BEFORE THE ENVIRONMENTAL APPEALS BOARD

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C.

In re Russell City Energy Center Russell City Energy Company, LLC PSD Permit Application No. 15487	)	PSD Appeal No. 10-02

PETITION FOR RECONSIDERATION OR ALTERNATIVELY CLARIFICATION AND REQUEST FOR IMMEDIATE STAY OF EFFECTIVE DATE OF NOVEMBER 18, 2010 ORDER DENYING REVIEW BY CHABOT-LAS POSITAS COMMUNITY COLLEGE DISTRICT

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I. PETITION FOR RECONSIDERATION AND REQUEST FOR STAY

Chabot Las-Positas Community College District (the "College District") petitions for reconsideration of the order executed and filed on November 18, 2010 by the Environmental Appeals Board denying review of the College District's petition of the Prevention of Significant Deterioration Permit issued by the Bay Area Air Quality Management District (BAAQMD) to Russell City Energy Center, LLC. (RCEC) authorized to administer the Prevention of Significant Deterioration permit program under the Clean Air Act (CAA) pursuant to a delegation of authority by the United States Environmental Protection Agency.

The College District further requests that pending the Board's review of this petition, that the Board stay the effectiveness of its November 18, 2010 order. If the Board disagrees with the College District and denies reconsideration, the College District also asks that the Board stay the effectiveness of its order denying reconsideration 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.

This permit authorizes construction of a new 600-megawatt natural gas-fired thermal power plant in the City of Hayward and County of Alameda, California. In its March 2010 petition for review, the College District together with twelve other petitioners, of which five petitions survived dismissal, contended that BAAQMD committed numerous procedural and substantive violations of the Clean Air Act in issuing the permit. The College District asked that the Board remand the permit and require the District to correct the identified violations and re-circulate a corrected draft to the public. The November 18, 2010 Order denies all five petitions.

As authorized by subdivision (g) of section 124.20 of title 40 of the Code of Federal Regulations, the College District now petitions for reconsideration and asks the

Board to stay the effectiveness of its order pending review as outlined below. As reflected in the underlying record, the proposed RCEC is a major stationary source that will be a significant source of pollution within the Bay Area Air District.

The community within which RCEC is located is a sensitive environmental justice community, which BAAQMD already has identified as at risk for serious health problems. Exhibit 2 attached to the College District's March 2010 petition consists of BAAQMD's own records published in December 2009, by BAAQMD's Community Air Risk Evaluation (CARE) Program which identifies Western Alameda County, where the Chabot campus of the College District is located and next to where RCEC would be located, as a community which already is "likely to face the highest health risks from toxic air contaminants (TAC)." Additionally, the San Francisco Bay Region already is designated non-attainment for 8 hr ozone and 24 hour PM2.5. As impliedly recognized by the Board's November 18, 2010 opinion, there are no applicable nonattainment regulations mitigating or offsetting RCEC's pollution. The absence of nonattainment regulations is highlighted by the fact that on November 19, 2010, BAAMD renewed the 2007 State permit or Authority to Construct or "ATC." Attached or accompanying this petition is a copy of BAAQMD's announcement by its senior engineer Weyman Lee.

Given the significant health and safety impacts on this environmental justice community, the College District seeks reconsideration of the Board's November 18, 2010 Order to address these important issues raised in the College District's petition which remains unresolved and not addressed in the opinion.

II. PROCEDURAL STANDING

On November 18, 2010, the Board filed and served by mail its Order denying review of all petitions for review. Under section 124.19, subdivision (g) and section 124.20, subdivision (d) of 40 C.F.R., petitioners have thirteen days from November 18, 2010 to petition for reconsideration. Additionally, as authorized by subdivision (g), of

section 124.20, the College District further asks that the Board issue an immediate stay of the November 18, 2010 Order pending the Board's consideration of this petition. Assuming the Board agrees to stay the November 18, 2010 Order, however denies reconsideration, the College District further request that the Board continue the stay order for ten court days after any order denying reconsideration to enable the District to move for a stay before the Ninth Circuit together with a petition for review.

The College District submits this petition within the ten day time period reserving its entitlement to supplement this petition.[1]

III. ISSUES WHICH EAB ORDER FAILED TO ADDRESS

A. It Is Undisputed That There Are No Nonattainment Permitting Regulations That Are Applicable To RCEC Resulting In The Issuance Of A PSD Permit Which Will Cause And Contribute To An Exceedence Of The NAAQS.

In reviewing the statutory and regulatory background, the Order states the following:

> Importantly, the PSD program is not applicable in nonattainment areas; it only applies in areas deemed to be in attainment or unclassifiable. *See* CAA § 161, 42 U.S.C. § 7471; *In re Sutter Power Plant*, 8 E.A.D. 680, 681-82 (EAB 1999); *see also In re Prairie State Generating Co.*, 13 E.A.D. 1, 5-6 (EAB 2006) ("The PSD permitting program regulates air pollution in 'attainment' areas, where air quality meets or is cleaner than the [NAAQS], as well as areas that cannot be classified * * *."). In nonattainment areas, the nonattainment area ("NAA") NSR requirements of the CAA and implementing regulations apply in lieu of the PSD requirements. *See* CAA §§ 171-193, 42 U.S.C. §§ 7501-7514; 40 C.F.R. §§ 51.160-.165; *Sutter*, 8 E.A.D. at 682 n.2; *see also NSR Manual* at 3-5 (explaining when PSD versus NAA permitting requirements apply), at G.1-.9 (containing an overview of the NAA preconstruction review requirements). Although a single geographic area may be designated as attainment or unclassifiable for one or more of the six criteria pollutants and as nonattainment for the others, the PSD

[1] Because the Board's opinion was served on Thursday, November 18, 2010, just prior to the Thanksgiving holiday, there were only five business days within the ten day time period to petition for reconsideration or clarification of this 137 page opinion.

> permitting requirements will only apply to the attainment/unclassifiable pollutants in that geographic area. *Sutter*, 8 E.A.D. at 8 n.2; *see also* 111 The effective date of the final rule was December 14, 2009. 74 Fed. Reg. at 58,688. *NSR Manual* at 4 ("[A] source may have to obtain both PSD and NAA permits if the source is in an area which is designated nonattainment for one or more pollutants."). In those circumstances where the SIP for a nonattainment area has not yet been fully approved by EPA, Appendix S of part 51 applies. *NSR Manual* at 5; *see* 40 C.F.R. pt. 51 app. S..

Slip Opn. 119-120. The opinion continues summarizing the "[i]mpact of the Bay Area's Recent 24-Hour PM 2.5 NAAQS Nonattainment Designation."

