

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

In the Matter of:	:
	:
	: Permit Appeal UIC 23-01
Penneco Environmental	:
Solutions, LLC	:
	:
	:
UIC Permit No.	:
PAS2D702BALL	:
	:

**REGION 3’S RESPONSE TO AN ORDER REQUESTING
CLARIFICATION FROM U.S. ENVIRONMENTAL PROTECTION
AGENCY REGION 3**

Here are Region 3’s responses to the questions the Board posed in its December 14, 2023 Order to the Region:

1. As set out in the Permittee’s motion, in prior instances where a party has filed an appeal beyond the filing deadline, the Board has dismissed the Petitioners’ appeal as untimely. *In re Windfall Oil & Gas, Inc.*, 16 EAD 769, 770 n.1 (EAB 2015); *In re Seneca Resources Corp.*, 16 EAD 411, 417-418 (EAB 2014).

October 23, 2023 was the deadline for filing an appeal of the permit at issue here. Petitioners did not file their appeal until October 26, 2023. Therefore, the Petitioners did not file a timely

appeal, and this is grounds for dismissal. 40 C.F.R. § 124.19(a)(3), *See In re Florence Copper, Inc.*, 17 EAD 406, 409 (EAB 2017) (“In considering any petition filed under 40 C.F.R. § 124.19(a), the Board first evaluates whether the petitioner has met threshold procedural requirements such as timeliness”)

2. The Region served notice that it was issuing the Final Permit at issue in this appeal via an email message and two pdf file attachments, sent as a single package. (While the Board’s Order of December 14, 2023 references the email message as the Sept. 21, 2023 Email, the Region thinks the message and attachments should be considered as one because they were sent together.) Based on the rule in 40 C.F.R. § 124.20(a) (“Any time period scheduled to begin on the occurrence of an act or event shall begin on the day after the act or event.”), the 30 days for filing an appeal started to run on September 22, 2023, the day after the event, i.e., the service of notice. The 30-day appeal period would have ended on October 22, 2023, except that October 22 was a Sunday. Since the final day of the time-period fell on a

weekend, the final day was extended to the next working day, Monday, October 23, 2033. 40 C.F.R. § 124.20(c).

3. The Sept. 21, 2023 Email, which consisted of the email message from Ryan Hancharick, Region Attachment 1 (“Hancharick message”); the Response to Comments document, Region Attachment 2 (“Response to Comments”) and the Final Permit, Region Attachment 3, is the Region’s notice of the final permit decision required under 40 C.F.R. § 124.15(a). The Region sent the Hancharick message and the two pdf file attachments as a single package to each person who provided written comments to the Region or testified at either of the two public hearings about the draft permit. Both Petitioners received the Sept. 21, 2023 Email. Hancharick message; Petitioners’ Exhibits A and B. As a result, the Sept. 21, 2023 Email was effective notice and compliant with 40 C.F.R. § 124.15(a).

The Sept. 21, 2023 Email included the Response to Comments which contained a recitation of the procedures for an interested party to appeal a final permit decision. Hancharick message and Response to Comments at 40-42. As a result, the

Region complied with 40 C.F.R. § 124.15(a)'s requirement that the notice of the final permit decision set out the procedures to appeal a final permit decision. (To further assist parties interested in appealing the Final Permit, in the Response to Comments' description of the appeals procedures, the Region included an electronic link to the Board's web site for the electronic submission of documents. *Id.* at 40.) As a result, the Sept. 21, 2023 Email provided effective notice of the Board's procedures.

4. Except for Petitioners' appeal, October 24, 2023 would have been the effective date of the final permit decision.¹ The Water Director Division Director approved the permit on September 19, 2023, as evidenced by her electronic signature on the Final Permit. Final Permit 1. As stated by the Board and in the Final Permit, the permit would become effective 35 days after the date of signature. *Id.* 1. So, the effective date would have been October 24, 2023, not October 26, 2023.

¹ The effective date of the final permit decision was stayed as a result of the Petitioners' appeal. 40 C.F.R. § 124.15(b)(2).

