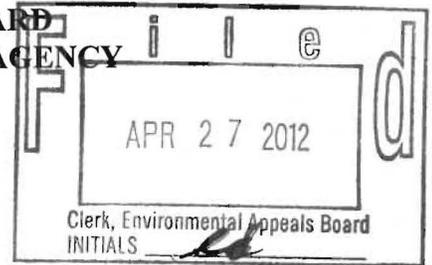


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



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In re: Palmdale Hybrid Power Plant)
)
PSD Permit No. SE 09-01)
)
)
)

PSD Appeal No. 11-07

ORDER DENYING MOTION TO INTERVENE

On March 20, 2012, Jane Williams filed a motion with the Environmental Appeals Board (“Board”) requesting leave to intervene in the above-captioned Prevention of Significant Deterioration (“PSD”) permit appeal, which was filed on November 17, 2011.¹ For the reasons explained below, the Board denies Ms. Williams’ motion.

¹ The Clerk’s record of this filing indicates that Ms. Williams’ motion, although signed by Ms. Williams, was electronically filed by Petitioner Rob Simpson, purportedly as a courtesy to Ms. Williams. Both Ms. Williams and Mr. Simpson should be aware that the use of the Board’s electronic filing system (currently “CDX”) constitutes more than simply electronic submission of the document. Filing through CDX also meets the signature requirement for all purposes under the relevant regulations governing the case that is being appealed. *See* Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Not Governed by 40 C.F.R. Part 22 (“*Order Authorizing E-Filing*”) at 3 (Jan. 28, 2010); EAB Practice Manual at 12 n.9 (Sept. 2010). Additionally, “by filing a document through the CDX system, a party, or its attorney or other representative, represents that the signatory [(i.e., the person filing through CDX)] has read the document, that to the best of his or her knowledge the statements made therein are true, and that the document is not interposed for delay.” *Order Authorizing E-Filing* at 3; *see also* EAB Practice Manual at 12 (instructing parties wishing to electronically file documents to register with CDX). Because Ms. Williams signed her own motion, the Board will accept her signature over Mr. Simpson’s electronic signature in this instance. In any future filings with this Board, however, unless Mr. Simpson is representing Ms. Williams, Mr. Simpson must reserve the use of his CDX account for his own filings, and Ms. Williams should obtain her own account for her own use. In the alternative, Ms. Williams may forego electronic filing and file her documents by mail. *See* EAB Practice Manual at 14-16.

I. DISCUSSION

A. Procedural Background

In her motion, Ms. Williams requests leave to intervene under 40 C.F.R. § 22.11(a), the section of EPA regulations that governs appeals from civil penalty assessments in enforcement matters. Motion for Leave to Intervene (“Mot.”) at 1. Ms. Williams states that she is “a community member involved with air toxics issues in the region,” lives less than 50 miles from the proposed facility, and participated in the California Energy Commission proceedings for the project. *Id.* She further states that she asked U.S. EPA Region 9 (the “Region”) to extend the public comment period. *Id.* She alleges that she “requested notice for actions on this permit but was not given notice of final issuance of the permit.” *Id.* She also asserts that she raised several issues during the public comment process that the Region failed to address (presumably in the response to comments document the Region filed when it issued the final permit). *Id.* Ms. Williams does not identify the issues she alleges were not addressed, nor does she submit a brief with her motion.

Both the Region and the Permittee (the City of Palmdale) filed oppositions to the motion. The Region requests that the Board deny the motion either as untimely or as moot. Region’s Response to Motion for Leave to Intervene (“Region’s Resp. to Mot.”) at 2, 13. The Permittee requests that the Board deny the motion because it was filed late in the proceedings, is substantively flawed, and does not contain sufficient grounds to justify intervention. City’s Opposition to Jane Williams’ Motion for Leave to Intervene at 1-2.

B. Analysis

There is no regulatory provision that gives Ms. Williams a right to intervene or otherwise participate in this permit appeal. The regulation under which Ms. Williams seeks leave to intervene, 40 C.F.R. § 22.11(a), does not apply to permit appeals, but applies solely to enforcement appeals. *See* 40 C.F.R. § 22.1 (listing part 22 proceedings).² The only provision in EPA's regulations that explicitly authorizes persons other than petitioners to participate in a permit appeal case is section 124.19(c), which authorizes "any interested person" to file an amicus brief in a case where the Board has "granted review." *See* 40 C.F.R. § 124.19(c); *see also* EAB Practice Manual at 45 (Sept. 2010). However, because the Board has not yet granted review in this case, this provision does not authorize Ms. Williams to file a brief in this case.

