

BACKGROUND

The District issued the PSD Permit that is the subject of this Petition for Review on February 3, 2010. (*See* Final PSD Permit, Exh. 1 to Declaration of Alexander G. Crockett In Support of Responses Requesting Summary Dismissal filed April 8, 2010 in this matter, Filing No. 30, (hereinafter, “Crockett Decl.”).) At the time of issuance, the District established an effective date of the permit of March 22, 2010. This effective date gave interested members of the public until March 22, 2010, to file any appeals of the permit under 40 C.F.R. Section 124.19. Notably, this appeal period granted interested members of the public well over the minimum 30 days required by 40 C.F.R. Part 124 to prepare and file any appeals.

When it issued the permit, the District made clear that March 22, 2010, was the deadline for filing any appeals. In doing so, the District also expressly stated that Petitions for Review must be actually received by the EAB by that date to be timely. (*See* Final PSD Permit, Crockett Decl. Exh. 1, at p. 2; Notice of Final Permit Issuance, Crockett Decl. Exh. 2; Responses to Public Comments, Crockett Decl. Exh. 3, at p. i.)

None of the three Petitioners in PSD Appeal Nos. 10-08, 10-09, or 10-10 filed their Petitions by the March 22, 2010, deadline, however. Petition Nos. 10-08 and 10-09 were not filed until April 1, 2010, ten days after the deadline. (*See* Petition for Review 10-08, Docket Entry No. 21; Petition for Review 10-09, Docket Entry No. 22) Petition No. 10-10 was not filed until April 6, 2010, fifteen days after the deadline. (*See* Petition for Review 10-10, Docket Entry No. 23.)¹

¹ The filing dates for these Petitions for Review are indicated both by the docketing information on the EAB’s docket website in this matter and by the “received” date stamp on the Petitions themselves.

STANDARD OF REVIEW

Before considering the merits of a Petition for Review under 40 C.F.R. Section 124.19, the Environmental Appeals Board must first ensure that the petitioner has satisfied the important jurisdictional prerequisites to EAB review, including the requirement that the Petition be timely filed within the appeal period established under Section 124.19. (*See In re Beeland Group, LLC*, UIC Appeal No. 08-02, 14 E.A.D. ___, Slip. Op. at 9 (EAB Oct. 3, 2008).) The burden rests with the petitioner to show that these procedural requirements have been satisfied sufficient to warrant review. (*See In re Avon Custom Mixing Services, Inc.*, 10 E.A.D. 700, 706 and n.12 (EAB 2002); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249 (EAB 1999); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 119-20 (EAB 1997).)

The Board has made clear that it “strictly construes” these threshold procedural requirements. (*In re Gateway Generating Station*, PSD Appeal No. 09-02, slip op. at ___ (EAB September 15, 2009); *In re Town of Marshfield, Mass.*, NPDES Appeal No. 07-03, slip op. at 8 (EAB, March 27, 2007) (collecting cases).) In doing so, the Board has always been mindful of the direction in the Preamble to 40 C.F.R. Section 124.19, the regulation governing PSD permit appeals, which states that the Board’s power of review “should be only sparingly exercised.” (45 Fed. Reg. 33,412 (May 19, 1980).) Thus, where a petitioner has not satisfied the minimum prerequisite of filing its petition for review within the time period established under 40 C.F.R. Part 124, the Board should summarily decline review.

