

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

IN RE:)	
)	
PIO PICO ENERGY CENTER, LLC)	PSD Appeal Nos. 12-04, 12-05 & 12-06
)	
PSD Permit No. SD 11-01)	

**INTERVENOR PIO PICO ENERGY CENTER LLC’S OPPOSITION TO PETITIONER
SIERRA CLUB’S MOTION FOR LEAVE TO FILE A REPLY, OR IN THE
ALTERNATIVE, MOTION TO FILE A SUR-REPLY**

Intervenor Pio Pico Energy Center LLC (“Pio Pico”) respectfully opposes Petitioner Sierra Club’s motion for leave to file a reply brief. In support of its opposition, Pio Pico states the following:

1. Pio Pico submitted its application for a PSD permit on April 1, 2011. Administrative Record (“A.R.”) at I.2. After Pio Pico satisfied repeated requests for additional information, EPA Region IX finally deemed Pio Pico’s application to be complete on June 14, 2012. A.R. I.61.¹ The Region issued a draft Prevention of Significant Deterioration Permit (“PSD”) permit on June 20, 2012. A.R. VII.3 at 2. The public comment period for the draft permit closed on September 5, 2012. Id. The Region issued Pio Pico’s PSD permit on November 19, 2012.

2. Petitioners Sierra Club, Helping Hand Tools, and Mr. Robert Simpson filed separate petitions for review of Pio Pico’s PSD permit on December 19, 2012. This Board granted Pio Pico’s motion for leave to intervene on January 24, 2013. Both Pio Pico and the Region filed their responses to the petitions for review on February 6, 2013.

¹ Petitioner Sierra Club’s claim that “application materials were being submitted by the applicant as late as August 31, 2012,” Petitioner Sierra Club’s Motion for Leave to File Short Reply at 1, is incorrect. The August 31, 2012 document cited by the Sierra Club, I.71, is a letter from Pio Pico’s consultant, Sierra Research, providing clarifying information regarding the cooling system water circulation rate at the request of the Region.

3. On April 19, 2011, this Board issued a standing order governing petitions for review of Clean Air Act New Source Review and PSD permits (“NSR Order”). Since PSD appeals have a “time-sensitive nature,” id. at 1, the Board modified its procedures in reviewing these appeals. Among the modifications was that “[t]he Board will apply a presumption against the filing of reply briefs and sur-replies in NSR appeals.” Id. at 3. This is a change from the typical practice of simply obtaining consent from the Board to file a reply without needing to overcome a presumption against such additional briefing. See 40 C.F.R. § 22.30(a)(2).
4. Despite this presumption against the filing of reply briefs, petitioner Sierra Club moved for leave to file a reply brief on February 19, 2012. Contrary to the Board’s Practice Manual, Sierra Club failed to inquire as to whether Pio Pico concurred with or objected to its motion for leave to file a reply. See The Environmental Appeals Board Practice Manual (June 2012) at 26.
5. In its motion, Sierra Club offered no explanation or rationale as to why the presumption against the filing of reply briefs should be disregarded in this proceeding. Instead, it merely referenced the Board’s ability to waive the presumption against reply briefs and the fact that the Board granted an extension of time to file response briefs in this case and one other. Sierra Club never provides any explanation as to why the substance of the response briefs by either the Region or Pio Pico merit a reply.
6. A brief examination of the Sierra Club’s proposed reply brief demonstrates that there is no basis for departing from the presumption against filing a reply brief. Sierra Club not only fails to address its burden in demonstrating a need to depart from this presumption, but it raises three substantive points that do not warrant a reply brief.

