

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

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

**RESPONSE OF THE NORTH COAST UNIFIED AIR QUALITY  
MANAGEMENT DISTRICT REQUESTING SUMMARY DISMISSAL**

Respondent, North Coast Unified Air Quality Management District (the “North Coast District”) files this Response to the Petition filed by Mr. Rob Simpson concerning the issuance of a prevention of significant deterioration (“PSD”) permit by the North Coast District for the Humboldt Bay Repowering Project (“HBRP”). As discussed below, the North Coast District issued the PSD permit in question under its State implementation plan (“SIP”) authority, and the Environmental Appeals Board (“EAB” or the “Board”) has no jurisdiction to review this permit. The Petition as to the North Coast District must be dismissed.

**Background**

On October 2, 2008, the Board mailed a letter to Richard L. Martin, Jr., the Air Pollution Control Officer (“APCO”) for the North Coast District, informing him of Mr. Simpson’s Petition and offering the North Coast District an initial opportunity to respond solely on matters of jurisdiction and other threshold issues to determine if summary

disposition is appropriate. The Board specifically reserved briefing on merits issues until after a determination of summary disposition matters. Based on this bifurcated approach, the North Coast District files this Response solely to seek summary dismissal based on jurisdictional grounds and respectively reserves the right to file additional argument and evidence on other relevant threshold or merits issues should the Board elect to defer its decision until after merits briefing.

This matter arises from a Petition filed on September 26, 2008 appealing two unrelated PSD permits issued by two separate California air districts: 1) that of the North Coast District pertaining to the HBRP and 2) that of the Bay Area Air Quality Management District (the “Bay Area District”) pertaining to the Russell City Energy Center (“RCEC”). Mr. Simpson previously appealed the Bay Area District’s PSD permit in RCEC (*See* PSD Appeal No. 08-01) to which this Board issued a Remand Order on July 29, 2008. *In re Russell City Energy Center*, PSD Appeal No. 08-01 (EAB, Jul. 29, 2008) 13 E.A.D. \_\_\_. In that Remand Order, the Board directed the Bay Area District to re-notice its PSD permit in accordance with the federal notice provisions of 40 CFR part 124, which are applicable to PSD permits issued under delegated permit authority. The instant Petition against the North Coast District alleges that the North Coast District, a SIP approved air district for its PSD program, is in violation of the Board’s RCEC Remand Order.

### **Summary of Argument**

The Board had no jurisdiction over the PSD permit issued by the North Coast District for the Humboldt Bay Repowering Project because the North Coast District issued the permit pursuant to its SIP approved program. The Board’s authority to review

PSD permits exists only when the permit is issued either by the EPA or by a regional air district exercising delegated authority.

### **Summary of Facts**

On September 29, 2006, Pacific Gas and Electric Company (“PGE”) filed with the North Coast District an application for Determination of Compliance (“DOC”) and Authority to Construct (“ATC”). *See* Declaration of Richard L. Martin, Jr. filed concurrently herewith (“Martin Dec.”) at par. 3. The project for which PGE sought a DOC and ATC involves the replacement of an existing natural gas and fuel oil power plant located in Eureka, California consisting of two steam turbine generators, 52 and 53 megawatts, dating to 1956 and 1953, respectively, with 10 new 16.3 megawatt engines which would be subject to best available control technology (“BACT”). *Id.* Because this is a power plant project of 50 megawatts or greater, PGE must additionally follow the state power plant license procedures of California Public Resources Code § 25000 *et seq.*, and, accordingly, on September 29, 2006, filed an Application for Certification (“AFC”) with the California Energy Commission (“CEC”). Martin Dec. at par. 4.

The application for ATC filed with the North Coast District triggered its PSD review and air quality analysis process. Martin Dec. at par. 5, 6. On October 24, 2007, pursuant to its rules, the North Coast District issued a document entitled, “Preliminary Determination of Compliance” (“PDOC”), which included a draft PSD and ATC permit. Martin Dec. at par. 8. On the same day, the North Coast District published and issued a notice in accordance with its rules seeking public comment. Martin Dec. at par. 9. After considering all comments made, the North Coast District issued its Final Determination of Compliance (“FDOC”) on April 14, 2008. Martin Dec. at par. 10. The

FDOC included a conditional ATC, temporary Permit to Operate, and PSD permit. *Id.*  
The ATC was made conditional on PGE's receipt of a license from the CEC. *Id.*

### Argument

#### **I. The EAB Has No Jurisdiction to Review PSD Permits Issued as Part of an Approved SIP.**

It is important to note at the outset the distinction between the PSD permit issued by the North Coast District for the HBRP and that issued by the Bay Area District for RCEC. Although both HBRP and RCEC projects are subject to licensing under the California power permit licensing program of the Warren-Alquist State Energy Resources Conservation and Development Act (California Public Resources Code §§ 25000 *et seq.*), the Bay Area District processed and issued the RCEC PSD permit under the federal PSD program pursuant to a delegation agreement with EPA. *In re Russell City Energy Center*, PSD Appeal No. 08-01, slip op. at 6 (EAB, Jul. 29, 2008) 13 E.A.D. \_\_\_. In contrast, the North Coast District processes PSD applications and issues PSD permits pursuant to its PSD program that EPA approved as part of the State's implementation plan ("SIP") for California for the North Coast District.

