

In re:

PSD Permit No. Sac 12-01

SUPPLEMENTAL BRIEF IN RESPONSE TO  
BOARD'S ORDERS OF MAY 16, 2013 AND MAY 28, 2013

EPA Region 9 submits this supplemental brief in response to the Orders of the Environmental Appeals Board (“Board” or “EAB”) dated May 16, 2013 and May 28, 2013 in the above-captioned matter. The Office of Air and Radiation, the Office of Environmental Justice, and the Office of General Counsel concur on this brief.

As to the first question in the Board’s order, the “significant degree of public interest” standard in section 124.12(a)(1) should be interpreted consistent with prior decisions of the Administrator and EPA regulations implementing section 165(a)(2) of the Clean Air Act. EPA’s PSD program regulations require PSD permitting authorities to provide an opportunity for interested persons to appear and present written or oral comments. 40 § C.F.R. 51.166(q)(2)(v). EPA’s Part 124 permitting regulations mandate a public hearing upon request based on a finding of a “significant degree of public interest.” 40 C.F.R. § 124.12(a)(1). This standard calls for a reasoned judgment on a case-by-case basis considering multiple factors, and has been historically applied in this manner in PSD permitting. This proceeding is not an appropriate place to reconsider prior rulemakings implementing section 165(a)(2) of the Act.

As to the second question, the focus of a public hearing should be on obtaining information and input from the public on the proposed action. EPA has discretion to hold a hearing in order to clarify issues, but there are often more effective forms of outreach available to ensure informed public participation and address requests for clarification besides a public hearing.

## **BACKGROUND**

In its order dated May 16, 2013, the Board has asked Region 9 to file a supplemental brief that addresses the following questions:

- (1) Section 124.12(a)(1) of Title 40 of the Code of Federal Regulations pertaining to public hearings in permit proceedings states, “[t]he Director shall hold a public hearing

whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit(s)." 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?

- (2) The persons who requested that the Region hold a public hearing related to the draft permit indicated that they had requested a hearing, in part, to obtain clarification of various issues from the Region. What weight should this fact carry in the Region's determination on whether to hold a hearing under either 40 C.F.R. section 124.12(a)(1) or section 124.12(a)(2) in light of the public participation policy enunciated in section 160(5) of the CAA, 42 U.S.C. §7470(5), and the description of a PSD public hearing in section 165(a)(2) of the CAA, 42 U.S.C. §7475(a)(2), as presenting the "opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations" on considerations relevant to the permit?

### **Overview of EPA Regulations**

EPA's Part 124 and PSD permitting regulations reflect EPA's interpretation that section 165(a)(2) of the statute requires an "opportunity" for a public hearing, and not require that a hearing be held in all cases or automatically upon request. EPA offices do not have information indicating that the regulations and the associated interpretation were ever challenged under the applicable judicial review provisions.

### **EPA's Part 124 Regulations**

EPA's regulations at 40 C.F.R. Part 124 establish generally uniform procedures for issuing permits under the PSD program and programs authorized by the Resource Conservation and Recovery Act ("RCRA"), the Safe Drinking Water Act ("SDWA"), the Clean Water Act ("CWA"). For the SDWA and CWA respectively, the specific programs are Underground Injection Control ("UIC") and the National Pollutant Discharge and Elimination System ("NPDES"). See 40 C.F.R. § 124.1(a) (Part 124 provides procedures regarding "RCRA, UIC, PSD and NPDES 'permits.'").

EPA regulations state that "Part 124 offers an opportunity for public hearings." 40 C.F.R. § 124.1(c). With respect to when to hold a public hearing, section 124.12(a)(1) provides that the

Regional Administrator "shall hold a hearing whenever he or she finds, on the basis of requests, a significant degree of public interest in a draft permit." Section 124.11 provides that a "request for a public hearing shall be in writing and shall state the nature of the issues to be raised during the hearing." In addition, section 124.12(a)(2) of EPA's regulations gives a Regional Administrator the discretion to hold a public hearing "whenever, for instance, such a hearing might clarify one or more issues involved in the permit process." Section 124.12(a) also includes a RCRA-specific provision regarding public hearings that reads as follows: "For RCRA permits only, (i) the Director shall hold a public hearing whenever he or she receives written notice of opposition to a draft permit and a request for a hearing within 45 days of public notice under § 124.10(b)(1)." 40 C.F.R. § 124.12(a)(3).

When a hearing is held, the conduct of public hearings is governed by section 124.12(c) which says the following: "Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required."

### **Relevant History of Part 124 Regulations**

In 1980, EPA revised Part 124, which had been used up to that time only to implement CWA requirements, as part of a broad rulemaking package entitled "Consolidated Permit Regulations: RCRA Hazardous Waste, SDWA Underground Injection Control; CWA National Pollutant Discharge Elimination System; CWA Section 404 Dredge or Fill Programs; and CAA Prevention of Significant Deterioration." 45 Fed. Reg. 33290 (May 19, 1980). As part of this expansive rulemaking, the May 1980 action promulgated Parts 122, 123, 124 and 125 in an attempt to (1) consolidate requirements for RCRA and UIC with already-established NPDES requirements; (2) establish state program requirements for RCRA, UIC and CWA section 404

programs; and (3) consolidate permit issuance procedures for EPA-issued PSD permits with the requirements for RCRA, UIC and NPDES. *See id.*; 40 C.F.R. § 124.1(a). In the 1980 rulemaking, EPA intended to establish a uniform process to implement various statutory programs.<sup>1</sup>

The version of 40 C.F.R. 124.12 promulgated by EPA in 1980 is virtually identical to the current version of section 124.12. In particular, both the 1980 and current versions of section 124.12 require a public hearing when there is “a significant degree of public interest” in a draft permit. *See* 45 Fed. Reg. at 33409.

