

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

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In re: )	
Chehalis Generating Facility, )	PSD Appeal No. 01-06
Permit No. EFSEC/95-02 )	
_____ )	

**ORDER DENYING REVIEW**

*I. INTRODUCTION*

On April 13 and 17, 2001, respectively, the United States Environmental Protection Agency, Region X ("Region") and the State of Washington's Energy Facility Site Evaluation Council ("EFSEC") jointly issued the "Amendment 1 Notice of Construction and Prevention of Significant Deterioration Final Approval" ("Amended PSD Permit"), to Chehalis Power Generating, Limited Partnership ("Chehalis Power"). The Amended PSD Permit authorizes the construction and operation of a 520-Megawatt ("MW") power facility consisting of two combined-cycle combustion turbines to be located near Chehalis, Washington. Amended PSD Permit, ¶ 1 (Makarow Declaration in Support of EFSEC's Motion for Summary Dismissal ("Makarow Decl.") Exhibit ("Ex.") 37). EFSEC

and the Region share responsibility for implementing the federal PSD regulations in the State of Washington pursuant to a delegation agreement.<sup>1</sup> Since permits jointly issued by EFSEC and the Region are considered EPA-issued permits, appeals of the permit decisions are heard by the Environmental Appeals Board ("Board" or "EAB") under 40 C.F.R. § 124.19. In this case, Rebound has timely filed a petition for review of the Amended PSD Permit decision for Chehalis Power. Rebound's Petition Under 40 CFR 124.19 F (sic) for Review of the Chehalis Power Prevention of Significant Deterioration Approval (May 15, 2001) ("Petition").

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<sup>1</sup>Under the delegation agreement with the Region, the State has primary responsibility for implementing the federal PSD program. Since the State acts as EPA's delegate, the permit is considered an EPA-issued permit and is subject to review by this Board. *In re Three Mountain Power, LLC*, PSD Appeal No.01-05, slip op. 3 n.1 (EAB, May 30, 2001), 10 E.A.D. \_\_\_\_; *In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692, 695 n.4 (EAB 1996) ("For purposes of part 124, a delegated State stands in the shoes of the Regional Administrator [and must] follow the procedural requirements of part 124. \* \* \* A permit issued by a delegate is still an 'EPA-issued permit'; \* \* \*") (quoting 45 Fed. Reg. 33,413 (May 19, 1980)). However, under the delegation agreement, the Region has retained authority over the nitrogen dioxide ("NO<sub>2</sub>") increment. Thus, when PSD permits are issued for major sources of nitrogen oxides (NO<sub>x</sub>), EFSEC and the Region issue PSD permits jointly. Delegation Agreement, EFSEC Record Ex. 44.

In this Order, we will begin with a discussion of the legal and factual background of this matter (part II) and then address the issues raised by Rebound in its Petition (part III).

## II. BACKGROUND

### A. Statutory and Regulatory Background

Congress established the PSD provisions of the Clean Air Act ("CAA" or "Act") to manage economic growth in a "manner consistent with the preservation of existing clean air resources." CAA § 160(3), 42 U.S.C. § 7470(3). The PSD provisions of the CAA are implemented through a pre-construction permit process. Specifically, pre-construction permits are required for new and modified major stationary sources, in areas of the country designated to be in "attainment" or "unclassifiable" with respect to federal air quality standards called "national ambient air quality standards" ("NAAQS").<sup>2</sup> See

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<sup>2</sup>NAAQS are maximum ambient air concentrations for six pollutants: sulfur dioxide ("SO<sub>2</sub>"), particulate matter ("PM"), carbon monoxide ("CO"), ozone (measured as volatile organic compounds) ("VOCs"), nitrogen dioxide ("NO<sub>2</sub>"), and lead. 40 C.F.R. §§ 50.4-.12.

CAA §§ 107, 160-169B, 42 U.S.C. §§ 7407, 7470-7492; 40 C.F.R. § 52.21.

Both the Act and the applicable PSD regulations require that several important analyses be performed before setting PSD permit conditions. Of particular importance in this matter, the PSD regulations require a new source or modified major source to employ the "best available control technology" or "BACT" to control emissions of those pollutants that it has the potential to emit in amounts greater than applicable "significant" levels established by the PSD regulations at section 52.21(b)(23). CAA § 165(a)(4), 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2). The regulations define BACT as follows:

Best available control technology means an emissions limitation \* \* \* based on the maximum degree of reduction for each pollutant subject to regulation under Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source

or modification through application of production processes or available methods, systems, and techniques \* \* \* for control of such pollutant.

40 C.F.R. § 52.21(b)(12).

Under the PSD regulations, once a final PSD permit has been issued, the permittee must begin construction within 18 months of receiving approval to construct and must complete construction within a reasonable time. See 40 C.F.R. § 52.21(r)(2). The PSD regulations allow the Administrator to extend this 18-month time period if justified. *Id.* If the permittee does not commence construction within the 18-month time period or within the time period allowed by an extension, the permit becomes invalid. *Id.*

In order to "commence construction" under the Act the following must have occurred:

[T]he owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and

air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

CAA § 169(2)(A), 42 U.S.C. § 7479(2)(A).

