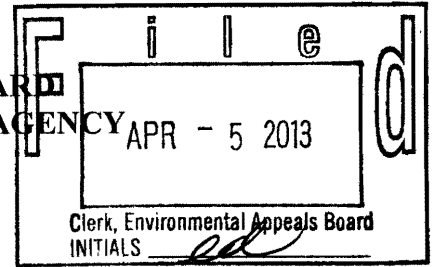


**BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.**



In re:

Pio Pico Energy Center

PSD Permit No. SD 11-01

) PSD Appeal Nos. 12-04 through 12-06

**ORDER SCHEDULING STATUS CONFERENCE AND DIRECTING PARTIES TO  
PROVIDE ADDITIONAL INFORMATION**

On December 19, 2012, Helping Hand Tools, Mr. Robert Simpson, and Sierra Club each filed a petition seeking Environmental Appeals Board (“Board”) review of the above-captioned Clean Air Act (“CAA”) prevention of significant deterioration (“PSD”) permit. The permit, issued by U.S. EPA Region 9 (“Region”), authorizes the permit applicant, Pio Pico Energy Center, LLC (“Pio Pico”), to construct and operate a 300 megawatt natural gas-fired power plant (“Facility”) in Otay Mesa, California. The petitions challenge the Region’s issuance, as well as several conditions, of the permit. Both the Region and Pio Pico filed responses to the petitions.

Concurrent with these PSD permit proceedings and pursuant to state law, the California Public Utilities Commission (“CPUC”) undertook review of an application submitted by San Diego Gas & Electric (“SDG&E”) for the approval of power purchase tolling agreements (“PPTAs”) with three power plants, one of which is the Pio Pico Facility.<sup>1</sup> On March 22, 2013,

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<sup>1</sup> In June 2009, SDG&E issued a request for offers (“RFO”) seeking proposals to provide power to meet the projected local capacity requirement identified in CPUC’s biennial procurement review process. *Decision Determining San Diego Gas & Electric Company’s Local Capacity Requirement and Granting Partial Authority to Enter into Purchase Power Tolling Agreements* at 2-3 (Mar. 21, 2013), available at <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M060/K898/60898567.PDF> (“CPUC Final Decision”). On May 19, 2011, SDG&E submitted to CPUC an application for authority to enter into PPTAs with three entities, including Pio Pico. *Id.* at 3. The PPTA with Pio Pico would have

(continued...)

Pio Pico filed a Notice of Supplemental Information (“Notice”) notifying the Board that the CPUC issued its final decision denying SDG&E the authority to enter into a PPTA with Pio Pico. Notice of Supplemental Information at 1 (Mar. 22, 2013) (“Notice”). Pio Pico further stated that it is “in the process of conferring with SDG&E to consider available options” and that it “does not need a PPTA to begin construction and operation of the [Facility], as it may be operated as a merchant plant.” Notice at 1. Shortly thereafter on March 26, 2013, Sierra Club filed a motion for leave to respond and a proposed response to Pio Pico’s Notice of Supplemental Information. On March 28, 2013, the Region also filed a motion for leave to respond and a proposed response to Pio Pico’s Notice of Supplemental Information and the Sierra Club’s response thereto. The Board hereby GRANTS Sierra Club’s and the Region’s motions, and will take their responses into consideration.

The recent changes in circumstances the parties report raise questions about whether Pio Pico will, in fact, be able to construct a merchant plant, as it now represents; if so, whether the nature, purpose, and design parameters of the project will remain as originally proposed in the PSD application and as permitted in the PSD decision the Region issued; when Pio Pico would likely begin construction on the proposed plant; and whether the Region would have approached its best available control technology (“BACT”) analysis in the same manner absent Pio Pico’s contractual obligation to SDG&E under the PPTA.

In previous PSD permit appeals where concerns about the construction of the proposed facility were raised during the course of the appeal, the Board and its predecessors stayed and/or

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<sup>1</sup>(...continued)  
authorized SDG&E to purchase power generated at the Facility beginning in 2014 and continuing for a 20-year period. *Id.* at 3, 14, 24.

remanded the permit decision as deemed appropriate under the specific circumstances of each case. See, e.g., *In re Mercer & Atl. Counties Res. Recovery Facility*, PSD Appeal No. 96-7 (June 24, 1997) (Remand Order); *In re NY Power Auth.*, 1 E.A.D. 825 (Adm'r 1983); see also *In re W. Suburban Recycling & Energy Ctr.*, 8 E.A.D. 192 (EAB 1999) (remanding permit so that permit issuer could issue a final permit decision denying the permit where applicant had sold several properties comprising the site, thereby raising serious concerns about the likelihood of the facility's construction). In *Mercer*, a case involving Board review of a PSD permit extension and modification request, the Board initially stayed the permit appeal while it ascertained the status of the proposed facility, but ultimately remanded the permit decision. *Mercer*, at 1, 7-8. In doing so, the Board explained that "[i]t would be a waste of both the Board's and the parties' time and resources to review this matter if the facility will no longer be built." *Id.* at 7; accord *NY Power* at 826-27. The Board also explained that "there is a substantial possibility that the issues raised in the petition for review may be moot, and a likelihood that further permit modifications would in any event take place before the facility could be constructed." *Mercer*, at 7.