EPA’s preamble in the 1980 rulemaking explains that it received adverse comments regarding this standard: “Several commenters argued that the ground for granting a hearing – ‘significant degree of public interest’ – was vague, and that it did not take account of the permit applicant’s interest (or someone else’s interest) in using the hearing to explore issues further.”

*Id.* at 33409. In response, EPA stated the following:

EPA has not changed this requirement. One of the purposes of having a public hearing is to respond to public interest, which is not subject to precise measurement. EPA, however, has added a second ground for holding a public hearing which allows the Director to hold a public hearing at his or her discretion.

Since a public hearing is not required by any of the statutes covered by this Part,[fn8] EPA does not believe that a refusal to hold a hearing, by itself, should ever lead to invalidation of a permit. The question on judicial review should be whether the record EPA generated adequately supports the decisions involved, not whether some other record might have been better.

*Id.* In footnote 8, referenced in this passage, EPA stated that “an *opportunity* for a hearing is required by statute” for the PSD program. 45 Fed. Reg. at 33409 n. 8 (emphasis added).

---

<sup>1</sup> EPA later decided to “deconsolidate” the Consolidated Permit Regulations in 1983 (in response to concerns raised by industry, environmental groups, states and EPA Regional Offices), but this “deconsolidation” did not extend to Part 124, which EPA left “in its current consolidated format.” *See*, 48 Fed. Reg. 14146-47 (April 1, 1983).

In 1981, EPA added section 124.12(a)(3). This provision, which applies to RCRA permits only, mandates a hearing upon request by anyone giving notice of opposition to the permit. The preamble to this rulemaking explains that Congress had amended RCRA's public participation requirements in October 1980, after EPA had promulgated the Consolidated Permitting Regulations in May 1980, including a new requirement, RCRA section 7004(b)(2)(B). At the time, EPA noted the following:

Section 124.12(a) of the May 19, 1980 regulations provided that an informal hearing will be held if anyone requests a hearing and the Director finds a significant degree of public interest in a draft permit, or if the Director decides in his or her discretion to schedule a hearing. The regulation is therefore being revised to require that, for RCRA permits only, a hearing be held in any case where written notice of opposition to a draft permit and a request for a hearing are received within 45 days of public notice of the preparation of a draft RCRA permit.

46 Fed. Reg. 36704 (July 15, 1981).

Furthermore, the history of EPA's Part 124 regulations indicates that EPA considered but rejected a more expansive scope for public hearings than under the existing regulations. The rejected option involved an opportunity to question a hearing panel "of EPA employees having special expertise related to the issues to be addressed at the hearing." 44 Fed. Reg. at 34236 (June 14, 1979) (proposed 40 C.F.R. § 124.13(a)(1)).

#### **Public Participation Provisions in the Clean Air Act for PSD Permitting**

Section 165(a)(2) of the Clean Air Act provides that a PSD permit may not be issued unless "a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations" on various topics related to the permit. 42 U.S.C. § 7475(a)(2). Section 160(5) of the Act notes that one purpose of the PSD program is to "assure that any decision to permit increased air pollution ... is made only after ... adequate procedural opportunities for informed public participation in

the decisionmaking process.” 42 U.S.C. § 7470(5). Section 160(5) and section 165(a)(2) are the only provisions in Part C of the Act that address public participation in PSD permitting decisions. These provisions were not revised in the Clean Air Act Amendments of 1990, nearly 10 year after EPA had included in section 124.12 EPA’s interpretation that section 165(a)(2) requires that the Regional Administrator hold a public hearing only when there is a showing of significant public interest.

### **PSD Permitting Regulations on Public Participation and Relevant History**

The Part 124 regulations were promulgated, in part, to implement the CAA’s relevant public participation provisions for PSD permits. EPA has also interpreted and implemented section 165(a)(2) of the Clean Air Act in its PSD permitting regulations. EPA’s PSD regulation that establishes the minimum requirements for state PSD programs requires that state implementation plans (“SIPs”) “[p]rovide an opportunity for a public hearing for interested persons to appear and submit written or oral comments” on specific topics described in the regulation. 40 C.F.R. § 51.166(q)(2)(v). For the federal PSD permitting program, 40 C.F.R. § 52.21(q) requires EPA to follow “the applicable procedures of 40 C.F.R. Part 124 in processing applications under this section.” Prior to the adoption of the Part 124 regulation, for the federal PSD permitting program, EPA initially had PSD-specific procedures for public participation at 40 C.F.R. § 52.21(r), which were substantially the same as required for state permitting programs under the current regulation in section 51.166(q)(2)(v). Specifically, the historic version of section 52.21(r) of EPA’s regulation required EPA to “[p]rovide opportunity for a public hearing for interested persons to appear and submit written or oral comments” on the specified topics. 40 C.F.R. § 52.21(r)(v) (1979). At the time section 52.21(r) was promulgated in 1978, EPA indicated that a public hearing was not necessary for every PSD permit. *See* 43 Fed. Reg. 26402-

03 (June 19, 1978) ("EPA will also solicit comment on the need to conduct a public hearing, if one is necessary. If no response to the latter is received by day 15 [of a 45-day public comment period], no public hearing will be held.").

