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Santa Teresa Citizen Action Group v. Env'tl. Appeals Bd.

United States Court of Appeals for the Ninth Circuit

November 5, 2002, Argued and Submitted, San Francisco, California ; November 21, 2002, Filed

No. 01-71611 EPA No. Clean Air

Reporter

51 Fed. Appx. 702 *; 2002 U.S. App. LEXIS 24011 **

SANTA TERESA CITIZEN ACTION GROUP; CITY OF MORGAN HILL; CALIFORNIANS FOR RENEWABLE ENERGY, INC.; and DEMAND CLEAN AIR, Petitioners, CALPINE CORPORATION AND BECHTEL ENTERPRISES HOLDINGS, INC., Intervenor, v. ENVIRONMENTAL APPEALS BOARD; UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondents.

For CALPINE CORPORATION AND BECHTEL ENTERPRISES HOLDINGS, INC., Intervenor: Thomas C. Jackson, Daniel M. Steinway, J. Barton Seitz, KELLEY DRYE & WARREN LLP, Washington, DC.

For ENVIRONMENTAL APPEAL, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondents: Kara Christenson, Esq., U.S. Environmental Protection Agency, Thomas H. Pacheco, Esq., UNITED STATES DEPARTMENT OF JUSTICE, San Francisco, CA.

For ENVIRONMENTAL APPEAL, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondents: General Counsel, ENVIRONMENTAL PROTECTION AGENCY, Chief Counsel-EPA, U.S. ENVIRONMENTAL PROTECTION AGENCY, Administrator, Washington, DC. **[**2]**

Notice: **[**1]** RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Prior History: On Petition for Review of an Order of the Environmental Protection Agency.

Disposition: PETITION DENIED.

Judges: Before: B. FLETCHER, RAWLINSON and CLIFTON, Circuit Judges.

Core Terms

Opinion

comment period, responded

[*703] MEMORANDUM *

Counsel: For SANTA TERESA CITIZEN ACTION GROUP, CALIFORNIANS FOR RENEWABLE ENERGY, INC., and DEMAND CLEAN AIR, Petitioners: Stephen C. Volker, Esq., LAW OFFICES OF STEPHAN C. VOLKER, Oakland, CA.

Before: B. FLETCHER, RAWLINSON and CLIFTON, Circuit Judges.

For CITY OF MORGAN HILL, Petitioner: Stephen C. Volker, Esq., BRECHER AND VOLKER, Oakland, CA.

The Environmental Appeals Board ("EAB") did not

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *Ninth Circuit Rule 36-3*.

abuse its discretion in denying Santa Teresa's¹ 1999).
petition for review of the federal prevention of
significant deterioration permit ("permit") issued by
the Bay Area Quality Management District
("District") pursuant to section 165 of the Clean Air
Act, 42 U.S.C. § 7475.

PETITION DENIED.

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After the close of the comment period [****3**] and prior to its issuance of the final permit, the District nonetheless responded to further comment and criticism by undertaking a top-down analysis of the best available control technology ("BACT"), an analysis the petitioners sought. Further, the EAB responded fully to Santa Teresa's challenge to the BACT analysis. Accordingly, we conclude that Santa Teresa failed to demonstrate that its comments did not have full consideration by both the District and the EAB or that it was prejudiced by the District's failure to reopen the comment period. See *Hall v. United States EPA*, 273 F.3d 1146, 1163 (9th Cir. 2000).

We defer to the EAB's expertise in its reasonable resolution of scientific and technical matters. See *Cent. Ariz. Water Conservation Dist. v. United States EPA*, 990 F.2d 1531, 1540 (9th Cir. 1993). The EAB did not abuse its discretion when it determined that the District properly based its BACT analysis upon generally accepted emissions limits. See *Alaska Dep't of Envtl. Conservation v. United States EPA*, 298 F.3d 814, 822 (9th Cir. 2002); *Ariz. Cattle Growers' Ass'n v. United States Fish and Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001). [****4**]

Finally, the EAB did not abuse its discretion in refusing to exercise jurisdiction over Santa Teresa's California Environmental Quality Act ("CEQA") claims. Consistent with its prior decisions, the EAB properly concluded that CEQA was a matter of state law inapplicable to its review of the federal permit. See *In re Knauf Fiber Glass*, PSD Permit No. 97- PO-06, 1999 WL 64235 (EAB Feb. 4,

¹ "Santa Teresa" refers collectively to petitioners Santa Teresa Action Group, the City of Morgan Hill, Demand Clean Air, and Californians for Renewable Energy.