

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

In re:)	
)	
)	
Knauf Fiber Glass, GmbH)	PSD Appeal Nos.
)	98-3 through 98-20
PSD Permit No. 97-PO-06)	
)	

ORDER ON MOTIONS FOR RECONSIDERATION

On December 14, 1998, three parties filed timely motions for reconsideration of the Board's November 30, 1998 Order Denying Review in Part and Remanding in Part ("Board's Order") in the above-captioned matter. Motions for reconsideration were received from 1) Deborah Lynn Fisher, Petitioner No. 98-20; 2) Knauf Fiber Glass GmbH ("Knauf"), the permittee; and 3) EPA's Office of General Counsel, in conjunction with EPA Region IX, Petitioner No. 98-19 ("OGC/Region IX").¹

Ivan Hall, Petitioner 98-5, and Colleen Leavitt, Petitioner 98-8, filed motions requesting permission to respond to Knauf's motion for reconsideration. Knauf requested an opportunity to respond to the motion for reconsideration filed by OGC/Region IX.

¹A motion for reconsideration was also received from Ivan Hall, Petitioner 98-5, on January 4, 1999. This motion was received well after the deadline for filing motions for reconsideration of a final order of the Board. In accordance with 40 C.F.R. § 124.19(g), motions for reconsideration of the Board's November 30, 1998 order needed to be received by the Board on or before December 14, 1998 in order to be considered. Mr. Hall's motion was untimely and therefore was not considered.

The responses filed by Mr. Hall, Ms. Leavitt and Knauf were considered in the Board's deliberations on the motions for reconsideration.²

For the reasons set forth below, Ms. Fisher's motion and Knauf's motion for reconsideration are denied. The motion for reconsideration filed by OGC/Region IX is granted in part and denied in part.

The regulation governing motions for reconsideration of final orders such as the Board's Order in this case requires that a motion "set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 124.19(g). Reconsideration is generally reserved for cases in which the Board is shown to have made a demonstrable error, such as a mistake of law or fact. *In re Arizona Municipal Storm Water NPDES Permits*, NPDES Appeal No. 97-3, at 2 (EAB, Aug. 17, 1998) (Order Denying Motion for Reconsideration). The reconsideration

²Citizens for Responsible Growth ("CRG"), Petitioner 98-7, filed a request for an extension of time in which to respond to the motions for reconsideration filed by Knauf and OGC/Region IX. CRG's request was granted by the Board and a deadline of January 4, 1999, was established for receipt of CRG's response. Order Granting Motion for Extension of Time (Dec. 23, 1998). However, no response was received from CRG by the filing deadline.

A letter relating to one of the issues raised in the OGC/Region IX motion for reconsideration was received from Arnold Erickson, Petitioner 98-13, on January 5, 1999. Mr. Erickson did not request permission to file a response to the motion for reconsideration, nor did he request an extension of time. Mr. Erickson's letter was therefore not considered.

process "should not be regarded as an opportunity to reargue the case in a more convincing fashion." *In re Southern Timber Prods., Inc.*, 3 E.A.D. 880, 889 (JO 1992) (citation omitted).

Deborah Fisher's Motion for Reconsideration

Ms. Fisher seeks reconsideration of that portion of the Board's Order addressing Petition No. 98-20. See Board's Order at 50. Her motion discusses the concept of zero emissions and other matters such as potential product substitutes for fiberglass. It appears that Ms. Fisher is advocating various policies of interest to her for the Knauf project and elsewhere. Ms. Fisher's motion does not satisfy the Board's standards for reconsideration. The reconsideration process is designed to address errors in the Board's decisions. Ms. Fisher has not alleged that the Board's denial of review of her petition involved any factual or legal error. Therefore, the motion for reconsideration is denied.

