



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

NOV 22 2011

ENVIRONMENTAL APPEALS BOARD

Nancy J. Marvel, Regional Counsel  
Office of Regional Counsel Office  
U.S. Environmental Protection Agency, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Re: Palmdale Hybrid Power Plant  
Permit Number: SJ 08-01  
Appeal Number: PSD 11-07

Dear Ms. Marvel:

This is to advise you that the Environmental Appeals Board (the "Board" or "EAB") received on November 17, 2011, a petition dated November 17, 2011, filed by April Rose Sommer, Attorney, on behalf of Rob Simpson, asking the Board to review a PSD determination by U.S. Environmental Protection Agency, Region 9.

A copy of the petition and exhibit can be found on the Board's website at [www.epa.gov/eab](http://www.epa.gov/eab). Click on "EAB Dockets" in the left-hand menu, and click on the "Active Dockets" link, and then click on the appropriate case name. If you have any difficulty accessing this document, please let me know.

To assist the Environmental Appeals Board in deciding whether the matters raised by Petitioner should be reviewed, please have your staff prepare a response that addresses the Petitioner's contentions and whether Petitioner has satisfied the requirements for obtaining review under 40 C.F.R. § 124.19 and file such response no later than December 13, 2011.

A copy of this letter is being sent to City of Palmdale as notification of this petition and these filing requirements. If the permittee chooses to file a response, it must be received by **December 13, 2011**, and comply with the filing instructions provided below. A copy of this letter is also being sent to the petitioner as notification of these filing requirements.

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Internet Address (URL) • <http://www.epa.gov>

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**Any response brief filed may not exceed 14,000 words.**<sup>1</sup> Include with your response relevant portions of the administrative record, together with a certified index of the entire administrative record. The permit issuer is encouraged to file the index to the record, preferably electronically, as soon as possible after receiving notification of this appeal. Early filing of the certified index enables the Board to begin prompt review of the record even before all of the briefs are filed.

Due to the time-sensitive nature of PSD permit appeals, the Board will apply a presumption against the filing of reply briefs and sur-replies and against holding oral argument. The Board may use scheduling and status conferences to narrow the issues on appeal or otherwise facilitate the expeditious resolution of this case. For additional information relevant to PSD permit appeals, please refer to the Board's April 19, 2011 Order Governing Petitions for Review of Clean Air Act New Source Review Permits (enclosed), also available at <http://www.epa.gov/eab> (Click "Standing Orders" on sidebar).

### **Filing Requirements**

Filing may be accomplished electronically pursuant to the Board's Order of January 28, 2010.<sup>2</sup> Alternatively, filing may be accomplished by filing a paper original (signed in blue ink) and two copies of these materials with the Board (at the address shown below) by the date specified above. A copy must be sent to Petitioner, and a certificate of service showing the date and method of service should be included with the filing.

**IMPORTANT:** All documents filed must reference the appeal number and the name, address, and telephone number of the filer. If available, the filer should also provide a fax number and an email address. **In addition, any envelope or other packaging containing documents sent through the U.S. Postal Service, Express Mail, hand-delivered or via**

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<sup>1</sup> Filers may rely on the word-processing system used to determine the word count. In lieu of a word limitation, parties may comply with a 30-page limit. Headings, footnotes, and quotations count toward the word limitation. A table of contents, table of authorities, statement requesting oral argument, statement of compliance with the word limitation, exhibits, or any addendum does not count toward the word limitation.

<sup>2</sup> The Board has issued an Order authorizing the electronic filing of documents in cases involving permit appeals. See Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Not Governed by 40 C.F.R. Part 22 (Jan. 28, 2010), available at <http://www.epa.gov/eab> (click "Standing Orders" on sidebar). Instructions on registration and document filing are available by using the "Electronic Filing" link on the Board's website. Documents containing confidential business information should not be filed electronically as the Board considers business confidentiality claims waived when a document is electronically filed. *Id.* at 5-6. Anyone electronically filing exhibits or attachments in support of a brief, motion, or other document should submit them separately from the associated brief or motion. *Id.* at 3.

**Courier must bear a complete and accurate return address in the upper left hand corner. The envelope or packaging must also clearly state the case name and case identifier in the lower left hand corner.<sup>3</sup>**

Documents that are sent through the U.S. Postal Service (except by Express Mail) **MUST** be addressed to the Environmental Appeals Board's mailing address which is:

U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board 1103B  
Ariel Rios Building  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460-0001

Documents that are sent to the Environmental Appeals Board's hand-delivery address through the U.S. Postal Service (except by Express Mail) will be returned to the sender and shall not be considered as filed.