In 1980, EPA replaced the PSD-specific procedures for public participation at 40 C.F.R. § 52.21(r) with 40 C.F.R. § 52.21(q). See 45 Fed. Reg. 52740 (August 7, 1980); see also *id.* at 52681. EPA's preamble for this revision to the 40 C.F.R. Part 52 regulations addressed the standard for public hearings in the context of PSD permitting as follows: "Where requested, or at its own discretion, the reviewing authority may conduct a public hearing to help clarify the issues and obtain additional information to assist in making a final permit decision." *Id.* at 52679.

#### **Application of Section 124.12 in PSD Permit Appeals and Title V Petitions**

EPA has twice considered the application of section 124.12's "significant degree of public interest" standard in the context of administrative appeals of PSD permits. In *In the Matter of Spokane Regional Waste-to-Energy Project*, 1990 EPA App. Lexis 91, PSD Appeal No. 89-4, 3 E.A.D. 68 (1990), ("*Spokane*") the EPA Administrator rejected challenges to the revision of a PSD permit issued by the State of Washington on the ground that the State had not held a hearing. As the Administrator stated:

The . . . alleged error has no merit because the decision to hold a public hearing . . . is largely discretionary. Under 40 C.F.R. § 124.12(a) the permit issuer is directed to hold a public hearing whenever the permit issuer finds that there is a 'significant degree of public interest in a draft permit.' [The State] elected not to hold a public hearing in this instance because the scope of the permit revision was narrow and it found no significant public interest in the revised NO[x] limitation. Under the circumstances, no clear error is apparent from Ecology's decision not to hold a public hearing.

*Id.* at 3-4. The Board also addressed section 124.12 in a footnote in one decision regarding a PSD permit. *In re Russell City Energy Center*, PSD Appeal No. 08-01, slip op. at 15, n. 13, 14



(EAB July 29, 2008). Here, the Board stated “40 C.F.R. part 124 directs a permit issuer to hold a hearing only when it ‘finds, on the basis of requests, a significant degree of public interest in a draft permit(s).’” *Id.* at 15. (emphasis added; citation omitted).

The Administrator also recently considered a state’s denial of a request for a public hearing on a PSD permit in the context of a Petition to Object to a Title V permit submitted pursuant to CAA Section 502(b)(2). *In the Matter of Noranda Alumina, LLC*, Title V Petition No. VI-2011-04, at 8-9 (EPA 2012) (“*Noranda*”). The petitioners, an environmental organization, alleged that Louisiana’s PSD permit (and by extension, its Title V permit) was deficient because they had requested a public hearing, but Louisiana denied the request. Though EPA noted that section 124.12 was not directly applicable because the matter involved the application of Louisiana’s rules and procedures, as approved by EPA into the SIP, EPA also noted the similarity between the “significant degree of public interest” standard in section 124.12(a)(1) of its regulation and the “significant public interest” standard applied by Louisiana in that instance to determine whether to conduct a public hearing. Citing to both *Spokane* and *Russell City*, EPA stated that it “has recognized some discretion in the permitting authority to not hold a public hearing for every PSD permit proceeding.” *Id.* at 8. EPA concluded that the state had provided an opportunity to request a hearing, the petitioners had failed to demonstrate that Louisiana lacked discretion to deny the petitioners’ request for a hearing on the PSD permit, and thus the petitioners had failed to demonstrate that Louisiana’s denial was unreasonable under the circumstances. EPA also found that Louisiana had provided an opportunity to provide written comments, that the Petitioners had indeed submitted written comments, and that petitioners had not demonstrated that the written comment opportunity was not adequate to assure informed public participation. After examining section 160(5) of the CAA, EPA also found that the

petitioners had failed to demonstrate how the denial of the hearing request had deprived them of a meaningful opportunity for public participation or that the denial might have resulted in a deficiency in the permit. Accordingly, the Administrator denied this part of the petition.

#### **EPA Guidance and Practice on the Application of Section 124.12 In PSD Permitting**

The Office of Air and Radiation has generally not provided written guidance to the Regional Offices on the application of section 124.12 in PSD permitting. To help inform their views on the questions asked by the Board, Region 9 and the Office of Air and Radiation have consulted with several Regional Offices about their historic application of section 124.12(a) when considering applications for PSD permits. Based on this consultation, Region 9 and OAR's understanding is that Regional Offices have considered multiple factors on a case-by-case basis in determining whether to hold a public hearing on a PSD permit application. Such factors have included the number of requests, media reports on the project, and other information that indicates the level of public interest.

#### **Title V Public Hearing Requirements**

EPA's approach to implementing the public hearing requirements in Title V has been similar to the approach that EPA Regional Offices have applied in PSD permitting. Section 502(b)(6) of the Clean Air Act requires "adequate, streamlined, and reasonable procedures ... for public notice, including offering an opportunity for public comment and a hearing ... ." 42 U.S.C. § 7661a(b)(6). The regulations that EPA promulgated to govern Title V permit programs under section 502(b) of the CAA are reflected in 40 C.F.R. Part 70. These regulations say that "all permit proceedings ... shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit." 40 C.F.R. § 70.7(h).

