

IN RE PENNECO ENVIRONMENTAL SOLUTIONS, LLC

UIC Appeal No. 23-01

ORDER DENYING MOTION TO DISMISS

Decided February 28, 2024

***Before Environmental Appeals Judges Aaron P. Avila, Wendy L. Blake,
and Mary Kay Lynch.***

Opinion of the Board by Judge Avila:

On October 26, 2023, Protect PT and Three Rivers Waterkeeper (collectively, “Petitioners”) filed a petition with the Environmental Appeals Board (“Board”) seeking review of an Underground Injection Control (“UIC”) permit decision by the U.S. Environmental Protection Agency, Region 3 (“Region”). The Region issued a UIC Class II-D permit to Penneco Environmental Solutions, LLC (“Penneco”), authorizing Penneco to construct and operate a commercial disposal injection well, Sedat #4A, API # 37-003-21644, for the purpose of injecting fluids produced solely in association with oil and gas production. Region 3, U.S. EPA, *Underground Injection Control Permit Number PAS2D702BALL Authorization to Operate a Class II-D Injection Well*, at 1 (signed Sept. 19, 2023) (“Permit”). Petitioners challenge the Region’s compliance with article 1, section 27 of the Pennsylvania Constitution, state and federal laws, and environmental justice protections. Petition for Review by Protect PT and Three Rivers Waterkeeper 1 (Oct. 26, 2023) (“Pet.”).

On November 6, 2023, Penneco filed a motion to dismiss the petition as untimely. Motion to Dismiss the Petition for Review 1 (Nov. 6, 2023) (“Mot. to Dismiss”). Petitioners opposed the motion, arguing that information the Region provided caused them confusion regarding the correct deadline for filing a petition with the Board. *See* Petitioners’ Response in Opposition to Penneco’s Motion to Dismiss the Petition for Review 2 (Nov. 20, 2023) (“Pet’rs Resp.”). The Board issued an order requesting clarification from the Region on its position on the motion to dismiss and on its communications related to the final permit decision with Petitioners and the public. Order Requesting Clarification from U.S.

Environmental Protection Agency Region 3 (EAB, Dec. 14, 2023). The Region filed a brief and supporting materials responding to the Board's order. Region 3's Response to an Order Requesting Clarification from U.S. Environmental Protection Agency Region 3 (Dec. 20, 2023) ("Region's Clarification"). Upon review of the record and parties' submissions, the Board denies the motion to dismiss.

I. BACKGROUND

On May 26, 2022, the Region issued a public notice requesting comment and offering the opportunity for a public hearing on the proposed issuance of the UIC permit to Penneco. Region 3, U.S. EPA, *Responsiveness Summary to Public Comments for the Issuance of an Underground Injection Control (UIC) Permit for Penneco Environmental Solutions, LLC*, at 1 (emailed on Sept. 21, 2023) ("Resp. to Cmts."). The Region held two public hearings at which it received oral comments. *Id.* Protect PT attended one of the hearings and provided oral comments, and both Petitioners submitted written comments to the Region by the September 7, 2022, comment period deadline. Pet. at 2-3; *see* Resp. to Cmts. at 1. The Region signed the final permit on September 19, 2023. Permit at 1. The permit stated that it "shall become effective 35 days after the date of signature," *id.*, which set the effective date as October 24, 2023.¹ On September 21, 2023, the Region sent an email notifying Petitioners (and many others) of its final permit decision. Email from Ryan Hancharick, Life Scientist, U.S. EPA Region 3 to Petitioners (Sept. 21, 2023) (filed with Pet'rs Resp. as exs. A-B) ("Sept. 21, 2023 Email"). The body of the email states in full:

Attached is the U.S. Environmental Protection Agency's (EPA) Response to Public Comments submitted to EPA during the Public Comment period for the issuance of EPA Permit # PAS2D702BALL for Sedat #4A disposal injection well located in Allegheny County, Pennsylvania.

A final permit has been issued to Penneco Environmental Solutions effective October 26, 2023. The permit shall remain in effect for 10 years. The permit has been attached for your review.

The Final Permit and Response to Comments document are being posted on EPA's website for public review.

¹ The Region stated that the effective date of the final permit decision was stayed due to the Petitioners' appeal. Region's Clarification at 4 n.1.