Knauf's Motion for Reconsideration

Knauf filed a Motion to Reconsider Remand Order ("Knauf's Motion") seeking reversal of those portions of the Board's Order that ordered a remand to the Shasta County Air Quality Management District ("AQMD") for additional proceedings. The Board's Order calls for a remand on the issues of best available control

technology ("BACT") and environmental justice. For BACT, AQMD is directed to develop a supplemental analysis documenting the BACT determination for PM₁₀ emissions from the proposed Knauf facility. Board's Order at 27, 70. For environmental justice, AQMD is required to obtain documentation of the environmental justice analysis conducted by EPA Region IX and include that documentation in the administrative record for this permit decision. *Id.* at 70.

The Board's Order also requires AQMD to reopen the permit proceedings to receive public comment on the BACT supplemental analysis and the environmental justice analysis. *Id.* at 71. Knauf claims that the information called for in the Board's Order is already part of the administrative record and was properly considered by AQMD during the previous permit proceedings. Knauf's Motion at 2. Knauf also states that the remand procedures will be unduly burdensome and will not result in any environmental benefit. *Id.* at 7.

On the BACT issue, Knauf's Motion recapitulates much of the information underlying AQMD's original BACT determination. Knauf's Motion at 4-7. Knauf cites to the AQMD Evaluation and its own permit application in support of its argument that AQMD's original BACT determination was sufficient. These are the very documents that the Board found presented an inadequate BACT analysis.

Knauf also identifies emission limits and control technologies in place at fiberglass manufacturing facilities operated by Owens Corning and Johns-Manville. Knauf's Motion at 5. This information was not previously provided to the Board by Knauf or AQMD. Knauf argues, however, that information on control options used by Owens Corning and Johns-Manville is irrelevant to the BACT determination for Knauf because the emission limit and control technology proposed for Knauf is substantially more stringent than the limits and technology in place at Owens Corning and Johns-Manville.

Knauf's discussion of the Owens Corning and Johns-Manville facilities in its motion for reconsideration begins to answer some of the questions left open by the abbreviated and incomplete BACT analysis presented in the permit application and AQMD's Evaluation. The discussion of these facilities in the Board's Order, however, was merely intended to highlight the lack of substantiation in the original BACT determination for the proposed Knauf facility. Owens Corning and Johns-Manville were mentioned by name in AQMD's Evaluation, but no information was provided regarding PM₁₀ emission controls and limitations on the forming lines at those facilities. Therefore, there was no basis upon which we could confirm that PM₁₀ controls at those facilities were indeed less stringent than the controls being proposed for Knauf's forming line. See Board's Order at 19. The

Board mentioned those facilities as just one example of the overall lack of substantiation in the original BACT determination. The Board also observed that Knauf and AQMD failed to assess alternative WEP configurations after public comments pointed out that fiberglass facilities operated by CertainTeed had more stringent PM₁₀ emission limits than those proposed for Knauf. In short, the Board found that the BACT determination was incomplete and ordered a remand so that a more thorough and fully substantiated BACT analysis may be prepared and made available for public comment.

Knauf's discussion of BACT issues in its motion for reconsideration does not constitute a complete BACT analysis. It merely begins to fill in some of the blanks from the original BACT analysis as presented in the permit application and AQMD Evaluation. We note that other issues identified in the Board's Order, such as WEP size and the possibility of a multiple-WEP configuration, still have not been addressed.³ The discussion in Knauf's motion for reconsideration cannot substitute for a

³We do not intend to limit or foreclose the scope of the supplemental BACT analysis in any way. Our identification of specific deficiencies, *i.e.*, lack of substantiation regarding Owens Corning and Johns-Manville facilities, and the failure to consider a multiple WEP configuration, were used to illustrate why we found the BACT determination to be incomplete. We expect the supplemental BACT analysis to contain not only these particular pieces of information, but to identify and discuss as appropriate any other information or assessments considered in reaching a BACT determination.

complete BACT analysis that is fully documented, made available for public review, and ultimately adopted by AQMD.

