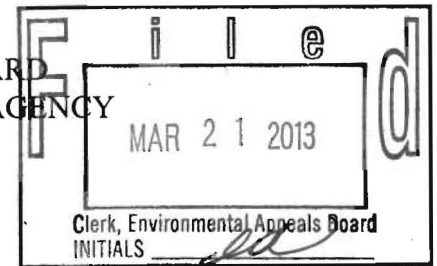


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)

Sierra Pacific Industries)

PSD Permit No. SAC 12-01)

PSD Appeal No. 13-01

ORDER DENYING EXTENSION OF TIME TO FILE APPEAL BRIEF

On March 19, 2013, Petitioner Citizens for Clean Air filed a "Notice of Appeal" seeking review of the Prevention of Significant Deterioration ("PSD") permit that U.S. EPA Region 9 ("Region") issued to Sierra Pacific Industries ("Sierra Pacific") on February 20, 2013. In its Notice of Appeal, Petitioner states that "the action violates Environmental Justice Guidelines, as well as the letter and intent of the Clean Air Act and other applicable laws." Notice of Appeal at 1 (Mar. 19, 2013). The filing further indicates that, an "appeal brief will be forthcoming within 30 days if approved."¹ *Id.* Petitioner simultaneously filed a Motion for an Extension of Time to File an Appeal Brief. Petitioner's stated reason for the extension is that Petitioner is waiting for a response to a FOIA request, by which a "full copy of the public comments" were sought, and that Petitioner does not "possess a complete and accurate record of the permit being reviewed." Motion for Extension at 1. For the reasons that follow, Petitioner's motion is denied.

¹ Petitioner also filed a "Notice of Appeal" on February 24, 2013 in which he stated that an appeal brief would "be forthcoming within 30 days if approved." *See In re Sierra Pacific Industries*, PSD Appeal No. 13-01 (Feb. 24, 2013) (Notice of Appeal).

The regulation governing the Environmental Appeals Board (“EAB” or “Board”) review of a PSD permit is 40 C.F.R. § 124.19. That section provides that petitions for review of a PSD permit must be filed “[w]ithin 30 days” after the final permit decision is issued. 40 C.F.R. § 124.19(a). Additionally, the rule requires that the petition include a statement of the reasons supporting review, including a demonstration that any issues being raised were raised during the public comment period * * * to the extent required.” *Id.* The petition must also include, when appropriate, a showing that the challenge to the permit being appealed is based on: “(1) a finding of fact or conclusion of law which is clearly erroneous, or (2) an exercise of discretion or an important policy consideration which the Environmental Appeals Board should, in its discretion, review.” *Id.* The Board has interpreted these provisions as requiring that petitioners demonstrate substantively *in their petition* why the permit decision warrants review. *See In re City of Pittsfield*, NPDES Appeal No. 08-19, at 7, 11-12 (EAB Mar. 4, 2009) (Order denying review), review denied, 614 F.3d 7, 11-13 (1st Cir. 2010); *see also In re City of Palmdale*, PSD Appeal No. 11-07, slip op. at 9-10 (EAB 2012).² Section 124.19 does not provide for filing “notice” of an appeal, followed by a later-filed substantive appeal brief.

The Board strictly construes threshold procedural requirements, such as the timely filing of a petition. *In re MHA Nation Clean Fuels Refinery*, NPDES Appeal Nos. 11-02, 11-03, 11-04

² The regulation governing permit appeals before the Board, 40 C.F.R. § 124.19 was recently revised. *See Revisions to Procedural Rules to Clarify Practices and Procedures Applicable to Permit Appeals Pending Before the EAB*, 78 Fed. Reg. 5,281 (Jan. 25, 2013). The revised regulation takes effect on March 26, 2013, and applies to any document filed with the Board on or after that date. Section 124.19(a)(4) of the revised rule codifies Board precedent concerning the substantive requirements for the content of a Petition for Review.

