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

In the Matter of:)
Russell City Energy Center)
)

APPEAL 08-07

RESPONSE TO REQUEST FOR SUMMARY DISMISSAL

SUMMARY

Because the PSD notice requirements were not carried out correctly by BAAQMD, the PDOC and FDOC issued to RCEC are likewise invalid. The EAB found that the PSD notice requirements were not carried out correctly by BAAQMD. The PSD notice requirements are carried out through procedures necessary for the issuance of PDOC and FDOC permits. Therefore, because the PSD notice requirements were not carried out correctly by BAAQMD, the PDOC and FDOC issued to RCEC are likewise invalid and should have been withdrawn by BAAQMD upon Remand of the PSD permit.

DISCUSSION

The Clean Air Act ("CAA") requires preconstruction approval in the form of a Prevention of Significant Deterioration ("PSD") permit before anyone may build a new major stationary source or make a major modification to an existing source if the source is located in an attainment area. CAA § 160(3), 42 U.S.C § 7470(3). Pursuant to a

delegation agreement with the Environmental Protection Agency (“EPA”), the Bay Area Air Quality Management District (“BAAQMD”) processes PSD permit applications and issues permits under the federal PSD program. *See* U.S. EPA-[BAAQMD], Agreement for Limited Delegation of Authority to Issue and Modify Prevention of Significant Deterioration Permits Subject to 40 C.F.R. § 52.21, Jan. 24, 2006 (“Delegation Agreement”).

Under this delegation agreement, permits issued by BAAQMD are specifically to conform to 40 CFR 52.21 and SIP 2-2. Delegation Agreement, Pg. 2. In addition, SIP 2-2 incorporates SIP 2-1-301. SIP 2-1-301 further incorporates SIP 2-3 by reference. SIP 2-1-102. Thus, permits issued by BAAQMD are to conform to 40 CFR 52.21 and SIP 2-1, SIP 2-2, and SIP 2-3. SIP 2-1 defines the general procedural requirements for reviewing new sources of air pollution. SIP 2-1-101. SIP 2-2 governs the review of new sources of air pollution by which an Authority To Construct (“ATC”) may be granted. SIP 2-2-101 SIP 2-3 further defines the procedural requirements for the issuance of an ATC permit for proposed power plants. SIP 2-3-101.

In order to build a power plant which emits air contaminants, the permit applicant must first receive written authorization from the district’s air pollution control officer (“APCO”) in the form of an ATC. SIP 2-1-301. An ATC cannot be issued until a Determination of Compliance (“DOC”) is issued. SIP 2-3-301. BAAQMD’s regulations mirror these SIP regulations. BAAQMD 2-1-301; BAAQMD 2-3-301; BAAQMD 2-3-201. BAAQMD’s regulations prescribe the federal and State of California standards that new sources of air pollution in BAAQMD’s jurisdiction must meet in order to obtain a Preliminary Determination Of Compliance (“PDOC”) and a Final Determination Of Compliance (“FDOC”) and, if approved, the subsequent ATC and its accompanying PSD permit. *See* BAAQMD 2-2, BAAQMD 2-2-100 – BAAQMD 2-2-608.

Under Part 124 of Title 40 of the Code of Federal Regulations, when a draft permit has been prepared proper notice must be given by BAAQMD’s APCO. 40 CFR 124.10(a)(1)(ii). *See also* 40 CFR 124.2. The draft permit in the BAAQMD jurisdiction is the PDOC. 40 CFR 124.10(a)(1)(ii); BAAQMD 2-2-404. *See also* 40 CFR 124.6; BAAQMD 2-3-402; BAAQMD 2-3-403; BAAQMD 2-3-201 Without a PDOC an FDOC cannot be issued. BAAQMD 2-3-405; BAAQMD 2-2-407; BAAQMD 2-3-201. Without an FDOC an ATC cannot be issued. BAAQMD 2-3-301. Without an ATC a PSD permit cannot be issued. BAAQMD 2-2-407. Thus, the issuance of a PDOC, FDOC, ATC, and PSD permits are intertwined and dependent upon one another.

