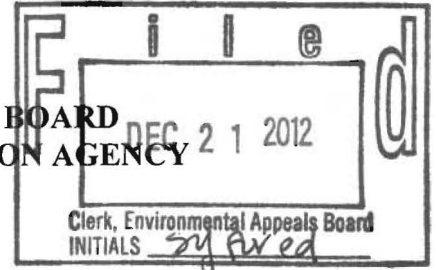


**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**



_____))
In re:))
Sierra Pacific Industries) PSD Appeal No. 12-03
PSD Permit No. SAC 12-01))
_____)

**ORDER DISMISSING PETITION FOR REVIEW WITHOUT PREJUDICE AS
PREMATURELY FILED**

On October 15, 2012, Citizens for Clean Air (“CCA”) filed a petition for review with the Environmental Appeals Board (“Board”) challenging U.S. Environmental Protection Agency (“Agency”) Region 9’s (“Region’s”) denial of its request for a public hearing on the proposed Prevention of Significant Deterioration (“PSD”) permit modification for Sierra Pacific Industries’ cogeneration plant in Anderson, California. *See* Notice of Appeal (“Petition”). For the reasons discussed below, the Board dismisses CCA’s petition for review without prejudice because it was prematurely filed.¹

I. BACKGROUND

On September 12, 2012, the Region provided notice of, and requested comment on, a proposed major modification of the PSD permit for Sierra Pacific Industries’ existing Anderson

¹ At the same time it filed its petition, CCA also filed a motion with the Board requesting an extension of time in which to file an appeal brief further addressing the issue it raised in its petition. *See generally* Motion of Extension of Time to File Appeal Brief. The Board stayed CCA’s motion. *See* Order to Show Cause Why Petition Should Not Be Dismissed Without Prejudice as Prematurely Filed at 3 (Oct. 24, 2012). Because the Board dismisses CCA’s petition for review as prematurely filed, the Board denies CCA’s motion for an extension of time as moot.

facility. U.S. EPA, Region 9, Public Information Sheet Overview, SPI-Anderson Proposed Clean Air Act Permit Modification at 1 (Sept. 2012), *available at* <http://www.epa.gov/region9/air/permit/r9-permits-issued.html>. The proposed major modification was for the construction and operation of “an additional cogeneration unit capable of generating 31 MW of gross electrical output from the combustion of clean cellulosic biomass.” *Id.* The comment period was scheduled to run through October 17, 2012. *Id.*; *see also* Motion of Extension of Time to File Appeal Brief (“Motion”) at 1; U.S. EPA, Region 9, Public Notice Announcement of Proposed Permit Modification and Request for Public Comment on Proposed Clean Air Act PSD Permit Application No. SAC 12-01 at 2 (Sept. 12, 2012), *available at* <http://www.epa.gov/region9/air/permit/r9-permits-issued.html>.

During the public comment period, CCA requested that the Region hold a public hearing on the proposed permit, a request which, according to CCA, the Region denied on October 1, 2012. Motion at 1; Petition at 1. Notably, CCA filed its appeal of the Region’s decision denying CCA’s request for a public hearing with the Board on October 15, 2012, two days before the public comment period was scheduled to end. Because it appeared likely that Petitioner had filed its petition prior to the Region’s issuance of a *final* permit decision, the Board issued an order directing CCA to show cause why its petition should not be dismissed without prejudice as prematurely filed. Order to Show Cause Why Petition Should Not Be Dismissed Without Prejudice as Prematurely Filed (“Show Cause Order”) at 3. The Board further directed CCA to provide, in its response, an explanation of how or why the Board has jurisdiction to hear CCA’s appeal at this time. *Id.* CCA’s response was due on November 20, 2012. *Id.* The Order also stated that the Region could file a response if it chose to do so. *Id.*

CCA filed a response to the show cause order on November 18, 2012. The Region did not file a brief.

