POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

PT AIR WATCHERS, NO BIOMASS BURN, WORLD TEMPERATE RAINFOREST NETWORK, OLYMPIC ENVIRONMENTAL COUNCIL, AND OLYMPIC FOREST COALITION, Appellants, v. STATE OF WASHINGTON DEPARTMENT OF ECOLOGY AMD PORT TOWNSEND PAPER CORPORATION, Respondents.	PCHB No. 10-160 ORDER ON SUMMARY JUDGMENT

PT Air Watchers, No Biomass Burn, World Temperate Rainforest Network, Olympic Environmental Council, and Olympic Forest Coalition (Appellants) filed an appeal with the Pollution Control Hearings Board (Board), challenging a Notice of Construction (NOC) and determination of non-significance issued by the Washington State Department of Ecology (Ecology) to Port Townsend Paper Corporation (PTPC). All parties filed motions for full or partial summary judgment.

Attorney David S. Mann appeared on behalf of the Appellants. Attorney Svend Brandt-Erichsen appeared on behalf of PTPC. Assistant Attorney General Katharine G. Shirey appeared on behalf of Respondent Ecology.

The Board ruling on the motion was comprised of Andrea McNamara Doyle, Chair, William H. Lynch, and Kathleen D. Mix. Administrative Appeals Judge Kay M. Brown presided for the Board. The Board reviewed the following pleadings submitted by the parties:

1. Appellants' Motion for Partial Summary Judgment on Issues, 2, 3, 4, 10, and 12(B), Declaration of R. Leon Leonard, Ph.D., P.E. with attached resume, and Declaration of David S. Mann, filed March 3, 2011, with attached Exhibits 1 through 10;

2. Respondent Department of Ecology's Motion for Summary Judgment, Declaration of Marc Heffner in Support of Ecology's Motion for Summary Judgment with attached Exhibits A through J, Declaration of Angela Fritz in Support of Ecology's Motion for Summary Judgment with attached Exhibits A through L, and Declaration of Robert Burmark in Support of Ecology's Motion for Summary Judgment; filed March 2, 2011, with attached Exhibits A through I;

3. Port Townsend Paper Corporation's Motion for Partial Summary Judgment, First Declaration of Dustin T. Till, with attached Exhibits A through D; and First Declaration of Eveleen Muehlethaler; dated March 2, 2011, with attached Exhibits A through I;

4. Respondent Department of Ecology's Response to Appellants' Motion for Partial Summary Judgment; Declaration of Marc Heffner in Support of Ecology's Response to Appellants' Motion for Summary Judgment dated March 14, 2011, with attached Exhibit A, Declaration of Katharine G. Shirey in Support of Ecology's Response to Appellants' Motion for Summary Judgment with attached Exhibits A through E; Declaration of Robert Burmark in Support of Ecology's Response to Appellant's Motion for Summary Judgment; dated March 14, 2011;

5. Appellants' Response to Motions for Partial Summary Judgment, Second Declaration of David S. Mann dated March 16, 2011, with attached Exhibits 1 through 25, Revised Declaration of R. Leon Leonard, Ph.D., P.E. dated March 15, 2011, Declaration of Duff Badgley, dated March 16, 2011;

6. Port Townsend Paper Corporation's Opposition to Appellants' Motion for Partial Summary Judgment, Second Declaration of Eveleen Muehlethaler dated March 15, 2011;

7. Appellants' Reply in Support of Their Motion for Partial Summary Judgment on Issues, 2, 3, 4, 10, and 12(B) and Third Declaration of David S. Mann dated March 23, 2011, with attached Exhibits 26 and 27;

8. Reply in Support of Port Townsend Paper Corporation's Motion for Partial Summary Judgment, and First Declaration of Svend A. Brandt-Erichsen; dated March 28, 2011, with attached Exhibits 1 and 2; and,

9. Respondent Department of Ecology's Reply on Motion for Summary Judgment, Second Declaration of Marc Heffner in Support of Ecology's Motion for Summary Judgment dated March 24, 2011, with attached Exhibits A and B, Declaration of Katharine G. Shirey in Support of Ecology's Reply on Summary Judgment dated March 28, 2011, with attached Exhibits A through D, and Second Declaration of Robert Burmark in Support of Ecology's Motion for Summary Judgment dated March 25, 2011, with attached Exhibit A.

