

BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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In re:	)	
	)	
Sierra Pacific Industries – Anderson Division	)	PSD Appeal Nos. 14-03, 14-05, 14-06
	)	
PSD Permit No. SAC 12-01	)	
	)	

MOTION FOR CONSOLIDATION AND CLARIFICATION OF DEADLINES

EPA Region 9 moves the Environmental Appeals Board to consolidate and clarify the deadlines for the filing of responses to the petitions for review, the certified index to the record, and excerpts of record in this matter. Three parties have filed petitions for review of the revised Prevention of Significant Deterioration Permit issued to Sierra Pacific Industries by EPA Region 9 on April 25, 2014. Under applicable procedures rules, EPA Region 9 “must file a response to the petition for review, a certified index to the record, and the relevant portions of the administrator record within 21 days after the filing of the petition.” 40 C.F.R. 124.19(b)(1). The permit applicant must file a notice of appearance and response to the petition by the same deadlines. 40 C.F.R. 124.19(b)(3).

According to the Board’s docket, three parties have filed petitions for review of this matter on multiple days. One of these parties has also filed a supplement to her initial petition for review. Section 124.19 of the EPA’s regulations does not address the deadlines or word limits that are applicable when multiple parties file petitions on different days for review of the same matter. To promote order and efficiency in this proceeding and foster clarity, EPA Region 9 requests an order from the Board establishing a deadline of June 17 for Region 9 to file the

certified index to the record and for Region and the applicant to file responses to the petitions for review and relevant portions of the administrative record.

There is a threshold question in this case regarding whether this matter is subject to any review by the Board. In the Board's July 18, 2013 order remanding an earlier iteration of the PSD permit issued by Region 9 to Sierra Pacific Industries, the Board wrote the following:

Once the Region issues a final permit decision following the public hearing required by this remand, that final permit decision and the Board's decision in this case become final agency action subject to judicial review. 40 C.F.R. § 124.19(l). Although an appeal to the Board is a prerequisite to judicial review of an initial final permit decision, *id.* at § 124.19(l)(1), such an appeal is not a prerequisite to judicial review of a final permit decision following a Board remand of a permit decision unless the Board "specifically provides that appeal of the remand decision will be required to exhaust administrative remedies." *Id.* at § 124.19(l)(2)(iii). The Board is not requiring and will not accept, an appeal to the Board on the final permit decisions following remand in this case.

*In re: Sierra Pacific Industries*, PSD Appeal Nos. 13-01, 13-02, 13-03, and 13-04, Slip. Op. at 67. However, the Board's order also noted that it expected Region 9 to consider how to proceed with the permit in light of a July 12, 2013 decision by the United States Court of Appeals for the District of Columbia Circuit which vacated a rule that Region 9 had relied upon to justify omitting any limitation on greenhouse gases from permit. *Id.* at 66. In response to that court decision, Region 9 elected to amend the PSD permit to add a limitation on greenhouse gas emissions. As a result of that action, Region 9 considered it prudent not to preclude interested parties from presenting for consideration by Region 9 and the Board any arguments as to why review to the Board should be available notwithstanding the above-quoted paragraph from the Board's earlier order. Thus, Region 9's public notice regarding its April 25, 2014 action notified interested parties that they may seek to petition the Board for review but also that the Board had earlier stated that it would not accept an appeal of the final permit decision following remand in the earlier case.

On May 27, 2014, Petitioner Center for Biological Diversity (“CBD”) filed a petition that articulated reasons why the Board should consider CBD’s petition addressing only the greenhouse gas limitations in the revised permit. Region 9 has not yet determined its views as to whether the Board should consider the merits of CBD’s petition or whether Region 9 desires to file a document addressing this threshold question prior to the deadline for responses to the petitions for review.

CBD certified that it served its petition on the Region and the permit applicant by United States mail. As a result, under the computation of time rule (40 C.F.R. 124.20), Region 9 understands its deadline for responding to CBD’s petition for review would be June 20, 2014. However, CBD also extended the courtesy of sending a copy of its petition to Region 9 and the applicant via email on the date that it was filed. Although the parties have not at this time reached an agreement to accept service by electronic means, Region 9 does not seek an additional three days here on the basis of the certified method of service of the CBD petition.

