

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

_____)	
In the Matter of:)	
)	
Three Mountain Power, LLC)	
)	
PSD Permit No. 99-PO-01)	PSD Appeal No. 01-05
)	
_____)	

ORDER DISMISSING PORTION OF PETITION FOR REVIEW

In a petition filed with the U.S. Environmental Protection Agency's Environmental Appeals Board (the "Board") on March 22, 2001, the Burney Resources Group ("Petitioner") seeks review of the provisions of a final Prevention of Significant Deterioration ("PSD") permit (the "Permit") issued to Three Mountain Power, LLC ("Permittee") by the Shasta County Department of Resource Management Air Quality Management District (the "District") on February 20, 2001. See Petition for Review (March 22, 2001). The Permit was issued by the District pursuant to a delegation agreement with the U.S. Environmental Protection Agency's Region IX ("Region IX").

Petitioner challenges the District's permit decision on the basis that the District failed to provide the public with an opportunity to comment on the Permittee's supplemental BACT

analysis, and to require the Permittee to employ the Best Available Control Technology ("BACT"). *Id.* at 6, 18. Petitioner seeks the reopening of the public comment period, an investigation of BACT for the gas turbines, and the establishment and inclusion of appropriate BACT limits *Id.* at 45.

After two separate conference calls in which the Petitioner, the Permittee, the District, Region IX,^{1/} and the California Energy Commission ("CEC") explored whether the Board's consideration of the Petition for Review could be expedited, Petitioner agreed in an April 19, 2001 telephone call to the Board, and in a follow-up letter dated April 23, 2001, to waive its procedural claim, effectively withdrawing the portion of the Petition for Review challenging the District's permit decision on procedural grounds and seeking a reopening of the public comment period.

Specifically, Petitioner agreed that it would waive its procedural challenge if it would be permitted to present new evidence challenging the District's BACT analysis during the briefing period, rather than relying on the possibility that it could offer such evidence if the Board, after considering the

^{1/}Region IX was represented at the first conference call held on April 11, 2001, but not at the second call that was held on April 18, 2001.

administrative record and written briefs submitted by the parties, ultimately decided to remand the permit to the District to reopen the public comment period. In addition, Petitioner stated that its waiver is contingent on the parties' agreement that they will not raise a procedural objection in this proceeding or in any future judicial appeal to the submission of Petitioner's new evidence with its reply challenging the District's BACT analysis.

Petitioner's understanding with respect to its ability to submit new evidence relative to the District's BACT analysis comports with that of the Board. Accordingly, the Board dismisses the portion of the Petition for Review challenging the District's permit decision on procedural grounds and seeking a reopening of the public comment period. Petition at 6-18. The Board confirms that Petitioner is permitted to introduce new evidence challenging the District's BACT analysis with its reply brief, and that the Board will not entertain any objections to the introduction of new evidence challenging the District's BACT analysis. The Board also understands that all parties agree not to challenge, judicially or otherwise, the Board's acceptance of the new evidence. Parties are free, of course, to challenge the validity, relevance or interpretation of such evidence.

If the Board does not receive within three (3) days an objection from any party to the statement that they have agreed to waive any challenge to the Board's acceptance of new evidence, the Board will interpret their silence as assent to the aforementioned terms. If any objection is received, this Order of dismissal will be vacated.

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: _____ /s/
Edward E. Reich
Environmental Appeals Judge

Dated: 04/25/01

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order in the matter of Three Mountain Power, LLC, PSD Appeal No. 01-05, were sent to the following persons in the manner indicated:

By Facsimile:

Nora J. Chorover, Esq.
515 Jackson Street
Albany, CA 94706
(510) 525-2223
(510) 525-6223 FAX

Martin J. McFadden, Jr.
Three Mountain Power, LLC
3085 Crossroads Drive
Redding, CA 96003
(530) 224-3305
(530) 224-3310 FAX

Scott Turner, Esq.
Nixon Peabody LLP
Clinton Square P.O.
Box 31051
Rochester, NY 14603-1051
(716) 263-1612
(716) 263-1600 FAX

Russell Mull
Shasta County
Department of Resource Management
Air Quality Management District
1855 Placer Street
Suite 200
Redding, CA 60001
(530) 225-5789
(530) 225-5237 FAX

Pam Schultz, Esq.
U.S. EPA, Region IX
75 Hawthorne Street
San Francisco, CA 94105-3901
(415) 744-1354
(415) 744-1041 FAX

Monica Schwebs, Esq.
California Energy Commission
MS 14
1516 9th Street
Sacramento, CA 95814
(916) 654-5207
(916) 654-3843 FAX

Dated: 04/25/01

/s/

Annette Duncan
Secretary