

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

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

EPA REGION 9’S RESPONSE TO MOTION FOR LEAVE TO INTERVENE

EPA Region 9 (“Region 9”) respectfully submits this response to Jane Williams’ Motion for Leave to Intervene, which was filed in the above-referenced case on March 20, 2012. This case involves an appeal to EPA’s Environmental Appeals Board (“EAB” or “Board”) of Region 9’s October 18, 2011 final permit decision granting a Prevention of Significant Deterioration (“PSD”) permit pursuant to section 165 of the Clean Air Act (“CAA”) to the City of Palmdale (“City”) for the Palmdale Hybrid Power Project (“PHPP” or “Project”).

Shortly after Region 9’s issuance of the final PSD permit for the Project, the Region transmitted several written notices of its final permit decision, as well as the final permit documents, to Ms. Williams and other representatives of two organizations with which Ms. Williams is directly affiliated, *i.e.*, Desert Citizens Against Pollution (“DCAP”) and California Communities Against Toxics (“CCAT”), which together had submitted a written comment on the Region’s proposed PSD permit for the Project. Given the significant delay in Ms. Williams’ filing of this motion for leave to intervene -- a delay of approximately four months after the November deadline for filing a petition for review, and more than a month after the conclusion of briefing in this matter, which involves a preconstruction New Source Review (“NSR”) permit

-- Region 9 respectfully urges the Board to exercise its discretion to deny Ms. Williams' untimely request to intervene, if it does not first find that the request is moot.

SUMMARY OF RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Region 9 understands that Ms. Williams acts as Director of DCAP and as Executive Director of CCAT.¹ On March 10, 2011, Ms. Williams sent Region 9 a message from the email address "dcapjane@aol.com" asking to be added to Region 9's distribution list for public notices concerning the EPA's permitting action for the PHPP. See Declaration of Gerardo C. Rios in Support of EPA Region 9's Response to Motion for Leave to Intervene ("Rios Decl."), ¶ 5 and Ex. A. On July 18, 2011, Region 9 responded by email to Ms. Williams stating that Region 9 staff had added Ms. Williams to its list to receive notice of all EPA PSD permit actions for the Project. *Id.*

On August 12, 2011, the Region emailed its public notice announcing its proposed PSD permit for the PHPP to Ms. Williams at the email address she had provided. Rios Decl., ¶ 6 and Ex. B.² On August 11, 2011, Region 9 had also sent a hard copy of the public notice of its proposed PSD permit for the PHPP via U.S. Mail to Mr. Lyle Talbot of DCAP, who was identified on Region 9's mailing list as a DCAP representative. Rios Decl., ¶ 7 and Exs. C-D.

On September 13, 2011, the day before the close of the public comment period, Ms. Williams conveyed an oral request for a 30-day extension of the public comment period to Mr. Stephen John of Region 9's Southern California Field Office. Ms. Williams did not make this

¹ See, e.g., http://stoptoxics.org/?page_id=10; http://www.energy.ca.gov/sitingcases/palmdale/documents/others/2011-03-29_Desert_Citizens_Against_Pollution_Opening_Brief.pdf.

² Region 9 has redacted from this document email addresses for other recipients not germane to this matter in order to protect the privacy interests of those recipients.

extension request in a written comment nor did she contact the EPA Region 9 contact person for this permitting action to make this request. Appropriate Region 9 personnel were informed of the request and notified Mr. John that the request was denied, and Mr. John conveyed that information to Ms. Williams via email. *See* RTC at 28, n. 9 (Docket #24.01).