II. DISCUSSION

In determining whether to grant review of a petition filed under 40 C.F.R. § 124.19(a), the Board first considers whether the petitioner has met threshold pleading requirements such as timeliness, standing, and issue preservation. *See* 40 C.F.R. § 124.19; *In re Beeland Group LLC*, UIC Appeal No. 08-02, slip op. at 8 (EAB Oct. 3, 2008), 14 E.A.D. ___; *In re Indeck-Elwood, LLC*, 13 E.A.D. 126, 143 (EAB 2006); *In re Avon Custom Mixing Servs., Inc.*, 10 E.A.D. 700, 704-08 (EAB 2002); *In re Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 5 (EAB 2000). The Board also must consider whether the permit decision is ripe for challenge. Under the Agency's permitting regulations, a person may file a petition for review with the Board "[w]ithin 30 days after a * * * PSD *final permit decision* * * * has been issued under § 124.15." 40 C.F.R. § 124.19(a) (emphasis added). Under section 124.15, the Region issues a "final permit decision" at some point in time after the close of the comment period. *See id.* § 124.15(a). When issuing the final permit decision, the Region must provide final notice of its decision and also must issue a response to the comments it received during the public comment period. *Id.* §§ 124.15(a), 124.17(a).

As noted above, CCA filed its petition for review before the comment period for the *proposed* permit ended and consequently before the Region issued a final permit decision. Thus, CCA did not file its petition within thirty days after a final permit decision as section 124.19(a) requires.

In its petition, CCA challenges the Region's denial of CCA's public hearing request under the "Environmental Justice Guidelines" and the Clean Air Act, with no explanation of why these provisions would authorize the Board to consider an appeal prior to the issuance of a final permit decision. Petition at 1. In its response to the Board's show cause order, CCA provides additional argument and explanation for its claim that the Region erred in declining to hold a public hearing and also cites additional authorities in support of its petition, the Administrative Procedure Act, 5 U.S.C. §§ 551-559, and Executive Orders 12898 and 13563. CCA, however, does not point to anything in its further explanations or additional references that would provide any basis for authorizing the Board to consider a petition for review at this time, i.e., prior to the Region's issuance of a final permit decision.²

Based on CCA's statements and the permitting authority's Web site, and in light of the part 124 regulations, the Board concludes that CCA has filed its petition prematurely in this matter. CCA's claims, therefore, are not yet ripe for review, and its petition must be dismissed.

See In re MHA Nation Clean Fuels Refinery, NPDES Appeal Nos. 11-02 through 11-04 & 12-03,

² CCA, in its response to the Board's show cause order, explains that it purposely appealed the Region's "final decision" to deny its public hearing request within 30 days of the Region's denial to ensure that it timely appealed that decision. Resp. to Order to Show Cause at 4. As indicated below in Part III, CCA may raise this issue in an appeal to the Board that is timely filed once the Region issues a final permit decision on Sierra Pacific Industries' permit modification (i.e., a petition is filed within 30 days after a PSD final permit decision has been issued under 40 C.F.R. § 124.15). *See* 40 C.F.R. § 124.19(a). If CCA timely raises the issue at that time, its challenge to the public hearing denial will not be time-barred. (Of course, all other threshold pleading requirements also must be met for the Board to review the petition at that time, such as a showing why any response from the Region regarding Petitioner's comment is inadequate.) The Board has considered challenges to public hearing procedures in appeals that were timely filed after the issuance of a final permit decision, and such challenges were not time-barred because the public hearing issue had occurred more than 30 days prior to the appeal. *See, e.g., In re Shell Offshore, Inc.*, OCS Appeal Nos. 11-05, 11-06, & 11-07, slip op. at 95-100 (EAB Mar. 30, 2012), 15 E.A.D. ___ (considering petitioner's challenges to public hearing procedures where public hearing had occurred in August 2011 and petition was timely filed in November 2011).

slip op. at 17 (EAB June 28, 2012), 15 E.A.D. ____ (“A petition challenging the permit modification proceedings will only be ripe for Board review after the permit issuer issues a final permit decision.”); *In re Ariz. Mun. Stormwater NPDES Permits*, 7 EAD 646, 651 (EAB 1998) (dismissing challenges to permit conditions that permit issuer had withdrawn and modified in response to petition as not yet ripe for Board review), *petition for review denied sub nom. Defenders of Wildlife v. Browner*, 191 F.3d 1159 (9th Cir. 1999); *cf. In re Envtl. Disposal Sys., Inc.*, UIC Appeal No. 07-01, at 3-4 (EAB July 11, 2007) (Order) (dismissing petition brought under 40 C.F.R. § 124.5 as prematurely filed where the underlying permit process was not yet completed). Importantly, even though the Region appears to have denied CCA’s request, the Region still could decide in response to public comments to hold a public hearing before issuing a final permit decision. The regulations do not permit a challenge to the Region’s denial until the Region has had an opportunity to consider and respond to public comments and a final permit decision has been issued.

