

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)

)

**PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE
AS TO WHY PETITION SHOULD NOT BE DISMISSED**

TABLE OF CONTENTS

INTRODUCTION..... 1

I. The Board Should Include the November 24 Petition for Review..... 1

II. Docket No. 5 Met All Threshold Filing Requirements.....2

III. The Board Should Consider Docket Nos. 2 and 4.....2

IV. All Issues Raised in Petition Were Raised in Comments and Responded To.....3

 A. Issues Raised in the Petition Regarding the Adequacy of the Public Comment Process Were Previously Raised by Petitioner or Were Not Then Reasonably Ascertainable.....3

 B. Issues Raised in the Petition Regarding the Adequacy of the BACT Analysis Were Raised in Public Comments, and the Region’s Responses are Inadequate.....4

 C. The Issue of Failure to Analyze the Need of the Project was Raised in Comment, and the Region’s Response is Inadequate.....5

CONCLUSION.....6

INTRODUCTION

The Environmental Appeals Board (“Board”) should not dismiss my Petition for Review because the threshold filing requirements have been met. In this Response to the Board’s March 1, 2012 *Order to Show Cause as to Why Petition Should Not Be Dismissed* (“Order”), I will show why the Board should consider the November 24th Petition (Docket No. 9), and that documents submitted on November 17th met filing requirements. I appreciate this opportunity to show that the filing requirements were met, and to provide further clarification to the Board.

As I pointed out in my motion to clarify the scope of the appeal, I was unaware of the ramifications of the Standing Order. I reviewed the website section titled EAB Guidance Documents. The Standing Order was not included in this section. I reviewed a document in the Guidance Document section titled “A Citizens' Guide to EPA's Environmental Appeals Board.” It did not contain the Standing Order. It did include a section titled “Where can I find out more about the EAB?” It did not reference the Standing Order or any need to look for one in all of its references. I read the practice manual (included in the Guidance Document section). It states;

"5. Filing and Service Requirements

The regulations do not set forth filing requirements for petitions to review a permit decision."

http://yosemite.epa.gov/oa/EAB_Web_Docket.nsf/General+Information/Environmental+Appeals+Board+Guidance+Documents?OpenDocument

The Guidance Document section included a CERCLA Guidance Document dated 2/23/12 and Federal Register Notice. I found no Federal Register Notice or reference to the Standing Order whatsoever in this section.

I. The Board Should Include the November 24 Petition for Review.

The Board could, in its discretion, review the November 24th Petition for Review (Docket No. 9). The November 24th Petition was merely a clerical amendment to the November 17th Petition submitted by April Sommer (Docket No. 5).

The two reasons the Board gave as to why it is not inclined to review the November 24th Petition are not compelling. The first is, though April Sommer characterized the document as a “Clerical Amendment”, the Permittee contends the changes contained therein are “more substantive than clerical.” *Order* at 7. The Board’s discussion of this issue suggests that the Board agrees with the Permittee’s characterization of the document, though no reasoning is given as to how this conclusion was reached. The significant changes to the document are formatting changes and the addition of table of contents and appendices. Docket No. 9 is therefore correctly characterized as clerical amendment to Docket No. 5. There are no substantive changes to the petition and the Permittee has not demonstrated otherwise. If it eases the Board’s consideration it could certainly strike the table of contents or whatever it chooses.

The second reason the Board states it is not inclined to consider the November 24th Petition is my statements about the document. Though I did not intend that the November 24th Petition replace all other documents filed, neither did I intend for it to be excluded entirely from consideration.

Because neither of the reasons on which the Board based its inclination to exclude the November 24th Petition are convincing, the Board should reconsider its stance on reviewing this Petition. If the Board excludes Docket No. 9 from review as untimely, the Board should still review the original Petition Docket No. 5 for reasons explained below.

II. Docket No. 5 Met All Threshold Filing Requirements.

Petition for Review filed November 17, 2011 (Docket No. 5) met all threshold filing requirements, and should therefore not be excluded from review. Docket No. 5 was timely filed, complied with the word limitation and had a statement of compliance therefor, and included a caption and signature. The Board identifies no threshold filing requirement deficiency for this document. The Board proposes to exclude Docket No. 5 from review because, when aggregated, Docket Nos. 1, 2, 3 and 5 exceed the 14,000 word limitation.

The Permittee seems to claim that the document 1-5 should be excluded because there is no Docket number. The Board had not yet issued a docket number so this would be an impossible threshold.

The Permittee seems to claim that 1-5 should be excluded because only one document includes a phone number. Phone numbers were submitted through the CDX system with the submittals.

The Permittee seems to wish that the Board will reject Docket #5 because it does not include an email address. Apparently an email address was not “available” at that moment. Email addresses were included with the filings on the CDX system.

