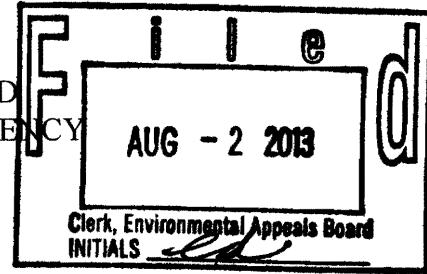


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



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In re: )  
)  
Energy Answers Arecibo, LLC ) PSD Appeals: 13-05, 13-06, 13-07, 13-08,  
Arecibo Puerto Rico ) &13-09  
Renewable Energy Project )  
)

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ORDER ON TIMELINESS OF PETITIONS FILED AND  
DENYING REGION'S MOTION TO DISMISS

The Board has received five petitions for review of the final Prevention of Significant Deterioration ("PSD") permit that U.S. EPA Region 2 ("Region") issued to Energy Answers Arecibo, LLC ("permittee" or "Energy Answers") on June 11, 2013 ("Final Permit"). As the Board determined in a prior order in this matter, the deadline for filing a petition for review of the Final Permit was July 15, 2013. *See* Order Granting in Part Extension of Time to File Petition for Review at 7 n.6 (July 11, 2013). The first petitioner to appear before the Board, the Coalition of Organizations Against Incinerators (La Coalicion de Organizaciones Anti-Incineracion) ("the Coalition") sought and received an extension of time to file its petition for review; the extended deadline was July 22, 2013, and the Coalition filed their petition (PSD Appeal No. 13-05) on that day. The second petitioner, Martha G. Quiñones Domínguez, filed her petition (PSD Appeal No. 13-06) on July 12, 2013. The Board received two petitions for review of the Final Permit on July 16, 2013: one (PSD Appeal No. 13-07) filed by Eliza Llenza<sup>1</sup>

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<sup>1</sup> Eliza Llenza apparently attempted to file her petition electronically beginning at 9:40 pm on Sunday, July 14, and encountered technical difficulties with the Board's Central Data Exchange ("CDX") eFiling system and network. She received an email notification from the  
(continued...)

and one (PSD Appeal No. 13-08) filed by Cristina Galán.<sup>2</sup> The Board received a fifth Petition for Review (PSD Appeal No. 13-09) on July 23, 2013, from Waldemar Natalio Flores Flores and Aleida Centeno Rodríguez.

On July 31, 2013, the Region filed a Motion to Dismiss the Flores/Centeno Petition for Review (PSD Appeal No. 13-09) as untimely. For the reasons that follow, the Board denies the Region's motion and concludes that it will consider as timely all five of the petitions for review filed in this matter.

As noted above, the Board extended the Petition deadline for the Coalition to July 22, 2013. The Board's order did not speak to whether it would also extend the deadline for other potential petitioners. On July 26, 2013, the permittee and the Region jointly sought to file one consolidated response to the petitions and sought to coincide the response deadline with the date the Board set for response to the Coalition's petition.<sup>3</sup> Neither the Region nor the permittee has

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<sup>1</sup>(...continued)

CDX system that she was registered on July 15 at 11:28pm. On July 16, Ms. Llenza notified the Board and sent documentation of all of the technical difficulties she encountered; she also successfully filed her petition on July 16, 2013.

<sup>2</sup> The Galán petition was mailed to the Board via United States Postal Service ("USPS"), first class certified mail on July 8, 2013. From the USPS tracking number on the certified mail stamp on the envelope, the Board has determined that the USPS received the petition on July 8, 2013, and did not deliver it to the EPA Mailing room until July 16, 2013.

<sup>3</sup> At the time Energy Answers' filed this motion, only four petitions (13-05 through 13-08) were identified. Energy Answers subsequently amended its motion to include the fifth petition. *See Energy Answers Arecibo, LLC's Amended Motion for an Extension of Time and Consolidated Response to Appeal Nos. 13-05, 13-06, 13-07, 13-08 and 13-09* (July 30, 2013)  
(continued...)

asked the Board to find the petitions filed on July 16th to be untimely. Having fully considered the circumstances of this matter, the Board concludes that it will apply the extended deadline of July 22, 2013, to all petitions filed. As such, the Board concludes that the first four petitions (PSD Appeal Nos. 13-05 through 13-08) were timely filed.

