

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

In the Matter of:)	
)	
Penneco Environmental Solutions, LLC)	
)	
Class II-D Injection Well, Plum Borough, Allegheny County Pennsylvania)	UIC Appeal No. 23-01
)	
Permit No. PAS2D702BALL)	

MOTION TO DISMISS THE PETITION FOR REVIEW

Penneco Environmental Solutions, LLC (Penneco), permittee for the above-described Underground Injection Control (UIC) permit (Permit), requests that the Environmental Appeals Board (Board) dismiss the October 26, 2023 Petition for Review (Petition) filed by Protect PT and Three Rivers Waterkeeper (Petitioners).

The Board should dismiss the Petition for failing to meet the threshold requirements specified at 40 CFR § 124.19(a). Specifically, the Petition was filed after the filing deadline specified at 40 CFR § 124.19(a)(3) and is therefore untimely. The Board has previously determined that failure to submit a timely petition precludes the Board from considering it. Accordingly, Penneco requests that the Board grant this Motion to Dismiss. Should the Board decline to grant this Motion, Penneco requests that the Board grant 30 days from the date of notice of the Board’s decision to submit a response to the Petition. Penneco represents that it contacted the permit issuer regarding this Motion and that the United States Environmental Protection Agency (EPA) does not object to the granting of this Motion.

I. BACKGROUND

On July 23, 2021, Penneco submitted an application for a Class II UIC permit for a facility located in Plum Borough, PA. Petition at 4. EPA issued a public notice on May 26, 2022 of the proposed issuance of the Permit, soliciting comments and requests for holding a public hearing. *Id.* EPA held a 104 day-long public comment period and two public hearings to solicit comments on the proposed Permit. *Id.* at 4-5.

On September 21, 2023, the EPA provided interested parties notice of its decision to issue the Permit, along with the Permit itself and its responses to public comments (Response to Comments). *Id.* at 5. As explained below, the deadline to file a Petition for Review was October 23, 2023. The Permit has an effective date of October 24, 2023.¹ Petitioners filed their Petition with the Board on October 26, 2023.

In any petition filed under 40 CFR § 124.19, the petitioner bears the burden of setting forth, in the petition, the basis for appeal and that it met threshold requirements, including “timeliness, standing, preservation of issues for review, and articulation of the challenged permit conditions with sufficient specificity.” *In re Gateway Generating Station*, PSD Appeal No. 09-02 (EAB Sept. 15, 2009) at *22; *In re Beeland Group, LLC*, 08-01 (EAB Mar. 6, 2008) at **8-9. Petitioners have failed their burden to meet the threshold and essential requirement of timeliness.

¹ Petition, Attachment 1 at p. 1 (stating that the permit becomes effective 35 days after date of signature and that the permit issuer’s signature was dated September 19, 2023). See also <https://www.epa.gov/uic/uic-permit-pas2d702ball>.

II. ARGUMENT

A. The Petition was filed past the deadline specified in § 124.19(a)(3) and is untimely.

Under 40 CFR § 124.19(a)(3), “a petition for review must be filed with the Clerk of the [Board] within 30 days after the [EPA] Regional Administrator serves notice of the issuance of” certain permits, including UIC permits. The deadline is express and unambiguous.

In this case, as acknowledged by Petitioners,² notice of the issuance of the Permit was provided on September 21, 2023. Pursuant to 40 CFR § 124.20(a), the 30-day window to file a petition began on the following day, September 22, 2023. Although 30 days after September 22, 2023 would be October 22, 2023 (falling on a Sunday), by effect of 40 CFR § 124.20(c), the deadline to file a petition would be carried over to the following working day, Monday, October 23, 2023. This is the deadline by which Petitioners were required to file their Petition in order for it to be timely. The Petitioners instead filed their Petition three days later. The Petition is therefore untimely and must be dismissed.

B. The untimely Petition must be dismissed.

The Board strictly construes threshold requirements of 40 CFR § 124.19(a), such as the timeliness of a petition, to provide finality to the permitting process. *In re B&L Plating, Inc.*, 11 E.A.D. 183, 191 (EAB 2003) (“The Board has an interest in bringing finality to the Agency’s administrative proceedings and will preserve its limited resources for parties who are diligent enough to follow its procedural rules”); *In re Envotech, LP*, 6 E.A.D. 260, 264 (EAB 2000).

Accordingly, the Board has repeatedly dismissed, without reaching their merits, untimely petitions for review of UIC and other permits filed after the deadline prescribed in 40 CFR § 124.19(a)(3). See, e.g., *In re Florence Copper, Inc.*, UIC Appeal No. 17-04 (EAB March 22,

² Petition at 5.