On September 14, 2011, DCAP and CCAT together submitted written public comments on Region 9's proposed PSD permit for the PHPP, through counsel, Mr. Gideon Kracov. Rios Decl., ¶ 8 and Ex. E; see also RTC at 7-10 (Docket #24.01). The DCAP/CCAT comment letter from Mr. Kracov included Ms. Williams as a contact person with respect to the DCAP/CCAT comment. Rios Decl., Ex. E. Mr. Kracov's email transmittal of the comments was also copied to Ms. Williams, at the same DCAP email address Ms. Williams had previously provided to Region 9. *Id.* Other than these comments from DCAP and CCAT, Region 9 did not receive any other written comments from Ms. Williams on the proposed PSD permit for the PHPP, and Ms. Williams did not provide any comments at the public hearing that the Region scheduled to receive comments on its the proposed PSD permit for the PHPP. Rios Decl., ¶ 8.

Shortly after issuing its final permit decision for the PHPP, on October 19 and 20, 2011, Region 9 sent Ms. Williams and other DCAP/CCAT representatives three separate transmittals announcing its decision. First, on October 19, 2011, Region 9 sent an email announcing the Region's final permit decision to Ms. Williams at the email address she had provided. Rios Decl., ¶ 9 and Ex. F.³ Second, Region 9 sent a separate email that same day to Ms. Williams and to Mr. Kracov, among others, that included not only the announcement of the final permit decision, but also the final PSD permit for the PHPP, EPA's Response to Comments document, and the cover letter sent to the City. Rios Decl., ¶ 9 and Ex. G. Third, on October 20, 2011,

³ Region 9 has redacted from this document email addresses for other recipients not germane to this matter in order to protect the privacy interests of those recipients.

Region 9 sent an announcement of the Region's final permit decision by U.S. Mail to Lyle Talbot of DCAP. *Id.*, ¶ 9 and Exs. H-I.⁴

After Petitioner and his counsel filed petition for review documents in this case, in a letter dated November 22, 2011, the EAB set a deadline of December 13, 2011 for Region 9's response in this matter. Docket # 6. On December 9, 2011, the Board issued an order staying this case until February 7, 2012 to allow the parties to participate in the ADR process. Docket #16. The parties were unable to resolve the case during the ADR process, and on February 1, 2012, the EAB issued an order lifting the stay and establishing a deadline of February 17, 2012 for Region 9 and the City to file responses to the Petition for Review. Docket #18. Region 9 and the City filed their responsive briefs on February 17, 2012. On March 1, 2012, the Board issued an Order to Show Cause As to Why Petition Should Not Be Dismissed, to which Petitioner Rob Simpson filed a response on March 8, 2012. Docket # 26, 30-33.

The docket for this matter indicates that Ms. Williams filed her motion seeking leave to intervene on March 20, 2012. Prior to filing the motion, Ms. Williams did not contact Region 9 to determine its position concerning her motion or otherwise notify Region 9 of her intent to file the motion, nor did Ms. Williams or any other person contact Region 9 to indicate that Ms. Williams, DCAP, CCAT, or any of their representatives did not receive adequate notice of the Region's final permit decision for the PHPP. Rios Decl., ¶¶ 12, 13.

To the best of Region 9's knowledge, Ms. Williams has not, to date, served Region 9 with a copy of her motion. Rios Decl., ¶ 14. Region 9 was first informed of the filing of Ms. Williams' motion by the City on March 21, 2012, followed by notification from Petitioner Rob Simpson on March 25, 2012. *Id.*

⁴ Region 9 previously redacted from this document contact information for certain individuals in order to protect the privacy interests of those recipients.

STANDARD OF REVIEW

In considering a petition for review, the Board first determines whether the petitioner has met key threshold pleading requirements such as timeliness, standing, and issue preservation. Among other things, any party seeking the Board's review must file its appeal within thirty days of permit issuance and must have participated during the public comment period. 40 C.F.R. § 124.19(a). The failure to timely file a request for review will generally lead to dismissal of the case, as the Board strictly construes threshold procedural requirements, such as the filing of a thorough, adequate, and timely petition. *In re Gateway Generating Station*, PSD Appeal No. 09-02, Order Dismissing Petition for Review 10-14 (EAB Sept. 15, 2009); *see also In re Puna Geothermal Venture*, 9 E.A.D. 243,273 (EAB 2000) (citing *In re Envotech, L.P.*, 6 E.A.D. 260, 266 (EAB 1996) (dismissing as untimely permit appeals received after the filing deadline); *In re AES Puerto Rico L.P.*, 8 E.A.D. 324, 328 (EAB 1999)).

