) On March 16, 2001, Arthur S.E. Hofmeister, an environmental engineer in the Air Planning Branch of the Air, Pesticides and Toxics Management Division at the EPA, Region 4 in Atlanta, Georgia (Hofmeister Decl. ¶ 1), received a similar email from Johnston, indicating that the permit "was

---

[2] Counting forty-five days from December 1, 2000 yields January 14, 2000, a Sunday. Because Monday, January 15 was a national holiday, the end of the review period was January 16, 2001.

reproposed to EPA on March 12, 2001" and that the modified permit and permit narrative were attached, but according to Mr. Hofmeister's Declaration, "Georgia EPD never re-proposed the Permit to EPA Region 4." (Def.'s Mot., Exs. A and C.)[3] Given a reproposal date of March 12, 2001, the EPA's 45-day review period would have expired on April 26, 2001. Because EPA did not object to the permit within that period, plaintiff would have had until 60 days later, June 25, 2001, to submit its petition. The petition filed on May 9, 2000 would have been timely.

EPA never responded to plaintiff's petition; although the agency claims that it is being considered as a petition to reopen the Caldwell Tanks permit. (Def.'s Mot. at 2.) To date, EPA has not commented on the substance of plaintiff's objections, and as noted above, there is no mandatory timeframe in which EPA must respond to such a petition.

ANALYSIS

Summary judgment is appropriate where "there is no genuine issue as to any material fact and the moving party is entitle to judgment as a matter of law." Fed. R. Civ. Proc. 56(c). Whether the permit was actually re-proposed is a factual matter that remains in dispute. Plaintiff claims that Georgia EPD reproposed the permit on March 12, 2001. (Pl.'s Mot. at 5; Pl.'s Reply at 2.) In making this claim, plaintiff relies on informal communications between its staff and employees at the Georgia EPD, as well as the March email messages from Johnston stating that the permit "was reproposed to EPA on March 12, 2001." (Pl.'s Mot. at 5.) Defendant flatly denies that the permit was ever reproposed by Georgia EPD, relying on a declaration from

[3] The two emails from Johnston dated March 16 and March 22, 2001, indicate that the modified permit and permit narrative are "attached" to the emails, but no attachments were presented by the parties. (*See* Pl.'s Mot., Ex. 3; Def.'s Mot., Ex. C.)

Hofmeister at the EPA. (Def.'s Mot. at 5.)[4]

However, determining the timeliness of plaintiff's petition does not require resolution of this factual issue. If the reproposed permit was received by EPA, plaintiff's petition was timely filed. But even assuming *arguendo* that the permit was not received, the petition may be deemed timely filed if the doctrine of equitable tolling applies and the circumstances of this case justify its application. Thus, this Court must first examine whether § 7661d(b)(2) permits equitable tolling of the citizen petition filing deadline. If tolling is available, the Court must then consider whether the undisputed facts justify tolling the deadline on behalf of plaintiff.

I. Availability of Equitable Tolling

Equitable tolling can apply to a statutory deadline, like the 60-day deadline in § 7661d(b)(2), that functions like a statute of limitations. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 94-96 (1990). Whether equitable grounds permit tolling this particular deadline should be ascertained from the language and structure of Title V: "Equitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *United States v. Beggerly*, 524 U.S. 38, 48 (1998).

In this case, the plain language of § 7661d(b)(2) permits an exception for equitable

---

[4] This statement is curious because the EPA admits that it also received an email from Johnston addressed to Hofmeister, dated March 16, 2001, indicating that the permit was in fact resubmitted. (Def.'s Mem. at 4-5.) The text of the email indicates that two documents were attached: a "modified permit" and a "permit narrative" with an addendum addressing EPA comments. (Def.'s Mem., Ex. C.) On its face, this document strongly suggests that the permit was re-proposed, yet neither defendant nor plaintiff makes any attempt to explain the conflict between the documentary evidence and the Declaration by Hofmeister, the email recipient, who disclaims reproposal. *See also* note 3, *supra*.

