

POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

SIERRA CLUB, NATIONAL PARKS
CONSERVATION ASSOCIATION, and
NORTHWEST ENVIRONMENTAL
DEFENSE CENTER,

Appellants,

v.

SOUTHWEST WASHINGTON CLEAN
AIR AGENCY and TRANSALTA
CENTRALIA GENERATION, L.L.C.,

Respondents.

PCHB NO. 09-108

ORDER GRANTING
SUMMARY JUDGMENT

On September 29, 2009, the Sierra Club, National Parks Conservation Association, and the Northwest Environmental Defense Center (Appellants or Conservation Organizations) filed an appeal with the Pollution Control Hearings Board (Board) challenging the Southwest Clean Air Agency's (SWCAA or Agency) issuance of Air Operating Permit SW98-8-R3 (Operating Permit) to TransAlta Centralia Generation, L. L. C. (TransAlta) for operation of its Centralia power plant. The parties submitted motions and related materials to the Board for its consideration on the written record. The Board heard oral argument by the parties regarding these motions on January 6, 2010, at the Board's offices in Lacey, Washington. Court reporting services were provided by Kim Otis of Olympia Court Reporters. Appellants are represented by Janette K. Brimmer and Kevin Regan. SWCAA is represented by Svend A. Brandt-Erichsen. TransAlta is represented by Richard L. Griffith. In deliberating on the motion, Board Members

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1 William H. Lynch, Presiding, Andrea McNamara Doyle, Chair, and Kathleen D. Mix, Member,
2 reviewed and considered the pleadings and record pertinent to the motion in this case, including
3 the following:

- 4 1. Appellants' Motion and Memorandum in Support of Summary Judgment;
- 5 2. Declaration of Janette K. Brimmer with Attached Exhibits A – J;
- 6 3. Declaration of Mark Riskedahl;
- 7 4. Declaration of Sean Smith;
- 8 5. Declaration of Douglas H. Howell;
- 9 6. Declaration of Ernest G. Niemi with Attached Exhibits A – B;
- 10 7. Declaration of Nathan Mantua with Attached Exhibits A – B;
- 11 8. Declaration of Stephanie Kodish with Attached Exhibits A – C;
- 12 9. Declaration of Ranajit Sahu with Attached Exhibits A – C;
- 13 10. SWCAA's and TransAlta's Response to Sierra Club, et al.'s Motion for Summary
14 Judgment on Legal Issues 1 and 3;
- 15 11. Declaration of Svend A. Brandt-Erichsen with Attached Exhibit 1;
- 16 12. Appellants' Reply Brief;
- 17 13. SWCAA's and TransAlta's Motion for Partial Summary Judgment;
- 18 14. Declaration of Stuart A. Clark;
- 19 15. Declaration of Robert D. Elliott in Support of SWCCA's and TransAlta's Motion for
20 Partial Summary Judgment and Attached Exhibits 1 – 5;
- 21 16. Respondent, TransAlta Centralia Generation, LLC's Motion and Memorandum to
Dismiss for Failure to Exhaust Administrative Remedies and Lack of Subject Matter
Jurisdiction;

- 1 17. TransAlta's Supplemental Brief in Support of SWCAA's and TransAlta's Motion for
- 2 Partial Summary Judgment with Attached Exhibits A - G;
- 3 18. Appellants' Combined Memoranda in Response to Motions for Summary Judgment
- 4 and/or to Dismiss of Southwest Clean Air Agency and TransAlta Centralia
- 5 Generation, L.L.C.;
- 6 19. Second Declaration of Janette K. Brimmer with Attached Exhibits A - C;
- 7 20. SWCAA's and TransAlta's Reply Supporting Summary Judgment;
- 8 21. TransAlta's Supplemental Brief in Reply to Appellants' Combined Memoranda in
- 9 Response to Motions for Summary Judgment and/or to Dismiss.

10 **SUMMARY OF DECISION**

11 The Board resolves this case on summary judgment in favor of Respondents TransAlta
12 and SWCAA. After a thorough review of the evidence and argument presented by the parties,
13 the Board concludes that Respondents' arguments concerning the scope of requirements that may
14 be included in an air operating permit at renewal are more persuasive. The interpretation of the
15 air regulations advanced by the Conservation Organizations does not comport with the legal
16 framework established by Congress and the resulting regulatory approaches enacted by the state
17 Legislature, Ecology, and SWCAA. The Board holds that air operating permits are limited in
18 nature, collecting existing substantive requirements, but not imposing new ones.

19 The general emissions standards contained in Ecology and SWCAA regulations, and
20 incorporated into TransAlta's Operating Permit, are applicable requirements but are enforceable
21 as written. The Board concludes that the law does not require SWCAA to use the permit renewal
process to transform those general emissions standards into more specific substantive

1 requirements related to carbon dioxide, nitrogen oxide, mercury, or other air contaminants. Such
2 new substantive requirements may, however, be imposed as permit modifications as regulatory
3 agencies develop new rules or regulatory orders. The Board concludes that state law clearly
4 defines Reasonably Available Control Technology (RACT) as those standards and requirements,
5 including existing regulatory orders, in effect at the time of operating permit renewal or issuance.

6 We conclude that, regardless of the need or desirability for increasingly stringent
7 requirements on emissions of concern, this Board does not have the authority to order Ecology or
8 the local air authority to undertake RACT reviews, or development of regulatory orders or rules
9 to address issues raised by the Conservation Organizations. As a result, we conclude that state
10 law does not require SWCAA to impose new technological requirements or emissions limitations
11 for the Centralia power plant at the time it issues or renews the air operating permit.