> More importantly for the matter at hand, the Bay Area's designation as nonattainment for 24-hour PM also means that the NAA NSR permitting requirements rather the PSD 2.5 permitting requirements apply to 24-hour PM in that area. CAA§§ 107(d), 161, 171-193, 42 U.S.C. §§ 7407(d), 7471, 7501-7514; 40 C.F.R. pt. 51 app. S; *NSR Manual* at 4-5, F.7, G.1; *see also* discussion *supra* Part VI.A; *cf.* 40 C.F.R. § 52.21(a)(2)(i) ("the requirements of this section [52.21] apply to the construction of any new major stationary source * * * in an area designated as attainment or unclassifiable")

Slip Opn. at 120. Later, however, the opinion acknowledges that in fact Appendix S of part 51 does not apply at all but is exempt. Relying on BAAQMD's argument, the opinion further explained that

> "it had analyzed the applicability of Appendix S in the event that the Bay 2.5 Area's PM (24-hour) re-designation becomes effective during this permitting proceeding. Here, **the facility would be exempt from 2.5 Appendix S because it will emit less than 100 tons per year of PM.**"ASOB at 55 (citing 40 C.F.R. pt. 51 app. S ¶ II.A.4(i)(a), which establishes a 100-tons-per-year threshold for regulation of major stationary sources).

Slip Opn. at 122; *compare*, Slip Opn. at 10: "BAAQMD and RCEC argue that [the "College District's substantive arguments challenging BAAQMD's 24-hour PM2.5 PSD analysis"] should fail because EPA designated the Bay Area nonattainment for the 24-

hour PM2.5, NAAQS and thus the nonattainment permitting regulations should apply instead of the PSD regulations." Relying on BAAQMD Resp. to College Dist. at 3 & RCEC Resp. to College Dist. at 2 (RCEC is anticipated to emit approximately 86.6 tons of particulate matter).

Moreover, as pointed out in the College District's Reply, the Response to Comments admits that "no additional federal permit [will be] required beyond the PSD Permit."

> Here, the facility is exempt from Appendix S because it will emit less than 100 tons per year of $PM_{2.5}$. (*See* 40 C.F.R. Appendix S, ¶ II.A.4(i)(a) (establishing 100 tpy threshold for regulation of Major Stationary Sources); *see also* Additional Statement of Basis at p. 55.) ***There are therefore no additional Clean Air Act regulatory requirements applicable beyond the PSD regulations, and no additional federal permit required beyond the PSD Permit.***

Response at 78, n. 158, emphasis and italics added. The day after this Opinion was served, on November 19, 2010, BAAQMD renewed RCEC's three year old state Authority to Construct permit without one single change. Exhibit A. No nonattainment regulations or even LAER will apply to RCEC or regulate either ozone or particulate matter. In essence, the Board issued a permit to build a significant source of pollution in a region designated nonattainment for two criteria pollutants in the face of modeling produced by BAAQMD establishing that the project will contribute and cause an exceedence to the NAAQS for 24 hour PM2.5.

The opinion attempts to portray the College District's arguments on this point as "confusing," not sufficiently raised in the petition, and refuses to consider much of the College District's substantive arguments, contending its reply, to which both RCEC and

BAAQMD enjoyed sur-replies, raises "new arguments." However, as reflected by the BAAQMD's February 2010 Response to Comments, this has been a long standing debate between commentators and BAAQMD. The Response summarizes the argument as follows:

> The Air District has tracked this evolving regulatory landscape during this permitting proceeding. When the Air District issued its initial Statement of Basis, the Bay Area was still designated attainment/unclassifiable for $PM_{2.5}$. At the time, EPA's regulations required the District to address $PM_{2.5}$ issues in PSD permitting by relying on its PM_{10} analysis as a surrogate for ensuring compliance with $PM_{2.5}$ requirements ("surrogate policy"). Based on its PM_{10} analysis, the Air District therefore concluded in the initial Statement of Basis that the facility would satisfy PSD requirements for $PM_{2.5}$ as well. **During the first comment period, the Air District received a number of comments criticizing its reliance on this surrogate policy, as well as criticizing the policy itself as being illegal**. Comments stated that reliance on the surrogate policy was optional for state agencies. Some comments implied that the surrogate policy should not apply for this facility by implying that the permit application was not submitted before the July 15, 2008, expiration date that EPA established for the policy. **Comments stated that the surrogate policy was inappropriate where the Bay Area was not in attainment of the $PM_{2.5}$ NAAQS, and when the non-attainment designation becomes effective the District will be required to address $PM_{2.5}$ pursuant to 40 C.F.R. Part 51, Appendix S.** These comments stated that the District should proceed to address $PM_{2.5}$ even before the designation becomes effective, and **implied that doing so would require the facility to use LAER and provide offsets for $PM_{2.5}$ and identified precursors. Some comments claimed that the permit should be denied because the Bay Area is not in attainment of the $PM_{2.5}$ standard, and claimed that permitting any new $PM_{2.5}$ source would be inconsistent with the Air District's other regulatory initiatives to reduce $PM_{2.5}$ pollution**. Other comments stated that the Air District should explain the $PM_{2.5}$ regulatory context better to help the public understand what is going on.

BAAQMD summarized its response to these comments as follows:

> The August 2008 Draft PSD Permit included proposed BACT conditions for $PM_{2.5}$, and the Additional Statement of Basis and

> supporting documents described Air Quality Impact Analysis for $PM_{2.5}$. **This additional permitting analysis specific to $PM_{2.5}$ was the Air District's response to the comments that the surrogate policy is inappropriate and illegal and that a $PM_{2.5}$-specific analysis is required.**[n]

Response at 77. BAAQMD footnoted the following:

> The August 2008 Draft PSD Permit included proposed BACT conditions for $PM_{2.5}$, and the Additional Statement of Basis and supporting documents described Air Quality Impact Analysis for $PM_{2.5}$. **This additional permitting analysis specific to $PM_{2.5}$ was the Air District's response to the comments that the surrogate policy is inappropriate and illegal and that a $PM_{2.5}$-specific analysis is required.**

Response at 77, n.157.

The Opinion adopts the arguments by BAAQMD that, although the College District has consistently been claiming that issuance of a PSD permit to construct a major stationary source of pollution in a nonattainment region which emissions will cause and contribute to a violation of the NAAQS is impermissible under the CAA, that somehow the College District did not sufficiently raise the issue that BAAQMD's PM2.5 analysis was flawed.

