No. 01-86

In the Supreme Court of the United States

SLINGER DRAINAGE, PETITIONER

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
JOHN C. CRUDEN
Acting Assistant Attorney General
SCOTT J. JORDAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Whether petitioner timely appealed a decision of the Environmental Appeals Board of the Environmental Protection Agency within the 30-day appeal period prescribed by 33 U.S.C. 1319(g)(8)(B).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 237 F.3d 681.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 2001. A petition for rehearing was denied on April 13, 2001 (Pet. App. 66a-71a). The petition for a writ of certiorari was filed on July 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is in the business of installing field drainage tile. Petitioner was hired by a landowner who wanted to drain a wetland portion of his property in

southeastern Wisconsin to make it suitable for farming. In completing that project, Slinger installed 26,000 linear feet (almost five miles) of drainage tile in a 50-acre area of wetlands. Pet. App. 2a, 48a. Following an evidentiary hearing, an administrative law judge (ALJ) determined that petitioner had violated Section 301(a) of the Clean Water Act, 33 U.S.C. 1311(a), by redepositing dredged material into waters of the United States without obtaining the permit required under Section 404 of the Act, 33 U.S.C. 1344. The ALJ assessed a Class II civil penalty of $90,000. Pet. App. 2a.

2. On September 29, 1999, the Environmental Appeals Board (EAB) of the Environmental Protection Agency affirmed the ALJ's decision. On November 1, 1999, petitioner appealed the EAB's decision to the United States Court of Appeals for the District of Columbia Circuit. Pet. App. 2a-3a.

3. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 1a-5a. The court observed that the Clean Water Act provides that a party may obtain judicial review of an assessment of a Class II penalty "by filing a notice of appeal * * * * within the 30-day period beginning on the date the civil penalty order is issued." *Id.* at 2a (quoting 33 U.S.C. 1319(g)(8)(B)). The court assumed, without deciding, that the EAB issued its decision on September 30, 1999, the day the EAB mailed its decision to petitioner and posted the decision on its website. The court nonetheless held that petitioner's appeal was untimely, because the 30-day period under 33 U.S.C. 1319(g)(8)(B) ended on October 29, 1999, and the notice of appeal was not filed until November 1, 1999. The court explained that it would not apply Federal Rule of Appellate Procedure 26(a), which provides that a computation of a time period under the Rules or an "applicable statute"

should "[e]xclude the day of the act, event, or default that begins the period." The court reasoned that the Clean Water Act itself specifies that the 30-day period begins *on* the date the civil penalty order is issued and thus the date of September 30 must be included in computing the 30-day period. Pet. App. 4a-5a.

ARGUMENT

Petitioner asks this Court to hold that his appeal was timely because the 30-day appeal period under 33 U.S.C. 1319(g)(8)(B) began on the day *after* the civil penalty order was issued, and that the date of issuance was the day on which the order was mailed to the parties and posted on EPA's website rather than the day that the order was signed and dated. Petitioner's contention, however, lacks merit and, in any event, does not warrant this Court's review.

1. The court of appeals correctly held that 33 U.S.C. 1319(g)(8)(B) directs that the 30-day appeal period begins on the date of issuance of a civil penalty order. Pet. App. 4a-5a. The text of that provision provides that a person seeking review of an EPA administrative civil penalty order under the Clean Water Act must file a notice of appeal "within the 30-day period beginning *on the date* the civil penalty order is issued." 33 U.S.C. 1319(g)(8)(B) (emphasis added). "Judicial review provisions * * * are jurisdictional in nature and must be construed with strict fidelity to their terms. * * * This is all the more true of statutory provisions specifying the timing of review, for those time limits are, as we have often stated, 'mandatory and jurisdictional.'" *Stone* v. *INS*, 514 U.S. 386, 405 (1995) (quoting *Missouri* v. *Jenkins*, 495 U.S. 33, 45 (1990)). The court of appeals properly applied that principle in concluding that 33 U.S.C. 1319(g)(8)(B) dictates that the 30-day

period begins on, not after, the date of an order's issuance. Pet. App. 2a.

