

the motion should contain a statement to that effect. EAB Practice Manual, June 2012, at 45 & n. 49.

On February 19, 2013, counsel for Sierra Club sent an email to counsel at Region 9 and EPA's Office of General Counsel transmitting its earlier filed Motion for Leave to File Short Reply and its Proposed Reply brief. As far as Region 9 is aware, Sierra Club did not contact counsel at EPA Region 9 or EPA's Office of General Counsel to determine whether Region 9 concurred or objected to the Sierra Club's Motion prior to its filing of the Motion.¹

2. Sierra Club Fails to Overcome the Presumption Against Reply Briefs in PSD Permit Appeal Proceedings

The EAB has adopted a presumption against filing reply briefs in Board proceedings involving appeals of PSD and other NSR permits, noting the time-sensitive nature of such proceedings given the fact that new source construction cannot begin prior to receiving a final permit under CAA section 165(a), 42 U.S.C. § 7475(a). *See* EAB Order Governing Petitions for Review of Clean Air Act New Source Review Permits, April 19, 2011 ("Standing Order") at 1-3. The Board has stated that a petitioner seeking leave to file a reply brief in an appeal of an NSR permit issued pursuant to the CAA, such as the PSD permit at issue in this case, must meet the "high threshold required to overcome the presumption against reply briefs that the Board applies in NSR appeals," and must state "with particularity the arguments to which the Petitioner seeks to respond and the reasons the Petitioner believes it is both necessary to file a reply to those arguments * * * and how those reasons overcome the presumption in the Standing Order." *See*

¹ Although counsel for Region 9, Julie Walters, was out of the office on leave from February 15-22, 2013, she left instructions on her voicemail to contact an alternate attorney in Region 9, Nina Spiegelman, during her absence, along with a telephone number for Ms. Spiegelman. Upon her return to the office, Ms. Walters determined that she had not received an email or voice mail message from Sierra Club attempting to ascertain Region 9's position regarding the Sierra Club's proposed motion for leave to file a reply brief prior to its being filed with the Board, nor were any of her Office of Regional Counsel or Office of General Counsel colleagues contacted in this regard during her absence.

In Re Shell Offshore, Inc., OCS Appeal Nos. 11-05, 11-06 & 11-07, slip op. at 11 (EAB Mar. 30, 2012) (quoting *In re Shell Gulf of Mex., Inc.*, OCS Appeal Nos. 11-02 through 11-04 and 11-08, slip op. at 15 (EAB Jan. 12, 2012)).

In this case, Sierra Club’s Motion fails to meet the “high threshold” required to overcome the presumption against reply briefs that the Board applies in NSR appeals. The Motion does not explain with particularity the reasons why it is necessary to reply to the particular arguments at issue in its Proposed Reply Brief, much less demonstrate that those reasons overcome the Board’s presumption against filing reply briefs in NSR appeals. Sierra Club’s Motion does not even attempt to demonstrate that the arguments it makes in its Proposed Reply Brief were not raised, and could not have been raised, in public comments or in its Petition for Review, or explain why the briefing of such issues is necessary now for the resolution of this case. It merely notes that in certain cases, including this one, parties have requested, and the Board has granted, extensions of filing deadlines for responsive briefs. Given Sierra Club’s failure to satisfy its burden to demonstrate that the presumption against a reply brief should be waived in this PSD permit appeal, Sierra Club’s Motion should be denied.

Even if Sierra Club’s failure to meet this burden were not dispositive in this case, a brief review of the Motion and Sierra Club’s Proposed Reply Brief makes clear that the arguments in that brief are wholly unnecessary for resolution of the issues on appeal, and in some cases are procedurally barred, as discussed below. The Motion should be denied on these grounds as well.

a. Sierra Club’s Reply Brief Arguments Concerning the Technical Feasibility of CCGT for the PPEC Are Unnecessary for Resolution of the Issue

Sierra Club states that one purpose of filing its Proposed Reply Brief is to clarify the distinction between the Power Purchase Agreement (“PPA”) and the Request for Offers (“RFO”) and how each relates, or does not relate, to the decisions the Region made. Motion ¶ 5(1). Per

the discussion above, Sierra Club fails to explain whether it raised this issue earlier, and if so, why further argument is necessary on reply, or alternatively, if the issue was not raised earlier, why it could not have been, and why briefing on it is necessary at this juncture.² Sierra Club's Motion should be denied on this basis alone.

Furthermore, Sierra Club fails to demonstrate that further briefing on this issue is necessary for resolution of this case. Region 9's Fact Sheet notes the fact that Pio Pico Energy Center, LLC (the "Applicant") developed the project to meet the objectives of San Diego Gas & Electric's ("SDG&E") RFO and the resulting contractual requirements of the PPA with SDG&E in response to the RFO. Fact Sheet (SC Pet. For Review Ex. 2) at 16-17. The Fact Sheet's Best Available Control Technology ("BACT") determination includes information from the PSD permit application that originated in the PPA³ and RFO providing details concerning the nature of the Applicant's project purpose and operation as a peaking and load-shaping facility, in order to inform the BACT analysis' consideration of the technical feasibility of combined-cycle gas turbines ("CCGT") for the Pico Pico Energy Center ("PPEC"). *Id.* However, regardless of the PSD permit application's reliance on information from the PPA and RFO, it is clear that the substantive issue under consideration by Region 9 in its BACT determination was whether a combined-cycle gas turbine was a feasible technology considering the Project's business purpose as a peaking and load-shaping facility. *See* EPA Region 9's Response to Petitions for Review at 13-23.

