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

In re:	)	
Russell City Energy Center	)	PSD Appeal No. 10-02
PSD Permit No. 15487	)	

RUSSELL CITY ENERGY COMPANY, LLC'S OPPOSITION TO CHABOT-LAS POSITAS COMMUNITY COLLEGE DISTRICT'S PETITION AND SUPPLEMENTAL PETITION FOR RECONSIDERATION OR ALTERNATIVELY CLARIFICATION AND REQUEST FOR IMMEDIATE STAY OF EFFECTIVE DATE OF NOVEMBER 18, 2010 ORDER DENYING REVIEW

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I. INTRODUCTION

Permittee Russell City Energy Company, LLC ("RCEC") hereby submits its opposition to the Petition and Supplemental Petition for Reconsideration or Alternatively Clarification and Request for Immediate Stay of Effective Date of November 18, 2010 Order Denying Review ("Petition" and "Supplemental Petition," respectively) filed by Chabot-Las Positas Community College District ("College District"). The Environmental Appeals Board ("Board") should deny the College District's Petition and Supplemental Petition because the College District shows no clear error in any of the Board's decisions related to fine particulate matter (*i.e.*, less than 2.5 microns in diameter) ("$PM_{2.5}$"), environmental justice, roadway modeling, or cost-effectiveness of an auxiliary boiler. The Board should also deny the College District's wholly unjustified request for a stay.

II. PROCEDURAL BACKGROUND

On November 18, 2010, after extensive briefing and oral argument, the Board issued a 136-page order denying the five remaining petitions for review in this case. *See In re Russell City Energy Center, LLC*, PSD Appeal Nos. 10-01, 10-02, 10-03, 10-04 & 10-05 (EAB Nov. 18, 2010) ("Order"). One of the five petitioners – the College District – subsequently petitioned for reconsideration, serving its Petition on November 29, 2010 and its Supplemental Petition on December 1, 2010. The College District bases its request for reconsideration on alleged "important issues raised in the College District's petition which remain unresolved and not addressed in the opinion." Pet. at 2; Supp. Pet. at 1. The College District also requests that the Board stay the effectiveness of the Order pending its review of the College District's Petition and Supplemental Petition and, if the Board denies reconsideration, for ten court days after an order denying reconsideration. Pet. at 1, 3. There is no basis for either reconsideration or a stay, and the Board should deny the College District's requests.

III. STANDARD OF REVIEW

A motion for reconsideration "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 124.19(g). "Such motions will not be granted absent a showing that the [Board] has made a clear error, such as a mistake of

law or fact." The Environmental Appeals Board Practice Manual 49 (Sept. 2010) ("EAB Practice Manual"). Moreover, "'[t]he reconsideration process 'should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of [the Board] clearly erroneous factual or legal conclusions.''" *Id.* (citing *In re Town of Ashland Wastewater Treatment Facility*, NPDES Appeal No. 00-15, at 2 (EAB Apr. 9, 2001) (Order Denying Motion for Reconsideration) (quoting *In re S. Timber Products, Inc.*, 3 E.A.D. 880, 889 (JO 1992))). The Board will entertain a motion for clarification only where the moving party "can demonstrate that an aspect of the [Board's] decision is ambiguous." EAB Practice Manual at 49 (footnote omitted).

"A motion for reconsideration shall not stay the effective date of the final order unless specifically ordered by the [Board]." 40 C.F.R. § 124.19(g). The Board may stay the effective date of its action pending reconsideration when it "finds that justice so requires." 5 U.S.C. § 705 ("When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review.").

IV. THE BOARD SHOULD REJECT THE COLLEGE DISTRICT'S REQUEST FOR RECONSIDERATION

A. The Board Did Not Err in Dismissing the College District's $PM_{2.5}$ Arguments

Although the College District cobbles together a number of arguments – some old, some new – it falls far short of establishing any error in the Board's determination that the College District's challenges to the substance of the Bay Area Air Quality Management District's ("BAAQMD's") 24-hour $PM_{2.5}$ analysis were essentially rendered moot by the Bay Area's nonattainment designation.

