

**IN RE DELTA ENERGY CENTER**

PSD Appeal No. 17-01

***ORDER DISMISSING PETITION FOR LACK OF  
JURISDICTION***

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Decided June 20, 2017

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## Syllabus

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, obtained an amendment of a license in March 2017 that effectively modified a prevention of significant deterioration (“PSD”) permit issued to Delta under the Clean Air Act, 42 U.S.C. § 7475.

The Bay Area Air Quality Management District (“BAAQMD”) issued Delta’s PSD permit in 1999 as a federal permit under delegated authority from the Environmental Protection Agency (“EPA”). However, effective August 31, 2016, EPA granted BAAQMD the authority to administer its own PSD program, and transferred to BAAQMD all relevant PSD permits, including the Delta PSD permit. Petitioners argue that the Environmental Appeals Board (“Board”) should exercise jurisdiction over the alleged modification of Delta’s PSD permit because it was “issued in violation of state and federal law” and could result in a “complete undermine of PSD permitting integrity in California [p]ower plants.”

Held: The Board lacks jurisdiction to consider the petition for review. Although BAAQMD issued Delta’s PSD permit under a federal delegated program, subsequent to August 31, 2016, any actions on PSD permits, including Delta’s, fall under BAAQMD’s jurisdiction because BAAQMD now administers an approved PSD program under its own authority. Petitioners instead must utilize the available state law procedures for challenging such actions.

***Before Environmental Appeals Judges Aaron P. Avila, Kathie A. Stein,  
and Mary Beth Ward.***

***Opinion of the Board by Judge Ward:***

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, obtained an amendment of a license in March 2017 that effectively modified a prevention of significant deterioration (“PSD”) permit issued to Delta under the Clean Air Act, 42 U.S.C. § 7475. In August 2016, however, the U.S. Environmental Protection Agency (“EPA”) authorized the Bay Area Air Quality Management District (“BAAQMD”) – the California agency responsible for the Delta PSD permit – to administer the PSD program under its own authority. 81 Fed. Reg. 50,339, 50,341 (Aug. 1, 2016). As such, the Environmental Appeals Board (“Board”) lacks jurisdiction to consider any alleged modification of the Delta PSD permit. *See* 40 C.F.R. § 124.1(e). Petitioners instead must utilize the available state law procedures for challenging such actions. The Board therefore dismisses this petition for lack of jurisdiction.

I. *STATUTORY AND REGULATORY BACKGROUND*

A. *The Clean Air Act PSD Program*

Under the Clean Air Act (“CAA”), a PSD program (or portions thereof) can be administered within a state 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 consider 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 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.”) (citation omitted).

But in the third scenario listed above, where a state gains EPA approval of a SIP submittal to administer the PSD program, the regulations 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). The Board therefore, lacks jurisdiction over challenges to PSD permits issued in this third scenario.

#### B. *EPA Approval of SIP Submittals*

When a state seeks EPA’s approval to, among other things, administer a PSD program and proposes to amend its SIP to that end, EPA may choose not to grant “full approval” but instead grant a limited approval and concurrent limited disapproval.<sup>1</sup> Memorandum from John Calcagni, Director, Air Quality Mgmt. Div., Office of Air Quality Planning & Standards, to Air Program Directors, *Processing of State Implementation Plan (SIP) Submittals* 2-3 (July 9, 1992), available at [www.regulations.gov](http://www.regulations.gov), Docket No. EPA-R09-OAR-2015-0280 (Section D, Document D.51) (“EPA’s 1992 Memorandum on Processing SIP Submittals”). Although the SIP submittal may contain provisions that do not meet CAA requirements, EPA may choose to follow this approach because the submittal nevertheless “represent[s] an improvement over what is currently in the SIP” and “strengthens the SIP as a whole.” *Id.* at 2, 3.

The limited disapproval further triggers an obligation for EPA to promulgate a FIP unless the state takes timely action to correct the provisions that do not meet CAA requirements. *Id.* at 4. But notwithstanding this limited approval/limited disapproval, and the need for the state to take action, the entire submittal is approved and becomes part of the approved SIP. *Id.* at 3.