In orders responding to Petitions to Object to state-issued Title V permits, EPA has explained that it does not interpret section 502(b)(6) of the CAA or section 70.7(h) of its regulations to provide a right to a public hearing upon request. *In the matter of: Operating Permits ExxonMobil Refining and Supply Company Complex Baton Rouge East Baton Rouge Parish, Louisiana*, Petition No. VI-2004-01, at 12 (June 29, 2005) (“Neither the Act nor EPA’s implementing regulations require a permitting authority to hold a hearing when one is requested.”); See *In The Matter of Dow Chemical Company*, Petition No. IX-2004-1, at 5 (July 2, 2004) (“a ‘right’ to a public hearing would be contrary to EPA’s interpretation of the Act, EPA’s implementing regulations for title V, and the Agency’s long-established view that a hearing may not be appropriate for every title V permit.”); See also *In Re Sirmos Division of Bromante Corp.*, Petition No. II-2002-03, at 7 (May 24, 2004) (stating that “neither the CAA nor EPA’s implementing regulations require a permitting authority to hold a hearing when one is requested” but that “the CAA and applicable regulations require only that [permitting authorities] offer an opportunity for a public hearing”). These orders reflect the view EPA articulated in response to comments on its Part 70 regulations. Response to Comments at 7-29 (“The EPA continues to believe that the Act does not require a hearing every time one is requested. The EPA also believes that to require hearings every time one is requested would be unduly burdensome on States, permitting authorities and sources.”).

EPA has also explained that its Title V regulations were designed to afford states discretion to determine criteria governing when a public hearing will be held on a Title V permit. Response to Comments at 7-29 (“The EPA will allow States to develop the criteria governing when a public hearing will be held, and then EPA will review each State program on a case-by-case basis to determine whether it provides ‘an opportunity for a hearing.’”); *In the matter of:*

*Operating Permits ExxonMobil Refining and Supply Company Complex Baton Rouge East Baton Rouge Parish, Louisiana*, Petition No. VI-2004-01, at 11-12 (June 29, 2005) (“Part 70 does not provide specific guidance on when, or under what circumstances, a hearing should be held. Permitting authorities have considerable discretion when determining whether to hold a public hearing. ... The permitting authority must independently analyze each request and make a reasonable judgment as to whether the facts before it warrant granting a particular request.”).

With respect to Title V permits issued by EPA and delegate agencies, EPA’s title V regulations have a nearly identical provision to section 124.12(a)(1). Section 71.11(f) provides that “a permitting authority shall hold a hearing, whenever it finds, on the basis of requests, a significant degree of public interest in a draft permit.”

#### **Other EPA Regulations Regarding Public Hearings**

EPA has written regulations in another context that require a public hearing any time that one is requested. Before adopting a SIP, a state must “provide the opportunity to submit written comments and allow the public the opportunity to request a public hearing” on the SIP. 40 C.F.R. § 51.102(a). The state’s notice proposing the SIP action must schedule a public hearing and notify the public of “the date, place, and time of the public hearing,” and the state must hold the hearing if it receives any requests, but may cancel the hearing otherwise. 40 C.F.R. § 51.102(a).

#### **Public Participation Process for the SPI Permit in This Instance**

Consistent with the approaches applied in other Regional Offices, Region 9 has historically considered multiple factors in determining whether to conduct a public hearing under section 124.12(a)(1). These factors have included, for example: public participation and engagement in the area regarding air/environmental issues, interest in local public meetings

and/or publications regarding the proposed project, socioeconomic status, linguistic isolation, education levels, minority population, and other factors as a particular case may warrant. Region 9 has considered these factors at different stages in the permitting process, including before issuing a public notice soliciting comments on a draft PSD permit. In cases where the factors indicate significant public interest early in the process, Region 9 has scheduled public hearings before the comment period is opened and announced the details of the hearing in the public notice for the draft permit. Region 9 has also scheduled "public information meetings" to provide information on the draft permit to members of the public prior to holding a public hearing to receive oral comments on a draft permit where warranted, such as when there is need for enhanced public outreach.

Based on an initial assessment of the degree of public interest in the permit for the SPI facility, the Region did not schedule a public hearing prior to issuing a public notice of the draft permit. Consistent with EPA practice, Region 9's public notice contained a statement explaining that the decision to hold a public hearing would be based on whether "there is a significant amount of public interest in the proposed permit." Attachment 1, ER # 8, Region 9's Response Brief (April 23, 2013). The notice further explained that "Requests for a Public Hearing must state the nature of the issues proposed to be raised in the hearing," consistent with the EPA regulation that states that a "request for a public hearing shall be in writing and shall state the nature of the issues to be raised during the hearing." 40 C.F.R. § 124.11.

Region 9 mailed the public notice to approximately 800 people and organizations (including many individuals in Shasta County), and emailed the notice to another 650 or so (there is some overlap in the two numbers), and also published the notice in a local newspaper. In addition, Region 9 provided materials online on the Region's website and the U.S.

government's national website (regulations.gov). Region 9 also prepared a two-page public information sheet that provided an overview of the SPI's proposed project and the draft permit to facilitate public participation. The public comment period for Region 9's draft PSD permit ran from September 14, 2012 through October 17, 2012.