**B. *Factual and Procedural Background***

This matter has a long and complicated history. The original PSD application for the Chehalis Generating Facility was submitted in 1994.<sup>3</sup> Chehalis Power's application proposed to

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<sup>3</sup>The PSD permitting process is just one of the permitting and approval requirements involved in a major industrial development project in the State of Washington. The State of Washington's review process requires a Site Certification Agreement ("SCA"), which is governed by State law and contains all terms and conditions required to construct and operate a facility. Chehalis Power's Initial Response and Motion for Summary Disposition at 3 (citing Wash. Rev. Code § 80.50.040(8), (12); Wash. Admin. Code § 463-39-095; Wash. Rev. Code

(continued...)

construct and operate an electrical power generating facility designed to be constructed in two phases, each phase consisting of a 230-MW combined cycle unit.<sup>4</sup> Fact Sheet for Prevention of Significant Deterioration Chehalis Generation Facility Project Chehalis, Washington at 1 (June 6, 1996) (EFSEC Record Ex. 3) ("1996 Fact Sheet").

After public notice and comment, EFSEC and the Region issued the Initial PSD Permit for the Facility on June 18, 1997, and March 7, 1997, respectively.<sup>5</sup> The Initial PSD Permit identified BACT for nitrogen oxides ("NO<sub>x</sub>") to be advanced dry low NO<sub>x</sub> burners ("ADLN") with an emissions limit for NO<sub>x</sub> of 9.9 parts per million on a volumetric basis ("ppmv"). Initial PSD Permit at 4 (Makarow Decl. Ex. 1); 1996 Fact Sheet at 2.

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<sup>3</sup>(...continued)  
§ 80.50.110(2) and 120). The SCA may contain provisions resulting from State law as well as federal PSD regulations. *Id.* The PSD permit becomes an exhibit to the SCA. *Id.*

<sup>4</sup>The proposed facility is subject to the PSD permitting process because it constitutes a "major stationary source" under the PSD regulatory definition. See 40 C.F.R. § 52.21(b)(1)(i)(a). There is no dispute that this is a major source subject to the PSD permitting regulations.

<sup>5</sup>Although Rebound did comment on the Initial PSD Permit, it did not appeal the Initial Permit in 1997.

Subsequent to the issuance of the Initial PSD Permit in 1997, Chehalis Power requested an 18-month extension of the Initial Permit pursuant to 40 C.F.R. § 52.21(r)(2). Along with its request for a permit extension, Chehalis Power submitted a review of BACT.<sup>6</sup> Makarow Decl. ¶ 7. On November 9, 1998, and November 16, 1998, respectively, after notice and comment, EFSEC and the Region approved the "Extension 1 Final Approval of the Notice of Construction and Prevention of Significant Deterioration Approval 18 Month Extension" ("PSD Permit Extension"), granting Chehalis Power's 18-month extension request. The PSD Permit Extension authorized Chehalis Power to commence construction for the project by no later than June 18, 2000.<sup>7</sup> PSD Permit Extension (Makarow Decl., Ex. 9). Under the

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<sup>6</sup>Chehalis Power's application for an 18-month extension of the Initial PSD Permit contained a reevaluation of BACT. In conducting its reevaluation of BACT, Chehalis Power reviewed EPA's RACT/BACT/LEAR Clearinghouse database and "made follow-up contacts to several sites and permitting agencies to update the original permit application's BACT determination." Fact Sheet for the Proposed 18-Month Extension at 1-2 (Sept. 8, 1998) (Makarow Decl. Ex. 7). After EFSEC reviewed the updated information that Chehalis Power submitted, EFSEC determined that the information did not justify changing any of the BACT requirements for the turbines. *Id.* at 2.

<sup>7</sup>Rebound did not comment on the PSD Permit Extension, nor did Rebound appeal the PSD Permit Extension. Makarow Decl. ¶¶ 11-12.



PSD Permit Extension, BACT for NO<sub>x</sub> continued to require the use of ADLN for NO<sub>x</sub>, but identified as an alternative the use of standard dry low NO<sub>x</sub> burners with selective catalytic reduction ("SCR"). *Id.* at 2, ¶ 8. The emission limit for NO<sub>x</sub> remained 9.9 ppmv. *Id.* at 4, ¶ 2.

In the latter part of 1999, Chehalis Power requested a determination from EFSEC that Chehalis Power had commenced construction under the PSD Permit Extension. After a series of meetings of the EFSEC discussing the commencement of construction issue, EFSEC determined that Chehalis Power had, in fact, commenced construction under its PSD Permit Extension. EFSEC Regular Meeting Minutes (Dec. 13, 1999) (Makarow Decl. Ex. 13); see also EFSEC Regular Meeting Minutes (Nov. 8, 1999) (Makarow Decl. Ex. 11). EFSEC based its commencement of construction determination on, *inter alia*, Chehalis Power's contract with General Electric to purchase advance dry low NO<sub>x</sub> turbines specified in the PSD Permit Extension. EFSEC Responsiveness Summary at 6, Comment 2 (April 13, 2001) (Makarow Decl. Ex. 27) ("Responsiveness Summary").