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<sup>1</sup> In addition to a “full approval” or “full disapproval” of a SIP submittal, EPA has three additional alternatives: partial approval, limited approval, and conditional approval. Memorandum from John Calcagni, Director, Air Quality Mgmt. Div., Office of Air Quality Planning & Standards, to Air Program Directors, *Processing of State Implementation Plan (SIP) Submittals* 1 (July 9, 1992), available at [www.regulations.gov](http://www.regulations.gov), Docket No. EPA-R09-OAR-2015-0280 (Section D, Document D.51) (“EPA’s 1992 Memorandum on Processing SIP Submittals”). The Board addresses only limited approval and concurrent limited disapproval in this decision.

With this statutory and regulatory framework in mind, we now turn to the events leading up to the filing of this petition and proceedings before the Board.

## II. *FACTUAL BACKGROUND*

### A. *Delta's PSD Permit and BAAQMD's PSD Program*

Petitioners state that BAAQMD<sup>2</sup> issued Delta's PSD permit in 1999 as a federal permit under delegated authority from EPA. Petition for Review at 2 (Apr. 7, 2017); *id.* Att. 1, at 1 (BAAQMD, *Final Determination of Compliance*, Delta Energy Center (Oct. 21, 1999)) (dkt. #2). Petitioners further assert that following a fire at the Delta plant, Delta petitioned the California Energy Commission ("CEC")<sup>3</sup> to amend its license to allow it to make temporary modifications to the plant's steam turbine so necessary repairs could be made while the plant operated in simple cycle mode, and that in March 2017, the CEC approved that request. Petition for Review at 2. Petitioners argue that the CEC "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 that BAAQMD "appears to have failed to adequately supervise the CEC in this action" and "appear[s] to have had no role in the amendment." *Id.* at 2.

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<sup>2</sup> BAAQMD is one of the California air districts charged with regulating stationary sources of air pollution in the state. *See* Cal. Health & Safety Code §§ 40000, 40200; *see also* <https://www.arb.ca.gov/drdb/dismap.htm>. BAAQMD coordinates with California's Air Resources Board ("CARB"), the designated air pollution control agency for all purposes set forth in federal law. Cal. Health & Safety Code § 39602. CARB is the state agency responsible for preparing California's SIP, and to that end, "shall coordinate the activities of all districts necessary to comply" with the CAA. *Id.*

<sup>3</sup> The California Energy Commission ("CEC") is the state's primary energy policy and planning agency. *See* California Energy Commission, [www.energy.ca.gov](http://www.energy.ca.gov) (click on "About Us," then "Fact Sheets – Core Responsibilities," then "Certifying Thermal Power Plants"). 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 into the CEC's certification process. *Id.* However, a CAA PSD permit is one example of an additional approval that, if required, must be obtained separately from the CEC's certification process. *Id.*; *see also In re Russell City Energy Ctr.*, 14 E.A.D. 159, 164-65 (EAB 2008) (describing the CEC certification process).

However, in 2013, BAAQMD submitted to EPA a set of rules revising California's SIP, including rules to establish an approved PSD program. After issuing a notice of proposed rulemaking in August 2015 and soliciting public comment, *see* Revisions to California State Implementation Plan, 80 Fed. Reg. 52,236 (Aug. 28, 2015), EPA granted a limited approval and limited disapproval of BAAQMD's SIP submission in August 2016, finding that the rules "strengthen the SIP and are largely consistent with the relevant CAA requirements." *See* Revisions to California State Implementation Plan, 81 Fed. Reg. 50,339 (Aug. 1, 2016) (codified at 40 C.F.R. pt. 52). As a result of the limited approval/limited disapproval, all of BAAQMD's rules became part of the approved SIP, while also triggering an obligation for EPA to promulgate a FIP unless California timely corrects the deficiencies.<sup>4</sup> *Id.* at 50,341, 50,342; U.S. EPA Region 9, *EPA's Response to Comments on the Notice of Proposed Rulemaking*, Revisions to the California State Implementation Plan; Bay Area Air Quality Management District; Stationary Source Permits at 22-23 (May 23, 2016), *available at* [www.regulations.gov](http://www.regulations.gov), Docket No. EPA-R09-OAR-2015-0280 (Section D, Document D.53) (citing EPA's 1992 Memorandum on Processing SIP Submittals).