THE EAB SHOULD DISMISS THESE THREE PETITIONS AS UNTIMELY BECAUSE THEY WERE NOT FILED BY THE MARCH 22, 2010, DEADLINE

The Environmental Appeals Board should summarily dismiss Petitions 10-08, 10-09 and 10-10 because they were not timely filed by the March 22, 2010, filing deadline in this matter. Petitions 10-08 and 10-09 were not filed until April 1, 2010,² ten days after the deadline, and Petition 10-10 was not filed until April 6, 2010, fifteen days after the deadline. All three Petitioners have therefore failed to satisfy the basic procedural requirements necessary to have her Petition for Review considered by the Environmental Appeals Board under 124.19. The Environmental Appeals Board should dismiss these Petitions as untimely.³

The Board has made clear on numerous occasions that threshold procedural requirements, such as timely filing of petitions for review, should be strictly construed.⁴ The Board has routinely dismissed petitions where, as here, they failed to adhere scrupulously to threshold procedural requirements such as timely filing. As the Board has explained, strict compliance

² Petition No. 10-09 appears to be dated March 17, 2010, but Petitions for Review are not considered filed for purposes of the timeliness requirement until they are actually received and filed by the EAB. *See, e.g., In re AES Puerto Rico, L.P.*, 8 E.A.D. 325, 329 n.5 (EAB 1999), *aff'd, Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 124 n.23 (EAB 1997); *In re Beckman Prod. Servs., Inc.*, 5 E.A.D. 10, 15 & n.8 (EAB 1994). The District also made clear in the final PSD Permit and related documentation that any appeals had to be actually received by the March 22, 2010, filing deadline to be timely.

³ In addition, the District reserves the right to object to the Petitions for failure to satisfy other important threshold prerequisites for review, including the requirement to demonstrate that Petitioners have standing to appeal by having participated in the permit proceeding and submitted comments on the draft permit and that the issues on which they seek review were preserved by being raised in comments on the draft permit. The District also reserves the right to object to the Petitions for failing to raise any issues related to PSD permit requirement within the Board's jurisdiction to review under 40 C.F.R. Section 124.19, and for failing to explain why the District's response to comments on any of the issues they raise were clearly erroneous or otherwise warrant review. Since the Petitions clearly fail to satisfy the threshold timeliness requirement, the District is refraining from presenting these arguments at this time. Should the Board decline to dismiss the Petitions on timeliness grounds, however, the District reserves the right to present such arguments at the appropriate time in a response on the merits.

⁴ *See, e.g., Gateway Generating Station*, PSD Appeal No. 09-02, Slip Op. at 10; *Town of Marshfield, Mass.*, NPDES Appeal No. 07-03, Slip. Op. at 8; and cases cited therein.

with the timeliness requirement is necessary in order to ensure procedural fairness and uniform application of Board's appeal provisions. "Uniform application of the requirement is necessary because of the various parties and permit that are subject to this provision and because important consequences flow from petitioning for review."⁵ The Board should continue to adhere to this well-established rule here and should dismiss these Petitions for failure to comply with the requirement of timely filing.⁶

The District is aware that the Board has allowed late-filed petitions for review to proceed under certain limited "special circumstances" where the tardiness was ultimately due to events that were entirely beyond the petitioner's control, for example where a late-filed petition was delayed in reaching the EAB for filing solely because of heightened security procedures to address anthrax terrorism concerns, and not because of any delay on the part of the petitioner;⁷ where a hurricane hit the affected area during the appeal period and prevented potential petitioners from filing on time;⁸ where a petition was received one day late because of aircraft problems experienced by the third-party overnight delivery service the petition had used, and where the petitioner had done everything reasonably necessary to get the petition filed on time and was prevented from doing so solely because of the delivery service's aircraft problems;⁹ or where the delay was attributable to failures the permitting authority, such as where the permitting authority mistakenly instructed the petitioner to file its petition with the wrong person¹⁰ or where the permitting agency failed to properly notify members of the public who were entitled to notice

⁵ *Town of Hampton, New Hampshire*, 10 E.A.D. at 132 (quoting *In re Bethlehem Steel Corp.*, 3 E.A.D. 611, 613 n.9 (Adm'r 1991)).

⁶ See also *In re B&L Plating, Inc.*, 11 E.A.D. 183, 191 (EAB 2003) (dismissing late-filed appeal because the EAB "will preserve its limited resources for parties who are diligent enough to follow its procedural rules.") (citing *In re Gary Dev. Co.*, 6 E.A.D. 526, 533-34 (EAB 1996)).