If a petitioner satisfies these pleading obligations, the Board then evaluates the petition on the merits to determine if review is warranted; however, “[t]he Board’s review of a PSD permit under part 124 is discretionary. That discretion is manifest in the language of section 124.19, which characterizes the appeal as a ‘request’ or ‘petition’ for review.” *In re Avenal Power Center, LLC*, PSD Appeal Nos. 11-02 through 11-05, slip op. at 14-15 and n. 13 (EAB Aug. 18, 2011); *see also In re Multitrade Ltd.*, 4 E.A.D. 24, 25 (EAB 1992) (explaining that petitioners do not have a right to the administrative review of a PSD permit). The Board analyzes PSD permits guided by the preamble to section 124.19, which states that the Board’s power of review “should be only sparingly exercised” and that “most permit conditions should be finally determined at the [permit issuer’s] level.” The petitioner bears the burden of demonstrating that review is warranted. *See In re Avenal Power Center, LLC*, slip. op. at 4-5.

Board guidance states that motions are required to be in writing, stating the grounds therefor with particularity, and setting forth the relief sought. EAB Practice Manual (September 2010) at 44-45. Motions must be accompanied by any necessary supporting documentation, and shall state whether the opposing party concurs or objects to granting the request set forth in the motion. *Id.* at 45.

As the Board has already explained, “[40 C.F.R.] Part 124 does not specifically address non-party participation or non-party briefs in permit appeal proceedings, except where review has been granted.” *Id.* at 45. While the Board has typically allows permittees not already a party to the proceeding to participate as intervenors, “the Board exercises its discretion, where appropriate, to allow intervention and/or non-party briefing.” *Id.* at 45-46 and cases cited therein.⁵

ARGUMENT

I. The Board’s Ruling on Its Order to Show Cause Should Precede Substantive Consideration of the Motion to Intervene

At the outset, Region 9 asks that the Board first issue its decision as to whether this case should proceed before considering Ms. Williams’ untimely request to intervene. The EAB’s Order to Show Cause in this matter indicated that the Board was inclined to dismiss this appeal for failure to comply with the Board’s filing requirements. Docket #26 at 7-8. If the Board dismisses the case entirely, Ms. Williams’ motion will be moot. *See In re: Gateway Generating Station*, Order Dismissing Petition for Review at 15 n.18 (“Because the Board is dismissing this

⁵ As a general matter, Region 9’s opposition will address Ms. Williams’ motion in light of the 40 C.F.R. Part 124 discretionary standard that the Board has established, and not on the C.R.O.P. intervention standard that the motion itself incorrectly applied.

Petition, CARE's Motion to Intervene and Petitioner's pending Motion to Compel and Request for Sanctions (filed June 9, 2009) are moot.”).

II. If the EAB Does Not Dismiss This Case, the Board Should Exercise Its Discretion to Deny the Motion for Leave to Intervene As Untimely