1. The College District's "Construction Moratorium" Argument Was Untimely

In response to the Board's finding that the College District's "construction moratorium" argument was procedurally barred because the College District failed to raise it in its petition for review, the College District quotes extensively from its September 16, 2009 comment letter (incorrectly referred to as its "Sept. 16, 2010 Response to Comments"), emphasizing, through use of bold-faced, italicized and underlined text, that these earlier comments included a reference

to all of "40 CFR Parts 51 and 52." Pet. at 10. Based upon this, the College District concludes that "contrary to the opinion that 40 CFR Part 52, within which the construction moratorium is set forth in section 52.24, is 'a completely different regulatory provision is [*sic*] raised for the first time,' it obviously is not." Pet. at 10 (quoting Order at 126 n.115).

In essence, the College District suggests that its blanket reference to the requirements for nonattainment at "40 CFR Parts 51 and 52" was adequate to excuse its failure to raise the construction moratorium as a basis for denying the permit in either its comments or in its petition for review. The College District is wrong. Its reference to the requirements for major stationary sources located in nonattainment areas is woefully inadequate to apprise either BAAQMD or the Board that it was contending that issuance of the PSD permit was prohibited by one very specific provision among the thousands of provisions appearing within the cited parts of Title 40 of the Code of Federal Regulations (Parts 51 and 52). Such a generic reference to the requirements of Parts 51 and 52 cannot possibly preserve an issue as distinct as the applicability and impact of the construction moratorium. Nor could it excuse the College District's failure to raise this issue in its initial petition. Accordingly, the Board did not err in failing to consider the substance of the College District's claims on this point.[1]

2. The College District's Clean Air Act Arguments Are Wrong

As in its comments, petition for review, and reply, the College District again fails to present any statutory or regulatory provision that supports its bald assertion that issuance of the PSD permit is prohibited pending California's development of the required SIP amendment.

The College District recites allegations made in its reply brief and at oral argument that

[1] Regarding the substance of the College District's claims concerning the construction moratorium, the College District can demonstrate no error in the Board's observation that the College District's "arguments are seemingly inconsistent with the statutes and regulations." Order at 125. The construction moratorium is inapplicable for the reasons described in detail in the sur-reply briefs filed by both BAAQMD and RCEC. *See* Respondent BAAQMD's Sur-Reply Brief, PSD Appeal Nos. 10-02, 10-03, 10-04 & 10-05 (Jun. 11, 2010) ("BAAQMD Sur-Reply") at 2-3; Russell City Energy Company, LLC's Sur-Reply Brief, PSD Appeal Nos. 10-02, 10-03, 10-04 & 10-05 (Jun. 11, 2010) ("RCEC Sur-Reply") at 3-5. Thus, no "mandatory and automatic prohibition against issuance of this permit" (Pet. at 8) exists in these circumstances, and the College District identifies no basis for such a prohibition.

BAAQMD was wrongfully reading the separate parts of the Clean Air Act in isolation from one another. *See* Pet. at 12-13. It then quotes extensively from Parts C and D of the Clean Air Act and lands on a provision that it suggests precludes issuance of a PSD permit in this case:

> Part D which sets forth the plan requirements for nonattainment areas, further specifically qualities [*sic*] its purpose as disallowing the issuance of a permit which does not satisfy applicable new source standards of performance. Specifically, sections 7501 of 42 U.S.C. provides that "***in no event* shall the application of this term** [nonattainment area] **permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance**." Clearly, this language contradicts the interpretation proposed by BAAQMD and RCEC adopted by the opinion that once a criteria pollutant becomes nonattainment, an air district or the EPA is authorized to issue a PSD permit without any consideration as to whether the facility's emissions of the nonattainment criteria pollutant will cause or contribute to an exceedance of the NAAQS even though there may be no SIP in place and/or the emissions fall below the 100 tons applicable to Appendix S.

Pet. at 14 (emphasis in original).

In addition to appearing for the first time in the College District's Petition requesting reconsideration, this argument fails to demonstrate any error in the Board's decision that the 24-hour $PM_{2.5}$ standard was no longer relevant for purposes of PSD permitting. First, in the above-quoted passage, the College District mistakenly refers to the Clean Air Act's definition of "lowest achievable emissions rate" ("LAER") as the definition of "nonattainment area." *See* 42 U.S.C. § 7501(3) (definition of "lowest achievable emission rate"); *cf.* 42 U.S.C. § 7501(2) (definition of "nonattainment area"). Furthermore, the cited portion of the definition of LAER merely provides that in no event shall LAER be less stringent than the applicable new source performance standards ("NSPS") promulgated by EPA for a particular source category under section 111 of the Clean Air Act. *See* 42 U.S.C. § 7411. This unremarkable proposition has no bearing on the Board's decision. Even if the quoted section from the definition of LAER did somehow bear upon the definition of "nonattainment area," it is difficult to imagine what the College District might be contending or how this could demonstrate any error in the Board's conclusion on this point. Accordingly, nothing in the College District's Petition changes the Board's conclusion that the College District presented "[c]onclusory arguments" that "are

seemingly inconsistent with the statutes and regulations." Order at 125.

