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

In re: Delta Energy Center	PSD Appeal No. 17-01

RESPONSE OF HELPING HAND TOOL AND ROB SIMPSON TO ORDER REQUESTING RESPONSE TO PETITION FOR REVIEW ADDRESSING BOARD'S JUSRISDICTION

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I. Introduction

First, I wish to commend the Environmental Appeals Board for expeditiously summarizing salient points from my petition despite my perhaps unartful presentation. My desire with this response is to clarify the points myself and helping hand tools made and show how the Environmental Appeals Board has jurisdiction to hear my claims.

II. Argument

To start, the order states:

> Petitioners argue that Delta's PSD permit is premised on the fact that its plant would operate in combined cycle mode as opposed to simple cycle mode, and that the CEC therefore 'effectively modified' Delta's PSD permit in violation of federal law when the CEC approved Delta's request for temporary safety modification. *Id.* at 5. Petitioner further asserts BAAQMD 'appears to have failed to adequately supervise the CEC in this action' and 'they appeared to have no role in the amendment.' *Id.* at 2." [1]

My intent was the claim that the project is a physical modification, requiring a PSD permit modification, which disables the more efficient combined cycle mode or BACT. The California Energy Commission ("CEC") issued that PSD permit modification but failed to follow any PSD rules, including those not approved into the SIP. Under color of authority delegated by the air district the CEC modified the PSD permit for the Delta Energy Center.

Delta Energy Center misstates my appeal by stating;

> "Petitioners' claims can be reduced to the contention that a PSD permit amendment should have been sought by Delta Energy Center and issued by BAAQMD with respect to the temporary safety modifications authorized by the CEC."[2]

My contention on appeal is clear that "The amendment modified the 'PSD permit.'" A permit has been issued through the CEC's "exclusive power" albeit with the CEC's reckless abandon to "supersede any applicable statute, ordinance, or regulation." PRC 25550. Bolstered by the prohibition against judicial review of CEC power plant actions. Delta is acting on the permit now, despite this appeal. The air district is not exercising regulatory authority and there is no other recourse for review of the permitting decision at the state level.

It is not even clear if the project would remain under the same Clean Air Act classification if it is not a steam generating unit, using steam production to increase efficiency. It is clear that it would be less efficient under the proposed operating scenarios than it would be prior to the physical modification or even a simple cycle unit. I also contend that there is nothing inherently temporary about the modification.

The CEC transcript reflects;

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[1] EAB ORDER REQUESTING RESPONSE TO PETITION FOR REVIEW ADDRESSING BOARD'S JURISDICTION pg. 2

[2] Delta Energy Center response pg. 4

> MS. ROOT: No. This is not a permanent amendment. You know, because the investigation is ongoing and we don't know the root cause, right now our best guess is possibly a year. But we will revisit this when the investigation's further along. And if this is becoming a permanent situation we will insist that an amendment be
> filed.
> MR. HARRIS: we don't have a good sense of exactly when we'll have some good information on what occurred, but once we have that information at that point we'll be at a decision point of whether we would proceed with the repairs.

Yet no reservation on the time which the facility could operate without combined cycle control equipment or authority to redress the issue at a later time was included in the order/permit.

It is apparent now that BAAQMD's role in this action was to cede its authority to the CEC. They have apparently taken no enforcement action (as none may be available at the state level) and have otherwise utterly failed to supervise the CEC permit issuance in this matter.

If PSD permits can continue to be modified by the CEC and operators can profit by such deregulation, there may be a complete undermine of PSD permitting integrity in California Power plants. Operators may receive significant insurance proceeds, cancel unfavorable contracts and operate without emission controls by disabling *control* equipment. All issues contained herein are important policy issues that the board should consider.

