

**IN RE SENECA RESOURCES CORP.**

UIC Appeal Nos. 14-01, 14-02, &amp; 14-03

***ORDER DENYING REVIEW***

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Decided May 29, 2014

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## Syllabus

This matter involves three consolidated petitions for review of an Underground Injection Control (“UIC”) permit that U.S. Environmental Protection Agency Region 3 (“Region”) issued to Seneca Resources Corporation for a Class II injection well (“Permit”) on January 28, 2014. In its consolidated response to the petitions, the Region challenged each petition on threshold procedural grounds.

Held: The Board denies Ms. Susan Swanson’s petition for review because it lacks the specificity required under 40 C.F.R. § 124.19(a)(4), denies Highland Township’s petition as untimely, and denies Ms. Judith Hudson’s petition for lack of standing.

***Before Environmental Appeals Judges Randolph L. Hill, Catherine R. McCabe, and Kathie A. Stein.***

***Opinion of the Board by Judge Stein:*****I. STATEMENT OF THE CASE**

On January 28, 2014, the U.S. Environmental Protection Agency (“EPA”) Region 3 (“Region”) issued an Underground Injection Control (“UIC”) permit to Seneca Resources Corporation for a Class II injection well (“Permit”). The Environmental Appeals Board (“Board”) received three petitions for review of the Permit from the following: Judith Hudson (UIC Appeal No. 14-01); Susan Swanson (UIC Appeal No. 14-02); and the Highland Township Municipal Authority (“Highland Township”) (UIC Appeal No. 14-03). The Board consolidated these petitions on March 18, 2014. The Region filed a consolidated response to the petitions for review on April 2, 2014, challenging each of these petitions on threshold procedural grounds. For reasons explained more fully below, the Board denies Ms. Swanson’s petition because it lacks the requisite specificity, denies Highland Township’s petition as untimely, and denies Ms. Hudson’s petition for lack of standing.

## II. THRESHOLD REQUIREMENTS FOR BOARD REVIEW

Section 124.19 of Title 40 of the Code of Federal Regulations governs Board review of a UIC permit. In considering any petition filed under 40 C.F.R. § 124.19(a), the Board first evaluates whether the petitioner has met threshold procedural requirements such as timeliness, standing, issue preservation and specificity. 40 C.F.R. § 124.19(a)(2)-(4); *see also In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006). If the Board concludes that a petitioner satisfies all threshold pleading obligations, then the Board evaluates the merits of the petition for review. *See Indeck-Elwood*, 13 E.A.D. at 143. If a petitioner fails to meet a threshold requirement, the Board typically denies or dismisses the petition for review. *See, e.g., In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-12 & 10-13 (EAB June 9, 2010) (Order Dismissing Two Petitions for Review as Untimely); *In re Presidium Energy, LC*, UIC Appeal No. 09-01, at 5 (EAB July 27, 2009) (Order Denying Review) (concluding petition lacked required specificity); *In re Beeland Group, LLC*, UIC Appeal Nos. 08-01 & 08-03, at 4, 10-11 (EAB May 23, 2008) (Order Denying Review) (concluding petitions lacked both standing and specificity); *see also In re Envotech, LP*, 6 E.A.D. 260, 266-69 (EAB 1996) (dismissing multiple petitions on threshold grounds of timeliness, standing, and specificity, all in the context of an order denying review).

In any appeal from a permit decision issued under part 124, the petitioner bears the burden of demonstrating that review is warranted. 40 C.F.R. § 124.19(a)(4). The petitioner bears that burden even when the petitioner is unrepresented by counsel (or pro se), as is the case here.<sup>1</sup> *In re New Eng. Plating Co.*, 9 E.A.D. 726, 730 (EAB 2001); *In re Encogen Cogeneration Facility*, 8 E.A.D. 244, 249-50 (EAB 1999). With these principles in mind, the Board next considers the three petitions presented in this appeal.

