

of its decision to issue the Permit, along with the Permit itself and its responses to public comments, and Permittee argues that petitions for review should have been filed thirty days thereafter, on or before October 23, 2023. Protect PT received the notice attached hereto as Exhibit A and 3RWK received the notice attached hereto as Exhibit B. Here, the later date of October 26, 2023 was set forth in each of the notices that Petitioners received: each of the notices stated that “***A final permit has been issued to Penneco Environmental Solutions effective October 26, 2023.***”

The notices themselves set the effective date of the Permit as October 26, 2023, therefore clearly rejecting Permittee’s argument that the Permit had already been in effect at the time the Petition was filed. Penneco would like for Petitioners to take the blame for the unclear communications by the EPA, which is improper burden shifting. The EPA had the responsibility to communicate clearly and it failed to do so. It would be prejudicial to Petitioners to dismiss the Petition as any perceived delay in filing was as the result of the EPA’s unclear communications.

Here, the last communication from the EPA indicated that the Permit would not become effective until October 26, 2023, in direct contradiction of the terms of the Permit, and the EPA’s website indicated that comments were not due until October 26, 2023. *See* Exhibit C. Petitioners reasonably relied on the EPA’s communications with respect to the effective date of the Permit that appeared to supersede the terms of the Permit and the response to public comments. Petitioners filed their Petition with the Board on October 26, 2023 because they had good cause based upon EPA’s communications to believe that the filing deadline was October 26, 2023.

2. In the Alternative, Good Cause Exists for the Board to Extend the Deadline

In the alternative, if the Board finds that the deadline was earlier than the October 26, 2023 date the EPA used in the notices, the Board may “relax or suspend” filing deadlines for “good cause,” *id.* § 124.19(n). The thirty-day filing period is established by rule, not by statute. Although

an administrative agency is generally bound to adhere to its own regulations, it has the discretion to relax its procedural requirements absent substantial prejudice to any party where justice so requires. *In the Matter of Georgetown Steel Corp.*, 3 E.A.D. 607, 608-609 (E.P.A. June 10, 1991).

Where a party files a petition after the deadline for filing a petition for review has passed, “good cause” requires a showing of “special circumstances” to justify missing the deadline. *See In re Invensys Sys., Inc.*, NPDES Appeal No. 15-10 (EAB Aug. 6, 2015) (Order Granting Extension of Time to File Petition for Review); *In re MHA Nation Clean Fuels Refinery*, 15 E.A.D. 648. 657-58 (EAB 2012). The Board has found special circumstances to exist in cases where mistakes by the permitting authority have caused the delay or when the permitting authority has provided misleading information. *In re MHA Nation Clean Fuels Refinery*, 15 E.A.D. 648 (E.P.A. June 28, 2012).

The Motion itself reflects that the EPA’s communications were unclear, including with respect to the effective date of the Permit. Permittee contends the effective date of the Permit is October 24, 2023, but in the Notices, the EPA stated the effective date of the Permit is October 26, 2023. Permittee contends that the filing deadline was October 23, 2023 while the notices stated October 26, 2023. The EPA provided misleading information as to the effective date of the Permit, and accordingly, the date upon which a petition for review was to be filed, and good cause exists to permit the filing of the Petition on October 26, 2023. Critically, Penneco alleged no prejudice in its Motion.

3. The Petition for Review Presents Important Matters of Policy that the Board Should Hear

Under the regulations that govern the Board's review of EPA permit decisions, a UIC permit decision will ordinarily *not* be reviewed unless it is based on either a clearly erroneous finding of fact or conclusion of law or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(a). The burden of demonstrating that review

is warranted rests with the petitioner who challenges the Region's permit decision or the conditions contained in the permit. *See* 40 C.F.R. § 124.19(a); *In re Beckman Production Services*, 5 EAD 10, at 14, UIC Appeal Nos. 92-9 through 92-16, (EAB 1994). *In re Envotech, L.P.*, 6 E.A.D. 260, 265 (E.P.A. February 15, 1996).

The Petition for Review sets forth multiple important policy arguments that the Board urgently needs to hear. One such argument is whether the EPA must abide by a state's green amendment, here the Pennsylvania Environmental Rights Amendment, to satisfy the EPA's Environmental Justice Policy. This would have broad implications, because if the Board finds that the EPA must abide by the Pennsylvania Environmental Rights Amendment pursuant to the EPA's Environmental Justice Policy, then that standard must be applicable to all permitting decisions by the EPA to guarantee equal treatment to residents across the country. Next, the Board must determine whether the Halliburton Loophole violates the EPA's Environmental Justice Policy. This too would have broad implications as those who live next to oil and gas operations will have the same protection under federal law as those who live next to regulated operations. Dismissing the Petition would be too harsh a sanction not only in light of the EPA's unclear communications, but also because important policy matters need to be heard by the Board.

4. Penneco Did Not Allege Prejudice

In the Motion, Penneco did not allege it had or would suffer any prejudice by the filing of the Petition on October 26, 2023 vs. October 23, 2023. Notably, this period is within the 3 extra days the rules provide for the filing of a petition for review if notice had been mailed, an objective indicator of no prejudice. 40 CFR § 124.20(d). Moreover, counsel for Petitioners and counsel for Penneco know each other professionally, and Petitioners' counsel emailed counsel for Petitioner on September 19, 2023 to advise that a petition for review would be filed in this matter. *See Exhibit D.*

5. Penneco Violated 40 CFR § 124.19(f)(2)

Penneco violated 40 CFR § 124.19(f)(2) because it failed to attempt to ascertain Petitioners' position on the Motion. While Penneco notes that it contacted the Region prior to filing the Motion, Penneco never attempted to contact Petitioners regarding the Motion. Motion at 1. Had Penneco contacted Petitioners, Petitioners would have pointed Penneco to the Region's statement that the Permit was not effective until October 26, 2023, which could have saved the Board from spending unnecessary time on this issue. Petitioners also note that when the Region requested an extension of time to respond to the Petition, Penneco emailed the Region and asked to be included in the Region's request for an extension yet did not request Petitioners' position on such an extension. *See Exhibit E.* Penneco's Motion should be denied and no further extension beyond that which was granted by the Board to the Region should be provided to Penneco.

WHEREFORE, Petitioners respectfully request that the Board deny the Motion and order Penneco to answer the Petition on or before the date that the Region's response is due.

Respectfully submitted,

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November 20, 2023

CERTIFICATE OF WORD COUNT

In accordance with 40 CFR § 124.19f(5), I hereby certify that this Response is less than 7,000 words.

Respectfully submitted,

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November 20, 2023

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served via email in accordance with the Environmental Appeals Board's September 21, 2020 Revised Order Authorizing Electronic Service of Documents in Permit and Enforcement Appeals, on the following persons, this 20th day of November, 2023:

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