There is no substantive judicial or other review of CEC power plant decisions in California. There was no opportunity to intervene or gain standing for review, no substantive response to comments, no conforming public notice... and any review of CEC decisions on power plants is meant to proceed directly to the California Supreme Court and review is limited to, "if the CEC regularly pursued its authority" not a trial on the merits or PSD issues. The California Supreme Court has also consistently and without exception denied review of CEC power plant license issues. Air Quality laws with respect to power plants in California are not "legally enforceable."[3]

The Order states;

> "However, a Clean Air Act PSD permit is one example of an additional approval that, if required, must be obtained separately from the CEC's certification process. *Id."*[4]

Although cited to www.energy.ca.gov, I was unable to find that information in the noted citation. On the contrary, the CEC understands that it may seize additional authority if it appears to be a state issued PSD permit. They exercise absolute authority in California modifying any state permit that they wish without recourse. They made it clear that they understand the distinction in a letter from the CEC Executive Director to the EPA administrator lambasting the EAB, they state;

> "frivolous (*EAB*) appeals often lead to lengthy delays in the construction of power plants in California….opponents can get the same effect (preconstruction injunction) without even hiring a lawyer by merely filing a comment letter and then re-filing it with the EAB…appeals typically

[3] See, California Public Resources Code 25531 that states "The decisions of the commission on any application for certification of a site and related facility are subject to judicial review by the Supreme Court of California." And that "No new or additional evidence may be introduced upon review and the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority"

[4] EAB order footnote 1

> take more than a year (and often much more than a year) to resolve – adding at least an additional year to the permit process even if the appeal is denied. *(Interestingly the footnote for this statement is not a denied appeal but the appeal that I filed regarding the Russell City Energy Center which gave the EAB a glimpse of the failure of BAAQMD and the CEC to protect the PSD permitting integrity. The CEC makes no distinction between meritorious and frivolous appeals)*…The negative impact on power plant projects delayed by EAB review is almost inestimable."

The CEC did recognize a difference between state and federally issued PSD permits in footnote 4, A difference which they attempted to exploit in the Delta matter. It is clear that the CEC prefers to proceed unhindered by the regulations that the EAB enforces, like pesky public participation and air quality laws. They further chide the EAB for being "user friendly" which is a complete foreign concept under the CEC regime.

Footnote 4 Only five smaller air districts (where there are few projects subject to PSD requirements) have their PSD function incorporated into their State Implementation Plan (SIP), which enables them to avoid EPA issuance of PSD permits on a project-by-project basis. [5]

Notably, the first PSD appeal for this project PSD Appeal No. 99-76 was dismissed in less than 90 days and completed prior to the completion of the CEC fifteen month process for this facility, a far cry from the CEC's complaint regarding the EAB also the Russell City process before the CEC was a 7 year process prior to EAB action.

I also wish to inform the board of relevant actions subsequent to the original petition. (see exhibits) First, my informal complaint and request for investigation with the CEC has received no substantive response. Second, my formal complaint and request for investigation to the CEC was rejected for consideration, the primary basis being that the complaint did not contain my phone number, despite the fact that my phone number was plainly visible on page 2, as were each of the subsequent excuses to deny consideration. Third, my motion for reconsideration of the CEC decision was denied without commission consideration. Fourth, my motion to intervene in the CEC proceeding was denied without commission consideration. Fifth, I timely submitted an appeal with the BAAQMD Hearing Board. The Clerk and BAAQMD attorney would not stamp the appeal as filed (only received) because I did not have tax returns for the filing organization at the time of filing, to submit for a fee waiver demonstration. They also rejected my offer to pay the $2114 hearing board fee in US legal tender cash on behalf of the organization, claiming that they do not accept cash. Sixth, I submitted a number of record requests to BAAQMD without substantive response. And Seventh, I sent a letter to the APCO without response.