12 BACKGROUND

13 [1]

14 TransAlta owns and operates a coal-fired power plant in Centralia, Washington. On
15 September 16, 2009, SWCAA issued the current Operating Permit to TransAlta for operation of
16 the Centralia power plant. The Operating Permit is valid for a period of five years. Brimmer
17 Decl., Ex. B at 3. The Operating Permit was first issued on August 6, 1999, and later renewed
18 on August 6, 2004. *Elliott Decl., Ex. 2 at 56 (Basis Statement)*.

19 [2]

20 Title V of the federal Clean Air Act requires states to develop and implement an air
21 operating permit program. This program is subject to oversight by the Environmental Protection

1 Agency (EPA). 42 U.S.C. § 7661a. The Legislature enacted the Washington Clean Air Act at
2 Chapter 70.94 RCW, which codifies Ecology's air operating permit program and vests local air
3 pollution control authorities with the authority to regulate air quality and the Title V program.
4 Ecology adopted regulations developing an air operating permit program based upon EPA
5 requirements. WAC 173-401.

6 [3]

7 SWCAA is responsible, as a local air authority under the Washington Clean Air Act, for
8 enforcing requirements against sources in its region unless Ecology adopts a rule based on a
9 finding that a type of source should be regulated on a statewide basis. RCW 70.94.141, RCW
10 70.94.395. SWCAA is responsible for issuing Operating Permits to the TransAlta plant because
11 Ecology has never assumed authority over the plant. *Clark Decl.*

12 [4]

13 Title V air operating permits (operating permits) were intended to include all of the air
14 requirements that apply to a particular facility into a single document. The single document
15 makes it easier for sources and regulatory agencies to identify the compliance requirements.
16 *Elliott Decl.; Clark Decl.*

17 [5]

18 The Centralia power plant generates electric energy from steam-driven turbines. Coal is
19 combusted in the boilers to produce heat that generates pressurized steam used in the turbines.
20 Construction of the combustion turbine project began in 2001 and was completed in the summer
21 of 2002. The project was permitted as a major modification to an existing major source. The

1 power plant can produce up to 268 megawatts (MW) of electricity at full load. Elliott Decl., Ex.
2 2 at 1-2.

3 [6]

4 Combustion of the coal produces emissions of sulfur dioxide, nitrogen oxides, particulate
5 matter, carbon monoxide, volatile organic compounds, and certain hazardous air pollutants,
6 including mercury. The power plant emits sufficient quantities of these pollutants to designate
7 the power plant as a Title V source of air pollutants. *Elliott Decl., Ex. 2 at 1.*

8 [7]

9 Appellants point to the lack of controls in the Operating Permit over emissions of carbon
10 dioxide (CO₂) and mercury, and also contend that emissions of nitrogen oxides (NO_x) are
11 allowed at levels that adversely impact the air quality of the region's National Parks and
12 wilderness areas. Appellants objected to the lack of adequate controls over these three pollutants
13 when the TransAlta Plant's Operating Permit came up for renewal. *Brimmer Decl., Ex. F.*

14 [8]

15 The Operating Permit, at Section VI, identifies the applicable requirements for the
16 Centralia power plant and specifies the monitoring methods to ensure compliance with those
17 requirements. *Brimmer Decl., Ex. B (Operating Permit)*. Section VI of the Operating Permit
18 includes the general emissions standards contained in both Ecology's and SWCAA's regulations
19 (WAC 173-400-040, SWCAA 400-040). *Id.*

The parties submitted a Stipulation of Facts to the Board prior to oral argument. The parties stipulate to the following facts:

Permit Terms

- A. The Title V Operating Permit No. SW98-8-R3 (the “Permit”) for TransAlta Centralia Generation, L.L.C. (“TransAlta”) does not contain emission limits for carbon dioxide (“CO2”). The Permit requires TransAlta to monitor and report CO2 emissions from the coal-fired boilers.
- B. The Permit does not contain emission limits for mercury.
- C. The Permit contains limits on nitrogen oxide (“NOx”) emissions from the coal-fired boilers based upon the 1998 RACT Order, SWCAA Order No. 97-2057-R1. The RACT limits are 0.30 lbs/mmBtu when combined loads equal or exceed 360 MW, and 0.35 lbs/mmBtu for all operating hours. The Permit also contains a limit of 0.40 lbs/mmBtu annual average NOx emissions from the coal-fired boilers, based upon 40 C.F.R. 76.7(a)(1).

Reasonably Available Control Technology (“RACT”)

The Southwest Clean Air Agency has not developed RACT limits for CO2 or mercury for the TransAlta Power Plant in Centralia, Washington.

Carbon Dioxide

- A. In 2008, the TransAlta plant in Centralia, Washington emitted 10,481,794 tons of CO2 (according to U.S. Environmental Protection Agency Clean Air Markets database.)
- B. CO2 is an air contaminant as defined by Washington law.

Mercury

- A. In 2007, the TransAlta plant in Centralia, Washington emitted 372.15 pounds of mercury (TransAlta report to SWCAA.)
- B. Mercury is an air contaminant as defined by Washington law.

1 **Nitrogen Oxides**

- 2 A. In 2008, the TransAlta plant in Centralia, Washington emitted 10,839 tons of NOx
3 (according to U.S. Environmental Protection Agency Clean Air Markets database.)
4 B. NOx is an air contaminant as defined by Washington law.

