

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

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In re:)	
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Pio Pico Energy Center)	Appeal Nos. PSD 12-04, 12-05
)	and 12-06
PSD Permit No. SD 11-01)	
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PETITIONER SIERRA CLUB’S MOTION FOR LEAVE TO FILE SHORT REPLY

Petitioner, Sierra Club, respectfully requests leave to file a reply in the above-captioned case. In support of this motion, Sierra Club states as follows:

1. This case involves a Prevention of Significant Deterioration (PSD) permit issued by Region 9 for the Pio Pico Energy Center (PPEC) in Otay Mesa, California.
2. Region 9 proposed to issue the PSD permit on June 20, 2012. The Region held a public comment period on the proposed permit beginning on June 20, 2012. After a short extension, the comment period closed on September 5, 2012.
3. It is unclear from the record when the PPEC application was complete. (See A.R., Certified Index (Jan. 17, 2013) (containing no indication of a determination of completeness).) However, it is clear that ambient air modeling was being submitted as late as May 23, 2012, and application materials were being submitted by the applicant as late as August 31, 2012. (A.R. I.68, I.71.) Assuming the application was complete as of the date that the Region proposed to issue the permit, any deadline pursuant to 42 U.S.C. § 7475(c) does not expire until June, 2013.
4. On April 19, 2011, the Board issued an Order Governing Petitions for Review of Clean Air Act New Source Review Permits (“NSR Order”). That Order governs this proceeding.¹ Pursuant to the NSR Order, the Board applies a presumption against replies. (NSR

¹ On January 25, 2013, EPA promulgated revisions to 40 C.F.R. § 124.19, but those regulations are not effective until March 26, 2013. 78 Fed. Reg. 5281 (Jan. 25, 2013). However, this motion is nevertheless consistent with the revisions to § 124.19(c). This motion is filed on the first business day after 10 days following the Region’s response. Additionally, the arguments in the response to which Petitioner seeks to reply and the reasons that reply is necessary are set forth herein. The total length of Petitioner’s proposed reply brief is significantly less than the presumptive limits in § 124.19(d)(3).

Order at 3 ¶ 3.) However, this is a presumption and not a bar; replies may be allowed by the Board. (NSR Order at 6 ¶ 13.) Indeed, the NSR Order also establishes filing deadlines (not just presumptive deadlines), and the Board has granted relief from those portions of the NSR Order, including in this case. Order Granting Req. for Extension of Time to File Resp. to Pets. For Review (Jan. 8, 2013); *In re Christian County Generation, LLC*, PSD Appeal No. 12-01, Order Granting EPA Office of Air and Radiation and Region 5's Mot. for Extension of Time (July 5, 2012).

5. Region 9's Response raises three arguments to which Petitioner seeks to reply:

(1) The Region's Response conflates the technology-specific Power Purchase Agreement (PPA) terms between PPEC and the utility contracting to buy its energy and the utility's initial Request for Offers (RFO) that the PPEC is intended to fill. For example, on pages 13, 15, 17, 19 and 21 of its Response, the Region refers to certain attributes of the PPEC that it contends are required by the RFO. However, the RFO did not require those attributes and, in fact, called for a wide range of potential generating plants with different attributes. It was the choice of PPEC to design and bid and enter a PPA based on its particular preferred technology. Other technologies would have satisfied the RFO. Therefore, Petitioner seeks to clarify the distinction between the PPA and the RFO and how each relates, or does not relate, to the decisions the Region made.

Additionally, Petitioner seeks to point out the significant negative ramifications for best available control technology (BACT) determinations if the Region's arguments about a facility's "project purpose" are upheld. The Region's position that a contract developed for and around a specific generating machine's attributes can exclude consideration of cleaner production processes that would also fulfill the applicant's customers' demands invites abuses and circumvention of the statute.

(2) The Region purports to have support for one portion (representing 1.4%) of the 7.4% of compliance margins that it included in the final Greenhouse Gas (GHG) best available control technology (BACT) limit for the PPEC. (Region Resp. at 25.) However, the one document it points to does not support the 1.4% portion designated as representing differences in heat rate based on ambient

conditions, much less the entire 7.4% margin. Therefore, Petitioner seeks to rebut the assertions that the Region makes about the document it cites related to the 1.4% ambient conditions margin and to clarify that the other 6% is not supported by any record evidence.

(3) In response to Sierra Club's request for remand for lack of a basis in the record for both parts of the Region's final two-tiered particulate matter BACT limit, the Region argues that it is allowed to establish a BACT limit that includes a margin above demonstrated emission rates where necessary to account for varying operations. (Region Resp. at 27-28.) Petitioner seeks to reply to this argument to clarify that it is not arguing that, generally, a permitting authority cannot include such a margin, but that in this case the Region did not make the necessary record nor the necessary findings required by the Board's precedent for such a decision. Additionally, the Region's Response asserts that the second tier of its two-tiered particulate BACT limit—a flat 5.5 pound-per-hour (lb/hr) emission limit for all operations less than 80% of the PPEC's rated capacity—is based on its "best professional judgment." (Region Resp. at 30.) However, there is nowhere in the record that the Region demonstrates a BACT analysis was conducted before arriving at the 5.5 lb/hour limit as BACT. Therefore, Petitioner seeks to reply to demonstrate that, notwithstanding the Region's claim to have exercised "best professional judgment," nothing in the record resembles a BACT analysis to support the flat 5.5 lb/hour limit.

6. A copy of Petitioner's proposed reply brief is being filed with this motion and both the motion and proposed reply are being served on the parties.

WHEREFORE, Sierra Club respectfully requests that the Board grant leave for Sierra Club to file the short reply filed herewith in support of its Petition in this case.

Respectfully submitted, this 19th day of February, 2013.

McGILLIVRAY WESTERBERG & BENDER LLC

A handwritten signature in black ink, appearing to read 'D.C.B.', with a horizontal line extending to the left.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of Sierra Club's Motion for Leave to File Short Reply and the proposed Reply Brief in this case, Pio Pico Energy Center, EAB Appeal Nos. PSD 12-04, PSD 12-05, and PSD 12-06, to be served by electronic mail upon the persons listed below.

Dated: February 19, 2013

s/ David C. Bender

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