Based on its review of the record and foregoing pleadings, the Board enters the following ruling:

BACKGROUND

PTPC owns and operates a Kraft pulp and paper mill located in Port Townsend, Washington. The mill was built in 1927, and produces unbleached containerboard, market pulp, bag and Kraft specialty papers. The mill burns wood fuel and fuel oil to produce steam for its pulp and paper processes. PTPC is an existing major stationary source of air emissions pursuant to provisions of the Clean Air Act. Air emissions from PTPC are currently regulated pursuant to an Air Operating Permit issued by Ecology on January 17, 2007, and reissued on April 28, 2010. *1st Muehlethaler Decl., ¶¶2-6; Mann Decl. (March 2, 2011), Ex. 1, pp. 1-1 to 1-3, Ex. 2.*

In May 2010, PTPC's consultant submitted an application for a notice of construction (NOC) to implement a new project at the existing facility, referred to as the "cogeneration project." The purpose of the project is to generate renewable electricity that will be sold to the power distribution system. The cogeneration project involves upgrading two existing steam generating units that provide steam for mill operations – Power Boiler 10 and the Recovery

Furnace. The Recovery Furnace has been in operation at the mill since 1968. Power Boiler 10 has been operational since 1976. The additional steam produced by upgrading these existing units will be used to generate electricity from a new steam turbine generator. The new steam turbine will generate less than 25 megawatts of electricity for sale as renewable energy.[1] The steam from Power Boiler 10 and the Recovery Furnace will also continue to support current pulp production. PTPC does not intend to increase paper production. *1st Muehlethaler Decl., ¶¶2-16 and Exs. A, B; Mann Decl., Exs. 1, 2.*

After the cogeneration project, the primary fuel for Power Boiler 10 will be wood fuels. These wood fuels include forest biomass (hog fuel) and urban wood. Forest biomass means the by-products of current forest management activities. Urban wood is purchased wood fuel. As a result of using primarily wood fuels in the cogenerator, the amount of fuel oil burned at the facility will be significantly decreased. Power Boiler 10 will continue to burn rejects from the mill and the old corrugated container recycle facility, which are processed to remove plastics and metal prior to use as fuel. Power Boiler 10 will also continue to burn sludge from the mill process wastewater treatment plant. It has been burning sludge since before 1989. The intent behind continuing to burn both the sludge and reject materials is to reduce the volume of the material prior to disposal. *1st Muehlethaler Decl., ¶¶7-16; 2nd Muehlethaler Decl., ¶¶2-4, and Exs. A, B; Mann Decl., Exs. 1, 2; Heffner Decl. (March 14, 2011) ¶3, and Ex. A, p. 4.*

[1] Federal Acid Rain Program regulation provisions (40 CFR Part 72) are triggered by units generating more than 25 megawatts.

To accommodate the increased wood fuel on the site, the project includes modification to the mill's solid fuel handling system. The project will also require the installation of a new cooling tower. *Mann Decl., Ex. 1, pp. 1-1 to 1-3, and Ex. 2.*

The project includes the installation of new, updated emission controls for Power Boiler 10, including a new dry electrostatic precipitator to control emissions of particulate matter, and a new selective non-catalytic reduction system to control emissions of nitrogen oxides (NO_x). In addition, PTPC will add caustic solution in the existing Power Boiler 10 scrubber to increase the efficiency of sulfur dioxide (SO_2) removal from the exhaust stream. As a result of these new emission controls, PTPC's emission of particulate matter, NO_x and SO_2 are expected to decrease. However, emissions of volatile organic compounds (VOCs) and carbon monoxide (CO) are expected to increase. The increases in VOCs and CO from the cogeneration project were determined to be below the Prevention of Significant Deterioration (PSD) Significant Emission Rate (SER) levels for these pollutants. *1st Muehlethaler Decl. ¶¶7-16; Mann Decl., Ex. 1, pp. 1-1 to 1-3, and Ex. 2, p. 5; Burmark Decl. (March 1, 2011) ¶16 and Ex. C, pp. 3-12, 3-13.*

Ecology reviewed PTPC's application under the State Environmental Policy Act (SEPA). PTPC's SEPA checklist was reviewed by Marc Heffner, an Environmental Engineer in Ecology's Industrial Program. His review included reviewing the expected greenhouse gas (GHG) emissions from the combustion at the plant as well as increases in GHG emissions from transporting biomass fuel to the plant. The SEPA checklist states that as a result of the cogeneration project, PTPC will reduce the amount of fuel oil burned by approximately 1,800,000 gallons per year. *Heffner Decl. (March 1, 2011) and Exs. C-J.*

As part of its SEPA review, Ecology issued a determination of non-significance (DNS), held a public hearing, and took written comments on the application. Overall, Ecology received over 140 comments which it responded to in a written document. It also posted fact sheets on its website. *Heffner Decl. (March 1, 2011) and Exs. A-J.*

The NOC was approved by Ecology and issued on October 22, 2010. *Heffner Decl. (March 2, 2011), Ex. B.* On November 22, 2010, PT Air Watchers and a number of other environmental groups timely appealed the NOC and underlying SEPA DNS to this Board.

