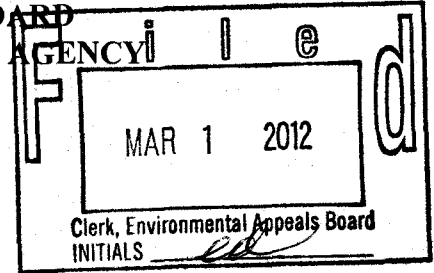


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



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In re: Palmdale Hybrid Power Plant )  
)  
PSD Permit No. SE 09-01 )  
)  
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PSD Appeal No. 11-07

**ORDER TO SHOW CAUSE AS TO WHY PETITION SHOULD NOT BE DISMISSED**

On November 17, 2011, Rob Simpson (“Petitioner”), both on his own and through his attorney, April Rose Sommer, filed with the Environmental Appeals Board (“Board”) four documents that appear to be multiple versions of a petition for review of the Prevention of Significant Deterioration (“PSD”) permit issued by EPA Region 9 (“Region”) to the City of Palmdale (“Permittee”) to construct and operate the proposed Palmdale Hybrid Power Plant. These four documents are described in more detail below. Petitioner filed an additional version of the petition for review on November 24, 2011, titled “Petition for Review (Clerical Amendment).” That document is identified on the docket as Docket No. 9 and will be referred to in this order as “the November 24th Petition.” The Board has also received conflicting communications from Mr. Simpson and his attorney regarding which document or documents constitute the petition for review. These are identified in the docket as Docket Numbers 8 and 20.

On February 17, 2012, following a stay of proceedings to allow parties to pursue alternative dispute resolution, the Permittee submitted a Response to the Petition for Review that

challenges the timeliness of the November 24th Petition. *See* Intervenor City of Palmdale Response to the Petition for Review (“Permittee’s Response”) at 1-4.<sup>1</sup> Additionally, the permittee challenges what it calls the “petition materials,” filed on November 17, 2011, as failing to meet the Board’s threshold filing requirements. *Id.* at 4-10. The Region filed a Response to the Petition for Review on February 17, 2012, in which it also asserts that Petitioner has not met threshold filing requirements.<sup>2</sup>

Because multiple documents have been filed that can be construed as a petition for review and it is unclear which document the Board should consider, the Board cannot begin to determine whether threshold filing requirements have been met. Accordingly, and for reasons more fully discussed below, the Board orders Petitioner to show cause as to why his appeal should not be dismissed.

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<sup>1</sup> The Permittee also questions whether the petition filed on November 24th is truly a “Clerical Amendment” as it is purported to be, because it “includes multiple substantive changes, including adding exhibits for the first time, providing tables of content and authority, reorganizing portions of arguments, and potentially other unknown revisions that the Board should not be obligated to ascertain.” Permittee’s Response at 3.

<sup>2</sup> More specifically, the Region argues that, “[a]s a general matter, much of the Petition fails to meet general pleading requirements by failing to identify, with cites to the applicable documents and page numbers, the specific comments provided to the Region or the relevant analysis and reasoning provided by the Region with regard to the various arguments raised.” *See* EPA Region 9’s Response to Petition for Review at 6-7. Region 9 also states that “some of Mr. Simpson’s claims are not properly before the Board because they also do not meet the Board’s other pleading requirements including the requirement to demonstrate that [reasonably ascertainable] arguments were raised with reasonable specificity during the public comment period \* \* \* .” *Id.*

## *DISCUSSION*

To ease discussion in this Order, the four documents filed on November 17th that can be construed as petitions for review are summarily described here and will be described throughout the remainder of this order simply by the docket number assigned:

The first of these documents (Docket No. 1) is titled "Petition for Review" and purports to be authored by Ms. Sommer, though it was submitted to the Board by Mr. Simpson. It is dated June 27, 2010. This first document is 15 pages long and states that it contains 6963 words.

The second document submitted (Docket No. 2) contains no caption, but contains the heading "Appeal of PSD permit for Palmdale Hybrid Power Project." The name and address at the end of Docket No. 2 belong to Mr. Simpson, and it was submitted to the Board by Mr. Simpson. This second document is 14 pages and does not contain a word count.

The third document (Docket No. 3), submitted by Mr. Simpson, has no caption, no author, no date, and no signature. The heading at the top of the document is "Public Notice," although that heading appears to summarily describe only the two paragraphs beneath the heading, as opposed to the entire four-page document.

