

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

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

Before Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

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 states¹ under the Clean Air Act (“CAA”) New Source Review (“NSR”) program.² This Order refers to such matters as “NSR appeals,” and they are governed by 40 C.F.R. § 124.19.³ This Order revises the Board’s March 27, 2013, standing order governing NSR appeals to conform to the Agency’s recent rule revising part 124.19. *See* Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650 (Aug. 21, 2020).

¹ 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).

² 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).

³ 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).

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).⁴ In the event of an administrative appeal, a permit decision does not become effective until the appeal is resolved. 40 C.F.R. §§ 124.15(b), 124.19(l)(2). 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 administrative appeal, agency action is not “final” for purposes of judicial review until administrative appeal is complete); 40 C.F.R. §§ 124.19(m)(1)-(2). 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 response briefs in NSR appeals may not exceed 14,000 words.⁵ 40 C.F.R. § 124.19(d)(3). A statement of compliance with the word limitation must be included with any

⁴ 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 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).

⁵ 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. 40 C.F.R. § 124.19(d)(3). Headings, footnotes, and quotations count toward the word limitation. *Id.* 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. *Id.*

petition or response brief filed. *Id.* § 124.19(d)(1)(iv). The Board may exclude any petition or response brief that does not meet these word limitations. *Id.* § 124.19(n). Where a party can demonstrate a compelling and documented need to exceed such limitations, such party must seek advance leave of the Board to file a longer petition or response brief. *Id.* § 124.19(d)(3). Such requests are discouraged and will be granted only in unusual circumstances. *Id.*

2. Petitioner must serve a copy of the petition for review on the Regional Administrator and the permit applicant (if the applicant is not the petitioner). *Id.* § 124.19(i)(3). In an NSR appeal, the permit issuer must file a response within 21 days after the filing of the petition. *Id.* § 124.19(b)(1). A permit applicant or permittee who did not file a petition may file a notice of appearance and a response to the petition. *Id.* § 124.19(b)(3). Such documents must be filed within 21 days after the filing of the petition. *Id.*

3. The Board will apply a presumption against the filing of reply briefs and sur-replies in NSR appeals. *Id.* § 124.19(c)(1).

4. The Board will apply a presumption against holding oral argument in NSR cases. *Id.* § 124.19(h).

5. The permit issuer must include with its response to the petition relevant portions of the administrative record, as well as a certified index of the entire administrative record. *Id.* § 124.19(b)(1). 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, but no later than 21

days after the filing of a petition. *See id.* 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, the petitioner must demonstrate, by specific citation to the administrative record, including to the applicable document name and page number(s), that each issue being raised was either raised during the public comment period (including any public hearing), *id.* § 124.19(a)(4)(ii), or was not reasonably ascertainable, *id.* § 124.13. If a comment was previously raised, the petitioner must also demonstrate with specific citation to the administrative record where in the response to comments document the permit issuer responded to the comment and must explain why the permit issuer's response to the comment is inadequate. *Id.* § 124.19(a)(4)(ii). 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. *See id.* § 124.19(a)(4)(i); Streamlining Procedures for Permit Appeals, 85 Fed. Reg. 51,650, 51,657 (Aug. 21, 2020). In determining whether to review an NSR appeal, the Board will consider the totality of the circumstances in a particular case, and in its sole discretion where the circumstances warrant, may decline review without issuing an opinion.

10. When an NSR appeal is filed following a Board remand, the permit issuer or the permittee may file, along with its response, a motion for denial of review by summary affirmance. The motion must describe clearly, by specific citation to the administrative 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, by joint motion, they may request to participate in the Board’s 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 program and the Board determines that participation in the ADR 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. *See* 40 C.F.R. § 124.19(o). The Board in its sole authority may revoke or amend this order at any time. *See id.* This order creates no vested rights in any party.

So ordered.

Dated: September 21, 2020