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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of:	)	Appeal No. PSD 11-07
	)	
PETITION FOR REVIEW RE:	)	
PALMDALE HYBRID POWER PLANT	)	**INTERVENOR CITY OF PALMDALE'S**
PSD PERMIT	)	**OPPOSITION TO JANE WILLIAMS'**
	)	**MOTION FOR LEAVE TO INTERVENE**
PSD Permit No. SE 09-01	)	
	)	

On behalf of the Permittee City of Palmdale ("the City"), applicant for the Palmdale Hybrid Power Plant ("Project") Prevention of Significant Deterioration ("PSD") Permit No. SE 09-01 ("PSD Permit") issued by the U.S. Environmental Protection Agency ("EPA") on October 18, 2011, we respectfully submit this opposition to Jane Williams' ("Ms. Williams") Motion for Leave to Intervene ("Motion") in the proceedings regarding Appeal No. PSD 11-07 ("Appeal") before the Environmental Appeals Board ("Board"). Not only does Ms. Williams' Motion come extremely late in these proceedings, over a month after all parties have completed briefing on the petition for review, Ms. Williams' Motion is substantively flawed. Ms. Williams has not made allegations sufficient to qualify her for intervention, and those allegations that she has made, primarily that she did not receive notice of the final approval of the PSD Permit, are not accurate. Ms. Williams received timely notice directly from the EPA. Because the Appeal itself is also flawed and should be dismissed, there should be no Appeal in which Ms. Williams

could participate as an intervenor. Finally, the Motion should be dismissed to expedite review of this appeal because of the time-sensitive nature of the PSD permit and the City's need for finality. For these reasons, the Board should deny Ms. Williams' Motion.

I. MS. WILLIAMS' MOTION SHOULD BE DENIED BECAUSE IT IS BASED ON THE WRONG PROCEDURAL RULES

A. The Consolidated Rules Of Practice Are Not Applicable To The Appeal.

Ms. Williams relies on 40 C.F.R. § 22.11(a) as the basis for her alleged right to intervene in these proceedings. Motion at 1. That regulatory section is part of the Consolidated Rules of Practice ("CROP") applicable to certain types of actions that the Board may hear. *See* Board Practice Manual at 20. While the CROP apply to certain types of actions that the Board may hear, they plainly do not apply to a PSD Permit Appeals case.

Title 40 C.F.R. § 22.1(a) sets forth the list of administrative adjudicatory proceedings to which the CROP applies. As set forth in 40 C.F.R. § 22.1(a), this list includes:

- The assessment of any administrative civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. § 136 l (a));
- The assessment of any administrative civil penalty under sections 113(d), 205(c), 211(d) and 213(d) of the Clean Air Act, as amended (42 U.S.C. §§ 7413(d), 7524(c), 7545(d) and 7547(d));
- The assessment of any administrative civil penalty or for the revocation or suspension of any permit under section 105(a) and (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. § 1415(a) and (f));
- The issuance of a compliance order or the issuance of a corrective action order, the termination of a permit pursuant to section 3008(a)(3), the suspension or revocation of authority to operate pursuant to section 3005(e), or the assessment of any civil penalty under sections 3008, 9006, and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. §§ 6925(d), 6925(e), 6928, 6991e, and 6992d)), except as provided in part 24 of this chapter;

- The assessment of any administrative civil penalty under sections 16(a) and 207 of the Toxic Substances Control Act (15 U.S.C. §§ 2615(a) and 2647);

- The assessment of any Class II penalty under sections 309(g) and 311(b)(6), or termination of any permit issued pursuant to section 402(a) of the Clean Water Act, as amended (33 U.S.C. §§ 1319(g), 1321(b)(6), and 1342(a));

- The assessment of any administrative civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. § 9609);

- The assessment of any administrative civil penalty under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA") (42 U.S.C. § 11045);

- The assessment of any administrative civil penalty under sections 1414(g)(3)(B), 1423(c), and 1447(b) of the Safe Drinking Water Act as amended (42 U.S.C. §§ 300g–3(g)(3)(B), 300h–2(c), and 300j–6(b)), or the issuance of any order requiring both compliance and the assessment of an administrative civil penalty under section 1423(c); and

- The assessment of any administrative civil penalty or the issuance of any order requiring compliance under Section 5 of the Mercury-Containing and Rechargeable Battery Management Act (42 U.S.C. § 14304).

