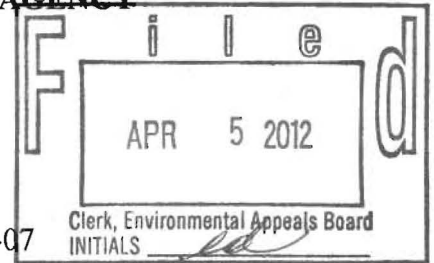


**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**



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

PSD Appeal No. 11-07

**ORDER IDENTIFYING PETITION FOR REVIEW AND
DENYING REQUESTS FOR STATUS CONFERENCE,
LEAVE TO FILE REPLY, AND ORAL ARGUMENT**

On March 1, 2012, the Board issued an Order to Show Cause directing Petitioner Rob Simpson (or his attorney on his behalf) to show cause why his appeal should not be dismissed for failure to meet the Board’s procedural filing requirements. As described in the Order to Show Cause, Mr. Simpson and his attorney April Rose Sommer (on his behalf) filed, on November 17, 2011, multiple and overlapping documents purporting to be a petition in this matter (see Docket Nos. 1-3 and 5). On November 24, 2011, Ms. Sommer filed an additional petition on Mr. Simpson’s behalf (Docket No. 9), which she represented as a “clerical amendment” to the version of the petition previously filed as Docket No. 5, adding a table of contents, citations and other technical corrections. Ms. Sommer requested that the Board accept this document as a substitute for all prior filings.

As noted in the March 1 Order to Show Cause, both permittee City of Palmdale (“City”) and Region 9 of the Environmental Protection Agency (“Region 9”) objected to the confusion in the record caused by the multiple filings by Mr. Simpson and his attorney and argued that the various versions of Mr. Simpson’s petition fail to meet the Board’s threshold filing requirements.

See Region 9's Response to Petition for Review at 2 n.3, 6-7; City's Response to Petition for Review at 1-10. In the Order to Show Cause, the Board ordered Mr. Simpson, among other things, to clearly identify by docket number which of his multiple filings he wishes to designate as his Petition for Review in this matter and to demonstrate that the document so identified meets the Board's threshold filing requirements.¹ Mr. Simpson and his attorney were further instructed to file only one response to the Board's Order to Show Cause. Such response was due March 8, 2012.

Despite the Board's instruction to file only one response to the Order to Show Cause, Mr. Simpson made two separate filings responding to that Order, the first on March 5, 2012, and the second on March 8, 2012. The March 5, 2012 filing is styled "Petitioner Motion to Clarify Scope of Appeal; Request for Status Conference; Request for Oral Argument; Request for Sur Reply; Request for Official Notice" ("Motion to Clarify"), and both responds to the March 1 Order to Show Cause and promises a more formal response to that Order. In his Motion to Clarify, among other things, Mr. Simpson identifies no fewer than five possible combinations of documents to be considered as his petition.

¹ Specifically, the Board ordered Mr. Simpson to demonstrate that his identified petition was timely filed and meets the page limit requirements for PSD appeals. See Board's Order Governing Petitions for Review of Clean Air Act New Source Review Permits ("*Standing Order Governing NSR Appeals*") at 2 (EAB Apr. 19, 2011). Petitioner was also required to certify that, for each issue appealed, Petitioner had (1) identified in the Petition for Review specifically where in the record (with citations to applicable record documents and page numbers) the issue was raised during the public comment period, or if the issue was not previously raised, then Petitioner had explained why the issue was not reasonably ascertainable, as provided in 40 C.F.R. § 124.13; and (2) identified in the Petition for Review whether and where the Region responded to the issue previously raised (with specific citation to the Region's response to comments document) and explained why the permit issuer's response to comments is inadequate. See *id.*

In addition, in his Motion to Clarify, Mr. Simpson disavows for the first time that he retained Ms. Sommer to represent him as an individual.² On March 7, 2012, Ms. Sommer submitted a notice to the Board that she no longer represents Mr. Simpson in this matter, signing as Mr. Simpson's "former attorney." On March 8, 2012, Mr. Simpson filed "Petitioner's Response to Order to Show Cause," in which he requests that the Board consider, among other documents, the versions of the petition filed on his behalf by Ms. Sommer (Docket Nos. 5 and 9). These inconsistent and self-contradictory statements add a new level of procedural confusion to the record before the Board.