Id. (link omitted). There is no reference in the email to procedures for appealing the final permit decision. The email attached two documents—the final permit and the response to comments document. The response to comments document, entitled, “Responsiveness Summary to Public Comments for the Issuance of an Underground Injection Control (UIC) Permit for Penneco Environmental Solutions, LLC,” explains that it provides answers to questions and responses to comments raised by commenting individuals and entities. Near the very end of the forty-two-page document, there is a reference to appeal procedures for filing a petition for review, stating in part, “A petition for review must be filed within thirty (30) days of the date of the notice announcing EPA’s decision. This means that the EAB must receive the petition within 30 days.” *Resp. to Cmts.* at 40. As discussed below, this statement is inaccurate and does not constitute the notice required under 40 C.F.R. § 124.15(a).

In the Region’s clarification, it admits to making several incorrect statements in the course of their communications with Petitioners concerning the final permit decision. *See* Region’s Clarification at 5, 7. The Region acknowledges that it mistakenly provided an incorrect permit effective date and an incorrect comment period closing date to Petitioners. *Id.* The September 21, 2023 email the Region sent notifying Petitioners of the final permit decision incorrectly stated that the effective date of the permit was October 26, 2023, as opposed to October 24, 2023. *See* Sept. 21, 2023 Email.

Additionally, the Region acknowledges that the EPA website (to which the Region’s September 21, 2023 email linked) incorrectly stated that comments for the permit were due on October 26, 2023, *see* Pet’rs *Resp.* ex. C, rather than September 7, 2022, the date on which the comment period actually closed. Region’s Clarification at 7-8; *see* *Resp. to Cmts.* at 1. The Region states that it “will work to make sure that all future notices for permit actions are clear about the nature of the actions.” Region’s Clarification at 8.

II. ANALYSIS

In assessing the motion to dismiss, we turn first to the regulatory provisions that establish the time period for filing a petition for review with the Board and Board precedent addressing those provisions. We next turn to whether Petitioners were properly provided notice of the procedures for appealing the Region’s permit decision. For the following reasons, the motion to dismiss is denied.

A. *Relevant Regulations and Board Decisions*

The regulations provide that “[a] petition for review must be filed with the Clerk of the Environmental Appeals Board within 30 days after the Regional Administrator serves notice of the issuance of a * * * UIC * * * final permit decision *under § 124.15.*” 40 C.F.R. § 124.19(a)(3) (emphasis added).² And section 124.15(a) specifies that “[t]he Regional Administrator shall notify the applicant and each person who has submitted written comments or requested notice of the final permit decision” and that such notice “*shall* include reference to the procedures for appealing a decision on a * * * UIC * * * permit under § 124.19 of this part.” *Id.* § 124.15(a) (emphasis added). In short, the regulations require a permitting authority to serve a notice of the final permit decision on certain entities, including those (like Petitioners here) who submitted written comments, and that notice shall include reference to the procedures for appealing the permit decision under 40 C.F.R. § 124.19. *See id.*

Indeed, the Board has explained that there is an integral relationship between the permit issuer’s notice of a final permit decision (40 C.F.R. § 124.15(a)) and the appeal rights of a party that has participated in the permitting proceedings (40 C.F.R. § 124.19(a)(3)). *In re Hillman Power Co., L.L.C.*, PSD Appeal Nos. 02-04, 02-05 & 02-06, at 4 (EAB May 24, 2002) (Order Directing Service of PSD Permit Decision on Parties that Filed Written Comments on Draft PSD Permit, Denying Motions to Dismiss, and Directing Briefing on the Merits). The thirty-day period to file a petition for review is triggered when the “Regional Administrator serves notice of the issuance of a * * * UIC * * * final permit decision

² Petitioners argue that the deadline for filing a petition for review was extended because of the Region’s statement in the September 21, 2023 email that the effective date of the permit was October 26, 2023. Pet’rs Resp. at 1-2. This argument fails because the permit’s effective date and the deadline for filing petitions for review are separate concepts with different regulatory bases. Although the effective date of the permit may be the same date as the appeal filing deadline, the regulations do not require these to be the same date. *Compare* 40 C.F.R. § 124.19(a)(3) (“A petition for review must be filed * * * within 30 days after * * * [service of] notice * * *.”), *with* 40 C.F.R. § 124.15(b) (“A final permit decision * * * shall become effective 30 days after the service of notice unless: (1) [a] later effective date is specified in the decision * * *.”). In addition, even if the Regional Administrator extended the permit’s effective date, as was done here, the Regional Administrator has no authority under the regulations to extend the appeal filing deadline under section 124.19(a). *Compare* 40 C.F.R. § 124.19(a)(3) (2013), *with* 40 C.F.R. § 124.19(a) (2000). So, the appeal filing deadline was not, and could not, be extended beyond the regulatory deadline by the Regional Administrator.

under § 124.15.” 40 C.F.R. § 124.19(a)(3) (emphasis added).³ There is an express regulatory linkage between the section 124.15 notice and the commencement of the thirty-day period for filing petitions with the Board under section 124.19. So, section 124.15’s requirement for proper service and notification of the section 124.19 appeal procedures is imperative to protect appeal rights.