Nowhere on the list of matters to which the CROP applies is an appeal of a PSD Permit. In fact, as indicated in the Board's Practice Manual, and as discussed below, permit appeals, including specifically PSD Permit appeals, are governed by 40 C.F.R. Part 124. *See* Board Practice Manual at 35-36.

Because the CROP are inapplicable to the Appeal at issue here, Ms. Williams' motion to intervene which relies on the CROP, and specifically 40 C.F.R. § 22.11(a), as the basis for her proposed intervention should be denied.

B. Even If CROP Did Apply, Ms. Williams Does Not Meet All Of The Necessary Requirements Of 40 C.F.R. § 22.11(a).

Even if the CROP were to apply, which it does not, as discussed above, Ms. Williams does not meet the three requirements that must be met for her to be allowed to intervene under 40 C.F.R. § 22.11(a).

The regulatory requirement reads:

> "The Presiding Officer shall grant leave to intervene in all or part of the proceeding if the movant claims an interest relating to the cause of action; a final order may as a practical matter impair the movant's ability to protect that interest; and the movant's interest is not adequately represented by existing parties." 40 C.F.R. § 22.11(a).

While Ms. Williams claims to satisfy all three of the requirements, and while Ms. Williams has claimed an interest in the cause of action that may be viable, it is clear that Ms. Williams cannot meet the other two requirements.

First, it is hard to understand how the outcome of the Appeal might affect Ms. Williams' ability to protect her interest, as Ms. Williams herself chose not to protect that interest by failing to file a petition for review within the specified allowable timeframe. Were Ms. Williams truly interested in protecting her interests, she could have filed a petition to review the PSD Permit within the appropriate time for doing so. Ms. Williams' contention that she was not made aware of the final approval of the PSD Permit, *see* Motion at 3, is unavailing because, as EPA described in its response to the petition, EPA followed the applicable public notice procedures, *see e.g.*, EPA Response to Petition at 8. Furthermore, as discussed further below, the record shows that Ms. Williams actually did receive notice of the final permit issuance.

Ms. Williams knew of the proceedings related to this project, having been an active participant in proceedings related to the project for which the PSD Permit was issued as an intervenor in the California Energy Commission's ("CEC") proceedings. *See* Exhibit A, CEC

Proof of Service List (including Ms. Williams on page 2).[1] Even though Ms. Williams knew of the proceedings, Ms. Williams' Motion comes very late in the game, more than a month after briefing on the petition for review, suggesting further that she was not particularly anxious to protect any interest she may have. Allowing intervention at this late stage would run contrary to the Board's statements regarding a need for an orderly and efficient administrative process, especially in new source review cases, such as this Appeal. *See In re Avenal Power Center LLC*, E.A.B., PSD Appeal Nos. 11-02, 11-03, 11-04, & 11-05 (Aug. 18, 2011) at 17; *see also* Order Governing Petitions For Review of Clean Air Act New Source Review Permits (E.A.B. Apr. 19, 2011).

Also, Ms. Williams offers no real reason why her interests are not adequately represented by the petitioner, Mr. Simpson. Ms. Williams admits that she and Mr. Simpson "are likely to have some similar issues," but insists that her "*circumstances* are different" because she "was not given notice of final permit issuance." Motion at 3 (emphasis added). Whether or not Ms. Williams' statement that her *circumstances* are different is true, Ms. Williams has not alleged a single interest of hers that Mr. Simpson could not adequately represent, as is required by 40 C.F.R. § 22.11(a). Ms. Williams has not given the Board any reason why she should be granted leave to intervene in this proceeding, and, as such, the Motion should be denied.

While Ms. Williams argues that her different circumstances, based on her not having received notice of the final permit issuance, justify her intervention, the record shows that Ms. Williams actually did receive notice of the final permit issuance at least twice. EPA sent two emails stating that the PSD Permit had been approved to its distribution list for the PSD Permit on October 19, 2011. Ms. Williams was a recipient of both of these emails. *See* Exhibit

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[1] The CEC Proof of Service list is available at: http://www.energy.ca.gov/sitingcases/palmdale/Palmdale_POS.pdf

B[2] (both emails from EPA include the email address "dcapjane@aol.com" in the distribution list, the same email address used by Ms. Williams as an intervenor in the CEC proceeding as indicated on the CEC proof of service list referenced above).[3] Thus, while Ms. Williams offers no real reason why her interests would not be adequately represented by the petitioner, the reason she did offer, that she did not receive notice of the final PSD Permit approval, is not in fact true.