The order states;

> August 31, 2016, it appears the BAAQMD has been empowered to administer the PSD permit program under its own authority, and now operates under the third scenario presented above. As such, it appears that any PSD permit, or permit modification, would not be reviewable by the Board but instead reviewable under state procedures for challenging such actions. [Citation][6]

The order then cites to the FR that transferred jurisdiction to the BAAQMD, but that FR states[7];

[5] http://www.energy.ca.gov/papers/2009-12-24_JONES_LETTER_TO_USEPA_ON_PSD.PDF
[6] EAB order page 6
[7] 81 Fed. Reg. 50,339

> The Environmental Protection Agency (EPA) is proposing a limited approval and limited disapproval of Regulation 2, Rules 1 and 2 for the Bay Area Air Quality Management District (BAAQMD or District) portion of the California State Implementation Plan (SIP) submitted on April 22, 2013

The limited disapproval is regarding rules that are absolutely germane to this action. The entire air quality analysis for the modification is as follows;

> **"Air Quality.** The proposed modification to the steam turbine condenser is not expected to cause any significant impact to air quality. Additionally, the proposed amendment would not result in changes or deletion of any Air Quality conditions of certification (application)

> **3.1.1 Air Quality**
>
> There are no proposed modifications to emissions emitting equipment. The emissions from the combustion turbines will remain the same and in compliance with all Commission Decision Air Quality Conditions of Certification and Bay Area Air Quality Management District Permits. Therefore, the proposed changes in the Petition will not cause any adverse impacts to air quality resources, and the project will remain in compliance with its air permit as it operates temporarily in simple cycle mode. (CEC staff analysis) "

It was problematic to file this petition with a void of regulatory basis for the decision. This is an example of the problem with the CEC (streamlining) permitting process as identified in the Order.

California Public Resources code 25500 states;

> "In accordance with the provisions of this division, the commission shall have the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility. The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law."

In this case the CEC issued its permit "in lieu" of a BAAQMD issued PSD permit modification and "supersede(d)" all PSD rules. It is The EAB's opportunity to determine if this is in fact within "the extent permitted by federal law" because if it does not; in addition to the injustice and clean air act violations of this action, a flurry of PSD modifications will surely follow into the CEC permitting rabbit hole. The EAB should decide if the CEC is the head or the tail of this dog and make a determination of if this within "the extent permitted by federal law".

The EAB should understand that this is business as usual in California. These are all the same players as Russell City BAAQMD the CEC and Calpine Corporation, The CEC regularly interjects itself into air district hearing board proceedings to inform the board that it does not have authority to review air district decisions pertaining to power plants. It occurred to me in an appeal of the Carlsbad Energy Center and Humboldt Bay repower project. Air districts in California are not even required to issue an Authority To Construct (ATC) for Power plants (although some do). The merely are instructed to produce a Determination of Compliance. Evidence indicates that the same procedures are being followed here for, what was thought to be, a state issued PSD permit. Air districts in California are disabled from legally

enforcing air quality laws regarding power plants in California whether the issues stem from air pollution permits issued by themselves or the CEC.

The Air district has made it clear that they do not claim authority to review the CEC Decision. The BAAQMD response addresses the issue (but claims that they are not addressing the issue.) As in Russell City "the District failed to exercise sufficient supervision over the CEC"

BAAQMD states;

> "Note also that the Petition does not in fact allege that the Air District issued any permit or permit modification. To the contrary, the entity that Petitioners allege "effectively modified" a permit is the California Energy Commission. With respect to the Air District, the Petition concedes that the Air District "had no role" in the alleged actions that form the basis of Petitioners' claims. See Petition at p. 2. As such, the Air District would not be a proper Respondent in this matter, even if the Petition concerned a subject over which the Board has jurisdiction (which it does not). Per the Board's April 18 Order, however, the Air District is limiting its Response to the question of whether the Board has jurisdiction over PSD permitting issues in an area with an EPA-approved state-law PSD permitting program. The Air District is therefore not addressing this or any other issues (other than the jurisdictional issue) at this time."[8]