The Board has recognized the important aspects of at least two parts of these regulations. First, the Board has explained the importance of “service” of the notice under section 124.15(a) and providing personal notification. *Hillman Power*, PSD Appeal Nos. 02-04, 02-05 & 02-06, at 4-7. The *Hillman* order highlighted the importance of proper notice given the “integral relationship” between notification of a final permit decision and the appeal filing deadline. *Id.* at 4. The Board noted that although the part 124 regulations do not explicitly state the method of service by which notice of a final permit decision must be given, posting a final permit decision online instead of through direct notification to the entities required to receive that notice under section 124.15(a) fails to value the “integral relationship” between the notice requirement of section 124.15(a) and the appeal procedures of section 124.19. *Id.* Among other things, attempting to serve notice online wrongly assumes that everyone entitled to notification has access to the internet and “puts the onus on the interested party to continually check for permit agency developments.” *Id.* The Board concluded that the posting of a permit decision on a website does not meet the requirements of part 124 and remanded to the Region. *Id.* at 3-6.

Second, the Board has emphasized the need for the notice under section 124.15(a) to be complete, including the required reference to the procedures for appealing the permit decision under 40 C.F.R. § 124.19. *In re Laidlaw Env'tl. Services (TOC), Inc.*, RCRA Appeal No. 92-20, at 4 (EAB Aug. 19, 1992) (Order Denying Motion to Dismiss). In *Laidlaw*, another EPA Region filed a motion to dismiss a petition for review filed by five citizens as untimely. *Id.* at 1. The Board denied the motion because “the [Region’s] notice failed to include any reference to the Agency’s appeal procedures as required by §124.15(a)” and accordingly the

³ Part 124 regulations extend the standard thirty-day appeal filing time period in limited circumstances, including where the appeal filing deadline falls on a weekend or legal holiday, the time period to file a petition for review is extended to the next working day. 40 C.F.R. § 124.20(c). Also, if service of notice is by mail, three days are added to the thirty-day time period. *Id.* § 124.20(d).

“notice was not effective and therefore did not trigger the 30-day time period for filing an appeal.” *Id.* at 4.

We now turn to whether the Region’s notice in this case met the requirements of section 124.15(a) and thus whether the thirty-day period for filing petitions has begun to run.

B. The Region Did Not Provide Proper Notice of the Appeal Procedures Required Under 40 C.F.R. § 124.15(a)

According to the Region, it provided Petitioners with the notice the regulations require by sending Petitioners the September 21, 2023 email with the attached final permit and response to comments document, the latter of which “contained a recitation of the procedures for an interested party to appeal a final permit decision.” Region’s Clarification at 3-4. We disagree. Although the Region’s September 21, 2023 email (set forth in its entirety above) provided notice of the permit decision, the permit, and the Region’s response to comments document, that email was at best incomplete because it did not “include reference to the procedures for appealing a decision” on a UIC permit, which is expressly required by section 124.15(a).⁴ *See* 40 C.F.R. § 124.15(a).

The Region argues that the “message [in the body of the email] and attachments should be considered as one [notice] because they were sent together.” Region’s Clarification at 2. We again disagree. The response to comments document is not the notice set forth in section 124.15(a). Moreover, the language regarding appeal procedures is inaccurate.

The issuance of the response to comments is a regulatory requirement under 40 C.F.R. § 124.17 that is distinct from, and serves a different purpose than, the notice required by 40 C.F.R. § 124.15. *In re ConocoPhillips Co.*, 13 E.A.D. 768, 777 (EAB 2008); *compare* 40 C.F.R. § 124.17 *with* 40 C.F.R. § 124.15. Specifically, “[a]t the time that any final permit decision is issued under § 124.15, the [permitting authority] shall issue a response to comments” and that “response shall: (1) Specify which provisions, if any, of the draft permit have been changed in the final permit decision, and the reasons for the change; and (2) Briefly describe and respond to all significant comments on the draft permit * * * raised during the

⁴ Although the notice was incomplete, service here was proper because the Region sent notification of the final permit decision to the Petitioners by email on September 21, 2023, consistent with *Hillman*. *See* Region’s Clarification at 3; Sept. 21, 2023 Email; 40 C.F.R. § 124.15(a).