& 12-03, slip op. at 14 (EAB 2012) (citing *In re AES P.R., L.P.*, 8 E.A.D. 324, 329 (EAB 1999), *aff'd*, *Sur Contra La Contaminación v. EPA*, 202 F.3d 443 (1st Cir. 2000)).³ The Board's strict adherence to the appeal deadline prescribed by the regulations is particularly warranted in matters involving the review of PSD permits because, as the Board has previously explained, PSD permit appeals are time-sensitive.⁴

The Board has, however, relaxed the requirements of 124.19 and granted extensions of time to file substantive briefing in support of a "notice"-type petition where Petitioners sought additional time due to the number and complexity of the issues involved, and the volume of the administrative decision or record. *See In re Desert Rock Energy Co., LLC*, PSD Appeal No. 08-03 & 08-04, at 2-3, 4 (EAB Aug. 21, 2008) (Order Granting Desert Rock's Motion to Participate, Granting a 30-Day Extension of Time) (citing the 220-page response to comments document with 42 attachments totaling several hundred pages); *In re City & County of Honolulu*, NPDES

³ Cf. *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) (denying review of several petitions on timeliness and standing grounds and noting Board's expectations of petitions for review); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 127 (EAB 1999) (noting strictness of standard of review and Board's expectation of petitions); *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996) (dismissing as untimely permit appeals received after the filing deadline).

⁴ Section 165(c) of the CAA requires that "[a]ny completed permit application * * * be granted or denied not later than one year after the filing of such completed application." CAA § 165(c), 42 U.S.C. § 7475(c). Additionally, under the CAA, new source construction cannot begin prior to receiving a final permit. CAA § 165(a), 42 U.S.C. § 7475(a). In the event of an administrative appeal, a permit decision does not become effective until the appeal is resolved. 40 C.F.R. §§ 124.15(b), 124.19(f). Resolution of the appeal is also a prerequisite to seeking judicial review of the permit. See 5 U.S.C. § 704 (establishing that where agency regulations provide for an administrative appeal, agency action is not "final" for the purposes of judicial review until the administrative appeal is complete); 40 C.F.R. § 124.19(e)-(f). For these reasons, the Board considers PSD permitting proceedings to be time-sensitive.

Appeal No. 09-01, at 1,3 (EAB Feb. 2, 2009) (Order Granting Alternative Motion for Extension of Time to File Petitions for Review) (citing the length and complexity of the administrative decision and record as well as the task of preparing appeals for two separate facilities simultaneously); *In re Guam Waterworks Authority*, NPDES Appeal Nos. 09-15 & 09-16, at 2, 4 (EAB Nov. 3, 2009) (same); *see also Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970) (explaining that it is always within the discretion of an administrative agency 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”).⁵

Where no good cause has been shown to relax the deadline, however, the Board will adhere to the 30-day deadline for petitions for review. *See, e.g., In re Massachusetts Correctional Institute*, NPDES Appeal No. 08-24, at 1 (EAB Oct. 30, 2008) (Order Denying Motion for Extension of Time to File Petition for Review); *In re BHP Billiton Navajo Coal Co.*,

⁵ In the context of petitions filed after the 30-day deadline has passed, the Board has relaxed the filing deadline only where special circumstances exist such as where the permitting authority has caused the delay or when the permitting authority has provided misleading information. *MHA Nation Clean Fuels Refinery*, NPDES Appeal Nos. 11-02, 11-03, 11-04 & 12-03, slip op. at 14; *see also, e.g., In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997) (delay attributable to permitting authority as it mistakenly instructed petitioners to file appeals with EPA Headquarters Hearing Clerk); *In re Hillman Power Co., L.L.C.*, 10 E.A.D. 673, 680 n.4 (EAB 2002) (permit issuer failed to serve all parties that had filed written comments on the draft permit). Delays stemming from extraordinary events, such as natural disasters and response to terrorist threats, or from causes not attributable to the petitioner, such as problems with the delivery service, have also led the Board to relax the filing deadline.” *See id.*; *see also, e.g., In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002) (delay in petition reaching the Board caused by anthrax sterilization process); *AES P.R.*, 8 E.A.D. at 328 (extraordinary circumstances created by hurricane and its aftermath impeded timely filing); *id.* at 329 (EAB 1999) (delay in petition reaching the Board attributable to aircraft problems experienced by FedEx).