In a letter dated January 10, 2000, Chehalis Power requested that the PSD Permit Extension be amended to "reflect proposed changes in the facility design and operation." Letter to D. Ross, EFSEC Chair, from P. Margaritis, Vice President, Chehalis Power (Jan. 10, 2000) (Makarow Decl. Ex. 16).

On May 18, 2000, EFSEC published a notice informing the public of the proposed permit amendment for the Chehalis Generating Facility. Under the proposed permit amendment, BACT for NO<sub>x</sub> remained 9.9 ppmv and ADLN technology continued to be identified as the control technology. The proposed Amended PSD Permit eliminated SCR as an alternative technology. The public comment period on the proposed Amended PSD Permit was open for 49 days, ending on July 5, 2000, during which time a public hearing was held on June 19, 2000. EFSEC received 16 written comments and 9 oral comments on the proposed amended permit. Responsiveness Summary at 3. Rebound was among the commenters. *Id.* at 6, 12, 13-14, 17-18, 21-22. During the public comment period, Chehalis Power signed a settlement agreement with Washington State's Department of Ecology which required the addition of NO<sub>x</sub> emission limits during startup and shutdown to the proposed Amended PSD Permit. Settlement Agreement Among

Washington Department of Ecology, Washington Department of Fish and Wildlife and Chehalis Power (May 24, 2000) (Makarow Decl. Ex. 26) ("Settlement Agreement").

In January of 2001, the Governor of Washington issued a proclamation stating that vital public services, including affordable electrical power, were at risk and declaring an energy supply alert throughout the State. Governor's Proclamation (Jan. 26, 2001), Region's Administrative Record ("Admin. Record") Ex. 92.

Subsequent to this proclamation, Chehalis Power and the Region entered into settlement discussions.<sup>8</sup> On March 19 and 22, respectively, Chehalis Power and the Region signed an Administrative Order on Consent ("AOC") that required Chehalis Power to request an additional revision of the proposed Amended PSD Permit, requiring the installation of SCR to control NO<sub>x</sub> emissions. AOC. Additionally, the AOC required a downward

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<sup>8</sup>Although not explicit in the Administrative Order on Consent ("AOC"), the Region presumably entered into the AOC because it disagreed with the prior commencement of construction determination by EFSEC and disagreed with the proposed Amended PSD Permit's BACT determination for NO<sub>x</sub>. See AOC at 2, 4, 6 (March 22, 2001) (EFSEC Record Ex. 38).

revision of the NO<sub>x</sub> emission limit to 3.0 parts per million volume dry (ppmdv) for the turbines when firing natural gas and 14 ppmdv when firing oil; and a 10 ppm limit for ammonia. *Id.* at 6.

The Region and EFSEC approved the Amended PSD Permit on April 13 and April 17, 2001, respectively. On April 13, 2001, EFSEC issued its Responsiveness Summary responding to the comments it received during the comment period. Responsiveness Summary. The approved Amended PSD Permit included the revisions set forth in the AOC, as well as the startup and shutdown limits negotiated with Washington's Department of Ecology. Amended PSD Permit. It is this Amended PSD Permit that Rebound asks the Board to review.<sup>9</sup>

Petitioner Rebound has raised several issues challenging the Permit and permitting process. In its Petition, Rebound asserts that: (1) a revised BACT analysis is required for limits on NO<sub>x</sub>

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<sup>9</sup>Rebound has also filed suit in the Superior Court for the State of Washington seeking review of the commencement of construction determination, BACT and other issues under the Washington Administrative Procedures Act. Chehalis Power's Initial Response and Motion for Summary Disposition at 5 n.3, 9.

emissions, carbon monoxide ("CO") emissions, volatile organic compounds ("VOC") emissions, particulate matter ("PM") emissions, and startup and shutdown NO<sub>x</sub> emissions; (2) public comment is required for the limits on startup and shutdown NO<sub>x</sub> emissions and for the limits on ammonia emissions; and (3) the Permit is missing language regarding appeal rights and joint authority with U.S. EPA which is mandatory under the delegation agreement. Petition at 5-6.

As the Board does in all of its permit appeal matters, it requested that both EFSEC and the Region, the permitting authorities, respond to the Petition. The Board also granted Chehalis Power's request to participate in the proceedings. Order Granting Motion to Intervene and Extension of Time to File Responses (May 30, 2001). The Board has received a motion for summary disposition of this matter from Chehalis Power and EFSEC, as well as a brief from the Region concurring with Chehalis Power's request for summary disposition. At the Board's request, the United States Environmental Protection Agency's, Office of General Counsel ("OGC") filed an amicus brief on one issue raised in the Petition. The Board has also provided the parties an

opportunity to file responses to the filings submitted in this matter.