Finally, the Board notes that it carefully considers environmental justice concerns when a petition appropriately raises them. *See, e.g., In re Shell Gulf of Mex., Inc.*, OCS Appeal Nos. 10-01 through 10-04, slip op. at 63-81 (EAB Dec. 30, 2010), 15 E.A.D. ____; *In re EcoEléctrica, LP*, 7 E.A.D. 56, 67 n.14 (EAB 1997) (explaining that the Board “takes a broad view of the reference to environmental justice,” especially when raised by a non-attorney); *In re Chem. Waste Mgmt. of Ind., Inc.*, 6 E.A.D. 66, 75-76 (EAB 1995) (articulating Board’s authority to review Executive Order concerning environmental justice and encouraging regions to examine any “superficially plausible” claim that a minority or low income population may be disproportionately affected by a particular facility). Insofar as CCA is raising claims under

“Environmental Justice Guidelines” and/or Executive Orders related to environmental justice with respect to a denial of its request for a hearing, the appropriate time to raise those challenges is also via a timely appeal of the Region’s final permit decision on Sierra Pacific Industries’ permit modification request. As the Board has explained in previous cases, environmental justice concerns have been considered in connection with the underlying claims to which they relate. *Cf. In re Hess Newark Energy Ctr.*, PSD Appeal No. 12-02, at 7 n.10 (EAB Nov. 20, 2012) (Order Dismissing Petition) (denying review of independent environmental justice claim, to the extent one was raised, as it was premised on underlying substantive claim which was dismissed for lack of jurisdiction); *In re Russell City Energy Ctr., LLC*, PSD Appeal Nos. 10-01 through 10-05, slip op. at 127 n.116 (EAB Nov. 18, 2010), 15 E.A.D. ____ (dismissing environmental justice claim at same time underlying substantive claim was dismissed as moot where environmental justice claim was an offshoot of the substantive claim). Thus, the Board does not reject the environmental justice concerns here as unimportant, but it is too soon to consider them. The Board’s dismissal of CCA’s petition should not be read in any way as a determination on the substantive merits of CCA’s claim.³

III. CONCLUSION

Based on the foregoing, the Board concludes that CCA’s petition for review, PSD Appeal No. 12-03, was filed prematurely and thus must be dismissed at this time. The Board dismisses

³ In its response to comments document, the Region should provide a well-reasoned explanation of why it declined the citizen group’s request for a public hearing in light of the statute and regulations and how it took the environmental justice Executive Order into account. In particular, see CAA § 165(a)(2), 42 U.S.C. § 7475(a)(2).

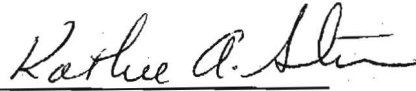
CCA's petition without prejudice. Petitioner therefore is not precluded from filing a petition for review raising this issue within thirty days of the Region's *final* permit decision.

So ordered.⁴

ENVIRONMENTAL APPEALS BOARD

Date:

December 21, 2012



Kathie A. Stein
Kathie A. Stein
Environmental Appeals Judge

⁴ The three-member panel deciding this matter is composed of Environmental Appeals Judges Leslye M. Fraser, Catherine R. McCabe, and Kathie A. Stein. *See* 40 C.F.R. § 1.25(e)(1).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Petition for Review Without Prejudice as Prematurely Filed in the matter of the Sierra Pacific Industries, PSD Appeal No. 12-03, were sent to the following persons in the manner indicated:

By Pouch Mail:

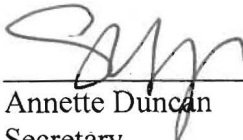
Nancy J. Marvel, Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
San Francisco, CA 94105

By First Class Mail:

Ed W. Coleman
Co-Coordinator
Citizens for Clean Air
P.O. Box 1544
Shasta Lake City, CA 96019

Sierra Pacific Industries
P.O. Box 496028
Redding, CA 96049-6028

Dated: 12/21/12

 for Annette Duncan
Annette Duncan
Secretary

CC by Inter-Office Mail:

Brian L. Doster
Air and Radiation Law Office (MC 2344A)
Office of General Counsel
U.S. EPA
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460