NPDES Appeal No. 08-06, at 2 (EAB Apr. 24, 2008) (Order Denying Extension of Time to File Petition for Review).

Petitioner's one-page motion for an extension of time to file its appeal brief does not present the circumstances that have led the Board, in other cases, to relax the 30-day appeal rule. Petitioner asserts only that it is awaiting a response to a FOIA request. Motion at 1. Petitioner does not say when its FOIA request was submitted, or what Petitioner anticipates it will receive from that request that is not already in the publicly available administrative record and that prevents it from timely preparing an "adequate brief." Petitioner also has not indicated whether it made any attempts to obtain a copy of any portion of the administrative record from the permitting authority. *See* Public Notice of the Final Permit Decision for Sierra Pacific Industries - Anderson, Permit Application No. SAC 12-01, at 1-2 (Feb. 21, 2013) (explaining where electronic portions of the administrative record were available and providing instructions for viewing and requesting hard copies of documents in the record). Moreover, section 124.17 requires Region 9 to issue a response to comments document that describes and responds to all significant comments on the draft permit that were raised during the public comment period. *See* 40 C.F.R. § 124.17. The Region issued the Response to Comments document as required and has made it available electronically through a link on its website, www.epa.gov/region09/air/permit/r9-permits-issued.html#psd, or at www.regulations.gov (Docket ID # EPA-R09-OAR-2012-0634). *See* Notice of Final Permit Decision (Feb. 21, 2013). Finally, Petitioner has not identified any circumstances of this permit that would warrant a greater amount of time to review the permit proceedings to adequately prepare a petition for

review. In short, Petitioner has not identified any circumstances that would warrant relaxing the appeal deadline in this appeal from a PSD permit decision. The failure to do so is fatal to its motion.

Based on the foregoing, the Board concludes that a 30-day extension of time to file an appeal brief in support of Petitioner's appeal is not warranted. **Petitioner's motion is denied.** If Petitioner wishes to timely challenge the PSD permit issued to Sierra Pacific, Petitioner must meet the petition deadline prescribed by the rule. The deadline for filing a petition for review of the PSD permit that Region 9 issued to Sierra Pacific on February 20, 2013 is Tuesday, March 26, 2013.⁶

So Ordered.

Dated: March 21, 2013

ENVIRONMENTAL APPEALS BOARD

By: Kathie A. Stein
Kathie A. Stein
Environmental Appeals Judge

⁶ Notice of the final permit decision was issued on February 21, 2013. Thirty days after February 21, 2013 is March 23, 2013. Taking into account the provision regarding computation of time at 40 C.F.R. § 124.20(d), petitions for review of the Sierra Pacific Industries permit at issue are due Tuesday, March 26, 2013. A documents is considered filed on the date that it is received by the Board. See 40 C.F.R. 124.19(a)(3)(2013). As stated previously, the regulation governing permit appeals before the Board, 40 C.F.R. § 124.19 was recently revised and the provisions of the revised rule will take effect on March 26, 2013, and will be applicable to any document filed with the Board on or after that date.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Extension of Time to File Appeal Brief in the matter of Sierra Pacific Industries, PSD Appeal No. 13-01, were sent to the following persons in the manner indicated:

By First Class Mail and Facsimile:

Citizens for Clean Air
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P.O. Box 1544
Shasta Lake City, CA 96019
Phone/Fax: 530-275-4626

By Pouch Mail and Facsimile:

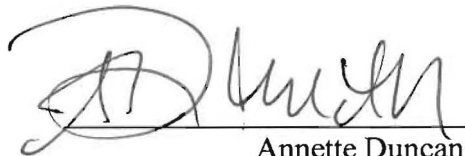
Nancy J. Marvel, Regional Counsel
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Courtesy Copy to:

Sierra Pacific Industries
P.O. Box 496028
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Dated:

MAR 21 2013



Annette Duncan
Secretary