On September 16, 2012, soon after the start of the public comment period, Petitioner Strand requested a public hearing, but did not state the nature of the issues she proposed to raise.<sup>2</sup> On September 17, 2012, Region 9 confirmed receipt of her request (per Ms. Strand's request that the Region do so). On October 1, 2012, Region 9 updated Ms. Strand regarding her public hearing request and advised her that EPA did not currently plan to hold a public hearing because, as of that date, the Agency had not received a significant amount of public interest. Region 9's communication included the following statement indicating that if the requester still desired a public hearing, he or she should identify the issues to be raised at the hearing "and we must receive indications that there is a significant amount of public interest." Region 9 also advised Ms. Strand that the public comment period would remain open until October 17, 2012. In an email also sent on October 1, 2012, Ms. Strand responded to Region 9's email identifying the following issues to be raised:

- 1) What methods of BACT (Best Available Control Technology) are being utilized by Sierra Pacific in the new construction of this Cogeneration plant?
- 2) Can you provide us with a discussion of the cumulative impacts of air, water, and waste disposal methods proposed for this new project?
- 3) Can you provide any information regarding Sierra Pacific's environmental violations at their pre-existing Shasta County facilities and operations?
- 4) What are your agenc[y]'s procedures for determining the threshold required to hold a public hearing?
- 5) Why doesn't EPA Region 9 require Sierra Pacific to secure a new PSD Permit for this new facility?

---

<sup>2</sup> Documents supporting this discussion can be found either in Attachment 1, "Excerpts of Record," to Region 9's Response to Petitions for Review, filed on April 23, 2013 ("Region 9's Response"), in particular, ER#9, "Public Comments," or in Attachment 2, "Full Email Correspondence With Petitioners Strand, Simpson, and Draisner."

On October 4, 2012 (a Monday), Region 9 responded to Ms. Strand. Based on the nature of her questions, Region 9 determined that she may not have reviewed the detailed materials the Region had prepared in connection with the draft permit. Region 9 therefore provided a link to Region 9's website and the "Fact Sheet" Region 9 had prepared in connection with the draft permit.<sup>3</sup>

On October 12, 2012 (while the public comment period was still open), Mr. Ed Coleman, filed a "Notice of Appeal" of the hearing denial with the Board alleging that Region 9's October 1, 2012 statement to Ms. Strand violated "Environmental Justice Guidelines, as well as the letter and intent of the Clean Air Act." *See In re Sierra Pacific Industries*, PSD Appeal No. 12-03 (Dec. 21, 2012). In a brief filed on November 18, 2012, Mr. Coleman challenged the Region's use of the significant public interest standard and asserted that he is part of an environmental justice community. *Id.* Mr. Coleman's arguments were based on the Administrative Procedure Act and environmental justice-related documents such as Executive Order 12898. *Id.*

On October 17, 2012, the last day of the public comment period, Region 9 received two additional requests for a public hearing, one from Mr. Rob Simpson and the other from Ms. Patricia Lawrence. Mr. Simpson submitted detailed comments identifying numerous alleged flaws in the SPI permit, but his request for a public hearing did not request clarification of any issues. Ms. Lawrence's request raised particular issues related to the draft permit, but did not indicate a need for clarification.<sup>4</sup> Petitioner Draisner's comments, which were not submitted in accordance with the instructions in Region 9's public notice, did not include a request for a public hearing.

---

<sup>3</sup> Petitioner Simpson also requested assistance from Region 9 via email dated September 26, 2012. Region 9 responded to Mr. Simpson's inquiry on September 28, 2012. *See* Attachment 2 to Region 9's Response (April 23, 2013).

<sup>4</sup> Region 9 provided a written response to Ms. Lawrence's comments. *See* RTC at 36-38.

## **Materials Prepared by Region 9 to Ensure Informed Public Participation Consistent with CAA Section 160(5)**

Region 9 took numerous steps to provide the public with materials and information to accompany the proposed permit for the SPI facility so that the public would be adequately informed and able to participate in the decisionmaking process. These steps included: (1) preparation of a detailed 50-page Ambient Air Quality Impact Report (which constitutes the "Fact Sheet," under 40 C.F.R. § 124.8); (2) preparation of a two-page "public information sheet" to provide an overview of the draft PSD permit; (3) preparation of a public notice, with distribution via U.S. mail to 800 addressees and through electronic mail to 650 addressees, and through publication in a local newspaper; (4) providing a contact name, phone number and email address for inquiries during the public comment period; (5) responding to inquiries from Ms. Strand and Mr. Simpson; (6) holding a public comment period of 33 days; (7) posting relevant materials on Region 9's website, and on regulations.gov, and providing hard copies of such materials at the Shasta County library in Redding, California, and the offices of the Shasta County Air Quality Management District, also in Redding; (7) contacting Shasta County AQMD to assess public interest in the permit; and (8) providing a detailed, 53-page response to timely-submitted public comments, as well as providing a response to Ms. Draisner's comments.