5 **LEGAL ISSUES**

6 The parties provided proposed legal issues prior to the pre-hearing conference. The
7 parties filed an agreed list of legal issues to the Board on October 30, 2009. The amended
8 pre-hearing order incorporates these legal issues.

- 9 1. Whether the Title V Operating Permit issued by SWCAA to TransAlta, Permit No.
10 SW98-8-R3 (Operating Permit), fails to meet the requirements of 42 U.S.C. §
11 7661c(a), 40 C.F.R. § 70.6, WAC 173-401-605 and 173-400-040(5) and SWCAA
12 400-040(5), as incorporated into Washington's State Implementation Plan because it:
13 a) Fails to require control of carbon dioxide emissions?
14 b) Fails to require control of mercury emissions?
15 c) Fails to require adequate control of nitrogen oxide emissions?
16 2. Whether SWCAA, in renewing TransAlta's Operating Permit, was required by RCW
17 70.94.161 and WAC 173-401 to develop new facility-specific limits on carbon
18 dioxide, mercury, and nitrogen oxide emissions to assure the Centralia Power Plant
19 complies with WAC 173-400-040(5) and SWCAA 400-040(5)?
20 3. Whether the Operating Permit issued by SWCAA to TransAlta fails to meet the
21 requirements of 42 U.S.C. § 7661c(a), 40 C.F.R. § 70.6, WAC 173-401-605 and 173-
400-040 and SWCAA 400-040, as incorporated into Washington's State
Implementation Plan because the Permit:
a) Fails to require Reasonable Available Control Technology (RACT) for carbon
dioxide emissions; and
b) Fails to require RACT for mercury emissions?
4. Whether SWCAA was prohibited by RCW 70.94.154(6) and WAC 173-401-605(3)
from developing and incorporating new RACT emission limits for carbon dioxide and
mercury emissions in TransAlta's Operating Permit?
5. Whether incorporation of emission standards in the Operating Permit that are
contained in SWCAA RACT Order No. 97-2057R1 satisfied the requirements of
WAC 173-400-040, SWCAA 400-040, RCW 70.94.154(6), and WAC 173-401-
605(3) to incorporate applicable requirements for RACT?

- 1 6. Whether Appellants lack standing to assert claims related to carbon dioxide emissions
from the Centralia Power Plant?
- 2 7. Whether Appellants failed to exhaust administrative remedies by not requesting or
petitioning that SWCAA make a new RACT determination for the Centralia Power
3 Plant under the procedures of RCW 70.94.154 and SWCAA 400-040?
- 4 8. Whether Appellants failed to exhaust administrative remedies by not requesting or
petitioning that SWCAA adopt emission limits for mercury, carbon dioxide, and
nitrogen oxides under authority of SWCAA 400-040(5)?
- 5 9. Whether the PCHB has jurisdiction to hear a claim that SWCAA has failed to carry
out a nondiscretionary duty to make a new RACT determination for the Centralia
6 Power Plant under the procedures of RCW 70.94.154 and SWCAA 400-040?
- 7 10. Whether the PCHB has jurisdiction to hear a claim that SWCAA has failed to carry
out a nondiscretionary duty to adopt limits on carbon dioxide, mercury, and nitrogen
oxide emissions under authority of SWCAA 400-040(5)?

8 ANALYSIS

9 [1]

10 Summary judgment is a procedure available to avoid unnecessary trials where formal
11 issues cannot be factually supported and cannot lead to, or result in, a favorable outcome to the
12 opposing party. *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). The summary
13 judgment procedure is designed to eliminate trial if only questions of law remain for resolution.
14 Summary judgment is appropriate when the only controversy involves the meaning of statutes,
15 and neither party contests the facts relevant to a legal determination. *Rainier Nat'l Bank v.*
16 *Security State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990), *review denied*, 117 Wn.2d
17 1004 (1991).

18 [2]

19 The party moving for summary judgment must show there are no genuine issues of
20 material fact and the moving party is entitled to judgment as a matter of law. *Magula v. Benton*
21

1 *Franklin Title Co., Inc.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). A material fact in a
2 summary judgment proceeding is one affecting the outcome under the governing law. *Eriks v.*
3 *Denver*, 118 Wn.2d 451, 456, 824 P.2d 1207 (1992). If the moving party satisfies its burden,
4 then the non-moving party must present evidence demonstrating that material facts are in
5 dispute. *Atherton Condo Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990),
6 *reconsideration denied* (1991). In a summary judgment proceeding, all facts and reasonable
7 inferences must be construed in favor of the non-moving party. *Jones v. Allstate Ins. Co.*, 146
8 Wn.2d 291, 300, 45 P.3d 1068 (2002).

9 [3]

10 The Board finds that it is appropriate to grant summary judgment in this case because
11 there are no genuine issues of material fact and judgment can be granted as a matter of law.

12 [4]

13 The Board has jurisdiction under RCW 43.21B.110(1)(d) and WAC 371-08-315(2)(c) to
14 hear appeals of permits issued by air pollution control authorities. The Board reviews the issues
15 raised *de novo* and the burden of proof is on the appealing party. WAC 371-08-485.

16 [5]

17 The Appellants assert two main legal arguments: First, by failing to control CO2 and
18 mercury emissions, and failing to adequately control NOx emissions, the Operating Permit
19 violates the general emissions standards, which are “applicable requirements” under Washington
20 and SWCAA regulations. Second, the Operating Permit fails to require Reasonably Available
21 Control Technology (RACT) standards for CO2 and mercury in violation of the plain language

1 of the general emissions standards under Washington law. Appellants request the Board to set
2 aside and remand the Operating Permit to SWCAA for RACT determinations on CO2 and
3 mercury, and for further review of NOx emissions.