3. The *Friends of Pinto Creek* Case Does Not Support the College District's Arguments

The College District wrongly suggests that this matter is analogous to a case concerning a National Pollutant Discharge Elimination System ("NPDES") permit, *Friends of Pinto Creek v. U.S. Envtl. Protection Agency*, 504 F.3d 1007 (9th Cir. 2007). In that case, the U.S. Court of Appeals for the Ninth Circuit reversed a Board decision denying review of an NPDES permit due to EPA's failure to abide by a specific regulatory provision that prohibits EPA from issuing permits for new discharges to impaired water bodies after development of a total maximum daily load, unless and until the discharger demonstrates that there are sufficient remaining pollutant load allocations and existing dischargers are subject to compliance schedules designed to bring the water body into compliance with applicable water quality standards. *See id*. at 1011-15. The Court found EPA's interpretation of "existing dischargers" to be contrary to the plain language of the regulation. *Id.* at 1013. In addition, the Court found that claims raised by petitioners in the second comment period could not have been raised in the first comment period and therefore should not have been deemed forfeited by the Board. *See id*. at 1016.

In contrast, in this case, the College District can demonstrate no violation of any regulatory requirement that prohibited issuance of the PSD permit once the 24-hour $PM_{2.5}$ nonattainment designation became effective and prior to California's development of the required SIP amendment. Moreover, the College District failed in any public comment period or its in petition for review to present any legal basis that might preclude issuance of a PSD permit in these circumstances. Thus, the situation presented by *Friends of Pinto Creek* is wholly inapposite to the Board's dismissal of the College District's arguments.

In sum, the College District failed to identify any clear error in the Board's determination that the Bay Area's nonattainment designation essentially rendered moot all of the College District's claims concerning alleged deficiencies in the 24-hour $PM_{2.5}$ analysis. Further, the College District failed to identify any error in BAAQMD's and RCEC's argument that BAAQMD correctly determined that the project would not cause or contribute to a violation of the 24-hour $PM_{2.5}$ standard, as described in the following sections.

B. The Board Did Not Err in Dismissing The College District's Environmental Justice Challenge as Dependent on Its 24-Hour $PM_{2.5}$ Arguments

The College District objects to the Board's dismissal of its environmental justice challenge, arguing that this challenge "Was Sufficiently Distinct Entitling The Community To An Opinion On Those Issues." Pet. at 16. This objection has no merit.

In its petition for review, the College District argued that "BAAQMD's environmental justice analysis is built on a faulty foundation" because the project's contribution allegedly would exceed the 1.2 micrograms per cubit meter ("$\mu g/m^3$") significant impact level ("SIL") for the 24-hour $PM_{2.5}$ standard and because BAAQMD allegedly failed to consider impacts from other roadways and to plot out results of modeling performed at higher than the permitted emissions rate. *See* Petition for Review of Prevention of Significant Deterioration Permit and Request for Oral Argument By Chabot-Las Positas Community College District (Mar. 22, 2010) ("Mar. 22, 2010 Pet.") at 36-37. These arguments relate solely to the 24-hour $PM_{2.5}$ analysis, which was no longer relevant once the nonattainment designation became effective.

Further, when asked at oral argument whether its environmental justice arguments were derivative of its arguments concerning the 24-hour $PM_{2.5}$ analysis, the College District's legal counsel responded in a way that could only lead the Board to conclude that such arguments were all related to the air quality impacts analysis concerning the 24-hour $PM_{2.5}$ standard.[2] According to the Petition, "[a] fair reading of the transcript reflects counsel attempting to explain that there was limited reliance and that 'part of the environmental justice argument' also relies on the run, *but not all*." Pet. at 19 (emphasis in original). When it had the opportunity to explain what other legal basis or set of facts might support its environmental justice argument, however, the College District referred to nothing more than the very same "2,400 additional sensitive receptors which