The cogeneration project is not the only project PTPC has moved forward with in the recent past. Prior to this project, PTPC applied to install improved process controls on its Power Boiler 10. PTPC included the emissions changes from this earlier process control improvement project when it calculated emissions for the cogeneration project for purposes of analyzing whether a PSD permit would be needed for the project. *Burmark Decl. (March 1, 2011) ¶11 and Ex. C, pp. 3-3, 3-4, and Ex. G.*

The parties established multiple legal issues through the pre-hearing process at the Board. Some issues were subsequently withdrawn by the Appellants. Currently nine issues remain in the case, and eight[2] are the subject of motions for full or partial summary judgment by all parties. These issues are:

1. Does Appellant No Biomass Burn have standing to appeal NOC Order No. 7850 and Ecology's Determination of Nonsignificance (DNS) to the Board?
2. Is an EIS required pursuant to RCW 70.95.700 because the proposal is a solid waste incinerator or energy recovery facility?

[2] The final issue, not included in motion practice, is whether the SEPA checklist and DNS are inadequate for failing to adequately consider the impacts of the project, including its connected actions on the shoreline environment.

3. Did the SEPA checklist and DNR for the cogeneration project properly rely on RCW 70.235.020 in concluding the project would result in a net reduction in greenhouse gas emissions by reducing the burning of hydrocarbon fuels?
4. Is the SEPA checklist and DNS inadequate for failing to adequately consider the significant impacts of the emission of greenhouse gases including carbon dioxide?
6. Is the SEPA checklist and DNS inadequate for failing to adequately consider the effects of burning biomass on ocean acidification?
7. Is the SEPA checklist and DNS inadequate for failing to adequately consider the effects of burning biomass on endangered species and impacts to forest lands?
10. Whether the proposed project is a "major modification" to a "major stationary source" and required PSD and New Source Review (NSR) and application of BACT?
12. Whether the major modification determination fails to follow the following rules or EPA guidance:
    a. New Source Review Aggregation Amendments; and,
    b. EPA guidance in projected actual emissions for the PTPC project based on concept of and procedure for determining "potential to emit" (PTE).

ANALYSIS

1. Summary Judgment

Summary judgment is a procedure available to avoid unnecessary trials on formal issues that cannot be factually supported and could not lead to, or result in, a favorable outcome to the opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 107, 108, 569 P.2d 1152 (1977). The summary judgment procedure is designed to eliminate trial if only questions of law remain for resolution. Summary judgment is appropriate when the only controversy involves the meaning of statutes, and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v. Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), rev. denied, 117 Wn.2d 1004 (1991).

The party moving for summary judgment must show there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a

summary judgment proceeding is one that will affect the outcome under the governing law. *Eriks v. Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). In a summary judgment, all facts and reasonable inferences must be construed in favor of the nonmoving party. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300, 45 P.3d 1068 (2002). Summary judgment may also be granted to the non-moving party when the facts are not in dispute. *Impecoven v. Department of Revenue,* 120 Wn.2d 357, 365, 842 P.2d 470 (1992).

Here, the Board concludes no material facts are in dispute related to the issues that are the subject of the motions in this case, and therefore summary judgment is appropriate on all issues upon which the parties have moved, with the exception of Issue 1 (standing of No Biomass Burn). The Board does not reach the issue of standing for this Appellant at this time.

2. SEPA Issues (Issues 2, 3, 4, 6, and 7)

Appellants challenge Ecology's DNS on several grounds. They contend that an environmental impact statement (EIS) is required for the cogeneration project based on RCW 70.95.700. They also contend that the DNS and SEPA checklist inadequately addressed the potential impacts from the release of CO_2 associated with burning of woody biomass, including the potential for increased ocean acidification, and the potential effect on endangered species and forest lands associated with the removal of wood from forest lands.

A. Effect of RCW 70.95.700 (Issue 2)

Appellants first contend that RCW 70.95.700 mandates the preparation of an EIS for the cogeneration project. RCW 70.95.700 states:

> No solid waste incineration or energy recovery facility shall be operated prior to the completion of an environmental impact statement containing the considerations required

> under RCW 43.21C.030(2)(c) and prepared pursuant to the procedures of chapter 43.21C RCW. This section does not apply to a facility operated prior to January 1, 1989, as a solid waste incineration facility or energy recovery facility burning solid waste.

The question is whether the cogeneration project qualifies as an energy recovery facility. "Energy recovery" is defined as "a process operating under federal and state environmental laws and regulations for converting solid waste into usable energy and for reducing the volume of solid waste." RCW 70.95.030(7). "Solid waste" is defined as "all putrescible and nonputrescible solid and semisolid wastes including, but not limited to, garbage, rubbish, ashes, industrial wastes, swill, sewage sludge, demolition and construction wastes, abandoned vehicles or parts thereof, and recyclable materials." RCW 70.95.030(22). The Washington Court of Appeals has held that a reusable substance does not constitute waste for the purpose of RCW 70.95. *Littleton v. Whatcom Cy.* 121 Wn. App. 108, 117, 86 P.3d 1253 (2004)(finding that chicken manure, as a reusable substance, did not constitute waste for purposes of RCW 70.95).

Here, the facts are not in dispute as to what materials PTPC will burn as fuel for the cogeneration project: wood fuels including forest biomass and urban wood; oil; sludge from the mill process wastewater treatment plant; and burnable rejects from the mill and old corrugated container recycle facility. Appellants contend, however, that all of these materials, with the exception of the oil, are solid waste.

