

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

In the Matter of La Paloma Energy
Center, LLC

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Appeal No. PSD 13-10

PSD Permit No. PSD-TX-1288-GHG

MOTION TO EXPEDITE AND RESOLVE PETITION

Dated: January 7, 2014

Richard Alonso
Timothy Wilkins
Sandra Y. Snyder
BRACEWELL & GIULIANI LLP
2000 K Street N.W., Suite 500
Washington, DC 20006

La Paloma Energy Center, LLC (“LPEC”) seeks to construct a new natural gas-fired combined cycle electric generating plant, La Paloma Energy Center (“La Paloma”), to be located in Harlingen, Cameron County, Texas. Petitioner Sierra Club has sought review of the greenhouse gas (“GHG”) Prevention of Significant Deterioration (“PSD”) permit issued to LPEC for this project by the United States Environmental Protection Agency (“EPA” or “Agency”) Region 6. On December 27, 2013, LPEC and EPA Region 6 submitted responses to the Petition for Review.

LPEC hereby motions the Environmental Appeals Board (“EAB” or the “Board”) to expedite consideration of the above captioned matter. Time is of the essence for LPEC, and both the Clean Air Act (“CAA”) and EAB regulations mandate rapid resolution of the PSD permitting process.

BACKGROUND

LPEC submitted a revised GHG PSD permit application to EPA Region 6 on July 17, 2012. Ex. 2.¹ That application was deemed complete on August 22, 2012. Ex. BB. Seven months later, EPA Region 6 prepared a Draft Statement of Basis, Ex. AA, and pursuant to the requirements under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* and 40 C.F.R. Part 124, EPA Region 6 made the draft GHG PSD permit issued for the construction of La Paloma available on March 20, 2013 for public notice and comment – nearly eight months after deeming the permit complete. Ex. 3 at 3. Following the notice and comment period, which concluded on April, 19, 2013, EPA Region 6 responded to significant comments, Ex. 3, and then issued a final permit for La Paloma on November 6, 2013, more than fourteen months after deeming the permit complete. Ex. 1. Sierra Club filed a Petition for Review on December 6, 2013 challenging two narrow issues.

¹ Exhibits cited herein refer to the exhibits filed in the briefing for this case. Petitioner Sierra Club labeled the Exhibits to its Petition for Review using numbers. EPA labeled its exhibits using letters and LPEC used double letters.

ARGUMENT

I. EXPEDITED REVIEW IS REQUIRED BY THE CLEAN AIR ACT, EAB REGULATIONS, AND EAB POLICY.

As the Board is aware, “new source construction cannot begin prior to receiving a final permit” and “a permit decision does not become effective until [an] appeal is resolved.” Revised Order Governing Petitions for Review of Clean Air Act New Source Review Permits at 2 (Mar. 27, 2013) (“2013 NSR Standing Order”). To prevent bureaucratic delay of the issuance of PSD permits, section 165(c) of the CAA, 42 U.S.C. § 7475(c), requires a final decision on a permit “not later than one year after the date of filing” a complete application. This one year deadline includes the resolution of administrative appeals. *Avenal Power Center, LLC v. U.S. EPA*, 787 F. Supp.2d 1 (D.D.C. 2011) (“while the Administrator is welcome to avail herself of whatever assistance the EAB can provide her *within the one-year statutory period*, she cannot use that process as an excuse, or haven, to avoid statutory compliance”).

Congress included section 165(c) as part of the 1977 Amendments to the CAA to address its concern that the PSD program could delay much-needed construction projects. In the Senate Committee on Public Works Report, a key part of the legislative history of the 1977 Amendments, Congress stated:

Inherent in any review-and-permit process is the opportunity for delay. The Committee does not intend that the permit process to prevent significant deterioration should become a vehicle for inaction and delay. To the contrary, the States and Federal agencies must do all that is feasible to move quickly and responsibly on permit applications and those studies necessary to judge the impact of an application. *Nothing could be more detrimental to the intent of this section and the integrity of this Act than to have the process encumbered by bureaucratic delay.*

S. Rep. No. 94-717, at 23 (1976) (emphasis added).

EPA must adhere to its statutory mandate to take final agency action on LPEC’s PSD permit application. Any further delay is exactly the type of inaction Congress sought to prevent by enacting section 165(c) of the CAA. On August 22, 2012, EPA Region 6 deemed LPEC’s application

complete. Ex. BB. Well over a year has passed. This delay unquestionably contravenes Congress's mandate for EPA to issue a final permit decision within a year. *See* 42 U.S.C. § 7475(c).

The CAA's statutory deadline is not the only driver for expedited review of this appeal – rapid resolution is critical for LPEC. Obtaining a final PSD permit is a key milestone for LPEC because having all of the necessary permits is a pre-requisite to obtaining financing for this project. Ex. FF at ¶ 4. LPEC has obtained all of the other necessary approvals and agreements – aside from this permit – to commence construction. *Id.* This permit is the last criteria that LPEC needs to fulfill before it can secure its financing and start construction. *Id.* Financing of large industrial projects such as La Paloma cannot begin until all permits – including the PSD permit – are obtained. *Id.* LPEC suffers other financial consequences for each day that goes by without a final PSD permit. *Id.* at ¶ 5. If this project continues to be delayed, LPEC may have to renegotiate the terms of its contracts and there is no assurance that LPEC will be able to renegotiate those same favorable terms. *Id.* Furthermore, LPEC will bring nearly 100 permanent new jobs to Harlingen and over 3,000 construction jobs during the construction period. *Id.* at ¶ 7. And it will serve a market in critical need of affordable, clean electricity. *Id.* at ¶ 6. Delays in the issuance of this permit jeopardize the project and could lead to the loss of these jobs and this energy source. *Id.* at ¶ 7.