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[2] *See* Oral Arg. Tr. at 28 (confirming Judge Reich's understanding that the modeling issues relate specifically to the $PM_{2.5}$ 24-hour standard); *id*. at 29 (College District responding that BAAQMD's characterization of its environmental justice analysis as an offshoot of its concerns regarding 24-hour $PM_{2.5}$ was "somewhat limited because part of the environmental justice argument also relies on the fact that the run, which we obtained from The District, essentially, inadvertently shows that there is a violation and that there are 2,400 additional sensitive receptors which have not been mapped out and not plotted . . . and we do not know where they are located.").

have not been mapped out and not plotted."[3] Oral Arg. Tr. at 29. Thus, the Board did not err in denying the College District's environmental justice claims as wholly derivative of its claims of alleged deficiencies in the $PM_{2.5}$ air quality impacts analysis.

Moreover, as a substantive matter, the College District failed to demonstrate any error in BAAQMD's conclusion that the project would not cause or contribute to a violation of the 24-hour $PM_{2.5}$ NAAQS. *See* BAAQMD's Response to Petition for Review, PSD Appeal No. 10-02 (Apr. 23, 2010) ("BAAQMD Resp.") at 15-32; RCEC's Response to Petition for Review Filed by Chabot-Las Positas Community College District, PSD Appeal No. 10-02 (Apr. 23, 2010) ("RCEC Resp.") at 5-35. In addition, as demonstrated by RCEC's response and sur-reply, all of the exceedances of either the 24-hour or annual $PM_{2.5}$ SIL occur *outside* of the priority community identified by the College District. *See* RCEC Resp. at 50-52; RCEC Sur-Reply at 11-12. Thus, to the extent that the College District alleges that any impact in excess of a $PM_{2.5}$ SIL in an identified environmental justice community would warrant denial of the permit, RCEC demonstrated that the project would have no such impacts within the identified priority community. *Id*. As a consequence, the College District's arguments concerning the alleged impact of exceedances of the SIL upon an environmental justice community lack merit.

C. The Order Does Not Contradict Board Precedent on Environmental Justice

The College District fails to demonstrate that the Board's denial of its environmental justice claims is inconsistent with Board precedent. The College District recites various Board decisions, all supportive of the proposition that "[t]his Board's precedent is that ***if*** **the project 'will not result in exceedance of the NAAQS or PSD increment' then the agency has complied**." Pet. at 22 (emphasis in original) (citing *Shell Offshore*, slip. op. at 67-68).[4] The College District then argues that the Board's Order "completely disregard[s] the undisputed evidence that RCEC will increase the community's PM2.5 concentration levels to greater than

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[3] These are same 2,400 receptors the College District alleged had exceeded the 24-hour $PM_{2.5}$ SIL in modeling runs conducted at higher than the permitted emissions rate. *See infra* at 9.

[4] The College District misquotes the Board's decision in *In re Shell Offshore, Inc.* *See* 13 E.A.D. 357, 405 (EAB 2007).

1.2 ug/m3, the significant impact level." Pet. at 23.

This is simply false. Both BAAQMD and RCEC demonstrated that, although not relevant to issuance of the PSD permit, BAAQMD's 24-hour $PM_{2.5}$ analysis confirms that the project would not cause or contribute to any exceedance of the 24-hour $PM_{2.5}$ NAAQS. *See* BAAQMD Resp. at 15-32; RCEC Resp. at 5-35. Moreover, BAAQMD's determination was clearly rooted in Board precedent, which affirms EPA guidance that, where a source's impacts above the SIL do not coincide both spatially and temporally with predicted exceedances of the NAAQS, the source does not cause or contribute to a violation of the NAAQS and the permit can be issued. *See, e.g., In re Prairie State Generating Co.*, 13 E.A.D. 1, 103-09 (EAB 2006) (affirming decision to issue permit where modeled NAAQS violations were not coincident in both time and location with the source's modeled impacts above the SIL). The College District ignores this and instead persists as though it has demonstrated that the project would cause or contribute to a violation of the 24-hour $PM_{2.5}$ NAAQS – which it has not done and could not do.

