

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

In the matter of _____)
) PSD Appeal No. 08-08
Humboldt Bay Repowering Project)
_____)

**MOTION OF THE UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, REGION 9, FOR LEAVE TO FILE A
BRIEF AS *AMICUS CURIAE* IN SUPPORT OF SUMMARY
DISPOSITION**

Pursuant to 40 C.F.R. § 124.19 and the Environmental Appeals Board Practice Manual (Section III.D.7.b), the United States Environmental Protection Agency, Region 9 (“EPA”), respectfully moves this Board for leave to file the accompanying brief as *amicus curiae* supporting the Motions for Summary Disposition filed in this matter. EPA supports the Motion that was filed on October 16, 2008, by the North County Unified Air Pollution Control District (“District”) and the motion that is expected to be filed Pacific Gas & Electric Company (“PGE”) as an intervenor. Specifically, EPA agrees that the District’s Prevention of Significant Deterioration (“PSD”) permit allowing construction of the Humboldt Bay Repowering Project was issued pursuant to the District’s SIP approved PSD

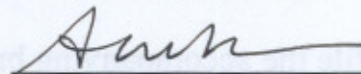
permitting program and that jurisdiction to review the PSD permit lies with the District's review procedures.

The undersigned Counsel for EPA has attempted to contact Petitioner Rob Simpson and has contacted counsel for the District and PGE. Counsel for the District and PGE do not oppose EPA's motion. Petitioner Rob Simpson has not responded to a voicemail message left on October 15, 2008.

For the reasons stated in the accompanying *amicus curiae* brief, the District's and PGE's Motions for Summary Disposition should be granted and the Petition with respect to Humboldt Bay Repowering Project should be dismissed in its entirety.

Date: October 16, 2008

Respectfully submitted



Ann H. Lyons
Assistant Regional Counsel
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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9'S *AMICUS CURIAE* BRIEF IN SUPPORT OF SUMMARY
DISPOSITION**

INTRODUCTION AND STATEMENT OF FACTS:

On October 2, 2008, the Environmental Appeals Board (EAB") notified the United States Environmental Protection Agency, Region 9 ("EPA") that Rob Simpson had filed a Petition for Review of a final Prevention of Significant Deterioration ("PSD") Permit issued by the North Coast Unified Air Pollution Control District ("District") on April 14, 2008. The District issued the PSD Permit to allow Pacific Gas & Electric Company ("PGE") to replace existing dual fuel natural gas and fuel oil steam turbine generators with several new engines that would operate primarily on natural gas and at levels consistent with Best Available Control Technology (BACT).

The EAB's notification instructed the District to file any motion for summary disposition on or before October 17, 2008. See also EAB Practice Manual, Section III.D.5, n. 43. Counsel for EPA understands that both the District and PGE intend to seek summary disposition by filing motions on or before October 17, 2008. EPA supports those motions for the reasons set forth below.

ARGUMENT

A. The Board Does Not Exercise Jurisdiction Over Permits Issued Pursuant to State Approved PSD Programs.

The EAB's jurisdiction to review PSD permitting decisions is limited to PSD permits that are issued pursuant to the federal regulations. See 40 C.F.R. §124.1(e) ("Part 124 does not apply to PSD permits issued by an approved State."). The EAB has recognized that "the authority of the Board to review permit decisions is limited by the statutes, regulations, and delegations that authorize and provide for such review." *In re Alcoa-Warrick Power Plant*, PSD Appeal No. 02-14, slip. op. at 6 (EAB Mar. 5, 2003). The EAB's Practice Manual similarly states:

Section 124.19(a) creates a direct appeal to the EAB from *federally-issued* RCRA, UIC, PSD and NPDES permit decisions. The EAB generally does not have authority to review state-issued permits; such permits are reviewable only under the laws of the state that issued the permit. *In re Great Lakes Chem. Corp.*, 5 E.A.D. 395, 396 (1994)(parenthetical omitted)(emphasis in original).

PSD Practice Manual, Section III.B (p. 27).

Where, as here, a petition is improperly filed for review of a PSD permit issued under a State program, expedited or summary disposition is appropriate. *See, e.g., In re Milford Power Plant*, 8 E.A.D. 670 (EAB 1999). The EAB explained in *Milford* that “a PSD program (or portions thereof) may be administered within a state in one of three ways.” *Id.* at 673. EPA may run the program and issue PSD permits pursuant to a Federal Implementation Plan, such as 40 CFR 52.21. *Id.*, see also 40 C.F.R. § 52.21(a). Alternatively, EPA may delegate its authority so that the state agency issues a federal PSD permit on behalf of EPA. *Id.* see also 40 C.F.R. § 52.21(u). Finally, EPA may approve the state’s PSD program and incorporate the state’s PSD program into the State Implementation Plan (SIP). *Id.* see also 40 U.S.C. 7510; 40 C.F.R. 51.166(a). The EAB stated that “[i]n this last instance, the state would conduct PSD permitting under its own authority.” *Id.* at 673. *See also In re Carlton, Inc. North Shore Power Plant*, 9 E.A.D. 690 (EAB 2001)(dismissing petition for review of permit issued pursuant state minor source program).

Because the PSD permit for the Humboldt Bay Repowering Project was issued pursuant to the District’s SIP approved program, as discussed below, the Petition should be summarily dismissed.

B. The District Issued the PSD Permit for Humboldt Bay Repowering Project Pursuant to its SIP approved PSD Program.

EPA approved the District's PSD program into the California SIP on July 31, 1985. 50 Fed. Reg. 30,941 (July 31, 1985), codified at 40 CFR 52.270(b)(2). The SIP approval retains limited federal jurisdiction for (1) co-generation projects, (2) projects with stack heights over 65 feet or using certain dispersion techniques, and (3) sources for which EPA had issued the PSD permit prior to July 31, 1985. *Id.* EPA's approval of the District's PSD permitting rules was effective on August 30, 1985.

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. The Humboldt Bay Repowering Project is not a co-generation project. EPA understands that its stack height is less than 65 feet and it will not use dispersion techniques. Finally, it is not a facility for which EPA issued a PSD permit prior to July 31, 1985.

EPA, therefore, supports the motions for summary disposition.

C. This Board's Decision in *In re Russell City* Does Not Establish a Basis for Jurisdiction over the PSD Permit for the Humboldt Bay Repowering Project.

The Petition in this matter relies exclusively on the Board's decision to remand a PSD permit issued by the Bay Area Air Quality Management

District for the Russell City Energy Project. *In re Russell City Energy Center*, PSD Appeal No. 08-01, slip op. (EAB, July 29, 2008).

Petitioner's reliance on the *Russell City* decision is misplaced. The PSD permit issued for Russell City was clearly issued pursuant to a delegation agreement between EPA and the Bay Area Air Quality Management District. In *Russell City*, the Board held only that permits issued pursuant to a delegation agreement must meet the minimum public notice requirements set forth in 40 C.F.R. §124.10. The Board's decision did not address PSD permits issued under SIP approved PSD programs.

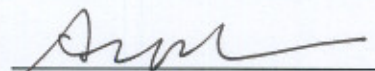
The District here had a SIP approved PSD program and issued the PSD permit to the Humboldt Bay Repowering Project pursuant to its SIP approved program.

CONCLUSION

For the reasons set forth above, EPA respectfully requests this Board to grant the District's and PGE's motions for summary disposition and to dismiss the Petition as it relates to the Humboldt Bay Repowering Project.

Date: October 16, 2008

Respectfully Submitted,



Ann H. Lyons
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