Mr. Simpson's multiple and overlapping filings of documents purporting to be petitions, his belated and self-contradictory disavowal of representation by Ms. Sommer, and his disregard of the Board's explicit direction in its Order to Show Cause to file a single response to that Order compound the Board's difficulty in identifying whether there is a timely-filed document that can be considered by the Board as the Petition for Review in this matter. Considerable time already has been consumed in this endeavor. As indicated in the Order to Show Cause, the Board has seriously considered dismissing this matter for failure to meet the procedural requirements that are necessary for prompt and efficient resolution.

² Specifically, Mr. Simpson stated: "I never retained [Ms. Sommer] to represent me as an individual. My expectation was that we would file a consolidated appeal or 2 appeals and the [sic] she would represent [Helping Hand Tools or "2HT"]. Subsequently, 2HT was omitted as a Petitioner and Ms. Sommer appears to represent only me. This was neither my intent nor the intent of 2HT." See Motion to Clarify (Docket No. 28) at 1. Helping Hand Tools (2HT) has never filed a petition or appeared in this matter. Further, Mr. Simpson acknowledged in a "Declaration" filed with the Board on March 9, 2012 (Docket No. 31), that he was aware at least by December 1, 2011, that Ms. Sommer had filed the petitions docketed as Nos. 5 and 9 as his attorney. Yet, he made no request to her or to the Board to withdraw those petitions or to add or substitute 2HT as a petitioner.

Nevertheless, considering all the facts and circumstances, and in the interest of providing Mr. Simpson with a full opportunity to be heard, the Board will exercise both its discretion and its authority to control its docket by allowing this matter to proceed based upon the designation of the petition for review filed on November 24, 2011 (Docket No. 9) as Mr. Simpson's exclusive Petition for Review in this matter. This is responsive to Mr. Simpson's first request in his Response to Order to Show Cause that the Board consider Docket No. 9. *See* Petitioner's Response to Order to Show Cause at 1. The November 24, 2011 document was filed by Ms. Sommer on Mr. Simpson's behalf, and the Board deems Mr. Simpson's request that the Board review this document as his ratification and adoption of that document, notwithstanding the new questions he has raised with regard to Ms. Sommer's representation of him as an individual. While the final version of the petition at Docket No. 9 was not timely filed, the Board has carefully compared the versions of the petition filed as Docket No. 5 (which was timely filed) and Docket No. 9, and is persuaded that Mr. Simpson's and Ms. Sommer's characterization of Docket No. 9 as a mere "clerical amendment" of Docket No. 5 is a fair characterization.

Mr. Simpson also continues to urge the Board to consider his other timely filings, Docket Nos. 1-4, particularly Docket Nos. 2 and 4. *See* Petitioner's Response to Order to Show Cause. As explained in the Board's Order to Show Cause, the versions of the petition filed as Docket Nos. 1-3 appear to be notes or earlier and incomplete drafts of the final versions submitted as Docket Nos. 5 and 9.³ These documents contain a substantial amount of overlapping material

³ The document filed as Docket No. 4 is not a draft petition, but an exhibit, and will be considered by the Board, as appropriate, in its review of the petition filed as Docket No. 9.

that is redundant of Docket No. 9, and collectively, they exceed the Board's page limits for this matter under our *Standing Order Governing NSR Appeals*.

As we explained in the March 1 Order to Show Cause, it is not incumbent on the Board to sift through multiple versions of the petition or Mr. Simpson's notes to find any pieces that were not included in the final version. The Board rejects Mr. Simpson's suggestion that we should consider, in addition to the Docket No. 9 petition, certain paragraphs of Docket No. 2, which Mr. Simpson suggests could be characterized as an "addendum" or "supplement" to explain some of the arguments contained in Docket No. 9 in more detail. Docket No. 2 appears to be a compilation of notes for the petition at an early stage.⁴ Selective and piecemeal review of portions of this document, in addition to the final version of the petition at Docket No. 9, would be redundant and inefficient.

Designating Docket No. 9 as Mr. Simpson's Petition for Review will provide for efficient and fair resolution of this matter, while affording Mr. Simpson the substantial leeway of allowing consideration of an untimely-filed document as he has requested. Docket No. 9 appears to be the most complete and final of all the versions of the petition submitted by or on behalf of Mr. Simpson. Further, Region 9, appropriately relying on Ms. Sommer's representation that Docket No. 9 replaced all prior filings, subsequently filed its response to the petition on February 17, 2012, based on the Docket No. 9 version of the petition. *See* Region 9 Response to Petition for Review at 4 n.2. Thus, the Board concludes that designating Docket No. 9 as the Petition for

⁴ This document contains question marks, incomplete citations, sentences that do not begin with a capital letter or end with punctuation or both, as well as unexplained acronyms and what appear to be passages from reports without proper quotation.