The College District then quotes heavily from a Board decision concerning EPA's authority to avoid threats to the health or the environment of a low-income or minority community under the omnibus clause of the Resource Conservation and Recovery Act ("RCRA"). *See* Pet. at 23-25. Again, the College District's allegations of harm relate entirely to its unfounded allegations that the project would result in exceedance of the 24-hour $PM_{2.5}$ SIL in "a community already suffering from environmental and health degradation." *Id*. at 25-26. This contention is wholly unfounded, and the College District failed to provide any evidence of an exceedance of the 24-hour $PM_{2.5}$ SIL within the boundaries of the community identified by the maps it submitted with its Supplemental Errata. *See* RCEC Sur-Reply at 11-12. Nor would any evidence of such an exceedance of a SIL require denial of a PSD permit, absent some further showing that it also resulted in an exceedance of the NAAQS or in adverse impacts to low-income or minority communities. But the College District made no such showing, and the Board did not err in denying the College District's environmental justice claims.

D. The Board Did Not Err in Dismissing The College District's Roadway Modeling Arguments

The College District next attempts to argue that the Board erred in failing to reach its

claims concerning BAAQMD's alleged failure to model certain additional roadways. According to the College District, these claims were "brushed under the dismissal of the '24-hour claims,'" when "[t]here was no agreement by counsel that the air modeling issues were completely 'dependent' on the recognition that BAAQMD has a duty not to issue a permit in violation of any NAAQS." Pet. at 30-31. This argument falls flat and provides no basis for reconsideration.

Although the College District suggests that its roadway arguments somehow went beyond the 24-hour $PM_{2.5}$ analysis and concerned the annual $PM_{2.5}$ standard (*see* Pet. at 27), all the evidence is to the contrary. First, in its petition for review, the College District based its arguments concerning modeling of additional roadways solely upon its allegations concerning the 24-hour $PM_{2.5}$ modeling. *See* Mar. 22, 2010 Pet. at 33 (providing the following heading: "No Cumulative Impact Analysis Has Been Performed Because BAAQMD Erroneously Excluded Emissions From All Nearby Roadways But One And There Are Over 2,400 Additional Locations Within A Seven Mile Radius Where The 1.2 ug/m3 SIL Was Exceeded Which Remains [*sic*] Unplotted And Not Disclosed."). Similarly, in its Petition, the College District resorts entirely to these same allegations concerning BAAQMD's failure to plot out 2,400 receptors as part of the 24-hour $PM_{2.5}$ impacts analysis. *See* Pet. at 30 ("The fundamental problem with this analysis, however, is that there are 2,400 additional receptors that exceed the SIL which locations remain unknown and not plotted out . . . ."). According to the College District, "[a]ssuming that some of these 2,400 additional receptors that exceed the SIL are located near these significant roadways that BAAQMD excluded, which remains unknown, applying BAAQMD's own rationale, the air modeling remains incomplete." *Id*. Thus, the only basis the College District proffers in its Petition to suggest that its roadway argument went beyond the 24-hour $PM_{2.5}$ analysis refers solely to alleged 24-hour $PM_{2.5}$ impacts.

At oral argument, the College District's counsel unequivocally confirmed to the Board that its arguments concerning modeling of roadways concerned the 24-hour $PM_{2.5}$ standard:

> JUDGE REICH: Okay. And just to make sure I understand the extent of the PM 2.5 24-hour issue, the way I read it, the modeling issues that you discuss both sort of in general and specifically as to the roadways, both seem to relate specifically to the PM 2.5 24-hour. Is that correct?

MS. HARGLEROAD: That is correct, Your Honor.

Oral Arg. Tr. at 28. In light of this, the College District could not have been any clearer in stating that its arguments concerning modeling of roadways were limited solely to its arguments concerning alleged deficiencies in BAAQMD's 24-hour $PM_{2.5}$ modeling analysis.

Furthermore, even if the College District's claims concerning the failure to model certain roadways had not been mooted by the nonattainment designation, the College District completely fails to show any error in BAAQMD's decision to include only Highway 92 in its $PM_{2.5}$ analysis. *See* BAAQMD Resp. at 24-32; RCEC Resp. at 25-35. Accordingly, the College District fails to demonstrate any basis for reconsideration.

E. The Board Did Not Fail To Address or Err in Addressing The College District's Auxiliary Boiler Arguments

Despite the significant effort that went into the Board's opinion with respect to BAAQMD's cost-effectiveness analysis of an auxiliary boiler, the College District argues that reconsideration is warranted because the Board barred certain arguments on procedural grounds. The Board properly barred such arguments, and the College District's claims provide no basis for reconsideration.