### III. DISCUSSION

#### A. Standard of Review

Under the rules governing this proceeding, the Board will consider issues raised in petitions for review that involve the PSD program and that meet the procedural requirements identified in 40 C.F.R. § 124.19. However, the Board will not review "issues that are not explicit requirements of the PSD provisions of the Clean Air Act or EPA's implementing regulations and have not been otherwise linked to the federal PSD program in the context of this case." *In re Knauf Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 through 98-20, slip op. at 54 (EAB, Feb. 4, 1999), 8 E.A.D. \_\_; see *In re Zion Energy, L.L.C.*, PSD Appeal No. 01-01, slip op. at 8 (EAB, March 27, 2001), 9 E.A.D. \_\_; *In re Carlton, Inc.*, PSD Appeal No. 00-9, slip op. at 5 (EAB, Feb. 28, 2001), 9 E.A.D. \_\_.

Further, the Board will deny review of a PSD 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. 40 C.F.R. §124.19(a); *In re Three Mountain Power, LLC*, PSD Appeal No.01-05, slip op. at 12 (EAB, May 30, 2001), 10 E.A.D. \_\_. The petitioner has the burden of demonstrating that review is warranted by stating his/her objections to the permit and explaining why the permit issuer's prior response to those objections is clearly erroneous, an abuse of discretion, or otherwise warrants review. *In re Steel Dynamics Inc.*, PSD Appeal Nos. 99-4 & 99-5, slip op. at 13-14 (June 22, 2000), 9 E.A.D. \_\_ (citing *In re Hawaii Elec. Light Co.*, PSD Appeal Nos. 97-15 through 23, slip op. at 8 (EAB, Nov. 25, 1998), 8 E.A.D. \_\_); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997); *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 60-61 (EAB 1997)). As we have noted on many occasions, the preamble to section 124.19 cautions that "the power of review should be only sparingly exercised" and "most permit conditions should be finally determined at the [permitting authority] level." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); accord *Steel*

*Dynamics*, slip op. at 13 (EAB, June 22, 2000); *Knauf Fiber Glass*, slip op. at 9 (EAB, Feb. 4, 1999).

## B. *BACT Analysis*

Rebound argues that EFSEC committed clear error by issuing the Amended PSD Permit without revising the BACT analysis for several of the criteria pollutants, and that this error warrants review by the Board. Specifically, Rebound asserts that a revised BACT analysis is required for NO<sub>x</sub>,<sup>10</sup> CO, VOC and PM, as well as for the limits on startup and shutdown of NO<sub>x</sub> emissions.

Rebound makes two alternative arguments supporting its position that a revised BACT analysis is required. First, Rebound argues that the 18-month PSD Permit Extension, on which the Amended PSD Permit is based, is no longer valid because

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<sup>10</sup>We read the portion of the Petition which argues that EFSEC should have included two additional technologies, SCONOX and XONON, in its "most recent BACT analysis" as relating to the argument that a new BACT analysis was required. See Petition at 5-6. To the extent the Petition can be read as asserting that EFSEC committed clear error by not including a discussion of SCONOX and XONON in its prior BACT analysis, in conjunction with the PSD Permit Extension, that appeal would be untimely.



Chehalis did not commence construction by June 18, 2000, the end date of the PSD Permit Extension. Thus, argues Rebound, Chehalis Power is without a valid PSD permit and must reapply for a new permit, which, in turn, would require a new BACT analysis. Petition at 14.

In Rebound's second argument, it insists that whenever a PSD permit is amended at the request of the permit applicant, the amendment triggers the requirement for a comprehensive new BACT review. Petition at 16 (citing Order on Motion to Stay, *In re Columbia Gulf Transmission Co.*, PSD Appeal No. 88-11 (Adm'r, July 3, 1990)).

#### 1. *Commencement of Construction*

Rebound's first argument for requiring a revised BACT analysis is that Chehalis Power had failed to commence construction under its PSD Permit Extension before the Permit expired, leaving Chehalis Power without a PSD permit in this matter. Petition at 12-14. Rebound argues that EFSEC committed

clear error when it determined that Chehalis Power had commenced construction by contracting for two turbines.<sup>11</sup>

As noted above, pursuant to the relevant statutory provisions, commencement of construction under a PSD permit requires that, "the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and \* \* \* has \* \* \* (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time." CAA § 169(2)(A), 42 U.S.C. § 7479(2)(A). Rebound's argument focuses on whether or not Chehalis Power has satisfied the "binding contractual

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<sup>11</sup>We reject Chehalis Power's argument that the Board is without jurisdiction to review the commence construction determination in this matter. Chehalis Power's Initial Response and Motion for Summary Disposition at 15. The Board clearly has jurisdiction under 40 C.F.R. § 124.19 to review permits issued under 40 C.F.R. § 52.21. The Amended PSD Permit is such a permit. To the extent the Amended PSD Permit is predicated on the earlier commencement of construction determination such that the commencement of construction determination affects the validity and terms of the Amended PSD Permit, as it does here, we have jurisdiction to evaluate that determination.

obligations" prong of the Act's definition of commencement of construction.