> . . . Reading these statements together, the College District appears to be making an argument that, even though the area has been designated nonattainment for 24-hour PM , the PSD provisions should still be applied to 24-hour PM2.5 .[n]
>
> **The College District's position is a conclusory disagreement with BAAQMD's approach and does not explain the College District's basis for this legal theory or how the statutory or regulatory provisions may be read to authorize applying PSD permitting requirements – which, by statute, apply to areas that *are* designated attainment or unclassifiable – to an area that has been designated nonattainment. Conclusory arguments such as these are not sufficient to demonstrate that review is warranted. This is especially true where the arguments are seemingly inconsistent**

with the statutes and regulations.[n]

Slip Opn. at 125. Footnoted was the following dismissal of the regulations and statutes supporting the College District's consistent arguments:

> **In its reply brief, the College District finally provides some sort of legal basis for its position**, contending that "40 C.F.R. § 52.24, otherwise known as the 'construction moratorium' for major stationary sources such as RCEC, clearly prohibits the approval of any PSD for RCEC." College Dist. Reply at 8. **This is the first time, however, that the College District raised concerns about or referenced the construction moratorium provision; this issue was not raised in the College District's comments on the draft permit or in its petition.** At oral argument, when asked whether it had challenged the position BAAQMD had laid out in the Additional Statement of Basis, the College District claimed that BAAQMD's position was ambiguous and confusing, implying that its failure to raise the issue was justified. *See* Oral Arg. Tr. at 22-23. **While this could arguably excuse the College District's failure to raise the construction moratorium issue in its comments, it does not excuse the failure to raise the issue in its petition. Accordingly, because this argument concerning a completely different regulatory provision is raised for the first time in the College District's reply brief and is an argument that could have been raised in the College District's petition (if not in the College District's comments on the draft permit), it is untimely and thus procedurally barred and will not be considered**. *See* discussion *supra* Parts III and VI.B.1.b.ii.

Slip Opn. at 125-26, n. 115, emphasis added.

As a result, contrary to the opinion's statement in its text, there certainly is a mandatory and automatic prohibition against issuance of this permit as outlined in the College District's reply, to which both BAAQMD and RCEC had the opportunity to respond through the Board's order authorizing sur-replies. However, rather than addressing this mandatory statutory scheme, the opinion states that "the arguments are seemingly inconsistent with the statutes and regulations." Slip Opn. at 125. Ignored,

however, is the College District's September 16, 2010 comments which specifically raised the recent July 2008 Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM2.5), Vol. 73 Fed. Reg. No. 96, which also supports the College District's position:

> Preliminarily, the PSD program does not "'create an entitlement to degrade air quality in general or visibility in particular, **because nothing in the CAA provides for issuance of a PSD permit as a matter of right.**'" (*American Corn Growers Association v. Environmental Protection Agency* (D.C. Cir. 2002) 291 F.3d 1, 32-33, emphasis added.) As summarized by the July 2008 Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM2.5), Vol. 73 Fed. Reg. No. 96,
>
> > **The PSD requirements include** but are not limited to:
> >
> > -Installation of Best Available Control Technology (BACT);
> >
> > **-Air quality monitoring and modeling analyses to ensure that a project's emissions will not cause or contribute to a violation of *any* NAAQS** or maximum allowable pollutant increase (PSD increment);
> >
> > **-violation of *any* NAAQS** or maximum allowable pollutant increase (PSD increment);
> >
> > -Notification of Federal Land Manager of nearby Class I areas; and
> >
> > -Public comment on the permit.
> >
> > ***Nonattainment NSR requirements include but are not limited to***:
> >
> > -Installation of Lowest Achievable Emission Rate (LAER) control technology;
> >
> > -Offsetting new emissions with creditable emissions reductions;

> -Certification that all major sources owned and operated in the State by the same owner are in compliance with all applicable requirements under the Act;
>
> -An alternative siting analysis demonstrating that the benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification; and
>
> -Public comment on the permit.
>
> Rules: Implementation of the New Source Review (NSR) Program for PM2.5, amending 40 CFR Parts 51 and 52.
>
> **Here, the Additional SOB purports to perform a "split" analysis applicable to PM2.5 given the District is not in attainment, although the designation was fully executed, but remains "ineffective" until finally published**. (Addi. SOB, p. 52.) ***However, absent from the Additional SOB is the required analysis for non-attainment as outlined above in the 40 CFR Parts 51 and 52* relied on by the District**. For that matter, Chabot-Las Positas takes administrative notice that the District remains in violation of the NAAQS for 8 hour Ozone, under which NOx must be analyzed applying the above nonattainment NSR analysis and requiring LAER. In exercising the District's discretion in deciding this application, these important factors likewise must be considered.

Sept. 16, 2010 Response to Comments at 1-2, emphasis and italics added.

As a result, 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 raised for the first time," it obviously is not. Further, the fact that there is no State Implementation Plan or SIP in place has been the context within which this discussion with BAAQMD has taken place. Slip Opn. at 120 ("California must develop a SIP that provides for attainment with the NAAQS as expeditiously as possible").[2]

[2] The College District also submits that section 51.165 further supports and is consistent with the statutory construction that the EPA may not issue PSD permits in a

40 CFR section 124.19 authorizes reconsideration when there a clearly erroneous finding of fact or conclusion of law or the issue raised involves an important matter of policy:

> Ordinarily, the Board will not grant review of a PSD permit **unless the petitioner demonstrates that the permitting authority based the permit condition in question on a *clearly erroneous finding of fact or conclusion of law or involves an important matter of policy* or an exercise of discretion that warrants review.** [Citations.]

Order at 13, emphasis and italics added, relying on 40 C.F.R. § 124.19(a); *Consolidated Permit Regulations*, 45 Fed. Reg. 33,290, 33,412 (May 19, 1980).

Here, as pointed out in its September 16, 2009 comment and latter on its petition, College District summarized BAAQMD's argument that "as long as a polluter in a non-attainment air district keeps its non-attainment pollution below the 100 tons/year threshold, the polluter may freely contribute to the violation of the 24 PM 2.5 hour standards." Pet. at 17.[3] In reply to BAAQMD's response, the College District pointed out that the authorities cited by BAAQMD, upon which this Opinion also relies, did not

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nonattainment region for a major stationary source which will cause and contribute to the exceedance of the NAAQS for which the region is in nonattainment.

[3] Specifically, the College District's petition contended:

> The College District's September 16, 2009 Comments, however, pointed out that based on the modeling results, even applying the understated 29 ug/m3 AAQS, "the concentrations from the project by itself are three to five times the Significant Impact Level and clearly fall within the provisions discussed above that 'the source is considered to cause or contribute to a violation of the NAAQS and may not be issued a PSD permit without obtaining emissions reductions.' (*Op cit.*, 54113738.) As a nonattainment region, this is where the analysis starts and stops." Sept. 16, 2009 Comments at 8, relying on and quoting 72 Fed. Reg. 54112, 541137-38.

address the question presented by this case: may an Air District "issue a PSD permit for a major stationary source in a region which is in non-attainment without a SIP" without any examination of the project's impact on the NAAQS emissions of a pollutant in nonattainment." Reply at 7. " In essence, according to BAAQMD and RCEC, emissions which violate the NAAQS in a region in which the pollutant is in non-attainment without a State Plan may cause and contribute to the exceedance concentrations of the pollutant for which the region is nonattainment as long as the annual tonnage, such as 99.99 tons, falls just below Appendix S's 100 tons/yr threshold." Reply at 7-8.