First, the College District disputes the Board's conclusion that the College District failed to preserve its challenge to the annualized cost estimate that supported BAAQMD's auxiliary boiler cost-effectiveness analysis.[5] *See* Supp. Pet. at 3-4. To support its claim that it adequately preserved this challenge, the College District quotes from its September 16, 2009 comments[6] and suggests that, by qualifying its description of the cost estimate, "as provided by Calpine," and of the cost-effectiveness, "as calculated by Calpine," the College District disputed the factual basis

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[5] The Supplemental Petition alleges that an auxiliary boiler "would substantially reduce CO emissions, a precursor to ozone for which the Bay Area in [*sic*] nonattainment." Supp. Pet. at 1. However, CO is not a precursor to ozone, either for purposes of PSD permitting or nonattainment NSR permitting. *See* 40 C.F.R. § 52.21(b)(50)(i)(*a*) ("Volatile organic compounds and nitrogen oxides are precursors to ozone in all attainment and unclassifiable areas."); 40 C.F.R. § 51.165(a)(1)(xxxvii)(C)(*1*) ("Volatile organic compounds and nitrogen oxides are precursors to ozone in all ozone nonattainment areas.").

[6] The College District again incorrectly identifies these as its "Sept. 16, 2010" comments. *See* Supp. Pet. at 4.

for the annualized cost estimate. *See* Supp. Pet. at 4. However, any suggestion of skepticism implied by these qualified statements falls far short of the level of specificity required to preserve a substantive dispute concerning the cost estimate. While the College District also recites certain claims it included in its petition concerning BAAQMD's reliance on a cost estimate for an auxiliary boiler intended for Minnesota or allegedly six times larger than needed for the project (*see* Supp. Pet. at 4), the College District fails to demonstrate that it ever adequately preserved this issue for appeal in its comments.[7] Although its comments may have challenged BAAQMD to reexamine its conclusion that the costs associated with requiring an auxiliary boiler would not be justified (*see* Supp. Pet. at 4), these comments related solely to the College District's substantive dispute concerning the amount of reductions that could be achieved through use of an auxiliary boiler; they in no way were adequate to put at issue the underlying cost estimate used by BAAQMD in the analysis. Accordingly, the Board did not err in finding that the College District's challenge to the annualized cost estimate was not preserved for appeal.

Second, the College District again attempts to cause confusion regarding the size of the auxiliary boiler used in BAAQMD's cost-effectiveness analysis by suggesting that the much larger boiler at Calpine's Los Medanos Energy Center ("LMEC") provided the basis for this cost estimate. *See* Supp. Pet. at 6-7. Both BAAQMD and RCEC already explained in detail that LMEC's larger boiler, which is rated at 320-million British thermal units ("MMBtu") per hour ("/hr") and is used to provide steam to its cogeneration client, was only used to establish the emissions rates (in pounds of emissions per MMBtu) needed to calculate *the small offsetting increase in emissions from the boiler itself*.[8] The College District's suggestion that BAAQMD

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[7] *See* BAAQMD Resp. at 40 ("Petitioner made no mention in its comments of any potential concerns with the District's cost numbers that it used in the auxiliary boiler cost-effectiveness analysis. In fact, Petitioner itself endorsed the District's cost numbers in its own cost-effectiveness calculations."); RCEC Resp. at 42 ("No comment was received that raised any concern with the size of the boiler used in the Air District's cost-effectiveness analysis, its appropriateness for the proposed Project, or the related cost estimates.").

[8] *See* BAAQMD Resp. at 42 ("In preparing the analysis of the Mankato data, therefore, it was necessary to calculate the emissions that would come from a 70 MMBtu/hr boiler if it were to be installed at the Russell City facility under California's strict emissions-control regulations. The Mankato emissions reduction spreadsheet therefore did so, using as a basis the emissions performance of the boiler at the Los Medanos Energy Center ('LMEC'), a cogeneration facility

(Footnote Continued on Next Page.)

relied upon LMEC's boiler as the basis for the cost used in its analysis can only be intended to confound the matter further. It does not provide any basis for the Board to grant reconsideration.

