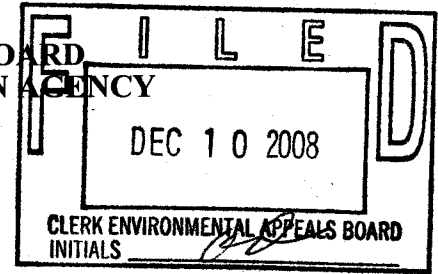


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:

Humboldt Bay Repowering Project

PSD Appeal No. 08-08

ORDER DENYING REVIEW

In a petition for review filed with the Board on September 29, 2008, Mr. Rob Simpson seeks review pursuant to 40 C.F.R. §124.19 of a Prevention of Significant Deterioration ("PSD") permit issued to the Pacific Gas and Electric Company ("PG & E") for the Humboldt Bay Repowering Project. ("HBRP").¹ See Petition For Review (Sept. 29, 2008) ("Petition").² The permit was issued by California's North Coast Unified Air Quality Management District ("North Coast UAQMD").

On October 2, 2008, Ms. Eurika Durr, the Clerk of the Board, sent a letter to the North Coast UAQMD seeking a response to the Petition. See Letter from Eurika Durr, Clerk of the Board, to Mr. Richard L. Martin, Jr., North Coast UAQMD (Oct. 2, 2008) ("EAB Letter"). This letter stated that if

¹ As described in a Declaration filed by Richard L. Martin, Jr., the Air Pollution Control Officer for the North Coast Unified Air Quality Management District, the project consists of the following:

The HBRP project consists of the construction and operation of 10 Wartsila 18V50DF 16.3 megawatt reciprocating engines, a new emergency generator and a new fire pump engine, all of which will replace an existing power plant located in Eureka, California. The existing plant, a natural gas and fuel oil power plant, consists of two steam turbine generators, 52 and 53 megawatts, respectively, primarily fueled by natural gas, with number 6 fuel oil used as a secondary fuel; and two mobile emergency power plants, consisting of diesel fueled turbines that operate as back-up units and peaker units. * * * Upon completion of the HBRP, PGE will decommission the existing power plant and they will be replaced with the 10 new 16.3 MW engines.

Declaration of Richard L. Martin, Jr. In Support of the Response of the North Coast Unified Air Quality Management District Requesting Summary Dismissal (Oct. 14, 2008) at 2, attached to the Response of the North Coast Unified Air Quality Management Requesting Summary Dismissal (Oct. 14, 2008).

² Although the Petition is dated September 26, 2008, it was not received by the Board until September 29. Documents are "filed" with the Board on the date they are received.

the North Coast UAQMD determined that summary disposition was appropriate, it should file a response with the Board no later than October 17, 2009. EAB Letter at 1.

On October 15, 2008, the North Coast UAQMD filed a response seeking summary dismissal of the Petition. *See* Response of the North Coast Unified Air Quality Management District Requesting Summary Dismissal (Oct. 15, 2008) (“North Coast Response”).

PG & E and U.S. EPA Region 9 (“Region”) filed motions with the Board requesting leave to participate in this matter. *See* Pacific Gas and Electric Company’s Motion for Leave to Intervene (Oct. 17, 2008); Motion of the United States Environmental Protection Agency, Region 9, for Leave to File A Brief as *Amicus Curiae* in Support of Summary Disposition (Oct. 21, 2008). Both PG & E and the Region have also filed briefs in support of summary disposition. *See* Intervenor PG & E’s Opposition to Petition for Review and Motion for Summary Disposition (Oct. 17, 2008) (“PG & E Response”); United States Environmental Protection Agency Region 9’s *Amicus Curiae* Brief in Support of Summary Disposition (Oct. 21, 2008) (“Region 9 Response”). PG & E’s and the Region’s motions to participate in this matter were granted and their submissions incorporated into the record before the Board by the Board’s order of November 3, 2008. Order Extending Time to File Response (EAB, Nov. 3, 2008).

By order dated November 3, 2008, the Board provided to Mr. Simpson the opportunity to file a reply by no later than November 14, 2008, with the reply limited to the jurisdictional issue raised in the North Coast Response and in the briefs submitted by PG & E and the Region. Mr. Simpson filed a timely reply on November 14, 2008. *See* Response to Request for Summary Dismissal (Nov. 13, 2008) (“Simpson Reply”).

