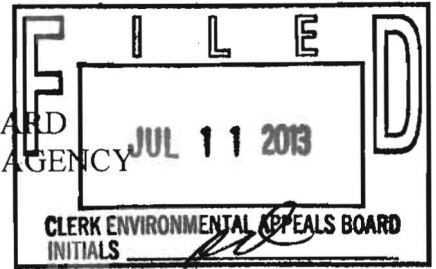


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
Energy Answers Arecibo, LLC) PSD 13-05
Arecibo Puerto Rico)
Renewable Energy Project)
)
)

ORDER GRANTING IN PART EXTENSION OF TIME TO FILE PETITION FOR REVIEW

On July 2, 2013, the Coalition of Organizations Against Incinerators (La Coalicion de Organizaciones Anti-Incineracion) (“the Coalition”) filed a Motion for Extension of Time to File Petition for Review of the final Prevention of Significant Deterioration (“PSD”) permit that U.S. EPA Region 2 (“Region”) issued to Energy Answers Arecibo, LLC (“Final Permit”). The Final Permit was issued on June 11, 2013, for the construction of the Arecibo Puerto Rico Renewable Energy Project. The Coalition’s motion seeks to have the Board compel the Region to translate the Final Permit into Spanish, and then to allow the Coalition an additional sixty days to file a petition for review of the Final Permit from the time the Spanish translation is published.

Motion at 1, 3.

The permittee, Energy Answers Arecibo LLC, opposes the motion. *See Opposition to Motion for Extension of Time to File Petition for Review* (July 8, 2013) (Docket No. 3); *Reply to Region 2’s Response to Motion for Extension* (July 10, 2013) (Docket No. 5). The Region opposes being compelled to translate the Final Permit into Spanish in contravention of its Policy on Translations and Interpretations, but the Region is not opposed to an extension of time to file

the petition for review. See *EPA Region 2's Response to Motion for Extension of Time to File Petition for Review* (July 9, 2013) (Docket No. 4). For the reasons that follow, the Board declines to compel the Region to translate the Final Permit into Spanish in the context of this Motion for Extension, but grants the Coalition an additional five business days to file a petition for review. The Coalition's deadline for filing a petition for review is extended to July 22, 2013. Responses to the Petition are due August 12, 2013.

DISCUSSION

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)(3) (2013).¹

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 & 12-03, slip op. at 14 (EAB 2012) (citing *In re AES Puerto Rico, 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)).² The Board's

¹ EPA recently revised the regulation governing permit appeals before the Board, 40 C.F.R. § 124.19. 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 took effect on March 26, 2013, and applies to any document filed with the Board on or after that date.

² 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 expectations of petitions); *In re Envotech, L.P.*, 6 E.A.D. 260, (continued...)

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.³

The Board has, however, relaxed the requirements of section 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) (citing the 220-page response to comments document with 42 attachments totaling several hundred pages); *In re City & County of Honolulu*, NPDES Appeal No. 09-01, at 1, 3 (EAB Feb. 2, 2009) (Order Granting Alternative Motion for Extension of Time 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

²(...continued)
266 (EAB 1996) (dismissing as untimely permit appeals received after the filing deadline).

³ 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(l) (2013). 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(l) (2013). For these reasons, the Board considers PSD permitting proceedings to be time-sensitive.

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”).⁴

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 Sierra Pacific Indus.*, PSD Appeal 13-01 (EAB Mar. 21, 2013) (Order Denying Extension of Time to File Appeal Brief); *In re Massachusetts Correctional Institute*, NPDES Appeal No. 08-04, 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.*, NPDES Appeal No. 08-06, at 2 (EAB Apr. 24, 2008) (Order Denying Extension of Time to File Petition for Review).

In this matter, the Coalition seeks an extension of the filing deadline to allow its Spanish-speaking members additional time to read and comprehend the permit in order to prepare and submit an adequate petition. Motion at 1. The Coalition’s extension is premised on the assumption that the Board will compel the Region to issue the permit in Spanish. Motion at 3.

⁴ 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).