Finally, the College District argues that the Board erred in barring the College District from raising in its reply the argument that BAAQMD's own rules precluded consideration of cost for achieved-in-practice technologies. *See* Supp. Pet. at 7-9. To suggest that it previously raised this argument, the College District cites its petition for review – an auxiliary boiler is "a common and available piece of equipment in use in other natural gas plants similar to that proposed RCEC and utilized as BACT" (*id.* at 8 n.4 (quoting Mar. 22, 2010 Pet. at 22)) – as well as "the general theme of its comments to BAAQMD." *Id.* at 8. Such statements fail, however, to bear any resemblance to the argument the College District made for the first time in its reply brief. Accordingly, the Board did not err in dismissing the College District's claim as untimely.[9]

V. THE BOARD SHOULD REJECT THE COLLEGE DISTRICT'S REQUEST FOR A STAY

The College District requests two stays of the Board's November 18, 2010 Order: a first stay that would be effective pending the Board's review of the College District's Petition, and a second stay that would be effective "at least ten court days after any Order denying reconsideration to enable the College District to petition for review to the Court of Appeal and concurrently move to stay the effectiveness of the order upon the expiration of those ten court days." Pet. at 1. According to the College District, "so that this Board's jurisdiction may be fully preserved to address these important issues, the College District urges the Board to issue a stay of the effectiveness of its November 18, 2010 Order . . . ." *Id.* at 32. In addition, the College District argues that "[g]iven the Board has not reached these issues which raise important policy questions, in order to protect the public's health and safety, the College District

(Footnote Continued from Previous Page.)

in the San Francisco Bay Area with a large 320 MMBtu/hr boiler used to generate steam for sale to the plant's cogeneration client."); *see also* RCEC Resp. at 44.

[9] The College District also fails to demonstrate any reason why the Board's substantive decision on this point, which it made in response to the claims of Citizens Against Pollution ("CAP"), is unsatisfactory. *See Order* at 45 n.35 ("To the extent the College District is reiterating CAP's argument on that point, the Board has already addressed that issue.").

requests that the Board stay the effectiveness of its November 18, 2010 order . . . ." Supp. Pet. at 9. These are the College District's only justifications for a stay. For the reasons discussed below, the College District's justifications are wholly inadequate for a stay either during reconsideration or after denial of the College District's request for reconsideration.

The Board may stay the effective date of its action when it "finds that justice so requires." 5 U.S.C. § 705. Federal agencies use a variety of approaches to determine when "justice so requires" them to stay a decision during either administrative or judicial review.[10] A number of agencies use the same standard that courts use in assessing whether to issue a stay.[11] In the Ninth Circuit, a party seeking a stay "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of relief, [3] that the balance of equities tip in his favor, and [4] that a stay is in the public interest." *Humane Soc'y of the United States v. Gutierrez*, 558 F.3d 896 (9th Cir. 2009) (citing *Winter v. Natural Resources Def. Council, Inc.*, ---U.S. ---, 129 S. Ct. 365, 374 (2008)) (hereinafter, "the four *Winter* factors").

Whichever test the Board uses to assess whether "justice so requires" it to stay the Order, it should deny the College District's request. As an initial matter, the College District's allegations are woefully inadequate to justify a stay. As the moving party, the College District has the burden to justify that a stay is warranted. *See, e.g., Humane Society*, 558 F.3d at 896 ("A party seeking a stay must establish [the four *Winter* factors]."). The College District's only justifications, however, are to "fully preserve[]" the Board's jurisdiction (Pet. at 32) and to

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[10] For example, the Federal Energy Regulatory Commission considers three factors in determining whether to issue a stay: (1) whether the moving party will suffer irreparable injury without the stay; (2) whether issuing the stay will substantially harm other parties; and (3) whether a stay is in the public interest. *See, e.g., In re Columbia Gas Transmission LLC*, 129 FERC P 61021, 61090, 2009 WL 3239660 (FERC Oct. 9, 2009) (Order Denying Motion for Stay). The Federal Trade Commission uses an "equity or public interest standard" that assesses the cost of granting a stay and the injury entailed in declining to grant a stay. *See, e.g., In re Cal. State Bd. of Optometry, Am. Optometric Ass'n, Cal. Optometric Ass'n, & Ark. State Bd. of Optometry*, 1989 WL 1182567 (FTC Sept. 1, 1989) (Order Denying Petitions for Stay and Exemptions).

[11] *See, e.g., In re McCafferty*, 1996 WL 897658 at *1 (DOL Adm. Rev. Bd. Oct. 16, 1996) (Order Denying Stay) ("The courts have developed a four part test to determine when agency action should be stayed, and some agencies, including the Department of Labor, have applied those standards in deciding whether to stay their own actions.").