AQMD should move forward with the task required by the remand order and prepare a supplemental BACT analysis. If AQMD undertakes this task seriously, its BACT determination will be better informed and more likely to withstand scrutiny. It will also result in an analysis that identifies and explains all of the information considered in reaching a conclusion on BACT. Such an analysis may well yield an environmental benefit, contrary to Knauf's protestations. The conclusion resulting from the supplemental analysis should not be a predetermined endpoint, but a conclusion based upon an honest assessment of the renewed inquiry into BACT. The supplemental analysis should also provide a significant step toward satisfying the statutory objective of "informed public participation in the decisionmaking process." CAA § 160(5), 42 U.S.C. § 7470(5). The public has a right to review the BACT analysis presented in a complete format.

On the environmental justice issue, Knauf presents demographic information on Shasta County, some of which does not appear to have been included in the administrative record. Knauf also references information from the administrative record regarding land use and public health impacts of the proposed facility. This information may be relevant to an environmental justice analysis, but it is not a substitute for an environmental

justice analysis.

Knauf claims that EPA Region IX properly concluded that the proposed facility would not disproportionately impact low-income or minority populations and that the Region's conclusion was adequately supported in the administrative record. Knauf's Motion at 4. In support of that proposition, Knauf cites a memorandum written by an AQMD official that was also referenced in the Board's Order. Memorandum from R. Michael Kussow to the Knauf Fiberglass File (June 3, 1998); see Board's Order at 69. That memorandum does not contain any analysis and in no way supports a conclusion that the criteria set forth in Executive Order 12898 have or have not been met. Further, the memorandum was written after AQMD issued its permit decision and after the petitions for review were filed with the Board. It was never subject to public comment.

We cannot agree with Knauf that the record supports a finding that "EPA [Region IX] did not clearly err in determining the PSD Permit complied with Executive Order 12898." Knauf's Motion at 4. There is no information in the administrative record documenting Region IX's environmental justice analysis and therefore, we simply cannot assess the adequacy of the Region's determination. The Board's remand on this issue is necessary.⁴

⁴We further address the environmental justice remand in our discussion of OGC/Region IX's motion for reconsideration below.

For the above stated reasons, Knauf's Motion for Reconsideration is denied and the Board's remand relating to BACT and environmental justice stands.

OGC/Region IX's Motion for Reconsideration

OGC/Region IX filed a Motion for Reconsideration and Clarification ("OGC Motion"). The motion does not seek a change in the ultimate disposition of any of the issues decided by the Board's Order, but suggests that the Board's reasoning might be clarified, both to assist the remand proceedings and to benefit future PSD permit activities. OGC Motion at 2. Although OGC/Region IX states that the Board's Order reflects misunderstandings of the facts of this case, most of the arguments presented in the OGC Motion do not turn on factual issues relevant to this case. It appears that the revisions requested by OGC/Region IX are primarily for the benefit of future cases.

We have reviewed our decision in this case in light of OGC/Region IX's arguments. We believe that our holdings were appropriate given the facts of this case and the manner in which the issues were presented to us in the petitions for review. Many of OGC/Region IX's arguments involve aspects of various issues that simply were not before us in this case. However, in the interest of making the Board's Order less susceptible to

misinterpretation in the future, we have revised the Board's Order and are reissuing it simultaneously with the issuance of this order.⁵

The revisions to the Board's order are primarily in the discussion of the "non-PSD" issues and clarify the nature and scope of the Board's jurisdiction, or lack thereof, over such issues. The Board also revised portions of the air quality analysis discussion to improve clarity. While not all of the revisions adopt OGC/Region IX's suggested interpretations in a wholesale manner, the revisions are responsive to OGC/Region IX's concerns and better describe the Board's position on the affected issues. Finally, as to certain issues addressed in the OGC Motion, the Board chose not to revise the Board's Order. The following discussion on selected topics provides further explanation of the Board's reasons for making or declining to make revisions to the Board's Order.

Unregulated and Hazardous Air Pollutants

The Board's holdings regarding unregulated pollutants and hazardous air pollutants were appropriate given the manner in which these issues were raised by the petitioners. Moreover, the Board actually anticipated and addressed several of the factual contingencies alluded to in OGC's motion.