The question of whether or not something is solid waste is not as simplistic as considering how materials are referred to in ordinary speech. Materials may be solid waste at the point of generation or initial transport, but may become useful after processing by a solid waste recycler and thereby no longer a solid waste. Ecology, as the agency responsible for regulation

of solid waste, and acting through its solid waste specialists, has thoughtfully analyzed the question of the solid waste status of forest biomass and other woody materials extracted for use in energy production. Ecology has written an analysis on the question, and the Board is persuaded that the analysis is sound. *See Heffner Decl. (March 14, 2011), Ex. A.* Ecology's conclusions in such a technical area are entitled to deference. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004); *Five Corners Family Farmers v. Ecology*, PCHB No. 09-106 (2010)(COL 11-13)(The weight to be given an agency policy or guidance document is based on the merit of its content, and deference is appropriate only when the agency's action has a sound basis.).

Here, Ecology concludes that forest biomass is not a solid waste because it has become a commodity. A significant reason for its status as a commodity is due to actions by the Legislature. In 2009, the Legislature passed ESSB 6170, providing tax incentives for activities related to development of renewable energy. The Legislature has also authorized the Department of Natural Resources to develop a contract program for forest biomass that facilitates a bid process similar to that used for timber sales. RCW 79.150.030. The Board concludes that forest biomass is not a solid waste because it is a marketable commodity.

The same type of analysis, when applied to hog fuel, urban wood, and burnable rejects from the mill and the old corrugated container recycle facility, leads to the conclusion that these materials, at the point they are burned, are also not solid waste. The materials might be waste at the time they are discarded, but they are no longer solid waste once they have been rendered into a form suitable for industrial combustion. These materials are processed for combustion by

shredding, grinding, or chipping to produce a relatively uniform sized material that maximizes combustion efficiency. The burnable rejects from the mill and old corrugated container recycling facility are processed to remove plastics and metal to create a product suitable for fuel. When PTPC purchases additional processed material, such as biomass and urban wood, to use as fuel it is no longer solid waste.

One material that is solid waste at the time it is burned at Power Boiler 10, however, is primary sludge from the mill process wastewater treatment plan. Burning sludge has been a common method of waste management in the pulp industry for years. While the sludge may have limited BTU value, the intent of the combustion is volume reduction of the material prior to disposal. Therefore, the sludge is a solid waste.

At this point in the analysis, the second sentence of RCW 70.95.700 becomes relevant. This sentence narrows the reach of the requirement that an EIS be prepared for all solid waste incineration or energy recovery facilities. It states: "This section does not apply to a facility operated prior to January 1, 1989, as a solid waste incineration facility or energy recovery facility burning solid waste." It is undisputed that the PTPC has been burning sludge in Power Boiler 10 since before 1989. It is also undisputed that the two steam producing units involved in the cogeneration project were installed at the mill and operating well before 1989. Therefore, Ecology and PTPC argue that the EIS requirement does not apply to the cogeneration project.

Appellants respond that the exception does not apply because, while Power Boiler 10 and the Recovery Furnace were constructed and operated before 1989, and while they have burned solid waste since before 1989, PTPC was not operated as a solid waste incinerator or energy

recovery facility prior to 1989. Appellants contend that because the amount of electricity previously generated was much smaller and PTPC was not producing electricity for resale, the facility does not qualify for the exception in RCW 70.95.700. The Appellants argument, however, ignores the fact that the functional purpose of the units is the same. They burn fuel and some solid waste (sludge) and convert it into useable energy and reduce the volume of the solid waste. This meets the definition of "energy recovery" under RCW 70.95.030(7). The fact that some of the energy will now be sold instead of used internally by the plant does not change the fact that PTPC has been operating Power Boiler 10 and the Recovery Furnace as energy recovery facilities since prior to 1989.

The Board concludes that most of the material burned in the cogeneration project is not solid waste. With respect to the limited type of material that is solid waste (sludge from the mill process wastewater treatment plan), the Board further concludes that an EIS is not required under RCW 70.95.100 because PTPC qualifies for the exception available to energy recovery facilities burning solid waste prior to January 1, 1989.

B. The DNS is not clearly erroneous (Issue 3, 4, 6, and 7)

Agency decisions under SEPA, including threshold determinations, are accorded substantial weight. RCW 43.21C.090; *Anderson v. Pierce Cy.*, 86 Wn. App. 290, 302, 936 P.2d 432 (1997). The PCHB will overturn an agency's SEPA threshold determination only when the Board finds that the agency's determination was "clearly erroneous." *Norway Hill Pres. & Prot. Ass'n. v. King County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire

evidence is left with the definite and firm conviction that a mistake has been committed." *Murden Cove Preservation Ass'n v. Kitsap County*, 41 Wn. App. 515, 523, 704 P.2d 1242 (1985).