4 **A. Compliance With All Applicable Requirements – General Emissions Standards**

5 [6]

6 The parties cite to and attempt to distinguish numerous cases. There is very little in the
7 caselaw, however, that is helpful to the Board in resolving the issues in this case because this
8 appears to be a case of first impression. After a careful reading of the statutes, regulations, EPA
9 interpretations, and caselaw, the Board concludes that Respondents’ arguments concerning the
10 scope of requirements that may be included in an air operating permit at issuance or renewal are
11 more persuasive, as further discussed below. The position advanced by the Conservation
12 Organizations does not comport with the legal framework established by Congress and the
13 resulting regulatory approaches enacted by the state legislature, Ecology, and SWCAA under
14 that framework.

15 [7]

16 Under Washington regulations, operating permits must contain all existing applicable
17 requirements at the time of permit issuance. WAC 173-401-600(1) and WAC 173-401-605(1)
18 contain similar language requiring each operating permit to contain terms and conditions that
19 assure compliance with all applicable requirements at the time of permit issuance.¹

20
21

¹ WAC 173-401-605(1) uses the phrase “emission limitations and standards” instead of “terms and conditions.”

1 [8]

2 “Applicable requirements” are defined to include several specific requirements of federal
3 and state law, as well as local air authority regulations, regulatory orders issued to a facility, and
4 any standard or other requirement provided for in the state implementation plan (SIP). WAC
5 173-401-200(4). “Applicable requirements” also include requirements promulgated or approved
6 by EPA, Ecology, or a local air authority through rulemaking at the time of permit issuance,
7 which have a future effective compliance date. WAC 173-401-200(4).

8 [9]

9 The general emissions standards contained in WAC 173-400-040 and SWCAA 400-040
10 state that “[n]o person shall cause or allow the emission of any air contaminant from any source
11 if it is detrimental to the health, safety, or welfare of any person, or causes damage to property or
12 business.” As discussed later in the decision, the general emissions standards require all sources
13 of air pollutants to use RACT. WAC 173-400-040 and SWCAA 400-040.

14 [10]

15 Washington and SWCAA’s general emission standards are both incorporated into
16 Washington’s State Implementation Plan (SIP). 40 C.F.R. § 52.2479. As cited earlier, the
17 general emission standards are contained in both Ecology and SWCAA rules. The Appellants
18 assert that the general emissions standards are applicable requirements because they are
19 incorporated into the Washington’s SIP and are contained in rules promulgated by Ecology and
20 SWCAA.

1 [11]

2 Appellants contend that because the general emissions standards are applicable
3 requirements, the Operating Permit must do more than simply reference or restate them: it must
4 assure compliance with them. Appellants assert that the Operating Permit does not comply with
5 all “applicable requirements” of the Clean Air Act and the Washington SIP because it does not
6 assure compliance with these general emissions standards. WAC 173-401-605. Appellants cite
7 to Title V of the federal Clean Air Act and to Washington law that provide a permit shall include
8 enforceable limits and standards and such other conditions as are necessary to assure compliance
9 with applicable requirements of the Clean Air Act, the requirements of the applicable SIP, and
10 state permitting requirements. 42 U.S.C. § 7661c(1); 40 C.F.R. § 70.6; RCW 70.94.16(10);
11 WAC 173-401-100(2); and WAC 173-401-200(4). Appellants further contend that specific
12 standards and conditions are necessary to assure compliance with all applicable requirements.
13 They assert that the specific standards and conditions must be some objective, measurable
14 standard, or condition in the Operating Permit terms beyond what is expressed in the general
15 emissions standards.

16 [12]

17 Appellants argue that their interpretation of the general emissions standards is consistent
18 with Congress’ intent when enacting Title V. Congress intended for operating permits to be
19 reviewed and renewed at least once every five years. Operating permits may be modified or
20 amended during a permit term for any reason allowed or required under the federal or
21 Washington Clean Air Acts. RCW 70.94.161(1). Appellants read RCW 70.94.154(6) as

1 establishing a floor that ensures existing requirements are not omitted during the operating
2 permit process, and not a ceiling that prohibits SWCAA from using its regulatory tools to add or
3 further prescribe compliance requirements. Permit terms may be changed or added as necessary
4 to assure compliance with all applicable requirements as part of the operating permit renewal
5 process, and Title V does not prohibit such changes. Because the general emissions standards
6 are valid and enforceable provisions of Washington’s Clean Air Act and SIP, Appellants contend
7 SWCAA has the authority to change or add terms to the Operating Permit. Further, they contend
8 SWCAA had a duty, as part of the Operating Permit renewal process, to examine whether such
9 changes or additional terms are necessary in this instance to ensure compliance with the existing
10 general emissions standards.