tolling. As the Supreme Court noted in *United States v. Brockamp*, 519 U.S. 347, 350 (1997), the text of many limitations provisions are consistent with equitable tolling: "Ordinary limitations statutes use fairly simple language, which one can often plausibly read as containing an implied 'equitable tolling' exception." As an example of such language, the Court referred to 42 U.S.C. § 2000e-16(c), which governs when an employment discrimination lawsuit may be filed: "Within 90 days of receipt of notice of final [EEOC] action . . . an employee . . . *may* file a civil action" (emphasis added). The language of § 7661d(b)(2) is similar: "If the Administrator does not object in writing to the issuance of a permit . . . , any person *may* petition the Administrator within 60 days after the expiration of the [Administrator's] 45-day review period" (emphasis added). Additionally, both provisions provide a relatively brief period in which to take action. *Cf. Beggerly*, 524 U.S. at 48-49 (given "unusually generous" 12-year statute of limitations and fact that period began when plaintiff "knew or should have known" of claim, extension of statutory period by tolling unwarranted). Moreover, the need for equitable tolling is more pressing with respect to § 7661d(b)(2) because the event that starts the statutory clock, the expiration of the Administrator's 45-day review period, is less definite than "notice of final [EEOC] action," which kicks off the 90-day period under § 2000e-16(c). Without any indication that congressional intent disfavors tolling, the § 7661d(b)(2) time limit need not be rigidly enforced.

Furthermore, the § 7661d(b)(2) petition deadline is not particularly insistent, providing additional evidence of congressional acquiescence to tolling. Unlike the limitations period in § 7661d(b)(2), a statutory deadline framed in "unusually emphatic form" can evidence congressional intent to bar tolling. *See Brockamp*, 519 U.S. at 350. Title V states that any

person "may" petition within 60 days, 42 U.S.C. § 7661d(b)(2); yet when the statute refers to actions of the permitting authority and EPA, the term "shall" is employed. 42 U.S.C. § 7661d(b)(1). "Shall" is understood to mean obligatory and might suggest that Congress did not intend to permit equitable tolling. *Cf. NRDC v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) (interpreting use of "shall" in § 202(a)(6) of the CAA to impose a mandatory duty on the EPA to promulgate standards). Similarly, the presence of the term "must" with respect to a statutory deadline has provided evidence that Congress intended to make a statutory time limit mandatory. *See King v. Dole*, 782 F.2d 274, 276 (D.C. Cir. 1986) (due to the mandatory nature of the time limit in 5 U.S.C. § 7703(b)(2), equitable tolling is inapplicable).[5] Thus, the decision to employ "may" and not the more forceful "shall" or "must," further demonstrates that tolling plaintiff's petition deadline is not inconsistent with congressional intent. Similarly, in *Mondy v. Secretary of the Army*, 845 F.2d 1051 (D.C. Cir. 1988), where the D.C. Circuit conducted a similar inquiry into whether the aforementioned time limit in § 2000e-16(c) was jurisdictional ("Within 30 days . . . an employee . . . may file a civil action . . . ."), the Court concluded that "exceptionally emphatic language" in a statute, such as "must" and "shall," could express a congressional intent to make a time limit jurisdictional, but that the language in question had "no special ring." 845 F.2d at 1055-56.[6]

---

[5] Defendant argues that the statute in *King* does not support this proposition because it provides that a person "may" obtain judicial review and in a separate provision states that the filing "must" take place within 30 days. (Def.'s Reply at 5-6.) While it is true that neither § 7661d(b)(2) nor § 2000e-16(c) singles out the deadline for separate treatment, this only demonstrates that Congress did not emphasize its mandatory nature. The term "may" remains less emphatic than the term "must."

[6] Defendant argues that this Court cannot rely on *King* or *Mondy*, because the holdings in those cases concerned the jurisdictional nature of a deadline, not the permissibility of tolling.

Nonetheless, defendant points to both the rigid timelines for permit review and EPA's authority to reopen the review process under § 7661d(e) as indicia of Congress's intent to foreclose equitable tolling with respect to Title V permit deadlines. (Def.'s Mot. at 8-10.) Defendant argues that the language of § 7661d(b)(2) is more like the limitations provision at issue in *United States v. Brockamp*, 519 U.S. 347 (1997), which the Supreme Court held did not permit equitable tolling. In *Brockamp*, the Court refused to apply equitable tolling to extend the statutory limitations period on a claim for a tax refund, because the provision was both detailed and reiterated the limitations period a number of times, thereby emphasizing the fixity of the requirement. 519 U.S. at 350-52. The Court indicated that the statute set out its limitations period in a "highly detailed technical manner, that . . . cannot easily be read as containing implicit exceptions." *Id.* at 350. Plaintiff responds that § 7661d provides not rigid, but "floating," deadlines, and consequently, equitable tolling is consistent with the regulatory scheme.