Appellants challenge Ecology's DNS on the grounds that Ecology inappropriately relied on RCW 70.235.020 for its conclusion that the project would not have a probability of significant impact to the environment due to increased emissions of carbon dioxide. (Issues 3 and 4). They also contend that the DNS does not properly consider the potential effects of the burning of biomass on ocean acidification, endangered species, and forest lands. (Issues 6 and 7). Appellants move for summary judgment on issues 3 and 4. PTPC moves for summary judgment on issue 4. Ecology moves for summary judgment on all four of these issues.

Ch. 70.235 RCW establishes Washington State's approach to limiting greenhouse gas emissions. RCW 70.235.005 explains that the intent of the Legislature is to reduce emissions of greenhouse gases, and that it has "established goals to grow the clean energy sector and reduce the state's expenditures on imported fuels." RCW 70.235.005(1). While RCW 70.235.010(6) includes carbon dioxide in its overall definition of greenhouse gases, consistent with its goal of encouraging the clean energy sector, RCW 70.235.020(3) excludes consideration of carbon dioxide emitted from industrial combustion of biomass as a greenhouse gas, except for purposes of reporting. RCW 70.235.020(3) states:

> Except for purposes of reporting, emissions of carbon dioxide from industrial combustion of biomass in the form of fuel wood, wood waste, wood by-products, and wood residuals shall not be considered a greenhouse gas as long as the region's silvicultural sequestration capacity is maintained or increased.

The record contains factual evidence to support the conclusion that the region's silvicultural sequestration capacity is currently increasing. *See Heffner Decl. (March 1, 2011) ¶12 and Exs. F at p. 1, G at p. 4.* The Board is satisfied that this evidence is reasonably reliable despite Appellants' challenges to the source of the information. Appellants offer no facts that contradict this information or the conclusion. Therefore, the dispute around the effect of RCW 70.235.020(3) is a legal one.

Appellants contend that the SEPA checklist and the DNS are inadequate because they relied on RCW 70.235.020(3) in concluding that the project will not cause a net increase in GHG emissions. The SEPA checklist explains how RCW 70.235.020(3) affects the analysis of GHG as follows:

> The displacement of fuel oil with wood will increase the mill's use of energy that is already part of the forest carbon cycle and reduce the plants emissions of carbon dioxide from geologic (petroleum) sources. For example, PTPC's annual GHG emissions were estimated to be 151,666 EPA CO2e MTs in 2007, which is based on the combustion of hydrocarbon fuels. After this project, they are expected to be less than 62,000 EPA CO2e MTs from burning hydrocarbons. Under RCW 70.235.020(3), carbon dioxide emitted from the combustion of biomass is not considered a greenhouse gas. The mill's CO2 emissions from burning additional wood are expected to increase by more than double. This CO2 would be released at forest site through slash burning without pollution controls and through natural decay.

Mann Decl., Ex. 4, p. 7. While disclosing that carbon dioxide emissions would increase due to the burning of biomass, PTPC and Ecology reached the conclusion that net GHG emissions would significantly decrease because the Legislature has specified that carbon dioxide emissions from the burning of biomass are not GHG emissions. This is consistent with the plain language of RCW 70.235.020(3). The Washington Supreme Court has directed that when the plain

meaning of a statue is unambiguous, the legislative intent is apparent and the statute should not be construed otherwise. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Appellants argue that the Legislature's decision to exclude biomass-related CO_2 emissions from GHG requirements was based on flawed scientific principles and should be reexamined by this Board. However, given the clear language of RCW 70.235.020(3) the Board declines to consider these arguments. The Board concludes that Ecology and PTPC appropriately considered and applied RCW 70.235.020(3) and, based on that statute, appropriately concluded that there would be a net *decrease* in GHG emissions from the cogeneration project. Summary judgment is therefore appropriately granted to Respondents on Issues 3 and 4. Further, since the Appellants "ocean acidification" issue is also based on the assumption that GHG emissions will increase due to the cogeneration project, the Board grants summary judgment to Respondents on issue 6 as well.

Appellants also argue that the SEPA checklist and DNS are clearly erroneous because they did not address diesel emissions from transporting biomass fuel to the plant and from the handling of the additional ash that will be created by the burning of biomass. The SEPA checklist did, however, discuss truck emissions and did identify that the amount of boiler ash will increase. *See Mann Decl., Ex. 4, p. 4*. Further, as explained by the Ecology SEPA official, despite the amount of increase in fuel from transporting biomass to the mill, the decrease in the use of fossil fuel is expected to be 1,800,000 gallons per year. Further, with regard to the handling of the ash, the actual number of trips to haul ash will decrease due to the type of equipment used, and therefore the diesel emissions generated by the facility will decrease.

Second Heffner Decl. (March 24, 2011) ¶3 and Ex. A. Therefore, the Board concludes that the SEPA DNS is not deficient on this ground.