The Agency interprets the statutory phrase "substantial loss" in the above definition to be satisfied only if: (1) the owner would have to pay more than ten percent of the total project cost to cancel construction contracts (the "10% criterion"); or (2) "the source has so committed itself, financially and otherwise, to the use of a particular site for a particular facility that relocation is not an option and delay or substantial modification would be severely disruptive (the "site-specific criterion"). 43 Fed. Reg. 26,388, 26,396 (June 19, 1978). The Agency further states that whether a source has commenced construction must be determined on a case-by-case basis. *Id.*

Rebound focuses its challenge on the fact that Chehalis Power's cancellation costs for the purchase of the two turbines were less than ten percent of the total cost of the project, and thus Chehalis Power's loss would not be "substantial." See Petition at 14. For example, in its Combined Reply to Chehalis

Power's Initial Response and Motion for Summary Disposition and Related Filings at 5, Rebound states:

EFSEC has ruled the down payment did commence construction, and this down payment was an irrevocable commitment to construct at a specific site, and the developer would have been liable for losses of over 10% of the project's cost, if actual construction does not start. EFSEC was simply wrong on the predicate facts and was wrong in applying the facts to the law.

In fact, Rebound mischaracterizes EFSEC's determination. EFSEC did not find that the 10% criterion was met, but rather relied on an analysis conducted under the site-specific criterion which is permissible even in circumstances where the 10% criterion is not met. In EFSEC's response to comments, it explained that in determining Chehalis Power had commenced construction, it relied on the following factors:

[T]he existing PSD permit had been initially issued and then renewed once, CP [Chehalis Power] continuously

complied with all Site Certification Agreement permitting requirements, and CP contracted for the purchase of the GE [General Electric] advanced dry low NO<sub>x</sub> turbines specified in the PSD permit and other permitting documents. In addition, CP certified that the GE turbines were purchased specifically for the CP project because all other turbines previously used, or projected for future use, by the corporate owner of CP (Tractebel Power, Inc.) for their other power projects were from a different manufacturer. The decision by CP to commit to installation of SCR at the site has further confirmed the intent and commitment of the company to have construction of the facility go forward in a continuous manner. Finally, as a requirement for the commencement of construction determination, Chehalis Power prepared a construction time line that met permitting requirements and continues to observe that schedule.

Responsiveness Summary at 6, Comment 2.

Rebound's Petition does not address in any meaningful way any of the specific factors discussed in EFSEC's response to comments explaining its commencement of construction determination. Significantly, the only reference to the site-specific criterion of the substantial loss interpretation in the Petition is a conclusory statement that "[t]hese turbines are not the type of site specific equipment, \* \* \*, that EPA memos indicate the purchase of which will commence construction." Petition at 13. Nowhere in its Petition does Rebound directly address the factors EFSEC relied upon in its response to comments regarding its commencement of construction determination. For example, Rebound does not address the significance of the certification by Chehalis Power that special turbines were purchased for the Chehalis Power project and that "all other turbines previously used, or projected for future use, by the corporate owner of CP [Chehalis Power] (Tractebel Power) for their other power projects were from a different manufacturer." Responsiveness Summary at 6. By not addressing the factors identified in EFSEC's response to comments, the Petitioner has failed to show why EFSEC's response to comments was clear error or otherwise warrants review -- Petitioner's burden to carry.

See *In re Steel Dynamics, Inc.*, PSD Appeal Nos. 99-4 & 99-5, slip op. at 13-14 (June 22, 2000), 9 E.A.D. \_\_\_; *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997); *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 60-61 (EAB 1997). Therefore, without addressing the merits of EFSEC's commencement of construction determination, we deny review on this issue.

## 2. *Amendments to Permit*

Rebound also argues that EFSEC must perform a comprehensive review of BACT because the PSD Permit Extension was amended. Petition at 16. In support of its argument that whenever a PSD permit is amended, BACT determinations must be reconsidered, Rebound relies primarily on Order on Motion for Stay, *In re Columbia Gulf Transmission Co.*, PSD Appeal No. 88-11 (Adm'r, July 3, 1990), along with an EPA memorandum regarding a request for a BACT determination for the Ogden Martin Tulsa Municipal Waste Incinerator Facility<sup>12</sup> ("Ogden Martin Memorandum"). *Id.*

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<sup>12</sup>Memorandum from G. McCutchen, Chief, New Source Review Section to J.D. Sullivan, Chief, ALO Enforcement Section, Region VI, "Request for Determination on Best Available Control

(continued...)

In response to Petitioner's challenge, EFSEC and Chehalis Power argue that only permit amendments that rise to the level of "major modifications" require a revised BACT analysis. Since the amendments requested by Chehalis Power would not result in a significant<sup>13</sup> increase in pollutants, and thus the amendments would not be considered "major modifications," Chehalis Power asserts that the BACT limits in the Amended PSD Permit do not need to be reconsidered. Chehalis Power's Initial Response and Motion for Summary Disposition at 14 (EFSEC joined Chehalis Power in this motion).