2017) at **1-2; *In re Seneca Res. Corp.*, 16 E.A.D. 411, 417 (EAB 2014); *Envotech*, 6 E.A.D. at 264 (“On the basis of these rules, the Board finds that ten of the petitions are either untimely or fail to meet the threshold standing requirements of 40 CFR § 124.19(a); those petitions must therefore be dismissed”); *In the Matter of Beckman Prod. Servs.*, 5 E.A.D. 10, 15 (EAB 1994); *In the Matter of Gelman Sci., Inc.*, 2 E.A.D. 460, 461 (EAB 1987); See also *Gateway Generating Station*, PSD Appeal No. 09-02 (EAB Sept. 15, 2009) at *15 (“The failure to timely file a petition for review will generally lead to dismissal of the petition, as the Board strictly construes threshold procedural requirements, such as the filing of a thorough, adequate, and timely petition”).

While the Board has held in some cases that the strict application of the timeframe to file a petition in § 124.19(a)(3) may be relaxed under certain limited “special circumstances,” those circumstances do not apply here. Such limited exceptional circumstances have included: where the notice of a permit decision specifically states that a Petition for Review would be timely if it were filed or alternatively postmarked by a certain date beyond 30 days after notice of permit issuance (*In re Puna Geothermal Venture*, 9 E.A.D. 243, 273 (EAB 2000)); where the permit issuer failed to provide notice of permit decision to parties filing written comments on the draft permit (*In re Hillman Power Co.*, 10 E.A.D. 673 at n. 4 (EAB 2000)); and where the notice of permit decision lists an incorrect address to file a petition (*In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 124 (EAB 1997)).

There are no such “special circumstances” present here. Contrary to the Petition’s assertion,³ EPA’s notice of Permit issuance did not state that the deadline to file a petition for

³ Petition at 5 (“The issuance of the Permit to Penneco was announced by Region 3 on September 21, 2023, together with notification that the filing deadline for petitions to be filed with the Board was set for October 26, 2023”).

review was October 26, 2023. There was a reference to that date on EPA’s website in a box on the side of the page stating “Comments due” and “October 26, 2023” directly under it.

Submission of comments is fundamentally distinct to the filing of a petition. Compare 40 CFR § 124.11 with § 124.19(a). In addition, the notice directed readers to refer to EPA’s Response to Comments for determining the deadline for filing a petition for review. On page 40 of the Response to Comments, it plainly references § 124.19 and also states that “a petition for review must be filed within thirty (30) days of the date of the notice announcing EPA’s decision.” Nowhere did the notice by the permit issuer specify October 26, 2023 as the date *by which a petition for review may be submitted*.

While Petitioners’ untimeliness might be reviewed more liberally against the strict standards of § 124.19 had Petitioners been unrepresented by legal counsel, in this case the deficiency is inexcusable since Petitioners are in fact represented by licensed counsel. Even assuming for the sake of argument that the October 26, 2023 “comments due” entry on EPA’s website was construed, erroneously, as a statement of the deadline by which to file a petition, Petitioners cannot rely on this obvious mistake to extend the deadline provided in 40 CFR § 124.19(a)(3).

Historic versions of § 124.19(a)(3) had allowed the permit issuer to establish a deadline to file a petition longer than 30 days after notice of permit issuance, but the text of the current version of § 124.19(a)(3) unambiguously provides for no such extension. The current version reflects revisions made to the rule in 2013 to, in part, “simplify the review process and promote [] judicial economy ...”. 78 Fed. Reg. 5281, 5282-5283 (March 26, 2013). To the extent any Board cases prior to 2013 held that a petition filed by a date specified in a notice of permit

issuance later than the typical 30-day window could render it timely, such cases cannot be relied on here to excuse Petitioners' untimeliness.

Moreover, the Permit specified an effective date of October 24, 2023, two days before the Petitioners filed their Petition. This effective date is established pursuant to 40 CFR § 124.15(b), providing for a permit to become effective "30 days after service of notice of the decision unless, among other things, "a later effective date is specified in the decision; or review is requested on the permit under § 124.19". Under 40 CFR § 124.16(a), the effect of a Petition properly meeting the threshold requirements is to stay the effectiveness of the contested portions of the Permit.

Based on the interplay between these two provisions, the rules provide for a carefully crafted timeline to allow for petitions for review of the permit *prior* to the point at which the permit takes effect. Allowing untimely petitions that post-date the effectiveness of a Permit would undermine this framework and upset the Board's interests in maintaining the finality of permits and avoiding prejudice to permittees who begin construction or other activities under the permit in reliance of the fact that the permit has already lawfully taken effect. Because the Permit had already taken effect before the Petition was filed, the Petition should be dismissed.

III. CONCLUSION AND RELIEF REQUESTED

The Board's rules for filing petitions are to be strictly applied and Petitioners' failure to submit its Petition by the deadline required in 40 CFR § 124.19(a)(3) warrants its dismissal. For the reasons above, Penneco requests that the Board hold the Petition to be untimely and grant Penneco's Motion to Dismiss. Should the Board decline to grant this Motion, Penneco requests that the Board grant 30 days from the date of notice of the Board's decision to submit a response to the Petition.

Respectfully submitted,

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Dated: November 6, 2023

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by e-mail this 6th day of November, 2023 upon the persons listed below:

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