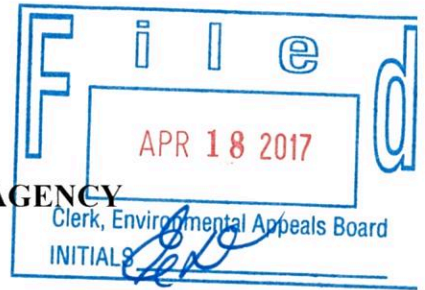


ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
) PSD Appeal No. 17-01
)
)
)
)
)

Delta Energy Center

**ORDER REQUESTING RESPONSE TO PETITION FOR REVIEW
ADDRESSING BOARD’S JURISDICTION**

Mr. Rob Simpson filed this petition for review on behalf of himself and Helping Hand Tools (collectively, “Petitioners”). Petitioners allege that Delta Energy Center (“Delta”), which operates a combined cycle gas-fired power plant, recently obtained an amendment of a license that effectively modified a prevention of significant deterioration (“PSD”) permit issued to Delta under the Clean Air Act, 42 U.S.C. § 7475. For the reasons discussed below, the Environmental Appeals Board (“Board”) is directing the relevant state agency responsible for issuing and modifying PSD permits – the Bay Area Air Quality Management District (“BAAQMD”) – to file a response limited to whether the Board has jurisdiction to review this petition.

Petitioners assert that a fire at the Delta plant in January 2017 damaged the plant’s steam turbine and the steam turbine generator; that Delta then petitioned the California Energy Commission (“CEC”)¹ to amend its license to allow it make temporary modifications to the

¹ The California Energy Commission (“CEC”) is the state’s primary energy policy and planning agency. See California Energy Commission, www.energy.ca.gov (click on “About Us,” and then “Fact Sheets – Core Responsibilities”). One of CEC’s responsibilities is to certify and assure compliance of thermal power plants 50-megawatts and larger. *Id.* Other local, state, and federal environmental permitting processes are streamlined so that they can be incorporated

steam turbine so necessary repairs could be made while the plant operates in simple cycle mode; and that in March 2017, the CEC approved that request. Petition for Review at 2 (Apr. 7, 2017). Petitioners argue that Delta’s PSD permit is premised on the fact that its plant would operate in combined cycle mode as opposed to simple cycle mode, and that the CEC therefore “effectively modified” Delta’s PSD permit in violation of federal law when the CEC approved Delta’s request for temporary safety modifications. *Id.* at 5. Petitioners further assert BAAQMD “appears to have failed to adequately supervise the CEC in this action” and “they appeared to have had no role in the amendment.” *Id.* at 2.

Under the Clean Air Act (“CAA”), a PSD program (or portions thereof) can be administered within a state such as California in three ways:

First, the program can be run by EPA pursuant to a Federal Implementation Plan (‘FIP’). *See, e.g.*, CAA §§ 109-110, 165, 168, 42 U.S.C. §§ 7409-7410, 7475, 7478; 40 C.F.R. pt. 52. *Second*, EPA can delegate its authority to operate the PSD program to a state, in which case the state issues PSD permits as federal permits on behalf of EPA. 40 C.F.R. § 52.21(u); [citation omitted]. *Third*, EPA can approve a state PSD program if it meets the applicable requirements of federal law, in which case the program is incorporated into the state’s ‘State Implementation Program’ (‘SIP’). *See, e.g.*, CAA §§ 110, 116, 161, 42 U.S.C. §§ 7410, 7416, 7471. In this last instance, the state could conduct PSD permitting under its own authority.

In re Milford Power Plant, 8 E.A.D. 670, 673 (EAB 1999) (emphases added). The Board has jurisdiction under 40 C.F.R. part 124 to review PSD permit decisions in the first two scenarios; that is, PSD permits issued pursuant to a FIP, or PSD permits issued by a state with delegated authority from EPA, where the state issues a federal PSD permit on EPA’s behalf. *See In re*

into the CEC’s certification process. *Id.* However, a Clean Air Act PSD permit is one example of an additional approval that, if required, must be obtained separately from the CEC’s certification process. *Id.*

Carlton, Inc., 9 E.A.D. 690, 692 (EAB 2001) (“EPA’s authority to issue federal PSD permits is limited to situations where the state or tribal PSD program has not been approved as part of the SIP.”) (citations omitted). In the third scenario listed above, where a state gains EPA approval to administer the PSD program and amends its SIP subject to EPA approval, the regulations at part 124 state that “[p]art 124 does not apply to PSD permits issued by an approved [s]tate.” 40 C.F.R. § 124.1(e); *see id.* § 124.41 (defining “approved program” as an EPA-approved SIP that provides for issuance of PSD permits).

Here, Petitioner states that BAAQMD issued Delta’s PSD permit in 1999. Petition for Review at 2. More recently, however, EPA issued a final rule in the Federal Register effective August 31, 2016, that, among other things, approved certain BAAQMD PSD rules into California’s SIP. In that final rule, EPA further stated that this approval “means that [BAAQMD] will be the PSD permitting authority on the effective date of this final action. Concurrent with the EPA’s approval of [BAAQMD’s] rules, all PSD permits for sources located in the BAAQMD issued directly by the EPA or under the PSD delegation agreement are being transferred to [BAAQMD].” 81 Fed. Reg. 50,339, 50,341 (Aug. 1, 2016). Thus, as of August 31, 2016, it appears that BAAQMD has been empowered to administer the PSD permit program under its own authority, and now operates under the third scenario presented above. As such, it appears that any PSD permit, or permit modification, would not be reviewable by the Board but instead reviewable under the available state procedures for challenging such actions. *See In re Seminole Elec. Coop., Inc.*, 14 E.A.D. 468, 474 (EAB 2009).

Based on the foregoing, the Board requests that BAAQMD file a response limited to whether the Board has jurisdiction to review this petition. BAAQMD must file its response no later than **Friday, May 5, 2017**. BAAQMD need not file any other documents with its response.

See 40 C.F.R. § 124.19(b)(1). Delta (as the permittee) as well as EPA Region 9 and EPA's Office of General Counsel may also file responses limited to the Board's jurisdiction to review this petition. Any response by Delta must also be filed no later than **Friday, May 5, 2017**. Any response by EPA Region 9 and EPA's Office of General Counsel must be filed no later than **Friday, May 12, 2017**. Responses may not exceed 7000 words. Petitioners may file a reply not to exceed 7000 words and limited to the Board's jurisdiction to review this petition no later than **Monday, May 22, 2017**.

So ordered.²

Dated: 4/18/2017

ENVIRONMENTAL APPEALS BOARD

By: Mary Beth Ward
Mary Beth Ward
Environmental Appeals Judge

² The three-member panel responsible for this order is composed of Aaron P. Avila, Kathie A. Stein, and Mary Beth Ward.

CERTIFICATE OF SERVICE

I certify that copies of the forgoing *Order Requesting Response to Petition for Review Addressing Board's Jurisdiction* in the matter of Delta Energy Center, PSD Appeal No. 17-01, were sent to the following persons in the manner indicated:

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Dated: APR 18 2017



Annette Duncan
Administrative Specialist