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<sup>1</sup> Although the Board generally endeavors to construe liberally the issues presented by a *pro se* petitioner, so as to fairly identify the substance of the arguments being raised, the Board nevertheless “expect[s] such petitions to provide sufficient specificity to apprise the Board of the issues being raised.” *In re Sutter Power Plant*, 8 E.A.D. 680, 687-88 (EAB 1999); *see also In re Envtl. Disposal Sys., Inc.*, 12 E.A.D. 254, 292 n.26 (EAB 2005); *Envotech*, 6 E.A.D. at 268. “The Board also expects the petitions to articulate some supportable reason or reasons as to why the permitting authority erred or why review is otherwise warranted.” *Sutter*, 8 E.A.D. at 688; *accord In re Beckman Prod. Servs.*, 5 E.A.D. 10, 19 (EAB 1994).

### III. ANALYSIS

#### A. *Ms. Swanson's Petition for Review (UIC Permit Appeal 14-02) Lacks the Requisite Specificity*

The revised part 124 regulations, which incorporate Board precedent, require a petition to contain, at a minimum, three essential components:

(1) clear identification of the contested permit condition or other specific challenge to the permit decision at issue that is based on either a clear error of fact or law or an exercise of discretion or important policy consideration warranting review; (2) a demonstration that any issue being raised on appeal has been preserved for Board review (i.e., was raised during the public comment period or public hearing on the draft permit), or an explanation as to why the issue was not required to be raised; and (3) argument, with factual and legal support, as to why the permit condition or other challenge warrants review by the Board, including an explanation as to why the Region's response to comment on the issue raised, if any, was clearly erroneous or otherwise warrants review.<sup>2</sup> See 40 C.F.R. § 124.19(a)(4)

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<sup>2</sup> 40 C.F.R. § 124.19(a)(4) (2013), in its entirety, provides:

(4) *Petition contents.* (i) In addition to meeting the requirements in paragraph (d), a petition for review must identify the contested permit condition or other specific challenge to the permit decision and clearly set forth, with legal and factual support, petitioner's contentions for why the permit decision should be reviewed. The petition must demonstrate that each challenge to the permit decision is based on: (A) A finding of fact or conclusion of law that is clearly erroneous, or (B) An exercise of discretion or an important policy consideration that the Environmental Appeals Board should, in its discretion, review.

(ii) Petitioners must demonstrate, by providing specific citation to the administrative record, including the document name and page number, that each issue being raised in the petition was raised during the public comment period (including any public hearing) to the extent required by § 124.13. For each issue raised that was not raised previously, the petition must explain why such issues were not required to be raised during the public comment period as provided in § 124.13. Additionally, if the petition raises an issue that the Regional Administrator addressed in the response to comments document issued pursuant to § 124.17, then petitioner must provide a citation to the relevant comment and response and explain why the Regional Administrator's response to the comment was clearly erroneous or otherwise warrants review.

(2013).<sup>3</sup>

Ms. Swanson's petition is one page in length and only generally raises concerns regarding the health and safety risks to the community's drinking water based on "anecdotal evidence of water sources being ruined around the country" by these types of injection wells and Ms. Swanson's suspected "collusion" of the oil and gas industry with the government and politicians to hide the facts regarding the safety of the practice. Ms. Swanson's Pet. at 1. Ms. Swanson also expresses very summarily her concern that "this practice is also causing earthquakes in Oklahoma and Ohio." Her petition also suggests that the Region has not done enough to find all of the abandoned wells in the area. *Id.*

While the Board recognizes that Ms. Swanson's concerns regarding injection wells and drinking water are very important, Ms. Swanson has not met her burden to demonstrate why the UIC permit issued to Seneca Resources warrants review. None of Ms. Swanson's generalized concerns specifically "identify the contested permit condition or other specific challenge to the permit decision" as required by rule. 40 C.F.R. § 124.19(a)(4)(i). Nor does Ms. Swanson set forth any legal or factual basis for why the Board should review the permit decision as required. *Id.* Without these minimal pleading elements, the petition provides no basis on which to consider whether review is warranted. When a petition lacks sufficient specificity, the Board does not consider the merits of the permit. *See, e.g., In re Chevron Mich., LLC*, 15 E.A.D. 799, 809-10 (EAB 2013) (denying review of substantive claims regarding drinking water based on a lack of specificity); *In re Presidium Energy, LLC*, UIC Appeal No. 09-01, at 5 (EAB July 27, 2009) (Order Denying Review); *In re Beeland Group, LLC*, UIC Appeal Nos. 08-01 & 08-03, at 4, 10-11 (EAB May 23, 2008) (Order Denying Review) (concluding petitions lacked both standing and specificity); *see also, e.g., In re*