The Board should not have aggregated the word counts from several documents to conclude that each document should be excluded from review for exceeding the word limitation. The Board is correct that it is not required to “ascertain whether, in the aggregate, threshold requirements are met” *Order* at 8. In this instance, however, the Board did not ascertain whether Docket No. 5, *standing alone*, met threshold filing requirements. For other threshold filing requirements, aggregation may benefit a petitioner, but not in the case of word limitations. “The Board may exclude any petition or response brief that does not meet these word limitations.” *Standing Order Governing NSR Appeals* at 2 (April 19, 2011). The Standing Order does not provide for the aggregation of word limitations to exclude multiple documents from review. The Board could consider #2 to be an addendum; “any addendum does not count toward the word limitation.” standing order pg 2

Because Docket No. 5 met all threshold filing requirements, the Board should not exclude this Petition for Review.

III. The Board Should Review Docket Nos. 2 and 4.

The Board should review Docket Nos. 2 and 4. Docket number 4 is clearly an exhibit. The Board could consider Docket No. 2 an addendum or Declaration. Docket No. 2 explains why the Region’s Response to Comments did not adequately address each

issue. Docket Nos. 5 and 9 address the inadequacy of the Region's responses, Docket No. 2 provides a more detailed discussion of each issue. Viewed in this context, the Board could review Docket No. 2 as a supplement to Docket No. 5 or Docket No. 9, for the purpose of explaining why the Region's Response to Comments was inadequate.

Docket No. 2 is approximately 6,000 words, it should not be calculated into the petition word count because, according to EAB guidance, word counts of addenda are not included in the 14,000 word limitation. Standing Order at 2. In the alternative, if the Board concludes that the word count from Docket No. 2 must be included in total word count, I submit Docket No. 2 with paragraphs one, two, and seven through nine (1, 2 and 7-9) removed. Docket No. 2 is then 5,445 words, and total Petition word count is 13,918.

Docket No. 4 is a two page document regarding emissions from startup and shutdown operations. This document was filed as an appendix and could not have been mistaken as a version of the Petition for Review. The body of the document contains approximately 100 words. The Board could, in its discretion, chose to include this document in its review.

IV. All Issues Raised in Petition Were Raised in Comments and Responded To.

All issues raised in the Petition were raised in the public comment period or were not reasonably ascertainable at the time. Docket Nos. 5 and 9 and Docket No. 2 have specified in more detail for each issue raised where in the record the issue was raised or why it was not reasonably ascertainable, and whether and where the Region responded.

A. Issues Raised in the Petition Regarding the Adequacy of the Public Comment Process Were Previously Raised or Were Not Then Reasonably Ascertainable.

The first issue raised in the Petition is that the public comment period should have been extended. see Docket No. 9 at 6; Docket No. 5 at 4; Docket No. 2 at 7. Petitioner raised this issue after his request to extend the public comment period was denied, and the Region responded. See Region Response at 25. The Region's response on this issue

is inadequate because it misstates both the length and complexity of the administrative record. This is a clear error. The Region failed to include a number of pages in its index of the administrative record.

The second issue raised is that the public comment period should have been reopened due to the large volume of new information submitted by the Permittee during the public comment period. see Docket No. 9 pages 7-10; Docket No. 5 pages 5-8. I requested on November 15, 2011 that the Region reopen the comment period. The Region has not as of the date of this filing responded to this request.

The third issue raised in the Petition is that the final permit is so different from the proposed permit that the permit should have been subjected to another round of public comment. This is essentially an argument that the final permit is not a logical outgrowth of the proposed permit, and that the public did not have adequate notice on substance of the final permit. See Docket No. 9 pages 10-15; Docket No. 5 pages 8-13; Docket No. 2 at 8. That the final permit would be substantially different from the draft permit was not an issue reasonably ascertainable during the comment period, and the Region has not as of the date of this filing responded to this issue.

The fourth issue raised in the Petition regarding the adequacy of the public comment process is that the Region failed to record public comments made at the September 14th, 2011 hearing. The Region responded to this issue, but did not explain why it did not deem comments made by the public at this to be “submitted at a public hearing.” Docket No. 2 at 2.

B. Issues Raised in the Petition Regarding the Adequacy of the BACT Analysis Were Raised in Public Comments, and the Region’s Responses are Inadequate.

The final set of issues raised in the Petition is that the BACT analysis for the project was flawed in several ways. The Region failed to identify all applicable control technology, and conducted flawed analysis of identified control technology. see Docket No. 9 pages 16-28; Docket No. 5 pages 14-28; Docket No. 2 pages 9-12.

The first issue raised in the Petition regarding the BACT analysis is that the BACT analysis failed to identify all available control technology. see Docket No. 2 at 4-6; Docket No. 9 at 19; Docket No. 5 at 16. Specifically missing is the possibility of using algae ponds as a control technology for CO₂. Docket No. 2 at 9. The Board dismisses this comment by responding that BACT does not require analysis of mitigation or offset measures. Response at 39. The Region's response is inadequate because it does not recognize the possibility of using of algae ponds as end-of-stack control technology rather than a separate mitigation or offset measure.¹

The second issue raised regarding the BACT analysis is that Region failed to consider solar as a control technology. In response to this comment, the Region agrees that the solar component of the project is "a lower-emitting GHG technology," and made modifications to the permit in response to comments, but does not agree to include solar in the GHG BACT analysis. Response at 40. The inadequacy of the Region's response is discussed in detail in the Petition. Docket No. 9 pages 21-25; Docket No. 5 pages 19-23, Docket No. 2 at 11.