Even if the Board does not dismiss this case, however, Ms. Williams’ untimely request to intervene should be denied. 40 C.F.R. Part 124 does not specifically address non-party participation or non-party briefs in permit appeal proceedings, except where review has been granted. EAB Practice Manual at 45. In Part 124 proceedings where the Board grants review, the Board must give public notice of its decision, and “shall state that any interested person may file an amicus brief.” *Id.* at 46; 40 C.F.R. § 124.19(c). In this case, however, Board review has not been granted, thus the Board’s determination whether to grant the instant motion for leave to intervene is purely discretionary. While in some cases the Board has allowed a non-party other than the permittee or a regulatory governmental body to participate in Part 124 proceedings as an amicus, or, in rare cases, to otherwise file a non-party brief, *see In re Desert Rock Energy Co.*, PSD Appeal Nos. 08-03 through 08-06, at 2-3 (Oct. 14, 2008) (granting instrumentality of the Navajo Nation’s motion for leave to participate and conservation group’s motion for leave to file an amicus curiae brief), such permission is not warranted in this case given the extended and unexplained delay in Ms. Williams’ filing of her motion for leave to intervene. In light of the evidence showing that Ms. Williams and the organizations with which she is affiliated were promptly given notice and therefore were or should have been aware of the Region’s final PSD permit decision for the PHPP shortly after its issuance, and Ms. Williams’ failure to demonstrate good cause for delay in filing her motion, Region 9 urges the Board to deny Ms. Williams’ request to submit briefing in this case.

The deadline for filing a petition for review in this matter was, at the latest, November 22, 2011, *i.e.*, 33 days after Region 9 provided service of notice of its final decision by U.S. Mail on October 20, 2011. *See* 40 C.F.R. §§ 124.19(a), 124.20(d). After Petitioner and his counsel filed petition for review documents on November 17, 2011, the Board initially set a briefing schedule under which responsive briefs were due no later than December 13, 2011, then, upon lifting the stay in the case that had been issued to facilitate ADR, the Board set a revised briefing deadline of February 17, 2012. *See* Docket # 6, 18. However, Ms. Williams' motion to intervene was not filed until March 20, 2012, approximately four months after the deadline for filing a petition for review in this matter, and more than a month after the parties completed their submittal of responsive briefs in this matter. Ms. Williams also failed to request the Region's position on the motion⁶ and has yet to serve a copy of her motion on Region 9; had other parties not provided notice, the Region would not have been aware that the motion had been filed.⁷ *See* Rios Decl., ¶¶ 13-14.

The EAB has noted that the processing of NSR permits is time-sensitive because new source construction cannot begin prior to the applicant's receiving a final permit. *See In re Shell Gulf of Mexico, Inc. & Shell Offshore, Inc.*, OCS Appeal Nos. 11-02, 11-03, 11-04 & 11-08, slip op. at 74 (EAB Jan. 12, 2012); *see also* Order Governing Petitions for Review of Clean Air Act New Source Review Permits (EAB Apr. 19, 2011) ("Standing Order"). "Clearly, the Board has an interest, as does the public and the regulated community, in bringing finality to the Agency's administrative proceedings, particularly in the context of preconstruction permits." *In re Gateway Generating Station*, Order Dismissing Petition for Review at 10-13 (citing, *inter alia*,

⁶ Ms. Williams' motion states that "Petitioner supports Movant's intervention." Williams' Motion at 1.

⁷ Board guidance states that "[a] party, or its attorney or other representative, filing electronically shall ensure that a certificate of service accompanies each document filed with the Board, and shall serve a copy of each document filed in the proceeding on each party." *See* Order Authorizing Electronic Filing In Proceedings before the Environmental Appeals Board Not Governed by 40 C.F.R. Part 22 (EAB Jan. 28, 2010) at 4 n. 8.

In re Conoco Phillips Co., PSD Appeal 07-02 (Sept. 26, 2007) (Order) (noting the Board's ongoing practice of assigning PSD permit appeals the highest priority on its docket, relative to other appeals where resolution of the appeal is not a prerequisite to a facility's construction or operation)). The Board has also strictly construed the 30-day filing deadline for petitions for review under Part 124, absent special circumstances, such as where the permit issuer had not fully complied with the notice requirements. *See id.* at 11-13. Furthermore, “[t]he Board’s review of a PSD permit under part 124 is discretionary. That discretion is manifest in the language of section 124.19, which characterizes the appeal as a ‘request’ or ‘petition’ for review.” *In re Avenal Power Center, LLC*, slip op. at 14-15 and n. 13 (EAB Aug. 18, 2011); *see also In re Multitrade Ltd.*, 4 E.A.D. at 25 (explaining that petitioners do not have a right to the administrative review of a PSD permit).