The consolidated PSD permit regulations of 40 CFR part 124, by their express terms, limit the scope of PSD permit review by this Board to PSD permits issued by or pursuant to federal permit programs. The regulation specifically states: "Part 124 does not apply to PSD permits issued by an approved State." 40 CFR § 124.1(e). As defined in 40 CFR § 124.41, "Approved program means a State implementation plan providing for issuance of PSD permits under the Clean Air Act and 40 CFR part 51. An approved State is one administering an approved program."

During its final rule making associated with 40 CFR part 124 the EPA explained the scope of the Part 124 consolidated permit program as applying to “the Prevention of Significant Deterioration (PSD) program under the Clean Air Act, where this program is operated by EPA or a *delegated State agency* under 40 CFR § 52.21(v); these procedures do not apply to PSD permits issued by States to whom administration of the PSD program has been transferred.” 45 Fed. Reg. 33,290 (May 19, 1980, emphasis added). “For the purposes of Part 124, a delegate State stands in the shoes of a Regional Administrator . . . a permit issued by a transferee State is a ‘State issued permit.’ Part 124 does not apply to State-issued PSD permits.” 45 Fed. Reg. 33,290 (May 19, 1980) at 33,484.

This Board has followed and consistently applied the delegated agency versus SIP agency authority distinction in applying its jurisdiction to hear PSD permit appeals. As stated by the Board in *In re Carlton, Inc.*, PSD Appeal No. 00-09, (9 E.A.D 690, 693):

“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. 45 Fed. Reg. 52,676 (Aug. 7, 1980). The consolidated permitting regulations at 40 C.F.R. pt 124 are correspondingly limited in scope. 40 C.F.R. § 124.1(e) (‘Part 124 does not apply to PSD permits issued by an approved State.’). More generally, permit appeals under 40 C.F.R. pt 124 are limited to the federal permitting programs listed therein, including appeals of permits issued under the federal PSD program. See 40 C.F.R. § 124.1. \* \* \* [Approved State-issued] permits are regarded as creatures of state law that can be challenged only under the state system of review.”

The point was reiterated by the Board in *In re Alcoa-Warrick Power Plant*, PSD Appeal No. 02-14, May 5, 2003, Unpub.Op. at fn 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.”

Pursuant to its authority under Part C, Subpart 1 of the Clean Air Act, the EPA approved the PSD rules for the North Coast District as part of the California SIP. 40 CFR § 52.270(b)(2) (*see also* Martin Dec. at Exhibit B). This SIP approval states the following:

“(2) The PSD rules for North Coast Unified Air Quality Management District are approved under Part C, Subpart 1, of the Clean Air Act. However, EPA is retaining authority to apply § 52.21 in certain cases. The provisions of § 52.21 except paragraph (a)(1) are therefore incorporated and made a part of the State plan for California for the North Coast Unified Air Quality Management District for:

- (i) Those cogeneration and resource recovery projects which are major stationary sources or major modifications under § 52.21 and which would cause violations of PSD increments.
- (ii) Those projects which are major stationary sources of major modifications under § 52.21 and which would either have stacks taller than 65 meters or would use “dispersion techniques” as defined in § 51.1.
- (iii) Sources for which EPA has issued permits under § 52.21, including the following permits and any others for which applications are received by July 31, 1985;
  - (A) Arcata Lumber Co. (NC 78-01; November 8, 1979),
  - (B) Northcoast Paving (NC 79-03; July 5, 1979),
  - (C) PG & E Buhne Pt. (NC 77-05).”

Although this SIP approval by the EPA contains reservations, none of the areas of PSD authority specifically retained by the EPA are applicable to the HBRP. In particular, the HBRP is not a cogeneration and resource recovery project. Martin Dec. par.13. Nor does the HBRP have stacks taller than sixty-five (65) meters. Martin Dec. par. 14. Finally, the HBRP does not use “dispersion techniques.” Martin Dec. par. 15,16.

Accordingly, the PSD permit at issue in this appeal was issued as part of a State approved program, which is outside the scope of Part 124, and outside the jurisdiction of this Board.

**Conclusion**

Based on the foregoing, the Petition against the North Coast District for issuance of a PSD permit to PGE for the HRBP must be dismissed.

DATED: October 15, 2008

Respectfully submitted,



Nancy Diamond, District Counsel  
North Coast Unified Air Quality  
Management District  
822 G Street, Suite 3  
Arcata, CA 95521  
Phone: (707) 826-8540  
Fax: (707) 826-8541  
email: ndiamond@humboldt1.com