In a belated effort to argue that the Region's BACT analysis was unduly narrow, Sierra Club's Proposed Reply Brief focuses on the idea that some other type of project could have been proposed in response to the broadly worded RFO from SDG&E. Regardless of whether some

² We note that Sierra Club's Petition for Review discusses the RFO and PPA documents at some length. *See* SC Pet. for Review at 3-6, 18.

³ The PPA itself was not a part of the administrative record for this permit decision.

other type of project could have been proposed in response to the RFO, Sierra Club's arguments do not change the peaking and load-shaping purpose of the specific project under consideration in this case, or the conclusions concerning technical feasibility of CCGTs for the PPEC in the Region's BACT analysis that considered that purpose. We also note that Sierra Club's statement that Region 9 "insists that its BACT analysis cannot look beyond the narrow contract parameters in the [PPA]," Proposed Reply Brief at 1, mischaracterizes the Region's position concerning the technical feasibility of CCGT, which appropriately considered whether CCGT would be achievable for the PPEC given the fundamental design elements necessary to meet the Project's purpose as a peaking and load-shaping facility. See EPA Region 9's Response to Petitions for Review at 17-20. In sum, the argument in the Proposed Reply Brief on this issue is a red herring, it mischaracterizes Region 9's position, and it is wholly unnecessary for resolution of this appeal.⁴ For these reasons, Sierra Club's Motion should be denied.⁵

b. The Arguments in the Proposed Reply Brief Are Unnecessary for Resolving Whether the Region Erred In Allowing a Margin of Compliance with the GHG BACT Limit

Sierra Club next argues that Region 9 failed to adequately justify its determination of an appropriate margin for the Greenhouse Gas ("GHG") BACT limit. Region 9 opposes Sierra Club's Motion with respect to this argument on the same basis as discussed above: Sierra Club has not explained, much less demonstrated, the necessity of further argument concerning this issue. The issue of an appropriate margin for the GHG BACT limit was discussed in the Region's Fact Sheet, Region 9's Response to Comments, the Sierra Club's Petition for Review,

⁴ We also note that the discussion in the Proposed Reply Brief also fails to comply with this Board's directive to cite with specificity to the record for the issues being appealed. Standing Order at 4, ¶ 7.

⁵ With respect to Sierra Club's related argument that in its Proposed Reply Brief, it seeks to point out negative ramifications for BACT determinations if the Region's arguments about a facility's "project purpose" are upheld, Motion at 2, ¶ 5(1), Sierra Club fails to explain why it could not have raised this issue in its comments or in its Petition for Review before the Board. Sierra Club's attempt to raise this issue for the first time in a reply brief is improper, and also fails to satisfy the threshold for overcoming the presumption against reply briefs in NSR appeals.

and Region 9's Response to Petitions for Review. Although the Proposed Reply Brief may provide more argument on this issue, the brief fails to provide any new substance or demonstrate that further explanation is necessary to resolve this issue.

We also note that Sierra Club's Proposed Reply Brief also attempts to introduce for the first time a new argument: the Region should have considered data from www.epa.gov/airmarkets. See Proposed Reply Brief at 5-6 n. 7. Sierra Club neglects to explain why it could not have made this argument during the public comment period, as the Fact Sheet discussed the considerations supporting the inclusion of these margins. Sierra Club is precluded from raising new issues on appeal without having commented on those issues during the permit proceeding without a demonstration that the issue or argument was not reasonably ascertainable during the public comment period. *See* 40 C.F.R. § 124.13. The Motion does not make any such demonstration, and even if that were not the case, Sierra Club would be barred from raising this issue for the first time on reply rather than in its Petition for Review. New issues raised at the reply stage of EAB permit appeal proceedings are equivalent to late filed appeals and must be denied on the basis of timeliness. *E.g., In re Russell City Energy Center*, PSD Appeal Nos. 10-01 - 10-05, slip op. at 70 (EAB Nov. 18, 2010), 15 E.A.D. ____.

For these reasons, Sierra Club's Motion does not overcome this Board's presumption against filing reply briefs and the Motion should be denied.

c. Further Argument Concerning the PM BACT Limit Is Unnecessary for Resolution of This Proceeding

Sierra Club also fails to explain or demonstrate that the Board's presumption against reply briefs should be waived in the context of its arguments about whether the Region's particulate matter ("PM") BACT limit in the final PSD permit for the PPEC warrants Board review. The argument in the Proposed Reply Brief does not provide any new information and

does no more than effectively repeat the assertions that are already in Sierra Club's Petition for Review. Sierra Club's apparent desire to have the last word on this subject should not provide a sufficient basis to overcome this Board's presumption against filing reply briefs, and the Motion should be denied.

B. In the Alternative, Region 9 Should be Granted Leave to File an Eight Page Sur-Reply Brief Within Two Weeks of the Board's Order

For all of the reasons stated above, Region 9 requests that the Board deny Sierra Club's Motion for Leave to File Short Reply. However, if the Board determines that Sierra Club's Motion is sufficient to overcome the presumption against filing reply briefs in this PSD permit appeal, Region 9 respectfully requests leave to file an 8-page sur-reply brief within two weeks from the date of any order granting the Motion.

Date: February 28, 2013

Respectfully submitted,

/S/ Julie Walters

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of **EPA REGION 9'S OPPOSITION TO SIERRA CLUB'S MOTION FOR LEAVE TO FILE SHORT REPLY** in the matter of Pio Pico Energy Center, EAB Appeal Nos. PSD 12-04, PSD 12-05, and PSD 12-06, to be served by electronic mail upon the persons listed below.

Dated: February 28, 2013

/s/ Julie Walters

Julie Walters

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