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<sup>3</sup> Recent revisions to the regulations governing permit appeals were intended to better clarify the required contents of a petition, by incorporating the Board's interpretations of permit appeal regulations into the text of the rule itself. Revisions to Procedural Rules to Clarify Practices and Procedures Applicable in Permit Appeals, 78 Fed. Reg. 5,281, 5,282, 5,283-84 (Jan. 25, 2013) (explaining that rule was intended to clarify for practitioners the required contents for a petition); *see also In re LCP Chems.-N.Y.*, 4 E.A.D. 661, 664 (EAB 1993) (summarizing the threshold requirements for a petition for review under 40 C.F.R. § 124.19); *see also Native Vill. of Kivalina IRA Council v. EPA*, 687 F.3d 1216, 1219 (9th Cir. 2012) (upholding the Board's consistent interpretation of section 124.19's minimum threshold requirements), *aff'g In re Teck Alaska, Inc.*, NPDES Appeal No. 10-04, at 7-11 (EAB Nov. 18, 2010).

*Peabody W. Coal Co.*, 15 E.A.D. 406, 429-30 n.36 (EAB 2011) (dismissing several issues as “vague” and “unsubstantiated” where it was unclear how the issues raised related to any conditions of the permit that petitioner was attempting to challenge) (citations omitted).

Ms. Swanson also does not “demonstrate, by specific citation to the record \* \* \* that any of these issues were raised during the public comment period” as required by 40 C.F.R. § 124.19(a)(4)(ii). The Region, however, acknowledges that such concerns were indeed raised below and were considered in the permitting process. *See* Region’s Resp. Br. at 16 (noting that Ms. Swanson’s petition echoes the concerns raised during the comment period); Response to Summary Comments for the Issuance of an Underground Control (UIC) Permit for Seneca Resources Corp. at 2-4 ((Administrative Record 36) (“RTC”) (addressing potential risks to the drinking water supplies), 3-4 (discussing the efforts to identify and address abandoned wells in the area), 5-9 (discussing the likelihood of increased seismic activity).

In response to public comments, the Region explained, among other things, that the two active drinking water supplies located within a mile of the proposed injection well are located “outside the zone of endangering influence and in formations that will be protected through construction and operational requirements of the well.” RTC at 2-3. Additionally, the Region concluded, “[b]ased on the topography, [that] a spill at the injection well site would flow southward and not endanger either of the drinking water wells.” *Id.* at 3.

The Region also addressed concerns regarding seismic activity, stating that “the geologic setting and reservoir characteristics of the proposed injection well are entirely different than the circumstances encountered in Ohio, Oklahoma and Arkansas.” *Id.* at 8. Further, the Region explained that “EPA is not aware of any case where a seismic event caused an injection well to contaminate a[n] underground source of drinking water[.]” *Id.* at 9.

With respect to abandoned wells, the Region concluded that Seneca Resources had put forth a good faith effort to identify and address abandoned wells in the area and to provide information to the public. *Id.* at 3. The Region also had sought any additional information concerning abandoned wells in the review that had not been identified from the public so that corrective action could be taken prior to injection. *Id.* at 4. Although one comment received suggested there were five additional wells in the area, no more specific information was provided. *Id.* The Region concluded that the five wells mentioned were likely included in the updated inventory the Region had received from Seneca Resources, which demonstrated

that there were additional wells but they were located outside of the area of review. *Id.* The Region also noted that (1) two monitoring wells will be installed to measure upward fluid movement due to pressurization of the injection formation; and (2) “[i]f at any time an abandoned well is discovered within the area of review, the permit requires the permittee to take immediate corrective action, in the form of plugging and abandonment.” *Id.*