Defendant is correct in part; however, § 7661d(b)(2) is not so rigid as to preclude tolling in limited circumstances. The Title V permit process does set forth specific timeframes for state permitting authority and federal action. Section 7661d provides a specific order of action for the Title V permit process, which begins with the initial permit application, continues through

---

(Def.'s Reply at 5.) However, the analysis of the jurisdictional nature of the deadlines in those cases turned, *inter alia*, on whether Congress had employed emphatic statutory language. The more emphatic, the more likely the time limit is determined to be jurisdictional, and the use of terms such as "shall" and "must" communicate an intent to make that time limit mandatory. *See King*, 782 F.2d at 276; *Mondy*, 845 F.2d at 1055-56. Similarly, in this case, more emphatic language is more likely to express a congressional intent to bar tolling. Thus, the analysis in *King* and *Mondy* is relevant and demonstrates that the language of § 7661d(b)(2) is not "clear and emphatic," suggesting that it is not inconsistent with equitable tolling. *Mondy*, 845 F.2d at 1055-56.

review by the permitting authority and EPA, and ends with an opportunity to file a petition demanding that EPA object to the permit. 42 U.S.C. § 7661d(a)-(c). However, while the sequence of actions is fixed, the calendar date associated with each step is not. For example, as this case demonstrates, reproposing a permit restarts the statutory clock, and all subsequent deadlines are pushed back. (Pl.'s Mot. at 6; Def.'s Mot. at 7.) Furthermore, even if the statutory requirements appear inflexible, actual practice seems somewhat more fluid.[7]

Moreover, § 7661d is not as rigid and emphatic as the statutory provision in *Brockamp*. The statutory deadline in the *Brockamp* statute was stated in an "unusually emphatic form" and set out in "highly detailed technical manner, that linguistically speaking, cannot easily be read as containing explicit exceptions." 519 U.S. at 350-51. Furthermore, the statute "reiterates its limitations several times in several different ways." *Id.* at 351. Moreover, because the *Brockamp* limitations provision was tied to recovery, tolling the period would have required tolling substantive limitations on the amount of recovery. *Id.* at 352. Section 7661d(b)(2) is not comparable. On the contrary, its simple language is similar to that of 42 U.S.C. § 2000e-16(c), which the *Brockamp* Court itself recognized can "plausibly [be] read as containing an implied 'equitable tolling' exception." *Id.* at 350. In sum, the deadline for plaintiff's petition was not set out in a "highly detailed technical manner." *Id.* To permit tolling would not "work a kind of linguistic havoc," *id.* at 352, and therefore, there is no evidence that it has been barred.

---

[7] This is demonstrated by the fact that reproposing a permit restarts the time period, which is not explicitly provided for in § 7661d. Additionally, a state permitting authority can submit a draft permit to the EPA at the same time it opens up the permit to public review and comment. This and other circumstances can evidently create some confusion on the part of the EPA as to whether the agency has received a draft permit or a "proposed permit" and whether its 45-day review period has commenced. (Def.'s Mot. at 6-7; Def.'s Reply at 3-4.)

Defendant also argues that the Administrator's authority to reopen consideration of a Title V permit demonstrates congressional intent to withhold equitable tolling from public participants in the permitting process. *Cf. Beggerly*, 524 U.S. at 48 (holding that equitable tolling was not warranted under the Quiet Title Act because the statute already provided a generous 12 year statute of limitations that would run from the time plaintiff "knew or should have known" of federal claim).[8] As noted above, the Administrator may terminate, modify, or revoke and reissue a permit for cause pursuant to 42 U.S.C. § 7661d(e). In fact, defendant claims that plaintiff's petition objecting to the Caldwell Tanks permit is being actively considered as a request to reconsider the permit under § 7661d(e). (Def.'s Mot. at 9.)

