

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

In re:)
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Delta Energy Center)
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_____))

PSD Appeal No. 17-01

**RESPONSE OF DELTA ENERGY CENTER, LLC TO
ORDER REQUESTING RESPONSE TO PETITION FOR REVIEW ADDRESSING
BOARD'S JURISDICTION**

Kevin Poloncarz
Donald Ristow
Paul Hastings LLP
101 California Street, Forty-Eighth Floor
San Francisco, CA 94111
Telephone: (415) 856-7029
Fax: (415) 856-7129
Email: kevin.poloncarz@paulhastings.com

Attorneys for Permittee Delta Energy Center, LLC

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ARGUMENT

In response to the Environmental Appeals Board (the “Board”) Order Requesting Response to Petition for Review Addressing Board’s Jurisdiction (the “Order”) concerning “whether the Board has jurisdiction to review [the] petition” filed by Mr. Rob Simpson on behalf of himself and Helping Hand Tools (“Petitioners”), Permittee Delta Energy Center, LLC (“Delta Energy Center”) submits that the Board lacks jurisdiction to review the petition. The Board’s jurisdiction “is limited by the statutes, regulations, and delegations that authorize and provide standards for such review.” *In re Carlton, Inc.*, 9 E.A.D. 690, 692 (EAB 2001) (citing 57 Fed. Reg. 5,320 (Feb. 13, 1992)). Jurisdiction to review prevention of significant deterioration (“PSD”) permits “is not all-encompassing” (*In re Milford Power Plant*, 8 E.A.D. 670, 673 (EAB 1999)), and does not extend to PSD permitting actions taken by a state taken pursuant to an approved PSD program incorporated in the state implementation plan (“SIP”). *In re Carlton, Inc.*, 9 E.A.D. at 692. Because the Bay Area Air Quality Management District (“BAAQMD”) now implements the PSD program pursuant to an approved SIP, the Board must deny review of the petition for lack of jurisdiction. Additionally, as recognized by the Board on repeated occasion, its jurisdiction “is limited to federal PSD permits that are *actually issued*” *E.g., In re DPL Energy, Montpelier Electric Generation Station*, 9 E.A.D. 695, 699 (EAB 2001) (quoting *In re Carlton, Inc.*, 9 E.A.D. at 692). The Board therefore has no jurisdiction to consider Petitioners’ “conten[tion] that a PSD permit should have been required,” but was not obtained. *See id.* at 698.

I. The Board Lacks Jurisdiction to Review the Petition Because Delta Energy Center’s PSD Permit Is Subject to the Authority of an Approved State Program

Petitioners assert that Delta Energy Center’s PSD permit was effectively modified “in violation of federal law” when the California Energy Commission (“CEC”) amended the facility’s license to allow for temporary safety measures to be implemented after a mechanical

failure and resultant fire damaged portions of the facility in January 2017. Petition for Review, at 5 (Apr. 7, 2017). Putting aside the absence of merit to Petitioners' allegations, the Board lacks authority to reach them. While the Board possesses jurisdiction to review federal PSD permitting decisions of the Environmental Protection Agency ("EPA") pursuant to a Federal Implementation Plan ("FIP"), or to review federal PSD permit decisions made by a state pursuant to a delegation agreement, it has no authority to review *state* PSD permitting decisions made under an authorized PSD program incorporated in the state's SIP. *See* 40 C.F.R. § 124.1(e) (Board jurisdiction does not extend to "PSD permits issued by an approved State."); *see also In re Milford Power Plant*, 8 E.A.D. at 670 ("BACT is part of Connecticut's approved PSD program and, as such, is not subject to Board review."); *In re Russell City Energy Center*, PSD Appeal No. 08-07, at 2 (EAB Nov. 25, 2008) (Order Denying Review) ("The Board's jurisdiction extends only to review of Federally issued permits, permits issued either by EPA or by a State under delegation from EPA. It does not extend to decisions made by a State that do not implement the Federal program.") (citing *In re Knauf Fiber Glass, GMBH*, 8 E.A.D. 121, 161-162 (EAB 1999); *In re Sutter Power Plant*, 8 E.A.D. 680, 690 (EAB 1999)).

Though BAAQMD issued the Delta Energy Center PSD permit in March 2000 pursuant to its PSD delegation agreement with EPA, BAAQMD has since obtained approval to operate all relevant portions of its PSD program independently as a matter of state law, as now incorporated within the California SIP. *See* 81 Fed. Reg. 50,339 (Aug. 1, 2016). Importantly, and as noted by the Board's Order, the approval made explicit that BAAQMD "will be the PSD permitting authority" effective August 31, 2016 and that "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. The Delta Energy Center PSD permit is specifically identified in the docket of the EPA approval action as among the PSD permits transferred to BAAQMD authority. *See* Doc. D.55, List of PSD Permits Transferred to

BAAQMD, EPA-R09-OAR-2015-0280-0017 (July 2016); *see also* Doc. D.52, BAAQMD Letter (Jim Karas) to EPA Region 9 (Gerardo Rios) re Implementation and Enforcement of PSD Permits issued by the EPA and the Bay Area Air Quality Management District, EPA-R09-OAR-2015-0280-0017 (Oct. 7, 2015) (clarifying during the approval process that BAAQMD was requesting “to exercise its authority under the SIP approved PSD program to administer its PSD Program with respect to those sources . . . that have existing PSD Permits issued by EPA or [BAAQMD] as a Delegated Agency” and that this would include “authority to process and issue any and all subsequent PSD action relating to such permits (including for example modification, amendment or revision of any nature) and authority to enforce such permits.”).