Ms. Swanson’s petition also does not discuss or “explain why the [Region’s] respons[es] to the comment[s] [were] clearly erroneous or otherwise warrant[ing] review,” as required by 40 C.F.R. § 124.19(a)(4)(ii), and a long line of Board precedent. *See, e.g., In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review), *aff’d*, 614 F.3d 7, 11-13 (1st Cir. 2010); *see also In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000) (“Petitions for review may not simply repeat objections made during the comment period; instead they must demonstrate why the permitting authority’s response to those objections warrants review.”).<sup>4</sup> In sum, Ms. Swanson’s petition fails to meet the requisite standard of specificity for review and fails to articulate any supportable reason or reasons as to why the permitting authority erred or why review is otherwise warranted. Accordingly, the Board denies Ms. Swanson’s petition for review.<sup>5</sup>

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<sup>4</sup> Federal circuit courts of appeal have consistently upheld the Board’s threshold requirement to demonstrate, with specificity, that review is warranted, including the requirement that a petitioner must substantively confront the permit issuer’s response to the petitioner’s previous objections. *See, e.g., Native Vill. of Kivalina IRA Council v. EPA*, 687 F.3d 1216, 1219 (9th Cir. 2012), *aff’g In re Teck Alaska, Inc.*, NPDES Appeal No. 10-04, at 7-11 (EAB Nov. 18, 2010); *City of Pittsfield v. EPA*, 614 F.3d 7, 11-13 (1st Cir. 2010), *aff’g In re City of Pittsfield*, NPDES Appeal No. 08-19 (EAB Mar. 4, 2009) (Order Denying Review); *Mich. Dep’t of Env’tl. Quality v. EPA*, 318 F.3d 705, 708 (6th Cir. 2003) (“[Petitioner] simply repackag[ing] its comments and the EPA’s response as unmediated appendices to its Petition to the Board \* \* \* does not satisfy the burden of showing entitlement to review.”), *aff’g In re Wastewater Treatment Fac. of Union Twp.*, NPDES Appeal Nos. 00-26 & 00-28 (EAB Jan. 23, 2001) (Order Denying Petitions for Review); *LeBlanc v. EPA*, 310 F. App’x 770, 775 (6th Cir. 2009) (concluding that the Board correctly found petitioners to have procedurally defaulted where petitioners merely restated “grievances” without offering reasons why the permit issuer’s responses were clearly erroneous or otherwise warranted review), *aff’g In re Core Energy, LLC*, UIC Appeal No. 07-02 (EAB Dec. 19, 2007) (Order Denying Review); *see also* 78 Fed. Reg. at 5,282.

<sup>5</sup> The Board observes that Ms. Swanson’s petition is also untimely, having been received (and filed) on March 6, 2014, three days after the filing deadline. *See* note 6, below. The envelope in which it was mailed was postmarked by the U.S. Postal Service

B. *Highland Township's Petition for Review (UIC Permit Appeal 14-03) Was Untimely*

A petition for review must ordinarily be filed with the Board within 30 days after the permitting authority issues the final permit decision. 40 C.F.R. § 124.19(a)(3). The 30-day period begins with the service of notice unless the permitting authority specifies a later date. *Id.* A document is considered filed with the Board upon receipt. *Id.* § 124.19(i). Although the Board will accept an untimely petition in special circumstances, such as where a petition is delayed by U.S. Postal Service security measures through no fault of the petitioner,<sup>6</sup> the Board has no basis from which to conclude special circumstances are warranted here.

The deadline for filing a petition for review of this permit was March 3, 2014.<sup>7</sup> The Board did not receive a petition from Highland Township by that date.

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on February 21, 2014. Thus, through no apparent fault of her own, the mail system took 13 days to deliver Ms. Swanson's petition to the Board. The Board need not decide whether this delay constitutes "special circumstances" warranting a relaxed deadline (see discussion on timeliness in Part III.B. below) because the Board is denying review of Ms. Swanson's petition based on a lack of specificity.

Additionally, notwithstanding the regulatory requirements, Ms. Swanson's petition is silent on whether she participated in the permit proceedings during the public comment period. The Region's brief, however, indicates that Ms. Swanson did submit comments. Region's Resp. Br. at 11.