For a number of reasons, however, the fact that Congress has granted the Administrator the authority to reopen a permit does not establish a congressional intent to bar equitable tolling. First, the Act does not indicate that the Administrator's authority has been provided as a safety net for late petitioners. Second, both parties agree that there is no statutory deadline for the EPA's response to a petition to reopen. (Pl.'s Reply at 8; Def.'s Mot. at 4.) In practice, significant delays attend EPA consideration of such petitions; plaintiff claims that one such petition has been open for more than thirteen months. (Pl.'s Reply at 8.) Because Congress provided only 60 days for EPA to respond to such petitions, it obviously intended a swift response, and the possibility that EPA might reopen the permit at some undetermined future date does not satisfy this intent. This provision is thus a poor substitute for the petition process, for it

[8] Section 7661d is easily distinguished from the statute at issue in *Beggerly*. Under § 7661d, the 60-day period commences when the Administrator's review period terminates, not when a petitioner learns of such termination; and the petition deadline is 60 days, not 12 years. If anything, these differences highlight the need for tolling in the Title V context.

does not compel prompt agency action to protect public health and does not further the public participation values embodied in Title V. Therefore it's availability does not demonstrate Congress's intent to eliminate tolling.

II. Application to Plaintiff's Petition

If a statutory deadline is subject to equitable tolling, and a plaintiff provides an "equitable reason" to excuse a failure to meet that deadline, then the plaintiff is entitled to tolling of the deadline. *Bull S.A. v. Comer*, 55 F.3d 678, 681 (D.C. Cir. 1995). Moreover, justified reliance on a government official's representations can provide equitable grounds for tolling. *Id.* Applying these principles to this case, the Court concludes that plaintiff reasonably and justifiably relied on the representations of Georgia EPD.

Courts have commonly modified limitations periods when a party's "failure to meet a statutory deadline 'may be excused . . . [as] the result of justifiable reliance on the advice of [a] government officer.'" *Id.* at 681 (citation omitted). In this case, Georgia EPD was the permitting authority for Georgia and responsible for issuing Title V operating permits in the state. The state agency's proposal or reproposal of a permit would start the clock on EPA's 45-day review period, which in turn would determine the deadline for plaintiff's period in which to bring an objection. On March 22, 2001, Johnston, the head of Georgia EPD's stationary source permitting program, sent an email to plaintiff that unambiguously stated that the Caldwell Tanks permit had in fact been reproposed on March 12, 2001. In fact, Johnston sent an identical email to EPA on March 16, 2001. Johnston's authority to make that representation on behalf of Georgia EPD has not been contested. Plaintiff was entitled to take the statement of reproposal at

face value.

Furthermore, plaintiff's communication with state officials was the appropriate means for determining its filing deadline and evidences Sierra Club's diligence in this matter. Until October 5, 2001, when Georgia EPD began posting permit reproposal information on its website (Pl.'s Mot. at 15 n.15), there was no reliable way for plaintiff to determine when its petition would be due aside from contacting the relevant state or federal authorities. (*Id.* at 14.) Admittedly, plaintiff did not contact EPA in this case. However, because the decision to repropose a permit rested with Georgia EPD, and the reproposing of the permit by the state official, as opposed to any action by EPA, started the relevant statutory timeframes for review and filing, plaintiff's failure to verify further Georgia EPD's statement does not demonstrate a lack of diligence.[9]

Defendant argues that reliance on representations by state authorities cannot toll a statutory deadline asserted by federal authorities, citing *Davis v. Browner*, 113 F. Supp. 2d 1223 (N.D.Ill. 2000), and *Chappell v. Emco Machine Works Co.*, 601 F.2d 1295 (5th Cir. 1979), to support this proposition. Notwithstanding the holdings in *Chappell* and *Davis* to the contrary, courts have permitted state agency misrepresentations to provide equitable grounds for tolling. *See, e.g.*, *Lanyon v. University of Delaware*, 544 F. Supp. 1262, 1272 (D.Del. 1982) (Title VII claimant misinformed by state agency about filing requirements); *Stutz v. Depository Trust Co.*,

[9] Defendant also argues that plaintiff should have filed a protective petition to secure an objection in case the reproposal did not occur. (Def.'s Reply at 6-7.) In *Eagle-Picher Industries, Inc. v. EPA*, 759 F.2d 905 (D.C. Cir. 1985), the D.C. Circuit admonished petitioners regarding the importance of filing "protective petitions for review" when petitioners delayed challenging agency action due to ripeness concerns. 759 F.2d at 912. While it would have been advisable for plaintiff to have filed a protective petition in this case, failure to do so is not fatal to its equitable tolling claim.