Appellants' final SEPA argument is that the SEPA checklist and DNS failed to adequately consider the effects of burning biomass on endangered species and forest lands. Appellants' argument is premised on an assumption that several new biomass burning projects will be permitted and built so that the increased competition for biomass will result in either increased forest harvests, or increased removal of forest debris necessary for forest health. The factual support for their argument is a letter sent to the Legislature from three scholars analyzing the potential demand for biomass and the strong possibility that this demand cannot be met without the harvest of new trees. *2nd Mann Decl., Ex. 14.*

While the Board accepts that there could be some merit to the argument that approval of a significant number of biomass burning projects could result in a shortage of biomass available in Washington forests, the Board concludes that this potential shortage is too remote and speculative to require additional SEPA analysis of PTPC's currently proposed cogeneration project. There does not appear to be any potential that a shortage of biomass would be an issue for this project or that this project would involve forest harvests or removal of debris otherwise required for forest health. Nor is there any evidence that this project will lead to the development of additional biomass burning projects. Further, the Board is persuaded that Washington forests and wildlife are protected by existing laws and plans. *See* the Forest

Practices Act, Ch. 76.09 RCW, the Forest Practices Board Rules,[3] Title 222 WAC, the Endangered Species Act, 16 U.S.C. §§ 1531-1544, Forest Practices Habitat Conservation Plan, and the Northwest Forest Plan. The primary concern expressed by Appellants is that live trees will be harvested to feed PTPC's cogeneration project. As pointed out by Ecology, this concern is addressed by the NOC which limits PTPC to burning biomass that is "by-products of current forest management activities, current forest protection treatments authorized by the agency, or the by-products of forest health treatment prescribed or permitted under Washington's forest health law." *Heffner Decl. (March 1, 2011), Ex. B at p. 3, Finding 6.*

Ecology did not fail to consider the potential for impacts to forest lands and wildlife when it issued its DNS. In its response to SEPA comments it stated that "suppliers must comply with applicable portions of the WA Forest Practices Act (Chapter 76.09 RCW and WA Forest Practices Rules (Title 222 WAC))" when removing biomass. *Heffner Decl. (March 1, 2011), Ex. C, p. 15.* The Board concludes that Ecology's DNS is not clearly erroneous on this point and that summary judgment should be granted to Respondents on Issue 7.

Overall, the Board concludes that Appellants have not met their burden of establishing a genuine issue of fact related to whether Ecology's DNS is clearly erroneous. Therefore, the Board grants summary judgment to Ecology on Issues 3, 6, and 7, and to Ecology and PTPC on Issue 4.

[3] The Board notes that the Forest Practices Board is in the process of amending its forest practices rules to clarify that the removal of forest biomass is a forest practice subject to the resource protection measures required in Title 222 WAC and Ch. 76.09 RCW. *Shirey Decl. (March 28, 2011), Ex. A.*

3. The cogeneration project is not a major modification (Issues 10, 12(a), and 12(b))

The Federal Clean Air Act (CAA) requires certain sources of criteria air pollutants to obtain a permit that ensures prevention of significant deterioration (PSD) of the quality of the ambient air. This PSD permit requirement applies to major new sources of criteria air pollutants, or existing major emitting facilities for which major modifications are proposed, that are located in areas where the ambient air meets the National Ambient Air Quality Standards (NAAQS). EPA has delegated to Ecology the issuance of PSD permits for most types of projects. 40 CFR 52.21(u). The Delegation Agreement under which Ecology is authorized to issue PSD permits requires Ecology to follow all of EPA's PSD policy, guidance, and determinations. Here, there is no dispute that PTPC is an existing major emitting facility located in an area that is in attainment of the NAAQs; therefore, all parties agree that Ecology needed to determine whether or not the project qualifies as a "major modification" requiring a PSD permit. *Burmark Decl. (March 1, 2011) ¶¶4-6, and Ex. B.*

A PSD permit is required if the cogeneration project is a "major modification." 42 U.S.C. § 7475, WAC 173-400-720. EPA's regulations define "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in: a significant emissions increase . . . of a regulated NSR [new source review] pollutant . . . and a significant net emissions increase of that pollutant from the major stationary source." 40 C.F.R. § 52.21(b)(2)(i)(emphasis added). Therefore, a PSD analysis involves a two step process. First, Ecology must determine whether a project causes a significant emissions increase for a regulated pollutant. If it does, Ecology must then determine whether or not the project also

results in a significant *net* emissions increase when emissions increases and decreases of that pollutant due to other projects at the facility during the last five years are considered. 40 C.F.R. § 52.21(a)(2)(iv)(a) and § 52.21(b)(3).