<sup>6</sup> See *In re Circle T Feedlot, Inc.*, 14 E.A.D. at 653, 659-61 (EAB 2010) (relaxing the petitioner's filing deadline where the petition was delayed by U.S. Postal Service security measures through no fault of the petitioner); see also *In re Hillman Power Co.*, 10 E.A.D. 673, 680 n.4 (EAB 2002) (relaxing the filing deadline where a permit issuer failed to serve all parties that had filed written comments on the draft permit); *In re AES Puerto Rico*, 8 E.A.D. 324, 329 (EAB 1999), *aff'd, sub nom. Sur Contra La Contaminación v. EPA*, 202 F.3d 443 (1st Cir. 2000) (determining special circumstances existed where petition was delayed due to hurricane and aircraft problems); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 123-24 (EAB 1997) (relaxing the filing deadline where the delay was attributable to permitting authority that mistakenly instructed petitioners to file appeals with the EPA's Headquarter's Hearing Clerk).

<sup>7</sup> The permitting authority served notice of the final UIC permit that is the subject of this appeal on January 28, 2014. Thirty days later was February 27, 2014. After taking into account the rules for computation of time provided in 40 C.F.R. § 124.20(d) (adding three days for service by mail) and 40 C.F.R. § 124.20(c) (moving to the next business day

The Region, in its March 13, 2014 Motion to Consolidate Appeals, stated that it had received a service copy of a petition for review from Highland Township on February 25, 2014. On March 14, 2014, having not yet received Highland Township's petition for filing, the Clerk of the Board contacted Highland Township and inquired whether it had intended to file a petition. Highland Township then sent a copy of its petition to the Board by overnight mail, which was received on March 18, 2014. Highland Township Petition (Mar. 18, 2014) (Docket No. 8). The representative for Highland Township, Ms. Swanson (who is also the petitioner in UIC Appeal No. 14-02), stated in a cover letter that Highland Township's petition was mailed on February 21, 2014, by first class mail to the Board, but provided no official record of that mailing. Letter from Susan E. Swanson, Secretary/Treasurer, Highland Twp. Mun. Auth., to Environmental Appeals Board, U.S. EPA (Mar. 14, 2014) (Docket No. 8). Although mail sent to the EPA via the U.S. Postal Service may be delayed by a random sterilization procedure applied to mail delivered to the federal government, such mail typically arrives within a few weeks after mailing. As of the date of this decision, the Board has not received the petition that Highland Township states was originally mailed in February. Given that more than two months has passed, it appears that any petition by Highland Township that may have been timely mailed to the Board has been lost indefinitely. With no proof of mailing and no verifiable basis on which to relax its filing deadline, the Board cannot conclude that special circumstances warrant acceptance of Highland Township's untimely petition. As such, the Board denies the petition for review.<sup>8</sup>

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filing dates that fall on weekends or holidays), petitions for review of the permit decision in this case were due March 3, 2014.

<sup>8</sup> The Board encourages all parties before the Board to consider using the Board's other available methods of filing when submitting time-sensitive documents for filing to the Board – i.e., electronic filing through the Board's eFiling system or filing by overnight delivery services to the Board's hand-delivery address. See 40 C.F.R. § 124.19(i) (describing available methods of filing); see also [www.epa.gov/eab](http://www.epa.gov/eab) (warning filers, on the Clerk of the Board webpage, that “[m]ail sent to the Environmental Protection Agency via the U.S. Postal Service may be delayed by a random sterilization procedure applied to mail delivered to the federal government”). Additionally, when submitting a filing by regular mail, parties may wish to consider obtaining proof of mailing from the postal service. Whatever method of filing is used, parties are reminded that the filer bears the burden of ensuring that submissions are timely received by the Board. See *AES Puerto Rico*, 8 E.A.D. at 329 (“It is a petitioner’s responsibility to ensure that filing deadlines are met, and the Board will generally dismiss petitions for review that are received after a filing deadline.”).