497 F. Supp. 654 (S.D.N.Y. 1980) (same).

Furthermore, both *Chappell* and *Davis* are factually distinguishable from this case. First, and most importantly, the relationship between Georgia EPD and EPA is much different than that between the state employee and the EEOC in *Chappell* and the clerk's office employee and the EEOC in *Davis*. In *Chappell*, a state employee informed the plaintiff that her EEOC complaint had been filed, when in fact it had not. The Fifth Circuit refused to interrupt the 180-day period for filing plaintiff's complaint because she could have discovered if her complaint had been filed by contacting the EEOC office. *Chappell*, 601 F.2d at 1303. The court denied tolling the period because the state officer was not an employee of the EEOC; plaintiff's conduct indicated that "she knew something was awry;" and the advice plaintiff received was indistinguishable from that she might have received from "a lawyer or a relative or an acquaintance." *Id.*

Under Title V, no simple distinction can be made between the state permitting authority and the EPA, and certain statements made by the state permitting authority *can* be attributed to EPA for the purposes of tolling. Georgia EPD is the permitting authority for Georgia and implements the EPA-approved Title V program in that state. Under the federal scheme, the state agency is responsible for implementing federal substantive health and safety regulations and must submit proposed permits to the EPA. 42 U.S.C. § 7661d. EPA retains oversight authority, which requires review of the program itself, as well as permits issued thereunder. 42 U.S.C. §§ 7661a(i)(1)-(4), 7661d(b)(1). In comparison, the state employee in *Chappell* was under no federal obligation to file a complaint on behalf of plaintiff and was not working within a federally authorized permitting program subject to federal oversight. Because Georgia EPD was the Title V permitting authority with respect to the Caldwell Tanks permit, plaintiff was entitled to rely on

its representations regarding the status of its permits without double-checking with the EPA.

Second, plaintiff contacted Georgia EPD to discover when its statutory time period would commence, not to inquire whether its obligation to file had been discharged as in *Chappell*. The statutory period in *Chappell* was not subject to the same fits and starts as the Title V permit process, which would restart upon permit reproposal; thus, diligence requires a different standard of behavior. The confusion in this case arose because plaintiff arguably received misinformation regarding a question that *Chappell* did not involve, "whether the event which would start the running of the [statutory] period had occurred," i.e., whether Georgia EPD had reproposed the permit. 601 F.2d at 1302. Plaintiff's claims concern, in part, deficient notice. The Title V permit process allows the statutory clock to be rewound if a permit is reproposed. Georgia EPD's representations indicated that plaintiff's time to petition would begin and had begun again; whereas in *Chappell*, the plaintiff had sufficient notice of the commencement of her time to file, but failed to insure that her complaint was actually received. *Id.*[10]

III. Commencement of the EPA's 45-Day Statutory Review Period

Defendant also suggests that whether Georgia EPD reproposed the permit, plaintiff's petition came too late because the EPA's 45-day review period began on November 1, 2000,

---

[10] Defendant's reliance on *Davis v. Browner*, 113 F. Supp. 2d 1223 (N.D.Ill. 2000), is similarly unavailing. In *Davis*, plaintiff claimed to have relied on the clerk's office, which informed her that she needed a right-to-sue letter to bring her EEOC complaint. However, as the court noted, "the EEOC decision clearly – and in no uncertain terms – told plaintiff that she had the right to file suit at that point." *Davis*, 113 F. Supp. 2d at 1228. In this case, the permitting authority itself informed plaintiff that it was planning on reproposing the permit and sent it an email notification that it had actually done so. There was no countervailing indication by either the state permitting authority or the EPA that the permit had not in fact been reproposed.

before the 30-day public comment period, when Georgia EPD transmitted a copy of the draft permit to EPA. (Def.'s Mot. at 6.) Defendant claims that this event may have begun EPA's review period because the Act requires EPA to object to a permit "within 45 days afer receiving a copy of the proposed permit." 42 U.S.C. § 7661d(b)(1). Therefore, the period expired 45 days later on December 18, 2000, and plaintiff did not file within 60 days of that date, February 16, 2001.