Ostensibly the District understands that we are addressing the modification of the permit that they issued. They do not deny that the PSD permit was modified, merely that they "would not be a proper respondent" or not have authority over the PSD permit modification that the CEC completed. No evidence has been produced (despite my public records requests) that the district has exercised any regulatory oversight over the CEC as it stands in the air districts shoes. In Russell City to EAB remanded "Pursuant to procedures for coordination of District and CEC proceedings, the District delegated to CEC the bulk of its 40 C.F.R. part 124 notice and outreach responsibilities with respect to the draft PSD permit for RCEC. In this case District (BAAQMD) delegated all permitting authority to the CEC…. The District's complacent compliance approach is encapsulated in the District's stated assumption that "because [CEC's] outreach efforts [were] so broad * * * all interested parties would be swept up" in that process. Teleconf. Hr'g at 32. Indeed, the record shows that in the absence of District supervision, the CEC simply carried out its own certification-related outreach process without adjusting it in any way to satisfy section 124.10's specific notice requirements.

In Russell City; CEC's statements during the teleconference hearing make clear that CEC's role in determining legal conformity with respect to federal PSD issues is a ministerial one. In response to the question of whether the CEC has authority to "change what was in the FDOC as it would impact PSD requirements," Mr. Ratliff, CEC's representative, responded that the CEC "would have to yield to the District" on PSD conditions because the "District stands in the role of EPA." Transcript of April 3, 2008 Teleconference Hearing at 14. Accordingly, Mr. Ratliff further explained that the CEC "could not overwrite or change the nature" of a District-issued permit regarding PSD issues because these are "determined by the [District] acting for * * * EPA." Id. at 17….During the teleconference hearing, Mr. Ratliff indicated that the CEC staff "don't really attempt to determine whether these are PSD comments or not

[8] Bay Area Air Quality Management District Response to Petition for Review Addressing Boards Jurisdiction Foot Note 2

The CEC made it clear that they did not have authority at that time due to the federal nexus "because" the district was acting for the EPA, conversely in the belief that this is a state permit the CEC exercised its exclusive authority.

It is incumbent on the EAB to produce a finding of program inadequacy and cause a "SIP call" to be initiated to correct this substantially inadequate regulatory scheme SIP. CAA § 110(k)(5), 42 U.S.C. § 7410(k)(5). The EAB should wield enforcement authority to prevent the modification from being constructed and operated. CAA §§ 113, 167, 42 U.S.C. §§ 7413, 7477.

I articulated the issue and the BAAQMD rule that could be applied to justify the basis is included in the rules disapproved by the EPA 2-2-602. I cited the same federal basis for the EPA disapproval of this rule CAA §§ 165(a).

When the EAB exercises jurisdiction for the disapproved regulations disclosed in the FR. It should also consider if the public notice and other rules where followed and consider its prior guidance,

In Russell City;

Also, in Rockgen, we described a remand as necessary to validate a key statutory objective of the Clean Air Act's PSD program, namely to "assure that any decision to permit increased air pollution * * * is made only after consideration of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decision-making process." See Rockgen, 8 E.A.D. at 557 (quoting CAA § 160(5), 42 U.S.C. § 7470(5)). In Rockgen, recognizing the CAA's stress on the central role of public participation in PSD permitting and the need for Board intervention to safeguard that role, we observed the following:

This is clear since initial notice of permitting actions -along with soliciting public comments, incorporating comments and EPA responses thereto in the administrative record, and providing proper notice of final permitting actions – constitute a set of related procedures that together support the statutory directive to foster effective public participation in PSD permitting. See CAA § 160(5), 42 U.S.C. § 7470(5).

Conferring standing in a restrictive manner would be at odds with clear Congressional direction for "informed public participation," see CAA § 160(5), 42 U.S.C. § 7470(5), and § 124.10's expansive provision of notice and participation rights to members of the public.

As applied to the notice violation, the allegation of error is considered to be the Permit in its entirety. See In re Chem. Waste Mgmt. of Ind., 6 E.A.D. 66, 76 (EAB 1995) (holding that the Board, in accordance with its review powers under 40 C.F.R. § 124.19, is "authorize[d] * * * to review any condition of a permit decision (or as here, the permit decision in its entirety.)."