As outlined in both the College District's reply and at oral argument, the statutory construction by BAAQMD and RCEC adopted by the Board results in impermissibly applying the different parts of the CAA in isolation rather than construing the parts together to accomplish Congress's purpose to protect the public's health. *See* Reply at 8 & Oral Arg. Tr.

> 5 . . .our whole argument has been **must look at the Clean Air**
> **6 Act as a whole. You cannot just isolate Part**
> **7 D or Part C or Part A in isolation.** ***You must***
> ***8 construe them together.*** And that is why in
> 9 fact if you look at Section 7475, it
> 10 specifically is directing and expects that a
> 11 major emitting facility on which construction
> 12 is commenced -- that no major emitting
> 13 facility may be constructed in any area to
> 14 which this part applies, unless subpart (3),
> 15 the owner or operator of such facility
> 16 demonstrates that emissions from construction
> 17 or operation of that facility will not cause
> 18 or contribute to air pollution in excess of
> 19 subpart B, the NAAQS in any air quality
> 20 control region.

Tr. at 29. As explained in the College District's reply brief responding to BAAQMD's and RCEC's criticism, the construction moratorium for major stationary sources, 40

C.F.R. §52.24, is based in Part A of the CAA, applicable to all permits, entitled "Air Quality and Emissions Limitations."

As Part C, applicable for PSD permits, explains, its purpose is to protect the public's health and safety from harmful pollution, which will be emitted from RCEC. Section 7470 of 42 U.S.C. sets forth the following:

The purposes of this part [C] are as follows:

> (1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air), notwithstanding attainment and maintenance of all national ambient air quality standards

Subsection (5) continues:

> (5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

Section 7475 of the CAA. entitled "preconstruction requirements" under part C continues:

> (a) Major emitting facilities on which construction is commenced
>
> **No major emitting facility on which construction is commenced** after August 7, 1977, **may be constructed in any area to which this part applies *unless*—**
>
> (1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;
>
> (2) the proposed permit has been subject to a review in accordance with this section, **the required analysis has been conducted in accordance with regulations promulgated by the Administrator,** and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral

presentations **on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations**;

(3) **the owner or operator of such facility demonstrates**, as required pursuant to section 7410 (j) of this title, **that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of *any***

(A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year,

(B) **national ambient air quality standard in *any* air quality control region**, or

(C) any other applicable emission standard or standard of performance under this chapter;

Emphasis & italics added.

Part D which sets forth the plan requirements for nonattainment areas, further specifically qualities its purpose as disallowing the issuance of a permit which does not satisfy applicable new source standards of performance. Specifically, section 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.

The circumstances of this application are similar to those presented in *Friends of Pinto Creek v. EPA*, ---Fed3d--- (9th Cir. 2007), where the polluter Carlota Copper Company, sought a National Pollution Discharge Elimination System or NPDES permit under the Clean Water Act to discharge copper into Pinto Creek, "a waterbody already in excess of water standards for copper." The issues presented in *Pinto Creek* were:

> A. Whether the issuance of the permit to discharge a pollutant, dissolved copper, into Pinto Creek, **which already exceeded the amount of dissolved copper allowed** under the Section 303(d) Water Quality Standard, is in violation of the Clean Water Act and the applicable regulations.
>
> B. **Whether the EPA's failure to include and regulate all discharges** from the Carlota Copper Mine in the NPDES **permit violates the Clean Water Act and the applicable regulations**.

---Fed3rd at ----, slip opn. at 13510, emphasis added. The arguments presented by *Friends of Pinto Creek* are parallel to those presented by the College District:

> The Petitioners contend that as a "new discharger" Carlota's discharge of dissolved copper into a waterway that is already impaired by an excess of the copper pollutant violates the intent and purpose of the Clean Water Act. Under the NPDES permitting program, 40 C.F.R. § 122.4(i) addresses the situation where a new source seeks to permit a discharge of pollutants into a stream already exceeding its water quality standards for that pollutant.

Id. at 13514.

Relying on the plain language of 40 C.F.R. §122.4, that "No permit may be issued . . . . [t]o a new source or a new discharger if the discharge from its construction or operation will cause or contribute to the violation of the water quality standards. . .," the Court observed how this "corresponds to the stated objectives of the Clean Water Act 'to restore and maintain the chemical physical, and biological integrity of the nation's waters.'" *Id* at slip opn. 13514-15, quoting 33 U.S.C. §1251(a) (1987). Like here, where there is no SIP in place and appendix S is rendered inapplicable, Pinto Creek likewise had "no plans or

compliance schedules to bring the Pinto Creek segment 'into compliance with applicable water quality standards'" as otherwise required by section 122.4(i)(2).

Similar to the issues here, petitioners in *Friends of Pinto Creek* also argued that the regulations must be "read together," not independently, as the College District has attempted here. *Id.* at slip opn. 13517. As the Court observed, not only was there "no plans or compliance schedules to bring the Pinto Creek segment 'into compliance with applicable water quality standards, as required by §122.4(i)(2), but the "error of both the EPA and Carlotta is that the objective of that section is not simply to show a lessening of pollution, but to show how the water quality standard will be met if Carlota is allowed to discharge pollutants into the impaired waters." *Id.* at 13517 & 19.

Here, like in *Friends of Pinto Creek*, BAAQMD's own air analysis establishes that applying the recognized achievable emissions rate of 9 lbs/hour, which BAAQMD had first proposed and performed an air modeling analysis based on that rate, the concentration levels of PM2.5 from RCEC will contribute 6.33ug/m3, a much higher concentration level than 4.9 ug/m3, than that disclosed by the Air District, admittedly exceeding the NAAQS. Pet. at 14. Further, it is undisputed that applying this recognized achievable emissions rate, there are 2,400 additional sensitive receptors remaining unidentified that likewise are applicable to annual PM analysis. (*See* discussion in part C below.) Given these circumstances, as a matter of law, it was a clear error of law for the Opinion to find that the College District presented merely a "conclusory argument" which is "seemingly inconsistent with the statutes and regulations."

B. The College District's Environmental Justice Challenge Was Sufficiently Distinct Entitling The Community To An Opinion On Those Issues.

Among the issues raised by the College District was the following issue:

> BAAQMD clearly erred in its environmental justice analysis by failing to consider or weigh the environmental and social costs imposed on the community and the impacts on a community already suffering from

disproportionate health risks and problems caused by pollution *against* the cost of RCEC's additional pollution

Petition at __, original emphasis, & Supp Errata Pet., p. 2; *compare* Order, slip opn. pp. 10-11. In addition to identifying the start-up and shut down issues related to BACT, the Board summarized the these issues raised by the College District as follows:

> Have the College District's 24-hour PM claims been essentially rendered moot in the PSD context because the Bay Area was designated as nonattainment for the 24-hour 2.5 PM NAAQS at the time of Final Permit issuance?