OGC and the Region have also weighed in on this issue. In both of their briefs to the Board, they state that while generally BACT determinations should be updated when a PSD permit is amended even if there is not a significant increase in emissions, the question must be approached on a case-by-case basis and the facts in this particular case support the issuance

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<sup>12</sup>(...continued)  
Technology (BACT) Issues -- Ogden Martin Tulsa Municipal Waste Incinerator Facility" (Nov. 19, 1987).

<sup>13</sup>As previously noted, the term "significant" is defined at 40 C.F.R. § 52.21(b)(23).



of the Amended PSD Permit without reconsidering the BACT analysis. Amicus Brief of the United States Environmental Protection Agency's Office of General Counsel as Requested by Order of the Environmental Appeals Board Dated June 21, 2001 ("Amicus Brief") (July 19, 2001); Region's Response to Rebound's Petition for Review (July 12, 2001).

We begin our analysis by noting, as OGC did in its brief that, "[t]he CAA and the federal PSD regulations are silent on the implementation of BACT requirements in the context of PSD permit amendments." Amicus Brief at 6. Although the Agency has reserved a place for a regulation addressing this issue, the Agency has not yet promulgated such regulations. See 40 C.F.R. § 124.5(g)(1). Nor do we find any guidance on this issue applicable to the facts of this case.

The cases and memoranda Rebound cites as supporting its contention that updated BACT analyses are *mandated* are distinguishable from the instant case. For example, the *Columbia Gulf* case involved a permit appeal where the original PSD permit had not yet been finalized. The permittee and the State

requested leave from the Administrator during the appeals process to supplement the administrative record to support the original BACT determination. In granting the permittee's request, the Administrator concluded that the State should update its BACT determination if, following the close of the comment period, the State subsequently reopens the record to admit new information supplied by the applicant. The Administrator added that the State, in performing the update, should do so "after giving full consideration to the information submitted by both the applicant and the Region." Order on Motion for Stay at 5, *In re Columbia Gulf Transmission Co.*, PSD Appeal No. 88-11 (Adm'r, July 3, 1990). Thus, the instant matter is clearly distinguishable from *Columbia Gulf* since here a final PSD permit has previously been issued. *Columbia Gulf* does not address the question whether a BACT revision is mandated when there is a revision to the permit subsequent to permit's issuance.

The Ogden Martin memorandum is likewise inapposite. This memorandum involves a fact pattern in which a facility began operating under its PSD permit and was unable to meet the BACT emission limits set in the permit. The permittee had requested a

relaxation of the BACT emission limit in its permit. Under these facts, EPA Headquarters issued interim guidance to Region VI in 1987 advising that "[a]ny time a permit limit founded in BACT is being considered for revision, a corresponding reevaluation (or reopening) of the original BACT determination is necessary." Ogden Martin Memorandum at 2. The memorandum indicates that the Agency planned to have more comprehensive guidance on the issue of permit amendments out by the end of that fiscal year. It advised that "[i]n the interim, this memorandum addresses only BACT changes for this source and operating sources in similar situations." Ogden Martin Memorandum at 1. Thus, this memorandum is not germane.<sup>14</sup>

In the absence of any controlling statutory provision or regulations, and without relevant guidance concerning when an updated BACT analysis is required in conjunction with an amendment to a previously issued permit, we must, nonetheless, decide whether EFSEC and the Region clearly erred or abused their discretion in declining to revise the BACT analysis here, as

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<sup>14</sup>While we will not go through each of the other memoranda cited at pp. 15-19 of the Petition, we note that none of them provide applicable guidance for this matter.

requested in the public comments. Based on the totality of the circumstances of this case, we find no such clear error or abuse of discretion.

In the instant matter, we have a unique set of circumstances, including an energy supply alert as declared by the Governor, a final permit which requires substantially stricter emission limits than the previously existing permit, and an Administrative Order on Consent signed by the Region in order to avoid protracted delays due to litigation. Region 10's Response to Chehalis Power's Motion Ex. 1 (Governor's Proclamation); Administrative Order on Consent (EFSEC Record Ex. 38). Significantly, both EFSEC and the Region determined it was not necessary to require an updated BACT analysis, and OGC has indicated its concurrence with that determination. Permit appeals are reviewed under a clear error/abuse of discretion standard, and some deference must be given to the permit issuer on this issue.<sup>15, 16</sup> *In re Steel Dynamics Inc.*, PSD Appeal Nos.

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<sup>15</sup>See *supra* part III.A.

<sup>16</sup>In EFSEC's Response to Rebound's Petition for Review, it cites a January 22, 1993 legal memorandum issued by Raymond  
(continued...)

