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

In re:	)	
	)	
Sierra Pacific Industries – Anderson	)	
	)	PSD Appeal Nos. 13-01, 13-02, 13-03, & 13-04
PSD Permit No. SAC 12-01	)	
	)	
	)	

REPLY TO REGION 9's SUPPLEMENTAL BRIEF IN RESPONSE TO THE BOARD'S ORDERS OF MAY 16, 2013 AND MAY 28, 2013

Sierra Pacific Industries (SPI) hereby submits this Reply to the "Supplemental Brief in Response to the Board's Orders of May 16, 2013 and May 28, 2013" submitted by EPA Region 9 ("Region 9") on June 7, 2013. SPI joins Region 9's responses as to its interpretation of the "significant degree of public interest" standard for a public hearing in a permit proceeding as set forth in section 124.12(a)(1) of Title 40 of the Code of Federal Regulations, and the application of that standard in this case. SPI submits this brief to further emphasize why review of the "significant degree of public interest" regulatory standard as a valid statutory interpretation is inappropriate in these proceedings. Permit proceedings are not the place for a challenge to a lawfully promulgated regulatory standard. That is particularly the case here, where the Petitioners have raised no such challenge, and where the project permitting process is already far behind schedule, jeopardizing the project itself as well as the substantial environmental and economic benefits it will produce. EPA's application of its "significant degree of public interest" standard is not clear error and should be upheld.

I. STANDARD OF REVIEW

The Board's review of a PSD permit determination is deferential. "Ordinarily, a petition for review of a PSD permit determination is not granted unless it is based on a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review." *In the Matter of Spokane Regional Waste-to-Energy Project*, 3 E.A.D. 68 (1990) (citing 40 C.F.R. § 124.19). The burden is on Petitioners to show that such review is warranted. *Id.*; *In re Three Mountain Power, LLC*, 10 E.A.D. 39 (2001) ("[A] decision to issue a PSD permit will ordinarily not be reviewed unless the petitioner shows that the permit condition in question is based on: (1) a finding of fact or conclusion of law that is clearly erroneous; or (2) an exercise of

discretion or an important policy consideration that the Board should, in its discretion, review."). The Board's power of review "should be only sparingly exercised." *Spokane*, 3 E.A.D. 68 (citing Final Rule for Consolidated Permit Regulations, 45 Fed. Reg. at 33,412 (May 19, 1980)). "Most permit conditions should be finally determined at the Regional level." Final Rule for Consolidated Permit Regulations, 45 Fed. Reg. at 33,412.

II. REVIEW OF EPA'S REGULATORY STANDARD IS UNWARRANTED AND INAPPROPRIATE

The Board's initial question for supplemental briefing asks: "How should the 'significant degree of public interest' standard in section 124.12(a)(1) be interpreted in light of the statutory language regarding public hearings in section 165 of the CAA, 42 U.S.C. §7475?" To the extent that this inquiry calls into question the validity of the "significant degree of public interest" standard itself as EPA's interpretation of the relevant statutory language, SPI respectfully submits that such a review of the regulation is inappropriate in these permitting proceedings.

A. The Validity of a Regulatory Standard Cannot Be Challenged in Permit Proceedings.

"It is well established that the Board generally will not consider challenges to underlying Agency regulations in the context of permit appeals." *In re Peabody Western Coal Co.*, 2013 WL 360031, CAA Appeal No. 12-01 (January 25, 2013) (citing *In re Tondu Energy Company*, 9 E.A.D. 710 n. 10 (2001) (noting Board's "frequent admonition against using the appeals process to challenge Agency regulations.")). This limited scope of review is based both on the terms of the regulatory provisions governing permit appeals at 40 C.F.R. § 124.19, as well as the judicial review provisions in the Clean Air Act itself. *See In re Federated Oil & Gas of Traverse City, Michigan*, 6 E.A.D. 722 (1997) ("As a general matter, 40 C.F.R. § 124.19 contemplates the Board will

review only permit "conditions" that are claimed to be erroneous."); *Peabody*, 2013 WL 360031 ("Section 307(b) of the Clean Air Act . . . limits opportunities to challenge regulations issued under that Act to petitions filed within sixty days following promulgation of the final regulation.").