Slip Opn. at 10-11. Later on, the Board sweeps the failure to model all but one roadway emissions, include highway 880 within the undisputed impacted area, and the College District's environmental justice issues on this community identified by BAAQMD as already "at risk," *all* under the discussion of the "24-hour PM claims." Specifically, the Order provides:

> 7. *Have the College District's 24-Hour PM2.5 Claims Been Essentially Rendered Moot in the PSD Context Because the Bay 2.5 Area Was Designated as Nonattainment for the 24-Hour PM NAAQS at the Time of Final Permit Issuance?*
>
> In addition to challenging the Final Permit's start-up conditions, an issue already addressed in Part VI.B.1 above, the College District also makes several arguments in connection with BAAQMD's air quality 2.5 analysis for 24-hour PM . More particularly, the College District disagrees with BAAQMD's conclusion that there will be no violation of 2.5 the 24-hour PM NAAQS, arguing that this conclusion is clearly erroneous because, in conducting its air quality analysis, BAAQMD failed to utilize the worst case scenario in its modeling run, emissions rate that is "non-achievable," **and excluded emissions from several significant roadways. College Dist. Pet. at 26-35. On a related note, the College District asserts that BAAQMD's "environmental justice analysis is built on a faulty foundation" because of the alleged 2.5 errors BAAQMD made in its PM analysis.**

Id. at 37.

Slip Opn at 117-118.

In conclusion, the Board finds the following:

> Because the Bay Area was designated nonattainment for 24-hour PM at the time BAAQMD issued the Final Permit, BAAQMD properly concluded that it was no longer required to address 24-hour PM in the PSD permit. Consequently, all of the College District challenges to the substance of BAAQMD's analysis of 24-hour PM have essentially been rendered moot by EPA's designation. [n]

Slip Opn. at 126-127. Footnoted was the following:

> **This includes the College District's challenge to BAAQMD's environmental justice analysis**, which, as noted above in the text, was premised on the College District's underlying assertion that the PM2.5 analysis was erroneous, thereby leading to a faulty environmental justice analysis. **Significantly, at oral argument, the Board noted that BAAQMD had interpreted the College District's environmental justice issue to be an "offshoot of [the College District's] concern about the effects of PM2.5 24-hour" and specifically asked the College District whether that was an accurate depiction of its environmental justice** concerns. Oral Arg. Tr. at 29. The College District did not dispute this interpretation of its environmental justice claim and, in fact, again referenced its PM2.5-related arguments, asserting that BAAQMD's PM2.5 air modeling showed that there was a "violation" and "additional sensitive receptors." *Id.*; *see also* College Dist. Pet. at 27-28 (arguing that BAAQMD's air modeling for PM2.5 is flawed and the modeling run showed more than 2,400 additional receptors).

Slip Opn. at 127. The transcript, however, reflects the following exchange where counsel attempted to qualify this assertion as limiting the scope of its argument:

> . . . . . [Judge Reich] And just to
> 15 make sure I understand the extent of the PM
> 16 2.5 24-hour issue, the way I read it, the
> 17 modeling issues that you discuss both sort of
> 18 in general and specifically as to the
> 19 roadways, both seem to relate specifically to
> 20 the PM 2.5 24-hour. Is that correct?

21 MS. HARGLEROAD: That is correct,
22 Your Honor.

1 JUDGE REICH: And the way The
2 District, at least, interprets your
3 environmental justice issue, **they also see it**
4 as an offshoot of your concern about the
5 effects of PM 2.5 24-hour. Is that an
6 accurate statement of your environmental
7 justice concern?

8 MS. HARGLEROAD: **Well, I would say**
9 it *is* *somewhat limited* *because part of the*
10 environmental justice argument also relies on
11 the fact that the run, which we obtained from
12 The District, essentially, inadvertently shows
13 that there is a violation and that there are
14 2,400 additional sensitive receptors which
15 have not been mapped out and not plotted --

16 JUDGE REICH: Okay.

17 MS. HARGLEROAD: **-- and we do not**
18 know where they are located.
19 JUDGE REICH: **Okay. But that**
20 tells me we are still talking PM 2.5 24-hour.
21 Okay, your time has expired. You
22 do have a reserve two minutes for rebuttal.

Oral Arg Tr. at 29. 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.*

As reflected in the College District's petition and supported by Exhibit 2 submitted in support and without objection by BAAQMD, according to BAAQMD's own records, this community is at risk.

C. This Decision Contradicts The Board's Precedent That A Proposed PSD Permit Violates Environmental Justice When It Results In A Proportionately High And Adverse Effect On Human Health Or The Environment In Low-Income Or Minority Population Areas Because The NAAQS Would Be Violated.

As this Board explained in *In re Knauf Fiber Glass, GMBH*, 8 E.A.D. 121 (EAB 1999) (*Knauf I*), the issue of environmental justice "does not readily fit into" issues "that are reviewable under the PSD program." *Id* at ___, slip opn. at 6. As *In re Knauf Fiber Glass, GMBH.* 9 E.A.D. 15 (EAB 2000) explains, Executive Order No. 12,898,

> . . . instructs federal agencies to address, as appropriate, "disproportionately high and adverse human health or environmental effects of [their] programs, policies, and activities on minority and low-income populations * * *." Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994) ("Executive Order").

Here, the College District's petition asserted that BAAQMD "did not engage in an environmental analysis considering the environmental and social cost to a community already 'at risk.'" (Pet. at 36.) As pointed out in the College District's petition,

> In addition to the BAAQMD's designation as non-attainment for 8 hour ozone, it recently was designated non-attainment for PM2.5 under the Clean Air Act. According to the Environmental Protection Agency, Alameda County has the highest ground level ozone concentration of the nine Bay Area Counties, 81 parts per billion, which has been linked to health problems and premature death. Exhibit 2 (*Compare*, the Counties of San Francisco, Marin and San Mateo: 47, 50 and 54 ppb respectively.) In December 2009, BAAQMD's Community Air Risk Evaluation (CARE) Program identified Western Alameda County, where the Chabot is located and next to where RCEC would be located, as one of the communities as "likely to face the highest health risks from toxic air contaminants (TAC)." (Exhibit 2.)
>
> Many of the students who attend Chabot lack medical insurance coverage. The Chabot campus has served historically disenfranchised populations, with the majority of students from race-ethnicity groups consisting of African American, Asian American, Filipino, Latino, as well

> as socio-economically disadvantaged Caucasian students. According to Dr. Sandra Witt of Alameda County's Public Health Department, the community in which both the Chabot campus and RCEC are located suffer from chronic health issues not present in other nearby Bay Area communities. February 2009 Comments. Dr. Witt's testimony specifically refers to the County's recent publication entitled "*Race, Class, and the Patterns of Disease Distribution in Hayward; Decision –Making that Reinforces Health Inequality.*"[4] (*Compare* BAAQMD Dec. 2009 CARE Memo: "identifying areas that (1) are close to or within areas of high emissions of toxic air contaminants, (2) have sensitive populations, defined as youth and seniors, with significant TAC exposures, and (3) have significant poverty." (Exhibit 2.)
>
> RCEC would be BAAQMD's sixth biggest polluter of CO2 in the nine Bay Area Counties, the second biggest fossil fuel power plant polluter of CO2, emitting 1,928,182 million tons of CO2, behind its "sister" plant Delta Energy Center, located in Pittsburg, Contra Costa County, also owned and operated by RCEC's owner Calpine. (Exhibit 2.)