"protect the public's health and safety." Supp. Pet. at 9. The Board has jurisdiction to decide a motion for reconsideration regardless whether it issues a stay. *See* 40 C.F.R. § 124.19(g). The College District offers no explanation whatsoever of the effect of a stay on the Board's jurisdiction. Nor does the College District explain how the public's health and safety could possibly be affected as a result of the concerns it has articulated by the commencement of the 32-month construction schedule anticipated by RCEC.[12] The College District's request should be denied on the basis of insufficient allegations alone.

Moreover, even if the College District attempted to justify a stay, it would fail. For the reasons discussed above, the College District did not demonstrate *any* error in the Board's decision and is highly unlikely to succeed on merits. The College District also cannot show any "irreparable harm," or an injury at all, if the Board declines to grant a stay: all of the harms that the College District alleges (*i.e.*, the plant's alleged violation of the NAAQS for 24-hour $PM_{2.5}$, alleged impacts on an environmental justice community, alleged cumulative effects with roadway emissions, and failure to use an auxiliary boiler) would occur *after* construction of the plant, during plant operation. *See, e.g., Palm Beach County Envtl. Coal. v. Florida*, 587 F. Supp. 2d 1254, 1257 (S.D. Fla. 2008) (denying plaintiff's request to cease power plant construction in part because "[p]laintiffs also failed to demonstrate irreparable harm at this point because the permitting and construction of the pipeline and intake system has already been accomplished, and the plant will not be operational for many months."). RCEC recently began plant construction, which, as discussed above, is scheduled to take 32 months. Thus, all of the College District's alleged harms, even if they had merit, which they do not, would occur more than two and a half years in the future. In contrast, a stay would impose certain, immediate, and severe harm on RCEC. Within five days of the Board's November 18, 2010 decision, RCEC issued a full notice to proceed, and RCEC's contractor has now begun on-site construction activities that

[12] *See* Russell City Energy Company, LLC's Opposition to Petitioners' Motions for Leave To File a Reply Brief and Request for Expedited Consideration, PSD Appeal Nos. 10-01, 10-02, 10-03, 10-04 & 10-05 (May 18, 2010) ("RCEC's Request for Expedited Consideration") at 54 (citing Exhibit 47, construction schedule, Russell City, California USA, prepared by Bechtel, Frederick, MD, Job No. 25483-001, Schedule Number Sch-001, Rev. F, Jan. 8, 2010).

were prohibited prior to the Board's decision. If RCEC had to stop construction at this point, it would face both daily damages up front and damages later for missing its operation deadline. Moreover, RCEC is subject to numerous contractual deadlines already renegotiated multiple times due to the extensive 18-month permitting process conducted by BAAQMD that would be practically impossible to alter at this late date. Thus, any balancing of equities tips completely in favor of denying a stay. Finally, a stay would not be in the public interest. Where, as here, a project that complies with all applicable requirements would provide a highly efficient and reliable source of power, as well as hundreds of union construction jobs at a time of high unemployment,[13] the public interest is served by allowing the project to proceed as scheduled.

Because the College District failed to allege the existence of any factor justifying a stay – and would be unable to do so – the Board should reject its unsubstantiated request.

VI. CONCLUSION

RCEC respectfully requests that the Board reject the College District's request for reconsideration and stay of the Board's Order denying review. The College District falls far short of establishing any error by the Board, and its request for a stay is wholly unjustified.

Respectfully submitted,

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Dated: December 10, 2010

[13] "For Alameda County, [failure to complete the project] would mean a loss of 650 union construction jobs . . . . Thus, the Project represents a much-needed *de facto* stimulus package for Alameda County and surrounding areas requiring no federal funding, at a time when the unemployment rate within Alameda County has risen to just below 12 percent and construction jobs are down more than 11 percent over the past year." RCEC's Request for Expedited Consideration at 57 (citations and footnotes omitted).

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of December, 2010, a copy of the foregoing Russell City Energy Company, LLC's Opposition to Chabot-Las Positas Community College District's Petition and Supplemental Petition for Reconsideration or Alternatively Clarification and Request for Immediate Stay of Effective Date of November 18, 2010 Order Denying Review was served via first-class U.S. mail, postage prepaid, to:

Nancy J. Marvel, Regional Counsel
Office of Regional Counsel
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

I hereby certify that on the 10th day of December, 2010, copies of the foregoing Russell City Energy Company, LLC's Opposition to Chabot-Las Positas Community College District's Petition and Supplemental Petition for Reconsideration or Alternatively Clarification and Request for Immediate Stay of Effective Date of November 18, 2010 Order Denying Review were served, per their consent and agreement with the undersigned, via electronic mail to:

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