11 [13]

12 Respondents point to a Washington rule pertaining to operating permits, which states
13 “chapter 173-401 WAC does not impose substantive new requirements.” WAC 173-401-100(2).
14 Both Ecology and SWCAA agree that this provision means they do not have the authority to
15 impose new emission limits through an operating permit. *Elliott Decl.; Clark Decl.* EPA has
16 interpreted federal regulation to mean that operating permits are not a vehicle for new
17 substantive requirements. 40 C.F.R. § 70.1(b); *Elliott Decl., Ex. 4, (EPA White Paper for*
18 *Streamlined Development of Part 70 Permit Applications) at 5.*

19 [14]

20 Respondents cite numerous decisions holding that operating permits collect existing
21 substantive requirements. Operating permits may impose new monitoring, recordkeeping, and

1 reporting requirements if necessary to assure compliance with existing requirements, but are not
2 a vehicle for creating new substantive requirements. *See Sierra Club v. Johnson*, 436 F.3d 1269
3 (11th Cir. 2006); *Sierra Club v. Environmental Protection Agency*, 536 F.3d 673 (D.C. Cir.
4 2008); *Sierra Club v. Environmental Protection Agency*, 551 F.3d 1019, 1022 (D.C. Cir. 2008);
5 *Citizens Against Ruining the Environment v. Environmental Protection Agency*, 535 F.3d 670,
6 672 (7th Cir. 2008); *New York Public Interest Group v. Whitman*, 321 F.3d 316, 320 (2nd Cir.
7 2002); and *Commonwealth of Virginia v. Browner*, 80 F.3d 869, 873 (4th Cir. 1996).

8 [15]

9 Respondents also assert that the Appellants' interpretation of the general emissions
10 standards² of WAC 173-400-040(5) and SWCAA 400-040(5) is mistaken because the general
11 emissions standards are enforceable as written, and does not require the setting of emission
12 limits on specific pollutants for its enforcement. *King County Dept. of Public Works v. Puget*
13 *Sound Air Pollution Control Authority* (PSAPCA), PCHB Nos. 85-54, 85-55, and 85-95 (1985).
14 EPA has concluded that Title V does not require emission limits to be quantified to assure
15 compliance with general emission standards. *In the Matter of Hercules, Inc. Brunswick, Georgia*
16 *Gum and Wood Chems*, Petition IV-203-1 (Order Responding to Petitioners' Request that the
17 Administrator Object to Issuance of a State Operating Permit) (Nov. 10, 2004). The Board has
18 frequently found violations of WAC 173-400-040(5) based upon odors and dust emissions,

19 _____
20 ² Respondents refer to the general emissions standards contained in WAC 173-400-040(5) and SWCAA 400-040(5)
21 as the "nuisance standard." Although the Board has previously recognized that this WAC and a similar regulation
by the Puget Sound Air Pollution Control Authority is similar to the traditional definition of a nuisance (citing RCW
7.48.010), the Board will use the term "general emissions standards" in this decision. *See Craftsman Press, Inc. v.*
Puget Sound Air Pollution Control Authority, PCHB No. 86-203(1988).

1 which are not regulated by specific emission limits or other numeric standards. *See for example,*
2 *Craftsman Press, Inc. v. PSAPCA*, PCHB No. 86-203 (1988); *In the Matter of Puget Sound By*
3 *Products v. PSAPCA*, PCHB No. 87-68 (1987); *In the Matters of Wayne Loranger & Peter Hill*
4 *v. PSAPCA*, PCHB Nos. 85-181 & 85-236 (1986).

5 [16]

6 Respondents argue that although Appellants may only be asking for an analysis of
7 emission levels for three pollutants (CO₂, NO_x, and mercury), this would still be a monumental
8 undertaking. Respondents question whether there is any basis for limiting the analysis to just
9 these three pollutants. If SWCAA determined that the Centralia power plant's emissions were
10 detrimental to persons or property, it would still have to determine the appropriate limit to avoid
11 those adverse effects. This would require a source-specific replication of the process that has
12 produced all the emission limits set forth in federal and state regulations, with an additional
13 requirement to evaluate all air contaminants that an individual source emits that are not currently
14 subject to emission limits. Respondents insist that this expansive reading of 400-040(5) would
15 swallow all other air pollution limits because local air authorities would be required to determine
16 case-by-case limits for all air contaminants.

17 [17]

18 Respondents indicate that Section VI of the Operating Permit identifies the applicable
19 requirements and specifies the monitoring method to ensure compliance with these requirements.
20 SWCAA 400-040(5)'s general emissions standards are listed in this section. Respondents assert
21

1 the inclusion of the general emissions standards as applicable requirements in the Operating
2 Permit sufficiently meets the requirements of the law.

3 [18]

4 The Board agrees with Respondents' characterization of the air operating permit program
5 statutes and regulations. Consistent with the cases discussed above that stand for the proposition
6 that air permits collect existing substantive requirements, this Board has also previously
7 recognized that operating permits are limited in nature and are not intended to impose new
8 substantive requirements. *TPS Technologies, Inc. v. Ecology & Roosevelt Regional Landfill*,
9 PCHB 99-012 (1999). In *TPS Technologies*, Ecology approved permits for a landfill through a
10 Notice of Construction (NOC) process. No separate conditions or limits were established for
11 volatile organic compounds (VOCs) in the permits and the NOC approval was not appealed.
12 Later, the landfill submitted an operating permit application to Ecology. TPS contended that the
13 project did not comply with all "applicable requirements" under the Clean Air Act because the
14 project should have been subject to a Prevention of Significant Deterioration (PSD) Permit if the
15 proper methods for calculating VOC emissions were utilized. The Board noted that no rule
16 required the use of the particular calculation format advocated by TPS, and to reopen the NOC
17 permit decisions as part of the operating permit appeal would only be for the purpose of
18 imposing new substantive permit requirements. The Board concluded that reopening the NOC
19 permit decisions would involve relief outside the scope of the operating permit program because
20 the federal air operating permit regulations state that they are not intended to impose substantive
21 new requirements.