**Hand Delivery Address**

Documents that are **hand-carried**, delivered via Courier, mailed by Express Mail or delivered by a non-U.S. Postal Service carrier (e.g., Federal Express or UPS) **MUST** be delivered to:

U.S. Environmental Protection Agency  
Clerk of the Board  
Environmental Appeals Board  
Ronald Reagan Building, EPA Mail Room  
1300 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

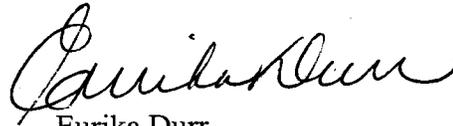
Such documents may be delivered to the Ronald Reagan Building, EPA Mail Room, from 8:30 a.m. to 4:00 p.m., Monday through Friday (excluding federal holidays). Documents filed electronically may be filed at any time up to 11:59 p.m. Eastern Time on the day the document is required to be filed with the Board.

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<sup>3</sup> All mail sent to the Environmental Protection Agency may be delayed by a random sterilization procedure. Parties are encouraged to utilize the Board's e-filing system or hand or courier delivery when filing pleadings with the Board. Additional information regarding mail delivery to the Board is available on the Environmental Appeals Board website ([www.epa.gov/eab](http://www.epa.gov/eab)) at the Clerk of the Board or Frequently Asked Questions links.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "Eurika Durr".

Eurika Durr  
Clerk of the Board

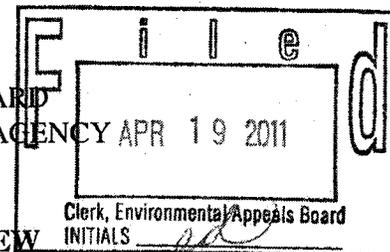
Enclosure:

cc: April Rose Sommer, Attorney  
P.O. Box 6937  
Moraga, CA 94570

Deborah Jordan, Director  
Air Division  
U.S. EPA, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

James C. Ledford Jr. Mayor  
Palmdale City Hall  
38300 Sierra Highway  
Palmdale, CA 93550

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



**ORDER GOVERNING PETITIONS FOR REVIEW  
OF CLEAN AIR ACT NEW SOURCE REVIEW PERMITS**

*Before Environmental Appeals Judges Edward E. Reich, Charles J. Sheehan, Kathie A. Stein, and Anna L. Wolgast*

*Per Curiam:*

The Environmental Appeals Board (“Board”), under authority delegated by the Administrator, 40 C.F.R. §§ 1.25(e) and 124.2(a), exercises jurisdiction over petitions for review of certain permits issued by the U.S. Environmental Protection Agency (“EPA”) and delegated states<sup>1</sup> under the Clean Air Act (“CAA”) New Source Review program.<sup>2</sup> This Order refers to such matters as “NSR appeals,” and they are governed by 40 C.F.R. § 124.19.<sup>3</sup>

NSR permits are time-sensitive because new source construction cannot begin prior to receiving a final permit. CAA §165(a), 42 U.S.C. § 7475(a).<sup>4</sup> In the event of an administrative

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<sup>1</sup> The “delegated states” are the states that have not adopted an EPA-approved Prevention of Significant Deterioration (“PSD”) program as part of their Clean Air Act State Implementation Plan, but have been delegated the authority to issue permits on behalf of the EPA, relying on EPA’s PSD program. Part 124 does not apply to PSD permits issued by states or eligible Indian tribes under an EPA-approved implementation plan. *See* 40 C.F.R. § 124.1(e).

<sup>2</sup> Such New Source Review permits include PSD permits and Outer Continental Shelf (“OCS”) permits. *See* 40 C.F.R. §§ 124.19; 55.6(a)(3). OCS permits may be issued as non-attainment new source permits, PSD permits, state-law minor source permits, or a combination of these. *See* CAA § 328(a)(1), 42 U.S.C. § 7627(a)(1).

<sup>3</sup> Implementing regulations for OCS permits are found in 40 C.F.R. part 55 and incorporate the procedural regulations of part 124. *See* 40 C.F.R. § 55.6(a)(3).

<sup>4</sup> PSD permits are required for certain new or modified sources of air pollution located or proposed to be located in areas of the country where the air is clean enough to meet the National Ambient Air Quality Standards (“NAAQS”) or in areas where air quality cannot be classified on

appeal, a permit decision does not become effective until the appeal is resolved. 40 C.F.R. §§ 124.15(b), 124.19(f). Resolution of the appeal is also a prerequisite to seeking judicial review of the permit. *See* 5 U.S.C. § 704 (establishing that where agency regulations provide for an administrative appeal, agency action is not “final” for the purposes of judicial review until the administrative appeal is complete); 40 C.F.R. §§ 124.19(e)- (f). Due to the time-sensitive nature of NSR appeals, the Board gives its highest priority to the timely resolution of NSR cases relative to other matters on the Board’s docket.