The fourth document that appears to be yet another version of a petition for review was submitted last and is identified as Docket No. 5.<sup>3</sup> It is also titled "Petition for Review," contains

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<sup>3</sup> One additional document was filed on November 17, 2011 (Docket No. 4) that is clearly not a petition for review. Rather, Docket No. 4 is a copy of a letter from Peter Bukunt, GE

(continued...)

a caption, and was signed and filed by April Rose Sommer on behalf of her client Rob Simpson. The document is dated November 17, 2011. It is 31 pages long and states that it contains 8,473 words.

As indicated above, the November 24th Petition was filed subsequent to the above four filings. That petition was accompanied by a letter to the Board (Docket No. 8), submitted by Petitioner's counsel. The letter indicates that the petition identified as Docket No. 5 was the intended Petition for Review, and stated that Docket Nos. 1 through 4 were submitted "in an abundance of caution" by Mr. Simpson because Petitioner's counsel was having difficulty with the Board's electronic filing system. The letter to the Board also seeks to "replace[] all documents filed November 17, 2011 with [the November 24th Petition]" and states that the November 24th Petition is simply a "clerical amendment" that "does not include any substantive changes."

Subsequently, Mr. Simpson sent an email to the Clerk of the Board on February 1, 2012, (Docket No. 20), with the subject line "Clarification of scope of appeal," that contradicts his attorney's November 24th letter.<sup>4</sup> Mr. Simpson indicates that the November 24th letter (submitted by his attorney on his behalf) was not intended "to modify the appeal, except to the

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<sup>3</sup>(...continued)

Energy to Kathleen Truesdell, Bay Area Air Quality Management District, regarding "Contra Costa Generating Station (Oakley) - Emissions Guarantees and Estimated Startup and Shutdown Durations and Emissions" (Dec. 1, 2010). Its relevance to the other filings is not apparent on the face of the document.

<sup>4</sup> The parties are advised that email correspondence to the Clerk of the Board is not a permissible form of communicating with the Board. Documents to be reviewed by the Board must be filed with the Clerk pursuant to the Board's filing requirements.

extent that the clerical amendment amends clerical issues in the documents that it replaces, identified as entry 1 and 5 on the docket[.] \* \* \* It is my intent that all other documents, timely filed, remain a part of my appeal.” Mr. Simpson’s email not only contradicts his attorney’s letter, it is internally contradictory as well. The Board views the email as entirely unclear regarding which document Petitioner seeks to have the Board consider as his Petition for Review.

With Petitioner’s filings in mind, the Board now considers briefly the filing requirements that apply to every petition for review of a PSD permit and the consequences for failure to comply with those requirements.

Every petition for review filed under 40 C.F.R. § 124.19 is required to meet certain threshold requirements in order to be considered by the Board. *See* 40 C.F.R. § 124.19(a) (requiring petitions for review to be filed within 30 days after a final permit decision has been issued and to state in the petition the grounds for review, including a demonstration that any issues being raised were raised during the public comment period to the extent required); *see also In re Russell City Energy Center, LLC*, PSD Appeal Nos. 10-12 & 10-13, slip op. at 4-7 (EAB Jun. 9, 2010); *In re Russell City Energy Center, LLC*, PSD Appeal No. 10-01 to 10-05, slip op. at 12-13, 94-95 (EAB Nov. 18, 2010); *In re Teck Alaska, Inc. (Red Dog Mine)*, NPDES Appeal No. 10-04, slip op. at 2, 4-11 (EAB Nov. 18, 2010); *In re Beeland Group LLC*, UIC Appeal No. 08-02, slip op. at 8 (EAB Oct. 3, 2008). Failure to submit a petition within the time provided will ordinarily result in the dismissal of the petition, as will the failure to satisfy other threshold filing requirements. *E.g., Russell City Energy Center*, PSD Appeal Nos. 10-12 & 10-13, slip op. at 4-7 (dismissing two petitions as untimely); *In re City of Pittsfield*, NPDES Appeal NO. 08-09,

at 6 (EAB Mar. 4, 2009) (Order Denying Review) (denying review of a petition that simply restated comments made on the draft permit, but did not address the permitting authority's responses to those comments), *aff'd*, *City of Pittsfield v. EPA*, No. 09-1879 (1st. Cir. Jul. 16, 2010); *In re Envotech*, 6 E.A.D. 260, 266, 268-69 (EAB 1996) (dismissing four petitions as untimely and dismissing one petition based on lack of specificity); *In re Beckman Prod. Servs.*, 5 E.A.D. 10, 15-16 (EAB 1994) (dismissing petition as untimely).