The Board may exercise its discretion to allow intervention and/or non-party briefing in permit appeal cases where appropriate.³ EAB Practice Manual at 45. For example, the Board typically exercises its discretion to allow permittees not already a party in the proceeding to participate as intervenors.⁴ Upon timely request, the Board has also allowed other entities to

² For example, part 22 applies to EPA proceedings assessing administrative civil penalties under certain provisions of the Clean Air Act, the Toxic Substances Control Act, and the Federal Insecticide, Fungicide, and Rodenticide Act. 40 C.F.R. § 22.1(a)(1), (2), (5).

³ "[I]t is always within the discretion of * * * an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." *Am. Farm Lines v. Black Ball Freight Serv.*, 397 U.S. 532, 539 (1970); *see also In re Peabody W. Coal Co.*, CAA Appeal No. 10-01, slip op. at 7 (EAB Aug. 13, 2010), 14 E.A.D. at ___ ("In the part 124 context, despite the lack of detailed procedures in the regulations, the Board has exercised broad discretion to manage its permit appeal docket by ruling on motions presented to it for various purposes * * * ."); *In re Desert Rock Energy Co., LLC*, PSD Appeal Nos. 08-03 through 08-06, slip op. at 14 n.15 (EAB Sept. 24, 2009), 14 E.A.D. ___ (explaining that Board may interpret its own regulations, when they are silent, in a manner consistent with the terms of part 124 and its purpose).

⁴ *See, e.g., In re Beeland Group, LLC*, UIC Appeal No. 08-01 through 08-03, at 2-3 (EAB
(continued...))

participate in a case for good cause and in appropriate circumstances.⁵ The Board will deny motions to participate in cases where the motion is untimely and the movant fails to provide adequate justification for the delay. *See, e.g., In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06, at 3-4 (EAB May 21, 2009) (Order Denying Motion to Participate) (movant submitted motion more than two months after deadline for amicus motions and failed to provide justification for belated request).

Timeliness is a particularly important factor in the Board's consideration of a request to intervene or to file a brief as amicus curiae in PSD appeals. As the Board has emphasized in previous orders, PSD appeals are time-sensitive because new source construction cannot begin until the permitting agency issues a final permit. Order Governing Petitions for Review of Clean Air Act New Source Review Permits ("*Standing Order Governing NSR Appeals*") at 1 (EAB Apr. 19, 2011); *accord In re Shell Gulf of Mex., Inc.* ("*Shell 2012*"), OCS Appeal Nos. 11-02 through 11-04 & 11-08, slip op. at 73-74 (EAB Jan. 12, 2012), 15 E.A.D. __ (citing CAA § 165(c), 42 U.S.C. § 7475(c)). For this reason, the Board applies a presumption against reply

⁴(...continued)

Mar. 28, 2008) (Order Consolidating Cases, Granting Motion to Intervene, and Granting Extension of Time) (granting intervenor status to permittee); *In re Haw. Elec. Light Co.*, 10 E.A.D. 219, 222 (EAB 2001) (referring to previous order granting permittee's motion to intervene).

⁵ *See, e.g., In re Desert Rock Energy Co.*, at 2-3 (EAB Oct. 14, 2008) (Order Granting Motion to Participate, Motion to File Amicus Curiae Brief, and Motion for Extension of Time to File Responses) (granting Diné Power Authority's motion for leave to participate and National Parks Conservation Association's motion for leave to file an amicus curiae brief). Notably, Diné Power Authority, an instrumentality of the Navajo Nation, had been a sponsor and co-developer of the permit being challenged and had filed its request in a timely fashion so that it could participate on the same briefing schedule as the other parties. *See id.* Similarly, National Parks Conservation Association, who submitted a brief in support of the petitions and whose brief only addressed issues already raised by two of the petitioners, had filed its amicus brief the same day the petitioners filed their supplemental briefs, thereby not adversely impacting the scheduling or timing of the case. *See id.* at 2 & n.1.

briefs, sur-reply briefs, and oral argument in PSD appeals. *Standing Order Governing NSR Appeals* at 3.⁶

Here, Ms. Williams filed her motion four months after the deadline for the filing of petitions for review,⁷ and more than a month after the parties' responses were filed. In contrast, the City's motion requesting leave to intervene as permittee was filed within a month of the filing of the petition.⁸ The case is now fully briefed and under consideration by the Board. Allowing Ms. Williams to intervene or file an additional brief at this late date would cause unacceptable delay in the resolution of this time-sensitive matter.

The Board is unpersuaded by Ms. Williams' excuse for her untimeliness. While Ms. Williams claims that she received no notice of the final permit issuance, Mot. at 1, 3, the administrative record shows that both she and the organizations with which she is affiliated in fact were sent timely copies of the final permit.⁹ See Region's Resp. to Mot. at 2-3; Rios Decl. ¶¶ 9-11 & Exs. F-I.

Moreover, although Ms. Williams has not filed either a copy of the proposed brief she would file or a detailed description of the issues she would raise were she allowed to participate,

⁶ See *Shell 2012*, slip op. at 15-17, 15 E.A.D. at ___ (applying the Board's presumption against reply briefs).