What the District appears to have done is turn over the public notice and outreach activities to the CEC without making any effort to assure that the CEC made any necessary modifications to its procedures to reflect the requirements of part 124.

As in Seminole;

This case also demonstrates the advisability of federal and state permitting authorities clearly addressing any transitional issues relating to public participation and judicial review as part of state program approval. The Agency's declaration that "if FDEP obtains the relief it is seeking and both the Board and Florida courts decline to review Sierra Club's appeals under the facts of this case" then FDEP will have thwarted full public participation for the Seminole permit, Region's Br. at 21, emphasizes that

one element of any PSD program SIP approval should be a clear articulation of public participation and judicial review procedures.

The EAB also has jurisdiction because the EPA disapproved of BAAQMD's visibility interpretation in the same FR notice. The CEC swept the visibility analysis up in its permitting smoke screen. The temporary safety modification application states;

> "The Project Owner notes that there is the possibility that the increased heat rejection from the condenser during operation in simple cycle mode could potentially cause increased visible water vapor Plumes."

While the analysis is so cursory that it is difficult to equate it with a PSD visibility analysis, this is the CEC's idea of streamlining PSD permits. The project certainly "may have an impact on visibility". Because "None of the rules for a PSD permit or permit amendment occurred." as I stated in the appeal, except perhaps the rule which allows the CEC to "supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency" The EPA disapproval of the SO2 issue is also within EAB jurisdiction that disappeared into the CEC permitting black hole.

The EAB should determine if the fee schedule and hearing board requirements are consistent with environmental justice and other regulations. The fee schedule that the hearing board uses is not approved by the SIP. There can be no doubt that the $2117 hearing board fee has a chilling effect on public participation particularly for those with financial hardship but anyone would likely give pause with a fee of such magnitude. I attempted to obtain records of hearing board fees and appeals without response so BAAQMD has produced no evidence that the fees have not prevented public participation. Clearly the EAB has not chosen to charge a filing fee and the basis must be the knowledge that it would prevent public participation. I can file at the supreme court for about 1/3 of what the hearing board wishes to charge. I can also get a fee waiver hearing at any court in the land without producing 2 years of tax returns. A person can even get elected to President of the United States without producing tax returns. These off-ramps prevent anyone who has not earned enough to require tax returns from filing fee waiver requests with the hearing board. They prevent organizations and others that have not operated for 2 years or otherwise do not have tax returns for any reason from filing with the hearing board.

The form that the hearing board requires also requires that "I AUTHORIZE THE RELEASE OF ANY INFORMATION THAT THE AIR DISTRICT NEEDS TO DETERMINE MY ELIGIBILITY" Mr. Sarvey[9] informed me that when he followed the rules, his tax returns were recklessly handled and bantered in an open hearing and that his private information was needlessly disclosed. He also informed me that the hearing board never returned the fee he paid that they were supposed to return.

The EAB should clarify that hearing boards that collect fees must accept US legal tender currency. Their refusal to accept cash prejudices those that do not have a bank account or other forms of payment from participating. Every court in the land accepts cash. The appeal to the hearing board was filed on behalf of a duly registered 501(C) 3 non-profit organization. It inherently has zero profit. It should therefore also inherently satisfy any financial hardship threshold since there is no financial gain. If the nonprofit status is adequate under federal law it should be adequate before a local hearing board.

III. Conclusion

[9] A member of Helping Hand Tools

The EAB should retain authority. There was a permit issued in violation of state and federal law. There is no other state venue for redress and there are a host of policy issues that the EAB should clarify.