In order to facilitate expeditious resolution of NSR appeals, while simultaneously giving fair consideration to the issues raised in any given matter, the Board adopts the following procedures:

1. Petitions and any response brief in NSR appeals may not exceed 14,000 words.<sup>5</sup> A statement of compliance with the word limitation should be included with any petition or response brief filed. The Board may exclude any petition or response brief that does not meet these word limitations. Where a party can demonstrate a compelling and documented need to exceed such limitations, such party may seek advance leave of the Board to file a longer petition

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the basis of available information as meeting or not meeting the NAAQS, otherwise known as “unclassifiable” areas. *See* CAA §§ 107(d)(1)(A), 161, 165, 42 U.S.C. §§ 7407(d)(1)(A), 7471, 7475. OCS permits are required for any source of air pollution that is located on the Outer Continental Shelf as provided in CAA § 328(a), 42 U.S.C. § 7627(a).

<sup>5</sup> Filers may rely on the word-processing system used to determine the word count. In lieu of a word limitation, parties may comply with a 30-page limit. Headings, footnotes, and quotations count toward the word limitation. A table of contents, table of authorities, statement requesting oral argument, statement of compliance with the word limitation, exhibits, or any addendum does not count toward the word limitation.

or response brief. Such requests are discouraged and will be granted only in unusual circumstances.

2. When an NSR appeal is filed, the Board will notify the permit issuer by letter and impose a deadline of 21 days from the date of the Board's letter for the permit issuer to file a response. The Board will also send a copy of that letter to the permittee (if not the petitioner) and, if the permittee chooses to respond to the petition, the permittee will be required to file a response by that same deadline.

3. The Board will apply a presumption against the filing of reply briefs and sur-replies in NSR appeals.

4. The Board will apply a presumption against holding oral argument in NSR cases.

5. The Board will require the permit issuer to include with its response relevant portions of the administrative record, as well as a certified index of the entire administrative record. The permit issuer is encouraged to file the index to the record, preferably electronically, as soon as possible after receiving notification of the NSR appeal. Early filing of the certified index enables the Board to begin prompt review of the record even before all of the briefs are filed. Requests for extensions of filing the certified index will be disfavored.

6. The Board will use scheduling and status conferences to expedite the filing of briefs, the narrowing of issues on appeal, and the resolution of cases. Parties may request the Board to schedule such a conference to expedite case resolution.

7. For each issue appealed, to satisfy the requirements of 40 C.F.R. § 124.19(a), the petitioner must demonstrate, by citing with specificity to the record, including to the applicable documents and page numbers, that any issues being raised were either raised during the public comment period or were not reasonably ascertainable, as provided in 40 C.F.R. § 124.13. Where a comment was previously raised, the petitioner must also demonstrate with specificity, by citing to the applicable documents and page numbers, where in the response to comments the permit issuer responded to the comments and must explain why the permit issuer's response to comments is inadequate. The Board may decline to consider issues that do not comply with these requirements. The Board will make use of summary disposition to resolve cases that do not meet these and other threshold requirements for filings before the Board.

8. The Board may use unpublished decisions to resolve issues the Board has addressed in previously decided matters.

9. The Board will not grant review of an NSR permit 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. *See* 40 C.F.R. § 124.19(a); Consolidated Permit Regulations, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980). In determining whether to exercise its

discretion to review an NSR appeal, the Board will consider the totality of the circumstances in a particular case and may, in its sole discretion where the circumstances warrant, decline review without issuing an opinion.

10. When an NSR appeal is filed following a Board remand, the Board will notify the permit issuer by letter and impose a deadline of 21 days from the date of the Board's letter for the permit issuer to file a response. The Board will also send a copy of that letter to the permittee (if not the petitioner) and, if the permittee chooses to respond to the petition, the permittee will be required to file a response by that same deadline. The permit issuer or the permittee may file, along with its response, a motion for denial of review by summary affirmance. The motion must clearly describe, by citing with specificity to the record, including to the applicable documents and page numbers, how the permit issuer's final decision on remand conforms with the Board's remand order and detail the changes in the permit or the record that were made in response to the Board's remand order. In appropriate cases, the Board may summarily affirm the reissued permit. Where an NSR appeal is filed following a Board remand, the Board generally will consider only issues arising out of the remand and will not consider any new issues that could have been raised in the initial appeal but were not.

11. Many of the Board's past remands of NSR permits were due to an inadequate record. Permit issuers are encouraged to ensure that the record accompanying the final permit decision will withstand Board review or a judicial appeal. Record deficiencies generally cannot be cured on appeal to the Board. Permit issuers are encouraged to seek a voluntary remand in cases where

an appeal to the Board reveals record deficiencies, as curing the record promptly prior to Board decision can shorten the time it takes to issue a final defensible Agency action.

12. Where the parties believe that alternative dispute resolution (“ADR”) would be of assistance in resolving disputed issues, they may, by joint motion, request to participate in the Board’s pilot ADR program. A detailed description of this program is available on the Board’s website. Where the parties jointly request to participate in the Board’s ADR pilot and the Board determines that participation in the ADR pilot program would expedite resolution, the Board will approve the use of ADR.

13. The Board, in its discretion, may issue an order modifying these procedures as appropriate on a case-specific basis. The Board, in its sole authority, may revoke or amend this order at any time. This order creates no vested rights in any party.

So ordered.

Dated: April 19, 2011