Review to be considered in this matter will provide the fairest, most practicable, and expeditious path to prompt consideration and resolution of this appeal.

As the Board has previously emphasized, PSD appeals are time-sensitive because new source construction cannot begin prior to receiving a final permit. CAA § 165(a), 42 U.S.C. § 7475(a). The Board does not see a need for a status conference, as Mr. Simpson has requested, to discuss these matters further. Mr. Simpson has had a full opportunity to be heard in response to the Order to Show Cause and has taken full advantage of that opportunity through his multiple filings. In light of the need for expedition and the presumption against replies and oral argument that is specified in the Board's *Standing Order Governing NSR Appeals* (p.3), the Board denies Mr. Simpson's request to file a reply to the Responses of Region 9 and the City, as well as his request for oral argument. The Board is also concerned that Mr. Simpson's additional request (in his Motion to Clarify) that the Board take official notice of the California Energy Commission Integrated Energy Policy Report could introduce potentially voluminous and irrelevant material, causing additional delay in the resolution of this matter. The Board, however, will take this request under advisement as it proceeds to consider the merits of Mr. Simpson's Petition for Review.

CONCLUSION AND ORDER

Having considered Petitioner Rob Simpson's multiple filings in response to the Board's Order to Show Cause and the various other documents filed in this appeal, and for reasons more fully discussed above, the Board now orders that:

1. The petition for review filed on November 24, 2011 as Docket No. 9 will be considered by the Board as the Petition for Review in this matter.

2. The Board will not consider the earlier-filed versions of the petition for review made by or on behalf of Mr. Simpson in this appeal (specifically, those filings designated as Docket Nos. 1, 2, 3, and 5).

3. Mr. Simpson's requests for a status conference, for permission to file a REPLY to the Responses of Region 9 and the City, and for oral argument are DENIED.


So ordered.⁵

ENVIRONMENTAL APPEALS BOARD

Dated:

April 5, 2012

By:



Catherine R. McCabe
Environmental Appeals Judge

⁵ The Board acknowledges that the parties have agreed to electronic service from each other and that Mr. Simpson has requested electronic service from the Board. The Board notes, however, that at this time the Board does not have in place procedures for electronic service and, thus, will continue to serve Mr. Simpson by U.S. Mail. Mr. Simpson is advised that he may monitor the Board's website for faster notice of Board Orders. Mr. Simpson may also provide the Board with a fax number and, in that case, the Board will serve parties by facsimile as well.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *Order Identifying Petition for Review, and Denying Requests for Status Conference, Leave to File Reply, and Oral Argument*, PSD Appeal No. 11-07, were sent to the following persons in the manner indicated:

BY U.S. First Class Mail:

Rob Simpson
27126 Grandview Avenue
Hayward, CA 94542

Michael J. Carroll
Mark T. Campopiano
Latham & Watkins LLP
650 Town Center Drive, Suite 2000
Costa Mesa, CA 92626
(714) 540-1235
(714) 755-8290 (fax)

By EPA Pouch Mail:

Julie Walters
Office of Regional Counsel
EPA Region 9 (MC ORC-2)
75 Hawthorne St.
San Francisco, CA 94105
(415) 972-3892
(415) 947-3570 (fax)

By Inter-Office Mail:

Kristi Smith
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave, N.W. (MC-2344A)
Washington, DC 20460
(202) 564-3068
(202) 564-5603 (fax)

Courtesy Copies

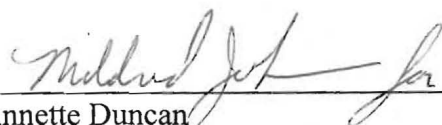
By U.S. First Class Mail Only:

James C. Ledford, Jr.
Mayor
City of Palmdale
38300 North Sierra Highway, Suite A
Palmdale, CA 93550

Laurie Lile
Assistant City Manager
City of Palmdale
38300 North Sierra Highway, Suite A
Palmdale, CA 93550

Thomas M. Barnett
Senior Vice President
Inland Energy, Inc.
3501 Jamboree Road
South Tower, Suite 606
Newport Beach, CA 92660

April Rose Sommer
P.O. Box 6937
Moraga, CA 94570
(510) 423-0676
(510) 590-3999 (fax)



Annette Duncan
Secretary

Date: APR 5 2012