7. First, Sierra Club seeks, for the first time in its reply brief, to raise a new policy argument where it advocates that permitting authorities and the Board must delve into complex bid requests and contractual terms between permit applicants and power purchasers as part of a Best Available Control Technology (“BACT”) analysis. Petitioner Sierra Club’s Proposed Reply (“SC Rep.”) at 1-4. For example, the Sierra Club now asks the Board to examine the San Diego Gas & Electric (“SDG&E”) Request for Offer and the subsequent power purchase agreement in exacting detail and then determine, (1) whether Pio Pico’s bid to SDG&E really offered what SDG&E requested; (2) whether the terms of the Request for Offer and the subsequent power purchase agreement must be consistent with one another; and (3) whether the terms of the Request for Offer and the power purchase agreement actually are consistent with one another. See id. at 1-3 (providing analysis of what the Request for Offer purportedly did and did not include). According to the Sierra Club, both the permitting authority and this Board must now begin effectively dictating contract terms between permit applicants and power purchasers as part of its BACT analysis. This novel and unsupported argument was never raised by the Sierra Club in either its comments on the draft PSD permit or in its petition for review. Therefore, the Board should deny the motion for leave pursuant to 40 C.F.R. § 124.13.
8. Second, Sierra Club continues to erroneously argue that the “safety factor” adjustments made by the Region to the Pio Pico turbines’ heat rate were unsupported by the record. SC Rep. at 4-5. The proposed reply never addresses the fact that Sierra Club failed to comment on the Region’s inclusion in the draft PSD permit of a 3% safety factor for unit variability and 3% safety factor for unit degradation. See Brief of Intervenor Pio Pico Energy Center, LLC in Response to the Petitions for Review (“Pio Pico Br.”) at 19.

Therefore, Sierra Club should not be permitted to file additional briefing on issues that are not properly before the Board, pursuant to 40 C.F.R. § 124.13. As for the third safety factor at issue, the 1.4% adjustment due to temperature and humidity variations, Sierra Club's proposed reply spends less than a paragraph disputing the Region's interpretation of a technical document. SC Rep. at 4-5. The proposed reply disregards Pio Pico's explanation of the record in support of the Region's decision. See Pio Pico Br. at 18-20. Given Sierra Club's "heavy burden" in "demonstrate[ing] why [the permitting authority's] technical analysis is clearly erroneous," In re Newmont Nevada Energy Investment, LLC, 12 EAD 429, 458 (EAB 2005), its criticisms of how the Region interpreted a chart are not pressing enough to overcome the Board's presumption against filing a reply brief.

9. Third, Sierra Club again merely restates its objections to the Region's interpretation of particulate matter emission data from dissimilar units and the Region's determination regarding the Pio Pico turbines' particulate matter emissions at various loads. SC Rep. at 6-8. As in its petition, the proposed reply brief does little other than to mischaracterize the administrative record and summarily declare that the evidence cited by the Region in support of its decisions are inadequate. Again, Sierra Club's proposed reply disregards Pio Pico's explanation of the record evidence in support of the Region's decisions. See Pio Pico Br. at 21-22. Raising a further round of unconvincing and unsupported disputes over technical data at this stage should not justify the Board lifting its presumption against filing a reply brief.
10. Should the Board decide to grant Sierra Club's motion to file a reply brief, Pio Pico requests leave to file a 7 page sur-reply limited to the Sierra Club's first argument, related

to permitting authorities' purported duty to interpret, compare, and effectively dictate contract terms between a permit applicant and non-party power purchasers. Pio Pico believes that Sierra Club's argument, if accepted, would result in a dramatic new interpretation of BACT that could alter the legal rights of third parties not subject to the Clean Air Act, require detailed and time consuming reviews of matters outside permitting authorities' areas of expertise, and interfere with state regulatory laws and regulations regarding electricity markets. We urge the Board not to consider adoption of such a radical and unprecedented change in how EPA interprets BACT requirements without additional briefing.

For the reasons stated above, Pio Pico requests that the Board grant it leave to intervene and respond to the above-captioned petitions for review.

DATED: February 21, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of February 2013, copies of the foregoing Opposition to Petitioner Sierra Club's Motion for Leave to File a Reply Brief were served by First Class mail to the following:

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