II. MS. WILLIAMS' MOTION SHOULD BE DENIED AS MOOT BECAUSE THE BOARD SHOULD DISMISS THE APPEAL

As described in the City's and EPA's responses to the petition for review, the initial petition in this Appeal must be dismissed, as it was untimely, did not comply with the Board's procedural requirements, and does not demonstrate that the PSD Permit at issue is based on a clearly erroneous finding of fact or conclusion of law, or involves an exercise of discretion or an important policy consideration that warrants review.

Because all of these facts conclusively demonstrate that the petition in this Appeal should be denied, if Ms. Williams' motion is not denied because it relies on the wrong rules and regulations as discussed above, Ms. Williams' Motion should be dismissed as moot, as once the petition is dismissed, there is no action in which Ms. Williams could participate, and it is too late for Ms. Williams to file her own petition.

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2 *See also* Docket Filing #37, Declaration of Gerardo C. Rios In Support of EPA Region 9's Response To Motion For Leave to Intervene, March 29, 2012, Exhibit B.

3 Ms. Williams is affiliated with Desert Citizens Against Pollution ("DCAP") and California Communities Against Toxics ("CCAT") which together submitted a written comment on the proposed PSD permit. DCAP and CCAT also received notice. *See id.*, at 2-4.

III. THE MOTION SHOULD BE DISMISSED TO ALLOW EXPEDITIOUS RESOLUTION OF THE APPEAL AND ADDRESS THE CITY'S NEED FOR FINALITY

"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). Order Governing Petitions For Review of Clean Air At New Source Review Permits, Before the Environmental Appeals Board, dated April 19, 2011 ("NSR Order"), at 2. It is the Board's policy of "facilitate expeditious resolution of NSR appeals." *Id.*

As detailed in the City's Response to the Petition For Review, the project has undergone intense regulatory scrutiny since the project was formally proposed to the California Energy Commission almost four years ago. The City has expended significant resources of time and money during this long process. Additional delay associated with this appeal have compounded the City's expenditure of resources and granting this Motion could lead to further delays. Consistent with the NSR Order, and based on the need for finality, the City requests that this late Motion be dismissed for the reasons described herein and to facilitate expeditious review of the appeal because of the time-sensitive nature of the PSD.

IV. CONCLUSION

Because Ms. Williams' Motion is based on the wrong set of rules, does not satisfy the requirements of the inapplicable rules it cites, the Appeal itself should be dismissed, and Board policy that recognizes the time-sensitive nature of PSD permits, the Board should deny Ms. Williams' Motion.

DATED: March 30, 2012

Respectfully submitted,

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Counsel to Applicant

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

In the Matter of:	)	Appeal No. PSD 11-07
	)	
PETITION FOR REVIEW RE: PALMDALE HYBRID POWER PLANT PSD PERMIT	)	**CERTIFICATE OF SERVICE**
	)	(Revised December 2, 2011)
PSD Permit No. SE 09-01	)	

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DECLARATION OF SERVICE

I, Robert Dickson, declare that on March 30, 2012, I served and filed copies of the attached document to all parties identified on the Proof of Service List in the following manner:

INTERVENOR CITY OF PALMDALE'S OPPOSITION TO JANE WILLIAMS' MOTION FOR LEAVE TO INTERVENE

For Service to Environmental Appeals Board

☒ Electronic transmission via CDX at http://CDX.EPA.GOV

☐ Transmission by depositing a copy with FedEx overnight mail delivery service at Costa Mesa, California, with delivery fees thereon fully prepaid and addressed to the following:

U.S. Environmental Protection Agency
Clerk of the Board, Environmental Appeals Board
1341 G Street, N.W., Sixth Floor
Washington, D.C. 20005

☐ I certify that the attached document is an identical copy of the document electronically filed in this case with the Environmental Appeals Board on this date.

For Service to All Other Parties

☒ Transmission via electronic mail to all email addresses on the Proof of Service list; and

☐ by depositing one paper copy with the United States Postal Service via first-class mail at Costa Mesa, California, with postage fees thereon fully prepaid and addressed as provided on the Proof of Service list.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 30, 2012, at Costa Mesa, California.

Robert Dickson