Pet. at 10-11; *also see* Exhibit 2 to the College District's March 2010 petition, BAAQMD's own records identifying Western Alameda County as "at risk," submitted without objection.) In its response, BAAQMD asserted that it had no obligation to consider compliance with the 24-hour PM2.5 NAAQS and therefore "where the agency is not permitted by law [to] condition permit issuance on an issue that is not part of the applicable regulatory requirements, it cannot condition the permit on that issue as part of the environmental justice analysis, either." BAAQMD Response at 44. Further, even if it could, RCEC's contribution to pollution will be "*de minimus*."

The problem with this argument, however, is that it contradicts this Board's earlier precedent clearly approving an environmental analysis, which takes into

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[4] Dr. Witt's testimony was attached as Exhibit 6 to the February 2006 comments by the Environmental Law Clinic of Golden Gate Law School on behalf of Citizens Against Pollution.

consideration whether an area is in attainment and whether the project will cause or contribute to an exceedence of the NAAQS.

In *Knauf II*, the Board held that it would not address any challenge to the sufficiency of the environmental assessment where the petitioner could not demonstrate that the conclusion that there was no adverse impact, because NAAQS would not be exceeded, was clearly erroneous. *Id.* at 17. *Also see In re Shell Offshore, Inc.*, OCS Appeals 07-01 and 07-02, slip op. at 67-68 (EAB Sept. 14, 2007);*Ecoeléctrica*, 7 E.A.D. at 69; *AES Puerto Rico*, 8 E.A.D. at 352.

In *Shell Offshore*, slip op. at 68. EPA Region 10 determined that issuing the OCS or Outer Continental Shelf permits would not cause "disproportionately high or adverse human health or environmental effects" on the identified environmental justice communities because the "emissions limits contained in a number of specific permit terms and conditions are expected to curb air pollution sufficiently **so that air quality in the region continues to attain the NAAQS, national standards which EPA has established to protect human health and the environment."** *Id.*

> The NAAQS are the Agency's standards, designed to protect human health and welfare with an adequate margin of safety. CAA § 109(b), 42 U.S.C. § 7409(b). EO 12,898 concerns itself with effects that are "adverse." This Board's precedent is that ***if* the project "will not result in exceedance of the NAAQS or PSD increment" then the agency has complied.** *See In re: Knauf Fiber Glass, GmbH*, 9 E.A.D. 1, 16-17 (EAB 2000) (stating that, given finding of no adverse impact based on conclusion that additional pollutants will not result in exceedance of NAAQS or PSD increment, the Board need not address objections to numerous aspects of Region's environmental justice analysis)

Shell Offshore, slip op. at 67-68, italics and emphasis added; *see also Knauf II*, 9 E.A.D.

at 16-17 (no adverse impact where "the air quality within the area surrounding the proposed site would remain well within the levels determined to [be] healthful and environmentally acceptable"); *Ecoeléctrica*, 7 E.A.D. at 68 ("the modeled maximum emission impacts from this project are insignificant and well below NAAQS, and [the] project therefore should have insignificant impacts on the surrounding communities"); *AES Puerto Rico*, 8 E.A.D. at 351 (finding no adverse effect where "all maximum predicted concentrations of [carbon monoxide, sulfur dioxide, nitrogen dioxide and particulate matter were*] below* the corresponding NAAQS" Italics added).

This Board, however, diverges from its precedent and instead adopts BAAQMD's invitation to completely disregard the undisputed evidence that RCEC will increase the community's PM2.5 concentration levels to greater than 1.2 ug/m3, the significant impact level. The entire basis for disregarding this undisputed evidence is that because the Bay Area is in non-attainment, BAAQMD may approve a new source of significant pollution in a region which already is too dirty and is in non-attainment for 24 hour PM2.5 and 8 hour ozone in a community which BAAQMD itself identifies as "at risk." The opinion essentially follows BAAQMD's argument that because evidence concerning a criteria pollutant that is in nonattainment is not purportedly part of the PSD review, it has no obligation to consider evidence establishing an exceedence of the NAAQS. *See* BAAQMD Response to College District at 44. BAAQMD is wrong and such a statutory construction impermissibly undermines the CAA.

Although the Board does not address the authority heavily relied on by BAAQMD in its response, *In re Chemical Waste Management of Indiana*, 6 E.A.D. 66,

an examination of *In re Chemical* contradicts BAAQMD's argument.

> A second area in which the Region has discretion to implement the Executive Order within the constraints of RCRA relates to the omnibus clause under section 3005(c)(3) of RCRA. The omnibus clause provides that:
>
> > Each permit issued under this section shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment.
>
> 42 U.S.C. § 6925(c)(3). Under the omnibus clause, if the operation of a facility would have an adverse impact on the health or environment of the surrounding community, the Agency would be required to include permit terms or conditions that would ensure that such impacts do not occur. Moreover, if the nature of the facility and its proximity to neighboring populations would make it impossible to craft a set of permit terms that would protect the health and environment of such populations, the Agency would have the authority to deny the permit. *See In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 796 n.64 (EAB 1995) ("[T]he Agency has traditionally read [section 3005(c)(3)] as authorizing denials of permits where the Agency can craft no set of permit conditions or terms that will ensure protection of human health and the environment."). In that event, the facility would have to shut down entirely. Thus, under the omnibus clause, if the operation of a facility truly poses a threat to the health or environment of a low-income or minority community, the omnibus clause would require the Region to include in the permit whatever terms and conditions are necessary to prevent such impacts. This would be true even without a finding of disparate impact.

Id. at 74. Further, the Board found:

Reviewing Challenges Based on the Executive Order: As a threshold matter, the Region suggests that claims relating to the implementation of the Executive Order are not subject to review. In support of this argument, the Region points out that the Executive Order itself expressly provides that it does not create any substantive or procedural rights that could be enforced through litigation. More specifically, the Order states in § 6-609 that:

> This order is intended only to improve the internal management of the executive branch and is not intended to, nor does it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. This order shall not be construed to create any right to judicial review involving the compliance or noncompliance of the United States, its agencies, its officers, or any other person with this order.

59 Fed. Reg. at 7629. However, while the Region is correct that section 6-609 precludes *judicial* review of the Agency's efforts to comply with the Executive Order, it does not affect implementation of the Order *within* an agency. More specifically, it does not preclude the *Board*, in an appropriate circumstance, from reviewing a Region's compliance with the Executive Order as a matter of policy or exercise of discretion to the extent relevant under section 124.19(a). Section 124.19(a) authorizes the Board to review any condition of a permit decision (or as here, the permit decision in its entirety). Accordingly, the Board can review the Region's efforts to implement the Executive Order in the course of determining the validity or appropriateness of the permit decision at issue. With that in mind, we turn to the specific challenges raised by Petitioners in this case.