As an initial matter, even if defendant's interpretation were correct, communications between plaintiff and Georgia EPD prior to February 16 might provide a basis for equitable tolling. Although plaintiff received the Johnston email on March 22, 2001, well after this earlier deadline, plaintiff claims that sometime between November 30, 2000 and March 22, 2001 Georgia EPD informally communicated an intention to repropose the permit. (Pl.'s Mot. at 5.) Because the details of these communications are not available, it is not clear if plaintiff could make out a case for equitable estoppel on the basis of the informal communications without the benefit of the later email. However, it is unnecessary to examine the substance of the communications because defendant's interpretation of the statute is erroneous.

First, the document submitted to EPA by Georgia EPD before the close of the public comment period was not a "proposed" permit but a "draft" permit, and thus, it did not commence the Administrator's 45-day review period. *See* 42 U.S.C. § 7661d(b)(1). Title V and the regulations promulgated thereunder distinguish between "proposed" and "draft" permits. If the Administrator wishes to object to a permit, she must do so "within 45 days after receiving a copy of the proposed permit under subsection (a)(1) of this section . . . ." *Id.* Subsection (a)(1) makes the meaning of "proposed" clear: "Each permitting authority . . . shall provide to the

Administrator a copy of each permit proposed to be issued and issued as a final permit." 42 U.S.C. § 7661d(a)(1). Because a permitting authority must afford an opportunity for public comment on permits it intends to issue, 40 C.F.R. § 70.7(h), the document submitted to EPA the day after it was made available to the public on October 31, 2000, could not have been a candidate for a "final permit." As the regulation makes clear, "[t]he permitting authority shall provide at least 30 days for public comment . . . ." 40 C.F.R. § 70.7(h)(4). Georgia EPD simply did not have the statutory authority to submit a proposed permit before the close of the 30-day public comment period. 42 U.S.C. § 7661a(b)(6); 40 C.F.R. § 70.7(h). Furthermore, prior to the close of the 30-day public comment phase, the regulations refer to the "draft" and not the "proposed" permit. 40 C.F.R. § 70.7(h).

Second, permitting EPA review prior to the close of the public comment period would undermine the ability of the public to participate in the permitting process and thereby frustrate the purposes of the Act. Title V orders the Administrator to promulgate by regulation the minimum elements of a permit program, including "[a]dequate, streamlined, and reasonable procedures . . . for public notice, including offering an opportunity for public comment and a hearing . . . ." 42 U.S.C. § 7661a(b)(6). A permit program would not be "adequate" if it allowed the permitting authority to pass on and EPA to review a draft permit that had never been subjected to public scrutiny. Yet this is exactly what defendant's interpretation would permit. In this case, Georgia EPD forwarded a copy of a draft permit to EPA the day after it issued notice to the public. A procedure that allows for simultaneous permit review by the public and the EPA provides little time to address public comments that may raise serious questions about a draft permit. Such a process also signals the irrelevance of public input, which clearly contravenes the

intent of Title V.

For these reasons, what the EPA received on November 1, 2000 was a draft, not a "proposed permit," and therefore EPA's 45-day review period did not commence until sometime after November 30, the close of public comment.

IV. EPA's Non-Discretionary Duty to Grant or Deny Plaintiff's Petition

EPA does not contest that it has an obligation to respond to timely citizen petitions that properly raise objections to Title V permits, but it does argue that considerations of fundamental fairness do not permit enforcement of the 60-day deadline to respond to plaintiff's petition when plaintiff itself missed its filing deadline. (Def.'s Reply at 8.) However, because equitable tolling is available and justified on the aforementioned exceptional circumstances, and because plaintiff filed its petition well within what would have been the deadline if the permit were reproposed, that petition will be deemed timely filed and EPA must respond in a timely fashion. Because EPA believed that plaintiff filed its petition outside the statutory deadline, its failure to respond should not be counted against the agency. Therefore, EPA will be given 60 days, as set forth by statute, to discharge its mandatory duty and affirm or deny plaintiff's petition requesting that EPA object to the Caldwell Tanks permit.

CONCLUSION

For all of the above reasons, plaintiff's motion for summary judgment will be granted and defendant's will be denied. A separate order will accompany this opinion.

ELLEN SEGAL HUVELLE
United States District Judge

Dated: 1/29/02