Even if Highland Township's petition were to arrive at some future date, and with it, proof of special circumstances warranting the acceptance of an untimely petition, the Board would deny review of the petition for the same reasons that it denies review of Ms. Swanson's petition above. Highland Township raises very general concerns that are similar to those raised by Ms. Swanson, and Highland Township's petition, while two pages in length, suffers from the same inadequacies in specificity as Ms. Swanson's petition.<sup>9</sup> *See* Part III.A, above. Thus, in any case, Highland Township fails to meet its burden to establish that review is warranted under 40 C.F.R. § 124.19(a)(4) (2013).

*C. Ms. Hudson's Petition for Review (UIC Permit Appeal 14-01) Lacks Standing*

In every appeal from a permit decision, a petitioner must demonstrate prior involvement in the public review process, either by filing written comments on the draft permit or by participating in a public hearing. 40 C.F.R. 124.19(a)(2).<sup>10</sup> A

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<sup>9</sup> Although not with the specificity required under 40 C.F.R. § 124.19(a)(4), Highland Township raises general concerns regarding (1) the health and safety risks to the community's drinking water from underground injection wells, (2) the belief that not all abandoned wells have been identified, (3) the Region's potential reliance on falsified records concerning abandoned wells, and (4) a potential conflict between this permit and local law. According to the Region, each of these concerns was raised below, and the Region responded to these concerns in its Responses to Comments document. *See* Region's Resp. Br. at 16 (noting that the Highland Township petition echoes the concerns raised during the comment period); RTC at 2 (discussing the relationship between the UIC permit and local regulations), 2-4 (addressing potential risks to the drinking water supplies), 3-4 (discussing the efforts to identify and address abandoned wells in the area), 5-9 (discussing the likelihood of increased seismic activity). Highland Township's petition does not discuss the Region's responses regarding these issues as required. *See* Part III.A, above.

<sup>10</sup> 40 C.F.R. § 124.19(a)(2) provides in relevant part:

Any person who filed comments on the draft permit or participated in a public hearing on the draft permit may file a petition for review as provided in this section. Additionally, any person who failed to file comments or failed to participate in the public hearing on the draft permit may petition for administrative review of any permit conditions set forth in the final permit decision, but only to the extent that those final permit conditions reflect changes from the proposed draft permit.

person who does not participate during the public review process may petition for review, but may only challenge the decision with respect to changes made between the draft and final permit. *Id.*; see also, e.g., *In re Am. Soda LLP*, 9 E.A.D. 280, 288-89 (EAB 2000); *In re Envotech, LP*, 6 E.A.D. 260, 267 (EAB 1996). The Board denies, for lack of standing, petitions for review that do not meet this threshold requirement. E.g., *In re Beeland Group, LLC*, UIC Appeal Nos. 08-01 and 08-03, at 4, 10-11 (EAB May 23, 2008) (Order Denying Review); *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 708 (EAB 2002).

After filing her petition for review, Ms. Hudson informed the Board that she did not attend any public hearing on this permit and indicated that she believes her petition is invalid as a result. See Letter from Judith E. Hudson to Environmental Appeals Board, U.S. EPA (Mar. 18, 2014) (Docket No. 10) (adding also that she is “opting out” of this appeal). Ms. Hudson did not state in either her one-page petition for review or her March 18, 2014 letter whether she submitted comments on the draft permit. The Region’s response to the petitions, however, states that Ms. Hudson did not submit comments on the draft permit during the public comment period. Region’s Resp. Br. at 13. Ms. Hudson also does not challenge the decision with respect to changes made between the draft and final permit. Based on all of the above, the Board concludes that Ms. Hudson does not meet the standing requirements of 40 C.F.R. § 124.19(a)(2) and, accordingly, denies Ms. Hudson’s petition for review.

#### IV. CONCLUSION

For all of the reasons stated above, the Board denies Ms. Swanson’s petition for review (UIC Appeal No. 14-02) because it lacks the requisite specificity, denies Highland Township’s petition for review (UIC Appeal No. 14-03) as untimely, and denies Ms. Hudson’s petition for review (UIC Appeal No. 14-01) for lack of standing.

So ordered.