In addition, before it initiated the public comment period for the draft PSD permit, Region 9 reviewed U.S. Census data for Shasta County and the cities of Anderson and Redding, California to identify whether the SPI PSD permit might have the potential to disproportionately affect minority or low-income populations and to help us assess whether the area may warrant enhanced public participation, or have other needs, to ensure the appropriate level of public outreach. Region 9 considered factors such as minority populations; numbers of persons aged under 18 years and over 64 years; education levels; household incomes; poverty levels and



linguistic isolation. Region 9 also reviewed maps of the immediate area surrounding the Project site for overall population density and low-income and minority population distribution. *See* Certified Index to Administrative Record, I.44. This included demographic information for the area, and after checking with the Shasta County AQMD about the level of public interest, the Region determined that neither the evidence of potential for EJ concerns nor other community-based information warranted holding a public hearing.

## **RESPONSES TO THE BOARD'S QUESTIONS**

**Response to Question 1: The "significant degree of public interest" standard in section 124.12(a)(1) should be interpreted consistent with prior decisions of the Administrator and EPA regulations implementing section 165(a)(2) of the Clean Air Act as a standard that calls for a reasoned judgment on a case-by-case basis considering multiple factors.**

The "significant degree of public interest" standard in section 124.12(a)(1) should be read in light of the statutory and regulatory background discussed above. EPA has implemented section 165(a)(2) through rulemakings that established relevant provisions in Part 124 (including 124.12(a)) and sections 51.166(q) and 52.21 of its regulations. The rules have been applied in many individual permitting decisions and in EPA approvals of state PSD programs. The terms of sections 124.12(a)(1) and 51.166(q) of EPA's regulation reflect EPA's prior interpretation that section 165(a)(2) of the statute requires an "opportunity" for a public hearing, and does not require that a hearing be held in all cases or automatically upon request.

This proceeding is not an appropriate place to reconsider prior rulemaking actions or establish a reading of section 124.12 that is unique to PSD permits. Nor is it a place to reexamine the statutory foundation for EPA's PSD permitting regulations and Part 124 or to make a policy decision that EPA's PSD rules should have been written differently. The Board has recognized that it has no authority to rule on matters that are outside the permit process. *In*

*re Federated Oil & Gas of Traverse City*, 6 E.A.D. 722, 725-26 (EAB 1997); *see also In re Tondu Energy Co.*, 9 E.A.D. 710, 716 n.10 (EAB 2001) (stating that the permit appeals process is not the appropriate venue to challenge Agency regulations).

EPA specifically considered section 165(a)(2) at the time it adopted section 124.12 of its regulations and said that, in the case of the PSD program, “an *opportunity* for a hearing is required by statute.” 45 Fed. Reg. 33409 n. 8 (emphasis added). While noting that this was not true of all the statutes governed by Part 124, EPA adopted a single standard, “significant degree of public interest,” for requiring a public hearing in each of the four permit programs covered by section 124.12 in 1980. Moreover, at the same time, EPA adopted separate program specific regulations for each permitting program, including Subpart C of Part 124, which is entitled “Specific Procedures Applicable to PSD Permits.” 45 Fed. Reg. at 33492-93. As adopted in 1980 and in application today, section 124.41 (within Subpart C) includes PSD-specific definitions for purposes of Part 124. The provision contains neither a PSD-specific standard for when a hearing should be held nor a PSD-specific definition of the term “significant degree of public interest.” Although it easily could have done so at the time it established the regulations, EPA did not create a unique standard in Part 124 for holding a public hearing in connection with a PSD permit. In contrast, EPA added section 124.12(b)(3) in 1981 to establish a unique standard for holding a public hearing in the case of RCRA permits based on section 7004(b)(2)(B) of that law. No provision in the Clean Air Act Amendments in 1990 warranted similar action by EPA.

This history of section 124.12 and Subpart C of Part 124 does not indicate EPA intended to apply a unique reading of section 124.12 in the context of PSD permitting on the basis of section 165(a)(2) of the Act. There is no indication that EPA intended to apply different

interpretations of the same language in section 124.12(a)(1) under different statutory contexts and different permitting programs.

Region 9 has not identified prior judicial or administrative decisions that specifically address the application of section 124.12's standard of "significant degree of public interest" in light of CAA section 165(a)(2). However, Supreme Court precedent suggests that applying such a standard is at least not unreasonable where a statute calls for an opportunity for a public hearing. *See, Costle v. Pacific Legal Foundation*, 445 U.S. 198 (1980) (upholding decision to issue NPDES permit without a hearing based on lack of significant interest where statute required "opportunity for a public hearing.").

The test for whether to hold a hearing on a PSD permit is whether there is a "significant degree of public interest." In applying that standard, the requirement that the Regional Administrator find a "significant" degree of public interest should be given meaning. The selection of this term suggests that something more than any public interest at all is needed to trigger a mandatory requirement to hold a public hearing on a PSD permit application; judgment and discretion must be applied. By contrast, EPA has shown that it understands how to write a regulation that requires public hearing any time that one is requested. *See e.g.*, 40 C.F.R. § 51.102 (regarding procedural requirements for state submittals for CAA SIPs under CAA section 110(a)).

The decision whether interest is significant enough to mandate granting a hearing request under section 124.12(a)(1) depends on the circumstances. Multiple factors have been and should continue to be considered by EPA Regional Offices in that decision. Historically, there has been no "bright line" test for defining "significant degree of public interest," and one should not be established in this proceeding based on the language in section 165(a)(2) of the Clean Air Act.