In that final rule, effective August 31, 2016, 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. at 50,341. And in particular, the final rule codified at 40 C.F.R. § 52.270(b)(16) states:

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<sup>4</sup> EPA identified deficiencies in a small number of BAAQMD's rules. *See* 81 Fed. Reg. at 50,339-40; 80 Fed. Reg. at 52,239 (noting that the rules BAAQMD submitted for SIP approval "contain a few deficiencies which prevent full approval"); US EPA, Region 9, *Technical Support Document*, Revisions to the California State Implementation Plan, BAAQMD (Aug. 9, 2015), *available at* [www.regulations.gov](http://www.regulations.gov), Docket No. EPA-R09-OAR-2015-0280 (Section D, Document D.1) ("Technical Support Document"). The Technical Support Document identifies option(s) for BAAQMD to correct the deficiencies and align BAAQMD's rules with the federal CAA program. EPA will be obliged to promulgate a FIP unless California corrects the deficiencies that are the bases for the limited disapproval within 24 months of August 31, 2016, the effective date of the action. 81 Fed. Reg. at 50,339, 50,341. This timeframe includes EPA approval of the rule revisions. *Id.*

*The PSD program for [BAAQMD] \* \* \* is approved under part C, subpart 1, of the Clean Air Act. For PSD permits previously issued by EPA pursuant to § 52.21 to sources located in the BAAQMD, this approval includes the authority for the BAAQMD to conduct general administration of these existing permits, authority to process and issue any and all subsequent permit actions relating to such permits, and authority to enforce such permits.*

*Id.* (emphases added). Despite BAAQMD issuing Delta's PSD permit under a federal delegated program, the final rule states that any actions on PSD permits such as Delta's, subsequent to August 31, 2016, are under BAAQMD's jurisdiction because BAAQMD now has a SIP-approved program.

#### *B. Proceedings Before the Board*

Following receipt of the petition, the Board issued an order requesting briefing on its jurisdiction over this matter because it appeared that BAAQMD had been empowered to administer the PSD program under its own authority, and as such, the Board lacked jurisdiction to consider any PSD permit, or permit modification, for a source located within the BAAQMD. *See* Order Requesting Response to Petition for Review Addressing Board's Jurisdiction at 3-4 (Apr. 18, 2017).

BAAQMD, Delta, and EPA Region 9 (in consultation with EPA's Office of General Counsel) each filed responses asserting that as of the August 2016 approval, the Board lacks jurisdiction to consider a PSD permit, or permit modification, for a source located within the BAAQMD. *See* BAAQMD Response to Petition for Review Addressing Board's Jurisdiction at 1-2 (May 5, 2017); Response of Delta to Order Requesting Response to Petition for Review Addressing Board's Jurisdiction at 1-3 (May 4, 2017); Response by EPA Region 9 to Board's Order Dated April 18, 2017 at 2 (May 12, 2017). EPA Region 9 attached to its response a letter containing a list of existing PSD permits transferred from EPA Region 9 to BAAQMD, including Delta's PSD permit. Response by EPA Region 9 to Board's Order Dated April 18, 2017, Att. 1 (May 12, 2017) (Letter from Elizabeth J. Adams, Acting Director, Air Division, EPA Region 9, to Jack Broadbent, Air Pollution Control Officer, BAAQMD (Aug. 30, 2016)).

Petitioners, however, object to dismissal of their petition, arguing that the Board should exercise jurisdiction over the alleged modification of Delta's PSD permit that was "issued in violation of state and federal law" and could result in a "complete undermine of PSD permitting integrity in California [p]ower plants."

Response of Helping Hand Tool[s] and Rob Simpson to Order Requesting Response to Petition for Review Addressing Board's Jurisdiction at 4, 10 (May 23, 2017) ("Petitioners' Reply").

### III. ANALYSIS

Based on the CAA, regulatory history, and applicable guidance, the Board concludes that as of August 31, 2016, BAAQMD administers the PSD program under its own authority. As such, the Board lacks jurisdiction to consider any PSD permit, or permit modification, for a source located within the BAAQMD issued on or after that date. Instead, any such challenge must proceed under the available state law procedures for challenging such actions. *See In re Seminole Elec. Coop., Inc.*, 14 E.A.D. 468, 474 (EAB 2009). Petitioners' contrary arguments are unavailing.