In *New York Power*, a matter very similar to the current appeal, the Administrator remanded the permit so that the permit issuer could deny the permit. In that case, after the Governor of New York decided he would not sign a contract for the sale of power from the proposed facility, the Administrator concluded that there was "no realistic prospect that construction of the project would commence, as required by § 52.21(r)(2), within eighteen (18) months after issuance of a final PSD permit." *NY Power*, 1 E.A.D. at 826. The Administrator provided the following reasons for denying the permit: (1) the regulatory time limits are intended to ensure that major emitting facilities are constructed in accordance with reasonably current

pollution control standards and on the basis of current information; (2) these time limits also prevent PSD increments from being tied up indefinitely; and (3) it is a waste of resources to review a BACT determination for a facility that may not be built, as BACT determinations are made on a case-by-case basis and would not apply elsewhere. *Id.* at 826-27.

The Board is fully cognizant of the one-year deadline under CAA section 165(c) , 42 U.S.C. § 7475(c). Nonetheless, the recent decision by the CPUC, along with the extensive commitment of Agency resources that examination of this time-sensitive appeal requires, make it appropriate for the Board to seek further clarification from both the permit applicant and the Region regarding the impact of the CPUC decision on this PSD permit decision. Despite their unequivocal statements that the CPUC decision has no bearing on these proceedings, both Pico and the Region appear to be unclear regarding the appropriate next steps subsequent to CPUC's decision to deny the PPTA. *See* Notice at 1 ("Pio Pico is now in the process of conferring with SDG&E to consider available options."); EPA Region 9's Response Regarding Pio Pico Energy Center, LLC's Notice of Supplemental Information and Sierra Club's Response at 2-3 (Mar. 28, 2013) (stating twice that it "remains unclear at this time what, if any, impact the CPUC's decision will have on the [Pio Pico Energy Center] project") ("Region's Response to Supplemental Information"). Given the number of issues that the petitions for review raise, the Board wants to be assured that a decision on the present PSD permit is necessary, and not merely advisory.

Based on these considerations and prior Board precedent, the Board has determined that a status conference would be beneficial at this juncture to aid the Board in its decision making. The Board is particularly interested in the three issues identified below. Accordingly, the Board

requests that **Pio Pico** provide the following information at the status conference and in its follow-up supplemental brief:

- (1) Assurance that there is, in fact, a realistic prospect that construction of the facility will commence within the 18-month time period required by 40 C.F.R. § 52.21(r)(2); and
- (2) A discussion of whether, if the merchant plant is built, the purpose, nature, and design of the facility will remain as described in the terms of the permit as required by 40 C.F.R. § 52.21(r)(1), which states that a permittee may only construct a facility in accordance with the permit application or the terms of the approval to construct.

In addition, further information from the Region will assist the Board in analyzing the Region's statement that the CPUC's decision does not provide a basis for the remand, reconsideration, or reopening of the permit decision in this matter. *See* Region's Response to Supplemental Information at 1, 4. While the Region's Response to Supplemental Information focuses on the representation that the Facility's nature, purpose, and design *may* not change absent an approved PPTA, it fails to account for any reasonable possibility that such items may change. Moreover, it fails to adequately address Sierra Club's concerns as they relate to the BACT analysis. *See id.* at 2 (stating that Sierra Club's "argument is baseless" without elaborating or providing support for this conclusion). Therefore, the Board requests that the **Region** provide the following information:

- (3) Further analysis to support its assertion that the BACT analysis should not be revisited via a remand. In doing so, the Region should explain why its BACT

analysis would have been the same had the PPTA and RFO not existed at the time it considered Pio Pico's permit application.<sup>2</sup>

- (4) Further discussion of the reasonable likelihood that the permit terms would not need to be altered.

The Region may also respond to the first two questions listed above.

Both Pio Pico and the Region should be prepared to discuss any other related questions the Board may have. If Pio Pico needs additional time to determine the status of the project in order to respond to the Board's inquiries, Pio Pico may move for a limited stay of these proceedings.