The third issue raised regarding the GHG BACT analysis is that Region did not adequately rank or compare the identified control technologies. A "top-down" analysis cannot be conducted without first creating a stratification of options. The Region did not address this flaw in Response to Comments. Docket No. 9 at 25; Docket No. 5 at 23.

The final issue raised regarding the GHG BACT analysis is that economic feasibility component of the "top-down" analysis was performed on a total cost basis rather than on a cost-per-ton basis, and that the total cost was exaggerated. Docket No. 9 pages 26-29; Docket No. 5 pages 24-28. The Region responded to this issue by defending the cost analysis performed, but did not address the cost-per-ton deficiency.

C. The Issue of Failure to Analyze the Need of the Project was Raised in Comment, and the Region's Response is Inadequate.

¹ see i.e. PGE Boardman Algae Carbon Capture Pilot Project. http://www.portlandgeneral.com/our_company/news_issues/current_issues/docs/algae_pilot_project.pdf

I raised in public comments the lack of a need analysis, and the Region responded by claiming that it was not required to perform one. Response pages 34-36. I have briefed at length why the Region's Response is inadequate. Docket No. 9 pages 29-33 ; Docket No. 5 pages 28-31; Docket No. 2 at 3.

CONCLUSION

The Region and the Permittee had 3 months to respond to the Petition. They could have responded at any time before the last day allotted. The Region, in fact, made a motion to extend the time to respond. The Permittee did not object. If at any time they did not understand the scope of the appeal or my clarification they could have sought guidance from the Board. They did not do so. Instead they made a calculated decision to run the clock and feign confusion in hopes of avoiding review. It may be an inconvenience for the Board to consider these matters at this time, but there is no basis for dismissal of the Petition. The issues are clear and warrant review. Most issues have been responded to with the exception of the issues that are uniquely contained in Docket No. 2.

Most of the Petition has been responded to. The two major issues that the Region and Permittee did not respond to are:

1. The Region failed to preserve comments for response. Docket No. 2 pg. 1-2
2. The Region failed its Environmental Justice Mandate Docket 2 Pg. 13-14

There is no doubt that over the last 3 months the Region and Permittee may have reviewed these issues. They should be granted an opportunity to respond to these issues (or voluntarily remand the permit) and expand on any other issues that they previously responded to, based upon the information contained in Docket Nos. 2 and 4. If the Region feels that its response to Docket No. 5 would have been somehow different than its response to Docket No. 9 and the Board determines that response to Docket No. 5 is warranted, then they should have the opportunity to modify their response.

For the reasons above, in the attached Declaration and with the options posed in my Motion(s) I respectfully request that the Board not dismiss the Petition for Review and instead consider its merits.

Dated March 8, 2012

Respectfully Submitted,

Rob Simpson
Address 27126 Grandview Avenue Hayward
California 94542
Telephone 510-909-1800
Email Rob@redwoodrob.com

STATEMENT OF COMPLIANCE WITH WORD COUNT LIMITATION

I hereby certify that this Response to Order to Show Cause as to Why Petition Should Not be Dismissed contains 2937 words

Rob Simpson

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of **PETITIONER'S RESPONSE TO ORDER TO SHOW CAUSE AS TO WHY PETITION SHOULD NOT BE DISMISSED** to be served by electronic mail upon the persons listed below.

March 8, 2012

Rob Simpson

Julie Walters
Office of Regional Counsel
EPA Region 9(MC ORC-2)
75 Hawthorne St.
San Francisco, CA 94105
Telephone: (415) 972-3892
Facsimile: (415) 947-3570
Email: Walters.Julie@epa.gov

Kristi Smith
Air and Radiation Law Office
Office of General Counsel (MC 2344-A)
Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, DC 20460
Telephone: (202) 564-3068
Facsimile: (202) 564-5603
Email: Smith.Kristi@epa.gov

Michael J. Carroll

LATHAM & WATKINS LLP

650 Town Center Drive, 20th Floor

Costa Mesa, CA 92626-1925

Email: michael.carroll@lw.com

Thomas M. Barnett
Senior Vice President
Inland Energy, Inc.
South Tower, Suite 606
3501 Jamboree Road
Newport Beach, CA 92660
Email: tbarnett@inlandenergy.com

James C. Ledford Jr.
Mayor
City of Palmdale
Palmdale City Hall
38200 Sierra Highway
Palmdale, CA 93550
Email: jledford@cityofpalmdale.org

Laurie Lile
Assistant City Manager
City of Palmdale
Palmdale City Hall
38200 Sierra Highway
Palmdale, CA 93550
Email: llile@cityofpalmdale.org