public comment period, or during any hearing.” 40 C.F.R. § 124.17(a) (emphasis added). The primary purposes of the response to comments are to provide the rationale for the final permit decision and to inform the public of the changes between the draft and final permit and the reasons for the changes as well as provide the permit issuer’s response to all significant comments. *In re U.S. Dep’t of Energy and Triad Nat’l Sec’y, L.L.C.*, 18 E.A.D. 797, 811 (EAB 2022) (“[T]he response to comments document is an appropriate vehicle for the Region to provide its rationale for a final permitting decision. Indeed, that is precisely the purpose of the response to comments document.” (quoting *In re City and Cty. of San Francisco*, 18 E.A.D. 322, 369 n.38 (EAB 2020)); *In re Atochem N. Am., Inc.*, 3 E.A.D. 498, 499 (Adm’r 1991) (“One purpose of requiring the Region to issue a response to comments at the time of permit issuance is to ensure that such comments are given serious consideration during the course of the permit-writing process.”)).

Additionally, although the response to comments document must be issued at the same time as the permit decision, *In re Chevron Mich., LLC*, 15 E.A.D. 799, 807 (EAB 2013) (citing 40 C.F.R. § 124.17(a)), the Board has found that neither section 124.15 nor section 124.17 require the response to comments to be included with the notice of the final permit decision served. *ConocoPhillips*, 13 E.A.D. at 777. Thus, both part 124 regulations and previous Board decisions support the finding that the response to comments is not designed or calculated to provide notice of appeal rights and accordingly there is no reason a member of the public would (or should be expected to) look there to find the regulatorily required notice of appeal rights.

Further, based on the language of part 124 and principles discussed in *Hillman* and *Laidlaw*, commenters should be able to find reference to their appeal rights within the body of a cover email, cover letter, or cover message providing notice of the final permit decision. Potential petitioners should not have to discover their right to file a petition for review by combing through the entirety of all attachments provided to them. Indeed, response to comment documents may consist of several volumes of documents. In this case, the only reference to appeal procedures sent directly to Petitioners was on page forty of a forty-two-page response to comments (and, as discussed below, even that reference was incorrect).

The Board therefore concludes that referencing appeal procedures in an attachment rather than in the body of the notice (e.g., a cover letter or email notifying potential petitioners of the final permit decision) contravenes the section 124.15(a) requirement that the notice must reference section 124.19 appeal procedures. Our decision is based on the language of section 124.15(a) and is reinforced by the “integral relationship” between the notice of the right to appeal

and the filing deadline. Our decision further comports with the intent of the regulations as well as principles of transparency and good governance. Moreover, as a practical matter, providing a reference to appeal procedures in the body of the letter or email notifying potential petitioners of the final permit decision can help avoid any confusion concerning the proper appeal procedures.

The Region having failed to serve Petitioners with the required notice, as specified in 40 C.F.R. § 124.15(a), the time for filing an appeal never began to run, and we therefore deny the motion to dismiss the petition as untimely.⁵ The Region is ordered to provide notice of the issuance of the final permit decision in accordance with the requirements of 40 C.F.R. § 124.15(a) on or before March 11, 2024. Any additional appeals may then be filed pursuant to the requirements of 40 C.F.R. § 124.19. But as to Petitioners here, we see no need to remand for the Region to provide these Petitioners notice and will adjudicate the merits of their petition. *See Laidlaw*, RCRA Appeal No. 92-20, at 4 (“The Agency has allowed petitions to be filed beyond thirty days where the untimeliness was attributable to erroneous appeal advice provided for in the notice of final permit decision. The same result should apply when the Region fails to meet the requirements of §124.15(a). Accordingly, rather than remand this matter * * * we will simply treat the petitions as timely.” (citations omitted)).

C. Additional Erroneous Statements Made by the Region Regarding Appeal Procedures

As set forth above, we have concluded that the Region’s failure to provide the regulatorily required notice mandates denial of the motion to dismiss. In order

⁵ Petitioners and the Region suggest that the Board utilize its discretion to relax the filing deadline under a finding of “good cause” in light of the erroneous information provided by the Region and accordingly deny the motion to dismiss. *See* 40 C.F.R. § 124.19(n) (“[F]or good cause, the Board may relax or suspend the filing requirements prescribed by these rules or Board order.”). In situations “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.” *In re Florence Copper, Inc.*, UIC Appeal No. 17-04, at 1 (EAB March 3, 2017) (Order Setting Deadline for Response to Motion, Staying Response to Petition, and Denying Motion for Extension of Time to File Response) (internal citations omitted). Penneco argues that the erroneous information does not qualify as a “special circumstance” under current Board case law. Mot. to Dismiss at 4-5. Because the Board denies the motion to dismiss for the reasons discussed above, the Board need not, and does not, reach the merits of the special circumstances argument.