Petitioners argue that EPA's limited approval and limited disapproval of revisions to BAAQMD's SIP concern "rules that are absolutely germane to this action," and thus the Board should review this matter. Petitioners' Reply at 6; *see also id.* at 8, 9. As demonstrated above, however, EPA's limited approval and limited disapproval of BAAQMD's rules does not alter the fact that EPA approved the PSD program. As such, the Board no longer has jurisdiction to consider petitions concerning PSD permits or PSD permit modifications for sources located within BAAQMD. And to the extent that Petitioners object to EPA's approval of BAAQMD's PSD program, the Board is not the proper forum to entertain such objection. *See In re FutureGen Indus. All., Inc.*, 16 E.A.D. 717, 724-25 (EAB 2015).<sup>5</sup>

Petitioners also challenge the available state law procedures for appealing the alleged PSD permit modification, and stress the need for the Board to exercise jurisdiction to allow for adequate public participation. Petitioner's Reply at 5, 7, 9. Petitioners cite, among other things, the Board's decision in *Seminole Electric Cooperative* as support for its argument that a state's PSD program approval should

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<sup>5</sup> As noted above, the public, including Petitioners, had the opportunity to comment on the Agency's proposed limited approval/limited disapproval of BAAQMD's PSD program, and the opportunity to file a petition for review in federal court challenging that final rule under the CAA. *See* 42 U.S.C. § 7607(b)(1); *see also* 81 Fed. Reg. at 50,342 (noting that any petition for review of the final rule approving BAAQMD's PSD program must be filed in the U.S. Court of Appeals for the appropriate circuit by September 30, 2016).

not thwart public participation. *See* Petitioners' Reply at 8-9 (citing *Seminole*, 14 E.A.D. at 482).

In *Seminole*, the state of Florida issued a draft PSD permit under a delegated federal program, but before the final permit was issued, Florida gained SIP approval for its PSD program.<sup>6</sup> The petitioners in *Seminole* argued that Florida's evolution from a federal delegated program to a SIP-approved state program during that PSD permitting process effectively prevented them from obtaining review of the final permit. *Seminole*, 14 E.A.D. at 481-82. As Petitioners here note, the Board observed in *Seminole* that federal and state permitting authorities should clearly address how the transition from a delegated PSD program to a SIP-approved state PSD program may impact public participation and judicial review processes. *Id.* at 482. The Board nevertheless declined to review the PSD permit to avoid confusion, and explained:

Granting Board jurisdiction of the state-issued Seminole permit would set a precedent for others to claim entitlement to Board review of state permits in the same circumstances. *Any erosion of the clear line preserving to approved states the power to adjudicate appeals of permit decisions under their own authority \* \* \* creates the potential for injecting unwarranted confusion into the national PSD program with regard to the CAA's carefully structured allocation of federal and state responsibilities.*

*Id.* (emphasis added); *cf. In re Sierra Pac. Indus.*, 16 E.A.D. 375, 380-82 (EAB 2014) (declining to review Title V permit issued by an approved state). For the same reasons that the Board articulated in *Seminole*, granting Board review of an alleged modification to the Delta permit in these circumstances would similarly

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<sup>6</sup> EPA granted Florida's PSD program conditional SIP approval, meaning that approval of Florida's PSD rules into its SIP was conditioned on the state's commitment "to adopt specific, enforceable measures" to correct four specific items no later than twelve months after the final conditional approval. Approval and Promulgation of Implementation Plans Florida, 73 Fed. Reg. 36,435, 36,436-37 (June 27, 2008); *see also* EPA's 1992 Memorandum on Processing SIP Submittals at 4-8 (discussing conditional approvals). EPA's conditional approval, however, did not change the fact that the state had an EPA-approved PSD program, thus precluding Board consideration of state-issued PSD permits under 40 C.F.R. § 124.1(e).



erode the clear line between federal and state responsibilities because BAAQMD now administers the approved PSD program.

#### IV. *CONCLUSION*

Based on the foregoing, the Board dismisses the petition for review. The Board lacks jurisdiction under 40 C.F.R. part 124 to adjudicate challenges to a PSD permit, or permit modification, when an agency such as BAAQMD has obtained EPA approval to administer the PSD program.<sup>7</sup> *See* 40 C.F.R. § 124.1(e). Petitioners may choose to pursue review of the alleged PSD permit modification under available state law procedures.

So ordered.

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<sup>7</sup> Because the Board lacks jurisdiction in this matter based on EPA's August 2016 approval of BAAQMD's PSD program, the Board does not address Delta's argument that the Board separately lacks jurisdiction because no PSD permit action occurred. *See* Response of Delta to Order Requesting Response to Petition for Review Addressing Board's Jurisdiction at 3-4 (May 4, 2017).