Additionally, 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). In an effort to streamline such appeals, the Board issued a *Standing Order Governing NSR Appeals* on April 19, 2011, that is applicable to this matter. The Standing Order requires that petitions for review in NSR cases, such as this PSD case, be no more than 14,000 words (or 30 pages in lieu of a word count), and provides that the Board may exclude any petition brief that does not meet this limitation. *Standing Order Governing NSR Appeals* at 2. The Standing Order also provides that

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.

*Id.* at 4.

As stated above, the Board cannot determine which filing should be considered as the Petition for Review due to the multiple filings by Petitioner and his attorney and the contradictory statements regarding those filings in subsequent communications by Petitioner and his attorney. The Board assumes that Petitioner was aware that the Board strictly construes the appeal deadline and apparently, to meet that deadline, Petitioner filed multiple versions of the petition which presumably were not as complete as Petitioner desired. The appeal deadline, however, is not a deadline for *draft or partial* Petitions for Review, that may be replaced by a more complete petition filed after the deadline has passed. Given the above, and for the following three reasons, the Board is not inclined to exercise its discretion to review this permit decision. See *In re Avenal Power Center, LLC*, PSD Appeal Nos. 11-02 to 11-05, slip op. at 4, 14-15 (EAB Aug. 18, 2011) (explaining that the Board's review of a permit is discretionary). The Board is instead inclined to dismiss the appeal outright for failure to comply with its filing requirements.

First, the November 24th Petition is untimely. Although it purports to be a "Clerical Amendment," the Permittee has argued that the changes contained in the November 24th Petition are more substantive than clerical. Additionally, Mr. Simpson has stated that he does not intend that the later-filed petition replace the other documents filed. Thus, the Board is not inclined to consider the November 24th Petition as a "clerical amendment" to a timely filing and is inclined instead to exclude this petition from review.

Second, when considered together, the documents filed on November 17th do not appear to meet the Board's filing requirements. In the aggregate, these filings drastically exceed the

Board's page limits for PSD appeals. Moreover, the documents combined are duplicative and would be overly cumbersome, if not impossible, for the Board to review with any clarity or efficiency. It is not incumbent upon the Board to review *multiple* versions of a petition for review to ascertain whether, in the aggregate, threshold requirements are met.

Third, the permittee and the Region allege that each individual document fails to meet the Board's filing requirements. *See* Permittee's Response at 4-10; Region 9's Response at 6-7. Again, it is not incumbent upon the Board to review *multiple* versions of a petition for review to ascertain whether any one of the multiple documents filed, on its own, meets the threshold filing requirements. Petitioner bears the burden to demonstrate in its petition that filing requirements have been met.

Under these circumstances, and as stated above, the Board is inclined to dismiss the appeal outright for failure to comply with its filing requirements. Before making a final decision, however, the Board will provide Petitioner the opportunity to provide justification for why the November 24th Petition for Review should not be excluded from review as untimely and the November 17th versions of the petition (including Docket Nos. 1, 2, 3 and 5) should not be dismissed for failing to meet threshold filing requirements.

#### *CONCLUSION AND ORDER*

Based on the foregoing, Petitioner is ordered to show cause as to why his petition for review should not be dismissed. Petitioner (*or* his counsel on his behalf) must file only one response to this Order. That response must clearly identify, by the assigned docket number,



which of Petitioner's filings constitutes the intended petition for review, and also demonstrate that the document so identified was timely filed and meets the page limit requirements for PSD appeals. Additionally, Petitioner must include a statement certifying (and demonstrating with citation to the identified petition for review) that, for each issue raised in the identified petition for review, Petitioner has:

(1) specified 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, has explained why the issue was not reasonably ascertainable, as required by in 40 C.F.R. § 124.13; and

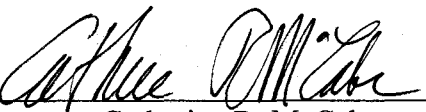
(2) specified whether and where in the record the Region responded to the issue previously raised (with citation to the Region's response to comments document) and explained why the permit issuer's response to comments is inadequate.

*See Standing Order Governing NSR Appeals at 2.* Petitioner's response to this Show Cause Order must be filed by **March 8, 2012**.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 3/1/12

By:   
Catherine R. McCabe  
Environmental Appeals Judge

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing *Order to Show Cause As To Why Petition Should Not Be Dismissed*, PSD Appeal No. 11-07, were sent to the following persons in the manner indicated:

**BY U.S. First Class Mail & Facsimile:**

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

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 & Facsimile:**

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 & Facsimile:**

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)


**By U.S. First Class Mail Only:**

Rob Simpson  
27126 Grandview Avenue  
Hayward, CA 94542

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



Annette Duncan  
Secretary

MAR - 1 2012

Date: \_\_\_\_\_