As stated above, the Region asks the Board to dismiss the Flores/Centeno Petition (PSD Appeal No. 13-09) as untimely because it was filed on July 23, 2013. As the Region correctly explains, 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).<sup>4</sup> 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). 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 June 28, 2012), 15 E.A.D. \_\_\_ (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)).<sup>5</sup> The

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<sup>3</sup>(...continued)  
(Docket No. 14).

<sup>4</sup> 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 took effect on March 26, 2013, and applies to any document filed with the Board on or after that date.

<sup>5</sup> *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, 266 (EAB 1996) (dismissing as untimely permit appeals received after the filing deadline).

Board's strict adherence to the appeal deadline the regulations prescribe is particularly warranted in matters involving the review of PSD permits because, as the Board has previously explained, PSD permit appeals are time-sensitive.<sup>6</sup>

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*, slip op. at 14, 15 E.A.D. \_\_; *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. *MHA Nation*, slip op. at 14, 15 E.A.D. \_\_; *see also, e.g., In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 703 n.6 (EAB 2002) (delay in petition

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<sup>6</sup> 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.

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 Flores/Centeno Petition was mailed from Puerto Rico via USPS first class certified mail on July 13, 2013. From the USPS tracking number on the certified mail stamp on the mailing envelope, the Board has determined that the envelope was in the possession of the USPS from July 13 through July 22, when the EPA mailing room received the envelope. The USPS's own anticipated delivery date (as designated in by tracking information) was July 16, 2013. Although the petition was received by EPA at the correct address on July 22, it was not delivered to the Clerk of the Board until the following day. According to its motion, the Region received a service copy of the petition "during the week of July 15." Prior Board order gives the Region and the permittee each until August 12, 2013, to respond to all petitions in one consolidated response. Thus, the delayed delivery of the petition to the Board will cause no prejudice or delay to the Region or the permittee. Given all of these circumstances, the Board will consider the Flores/Centeno Petition in this matter as timely filed. Accordingly, the Board denies the Region's motion to dismiss the Flores/Centeno Petition.

Notwithstanding the outcome of this motion, parties are reminded that it is each filer's responsibility to meet the filing deadlines. A party filing by mail assumes the risk that the delivery method chosen will not deliver the mail in a timely manner. As stated on the Board's

website ([www.epa.gov/eab](http://www.epa.gov/eab)): **Mail sent to the EPA via the U.S. Postal Service may be delayed by random sterilization procedure applied to mail delivered to the federal government. Parties are encouraged to utilize the Board's eFiling system or non-U.S. Postal Service carriers and the Board's hand-delivery address when filing pleadings with the Board.**

Additionally, a party filing electronically assumes the risk at all times of filing problems caused by its own errors in using the electronic filing system. *See* Environmental Appeals Board Practice Manual (Jan. 2013) at 13. Parties are advised to allow sufficient time in advance of a filing for timely delivery to occur; parties are also advised to choose a method of filing that will best ensure meeting the deadline.

The Board also reminds all parties that the Board will migrate to a new eFiling System on August 12, 2013. This system will replace the Central Data Exchange (CDX) as the portal for electronically filing documents with the EAB. All users, including those currently registered with CDX, must register with EPA's eFiling Login/Registration system in order to file documents with the EAB electronically in the new system. Once registered, users will be able to access the new EAB eFiling System beginning on August 12, 2013. **Because registration can take 1-2 business days to process, all current and future users are encouraged to begin the process as soon as possible to ensure timely access the EAB eFiling System.** For more information and for a link to the new registration system, please visit the Board's website at [www.epa.gov/eab](http://www.epa.gov/eab).

Based on the foregoing, the Board DENIES the Region's Motion to Dismiss the Flores/  
Centeno Petition for Review.

So Ordered.

Dated: August 4, 2013

ENVIRONMENTAL APPEALS BOARD

By: Kathie A. Stein

Kathie A. Stein  
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Order on Timeliness of Petitions Filed and Denying Region's Motion to Dismiss in the matter of Energy Answers Arecibo, LLC, Arecibo Puerto Rico Renewable Energy Project, PSD Appeal Nos. 13-05 through 13-09, were sent to the following persons in the manner indicated:

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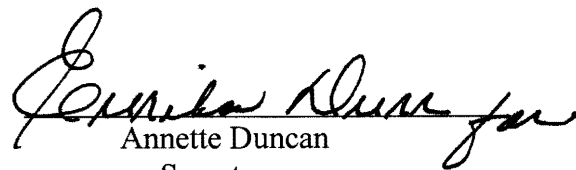
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Dated:

*August 2, 2013*

  
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Secretary