99-4 & 99-5, slip op. at 8 (EAB, June 22, 2000), 9 E.A.D. \_\_; *In re Inter-Power of N.Y., Inc.*, 5 E.A.D. 130, 144 (EAB 1994) ("In general the Board will defer to the permit issuer's judgement absent evidence of a clear error of fact or law.").

As stated above, there is no controlling statutory or regulatory provision or even on point guidance going to when a revised BACT analysis is mandated in the context of PSD amendments to a previously existing permit. Against this backdrop, and in view of the totality of the circumstances in this case, we find that the permitting authorities' decision not

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<sup>16</sup>(...continued)

Ludwiszewski, Acting General Counsel, as emphasizing the deference given to states in situations it asserts are similar to the instant matter. See EFSEC's Response to Petition at 2 (July 23, 2001). While we agree that the permitting authority does enjoy deference in permitting matters, we do not find this legal memorandum particularly relevant to the issue at hand. The memorandum cited deals with issues relating to federal enforcement when there has been a state-issued permit, not, as is the case in this matter, an appeal of a federal PSD permit issued by a delegated state. See Memorandum from R. Ludwiszewski, Acting General Counsel to S. Fulton, Acting Assistant Administrator, "EPA Enforcement Authority with Respect to Sources Based on a Finding of a State's Failure to Comply with New Source Requirements: The Effect of the 1990 Amendments - Legal Opinion" (Jan. 22, 1993).

to revise the BACT determinations in the Amended PSD Permit does not constitute clear error or abuse of discretion.

*C. Reopening of Public Comment Period*

Rebound argues that EFSEC must reopen the public comment period in order to allow for comment on changes made to the Amended PSD Permit. To the extent Rebound is arguing that additional public comment should be allowed as part of a revised BACT analysis, we have addressed this issue above. However, to the extent the Petition argues that, apart from updating BACT, the public comment period should be reopened, we evaluate that argument below.

Although a bit unclear from the Petition, Rebound apparently believes that additional public comment should be allowed on BACT issues generally, the NO<sub>x</sub> emission limits, the NO<sub>x</sub> emission limits for startup and shutdown<sup>17</sup> and ammonia emission limits,

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<sup>17</sup>In Chehalis Power's motion for summary disposition, it asserts that the startup and shutdown NO<sub>x</sub> emission limits are a product of State law and are therefore not within the Board's jurisdiction to review. Summary Disposition Motion at 18.

(continued...)

which are incorporated in the final Amended PSD Permit. Petition at 4-6.

Part 124 provides for reopening of the public comment period in the following instances:

(a) (1) The Regional Administrator may order the public comment period reopened if the procedures of this paragraph could expedite the decision-making process.

\* \* \* \*

(b) If any data information or arguments submitted during the public comment period, including information or arguments required under §124.13, appear to raise substantial new questions concerning a permit, the Regional Administrator may take one or more of the following actions: \* \* \* (2) Prepare a revised

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<sup>17</sup>(...continued)

However, both the Region and EFSEC discuss the startup/shutdown limits in terms of the federal PSD regulations. See Region's Response to Petition at 9-13 (explaining that these limits are supported by previous air quality analyses and that a new BACT analysis is not necessary); EFSEC's Response to Petition at 6 (concurring with Region's Response to Petition regarding the issue of startup/shutdown limits). Accordingly, upon review, we do not find that this issue is entirely a creature of state law, such that the Board is without jurisdiction to examine it.

statement of basis under § 124.7, a fact sheet or revised fact sheet under § 124.8 and reopen the comment period under § 124.14; or (3) Reopen or extend the comment period under § 124.10 to give interested persons an opportunity to comment on the information or arguments submitted.

40 C.F.R. § 124.14.

In past decisions, we have recognized that the permitting authority has substantial discretion in deciding whether to reopen the public comment period. *See, e.g., In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 585 (EAB 1998), *review denied sub nom. Penn Fuel Gas, Inc. v. U.S. EPA*, 185 F.3d 862 (3d Cir. 1999) ("A reopening of the public comment period under section 124.14(b) largely depends on the Region's discretion \* \* \*."); *In re Amoco Oil Co.*, 4 E.A.D. 954, 980 (EAB 1993) (the determination of whether or not to reopen a public comment period "is generally left to the sound discretion of the Region"); *In re Old Dominion Elec. Coop.*, 3 E.A.D. 779, 797 (Adm'r 1992) ("The decision by the permit issuer to reopen the public comment period is



discretionary, as is clear from the plain terms of the regulation \* \* \*." ) As we stated in *Ash Grove Cement*, "[a] reopening is generally at the discretion of the Region and is only appropriate where information received during the comment period raises 'substantial new questions' regarding the permit." *In re Ash Grove Cement Co.*, 7 E.A.D. 387, 431 (EAB 1997).