The status conference will be held on Thursday, **April 11, 2013**, beginning at 1:00 p.m. EDT, 10:00 a.m. PDT, in the Administrative Courtroom, U.S. Environmental Protection Agency, EPA East Building, Room 1152, 1201 Constitution Avenue, Washington, DC 20005. Parties who wish to attend the status conference in person or to participate via videoconference

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<sup>2</sup> In its BACT analysis, the Region relied on the applicant's contractual obligation under the PPTA as well as on the objectives of SDG&E's 2009 Request for Offers as defining the nature, purpose, and design requirements of the proposed facility. *See, e.g.*, Region's Response to Comments Document ("RTC") at 27-29 ("The Project is appropriately defined at this time, and for our current purposes, by the applicant's ultimate contractual obligation and its proposal to meet that obligation."); EPA Region 9's Response to Petitions for Review at 13-14 (stating that the Project's purpose and design parameters "are necessary in order to meet the specific objectives of the 2009 Request for Offers (RFO) by San Diego Gas & Electric (SDG&E) and resulting contractual requirements contained in the Power Purchase Agreement (PPA) between SDG&E and [Pio Pico]"). More particularly, the Region's analysis of BACT for greenhouse gases ("GHGs") and its determination that combined cycle gas turbines would be technically infeasible appear to rely heavily on the RFO's requirements for a peaking plant "supporting renewable power generation," the power generation (megawatts) requirements of the PPTA and/or RFO, and the start-up times that the RFO/PPTA would necessitate. *See* U.S. EPA Region 9, Fact Sheet and Ambient Air Quality Impact Report for a CAA PSD Permit for PPEC, at 16-17 (June 2012); RTC at 27-30; *see also* Pio Pico's Revised Application at 2-1 to 2-3, 3-1, App. 1-83 (Sept. 2011) (discussing the purpose of the project in terms of SDG&E's RFO and PPTA requirements and relying on those requirements in the BACT analysis for GHGs).

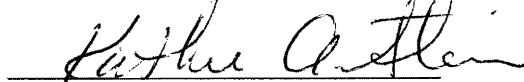
equipment should contact the Clerk of the Board, Eurika Durr, at (202) 233-0122, no later than Tuesday, April 9, 2013.

The Region will participate in the status conference via videoconference, and any party interested in participating from the Region's site should contact Lisa Beckham at (415) 972-3811. Parties should note that space is limited at the Region's location, and it is likely that only two people per party will be able to participate from that site. Parties who cannot attend in person or via videoconference may participate via telephone, and should contact the Clerk of the Board for further instruction no later than Tuesday, April 9, 2013.

Both Pio Pico's and the Region's supplemental briefs are limited to fifteen (15) pages and are due no later than Monday, **April 15, 2013**. The supplemental briefs should contain responses to the requests for information specified in this order as well as to any additional issues identified by the Environmental Appeals Judge at the status conference. Petitioners may file responses to these supplemental briefs. Petitioners' responses are limited to seven (7) pages and are due no later than Friday, **April 19, 2013**.

So ordered.

ENVIRONMENTAL APPEALS BOARD

A handwritten signature in cursive script, appearing to read "Kathie A. Stein", written over a horizontal line.

Kathie A. Stein  
Environmental Appeals Judge

Date: *April 5, 2013*

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Scheduling Status Conference and Directing Parties to Provide Additional Information in the matter of Pio Pico Energy Center, PSD Appeal Nos. 12-04 through 12-06, were sent to the following persons in the manner indicated:

### By First Class Mail:

Robert Simpson  
27126 Grandview Avenue  
Hayward, CA 94542  
510-688-8166

Johannes Hubert Epke  
Attorney for Helping Hand Tools  
1108 Fifth Ave. Suite 2002  
San Rafael, CA 94901  
415-482-7575

David C. Bender  
MCGILLIVRAY WESTERBERG  
& BENDER, LLC  
211 S. Paterson St., Suite 320  
Madison, WI 53703  
608-310-3560

SIERRA CLUB  
Joanne Spalding  
Travis Ritchie  
85 Second St.  
San Francisco, CA 94105  
415-977-5725

Jim Wedeking  
Attorney for Pio Pico Energy Center, LLC  
Sidley Austin, LLP  
1501 K St., N.W.  
Washington, D.C., 20005  
202-736-8281

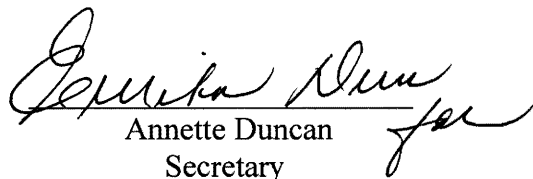
### By Pouch Mail:

Julie Walters  
Office of Regional Counsel  
U.S. EPA Region 9 (MC ORC-2)  
75 Hawthorne Street  
San Francisco, CA 94105-3901  
415-972-3892

### By Interoffice Mail:

Kristi Smith  
Air and Radiation Law Office  
Office of General Counsel (MC 2344-A)  
Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460  
202-564-3068

Dated: *April 5, 2013*

  
Annette Duncan  
Secretary