The only bases provided for why the Board should compel a Spanish translation of the permit are: (1) that the Region has issued “other documents in this matter in both English and Spanish” and “translating the final permit into Spanish would be consistent” with such action; and (2) that Executive Order 12898, which is aimed at addressing environmental justice in minority and low-income populations, “allows EPA to translate crucial public documents for limited English speaking populations ‘whenever practicable and appropriate.’” Motion at 2 (citing E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7,629 (Feb. 11, 1994)).

Absent from the Coalition’s motion is any mention of the Region’s long-standing Policy on Translations and Interpretations, which specifically addresses the translation of final permits in Region 2, taking into account the unique status of Puerto Rico, where “Spanish is an official language and is the ‘first’ language of most of the citizens.” Policy at 1 (Ex. A to Region’s Response to Motion). That policy specifically provides documents generated by the Region that have legally binding effect will be written in English and will not be translated into Spanish because doing so increases the potential for introducing ambiguity or confusion about the intended meaning of the document. *Id.* at 2. Additionally, such documents are “extremely long and highly technical,” and confirming the accuracy of the translation could be “prohibitively expensive.” *Id.* The Coalition has provided no authority or basis for the Board to consider the Region’s policy or to compel a Spanish translation of the permit. The Board concludes that, in any case, a motion for an extension of time to file a petition for review of a permit is not the appropriate context in which to raise or consider this issue. As such, the Board will not compel the Region to translate the Permit into Spanish.

In reaching this conclusion, the Board is also cognizant of the efforts the Region took to communicate effectively with the Spanish-speaking members of the public and to give effect to Executive Order 12898 including holding two informal public availability meetings and six public hearing sessions, all with simultaneous translation, published public notices and a fact sheet in Spanish, accepted written comments in Spanish, and translated transcripts of the public hearings from Spanish to English. *See* Region's Response at 2. The Region also posted an unofficial translation of the Response to Comments document online. *Id.*

Notwithstanding the Board's determination not to compel the Region to translate the permit into Spanish, the Board will allow the Coalition an additional five business days to file its Petition for review.⁵ Based on the foregoing, the Board GRANTS the Coalition's motion IN PART. The Coalition may have until July 22, 2013 to file a Petition for Review of the Final

⁵ The Coalition's motion was filed just before the federal Independence Day holiday, which was followed by an Agency-wide designated furlough day due to sequestration. The timing of this motion resulted in the Board's decision being issued very close to the Coalition's filing deadline. Thus, under these circumstances, the Board is extending the filing deadline by an additional five business days.

Permit.⁶ Responses are due August 12, 2013.

So Ordered.

Dated: *July 11, 2013*

ENVIRONMENTAL APPEALS BOARD

By: *Kathie A. Stein*

Kathie A. Stein
Environmental Appeals Judge

⁶ Notice of the Final Permit decision was issued on June 11, 2013. Thirty days after June 11, 2013 is July 11, 2013. Taking into account the provision regarding computation of time at 40 C.F.R. § 124.20(d), petitions for review of the Final Permit were originally due July 15, 2013. Five business days after July 15, 2013 is July 22, 2013. A document is considered filed on the date that it is received by the Board. *See* 40 C.F.R. § 124.19(a)(3) (2013).

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Order Granting in Part Extension of Time to File Petition for Review in the matter of Energy Answers Arecibo, LLC, Arecibo Puerto Rico Renewable Energy Project, PSD Appeal 13-05, were sent to the following persons in the manner indicated:

By First Class Mail:

Christopher D. Ahlers
Environmental and Natural Resources Law Clinic
Vermont Law School
P.O. Box 96, 164 Chelsea Street
South Royalton, VT 05068

Henry C. Eisenberg
Skadden, Arps, Slate, Meagher & Flom, LLP
1440 New York Avenue, NW
Washington, DC 20005-2111

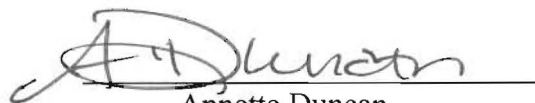
By Pouch Mail:

Joseph A. Siegel
Assistant Regional Counsel
U.S. EPA Region 2
290 Broadway
New York, NY 10007

Brian L. Doster

Air and Radiation Law Office
Office of General Counsel
1200 Pennsylvania Ave. NW (MC2344A)
Washington, DC 20460

Dated: JUL 11 2013



Annette Duncan
Secretary