⁷ See *Avon Custom Mixing*, 10 E.A.D. at 703 n.6.

⁸ See *In re AES Puerto Rico L.P.*, 8 E.A.D. 315, 328 (EAB 1999), *aff'd*, *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000).

⁹ See *id.* at 329.

¹⁰ See *Kawaihae Cogeneration Project*, 7 E.A.D. at 123-24 (EAB 1997).

of the permit.¹¹ But are no such “special circumstances” here that rendered timely filing outside of Petitioners’ control. There have been no natural disasters or terrorism incidents that prevented Petitioners from filing on time; there is no indication that Petitioners’ delay was due to problems with a third-party delivery service; and there is no evidence that Petitioners were misinformed about the applicable filing requirements and procedures. To the contrary, the District clearly stated in the notice it provided on the issuance of the final PSD permit, in the final PSD permit itself, and in the Responses to Comments document that appeals had to be actually received by the EAB in Washington D.C. by March 22, 2010, in order to be timely. (*See* Final PSD Permit, Crockett Decl. Exh. 1, at p. 2; Notice of Final Permit Issuance, Crockett Decl. Exh. 2; Responses to Public Comments, Crockett Decl. Exh. 3, at p. i.) Petitioners’ failure to file by the deadline was entirely within their own control, and they should therefore not be excused from complying with this important threshold procedural requirement.

The District also submits that the Petitioners’ failure to file the Petitions by the established deadline should not be excused because Petitioners are (apparently) proceeding *pro se* and are not represented by counsel. Although the Board has recognized that “[a] *pro se* party . . . must be given reasonable latitude in effectuating its intent . . . ,” the Board has consistently held that “[n]onetheless, a litigant who elects to appear *pro se* takes upon himself or herself the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance.”¹² Accordingly, Petitioners’ *pro se* status does not

¹¹ *See In re Hillman Power Co., L.L.C.*, 10 E.A.D. 673, 680 n. 4 (EAB 2002).

¹² *In re Rybond, Inc.*, 6 E.A.D. 614, 627 (EAB 1996); *see also AES Puerto Rico*, 8 E.A.D. at 329-30 (dismissing appeal of PSD permit by *pro se* petitioner Mr. Pedro J. Saade Lorens (Appeal No. PSD-98-31), which was received after the filing deadline because petitioner mistakenly mailed it to the EPA regional office, not directly to the Environmental Appeals Board); *In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 320-21 (EAB 1999) (rejecting argument that appellant should be excused from failure to comply with filing deadlines because, for the first failure at least, the appellant was proceeding *pro se*); *Envotech*, 6 E.A.D. at 268 n.13 (“While the Board does not expect or demand that [*pro se*] petitioner will necessarily conform to exacting and technical pleading requirements, a petitioner must nonetheless comply with the minimal pleading standards”) (citation omitted).

excuse them from complying with the Board's procedural requirements for filing permit appeals. This point is especially salient with respect to a failure to meet the March 22, 2010, filing deadline, as the deadline was clearly set forth in the documentation the District issued with respect to the Final PSD Permit in a manner that any layperson could easily understand. (*See* Final PSD Permit, Crockett Decl. Exh. 1, at p. 2; Notice of Final Permit Issuance, Crockett Decl. Exh. 2; Responses to Public Comments, Crockett Decl. Exh. 3, at p. i.) (explaining that appeals had to be received by the EAB by March 22, 2010 to be considered timely.) There is no reason why Petitioners should not have been able to understand this deadline, regardless of whether or not they were represented by counsel. Thus, even with maximum deference to Petitioners' *pro se* status, the Petitions still must be dismissed for failure to meet the established filing deadline in this case.

CONCLUSION

For the foregoing reasons, the Petitions for Review in PSD Appeal Nos. 10-08, 10-09, and 10-10 should be DISMISSED.

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Respectfully Submitted

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