Applying the “significant degree of public interest” standard requires at least partially a qualitative judgment that should not be based simply on the number of requests for hearing received or any other mechanical criteria. *See e.g., Spokane*, 3 E.A.D. 68 (upholding denial of public hearing request based on a determination that there was not “significant public interest”); *In re City of Attleboro, MA Wastewater Treatment Plant*, (NPDES) Appeal No. 08-08, slip. op. at 90-91 (EAB September 15, 2009) (upholding EPA region’s denial of public hearing request “because of the limited comments received and the fact that there were no other hearing requests.” At the time section 124.12(a)(1) was adopted, EPA observed that “public interest ... is not subject to precise measurement.” 45 Fed. Reg. at 33409.

Under the clear error standard, the EAB’s review of decisions not to hold public hearings under section 124.12 in the context of a PSD permit should examine whether the record in each case reflects a reasoned consideration of relevant information regarding whether there is a significant degree of public interest, giving appropriate deference to the Region’s judgment. No one factor is dispositive, and there is no exclusive list of factors that can or must be considered. The factors considered to determine whether there is a “significant degree of public interest” have involved, and should continue to involve, considerations of environmental justice, demographic and socioeconomic information, as well as additional factors, including those raised by stakeholders, that indicate whether there is significant interest in a PSD permitting decision within potentially affected communities. As discussed above, these factors have included the number of requests, media reports on the project, and other information that indicates the level of public interest. The EPA Regional Offices should retain the discretion to consider a variety of factors in making the decision, including factors that might not have been previously identified.

EPA's consideration of particular factors in determining whether a hearing is required under section 124.12(a)(1) does not restrict EPA's discretion to hold a public hearing for other reasons under the authority of section 124.12(a)(2). EPA's discretion to conduct a public hearing as part of an effort to provide enhanced outreach to environmental justice communities is not impeded when EPA's assessment under section 124.12(a)(1) does not indicate that a hearing is required based on a significant degree of public interest in a PSD permit.

EPA offices believe strongly that the discretion to grant or deny a public hearing must be exercised appropriately. The Agency has efforts underway to encourage enhanced public participation in communities generally, including those with Environmental Justice concerns, before permits are issued. 78 Fed. Reg. 27220 (May 9, 2013); <http://www.epa.gov/region9/ej/permitting.html>. As part of those efforts, EPA offices continually work to ensure that decisions to grant or deny permit hearings are appropriately made and will, if appropriate, consider whether guidance is needed.

**Response to Question 2: The focus of a public hearing should be on obtaining information and input from the public on the proposed action. EPA has discretion to hold a hearing in order to clarify issues, but there are often more effective forms of outreach available to ensure informed public participation and address requests for clarification besides a public hearing.**

Although EPA permitting regulations at 40 C.F.R. 124.12(a)(1) require a hearing upon request where there is "significant public interest" in the permit, the decision whether to hold a hearing to clarify issues relating to a permit is discretionary. 40 C.F.R. § 124.12(a)(2). Public outreach and informed public participation are important parts of the PSD permitting program, but a public hearing under 124.12 is not necessarily the most effective mechanism for providing the public with clarifying information about permitting matters. EPA has developed and employed other tools that can more effectively promote informed public participation in the

decisionmaking process. EPA Region 9 and other Regional Offices regularly employ those tools to insure that members of the public have information and obtain clarification as needed. One such practice that has often been employed is to hold a "public information meeting" to provide information and respond to questions from the public, and then follow that with a public hearing where input is received. In addition, EPA recently published in the Federal Register a number of actions that EPA Regional Offices may take to promote public participation in the permitting process for PSD, UIC, NPDES and RCRA permits. *See*, "EPA Activities to Promote Environmental Justice in the Permit Application Process," 77 Fed. Reg. 38051 (June 26, 2012) (identifying suggested actions for EPA Regional Offices, as well as "draft best practices" for permit applicants.). The "best practices" described in this document focus on early outreach and engagement before members of the public have the opportunity to submit their views to EPA through written comments or in an oral presentation at a public hearing.

Section 124.12 indicates that the primary purpose of a public hearing is to serve as a venue where EPA may receive information or data in oral or written comments. Section 124.12(c) describes the hearing process as a mechanism for the public to submit information and statements concerning the permit proposal: "Any person may submit oral or written statements and data concerning the draft permit. Reasonable limits may be set upon the time allowed for oral statements, and the submission of statements in writing may be required." Consistent with this language, EPA's practice in public hearings under 124.12 is generally to hear the views of the public, rather than to provide clarification of the nature of EPA's action or the rationale for the proposed regulation. Although section 124.12(a)(2) provides for a discretionary hearing "to clarify one or more issues involved in the permit process," there is no requirement to hold a hearing for that purpose.

This focus on a hearing as a mechanism to enable the public to submit information to EPA as a formal part of the permitting process is consistent with section 165(a)(2) of the Act, which requires “an opportunity for interested persons ... to appear and submit written or oral presentations.” As discussed above, EPA was aware of this statutory language when it wrote Part 124.