The North Coast Response asserts that the Board does not have jurisdiction in this matter. According to this Response, the permit being challenged was issued by North Coast UAQMD under

its authority to implement a PSD program, which authority is part of the Federally approved State Implementation Plan ("SIP") for California. Because the permit was issued under an approved State program, as opposed to authority delegated by the Federal government, it can be challenged only under the state system of review. *In re Carlton, Inc.*, 9 E.A.D. 690, 693 (EAB 2001) ("[Approved State-issued] permits are regarded as creatures of state law that can be challenged only under the state system of review"); *In re Alcoa-Warrick Power Plant*, PSD Appeal No. 02-14, (Order Denying Petition for Review, May 5, 2003), Unpub.Op. at 3 n.2 ("[I]n circumstances in which a state's PSD program has been approved as part of its SIP, permits issued under the state program are considered creatures of state law, not federal law, and are thus reviewable under the state system of review rather than by this Board.") The part 124 review procedures that Mr. Simpson attempts to invoke do not apply to such permits. *See* 40 C.F.R. §124.1(e) ("Part 124 does not apply to PSD permits issued by an approved State.") The Region's and PG & E's responses make the same argument. PG & E Response at 5-8; Region 9 Response at 2-3.

In his Reply, Mr. Simpson does not contest this legal framework. Instead, he focuses on the terms of the SIP approval as it relates to the North Coast UAQMD PSD program, more particularly the exceptions to that approval.

EPA's approval of the North Coast UAQMD program retained Federal authority for the following three categories of permits: (1) cogeneration and resource recovery projects that are major stationary sources or major modifications that would cause violation of PSD increments; (2) major stationary sources or major modifications that would "either have stacks taller than 65 meters or would use 'dispersion techniques' as defined in § 51.1"; and (3) sources for which EPA had already issued PSD permits, including three specified by name, one of which was "PG & E Buhne Pt. (NC 77-05)." 40 C.F.R. § 52.270(b)(2).

Mr. Simpson makes two arguments why the permit at issue falls within the scope of these reserved authorities and thus falls within Federal jurisdiction.³ First, he argues that the permit is subject to Federal jurisdiction because it allegedly uses dispersion techniques. As relevant to this proceeding, “dispersion techniques” includes:

any technique which attempts to affect the concentration of a pollutant in the ambient air by: (I) Using that portion of a stack which exceeds good engineering practice stack height; (ii) Varying the rate of emission of a pollutant according to atmospheric conditions or ambient concentrations of that pollutant; or (iii) Increasing final exhaust gas plume rise by manipulating source process parameters, exhaust gas parameters, stack parameters, or combining exhaust gases from several existing stacks into one stack; or other selective handling of exhaust gas streams so as to increase the exhaust gas plume rise.

40 C.F.R. § 51.100(hh).

Mr. Simpson argues that, because “stack height determinations require the opportunity for public participation” and this notice did not occur correctly, no stack height meets “good engineering practice until the public has had the opportunity to participate.” Simpson Reply at 2. Mr. Simpson argues further that permit limits regarding hours of operation inherently vary the rate of emissions of pollutants based on ambient concentrations. *Id.* at 2-3. Finally, Mr. Simpson alleges that exhaust gas parameter, temperature, and related plume characteristics are being manipulated so as to increase the exhaust gas plume rise. *Id.* 3-5. In making these assertions, Mr. Simpson quotes selected sections from the Final Document of Compliance issued by North Coast UAQMD in this matter but without explaining the relevance of the quotes. *Id.* at 2-5.

North Coast UAQMD specifically denies that the facility has any stack heights above 65 meters (which is undisputed) or that the permit uses dispersion techniques. The declaration filed by Richard L. Martin, North Coast UAQMD’s Air Pollution Control Officer, specifically recites that

³ Mr. Simpson argues that, because of this reservation of Federal authority, either North Coast UAQMD did not have the authority to issue the permit or EPA retained the authority to review it.

“none of the[] EPA retained authority categories applies to HBRP” and, more particularly, “[t]he HBRP will not use ‘dispersion techniques’ as defined on 40 CFR § 51.100(hh).” Martin Declaration at 4-5. PG & E makes the same assertion. PG & E Response at n.1 and Declaration of Gary S. Rubenstein at 3-4.⁴ The Region agrees, stating that “EPA’s review of the District’s PSD permit for the Humboldt Bay Repowering Project indicates that it does not fall within any of the three categories for which federal permitting authority was retained” and that “it will not use dispersion techniques.” EPA Response at 4. Mr. Simpson provides no meaningful refutation of these assertions, and we have no reason to question them.