Id. at 76.

Here, BAAQMD concludes that there will be "no disproportionate adverse impacts on any environmental justice community" on the ground "that there will be no significant adverse impacts *to any community*, regardless of demographic makeup." Response at 192, original italics. The underlying basis for this conclusion is that RCEC's contribution to pollution is "*de minims*." Response at 193-194. Obviously, as established above, the contribution of pollution by this project to a community already suffering from

environmental and health degradation cannot be "*de minimis.*" Based on BAAQMD's own admissions, it is undisputed that the project increases the community's PM2.5 concentration levels to greater than 1.2 ug/m3, the significant impact level. Additional SOB at 84 & fn 147, relying on fn 141,Table III. Obviously, applying the Board's precedent's cited above, such a contribution of pollution directly associated with serious health problems is not "*de minimus.*"

D. The Board Clearly Erred By Not Addressing The College District's Distinct Argument That BAAQMD Did Not Conduct A Cumulative Air Modeling Analysis By Excluding All Roadways But One, Which Has With Less Traffic.

In its February 2010 response to comments, BAAQMD admitted that its air modeling analysis remains relevant for PSD purposes even disregarding the recent designation of the Bay Area as non-attainment for 24 hour PM2.5 as it also must take into consideration the annual PM requirements. BAAQMD's Response summarizes its air analysis as follows:

> At the time the Air District published its initial proposal in December of 2008, EPA required that its "surrogate policy" be used **and that an analysis of PM_{10} impacts should be used to address $PM_{2.5}$ issues. EPA subsequently stayed that requirement and proposed to repeal it, and so the Air District determined that reliance on the surrogate policy was not appropriate and that an analysis of $PM_{2.5}$ specifically was required.** The District therefore completed an Air Quality Impact Analysis for $PM_{2.5}$ impacts, which it published in connection with the August 2009 Additional Statement of Basis.[275] At that time, the San Francisco Bay Area was still designated as "attainment/unclassifiable" for $PM_{2.5}$ for both the 24-hour ***and*** annual standards, and so the Air District evaluated the facility's impacts with respect to both standards in the Air Quality Impact Analysis. The analysis found that the facility would not cause or contribute to an exceedance of either standard. (*See* Additional Statement of Basis at pp. 84-92.) Subsequently, the Bay Area's redesignation as non-attainment for the 24-hour NAAQS became effective, making $PM_{2.5}$ subject to Non-Attainment NSR requirements and making PSD requirements inapplicable for this pollutant (for the 24-hour standard, at least). As explained in detail in Section VI, the Air District is

> conservatively treating this "split" designation as meaning that the facility is subject to Non-Attainment NSR permitting for the 24-hour standard (to the extent applicable***), but remains subject to PSD permitting requirements for the annual standard***. The Air District addressed the applicable BACT requirements for $PM_{2.5}$ in Section VI, and addresses the Air Quality Impact Analysis requirements here.

ASOB at 141-42.

Applying the SILs, the "Air District determined that the facility would cause impacts above the SIL at several locations. Under the two-step methodology prescribed by the NSR Workshop Manual, when impacts are above the SIL the analysis must proceed to the second step, the 'full impact analysis.'" ASOB at 142. No where in its responses to the College District's petition does BAAQMD deny that a full impact analysis to determine the cumulative impact was not necessary to address the annual PM2.5 requirements.

> The Air District also evaluated non-point sources within this area that could cause a significant concentration gradient **at any of the areas where the facility's impact was above the SIL**. The Air District identified a portion of Highway 92 that is located approximately 1 km south of the facility as such a nonpoint source, and included it in the analysis. **The cumulative impact from all of these contributions (the facility, the 29 point sources, and Highway 92) was then modeled for each receptor location within the impact area where the facility's impact was above the SIL.**

ASOB 143, emphasis added.

It was during this examination that BAAQMD, without any prompting by the public, reduced the emissions rate from its earlier approved 9lbs/hour, guaranteed by the vendors, to 7.5 lbs/hour based on RCEC's "testing." This reduction then generated the comments from other power plant operators and owners that setting a 7.5lbs/hour

emissions rate was not achievable. Response at 83 (reduction was BAAQMD's "own volition") & 15 (summarizing comments from power plant owners and operators). The result of reducing the emissions rate was to delete the fact that there were 2,400 additional sensitive receptors that exceed the SIL that remain undisclosed.

Although BAAQMD and RCEC make much before this Board that the 7.5lbs/hour emissions rate is enforceable, its February 2010 Response reflects that BAAQMD is "still investigating."

> Finally, the Air District also received communications outside of the formal comment period from power plant owner/operators who questioned whether a limit of 7.5 pounds per hour would be achievable over all operating scenarios. **These interested parties stated that equipment manufacturers will not guarantee emissions performance at 7.5 pounds per hour.** They also noted that some of the test results showed emissions above 7.5 pounds per hour, and stated that as an enforceable not-to-exceed permit condition the BACT limit needs to be set at a level that can accommodate all such test results. They stated that the Air District should not establish a BACT limit at less than 9.0 pounds per hour. ***The Air District acknowledges these points and is considering them, but ultimately does not need to make a definitive determination*** **in response because the project applicant is willing to accept the 7.5 pound-per-hour permit limit.** The Air District understands that equipment manufacturers will not guarantee emissions below 9.0 pounds per hour. Vendor guarantees are one important indicator of what emissions performance level is achievable for a BACT analysis, although the presence or absence of a vendor guarantee is not by itself determinative.[n] **The Air District is also fully aware that some of the test results it review showed emissions above 7.5 pounds per hour**, as discussed in the Additional Statement of Basis. . . . . **The Air District is investigating these test results further to develop more information on this issue.** It may be that the high test results were due to inherent uncertainties in the test method as discussed above, or because of upsets in facility operation that led to excessive particulate matter. **Alternatively, it may be that the equipment cannot in fact ensure emissions below 7.5 pounds per hour under all foreseeable circumstances. The Air District will continue to evaluate this issue going forward. But for purposes of the Russell City permit, the District does not need to make a final**

> **determination of whether BACT for this type of equipment should be 7.5 pounds per hour, 9.0 pounds per hour, or some number in between.**

Response at ___, emphasis and italics added.