The Board’s docket indicates that Petitioner Russ Wade filed his petition for review with the Board electronically on May 24, 2014, which was the Saturday prior to the Memorial Day holiday when the United States Government was closed. Mr. Wade also certified that he served his petition on the Region and permit applicant by fax. Neither section 124.19 nor EPA’s computation of time rule (40 C.F.R. 124.20) address how time is computed when a party files a document electronically or serves it by fax on a weekend or legal holiday. The computation of time rule addresses how time is computed when the final day of a time period falls on such a day, but not when the first day of time period falls on such a day. Region 9 did not receive actual notice of the filed petition until the United States government re-opened, May 27, 2014.

Twenty-one days from the date Region 9 received actual notice of Mr. Wade's petition would be June 17, 2014.

According to the Board's docket, Petitioner Marily Woodhouse filed a petition for review on May 12, 2014. However, Ms. Woodhouse assigned a May 6, 2014 date to her petition and her certification says that she served this petition on the Region and permit applicant by mail. In addition, the Board's docket indicates that Ms. Woodhouse filed a supplement to her petition for review on May 29, 2014, although the supplement is dated May 19, 2014. Ms. Woodhouse certified that she served her supplemental petition by United States mail and email. As noted above, the parties have not as of this time reached an agreement to accept service by electronic means. The Board's regulations do not address the applicable deadline for the filing responses to a petition and related documents in circumstances where a petition is supplemented or amended.<sup>1</sup> Thus, it not presently clear when Region 9 and the applicant must respond to Ms. Woodhouse's petition and supplemental petition.

To promote order and efficiency in this proceeding and clarify the deadline for responding to Ms. Woodhouse, Region 9 requests an order from the Board that aligns the responsive filing deadlines for all three petitions. Assuming the Board's prior order is not preclusive of the proceeding, aligning the filing deadlines would enable the Region to file a single, consolidated response on the same day addressing all three petitions and the supplement by Ms. Woodhouse, and for the permit applicant to do likewise. Because there is some overlap in the issues raised in each petition, addressing all petitions and the supplemental petition in a consolidated response will promote efficiency in the responsive submissions. Given the nature

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<sup>1</sup> Region 9 notes that Ms. Woodhouse's supplemental filing may have been made after the deadline for filing petitions for review of the Region's April 25 action, but Region 9 takes no position at this time as to whether the Board may consider that supplement.

of the issues and the length of the petitions, Region 9 does not request more than 14,000 words to respond to the three petitions and the supplement.

In accordance with section 124.19(f)(2) of EPA regulations, on Friday, May 30, 2014, Region 9 contacted the other parties in this matter to determine whether they concur or object to this motion. The permit applicant, Sierra Pacific Industries, informed Region 9 that it is not opposed to aligning the deadlines for responding to the Petitions for Review. Petitioner Center for Biological Diversity informed Region 9 that it takes no position on the Region's proposal to align the response deadlines to June 17, 2014. Petitioner Marily Woodhouse informed Region 9 that she is fine with the Region's proposal to align the response deadlines to June 17, 2014. Region 9 left a recorded message regarding the proposed date of June 17, 2014 with Petitioner Russ Wade; on Monday, June 2, 2014, Petitioner Wade returned Region 9's call and left a recorded message, but did not provide a response to the proposed date of June 17, 2014. Region 9's subsequent attempt to reach Petitioner Wade by telephone was unsuccessful.

Wherefore, Region 9 moves for an order establishing that Region 9 and the permit applicant may each file a single 14,000-word response to all three petitions for review by June 17, 2014, to be accompanied by relevant excerpts of the record. Region 9 also requests leave to file the certified index to the record on June 17, 2014.

Date: June 2, 2014

Respectfully Submitted,

*/s/ Kara Christenson*

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**CERTIFICATE OF SERVICE**

I hereby certify that I caused a copy of **EPA Region 9's Motion for Consolidation and Clarification of Deadlines** in the matter of Sierra Pacific Industries, Inc. EAB Appeal Nos. PSD 14-03, 14-05, and 14-06 to be served upon the persons listed below by the means so indicated.

Dated: June 2, 2014

*/S/ Kara Christenson*

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Kara Christenson

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