In quantifying the emissions attributable to a proposed project for purposes of the PSD applicability analysis, EPA first requires an aggregate analysis, which considers whether to aggregate emissions from other recent projects with emissions caused by the current project for purposes of determining whether emissions from the current modification are significant. This aggregate analysis is designed to deter sources from attempting to evade a PSD permit and expedite construction by permitting several changes separately as minor modifications. *See Burmark Decl. (March 1, 2011) ¶11 and Ex. G.*

Appellants contend, and Ecology agrees, that emissions changes from PTPC's recent improved process controls project needed to be aggregated with the analysis of the cogeneration project's emissions. Ecology and PTPC assert that this was done. Appellants, however, contend that the record is not clear that it was. The Board disagrees with Appellants. The NOC application explains that the emissions changes from the improved process controls project are included in the PSD applicability emission calculations for the cogeneration project. *Burmark Decl. (March 1, 2011), Ex. C at 3-3, 3-4 (Section 3.2 Aggregation).*

Appellants argue that Ecology e-mails indicate otherwise. These emails were written during the evaluation of the PSD applicability analysis conducted for the process controls project. They address the question of whether the possible future cogeneration project, for which Ecology had not yet received an application, should be aggregated with the process controls

project in the determination of the applicability of PSD to the process controls project. *Burmark Decl. (March 25, 2011)* ¶*7.* These e-mails do not address the question at issue here, which is whether the PSD applicability analysis for the cogeneration process included emissions changes from the process controls project. The Board concludes that Appellants have not presented any evidence that controverts Ecology and PTPC's evidence that the PSD application for the cogeneration project appropriately aggregated the emission changes from the process controls project.

EPA regulations and guidance direct the method for determining whether a proposed modification will have a "significant emissions increase." A significant emissions increase is an increase in net emissions or the potential of a source to emit regulated pollutants at rates in excess of the rates established in EPA regulations for those pollutants. 40 C.F.R. § 52.21(b)(23)(i) and § 52.21(b)(40). The procedure for calculating whether a significant emissions increase will occur depends upon the type of emissions unit being modified. 40 C.F.R. § 52.21(a)(2)(iv)(b) and §52.21(b).

For existing emissions units, EPA regulations allow a project to use either a "projected actual emissions" or a "potential to emit" methodology.[4] The "projected actual emissions" methodology regulations require a comparison of the facility's "baseline actual emissions" (i.e. the facility's pre-project emissions) with the "projected actual emissions" (i.e. the facility's anticipated post-project emissions under expected operating conditions). *See* 40 C.F.R. § 52.21(a)(2)(iv)(*c*)(actual-to-projected-actual test for existing emission units). *See also* 40 C.F.R.

[4] EPA guidance issued in 2002 addressed the addition of the option to use the "projected actual emissions" methodology. See 67 Fed. Reg. 80,186.

§ 52.21(b)(41)(defining "projected actual emissions") and 40 C.F.R. § 52.21(b)(48)(defining "baseline actual emissions").

New emission units must use the expected "potential to emit" (40 C.F.R.§ 52.21(a)(2)(iv)(d)), whereas projects that involve modifications to existing emission units and the construction of new emissions units, must use a "hybrid test" to determine whether the project will have a significant emissions increase. 40 C.F.R. §§ 52.21(a)(2)(iv)(*f*). Under the hybrid approach, "potential to emit" is used for new emission units and "projected actual emissions" is used for modified emission units. *Id.* The increases in emissions are then added together and compared to the significant emissions rate (SER). The hybrid test was used to evaluate the current project under appeal.

Appellants question whether emissions controls proposed as part of a project can be considered in calculating emissions for purposes of the PSD applicability analysis. This issue has already been addressed by EPA and the courts. At least one federal court has held, in the face of a contrary argument from EPA, that emissions controls are considered incorporated into the project design, and therefore can be taken into account in making PSD calculations. *Alabama Power Co. v. Costle*, 636 F.2d 323, 353 (D.C. Cir. 1979, as amended April 21, 1980).

A second question raised by Appellants is whether emissions reductions resulting from the installation of new emissions control equipment must be "federally enforceable" to be included in the emissions calculations. This question has also already been answered. As a result of a 1995 federal court decision[5] vacating EPA's regulation requiring federal

[5] *National Mining Ass'n v. U.S. Environmental Protection Agency*, 59 F.3d 1351, 1362-65 (D.C. Cir. 1995).

enforceability, EPA has issued guidance providing that the "federally enforceable" requirement in the existing regulations should now be interpreted to mean "federally enforceable or legally and practicably enforceable by a state or local air pollution control agency." *Shirey Decl. (March 16, 2011), Ex. A at 6*.

In general, limitations in PTPC's NOC order are enforceable by Ecology under the Washington Clean Air Act. RCW 70.94.431(1). A failure by PTPC to comply with the NOC can result in the issuance of civil penalties or other actions to enforce the terms of the NOC. *Heffner Decl. (March 1, 2011), Ex. B at 11*. On this basis, we conclude there is no violation of the "federally enforceable" regulation.

In this case, Ecology went only as far as step one in the PSD analysis because it concluded based on PTPC's calculations that the project will not cause a significant emissions increase. The Appellants disagree with this conclusion, not on the basis of factual arguments, but on the basis of the legally defined methods for calculating significant emissions increases.