to help ensure that proper notice is given going forward, we note that the Region mischaracterized or misstated the appeal procedures in several places. First, the regulatory language concerning the appeal procedures is incorrectly paraphrased in the response to comments. The response to comments document states that “[a] petition for review must be filed within thirty (30) days of the *date of the notice announcing* EPA’s decision.” Resp. to Cmts. at 40 (emphasis added). However, section 124.19 states that “[a] petition for review must be filed * * * within 30 days after the Regional Administrator *serves notice* of the issuance of a * * * UIC * * * final permit decision.” 40 C.F.R. § 124.19(a)(3) (emphasis added).

According to the Region, “announcing” the final permit decision by sending the response to comments document with the September 21, 2023 email was adequate “[b]ecause the Region used email to serve notice of its final permit decision, [so] the 30 days did run from the date the Region announced its permit decision.” See Region’s Clarification at 6. The Region therefore concludes that the language in the response to comments is the “functional equivalent” of 40 C.F.R. § 124.15(a). *Id.*⁶ Above we reject the Region’s reliance on the response to comments document as meeting the requirements of section 124.15(a). We also reject the Region’s attempt to equate its language describing the appeal timeframe as running from the date of the Region “announcing” its permit decision with the term used in the regulation—the date the Regional Administrator “serves” its notice. A public announcement is not the service of notice required by section 124.19(a)(3). See *Hillman Power*, PSD Appeal Nos. 02-04, 02-05 & 02-06 at 4. An announcement is broader than service and can include a myriad of actions, including posting public notices to the agency’s website, and other forms of announcement that put the burden of discovery on the public. Adding to the confusion, the Region uses the term “announce” with regard to its use of the national EPA website to post information about public comment periods and issuance of permits. See Region’s Clarification at 7 (“EPA utilizes national public web sites to announce, for among other things, the start of public comment periods for draft permits and issuance of final permit decisions.”). The announcement of permit decisions and the use of websites is not notice under section 124.15(a).

⁶ Whether the dates of announcement and service in this case ended up being the same is happenstance and immaterial. For the reasons discussed above, we have concluded that the notice was deficient under section 124.15(a). Further, to the extent the Region stated appeal procedures elsewhere, the language is misstated, confusing, and lacks transparency.

The appeal procedures were also incorrectly stated on EPA’s website. *See* Region’s Clarification attach. 4. The appeal procedures displayed on the website stated that “[a]nyone who submitted a written comment during the public comment period or provided oral comments during the public hearing has 30 days from the *permit issuance date* to file a petition for appeal with the EPA Environmental Appeals Board.” *Id.* (emphasis added). This incorrectly states the regulatory language, which provides that petitions for review be filed “within 30 days after the Regional Administrator *serves notice* of the issuance of a * * * UIC * * * final permit decision.” 40 C.F.R. § 124.19(a)(3) (emphasis added). In fact, here, there was a two-day delay between signature of the final permit and notice of the issuance of the final permit. Although a website announcement cannot satisfy the Region’s obligation under section 124.15(a), the incorrect appeal date on the Region’s website highlights the confusion of dates and triggering events for filing a petition with Board prevalent throughout this case. The Board is ordering the Region to provide notice of the issuance of the final permit decision due to its failure to comply with 40 C.F.R. § 124.15(a). In doing so, the Region should ensure it avoids the other errors described above.

III. CONCLUSION

The notice the Region sent to Petitioners was incomplete and did not meet the requirements of 40 C.F.R. § 124.15(a); accordingly, the thirty-day time period for filing an appeal was never triggered. Thus, the Board denies the motion to dismiss and will review the petition on its merits.

It is therefore ORDERED:

- (a) The Motion to Dismiss the Petition for Review is DENIED;
- (b) The Region must file its response to the petition, a certified index of the administrative record, and the relevant portions of the administrative record on or before April 15, 2024, *see* 40 C.F.R. § 124.19(b)(2);
- (c) Penneco must file its response to the petition on or before April 15, 2024, *see* 40 C.F.R. § 124.19(b)(3);
- (d) The Petitioner must file its reply brief, if it chooses to file one, within fifteen days after service of the responses, *see* 40 C.F.R. § 124.19(c)(2); and
- (e) The Region must provide notice of the issuance of the final permit decision in accordance with all of the requirements of section 124.15(a) on or before March 11, 2024.

So ordered.