Petitioner errs in relying (Pet. 13) on Federal Rule of Appellate Procedure 26(a)(1), which provides for the exclusion of the date of an order to be appealed with respect to the computation of time for an appeal under any "applicable statute." The court of appeals correctly concluded that Rule 26(a) has no application to 33 U.S.C. 1319(g)(8)(B) because "Congress has specified a particular method of counting in the statute itself and there is no indication of a contrary congressional intention." Pet. App. 4a. Contrary to petitioner's assertion (Pet. 17), Rule 26(a) and the statute cannot be read together. Rule 26(a) provides for counting to begin *after* the date an order is issued, while 33 U.S.C. 1319(g)(8)(B) specifies that the counting must begin *on* the date that the order is issued.

Petitioner further argues (Pet. 14-25) that the court of appeals' decision is inconsistent with the decisions of other courts. Petitioner cites no other decision, however, interpreting 33 U.S.C. 1319(g)(8)(B), the statute at issue in this case. Indeed, many of the decisions that petitioner cites involve statutes that provide that the running of the appeal period begins "after" the action sought to be appealed,[1] or address the application of Federal Rule of Appellate Procedure 26(a)(3), which

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[1] See, *e.g.*, *Burnet* v. *Willingham Loan & Trust Co.*, 282 U.S. 437 (1931) (claim must be filed "within five years after" tax return was due or was filed); *United Mine Workers of America* v. *Dole*, 870 F.2d 662, 663 (D.C. Cir. 1989) (a challenge to a new safety standard under 30 U.S.C. 811(d) must be filed before the 60th day "after" such standard was promulgated); *Tribue* v. *United States*, 826 F.2d 633 (7th Cir. 1987) (claim under Federal Tort Claims Act must be filed within six months after final denial of claim by agency).

extends the time to file when the last day falls on a weekend or holiday.[2]

Petitioner also relies (Pet. 20-21) on *American Federation of Government Employees* v. *FLRA*, 802 F.2d 47 (2d Cir. 1986). That decision interpreted 5 U.S.C. 7123(a), which provides for review of a final agency order "during the 60-day period beginning on the date on which the order was issued." The court concluded that the clock under 5 U.S.C. 7123(a) begins after the date that the order was issued. 802 F.2d at 48-49. The court reasoned that counting the date of issuance as one of the 60 days leaves a petitioner with only 59 days plus some portion of the date of issuance, depending on the time of day on which the order is issued. *Id.* at 48. The result reached by the court, however, expands the 60-day period to 60 days plus some portion of the date of issuance, because theoretically a petitioner could file its appeal on the date of issuance.

In any event, *American Federation* does not present a square conflict with the decision below because the decisions interpret different statutes. Moreover, the existence of a single decision decided 15 years ago suggests that even if there is a tension in the circuits, it is not sufficiently developed or widespread to warrant review by this Court at this time.

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[2] We do not dispute that Rule 26(a)(3) would apply if the final day of petitioner's appeal period had fallen on a weekend or holiday, because Section 1319(g)(8)(B) itself does not address computation in the event that the 30th day falls on a weekend or holiday.

2. This Court's review is also not warranted because petitioner's appeal was untimely in any event unless petitioner is also correct in its contention that the date of issuance of the civil penalty was September 30, 1999 (the date the decision was sent to petitioner) and not September 29 (the date of the decision). Pet. App. 3a; see also Pet. 8-9, 25-27. The court of appeals, however, did not decide that question or consider the general question of when a civil penalty order is "issued" for purposes of 33 U.S.C. 1319(g)(8)(B). See Pet. App. 3a ("For the purpose of assessing our jurisdiction, we assume, without deciding, that [petitioner] is correct that the order issued on Thursday, September 30, 1999."). Nor does petitioner cite a decision of any other court that addresses that question under 33 U.S.C. 1319(g)(8)(B). Accordingly, this Court should decline petitioner's request that it address the issue in the first instance. See, *e.g.*, *United States* v. *Oakland Cannabis Buyers' Coop.*, 121 S. Ct. 1711, 1719 (2001); *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

JOHN C. CRUDEN
Acting Assistant Attorney General

SCOTT J. JORDAN
Attorney

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