1 [19]

2 In *Green v. Department of Ecology & U.S. Department of Energy*, PCHB No. 07-012
3 (Summary Judgment Order, August 22, 2007), the Board recognized that under Ecology's Air
4 Operating Permit Program, an operating permit compiles into a single permit all the substantive
5 air quality requirements applicable to a qualified source of emissions (citing RCW
6 70.94.161(10), WAC 173-401-100(2), and WAC 173-401-200(4)). In response to Mr. Green's
7 challenges to certain quality assurances and reporting requirements contained in the operating
8 permit at issue, the Board noted that Ecology did not create the challenged requirements but
9 compiled them pursuant to the air operating permit process. *Green* at 13.

10 [20]

11 Appellants argue that specific standards and conditions are necessary to assure
12 compliance with all applicable requirements, and that these specific standards and conditions
13 must be some objective, measurable standard or condition in the Operating Permit terms.
14 Regardless of whether these specific standards and conditions contain numeric or narrative
15 limits, the Board finds these would be new substantive requirements that cannot be added as
16 conditions when the agency issues or renews the air operating permit. WAC 173-401-100(2)
17 clearly provides that chapter 173-401 WAC does not impose substantive new requirements. The
18 new standards and conditions would impose a legal obligation upon TransAlta in contradiction to
19 WAC 173-401-100(2) because they would govern the operation of the coal-fired power plant,
20 and TransAlta would be subject to enforcement actions and penalties if it failed to abide by the
21 new standards and conditions. Stated another way, while the general emission standards of the

1 regulations are applicable requirements, and referenced as such in the permit, translation of the
2 general standards into more specific, measurable narrative, or numerical limits for purposes of
3 permit issuance or renewal would create and impose a new substantive standard in the absence of
4 authority to do so. As discussed further in Section B below, the law anticipates a process for
5 adding new substantive conditions into air operating permits. However, that process involves
6 either agency rule-making or issuance of a regulatory order that sets forth specific standards that
7 must be met, and which would be incorporated as an applicable requirement into an operating
8 permit at the time the agency finalizes the rule or regulatory order. RCW 70.94.154.

9 [21]

10 The Board concludes that the general emissions standards of WAC 173-400-050(5) and
11 SWCAA 400-040(5) are applicable requirements for purposes of the Operating Permit because
12 they are included within the Washington SIP and Washington Administrative Code and within a
13 regulation adopted by SWCAA, but also concludes that the general emissions standards are
14 enforceable as written, as evidenced by the numerous cases cited by Respondents. Appellants
15 attempt to distinguish the odor cases cited by Respondents as being irrelevant to the appeal at
16 hand because odor is not part of the Washington SIP.³ Appellants are unable to show why the
17 narrative general emissions standards are not enforceable without first setting source-specific
18 emission limits on specific pollutants.

19
20 _____
21 ³ The parties also provide argument about EPA's position on whether general emissions standards belong in SIPs. The Board does not need to address these arguments because it concludes that the general emissions standards are enforceable applicable requirements.

1 [22]

2 Finally, the Board concludes that an expansive reading of 400-040(5), as requested by the
3 Appellants, would swallow the rules regarding other air pollution limits and would result in local
4 air authorities being required to determine case-by-case limits for numerous air contaminants.

5 [23]

6 The Board grants summary judgment to the Respondents on Legal Issues 1 and 2.

7 **B. Compliance With Reasonably Available Control Technology (RACT)**

8 [24]

9 Appellants argue that the Operating Permit fails to require reasonably available control
10 technology (RACT) for CO2 emissions and mercury emissions. The Board concludes that
11 Respondents' arguments concerning the need to require RACT for CO2 and mercury emissions
12 in the Operating Permit are more persuasive, as further discussed below.

13 [25]

14 In support of their position, Appellants correctly point out the Washington Clean Air Act
15 states that RACT is required for existing sources and that the general emissions standards require
16 all sources of air pollution to use RACT. RCW 70.94.154(1); WAC 173-400-040. Appellants
17 claim that because the general emissions standards are applicable requirements, each operating
18 permit must assure compliance with WAC 173-400-040 and SWCAA 400-040. Appellants point
19 to language in the general emissions standards, which provide that where current controls are
20 determined to be less than RACT, then RACT must be defined for each source or source
21 category and a rule or order issued requiring the installation of RACT. WAC 173-400-040.

1 [26]

2 RACT is defined as:

3 [T]he lowest emission limit that a particular source or source category is capable of
4 meeting by the application of control technology that is reasonably available considering
5 technological and economic feasibility. RACT is determined on a case-by-case basis for
6 an individual source or source category taking into account the impact of the source upon
7 air quality, the availability of additional controls, the emission reduction to be achieved
8 by additional controls, the impact of additional controls on air quality, and the capital and
9 operating costs of the additional controls. RACT requirements for a source or source
10 category shall be adopted only after notice and opportunity for comment are afforded.

11 RCW 70.94.030(20) and WAC 173-400-030(73).

12 [27]

13 SWCAA has not developed RACT limits for CO2 or mercury for the Centralia power
14 plant. Appellants assert that RACT should not be read in isolation. They argue that because
15 operating permits are issued every five years, there is a corresponding duty for a local air agency
16 to look at new technologies to address emerging pollutants. The Conservation Organizations
17 argue that SWCAA's practice of carrying forward without revising requirements from an earlier
18 regulatory order is insufficient to assure compliance with RACT. They also argue that the 1998
19 RACT formulation is too outdated to be meaningful for the current Operating Permit.
20 Appellants contend that SWCAA has different regulatory tools available to assure compliance
21 with RACT but did not use them. The Appellants also maintain that it is not necessary to set
numeric limits for pollutant discharges in order to comply with RACT, but that a certain
technology or operating conditions could be mandated instead. Appellants also insist that EPA's

1 or Ecology's on-going work on developing new pollutant standards does not relieve SWCAA of
2 its responsibility to comply with the law.

