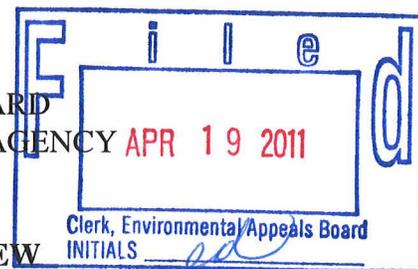


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



**ORDER GOVERNING PETITIONS FOR REVIEW
OF CLEAN AIR ACT NEW SOURCE REVIEW PERMITS**

Before Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, Kathie A. Stein, and Anna L. Wolgast

Per Curiam:

The Environmental Appeals Board (“Board”), under authority delegated by the Administrator, 40 C.F.R. §§ 1.25(e) and 124.2(a), exercises jurisdiction over petitions for review of certain permits issued by the U.S. Environmental Protection Agency (“EPA”) and delegated states¹ under the Clean Air Act (“CAA”) New Source Review program.² This Order refers to such matters as “NSR appeals,” and they are governed by 40 C.F.R. § 124.19.³

NSR permits are time-sensitive because new source construction cannot begin prior to receiving a final permit. CAA §165(a), 42 U.S.C. § 7475(a).⁴ In the event of an administrative

¹ The “delegated states” are the states that have not adopted an EPA-approved Prevention of Significant Deterioration (“PSD”) program as part of their Clean Air Act State Implementation Plan, but have been delegated the authority to issue permits on behalf of the EPA, relying on EPA’s PSD program. Part 124 does not apply to PSD permits issued by states or eligible Indian tribes under an EPA-approved implementation plan. *See* 40 C.F.R. § 124.1(e).

² Such New Source Review permits include PSD permits and Outer Continental Shelf (“OCS”) permits. *See* 40 C.F.R. §§ 124.19; 55.6(a)(3). OCS permits may be issued as non-attainment new source permits, PSD permits, state-law minor source permits, or a combination of these. *See* CAA § 328(a)(1), 42 U.S.C. § 7627(a)(1).

³ Implementing regulations for OCS permits are found in 40 C.F.R. part 55 and incorporate the procedural regulations of part 124. *See* 40 C.F.R. § 55.6(a)(3).

⁴ PSD permits are required for certain new or modified sources of air pollution located or proposed to be located in areas of the country where the air is clean enough to meet the National Ambient Air Quality Standards (“NAAQS”) or in areas where air quality cannot be classified on

appeal, a permit decision does not become effective until the appeal is resolved. 40 C.F.R. §§ 124.15(b), 124.19(f). Resolution of the appeal is also a prerequisite to seeking judicial review of the permit. *See* 5 U.S.C. § 704 (establishing that where agency regulations provide for an administrative appeal, agency action is not “final” for the purposes of judicial review until the administrative appeal is complete); 40 C.F.R. §§ 124.19(e)- (f). Due to the time-sensitive nature of NSR appeals, the Board gives its highest priority to the timely resolution of NSR cases relative to other matters on the Board’s docket.

In order to facilitate expeditious resolution of NSR appeals, while simultaneously giving fair consideration to the issues raised in any given matter, the Board adopts the following procedures:

1. Petitions and any response brief in NSR appeals may not exceed 14,000 words.⁵ A statement of compliance with the word limitation should be included with any petition or response brief filed. The Board may exclude any petition or response brief that does not meet these word limitations. Where a party can demonstrate a compelling and documented need to exceed such limitations, such party may seek advance leave of the Board to file a longer petition

the basis of available information as meeting or not meeting the NAAQS, otherwise known as “unclassifiable” areas. *See* CAA §§ 107(d)(1)(A), 161, 165, 42 U.S.C. §§ 7407(d)(1)(A), 7471, 7475. OCS permits are required for any source of air pollution that is located on the Outer Continental Shelf as provided in CAA § 328(a), 42 U.S.C. § 7627(a).

⁵ Filers may rely on the word-processing system used to determine the word count. In lieu of a word limitation, parties may comply with a 30-page limit. Headings, footnotes, and quotations count toward the word limitation. A table of contents, table of authorities, statement requesting oral argument, statement of compliance with the word limitation, exhibits, or any addendum does not count toward the word limitation.

or response brief. Such requests are discouraged and will be granted only in unusual circumstances.