With regard to the ammonia emission limits on which Rebound believes it and others should have the chance to comment, ammonia emission limits are only regulated under federal PSD regulations in the BACT context.<sup>18</sup> With this as our predicate, and since we have found that the permitting authorities did not commit clear error in not updating the BACT determination for NO<sub>x</sub>, public comment on the ammonia limit is not required under the federal PSD regulations. Furthermore, we note that Rebound did comment on the ammonia emission limit issue. Although no specific

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<sup>18</sup>Ammonia slip emissions must be reviewed for their collateral effects when evaluating certain control technologies during a BACT analysis. SCR, which uses ammonia as a catalyst to reduce NO<sub>x</sub> emissions, is such a technology that requires the collateral effects of ammonia slip to be evaluated. See *In re Three Mountain Power*, PSD Appeal No. 01-05, slip op. at 25 n.18 (EAB, May 30, 2001), 10 E.A.D. \_\_.

ammonia limit was included in the proposed Amended PSD Permit, Rebound raised in its comments the possible use of SCR and discussed what it viewed as being an appropriate ammonia emission limit. Rebound's Comments at 29-31 (July 5, 2000). In light of this and the discretionary nature of 40 C.F.R. § 124.14, it was not clear error for the permitting authority to decline to reopen the comment period.

Rebound asserts also that EFSEC must reopen the public comment for the startup/shutdown NO<sub>x</sub> emission limits in the Amended PSD Permit. Rebound argues that the public did not have an opportunity to comment on this portion of the Amended PSD Permit. Petition at 18. However, a review of the record indicates that the startup/shutdown NO<sub>x</sub> emission limits were available to the public and part of the record prior to the close of the public comment period on July 5, 2000. The limits were submitted to EFSEC during the public comment period on June 13, 2000 -- 22 days prior to the close of the public comment period. See Settlement Agreement; Letter to R. Burmark, Washington Dept. of Ecology from Eric Hansen, Chehalis Power Consultant (June 22, 2000) (EPA Admin. Record Ex. 15). Moreover, Rebound was on

notice that startup/shutdown emission limits had been set no later than June 19, 2000, during the public hearing, at which it was represented, but it apparently chose not to address those specific limits in its comments filed on July 5, 2000. See Public Hearing Trans. at 9 (June 19, 2000) (EFSEC Record Ex. 25); Public Hearing Sign-In Sheet (June 29, 2000) (EFSEC Record Ex. 24); Rebound's Comments (July 5, 2000).

The record in this matter indicates that the addition of startup and shutdown emission limits for NO<sub>x</sub>, and the tighter NO<sub>x</sub> emission limits to the final Amended PSD Permit, resulted from comments received by Rebound and others during the public comment period. See generally Rebound's Comments, EFSEC Record Exs. 10, 12-22, 26 (comments regarding BACT determinations and need for public comment, comments on NO<sub>x</sub> emissions and controls, comments on startup/shutdown limits) & 29 (Rebound comments on BACT analysis, comments on startup/shutdown limits). Thus, the final Amended PSD Permit reflected comments received during the public comment period. Changing the final permit to incorporate comments is anticipated under the permitting regulations. See 40 C.F.R. § 124.17; *NE HUB Partners*, 7 E.A.D. at 586-87 (declining

to reopen public comment period where there is no evidence of a "substantial new question"); *Ash Grove Cement*, 7 E.A.D. at 431 ("A reopening is generally at the discretion of the Region and is only appropriate where information received during the comment period raises 'substantial new questions' regarding the permit."); *In re Old Dominion Elec. Coop.*, 3 E.A.D. 779, 797 (Adm'r 1992) ("The revised permit by all accounts is a logical outgrowth of the notice and comment process and all commenters have had a fair and reasonable opportunity to present their views on the permit."). Taking into account the due deference to the permitting authorities, Rebound has not established that EFSEC's decision not to reopen the public comment period constitutes clear error. Accordingly, we deny review on this issue.

**D. *Inclusion of Rights of Appeal and Delegation Language***

Petitioner has also requested that the permit be "rewritten to contain the appeal rights and EPA joint authority language that was mandated by the 1992 delegation letter." Petition at 7. This sentence is the only statement on this issue appearing in the Petition.

After reviewing the relevant portions of the record, we do not find any comments regarding the omitted language either from Rebound or other commenters. See Public Comments and Responsiveness Summary, EFSEC Record Exs. 9-30. Nor does Rebound identify the portions of the record that properly preserve this issue for review. Thus, Petitioner has failed to satisfy the procedural requirements of 40 C.F.R § 124.19. Accordingly, we deny review on Petitioner's request for additional language in the Amended PSD Permit.

#### IV. CONCLUSION

For the foregoing reasons, Rebound's Petition must be denied.

So ordered.

ENVIRONMENTAL APPEALS BOARD<sup>19</sup>

By: \_\_\_\_\_ /s/ \_\_\_\_\_

Dated: 08/20/01

Edward E. Reich  
Environmental Appeals Judge

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<sup>19</sup>The three-member panel deciding this matter is comprised of Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein. See 40 C.F.R. § 1.25(e)(1).

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order Denying Review in the matter of Chehalis Generating Facility, PSD Appeal No. 01-06, were sent to the following persons in the manner indicated:

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\_\_\_\_\_/s/\_\_\_\_\_  
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