

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

In re:)	
Delta Energy Center)	PSD Appeal No. 17-01
Facility: Delta Energy Center)	
Facility ID No.: B2095)	
Permit Applicant: n/a)	
Permit No.: n/a)	
<i>[Petition does not allege that a PSD permit was applied for or approved]</i>)	

**BAY AREA AIR QUALITY MANAGEMENT DISTRICT
RESPONSE TO PETITION FOR REVIEW
ADDRESSING BOARD’S JURISDICTION**

Pursuant to the Environmental Appeals Board’s April 18, 2017, Order Requesting Response to Petition for Review Addressing Board’s Jurisdiction (“Order”), the Bay Area Air Quality Management District (“Air District”) hereby submits this Response. In accordance with the Board’s April 18 Order, this Response is limited to the issue of whether the Board has jurisdiction over PSD permitting matters with respect to facilities located in the San Francisco Bay Area.¹

The Order correctly observes that EPA has approved the Air District’s regulations implementing the PSD elements of the federal Clean Air Act, effective August 31, 2016. *See* 81 Fed. Reg. 50,339 (Aug. 1, 2016). As a result of EPA’s approval, these regulations are now part of California’s State Implementation Plan. 40 C.F.R. § 52.270(b)(16) (“The PSD program for

¹ Given the summary nature of this Response and its short length, the Air District is not including the table of contents, table of authorities, and table of authorities that are required for briefs under 40 C.F.R. section 124.19(d)(i)-(iii). Should briefing become necessary in this matter, the Air District will include those elements in any briefs filed.

the Bay Area Air Quality Management District . . . is approved under part C, subpart 1, of the Clean Air Act.”). PSD permitting in the San Francisco Bay Area (where the Delta Energy Center is located) therefore falls under the third scenario identified on pp. 2-3 of the Order: the situation where “EPA [has] approve[d] a state PSD program . . . , in which case the program is incorporated into the state’s ‘State Implementation [Plan]’ (‘SIP’).” As such, any PSD permit or permit modification issued for a facility located in the Bay Area – including any permit or permit modification for the Delta Energy Center² or any other facility in the Bay Area – “would not be reviewable by the Board but instead reviewable under the available state procedures for challenging such actions,” as the Board correctly concluded. Order at p. 3; *see also In re Seminole Elec. Coop., Inc.*, 14 E.A.D. 486, 475-76 (EAB 2009); *In re Carlton, Inc., North Shore Power Plant*, 9 E.A.D. 690, 692-93 (EAB 2001); *In re Milford Power Plant*, 8 E.A.D. 670, 673-74 (EAB 1999).

The Board’s understanding expressed in its April 18 Order is correct. PSD permitting in the San Francisco Bay Area is now a matter of state law under an EPA-approved state permitting program. As such, it “falls outside the body of federal permits subject to Board review.” *In re Carlton*, 9 E.A.D. at 693. Petitions concerning PSD permitting in the Bay Area are therefore not within the Board’s jurisdiction over federal PSD permits pursuant to 40 C.F.R. section 124.19.

² 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.

Dated: May 5, 2017

Respectfully submitted,

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DISTRICT

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STATEMENT REGARDING COMPLIANCE WITH WORD LIMITATION

I, Alexander Crockett, counsel for the Bay Area Air Quality Management District, hereby certify pursuant to 40 C.F.R. section 124.19(d)(iv) as follows: This Response contains 598 words, including footnotes, but excluding the caption, title block, signature block, this Statement Regarding Compliance with Word Limitation, and the accompanying Certificate of Service. This word count was obtained using the computer program with which the Response was prepared.

Dated: May 5, 2017

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