⁵The Board's revised Order Denying Review in Part and Remanding in Part replaces and supercedes the November 30, 1998 decision. The November 30th decision henceforth has no precedential value in this or any other case.

When the Board stated that PSD statutory provisions and regulations do not apply to hazardous air pollutants, the Board expressly noted that there is an exception for such pollutants and other unregulated pollutants under the BACT collateral impacts doctrine. Board's Order at 54, n.53. The collateral impacts doctrine might also be used to address issues such as odor and disposal of wastes associated with BACT candidate technologies if such issues were raised in the context of the BACT selection process.

Notably, none of these issues were raised in the context of the BACT determination in this case. Based upon the descriptions and nature of the objections regarding hazardous air pollutants, odor, and waste disposal in the petitions for review, we correctly categorized these matters as "non-PSD" issues. Nothing in the Board's Order precludes a party from pursuing these issues under the collateral impacts doctrine in a future case with an appropriate factual backdrop.

OGC/Region IX also expresses concern over the Board's characterization of the fiberglass emissions at issue in this case as unregulated pollutants. OGC Motion at 14. OGC/Region IX points out that the fiberglass emissions fall within the definition of PM₁₀, a regulated pollutant. We do not disagree with OGC's argument in this respect. In fact, we acknowledged that respirable fiberglass may be a component of PM₁₀ and subject

to PSD requirements as PM₁₀. Board's Order at 58, n.57. The petitions for review which the Board was addressing, however, specifically requested permit conditions regulating fiberglass emissions as respirable fiberglass *per se*, not as PM₁₀. We declined those requests because fiberglass emissions *per se* are unregulated pollutants.

Odor

In addition to arguing that permit conditions on odor may be considered in the context of the BACT determination, OGC/Region IX also asserts that conditions on odor can be legitimate permit provisions for purposes of assuring enforcement of PSD requirements. OGC Motion at 12. The Board has indeed acknowledged that it has the authority to review conditions that relate to enforcement of permit requirements. *In re Federated Oil & Gas*, 6 E.A.D. 722, 730 (EAB 1997) (monitoring and reporting requirements are legitimate subjects of Board review because such provisions might affect subsequent enforcement of a permit). The Board has also denied review of petitions asserting generalized challenges regarding prospective permit compliance or enforcement. *In re EcoEléctrica, L.P.*, PSD Appeal Nos. 96-8 and 96-13, slip op. at 21 (EAB, April 8, 1997); *In re Envotech, L.P.*, 6 E.A.D. 260, 273-274 (EAB 1996); *In re Brine Disposal Well*, 4 E.A.D. 736, 746 (EAB 1993). While it is entirely plausible that odor control provisions may be amenable to Board review as

conditions designed to assure compliance/enforcement of a PSD requirement, the Board has not previously reached such a holding.

The Board believes that the issue identified by OGC/Region IX is sufficiently important that it should be decided after receiving the full benefit of the adversary process, *i.e.*, through an issue presented to a permitting authority during the permit development process, addressed in a response to comments document, properly raised in a petition for review, and fully briefed before the Board. As that process has not occurred in this case, we believe that it is unwise to include a holding on this issue in the Board's Order.

Secondary Emissions

OGC/Region IX disagrees with the Board's reasoning in denying review of petitioners' claims that potential landfill emissions constitute "secondary emissions" as that term is used in the PSD regulations. Specifically, OGC/Region IX believes that Board has endorsed a definition of "same general area" that is unduly narrow. OGC Motion at 17-18. We believe that OGC/Region IX's description of the Board's holding on this issue is inaccurate and therefore clarification is unnecessary.