Moreover, it is generally the petitioner's burden to establish that a permitting determination warrants review. *Spokane*, 3 E.A.D. 68. Here, Petitioners have challenged only the application of the "significant degree of public interest" standard—not its validity. While the Board has the power to raise certain issues *sua sponte*, 40 C.F.R. § 124.19, our legal system, of course, strongly favors the resolution of issues through the adversarial process. *Greenlaw v. U.S.*, 554 U.S. 237 (2008) ("As a general rule, our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief. . . . Courts do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties." (internal quotation marks and citations omitted)). A reexamination of a regulatory standard that has been in existence for over 30 years should only be visited through a full adversary proceeding in the proper administrative forum, not through a *sua sponte* supplemental review in the context of an individual permit. Moreover, the Board's *sua sponte* authority is limited to those issues it is authorized to review, which do not include the validity of underlying regulations: "As the Board has explained repeatedly, the regulations that govern the Board's review of permits authorize the Board to review conditions of the permit, *not the statutes or regulations that are the predicates for such conditions*." *Peabody*, 2013 WL 360031 (emphasis added).

B. The Regulatory Standard is Entitled to a "High Degree of Deference."

Even if the Board had the power to review the "significant degree of public interest" standard, such review would be entitled to a "high degree of deference." *In re Deseret Power Elec. Coop.*, 2008 WL 8415638, PSD Appeal No. 07-03 (November 13, 2008). "Courts often accord a high degree of deference to agency interpretations that are made contemporaneous with the legislative enactment, especially when the agency clearly articulates and consistently follows the interpretation over a long period of time." *Id.* The governing statutory provision here, section 165 of the Clean Air Act, was enacted in 1977. As Region 9 has explained, EPA has consistently interpreted section 165 to require an "opportunity" for a hearing in PSD proceedings, not a hearing in all cases. *See* Region 9 Supp. Br. at 5 (citing 455 Fed. Reg. at 33,409 n.8). EPA's initial PSD-specific procedure for public participation in permitting proceedings at 40 C.F.R. § 52.21(r), promulgated in 1978, did not require a public hearing. *Id.* at 4-5, 7-8. That PSD-specific regulation was replaced in 1980 by the consolidated permit regulations of section 124.12, which included the current standard stating that a hearing shall be held when the Regional Administrator finds a "significant degree of public interest in a draft permit." *Id.* at 4-5, 8. This standard was left unchanged by the 1990 Clean Air Act amendments, and has been repeatedly applied in PSD proceedings where no hearing has been granted. *Id.* at 9-10. It is a valid standard and its application in this case was not clear error. *Id.* at 12-17.

III. THE PROJECT'S PERMIT SHOULD NOT BE FURTHER DELAYED

Review of the validity of the "significant degree of public interest" standard is inappropriate in general in permit proceedings, but it is especially inappropriate in this

case. As the Board has recognized, PSD permitting proceedings are particularly "time-sensitive." *See In re: City of Palmdale*, PSD Appeal No. 11-07, slip op. at 17 n.5 (EAB Sept. 17, 2012). Here, the permitting proceedings have been already been underway for over two-and-a-half years. The extensive delay is now threatening the viability of SPI's Project due to the potential expirations of renewable energy tax credits and power purchase agreements that make it feasible. Here, not only are there are no "compelling circumstances" warranting review of EPA's long-governing regulatory standard for public hearings, *see Peabody*, 2013 WL 360031, there are numerous compelling circumstances for why the Project should finally be allowed to move forward.