⁷ See 40 C.F.R. § 124.19(a) (requiring petitions to be filed within 30 days of a region's issuance of final permit decision); Final Permit (issued on October 18, 2011).

⁸ Permittee filed a motion requesting it be allowed to intervene in the proceedings on December 5, 2011, which the Board granted on December 9, 2011.

⁹ According to the comment submitted jointly by Desert Citizens Against Pollution and California Communities Against Toxics, Ms. Williams was one of the contact persons for the comment. Region's Resp. to Mot. at 2; Rios Decl. Ex. E, at 2. The Region notified both groups of the Permit's issuance. Region's Resp. to Mot. at 2-3; Rios Decl. ¶¶ 10-11 & Exs. G-I.

her motion indicates that she plans to raise issues that are more appropriately included in a petition for review. For example, she states that her interest in the case is that she “raised several issues in the public comment process for the PSD permit that were not responded to [by Region 9] and are related to the issues at hand in this [appeal].” Mot. at 1. She also refers to her request to the Region that the comment period be extended, *id.* at 2, which the Region denied.¹⁰ See Region’s Resp. to Mot. at 3; U.S. EPA, Response to Public Comments on the Proposed PSD Permit for the Palmdale Hybrid Power Project at 28 n.9 (Oct. 2011) (mentioning a request for an extension of the comment period that it had denied). Both of these issues should have been timely raised in a petition for review and may not be raised belatedly in an intervention motion, motion to participate, intervenor brief, or amicus curiae brief. See, e.g., *In re Dominion Energy Brayton Point LLC*, 12 E.A.D. 490, 595 & n.168, 626 n.215, 651 n.263, 661 n.286 (EAB 2006) (declining to consider issues raised by participants and amici in various responsive briefs, pointing out that those participants could have, and should have, filed petitions for review raising those issues).¹¹

¹⁰ Ms. Williams also states that “[she] and Petitioner raised several similar issues,” Mot. at 1, and that “the only party that could possibly represent some of [her] issues,” is Mr. Simpson, the petitioner in this case, *id.* at 3. These statements likewise imply that the issues she wishes to raise are ones that are typically raised in a petition for review. Her statement that “[a] final order from the Board without [her] participation may impair [her] ability to raise her issues in another forum,” *id.* at 1, further suggests that she wants to raise issues that are more properly raised in a petition.

¹¹ The Board has similarly declined to consider, on numerous occasions, issues petitioners have raised in reply briefs because “[n]ew issues raised for the first time at the reply stage of the[] proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness.” *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999); accord *In re Russell City Energy Ctr.*, PSD Appeal Nos. 10-01 through 10-05, slip op. at 38 n.24, 70-71 & n.63, 73 n.67, 125 n.115, 136 n.128 (EAB Nov. 18, 2010), 15 E.A.D. ____, *appeal docketed sub nom. appeal Chabot-Las Positas Cmty. Coll. Dist. v. EPA*, No. 10-73870 (9th Cir. Dec. 20, 2010); see also *In re City of Ames*, 6 E.A.D. 374, 388 n.22 (EAB 1996) (denying petitioner’s request to file a supplemental brief where the brief was filed after the
(continued...)

Under the Board's rules, a petition filed at this late date would be untimely. In general, the Board strictly construes threshold procedural requirements and "will relax a filing deadline only where special circumstances exist." *In re AES Puerto Rico L.P.*, 8 E.A.D. 325, 329 (EAB 1999), *aff'd*, *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000); *accord Russell City*, at 7 (EAB May 3, 2010) (Order Dismissing Four Petitions for Review as Untimely); *In re Town of Marshfield*, NPDES Appeal No. 07-03, at 4-5 (EAB Mar. 27, 2007) (Order Denying Review). As noted above, the regulations require petitions for review to be filed within 30 days of the Region's issuance of a final permit decision, and Ms. Williams has certainly not demonstrated that special circumstances exist to excuse her filing of a late petition. *See In re Puna Geothermal Venture*, 9 E.A.D. 243, 276-77 (EAB 2000) (denying movant's request for extension of time to file petition unless movant could establish to Board's satisfaction that permit issuer improperly denied him notice of the permit issuance).

II. CONCLUSION AND ORDER

For the above-described reasons, Ms. William's motion for leave to intervene in this PSD appeal is denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: 

Catherine R. McCabe

Environmental Appeals Judge

Dated:

April 27, 2012

¹¹(...continued)

appeal period had passed and raised a related but "distinct" new issue).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Order Denying Motion to Intervene*, PSD Appeal No. 11-07, were sent to the following persons in the manner indicated:

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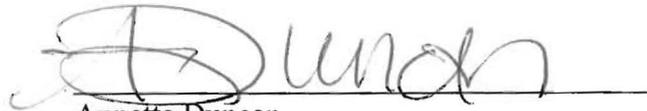
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