

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

2008 OCT 17 AM 10:18  
ENVIR. APPEALS BOARD

In the matter of )  
Russell City Energy Center ) PSD Appeal No. 08-07  
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)  
)

**RESPONSE TO PETITION FOR REVIEW**  
**REQUESTING SUMMARY DISMISSAL**

Pursuant to the October 2, 2008, letter from the Clerk of the Board, Respondent the Bay Area Air Quality Management District ("Air District") hereby submits this Response Requesting Summary Dismissal of the above-captioned matter. As explained herein, the Petition for Review should be summarily dismissed with respect to Respondent Air District because it does not identify any permitting decision by the Air District within the Environmental Appeals Board's scope of review. The Board therefore lacks jurisdiction over the Petition with respect to the Air District and must dismiss it.

**I. The Air District Has Not Taken Any Permit Action Subject To Review**

Under 40 C.F.R. Sections 124.19(a) and (b), the Environmental Appeals Board's jurisdiction over permitting matters extends to review of a "permit decision" under certain federal statutes, including Prevention of Significant Deterioration ("PSD") permitting under the Clear Air Act. But Petitioner does not allege that Respondent Air District has made any federal PSD "permit decision" here that could be subject to EAB review. To the contrary, the only decisions that Petitioner even alludes to with respect to the Russell City Energy Center<sup>1</sup> are two

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<sup>1</sup> The Petition for Review also makes allegations regarding the Humboldt Bay Repower Project, which is apparently a proposed power plant modification project subject to CEC jurisdiction in another area of California outside of the jurisdictional boundaries of the Bay Area Air Quality Management District. (See Petition at pp. 3-5.) The Board has bifurcated the Petition for Review into two dockets, one for the Russell City Energy Center issues and another for the Humboldt Bay Repower Project. As the Air District has been asked to respond only in the Russell City docket, and as the Humboldt Bay project is not within the San Francisco Bay Area,

state-law decisions made within the sole discretion of the California Energy Commission (“CEC” or “Energy Commission”) under California’s Warren-Alquist Act (California Public Resources Code sections 25000 *et seq.*):

- (i) The Commission’s July 30, 2008, decision to extend the period of the license it granted for the Russell City Energy Center; and
- (ii) The Commission’s subsequent decision not to grant reconsideration of that extension.

As the Board recognized in its October 2, 2008, letter,<sup>2</sup> these were licensing decisions made by the Energy Commission, not by the Air District. The Air District played no part in the decisions, and so there can be no action by the Air District for the Board to review. *See, e.g., In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 73-74 (EAB 1997) (declining to review a power plant licensing decision by the government of Puerto Rico in the context of a PSD permit appeal). Moreover, regardless of what agency made these decisions, decisions regarding whether to extend a state-law license under California’s Warren-Alquist Act are not federal PSD permitting issues within the jurisdiction of the Environmental Appeals Board, but matters of state law to be addressed through the state system. As such, they would not be reviewable by the Board even if they somehow could have been made by the Air District. *See In re Russell City Energy Center*, PSD Appeal No. 08-01, slip. op. at p. 40 (EAB July 29, 2008) (“State of California requirements” . . . “are outside the Board’s jurisdiction”); *see also In re Sutter Power Plant*, 8 E.A.D. 680, 690 (EAB 1999) (“The Board may not review, in a PSD appeal, the decisions of a state agency made pursuant to . . . state or local initiatives not otherwise relating to permit conditions implementing the PSD program.” (citations omitted)). For both of these reasons, the Petition for Review has

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the Air District does not address any of the purported Humboldt Bay issues raised by the Petition.

<sup>2</sup> The October 2, 2008, letter recognizes on page 1 that “the action being complained of is apparently one taken by the California Energy Commission.”

not identified any federal permitting decision by the Air District that this Board may review. The Petition must therefore be dismissed with respect to the Air District.<sup>3</sup>

## **II. The Petition For Review Does Not Allege Any Impropriety By The Air District**

Not only does the Petition fail to identify any federal PSD permit decision that could be subject to EAB review at this stage, the Petition does not identified any alleged impropriety of any type on the part of the Air District. The Air District is diligently working on re-issuing a draft PSD permit for the Russell City Energy Center, and on providing further public notice of and an opportunity to comment on that draft permit, as directed by the Board in its Remand Order in PSD Appeal No. 08-01. *See* Remand Order, *In re Russell City Energy Center*, Appeal No. PSD 08-01 (EAB July 29, 2008) (“Remand Order”). Indeed, the fact that the Air District is in the process of doing so was the reason that the Energy Commission extended its license, and it is at the center of the concerns that Petitioner claims to have with the Commission’s decision to do so. *See* Petition at p. 2 (objecting to the CEC’s extension of its license while the Air District is “process[ing] the PSD permit”). There is simply no way that the Air District can be faulted for actions being taken expressly in response to an order of this Board. Thus even if there was some Air District permitting action that could be subject to EAB review at this time, there would be no substantive grounds on which such review could be granted based on the Air District’s conduct.<sup>4</sup>

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<sup>3</sup> Because there has been no “permit decision” by the Air District subject to Board review, Petitioner cannot satisfy the pre-requisites for review of a permit decision under 40 C.F.R. section 124.19, including timeliness, standing, and preservation of issues for review.