Rapid resolution is also mandated by the Agency's own regulations. In January 2013, EPA revised its regulations to establish specific deadlines for petitions, responses, replies, and motions in PSD permit appeals. 78 Fed. Reg. 5,281 (Jan. 25, 2013). These rules were designed to “streamline and make more efficient the appeal process” 78 Fed. Reg. at 5,283. For example, EPA granted the EAB the authority to “act on a motion for a procedural order at any time without awaiting a response.” 40 C.F.R. § 124.19(f)(5).

Because New Source Review (“NSR”) permits are “time-sensitive,” the Board “gives its highest priority to the timely resolution of NSR cases relative to other matters on the Board’s docket.” 2013 NSR Standing Order at 2. To ensure the “expeditious resolution of NSR appeals,” the EAB established several procedures to implement the revisions EPA made to the regulations governing PSD permit appeals, *id.*, including a presumption against oral argument and a presumption against reply briefs. *Id.* at 3-4.

The Board should adhere to the spirit and intent of these orders and rules by rapidly resolving this matter. This matter is one of only three PSD matters currently on EAB’s docket and is the easiest matter of those permit appeals to resolve. One matter is extremely complicated, involving multiple petitioners and cutting edge PSD issues, including the applicability of the GHG PSD program to biomass. *Energy Answers Arecibo, LLC*, PSD Appeal Nos. PSD 13-05; PSD 13-06; PSD 13-07; PSD 13-08; PSD 13-09 (EAB File Date July 2, 2013). The other PSD matter was just initiated on December 26, 2013 and briefing is not yet complete. *ExxonMobil Chemical Co. Baytown Olefins Plant*, PSD Appeal No. PSD-13-11 (EAB File Date Dec. 26, 2013).

The LPEC appeal does not involve multiple petitioners or dozens of amici who would like to weigh in on a highly technical or controversial issue of high policy import. Furthermore, the issues raised in this appeal are well-defined, narrow, and are not complex.

LPEC agrees with the general sentiment the Board has expressed – NSR permit appeals must be resolved rapidly. Therefore, the Board should utilize this opportunity to show its firm commitment to rapidly resolving NSR permit appeals by granting expedited review of this appeal. Because both the CAA and EAB policy mandate rapid resolution of the PSD permitting process, and because rapid resolution is critical to LPEC, the EAB should resolve this matter as expeditiously as practicable. LPEC respectfully requests a final decision on the permit appeal by January 31, 2014.

POSITION OF OTHER PARTIES

In accordance with 40 C.F.R. § 124.19(f)(2), counsel to LPEC conferred with EPA and Petitioner Sierra Club to confirm their positions on this motion. EPA takes no position on the motion. Sierra Club opposes it.

CONCLUSION AND RELIEF SOUGHT

LPEC asks the Board to resolve this matter as quickly as possible, consistent with the CAA and the Board's own regulations and 2013 NSR Standing Order. Because the issues on appeal are well-defined, narrow, and do not require analysis of complex technical issues, LPEC asks the Board to (1) issue a final determination by January 31, 2014 and (2) issue a brief order rather than a lengthy opinion.

Respectfully submitted, this 7th day of January, 2014.

/s/ Richard Alonso

Richard Alonso

Timothy Wilkins

Sandra Y. Snyder

BRACEWELL & GIULIANI LLP

2000 K Street N.W., Suite 500

Washington, DC 20006

(202) 828-5800 (Telephone)

(202) 223-1225 (Facsimile)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served, electronically, the foregoing **MOTION TO EXPEDITE AND RESOLVE PETITION** through the Environmental Appeal Board's electronic filing system and by electronic mail to the following parties:

Brian Tomasovic
Office of Regional Counsel
EPA Region 6 (6RC-M)
1445 Ross Avenue
Dallas, TX 75202-2733
(214) 665-9725
Tomasovic.Brian@epa.gov

Rick Franzese
Bechtel Development Company
5275 Westview Drive
Frederick, MD 21703
rfranzes@bechtel.com

Jeffrey Robinson
Air Permits Section Chief
EPA Region 6 (6PD-R)
1445 Ross Avenue
Dallas, TX 75202-2733
(214) 665-6435
Robinson.Jeffrey@epa.gov

Kathleen Smith
La Paloma Energy Center, LLC
115 Bella Strada Cove
Austin, TX 78734
ksmith@coronado-ventures.com

Travis Ritchie
Associate Attorney
Sierra Club Environmental Law Program
85 Second Street, 2nd Floor
San Francisco, CA 94105
Travis.Ritchie@sierraclub.org

John Upchurch
La Paloma Energy Center, LLC
815 Summer Park Drive, Suite 450
Stafford, TX 77477
jupchurch@coronado-ventures.com

David C. Bender
McGillivray Westerberg & Bender LLC
211 S. Paterson Street, Ste 320
Madison, WI 53703
bender@mwattorneys.com

Matthew Marks
Air and Radiation Law Office
Office of General Counsel
Environmental Protection Agency
1200 Pennsylvania Ave. NW
Washington, DC 20460
(202) 564-3276
Marks.Matthew@epa.gov

Dated: January 7, 2014

/s/ Richard Alonso
Richard Alonso
BRACEWELL & GIULIANI LLP