In this case, Ms. Williams not only failed to meet the 30-day deadline for filing a petition for review, but also waited to file her motion to intervene until approximately four additional months had passed -- and after more than a month had elapsed since Region 9 and the City filed their responsive briefs. Given the need to bring finality to this proceeding, which concerns a preconstruction permit, Region 9 believes that the Board should deny Ms. Williams’ untimely attempt to submit briefing in this case. Granting such a late-filed motion would unduly delay the Agency’s decision in this case as well as imposing additional, unwarranted resource burdens on the Agency and the permittee.

Ms. Williams suggests that her untimely filing should be excused because, she states, she “never received notice” of the Region’s final permit decision for the PHPP. Williams Motion at 1-3.⁸ This vague assertion, however, does not excuse her significant delay in moving to

⁸ Ms. Williams’ motion states that “[t]hough she was added to the Public Notice Distribution list, the last communication she received from EPA Region 9 regarding this permit was the August 8, 2011 Public Notice

intervene in this matter, particularly in light of the overwhelming evidence that Region 9 did in fact provide timely notice of the Region's final permit decision to Ms. Williams as well as to the two organizations with which she is directly affiliated that submitted formal comments on the Region's proposed permit decision. Indeed, the comments submitted by DCAP/CCAT on the Region's proposed PSD permit decision for the PHPP provide the sole basis on which Ms. Williams could seek to intervene in this matter given that she did not submit her own individual comments on the Region's proposed permit for the PHPP, either in writing or during the public hearing that Region 9 scheduled for the proposed PSD permit. Rios Decl., ¶ 8. *See* 40 C.F.R. §§ 124.11 ("During the public comment period, . . . any interested person may submit written comments on the draft permit.") and 124.12(c) ("[a]ny person may submit oral or written statements and data concerning the draft permit" during the public hearing).

On October 19, 2011, the day after Region 9 issued its October 18, 2011 final PSD permit decision for the Project, the Region emailed Ms. Williams notice of the decision at the email address she had provided to the Region, followed by a second emailed notice that day which included not only the announcement of the decision but the final permit documents. Rios Decl., ¶¶ 9-10 and Exs. F-G. The second email was also copied to Mr. Kracov, counsel for DCAP/CCAT, the organizations which Ms. Williams leads and which submitted formal comments on the decision with her apparent knowledge. *Id.*, ¶ 10 and Ex. G. Last, on October 20, 2011, Region 9 sent an announcement of the Region's final permit decision to Lyle Talbot of DCAP by U.S. Mail. *Id.*, ¶ 11 and Exs. H-I.

Even if Ms. Williams somehow did not receive or review the two email notices sent to her by Region 9 on October 19, 2011, it is clear that this circumstance was not caused due to

Request for Comments on the draft permit." Williams Motion at 2-3. As discussed above, Mr. Stephen John of Region 9's Southern California Field Office informed Ms. Williams by email that her oral request for an extension of the comment period was denied. *See* RTC at 29, n. 9 (Docket #24.01).

error by the Region. Furthermore, the Region's additional notices to Mr. Kracov and Mr. Talbot were more than adequate to put DCAP and CCAT on notice of the Region's final permit decision, and such notice should be imputed to Ms. Williams as the Director and Executive Director, respectively, of these organizations, especially since the comments submitted by these organizations provide the only basis on which Ms. Williams could even attempt to intervene in this matter.