Here, BAAQMD excluded emissions from all roadways but one, Highway 92. The nearby excluded roadways, such as interstate highway 880, all within the impact area, experience vehicle and truck volumes at least three times or greater than the one included roadway, Highway 92, in which these communities are located. However, exactly where these 2,400 additional sensitive receptors are located remains known to BAAQMD, but not to the public. The fact that BAAQMD refuses to disclose the location of these 2,400 additional sensitive receptors that its own air modeling run produced applying a recognizably achievable rate of 9lbs/hour, undermines BAAQMD's assertion, made without any evidence or authority to support its conclusion, that RCEC's pollution, in conjunction with the emissions contributed from these nearby roadways, is "*de minimis*." *Compare*, Sept. 16, 2009 Comment at 2.[5] As set forth by BAAQMD's response to the College District's petition:

> The District did not err in evaluating only receptor locations where the facility's impacts will be above the SIL because locations with impacts below the SIL are considered *de minimis* for purposes of PSD review. The District did not err in evaluating only sources that could cause a significant concentration gradient at such receptor locations

[5] Sept. 16, 2009 comment, p. 2, referring BAAQMD to the now finalized Rules: Implementation of the New Source Review (NSR) Program for PM2.5, amending 40 CFR Parts 51 and 52., requiring that any NSR analysis must include "An **alternative siting analysis demonstrating that *the benefits of the proposed source significantly outweigh the environmental and social costs* imposed as a result of its location,** construction, or modification." Although the College District recognizes that this analysis is applicable to an application for NSR, the question posed is important and equally is relevant to a determination of whether a project disproportionately impacts an already stressed community.

> because applicable guidance is clear that the number of nearby sources needs to be limited and should focus only on those that could cause significant contributions.

BAAQMD Response at 26-27.

> . . . the District determined that areas **where the facility will not cause impacts above the SIL do not need to be included** in the full analysis of where and when the 24-hour PM2.5 NAAQS could be exceeded. The District therefore concluded that if there were any other sources that could cause significant concentration gradients only at receptor locations where the facility's impacts were below the SIL, any such sources could not make a difference in the outcome of the analysis. This is because even if nearby sources were causing a NAAQS violation at such locations, such violations would not lead to a "cause or contribute" finding under Section 52.21(k) because at that location, the facility's contribution will be less than the SIL and thus considered *de minimis*.

BAAQMD Response at 28, emphasis added.

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 despite the College District's request that BAAQMD identify these locations. (These receptors are part of the air run performed for BAAQMD generated when the vendor guaranteed achievable emissions rate is used.) Assuming 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.

Here, the College District raised this issue as a distinct and stand alone issue, which was brushed under the dismissal of the "24 hour claims."[6] There was no

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[6] Specifically, the College District raised the following issue:

> BAAQMD clearly erred by excluding from its modeling ***all roadway emissions but one*** as those excluded nearby roadway emissions already have been identified as causing significant concentration gradients within the acknowledged significantly impacted area, and generally are recognized by BAAQMD as a

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. Also see EPA Modeling Guidelines, Appendix W, concerning identification of receptors: http://www.epa.gov/ttn/scram/guidance/guide/appw_05.pdf. Given the "split" analysis by BAAQMD and its reliance on the air modeling to justify the issuance of the permit with respect to the annual PM, the Board needs to address these important issues raised by the College District.

VI. CONCLUSION

Based on the underlying administrative record before the Board, the issuance of the PSD Permit for RCEC by BAAQMD was clearly erroneous and as a matter of law must be remanded back for further proceedings. The College District submits that if the Board reconsiders the issues which it did not address in its November 18, 2010 opinion, it will require BAAQMD to perform a proper air impact analysis applying the "worst case" emission rate for PM2.5; and, in preparing that air analysis, BAAQMD must include those roadways it erroneously excluded which BAAQMD's CARE program identifies as contributing to existing health problems of the community, and to model those emissions.

Likewise, if the Board reconsiders the College District's environmental justice challenge, it will remand this permit back to require BAAQMD to apply an environmental justice analysis which recognizes the existing health problems in this community which BAAQMD already has identified as suffering from disproportionate

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> contributing factor for the cause of the increased health problems experienced in the community.

Pet at 2, italics and emphasis original.

health risks from pollution, and the impact that RCEC's pollution will cause to a community which already bears high economic burdens due to pollution.

Lastly, 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 pending review of the College District's petition for reconsideration.

Dated: November 29, 2010

Respectfully Submitted,

Jewell J. Hargleroad,
Attorney for Petitioner Chabot Las-Positas
Community College District

CERTIFICATE OF SERVICE

I hereby certify that the Petition By Chabot-Las Positas Community College District For Reconsideration or Clarification and Request for Immediate Stay Of the November 18, 2010 Order Denying Review was sent to the following persons in the matter indicated:

Via Email:
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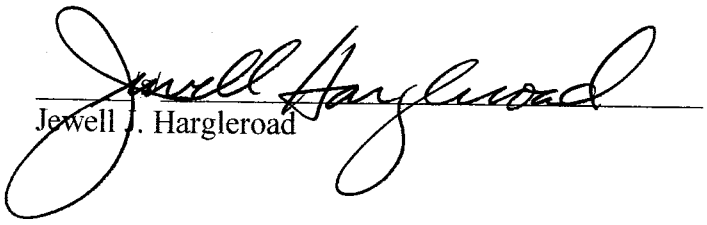
I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct. Executed this 29th day of November, at Hayward, California.



Jewell J. Hargleroad

From: Vanessa Hodgson <VHodgson@baaqmd.gov>
Date: November 18, 2010 4:19:52 PM PST
Cc: Brian Bateman <BBateman@baaqmd.gov>, Brenda Cabral <BCabral@baaqmd.gov>, Weyman Lee <Weyman@baaqmd.gov>, BYoung@baaqmd.gov
Subject: Renewal of Authority to Construct for the Russell City Energy Center

November 18, 2010

Subject: Renewal of Authority to Construct for the Russell City Energy Center

Dear commenter:

The Bay Area Air Quality Management District is sending this notice to interested persons who submitted comments to the District regarding the federal Prevention of Significant Deterioration (PSD) Permit for the Russell City Energy Center. This notice is to inform you that the District has renewed the state-law Authority to Construct for this facility. The Authority to Construct is a state-law permit, as opposed to the PSD permit, which is a federal permit. The District has renewed the Authority to Construct in accordance with a recent amendment to the California Energy Commission's license for the facility in Commission proceeding No. 01-AFC-7C. Under the Warren-Alquist State Energy Resources Conservation and Development Act (Public Resources Code sections 25000 *et seq.*), the Energy Commission has plenary authority over all state-law permitting issues regarding power plants such as the Russell City Energy Center, and the District implements the permitting determinations of the Energy Commission by incorporating the conditions of the Commission's license into the Authority to Construct. The District

EXHIBIT A

has issued a renewed ATC incorporating revised licensing conditions that the Energy Commission approved in proceeding No. 01-AFC-7C. The District is informing interested persons who commented on the federal PSD permit of this renewal of the Authority to Construct because persons who commented on the federal PSD permit may also be interested in the status of the state-law Authority to Construct. The District is also informing the Energy Commission of this renewal.

Sincerely,
Weyman Lee
Senior Air Quality Engineer
. . .