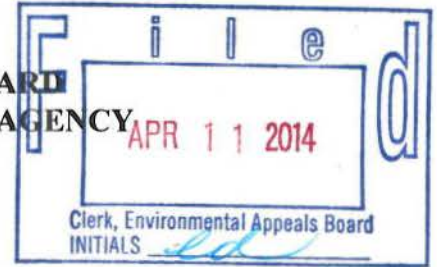


**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**



In re: Energy Answers Arecibo, LLC
(Arecibo Puerto Rico Renewable Energy
Project)

PSD Appeal Nos. 13-05 to 13-09

ORDER DENYING MOTION TO INTERVENE

On March 25, 2014, the Environmental Appeals Board (Board) issued a decision on five consolidated petitions for review of a prevention of significant deterioration (PSD) permit decision. The Board upheld the permit on nearly all grounds, but granted the Region's motion for a limited remand to revise the permit to regulate biogenic greenhouse gas emissions. The Board considered, but did not require, the Region to reopen the permit for public comment on the proposed revisions. On April 4, 2014, Leonardo Ramos-Hernandez filed¹ a motion with the Board requesting leave to intervene in this matter for the purpose of filing a Motion for Reconsideration of the Board's final order. For the following reasons, the Board denies Mr.

¹ The motion was emailed as an attachment to the Clerk of the Board rather than eFiled using the Board's eFiling system. Mr. Ramos did not include any documentation of technical difficulties or other justification for this method of filing. Ordinarily sending documents for filing to the Clerk via email is authorized only as a fail-safe for when the Board's system, through no fault of the user, is experiencing technical difficulties. Such difficulties must be documented appropriately in an email to the Clerk. Mr. Ramos and all parties before the Board are reminded that the failure to follow the proper procedures for filing may result in your filing being rejected by the Board. *See* 40 C.F.R. § 124.19(i)(2) (setting forth the methods of filing). Parties may obtain more information on electronic filing on the Board's website at www.epa.gov/eab.

Ramos' motion.

I. DISCUSSION

The rules governing PSD permit appeals set forth a clear timeline for participants in an appeal. Any person who filed comments on the draft permit or participated in a public hearing on the draft permit may file a petition for review within 30 days after notice of the permit issuance is served. 40 C.F.R. §§ 124.19(a)(2), (a)(3) (2013) (emphasis added). Responses to PSD petitions are due within 21 days after the petition is filed, whether by the permitting authority, the permit applicant, a state, or a local tribe. *Id.* §§ 124.19(b)(1), (b)(3) & (b)(4). Additionally, any other interested person may file an amicus brief in any pending PSD appeal within 21 days after the filing of a petition. *Id.* § 124.19(e). The recent revisions to this rule were intended to make more efficient the permitting appeal process. *See* 78 Fed. Reg. 5,281 (Jan. 25, 2013). The rule's explicit deadlines and authorization to file "are intended to streamline * * * the appeal process by removing the need to request permission from the Board to participate, and eliminating the corresponding additional time needed to grant participation and to impose briefing schedules later in the process." *Id.* at 5,283. Although the Board retains the discretion to allow intervention, where appropriate,² the Board would rarely exercise such discretion where the request is untimely. *See, e.g., In re Palmdale*, PSD Appeal No. 11-07 (Apr. 27, 2012) (Order Denying Motion to Intervene) (denying intervention to a person seeking to file

² "[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).

more than four months after the first petition was filed); *In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06, at 4 (May 21, 2009) (Order Denying Motion to Participate).³

Having considered Mr. Ramos' motion, and given the procedural posture of this case, the Board denies the Motion Requesting Leave to Intervene. First and foremost, Mr. Ramos' request to intervene in this matter is untimely in the extreme. Petitions were filed in this matter in July, 2013, more than eight months ago. After extensive consideration the Board issued a 98-page decision setting forth its rationale for both denying review of the many issues raised and for remanding one issue for a limited purpose. Quite simply, Mr. Ramos' attempt to participate in this appeal is many months too late.

From the motion, it is clear that Mr. Ramos seeks to reopen this already-decided matter because he is dissatisfied with the result. Dissatisfaction with a Board's final decision is not grounds for allowing an untimely motion to intervene.⁴ Although the Board is unlikely to grant a

³ In *Desert Rock*, the Board ultimately allowed American Coalition for Clean Coal Electricity ("ACCCE") to participate in the case. Following the Board's initial denial of the motion to participate, ACCCE filed a motion for reconsideration and, in its second motion, provided a persuasive justification for its late request to participate, which the Board accepted. *See Desert Rock*, at 4 (EAB May 27, 2009) (Order Granting Motion Requesting Reconsideration of Motion to Participate and Permission to File Amicus Curiae Brief Out of Time) (noting that, "on balance, the Board concludes that, in light of the unique circumstances in this case and the fact that no prejudice will result from granting the motion, it is appropriate to grant the belated motion to participate and allow for the filing of an out of time brief"). Notably, ACCCE moved to participate long before the Board rendered its decision that case.