Notably, neither Ms. Williams nor any other person has contacted Region 9 to indicate that Ms. Williams, DCAP, CCAT, or any of their representatives did not receive notice of the Region's final permit decision for the PHPP. Rios Decl., ¶ 12. Ms. Williams' motion fails to mention whether Mr. Kracov or Mr. Talbot received the notices that the Region issued to them as DCAP/CCAT representatives. Further, Ms. Williams' motion neither specifies when or how she actually learned of the Region's final permit decision for the PHPP, nor explains why she could not have filed a petition for review in the matter prior to the filing deadline or filed a motion to intervene earlier in the proceeding, given her organizations' knowledge of the Region's permit decision. In sum, Ms. Williams has failed to demonstrate good cause explaining the delay in submitting her motion and therefore the motion should be denied as untimely.

Ms. Williams does argue that the procedures and requirements in 40 C.F.R. § 22.16(a) and Federal Rule of Civil Procedure 24(a)(2) govern the Board's consideration of her motion to intervene, arguing that the Board *must* grant her leave to intervene if she meets the three elements outlined in those rules. Williams Motion at 1-3. However, neither of these authorities, which provide for intervention as of right, applies to proceedings under 40 C.F.R. Part 124.

Indeed, given that petitioners in general have no right to administrative review of permits under Part 124, Ms. Williams' argument that she has a right to intervention here must fail.⁹

Finally, we note that even if Ms. Williams' motion had been filed in a more timely manner, it fails to explain with particularity the basis for her need to intervene. *See* EAB Practice Manual at 44. For example, Ms. Williams does not specify what her particular claims are or how Petitioner's filing is not adequate to address her interests. Her general assertions of interest in this matter are inadequate to warrant the additional burden and delay that would be caused by her intervention or otherwise submitting briefing in this matter. Under any standard, her motion should be denied.

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⁹ Although inapplicable here, we note that 40 C.F.R. § 22.16(a) also requires that those seeking to intervene do so early in the proceedings: "A motion for leave to intervene that is filed after the exchange of information pursuant to 40 C.F.R. § 22.19(a) shall not be granted unless the movant shows good cause for its failure to file before such exchange of information." *Cf.* Fed. R. App. P 15(d) (motion to intervene must be filed within 30 days of the date the petition was filed and must contain a concise statement of the interest of the moving party and the grounds for intervention).

CONCLUSION

For the reasons stated above, the Board should deny Ms. Williams' Motion for Leave to Intervene as untimely, if it does not first find that the request is moot. If the Board does decide to let Ms. Williams participate in this matter, Region 9 believes that, at most, she should be granted amicus status, with briefing limited to the issues that the Board determines were validly raised by Petitioner and remain at issue in this case, and that the Region should be allowed to respond to any such briefing.¹⁰

Date: March 29, 2012

Respectfully submitted,

/S/

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¹⁰ See, e.g., *In re USGen New England*, NPDES Appeal No. 03-12, at 7 & n.13 (Feb. 20, 2004) (denying two requests to intervene but simultaneously granting leave to file an amicus brief); *In re Dist. Of Columbia Water & Sewer Auth.*, NPDES Appeal Nos. 05-02 & 07-10 through 07-12, at 2 (EAB July 26, 2007) (granting a non-party leave to file a brief, but making clear that "issues raised by [the nonparty] would not expand the scope of the appeal," and that its brief "shall be limited to the remaining legal argument or issues raised by the parties"); *In re Indeck-Elwood LLC*, 13 E.A.D. 126, n. 45 (EAB 2006) (explaining that the Board denied a motion for leave to file an amicus brief because the brief sought "to raise an issue outside the scope of the [] Petition").

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the attached **EPA REGION 9'S RESPONSE TO MOTION FOR LEAVE TO INTERVENE** and **DECLARATION OF GERARDO C. RIOS IN SUPPORT OF EPA REGION 9'S RESPONSE TO MOTION FOR LEAVE TO INTERVENE (with attached exhibits)** to be served by electronic mail upon the persons listed below. I also caused a copy of these documents to be served by U.S. Mail upon Jane Williams at the address listed below.

Dated: March 29, 2012

/S/

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