Once BAAQMD accepts an Application For Certification (AFC) as complete for purposes of compliance review, notice requirements are triggered. SIP 2-3-403; BAAQMD 2-3-403. Specifically, within 180 days of BAAQMD’s accepting an Application For Certification (AFC) as complete for purposes of compliance review, BAAQMD’s APCO is required to conduct a review of the application and make a preliminary determination as to whether proposed power plant meets the requirements of BAAQMD’s regulations. SIP 2-3-403; BAAQMD 2-3-403. If this preliminary decision is affirmative, BAAQMD regulations provide that BAAQMD issue a PDOC. SIP 2-3-403; BAAQMD 2-3-403.

In addition, within 240 days of BAAQMD's acceptance of an AFC as complete, BAAQMD must issue an FDOC or otherwise inform the CEC that the FDOC cannot be issued. SIP 2-3-405; BAAQMD 2-3-405. Once the FDOC is issued by BAAQMD and submitted to the CEC, the Authority To Construct (ATC) and its accompanying PSD are then ordinarily issued as part of a ministerial process. SIP 2-3-301; BAAQMD 2-3-301; Environmental Appeals Board Remand Order of July 29, 2008, ("Remand Order"), pg. 10, footnote 9, *available at* [http://yosemite.cpa.gov/oa/EAB_wcd_Docket.nsf/Findings%20By%20Appeal%20Number/EA6F1B6AC88CC6F085257495006586FB/\\$File/Remand...50.pdf](http://yosemite.cpa.gov/oa/EAB_wcd_Docket.nsf/Findings%20By%20Appeal%20Number/EA6F1B6AC88CC6F085257495006586FB/$File/Remand...50.pdf).

Further, BAAQMD's regulations require that if the application is for a new major facility or requires PSD analysis, both of which apply to the RCEC's application, the APCO shall within 10 days of receiving the AFC from the applicant begin the public comment process. SIP 2-2-405; BAAQMD 2-2-405. This means that the notice requirements triggered when BAAQMD considers an AFC as complete for purposes of PSD analysis are required to begin prior to the issuance of a PDOC. In addition, under Part 124 of Title 40 of the Code of Federal Regulations, the APCO can only issue a decision on an FDOC after the close of the public comment period. 40 C.F.R. § 124.15. Thus, the notice requirements must be fulfilled and completed prior to the issuance of an FDOC.

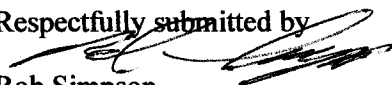
The Environmental Appeals Board (EAB) in the Remand Order held that the certification process performed by BAAQMD was so seriously and fundamentally flawed that the PSD granted to RCEC was held to be invalid. Remand Order, pg. 3, 39. Specifically, it was the failure of BAAQMD to properly notice the PDOC and the subsequent FDOC which caused the PSD to be invalid. As a result, BAAQMD has been directed by the EAB to reopen the public comment period on the draft permit, here the PDOC, so that it can provide public notice fully consistent with the requirements of 40 C.F.R. § 124.10. Remand Order pg. 42.

The notice required for the issuance of the federal PSD permits were part and parcel to the issuance of the PDOC and the subsequent issuance of the FDOC by BAAQMD. Fulfillment of the PDOC and FDOC notice requirements assigned to and prescribed by BAAQMD constitute the fulfillment of the federal PSD notice requirements. Thus, because the PSD notice requirements carried out by BAAQMD through the notice provisions required for the issuance of a PDOC and the subsequent FDOC were found by the EAB to be fundamentally flawed, the same notice required for the issuance of the PDOC and FDOC are likewise invalid. Therefore, the PDOC and the FDOC invalid.

CONCLUSION

Because the PSD notice requirements were not carried out correctly by BAAQMD, the PDOC and FDOC issued to RCEC are likewise invalid. BAAQMD should have withdrawn these determinations upon Remand from the EAB.

Respectfully submitted by


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