The Board held that primary and secondary emissions are presumed to impact the same general area when "emissions from the primary source (*i.e.*, the proposed fiberglass plant) and the alleged secondary source (*i.e.*, a landfill) overlap." Board's

Order at 59. For purposes of assessing any potential emissions overlap in this case, the Board looked at the significant impact area predicted for the Knauf facility and noted that petitioners had not shown that potential emissions from a landfill will overlap with this area of predicted impact from the proposed Knauf facility.⁶ *Id.* Notably, the Board's order places no limitations on where the alleged secondary emissions source might be located. The Board simply said that the *emissions* from the alleged secondary source, regardless of the source's location, must reach the significant impact area, thus overlapping with emissions from the primary source.

OGC/Region IX apparently reads the Board's Order as requiring a secondary emissions source to be located within the significant impact area. As noted above, the Board did not establish such a limit. The Board denied review of the secondary emissions issue, not because the potential landfills were outside of Knauf's significant impact area, but because the petitioners had not shown that any landfill emissions would impact the significant impact area.

⁶We note that our application of the "same general area" concept was consistent with Agency policy as expressed in a memorandum from the compendium of New Source Review guidance. See Memorandum from Edward F. Tuerk, Acting Assistant Administrator for Air, Noise and Radiation, to Allyn M. Davis, Air and Hazardous Materials Division (compendium document # 5.8) (stating that the significant impact area can be used in determining whether there is an area of common impact from primary and secondary emissions).

BACT

With regard to the remand on BACT, OGC/Region IX seeks revisions to the Board's Order regarding the steps that AQMD and Knauf must take in considering a competitor's proprietary and confidential process technologies for the purposes of the supplemental BACT analysis that has been ordered by the Board. OGC/Region IX states that Knauf should be required to seek "licensing arrangements with CertainTeed and other potential vendors of fiberglass production process technologies." OGC Motion at 7. OGC/Region IX is concerned that Knauf will be able to make only *pro forma* inquiries regarding process technologies used by its competitors and then claim that such technologies are unavailable because they are proprietary and confidential. *Id.* OGC/Region IX argues that Knauf should be required to exercise "due diligence" in acquiring such technologies, which it defines as similar to the level of effort that "the Region was willing to undertake in order to settle its petition in this case prior to issuance of the [Board's] Order."⁷ *Id.*

The Board's Order discussed Knauf's obligation to look at

⁷OGC/Region IX is referring to the proposed settlement of Region IX's petition for review that involved commitments from both Region IX and Knauf to conduct a detailed investigation and assessment of process technology used by other fiberglass manufacturers. See Board's Order at 30-31. Because of weaknesses in the proposed plan and the fact that the proposal would not address deficiencies in the BACT analysis, the Board specifically declined to order that the settlement be implemented. *Id.* at 31.

proprietary and confidential process technologies in the context of the BACT determination for this project. The Board made clear that emission control options, including process technologies, from other fiberglass manufacturing plants must be included in the supplemental BACT analysis and a technical feasibility analysis must be documented for any option claimed to be infeasible. Board's Order at 27-28. Claims that a particular control option involves proprietary or confidential process technology should be addressed in the context of a technical feasibility analysis. One of the elements of technical feasibility is "availability." See *id.* at 13. Availability in this context typically refers to commercial availability. *Id.* We specifically noted that the commercial availability test is the appropriate way to address claims of proprietary and confidential process technologies. *Id.* at 29 n.34.

The supplemental BACT analysis will need to address issues of technical feasibility and may well include claims relating to the commercial availability of proprietary and confidential process technologies. This analysis will be made available for public comment, at which time interested parties may comment on a proprietary and confidential claim or any other aspect of the BACT analysis.

We hesitate to prescribe a specified set of procedures or actions that a permit applicant must satisfy in determining

whether a particular technology is commercially available. BACT is determined on a case-by-case basis, and issues of commercial availability will be different depending on the nature of the proposed project and the types of control options under consideration. It is the job of the permitting authority, in the first instance, to determine whether a claim of technical infeasibility has been sufficiently supported. The permit appeal process provides additional protection against sham proprietary and confidential claims. As can be seen from the Board's Order in this case, we will look for adequate justification in a BACT decision and will not hesitate to order a remand if the analysis is incomplete or justification is lacking.