⁴ Mr. Ramos also states that he is dissatisfied with the Coalition's representation of the
(continued...)

motion to intervene that is filed after a matter is fully briefed and a final decision has been made in any circumstance, that non-likelihood is even more certain in a PSD appeal. As the Board has often emphasized, PSD appeals are particularly time-sensitive because new source construction cannot begin prior to receiving 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)); *Desert Rock*, slip op. at 48 n.51, 14 E.A.D. at __; *see also* 78 Fed. Reg. 5,281, 5,283 (Jan. 25, 2013) (explaining that certain presumptions, tighter deadlines, briefing limitations and other procedures for PSD appeals that are now incorporated into 40 C.F.R. § 124.19 were intended to facilitate the expeditious resolution of new source review appeals). In light of the need for expedition of these cases, the Board is disinclined to consider any belated intervention, participation, or other request to join the appeals process beyond what is provided by the rule.

Mr. Ramos attempts to justify the lateness of his request to intervene by stating that “jurisdictional and due process issues * * * can be raised at any time by any party.” Ramos’ Motion to Intervene at 2. Mr. Ramos, however, does not challenge the jurisdiction of the Board.

⁴(...continued)
issues. To the extent that the Coalition was representing Mr. Ramos, which is not clear, Mr. Ramos’ dissatisfaction with either the Coalition or the Board’s final decision does not entitle him to a new opportunity to appeal.

Rather, in describing the issues he would raise if permitted to intervene and to file a late motion for reconsideration, Mr. Ramos asserts that the Puerto Rico Environmental Quality Board “lacks jurisdiction to enforce Clean Air Act Part D.” The decision before the Board, however, is a PSD permit issuance by EPA Region 2 under Clean Air Act Part C, over which the Board undisputedly has jurisdiction. *See* 40 C.F.R. § 124.19 (clearly authorizing the Board to review PSD permit appeals). Mr. Ramos’ jurisdictional assertion has no bearing on the Board’s decision in this matter.

With respect to due process, Mr. Ramos’ motion establishes that he was aware of the permit issuance and the appeal, and that he “had all the reason to believe the Coalition was representing him in the EPA proceedings.” *See* Motion at 2. Mr. Ramos has not asserted any due process violation that could justify his failure to timely file a petition, response or amicus brief pursuant to the deadlines set forth in 40 C.F.R. § 124.19.

Mr. Ramos also attempts to argue that he should be permitted to intervene at this late date based on the Board’s decision to remand the permit for the limited of purpose of including emission limits for biogenic greenhouse gases, and the Board’s corresponding decision not to require the Region to reopen the permit for public comment. In so arguing, Mr. Ramos cites 40 C.F.R. § 124.19(a), which allows a person who has not previously participated in permit proceedings to “*petition* for administrative review of any permit conditions set forth in the final permit decision, but only to the extent that those final permit conditions reflect changes from the

draft permit.” 40 C.F.R. § 124.19(a)(2). Mr. Ramos’ reliance on this provision is misplaced because this provision addresses who may file *a petition for review* and the filing deadline for such petitions is 30 days after service of notice of the permit is issued. *Id.* § 124.19(a)(2) & (3).

Moreover, the Board thoroughly considered the question of whether the Region should be required to reopen the permit for public comment based on the Region’s proposed revisions to the permit to include limits on biogenic carbon dioxide emissions. *See* Final Order at 31-37. For the purpose of efficiency, that discussion will not be repeated here. Suffice it to say that among the reasons given for not requiring the permit to be reopened, the Board explained that the revisions to the permit “will not result in any effective change in [carbon dioxide] emissions (whether biogenic or non-biogenic) and will not alter the Region’s BACT determination,” on which the public was given ample opportunity to review and comment. Further, none of the public comments received challenged the Region’s BACT determination for carbon dioxide (which took into account both biogenic and nonbiogenic emissions). *Id.* at 33. Nor did any of the petitioners challenge the Region’s BACT determination or the technology selected for carbon dioxide. *Id.* at 35. As such, the Board determined there was “no reason to believe additional public process on the proposed revisions would add any substantial value or result in any different outcome.” *Id.* at 36. Mr. Ramos does not address or challenge the Board’s rationale in his motion and has provided no basis for the Board to question its determination on this issue. Accordingly, the Board is not persuaded that Mr. Ramos’ untimely request to intervene (for the purpose of urging the Board to reconsider its decision) is justified by the Board’s limited remand

to add regulation of the biogenic portion of carbon dioxide emissions, without a requirement to reopen the public comment period.

Finally, Mr. Ramos' motion provides "issues to be raised on reconsideration." Motion at 2-3. None of the issues identified, however, provides any justification for why the Board should consider allowing Mr. Ramos' untimely request to intervene. In sum, Mr. Ramos has not shown good cause for his belated request to intervene in this matter.

II. CONCLUSION AND ORDER

For the reasons stated above, the Board denies Mr. Ramos' motion for leave to intervene in this already-decided PSD appeal as untimely.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: April 11, 2014

By: Kathie A. Stein

Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I certify that copies of the foregoing *Order Denying Motion to Intervene* in the matter of Energy Answers Arecibo, LLC, PSD Appeal Nos. 13-05 through 13-09, were sent to the following persons in the manner indicated:

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