The second basis for arguing that this permit falls within the exceptions to the North Coast UAQMD’s PSD permit approval is that this project is a “modification” of PG & E Buhne Point (NC 77-05), one of the permits specifically reserved to EPA in EPA’s approval. Simpson Reply at 2. Since this argument was raised for the first time in Mr. Simpson’s Reply, the Board ordered both the Region and the North Coast UAQMD to file replies addressing this issue. *See Order Requiring Replies* (Nov. 25, 2008). In compliance with this order, both parties have filed replies. *See United States Environmental Protection Agency’s Reply Brief in Support of Summary Disposition* (Dec. 4, 2008) (“EPA Supplemental Reply”); *Response of the North Coast Unified Air Quality Management District to ROB Simpson Reply* (Dec. 4, 2008) (“North Coast UAQMD Supplemental Reply”)

As described in the Final Determination of Compliance as quoted by Mr. Simpson in his Reply, the project entails decommissioning and replacing the existing power plant. Simpson Reply at 2. Thus, the HBRP would appear to be a new facility replacing the currently permitted facility, rather

⁴ Mr. Rubenstein is a Senior Partner in Sierra Research and represents that he is “familiar with the permitting files and the air quality-related technical and ambient air quality modeling analyses prepared for the Humboldt Bay Repowering Project.” Declaration of Gary Rubenstein at 1 (Oct. 16, 2008) attached to the PG & E Response.

than a modification to it. We note that PG & E, in its Response, does refer to the project as “a major modification to an existing major source.” PG & E Response at 5. However, on November 21, 2008, PG & E filed a Notice of Clarification and Motion to Strike (“Notice of Clarification”) that specifically addresses this issue.

In the Notice of Clarification, PG & E explains that the permit referenced by Mr. Simpson, PG & E Buhne Point (NC 77-05), was for a modification to the Humboldt Bay Power Plant to allow for installation of the two mobile emergency power plants (“MEPPs”) and that this permit applies only to the MEPPs. As detailed in n.1, once the HBRP is completed, the MEPPs will be decommissioned. Similarly, as the Region makes clear, this matter involves the permitting of a new facility rather than a modification to the Buhne Point permit. *See* EPA’s Supplemental Reply. As the Region explains:

In 2007, when PG & E decided to replace the entire Power Plant by undertaking the HBRP, EPA did not consider the project to be a modification of the PSD permit we issued and modified for the two mobile turbines. From 2007 until the present, EPA has been actively involved in reviewing the HBRP permits, participating in both the California Energy Commission and District proceedings on permitting the HBRP. In addition, EPA was aware that PG & E would be removing the two mobile turbines when HBRP commences operation. We do not consider removal of the two mobile turbines to constitute a modification * * *.

Id. at 4 (citations omitted); *see also* North Coast UAQMD Supplemental Reply at 1, 4 (“[T]he PSD permit issued by the [North Coast UAQMD] authorizes the construction and temporary operation of new equipment at an existing facility; and does not authorize the modification of the pre-existing units at that location.”); “Because the HBRP permit issued by the [North Coast UAQMD] does not authorize a modification of the MEPPs units, the HBRP does not present a modification of the pre-

existing MEPPS units permitted under the EPA Buhne Point PSD permit.”).⁵ Thus, the permit for the HBRP is not a modification to the permit referenced in EPA’s approval of the North Coast UAQMD PSD program.

In any event, even if Mr. Simpson were correct that the permit was of a type exempted from approved SIP, that still would not vest jurisdiction in this Board. The permit was issued under State authority, not pursuant to a federal delegation. Whether the permit is valid as a matter of State law, or whether a permit still needs to be obtained from EPA as a matter of federal law, are questions outside the scope of Board review. The Board's jurisdiction is limited to review of permits actually issued under federal authority, whether by EPA or a state pursuant to a delegation from EPA, and that is not the case with the permit being challenged in this appeal.

For the reasons detailed above, the petition for review is denied.

So ordered.⁶

Dated: 12/10/08

ENVIRONMENTAL APPEALS BOARD

By: 

Edward E. Reich

Environmental Appeals Judge

⁵ The fact that the permit requires that the MEPPS be shut down upon completion of the HBRP does not affect this determination since there is no increase in emissions from the MEPPs associated with that shutdown. See 40 C.F.R. § 52.01(d) (defining “modification” to mean “any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under part 50 of this chapter or which results in the emission of any such pollutant not previously emitted.”).

⁶ The panel deciding this matter is comprised of Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Denying Review in the matter of Humboldt Bay Repowering Project, PSD Appeal No. 08-08, were sent to the following persons in the manner indicated:

Certified Mail: Nancy Diamond, District Counsel
North Coast Unified Air Quality Management District
822 G Street, Suite 3
Arcata, CA 95521

David R. Farabee
Julie E. Macedo
Pillsbury Winthrop Shaw Pittman, LLP
50 Fremont Street
San Francisco, CA 94105

William V. Manheim
David T. Kraska
PG & E, Law Dept.
P.O. Box 7442
San Francisco, CA 94120

Rob Simpson
27126 Grandview Ave.
Hayward, CA 94542

By Pouch Mail: Ann H. Lyons (ORC-2)
Assistant Regional Counsel
U.S. EPA Region 9
75 Hawthorne Street
San Francisco, CA 94105

Dated: DEC 10 2008



Annette Duncan

Secretary