I hereby certify that the forgoing is true and correct

_____/_____

Rob Simpson

Executive Director

Helping Hand Tools

IV. Supplementary Information

Among other things, section 110 of the Act requires that SIP rules be enforceable, and provides that EPA may not approve a SIP revision if it would interfere with any applicable requirements concerning attainment and reasonable further progress or any other requirement of the CAA. Section 110(a)(2) and section 110(l) of the Act require that each SIP or revision to a SIP submitted by a State must be adopted after reasonable notice and public hearing.

subsection 2-2-606.2 is deficient as it applies to major modifications because it allows "fully-offset" sources to calculate the emission increases from a proposed modification based on the difference between the post-modification PTE and pre-modification adjusted PTE. 40 CFR 51.165(a)(3)(ii)(J) requires that offsets must be provided for the actual increase in emissions from a major modification based on an actual to PTE emissions increase test. BAAQMD may resolve this deficiency by developing separate procedures based on the difference between the allowable emissions (i.e. PTE) after the modification and the actual emissions before the modification for calculating the quantity of offsets required for an emission unit or modification subject to the major NSR preconstruction review requirements. Alternatively, BAAQMD may revise the offset equivalency provisions of Section 2-2-412 to track the difference in the quantity of offsets required under the rule and as required by the CAA, and demonstrate that in the aggregate, an equivalent amount of offsets are provided. We note that if the District addresses this deficiency in section 2-2-412, offsets must be addressed for PM2.5 and the PM2.5 precursors (NOX and SO2) in addition to the ozone precursors already addressed in this provision.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Population

Executive Order (EO) 12898 (59 FR 7629, Feb. 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.
COMMISSIONER DOUGLAS: the question that is
10 before us is to approve what is, from a standpoint of
11 physical modification, and pretty modest modifications that
12 allow this power plant to operate differently than it has
13 been operated.

§ 1714. Distribution of Copies to Public Agencies; Request for Comments. (c) The executive director shall also transmit a copy of the notice or application to the Coastal Commission for any site located in the coastal zone, to the Bay Conservation and Development Commission (BCDC) for any site located in the Suisun Marsh or the jurisdiction of the BCDC, to the California Department of Fish and Wildlife to the Air Pollution Control District in which the project is located, to the Regional Water Quality Control Board in which the project is located, to all federal, state, regional, and local agencies which have jurisdiction over the proposed site and related facility, or which would have such jurisdiction but for the commission's exclusive authority to certify sites and related facilities pursuant to Chapter 6 (commencing with section 25500) of Division 15 of the Public Resources Code, and to any other federal, state, regional, or local agency which has been identified as having a potential interest in the proposed site and related facility, and shall request analyses, comments, and recommendations thereon.

§ 1714.5. Agency Comments on an Application; Purpose and Scope.

(2) Perform or conduct such analyses or studies as needed to resolve any significant concerns of the agency, or to satisfy any remaining substantive requirements for the issuance of a final permit by the agency which would have jurisdiction but for the commission's exclusive authority, or for the certification by the commission for the construction, operation, and use of the proposed site and related facilities;

1744.5. Air Quality Requirements; Determination of Compliance.

(b) The local air pollution control officer shall conduct, for the commission's certification process, a determination of compliance review of the application in order to determine whether the proposed facility meets the requirements of the applicable new source review rule and all other applicable district regulations. If the proposed facility complies, the determination shall specify the conditions, including BACT and other mitigation measures, that are necessary for compliance. If the proposed facility does not comply, the determination shall
identify the specific regulations which would be violated and the basis for such determination. The determination shall further identify those regulations with which the proposed facility would comply, including required BACT and mitigation measures. The determination shall be submitted to the commission within 240 days (or within 180 days for any application filed pursuant to Sections 25540 through 25540.6 of the Public Resources Code) from the date of the acceptance.

1769. Post Certification Amendments and Changes.

(D) If the modification is based on new information that changes or undermines the assumptions, rationale, findings, or other bases of the final decision, an explanation of why the change should be permitted;

§ 1770. Compliance Verification. (b) To the extent permitted by law, the Commission may delegate authority for compliance verification to state and local agencies which have expertise in subject areas where conditions of certification have been established. Such agencies may include the local building department and the local air quality management district.