Under the circumstances of this case, we must disagree with OGC/Region IX's due diligence proposal. It suggests, in effect, that a determination of commercial unavailability by Knauf and AQMD is presumptively *pro forma* unless it is accompanied by a predetermined quantum of effort equivalent to the Region's settlement proposal. There is no basis for this presumption.

Our statements as to Knauf's obligations in addressing the remand were based in significant part on Knauf's actual efforts to date to obtain information regarding CertainTeed's process technology. Our holding that Knauf need not pursue negotiations with CertainTeed to license CertainTeed process technology in order to satisfy BACT requirements reflected an awareness that

Knauf's previous efforts in this regard were rebuffed by litigation initiated by CertainTeed.⁸

This case is also somewhat unique in that the Agency has publicly acknowledged that process technology for the fiberglass manufacturing industry can be confidential and proprietary and therefore not available to others in the industry. See Board's Order at 25-26; 50 Fed. Reg. 7694, 7696 (Feb. 25, 1985). The Agency has gone on record over the past two decades using the issue of confidential and proprietary process technology in this industry as grounds for proposing less stringent emission standards than it might have otherwise. See, e.g., 62 Fed. Reg. 15,228, 15,242 (Mar. 31, 1997) (proposed NESHAP standards); 49 Fed. Reg. 4590, 4597 (Feb. 7, 1984) (proposed NSPS standards). We find it peculiar that OGC/Region IX is completely silent on this regulatory history notwithstanding the Board's explicit reliance on these regulatory decisions. Board's Order at 24-26. We recognize that the Agency's decisions in the NSPS and NESHAP rulemakings do not directly affect the obligation of a PSD permit applicant to investigate available control options, but they do provide a basis for believing that proprietary and confidential claims regarding process technology in this industry may be

⁸If OGC/Region IX is serious about expanding the amount of information generally available on emission control options for the fiberglass industry, it is welcome to exercise the information-gathering authority under Clean Air Act section 114 and undertake any ensuing litigation.

legitimate.

Under the narrow circumstances of this case, we find that Knauf need not make further attempts to license CertainTeed's proprietary and confidential process technology.

Environmental Justice

The Board's remand of the environmental justice issue requires AQMD to obtain Region IX's environmental justice analysis and make it available for public comment. OGC/Region IX states that "it may be appropriate to supplement [the] existing documentation with additional analysis before submitting [the] work to AQMD * * *." OGC Motion at 18-19. OGC/Region IX requests that the Board clarify the remand order to permit Region IX to supplement the environmental justice analysis. The Board's Order did not specifically call for supplementation of the environmental justice analysis because the arguments presented by AQMD and Knauf suggested that Region IX had conducted an analysis supporting the conclusion that environmental justice policies were not implicated by this project. Assuming that to be the case, the Board believed that the remand process could proceed by making the documentation supporting the environmental justice conclusion immediately available for public comment. The Board did not intend to foreclose AQMD's ability to conduct more extensive remand proceedings, such as supplementing the administrative record prior to inviting public comment. If it is

the judgment of Region IX and/or AQMD that the existing environmental justice analysis is insufficient or unlikely to provide adequate justification for a finding on environmental justice, it is absolutely appropriate to supplement that analysis prior to the public comment process.

The purpose of the remand is to provide AQMD an opportunity to reconsider the issues that are the subject of the remand order. This process may involve consideration of new information, reanalysis of information already in the administrative record, or a combination of thereof. Any new materials and/or revised explanations must be subject to public comment. Ultimately, AQMD's decision on remand and any

accompanying response to comments documentation must be justified by the underlying administrative record. Therefore, it is within AQMD's discretion to supplement the administrative record as part of the remand process.

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: _____/s/_____

Ronald L. McCallum
Environmental Appeals Judge

Dated: 2/4/99

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order On Motions for Reconsideration in the Matter of Knauf Fiber Glass, GmbH, PSD Appeal Nos. 98-3 through 98-20, were sent to the following persons in the manner indicated:

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