3 [28]

4 Respondents answer the Conservation Organizations' contention that SWCAA should
5 have developed and included new RACT requirements into the Operating Permit by citing to
6 language in RCW 70.94.154(6) and WAC 173-401-605(3). Both of these subsections state:
7 "Emission standards and other requirements contained in rules or regulatory orders *in effect at*
8 *the time of operating permit issuance or renewal* shall be considered RACT for purposes of
9 permit issuance or renewal." (emphasis added) Respondents argue these express statutory and
10 regulatory provisions regarding the use of RACT cannot be ignored. SWCAA, Respondents
11 assert, could not create new emission limits as terms in the Operating Permit.

12 [29]

13 Respondents assert that because EPA approved Ecology's Air Operating Permit Program,
14 this approval implicitly endorsed RCW 70.94.154(6) and WAC 173-401-605(3) as being
15 consistent with the federal Clean Air Act's requirements for Air Operating Permit Programs. 59
16 Fed. Reg. 55813 (Nov. 9, 1994, final interim approval.) EPA has also determined that operating
17 permits are not the appropriate mechanism for setting RACT limits. *See* 63 Fed. Reg. 13789
18 (March 23, 1998).

19 [30]

20 Respondents also address Appellants' RACT arguments by asserting that Washington's
21 RACT provisions establish a process for determining RACT for specific sources and for source

1 categories, similar to “generic RACT” requirements in other state laws. Washington law
2 requires the adoption of RACT by rule or order followed by incorporation into the operating
3 permit pursuant to permit modification procedures. *See* RCW 70.94.154(6) and WAC 173-401-
4 605(3). EPA has previously described generic RACT provisions as not setting specific “up-
5 front” emission limits, but instead as establishing a process for setting individual RACT emission
6 limits that are then submitted to EPA for approval as revisions to the SIP. 62 Fed. Reg. 43134,
7 43136 (Aug. 12, 1997). This interpretation directly contrasts with the Conservation
8 Organizations’ assertion that RACT is an existing applicable requirement before specific RACT
9 limits have been established by a rule or order. Respondents argue that consistent with their
10 assertions, local air authorities apply RACT prospectively rather than as an existing limit on a
11 source, and that the agencies’ interpretation is entitled to great weight.

12 [31]

13 Respondents maintain the Operating Permit includes the necessary RACT requirements
14 because it incorporates the limits for emissions of sulfur dioxide, NO_x, particulate matter, and
15 carbon monoxide that were determined by RACT Order 97-2057R1 for the Centralia coal plant.⁴
16 This RACT Order, which was issued on February 26, 1998, was appealed to the Board. The
17 Board affirmed SWCAA’s RACT determinations at that time, *Bowers v. SWAPCA*, PCHB No.
18 98-3 & 31 (1999), and the Board’s decision upholding the RACT determinations was affirmed
19 by the State Court of Appeals. *Bowers v. PCHB*, 103 Wn. App. 587, 13 P.3d 107 (2000),
20 *petition for review denied*, 144 Wn.2d 1005, 29 P.3d 717 (2001). Any subsequently developed

21 ⁴ *See Elliott Decl., Ex. 3, Final Technical Support Document, Centralia Plant Reasonably Available Control Technology (Dec. 8, 1997).*

1 RACT requirements will be incorporated by amendment into the Operating Permit pursuant to
2 RCW 70.94.154(6) and WAC 173-401-605(3). Respondents note that Ecology recently
3 concluded a public comment period on a proposed regulatory order which would impose stricter
4 limits on NOx emissions from the Centralia coal plant based upon a determination of best
5 available retrofit technology. If stricter limits are contained in the final order, these would be
6 incorporated into the Operating Permit by SWCAA. Respondents state that EPA is also
7 considering actions that could result in stricter limits on mercury and CO2 emissions. *Brandt-*
8 *Erichsen Decl.*

9 [32]

10 The Board concludes that the plain language of RCW 70.94.154(6) and WAC 173-401-
11 605(3) expressly define what shall be considered RACT at the time of the issuance or renewal of
12 an operating permit. Both of these sections define RACT as those standards and requirements
13 contained in rules or regulatory orders “*in effect at the time of operating permit issuance or*
14 *renewal.*” The Board is also persuaded by Respondents’ analysis that the RACT provisions
15 establish a process for determining RACT for specific sources and for source categories, in
16 contrast to the Appellants’ assertion that RACT is an existing applicable requirement before
17 specific RACT limits have been established by a rule or order.

18 [33]

19 Appellants argue about the actions SWCAA *could* have taken. These actions include the
20 determination of RACT by rule pursuant to RCW 70.94.154(1) and (3); and the issuance of a
21 RACT order in accordance with RCW 70.94.154(3)(c). The Board does not disagree that

1 SWCAA has the authority to undertake such actions. Similarly RCW 70.94.395 authorizes a
2 local air authority, after public hearing and findings, to adopt more stringent rules than those
3 adopted by Ecology. These statutory provisions are permissive and lie within the discretion of
4 the local air authority.