<sup>4</sup> The Petition does attack the Air District for “declin[ing] [Petitioner’s] request to inform the CEC of the remand or its ramifications.” (Petition at p. 2.) But the Energy Commission did not need to be informed of the remand or its ramifications, as the Commission had already been so informed from multiple sources. The Board itself served the Commission with the Remand Order (*see* Certificate of Service, unnumbered final page of Remand Order); and Petitioner also brought it to the Commission’s attention at a hearing the day after the Remand Order was issued, at which time the Commission took judicial notice of the Remand Order (*see* Petition at p. 1; “Petition for Reconsideration *etc.*”, Exh. 1a to Petition, at p. 3). In light of these facts – taken from Petitioner’s own submissions – Petitioner’s criticisms of the Air District’s alleged inaction appear to be little more than an *ad hominem* attack on the Air District staff with whom Petitioner discussed this issue.

### **III. The Petition For Review Provides No Basis For Sanctions**

Petitioner also requests that the Environmental Appeals Board sanction the Air District by ordering the Air District to pay Petitioner an amount equal to the fees the Air District has charged for processing the Russell City Energy Center permit application. *See* Petition at p. 5. But Petitioner cites no authority under which the Board may order sanctions against a permitting agency in an appeal of a permit decision, and the Air District has found none anywhere in 40 C.F.R. Part 124, the Board's precedents, or anywhere else.<sup>5</sup> The request for sanctions should therefore be dismissed with respect to the Air District for lack of jurisdiction and authority.

Moreover, even if the Environmental Appeals Board were authorized to order sanctions for violations of Board orders or the Clean Air Act's permitting requirements, Petitioner has not shown any impropriety on the part of the Air District here that could warrant any sanction here, as explained above. Petitioner makes the inflammatory allegations that the Air District is "ignor[ing] or mutilat[ing] EAB orders and the Clean Air Act" (Petition at p. 5), but has alleged nothing of substance that the Air District has done wrong. To the contrary, Petitioner's own submissions show that the Air District is in the process of doing exactly what the Board asked it to do in its Remand Order – to re-notice the draft PSD permit and provide further opportunity for public comment. Petitioner's request for "sanctions" should therefore be denied on the merits even if the Board were to find that its jurisdiction extends to sanctions over permitting agencies.

### **IV. The Petition For Review Should Be Dismissed With Respect To The Air District**

For all of these reasons, the Petition for Review should be summarily dismissed with respect to the Air District. Petitioner has not alleged any permitting action by the Air District that the EAB would have jurisdiction to review nor any matter over which the EAB would have

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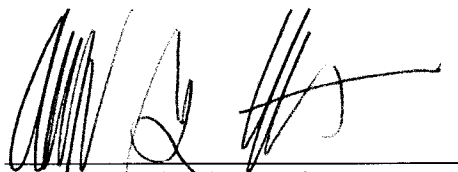
<sup>5</sup> Notably, authority for EPA's Environmental Appeals Board to order monetary sanctions against an EPA regional office for issuing PSD permits would create the anomalous potential for one branch of EPA, the EAB, to order monetary sanctions against another branch of the same agency, the relevant EPA regional office issuing the permit. The fact that the Air District issues EPA's PSD permits in the Bay Area on EPA's behalf would be a distinction without a difference.

jurisdiction to order sanctions. Moreover, on the merits Petitioner has not alleged any impropriety on the part of the Air District in responding to the Board's Remand Order.

Dated: October 16, 2008

Respectfully submitted,

BRIAN C. BUNGER, ESQ.  
DISTRICT COUNSEL  
BAY AREA AIR QUALITY MANAGEMENT  
DISTRICT



By: Alexander G. Crockett, Esq.  
Assistant Counsel

**STATEMENT REGARDING AGENT FOR SERVICE ON  
RESPONDENT AIR DISTRICT**

Pursuant to the requirements of Section I.G.4. of the Environmental Appeals Board Practice Manual, the following person is authorized to receive service in this proceeding on behalf of Respondent Air District:

Alexander G. Crockett, Esq.  
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**PROOF OF SERVICE**

I, Charlene Forbush, declare as follows: I am over the age of 18, not a party to this action, and employed in the City and County of San Francisco, California, at 939 Ellis Street, San Francisco, CA 94109. On the date set forth below, I served this document, "Response to Petition for Review Requesting Summary Dismissal", by placing a copy of it in a sealed envelope, with First Class postage thereon fully paid, and depositing said envelope in the United States Mail at San Francisco, California, addressed to the person set forth below:

Mr. Rob Simpson  
27126 Grandview Avenue  
Hayward, CA 94542

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on October 16, 2008, at San Francisco, California.



Charlene Forbush