EPA’s approval effectively converted the Delta Energy Center PSD permit to a “creature[] of state law that can be challenged only under the state system of review” (*In re Carlton*, 690 E.A.B. at 693), inclusive of any and all subsequent action modifying, amending, or revising that permit. As a result, taking jurisdiction to review the petition “would be at variance with a central element of an approved state program – exclusive state jurisdiction over appeals of its final PSD permitting decisions” *In re Seminole Electric Cooperative, Inc.*, 14 E.A.D. 468, 470 (EAB 2009). Because the Clean Air Act provides “no basis . . . to support such a variance” (*Id.*), the Board must deny the petition.

II. The Board Separately Lacks Jurisdiction to Review the Petition Because No PSD Permit Action Was Taken

In addition to the threshold absence of jurisdiction stemming from the recent approval of the BAAQMD PSD program into the California SIP, the Board has separately recognized that its authority does not extend to circumstances where no PSD permit is actually issued. *See In re Carlton*, 690 E.A.B. at 693 (“Significantly, the Board’s jurisdiction is limited to federal PSD permits that are *actually issued*”); *In re DPL Energy, Montpelier Electric Generating Station*, 9 E.A.D. at 699 (“[W]hether or not Petitioner is correct in asserting that [the state

permitting authority] should have issued a PSD permit . . . is not something over which the Board may take cognizance for purposes of exercising its review powers under 40 C.F.R. § 124.19.”); *In the Matter of Alcoa-Warrick Power Plant*, PSD Appeal No. 02-14, at 8 (EAB Mar. 5, 2003) (Order Denying Petition for Review) (citing *In re Carlton, Inc.* and applying actual action principle as limitation on jurisdiction).

At bottom, Petitioners’ claims can be reduced to the contention that a PSD permit amendment should have been sought by Delta Energy Center and issued by BAAQMD with respect to the temporary safety modifications authorized by the CEC. As the Board has long recognized, consideration of such a contention is beyond the authority conferred by 40 C.F.R. § 124.19 and “must be reserved for other fora.” See *In re DPL Energy, Montpelier Electric Generating Station*, 9 E.A.D. at 699.

CONCLUSION

The petition for review should be denied for lack of jurisdiction.

Dated: May 4, 2017

Respectfully submitted,

/s/ Kevin Poloncarz

Kevin Poloncarz

Donald Ristow

Paul Hastings LLP

101 California Street, Forty-Eighth Floor

San Francisco, CA 94111

Telephone: (415) 856-7029

Fax: (415) 856-7129

Email: kevin.poloncarz@paulhastings.com

Attorneys for Permittee Delta Energy Center, LLC

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Response of Delta Energy Center, LLC to Order Requesting Response to Petition for Review Addressing Jurisdiction complies with the word count limit established in the Board's April 18, 2017 Order because it contains 1,213 words as counted by the word-processing system used to prepare it.

/s/ Kevin Poloncarz
Kevin Poloncarz

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Response of Delta Energy Center, LLC to Order Requesting Response to Petition for Review Addressing Jurisdiction were served by first class mail through the United States Postal Service to the following on this 4th day of May, 2017:

Rob Simpson, Executive Director
Helping Hand Tools
27126 Grandview Avenue
Hayward, CA 94542

Jack Broadbent, Chief Executive Officer/ APCO
Bay Area Air Quality Management District
375 Beale Street, Suite 600
San Francisco, CA 94105

Alexander Crockett, Assistant District Counsel
Bay Area Air Quality Management District
375 Beale Street, Suite 600
San Francisco, CA 94105

Robert B. Weisenmiller
Kourtney Vacarro
Office of Chief Counsel
California Energy Commission 1516 Ninth Street, MS-14
Sacramento CA 95814

Bryant Cannon, Deputy Attorney General
California Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Sylvia Quast, Regional Counsel
U.S. Environmental Protection Agency, Region 9
75 Hawthorne Street
Mail Code ORC-1
San Francisco, CA 94105

Lorie Schmidt, Associate General Counsel, Air and Radiation Law Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Mail Code 2344A
Washington, DC 20460

Jeffery Harris
Peter Kiel
Samantha Neumyer
Ellison, Schneider, Harris & Donlan LLP
2600 Capital Avenue, Sute 400
Sacramento, CA 95816

Dated: May 4, 2017

/s/ Kevin Poloncarz
Kevin Poloncarz