2. When an NSR appeal is filed, the Board will notify the permit issuer by letter and impose a deadline of 21 days from the date of the Board's letter for the permit issuer to file a response. The Board will also send a copy of that letter to the permittee (if not the petitioner) and, if the permittee chooses to respond to the petition, the permittee will be required to file a response by that same deadline.

3. The Board will apply a presumption against the filing of reply briefs and sur-replies in NSR appeals.

4. The Board will apply a presumption against holding oral argument in NSR cases.

5. The Board will require the permit issuer to include with its response relevant portions of the administrative record, as well as a certified index of the entire administrative record. The permit issuer is encouraged to file the index to the record, preferably electronically, as soon as possible after receiving notification of the NSR appeal. Early filing of the certified index enables the Board to begin prompt review of the record even before all of the briefs are filed. Requests for extensions of filing the certified index will be disfavored.

6. The Board will use scheduling and status conferences to expedite the filing of briefs, the narrowing of issues on appeal, and the resolution of cases. Parties may request the Board to schedule such a conference to expedite case resolution.

7. For each issue appealed, to satisfy the requirements of 40 C.F.R. § 124.19(a), the petitioner must demonstrate, by citing with specificity to the record, including to the applicable documents and page numbers, that any issues being raised were either raised during the public comment period or were not reasonably ascertainable, as provided in 40 C.F.R. § 124.13. Where a comment was previously raised, the petitioner must also demonstrate with specificity, by citing to the applicable documents and page numbers, where in the response to comments the permit issuer responded to the comments and must explain why the permit issuer's response to comments is inadequate. The Board may decline to consider issues that do not comply with these requirements. The Board will make use of summary disposition to resolve cases that do not meet these and other threshold requirements for filings before the Board.

8. The Board may use unpublished decisions to resolve issues the Board has addressed in previously decided matters.

9. The Board will not grant review of an NSR permit unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. *See* 40 C.F.R. § 124.19(a); Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). In determining whether to exercise its

discretion to review an NSR appeal, the Board will consider the totality of the circumstances in a particular case and may, in its sole discretion where the circumstances warrant, decline review without issuing an opinion.

10. When an NSR appeal is filed following a Board remand, the Board will notify the permit issuer by letter and impose a deadline of 21 days from the date of the Board's letter for the permit issuer to file a response. The Board will also send a copy of that letter to the permittee (if not the petitioner) and, if the permittee chooses to respond to the petition, the permittee will be required to file a response by that same deadline. The permit issuer or the permittee may file, along with its response, a motion for denial of review by summary affirmance. The motion must clearly describe, by citing with specificity to the record, including to the applicable documents and page numbers, how the permit issuer's final decision on remand conforms with the Board's remand order and detail the changes in the permit or the record that were made in response to the Board's remand order. In appropriate cases, the Board may summarily affirm the reissued permit. Where an NSR appeal is filed following a Board remand, the Board generally will consider only issues arising out of the remand and will not consider any new issues that could have been raised in the initial appeal but were not.

11. Many of the Board's past remands of NSR permits were due to an inadequate record. Permit issuers are encouraged to ensure that the record accompanying the final permit decision will withstand Board review or a judicial appeal. Record deficiencies generally cannot be cured on appeal to the Board. Permit issuers are encouraged to seek a voluntary remand in cases where

an appeal to the Board reveals record deficiencies, as curing the record promptly prior to Board decision can shorten the time it takes to issue a final defensible Agency action.

12. Where the parties believe that alternative dispute resolution (“ADR”) would be of assistance in resolving disputed issues, they may, by joint motion, request to participate in the Board’s pilot ADR program. A detailed description of this program is available on the Board’s website. Where the parties jointly request to participate in the Board’s ADR pilot and the Board determines that participation in the ADR pilot program would expedite resolution, the Board will approve the use of ADR.

13. The Board, in its discretion, may issue an order modifying these procedures as appropriate on a case-specific basis. The Board, in its sole authority, may revoke or amend this order at any time. This order creates no vested rights in any party.

So ordered.

Dated: April 19, 2011