Appellants make several arguments as to why the emissions calculations were legally incorrect. The Board concludes that most of their arguments are based on outdated versions of regulations, or regulations that have been vacated by the courts. *See* i.e. Appellants' argument that Ecology improperly allowed PTPC to reduce their projected actual emissions by emission reductions attributed to pollution control technology (*Appellants' opening brief, pp. 22-23, response brief, p. 21)*; Appellants' contention that emissions reductions may only be included if they are federally enforceable *(Appellants' opening brief, pp. 23-24, response brief, pp. 22-23)*; and Appellants' argument that PTPC should have based its PSD determination on Power Boiler

10's "potential to emit" rather than its "projected actual emissions." (*Appellants' opening brief pp. 19-20.)*

Appellants do not focus on the correct legal requirements for making a PSD determination until their final reply brief, and even then they rely on a "2011" guidance document from EPA, which was actually issued in 1989. *See Appellants' reply brief, p. 14.*

Another new argument raised for the first time in their reply brief is that the installation of the turbine generator converts Power Boiler 10 into a new emissions unit, and therefore its emissions should have been analyzed using the potential to emit standard. The Board does not find this argument persuasive because the turbine generator is in a separate building from Power Boiler 10, and its emission unit is the cooling tower. Emissions from the cooling tower were calculated using the potential to emit standard. *1st Muehlethaler Decl., Ex. E at pp. 3-10 and Appendix A.*

Yet a third new argument made by Appellants is that the NOC does not include enforceable limitations on particulate matter (PM). Appellants focus specifically on the lack of separate limits for the two size categories of PM. Contrary to Appellants' contentions, however, the NOC does include limitations for PM 10 and PM 2.5, because it includes a number of provisions addressing PM generally, of which PM 10 and PM 2.5 are subsets. *Heffner Decl. (March 14, 2011)* ¶5.

The Board concludes that the record on summary judgment establishes that PTPC went through the proper analytical steps in its PSD application process. PTPC properly aggregated emissions changes from the process controls project with the cogeneration project. PTPC

properly utilized the projected actual emissions for existing emissions sources (Power Boiler 10, the Recovery Furnace, and fugitive emissions from the solid fuel handling area); calculated the "potential to emit" for the cooling tower because it is a new emitting unit; and demonstrated that only emissions of carbon monoxide and volatile organic compounds will increase as a result of the Project and that these increases are below the regulatory thresholds that trigger PSD permitting requirements. *Mann Decl., Ex. 1, at* §3.5 and pp. 2-1, 3-3, 3-4, 3-12.

The record also demonstrates that PTPC's calculations were reviewed by Ecology's Air Quality Program, the program charged with all phases of PSD applicability review and permitting.[6] After following the PSD applicability procedures set forth in federal regulations, Ecology concluded that the PSD applicability analysis complied with EPA and Ecology regulations, and that the emission increase from all PSD regulated pollutants due to the project are less than their PSD significance levels. *Burmark Decl. (March 1, 2011) ¶16.* Appellants have not offered any factual material to controvert this conclusion. Nor have they made any persuasive legal arguments. The Board concludes that the cogeneration project is not a major modification subject to PSD permitting requirements.

The area of calculation of emissions changes for PSD determinations is highly complex, both technically and legally. Ecology, as the agency in Washington charged with administration, is entitled to deference. *Port of Seattle v. Pollution Control Hearings Board*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004). The Board concludes that Appellants have not put forward any facts that controvert any material facts in the PSD analysis. Further, Appellants have not made any

[6] Ecology's reviewing scientist was Robert Burmark, a licensed chemical engineer, who has participated in Ecology's PSD applicability review and permitting for the last 17 years. *Burmark Decl. (March 1, 2011) and Ex. A.*

persuasive legal arguments that PTPC's PSD analysis, as reviewed and accepted by Ecology, was flawed. Therefore, the Board grants summary judgment to Ecology on issues 10, 12(a), and 12(b)

4. Standing (Issue 1)

PTPC challenges standing for only one appellant in this case, No Biomass Burn. The standing for the other appellants is not challenged. Therefore, the case will proceed to hearing whether or not the Board ultimately concludes that No Biomass Burn has standing. Given this situation, the Board defers its ruling on No Biomass Burn's standing to a later date.

Based on the foregoing analysis, the Board enters the following:

ORDER

1. The Board defers ruling on PTPC's motion for summary judgment on Issue 1.
2. The Board grants summary judgment to PTPC on Issue 2.
3. The Board grants summary judgment to Ecology on Issues 3, 6, 7, and 12(a) and (b).
4. The Board grants summary judgment to Ecology and PTPC on Issues 4 and 10.

The two remaining issues in this appeal are Issue 1 and Issue 5.

SO ORDERED this 10th day of May, 2011.

POLLUTION CONTROL HEARINGS BOARD
ANDREA MCNAMARA DOYLE, Chair
WILLIAM H. LYNCH, Member
KATHLEEN D. MIX, Member

Kay M. Brown, Presiding
Administrative Appeals Judge