Although the statement in the Sept. 21, 2023 Email that October 26, 2023 would be the effective date was incorrect and may have been a source of confusion, this is irrelevant to the Petitioners not filing a timely appeal. The deadline for filing an appeal is independent of a permit's effective date and is established by a separate rule.

40 C.F.R. 124.19(a)(3) provides 30 days to file the appeal and Section 124.20 sets how to calculate when the 30-day period runs. While 40 C.F.R. § 124.15(b) sets a 30-day period for an effective final permit decision, a Region could decide to provide a longer period than 30 days for the final permit decision to take effect if the Region decides this is necessary. 40 C.F.R. § 124.15(b)(1). In contrast, 40 C.F.R. § 124.19(a)(3) does not authorize a Region to extend the time for an appeal. Therefore, the end date of the appeal period and effective date of the final permit decision are separate and established by two different rules.

The Hancharick message was incorrect when is stated that the effective date was October 26, 2023. The incorrect date was apparently related to the two-day gap between when the Water

Division Director signed the permit on September 19 and when notice of the final permit was sent out and served on September 21, 2023. It appears that Region 3 staff may have mistakenly thought that the effective date was extended because of the two-day gap.

5. As a practical matter, the statement in the Sept. 21, 2023 Email, contained within the Response to Comments, that the 30 days to file an appeal ran from the date of the notice announcing the Region's decision to issue the Final Permit is the functional equivalent of the requirement in 40 C.F.R. § 124.15(a). Because the Region used email to serve notice of its final permit decision, the 30 days did run from the date the Region announced its permit decision.

As noted above in its answer to question 3, the Region sent the Sept. 21, 2023 Email to every person and entity that provided comments on or testified about the draft permit and who gave their email addresses to the Region. The Region sent out the Sept. 21, 2023 Email to each of these email addressees thereby "announcing" EPA's decision and serving notice of the final permit

decision. Therefore, the Region accurately described in the Sept. 21, 2023 Email how much time any party receiving the notice had to file their appeal and met the requirement in 40 C.F.R. § 124.15(a).

6. The notice on the web site was in error. The Region did not intend to start a new public comment period on the Final Permit.

EPA utilizes national public web sites to announce, for among other things, the start of public comment periods for draft permits and issuance of final permit decisions. These web sites are inter-connected and used Agency-wide. In lieu of their own web sites, the Regions use these national web sites to let interested parties know about Agency actions, including permit actions.

Petitioners' Exhibit C is an example of one of these Agency-wide sites. (The link for the current version of the site is [Search Public Notices | US EPA](#), last accessed on December 20, 2023.) Clicking on the caption in a box for each notice will take you to a web site with more information about the individual permit

action. Clicking on the Penneco permit caption in Petitioners' Exhibit C would have brought up the web page shown as the Penneco Permit Web Page, Region Attachment 4. While this web page has a smaller text box stating that the comment period ended on October 26, 2023, the caption for the permit clearly states that it is a notice for issuance of a final permit and has a statement about the deadline for filing an appeal in the text box. *Id.* The caption and text box statement leave no doubt as to the nature of the action the Region took. The Region will work to make sure that all future notices for permit actions are clear about the nature of the actions.

While the rules for when to file an appeal are clear and the Region provided effective notice of the rules in the Sept. 21, 2023 Email, the Region recognizes that the web pages may have caused confusion about the status of the permit and the time for an appeal. Although the rule establishing the deadline for filing is strictly enforced, 40 C.F.R. § 124.19(n) authorizes the Board to

relax filing requirements for good cause. This may be such an instance.

Respectfully submitted.

/s/

*(signed per Revised EAB Order re:
Electronic Filing in non-Part 22
Proceedings, 8/12/13)*

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Certificate Of Service

I hereby certify that copies of the foregoing Region 3's Response to an Order Requesting Clarification from U.S. Environmental Protection Agency Region 3 in the matter of Penneco Environmental Solutions, LLC; UIC Permit No. PAS2D702BALL; Permit Appeals No. 23-01; were served by email on the following persons, this 20th day of December 2023:

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