SPI's Project is for a cogeneration plant powered by renewable energy that brings with it substantial environmental and economic benefits. The Project, located within an existing sawmill facility, will use biomass byproducts of timber and sawmill operations to produce approximately 25 megawatts of electricity, as well as steam that will be used in onsite lumber drying processes. This electricity generated power will power the facility and be exported to the grid, where it will replace the need for higher-emission petroleum-generated power. The Project will employ 30 to 40 people during the yearlong construction period and 12 to 14 permanent employees thereafter, and is expected to generate an additional $400,000-$450,000 in annual tax revenue for Shasta County.

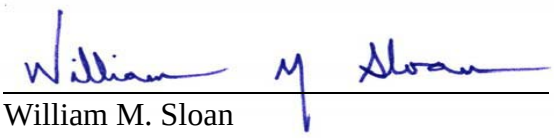
SPI submits that the record extensively demonstrates that the Project is good for the environment and the economy. Region 9 and the EPA Office of Environmental Justice have concurred that this Project should proceed. At various times, Petitioners have objected to the lack of any special additional outreach or hearing procedures that they wanted, arguing that the absence of this special treatment is somehow in conflict

with the Board's decision in *In re Knauf Fiber Glass*, 8 E.A.D. 121 (1999). *See, e.g.*, Letter of Protest to V. Robinson (June 13, 2013). But the Board in *Knauf* made no factual finding as to whether the surrounding community (the City of Shasta Lake) was an environmental justice community. In that case, the adequacy of the agency's reasoning was in question, because the agency had provided only a one-sentence statement that it had "review[ed] the project location and surrounding demographics." *Id.* Here, in contrast, Region 9 has explained in detail what data was reviewed and what factors were considered in its environmental justice analysis. *See* Region 9 Supp. Br. at 16-17. Nothing in *Knauf* warrants a reversal of Region 9's findings, which are entitled to deference. *See Spokane*, 3 E.A.D. 68.

The Project has already been subject to extensive review and public comment in the EIR and draft permitting process, and opposition has been minimal. Region 9 Supp. Br. at 12-17. The PSD permit includes standards sufficient to maintain air quality in the region and its issuance without further public hearing is a lawful and appropriate exercise of Region 9's discretion. Petitioners have not shown that Region 9's application of the standard was clear error. SPI urges the Board to deny the appeal.

Dated: June 21, 2013

Respectfully submitted,



William M. Sloan
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Tel. (415) 268-7209
Fax: (415) 268-7522
Email: WSloan@mofo.com
Counsel for Sierra Pacific Industries

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of June 2013, copies of the foregoing **REPLY TO REGION 9's SUPPLEMENTAL BRIEF IN RESPONSE TO THE BOARD'S ORDERS OF MAY 16, 2013 AND MAY 28, 2013** in the matter of Sierra Pacific Industries, Inc. EAB Appeal Nos. PSD 13-01, PSD 13-02, PSD 13-03, and PSD 13-04 to be served upon the persons listed below by the means so indicated.

Dated: June 21, 2013

Patti Pomerantz

By U.S. Mail:

Ed W. Coleman
P.O. Box 1544
Shasta Lake City, CA 96019
(530) 275-4626

By Electronic Mail:

Kara Christenson
Office of the Regional Counsel
U.S. EPA, Region 9
Mail Code: ORC-2
75 Hawthorne Street
San Francisco, CA 94105
Christenson.Kara@epa.gov

Celeste Draisner
1000 Shepard Court
Redding, CA 96002
(530) 223-0197
mysecretfires@gmail.com

Heidi Strand
P.O. Box 1544
Shasta Lake City, CA 96019
(530) 275-4626
hswriter@frontiernet.net

Rob Simpson
Helping Hand Tools
27126 Grandview Avenue
Hayward, CA 94543
(510) 688-8166
rob@redwoodrob.com

David C. Brown, PE
Environmental Affairs & Compliance Manager
Sierra Pacific Industries
19794 Riverside Avenue
Redding, CA 96049-6028
(530) 378-8179
dbrown@spi-ind.com