5 [34]

6 The Board also agrees with the Appellants' point that the statute that requires RACT for
7 existing sources seems to establish regulatory agency responsibility for ongoing RACT reviews
8 and determinations. *See* RCW 70.94.154(4).⁵ The statute anticipates that Ecology will develop
9 a list of sources and source categories requiring RACT review, and review it every five years.
10 Ecology and local air authorities are expected to revise RACT requirements, as needed, based on
11 that review. *Id.* The Board takes judicial notice of the fact that an initial list of sources and
12 categories was developed by Ecology after the law first passed in 1993.⁶ But other than that, the
13 parties provided the Board no evidence regarding a more current list, or any schedule of related
14

15 _____
16 ⁵ RCW 70.94.154(4) provides: "By January 1, 1994, ecology shall develop a list of sources and source categories
17 requiring RACT review and a schedule for conducting that review. Ecology shall review the list and schedule within
18 six months of receiving the initial operating permit applications *and at least once every five years thereafter*. In
19 developing the list to determine the schedule of RACT review, ecology shall consider emission reductions
achievable through the use of new available technologies and the impacts of those incremental reductions on air
quality, the remaining useful life of previously installed control equipment, the impact of the source or source
category on air quality, the number of years since the last BACT, RACT, or LAER determination for that source and
other relevant factors. Prior to finalizing the list and schedule, ecology shall consult with local air authorities, the
regulated community, environmental groups, and other interested individuals and organizations. *The department and
local authorities shall revise RACT requirements, as needed, based on the review conducted under this subsection.*"
(emphasis added)

20 ⁶ See "Reasonably Available Control Technology (RACT) 1996 List and Schedule," Ecology publications 96-
1006A- Air (December 1996) [available at <http://www.ecy.wa.gov/programs/air/pdfs/961006b.pdf>] & 96-1006B-
21 Air (December 1996, revised 01/97) [available at <http://www.p2pays.org/ref/14/13240.pdf>].

1 reviews or RACT revisions, and it is unclear whether this process is occurring as the Legislature
2 intended.

3 Ecology and local air authorities are also to address, where practicable, all air
4 contaminants deemed to be of concern for a source when establishing or revising RACT
5 requirements under this section. RCW 70.94.154(5). Again, the record before the Board lacks
6 clear information about when and how the agencies implement this provision of the law.

7 What is clear, however, is that there is no enforcement mechanism specified for these
8 provisions of RCW 70.94.154. If Ecology and local air authorities have an ongoing process to
9 update RACT determinations, and require new ones for air contaminants that have been
10 determined to be a concern, these RACT determinations could then be included in the air
11 operating permit renewals, or permit modifications as rules or new regulatory orders. This
12 would provide a platform for expecting sources to meet increasingly stringent requirements as
13 permits come up for renewal, as is the case with sources regulated under the Clean Water Act. In
14 the context of the case before us, this provides an avenue to address the increasing concerns over
15 CO2 and mercury emissions. However this Board does not have the authority, nor have we been
16 asked in the context of this case, to order Ecology (or the local air authority) to undertake the
17 RACT reviews outlined in the referenced statutes. Regardless of the need or desirability for
18 ongoing RACT determinations, the Board concludes that the air operating permit issuance or
19 renewal process does not require, and is not the appropriate vehicle for establishing, new RACT
20 determinations.

1 [35]

2 The Board grants summary judgment to the Respondents on Legal Issues 3, 4, and 5.

3 **C. Exhaustion of Administrative Remedies/Board Jurisdiction**

4 [36]

5 TransAlta moved for dismissal of the appeal based upon failure to exhaust administrative
6 remedies and lack of subject matter jurisdiction. TransAlta asserts that the Conservation
7 Organizations are requesting the Board to order SWCAA to consider adopting or to adopt new
8 emission limits for the Centralia power plant. TransAlta characterizes this request to the Board
9 as an action for failure to perform a nondiscretionary duty. TransAlta argues that the
10 Conservation Organizations must request SWCAA or Ecology to exercise its authority to set
11 emission limits in order to exhaust administrative remedies prior to seeking judicial review. By
12 deciding legal issues 1-5 in favor of Respondents, the Board has essentially disposed of this case.
13 As discussed earlier, SWCAA has the authority to issue a RACT rule or order, but the statutory
14 provisions are permissive and lie within the discretion of the local air authority. Therefore,
15 SWCAA's inaction regarding the adoption of new emission limits for the Centralia power plant
16 cannot constitute a failure to perform a nondiscretionary duty. The exhaustion of administrative
17 remedies does not apply in this instance. The Board lacks the authority, however, to compel
18 SWCAA to issue a RACT rule or order. Because the Board cannot provide the relief requested,
19 the Board lacks jurisdiction to hear a claim that SWCAA failed to carry out a duty to adopt
20 emission limits by a rule or order.

1 [37]

2 The Board grants summary judgment in favor of Appellants on Legal Issues 7 and 8. The
3 Board grants summary judgment in favor of Respondents on Legal Issues 9 and 10.

4 Based on the above analysis, the Board enters the following order:

5 **ORDER**

- 6 1. Summary judgment is GRANTED to Respondents on Legal Issues Nos. 1-5, 9, and
7 10.
8 2. Summary judgment is GRANTED to Appellants on Legal Issues 7 and 8.

9 DONE this day of April 19, 2010.

10 **POLLUTION CONTROL HEARINGS BOARD**

11 WILLIAM H. LYNCH, Presiding
12 ANDREA MCNAMARA DOYLE, Chair
13 KATHLEEN D. MIX, Member
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