The CAA provisions governing public hearings for rulemakings likewise focus on a primary goal of obtaining public input, rather than on explaining the proposed action to the public. Specifically, CAA section 307(d)(5)(i), (ii) provides: “the Administrator shall allow any person to *submit* written comments, data, or documentary information \* \* \* [and] give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written *submissions*.” 42 U.S.C. 7607(d)(5)(i),(ii) (emphasis added).

EPA’s permitting regulations formally specify the substance and form of information that EPA must provide to the public during the permitting process. Those include a draft permit, a statement of basis or fact sheet, and notice of the draft permit and public comment period. 40 C.F.R. §§ 124.6-124.14. EPA must also issue a response to comments that must “[b]riefly describe and respond to all significant comments on the draft permit \* \* \* raised during the public comment period or any hearing.” 40 C.F.R. § 124.17(a)(2). The provisions of section 124.12 addressing the scope and substance of the public hearing may limit the utility of a hearing as a tool for providing information to the public.

Another limitation of a hearing under section 124.12 as a tool for informing the public is that it is held after the draft permit is issued. While public hearings provide an opportunity to submit oral comments on a draft permit to those who otherwise would not be able to hand in written comment, early involvement and engagement with the public is the best way to promote

informed participation in decision-making. EPA recognizes that “[p]ublic involvement works best when you consult with communities early and often.” *EPA’s Action Development Process: Interim Guidance on Considering Environmental Justice During the Development of an Action*, July 2010 at 13. EPA’s May 2013 Regional Actions to Promote Environmental Justice recognizes the importance of providing information to the public before the permit is drafted, even before a permit application is filed. 78 Fed. Reg. 27220 (May 9, 2013). EPA’s Regional actions to promote environmental justice indicate that EPA should exercise judgment as to how to provide effective public outreach and emphasize the range of tools that should be used to promote effective public outreach. <[www.epa.gov/region9/ej/permitting.html](http://www.epa.gov/region9/ej/permitting.html)>. In addition to meeting the requirement to use plain language, it suggests that the Regional Offices consider the following other options: designating an EPA point of contact, preparing informational fact sheets, using direct mailings, local newspapers and emails, making documents available online as well as hard copies, and holding public meetings. 78 Fed. Reg. 27220 (May 9, 2013). These tools, many of which are standard practice already, can be employed in conjunction with the information provided in the Part 124 process (such as a statement of basis, “fact sheet,” and draft permit). Consistent with that, EPA’s draft Federal Register Notice responding to comments on the June 2012 outreach document emphasizes the need for activities that “supplement the standard notice-and-comment procedures required by law.”

EPA has discretion with respect to how to ensure informed participation. As discussed above in detail, a decision whether to hold a hearing should be made on a case-by-case basis, depending on the particular facts and circumstances of the specific permitting decision involved.

Region 9 exercised such discretion in this case. As explained above, for the SPI permit, Region 9 prepared a 50-page support document and a two-page overview; posted information on



its website and regulations.gov; provided assistance to members of the public during the public comment period; and disseminated information online and in hard copies within the community and responded to written comments. One of the Petitioners in this matter stated that one purpose for her request for a public hearing was to obtain clarification. Region 9 responded to this request for clarification in two emails dated October 4, 2013 which encouraged the Petitioner to consult the public information sheet and AAQIR, the latter of which "discusses many of the concerns that you raise in your email regarding the project." Region 9 has often held public meetings in order to provide the public with information about the permit, but considered this requestor's stated desire to use a public hearing to obtain clarification in light of the substantial record Region 9 had prepared to provide information to the public and the nature of the requestor's questions. Region 9 considered various appropriate factors, including but not limited to the potential for environmental justice concerns, in determining whether the level of public interest was significant enough to warrant a public hearing, and concluded that holding a public hearing would not be the best way to provide the additional clarification requested and exercised its discretion under 124.12(a)(2) not to hold a hearing in order to clarify permit issues. All of the requesters provided written comments.

Date: June 7, 2013

Respectfully Submitted,



Brian L. Doster  
David Coursen  
Air and Radiation Law Office  
Office of General Counsel  
1200 Pennsylvania Ave. NW (MC 2344A)  
Washington, DC 20460  
Telephone: 202 564-1932  
Facsimile: 202 564-5603  
Doster.Brian@epa.gov  
Coursen.David@epa.gov

Kara Christenson  
Office of Regional Counsel  
EPA Region 9 (ORC-2)  
75 Hawthorne St.  
San Francisco, CA 94105  
Telephone: 415 972-3881  
Facsimile: 415 947-3570  
Christenson.kara@epa.gov

## CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of Region 9's Supplemental Brief in Response to Board's Order 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 7, 2013

/s/ Kara Christenson

  
Kara Christenson

By U.S. Mail:

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

By Electronic Mail:

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

Celeste Draiser  
1000 Shepard Court  
Redding, CA 96002  
(530) 223-0197  
[mysecretfires@gmail.com](mailto:mysecretfires@gmail.com)

Rob Simpson  
Helping Hand Tools  
27126 Grandview Avenue  
Hayward, CA 94543  
(510) 688-8166  
[rob@redwoodrob.com](mailto: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](mailto:dbrown@spi-ind.com)

William M. Sloan, Esq.  
Morrison & Foerster LLP  
425 Market Street  
San Francisco, CA 94105  
415-268-7209  
[wsloan@mof.com](mailto:wsloan@mof.com)