

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

_____)
In the Matter of:)
)
Delta Energy Center)
) PSD Appeal No. 99-76
Bay Area Air Quality)
Management District)
PSD Permit App. No. 19414)
_____)

ORDER GRANTING MOTION TO DISMISS

On December 23, 1999, Calpine Corporation and Bechtel Enterprises ("Calpine/Bechtel"), the owner and operator of a proposed 880-megawatt electrical generating facility known as the Delta Energy Center, filed a Motion for Leave to File and Expedited Motion to Dismiss ("Motion to Dismiss") seeking the dismissal of a petition for review filed by Californians for Renewable Energy ("CRE"), a California nonprofit corporation. In its petition, filed November 18, 1999, CRE challenges provisions of a Final PSD Permit determination ("Final Permit") issued to Calpine/Bechtel by the Bay Area Air Quality Management District (BAAQMD) on October 21, 1999.

In their Motion to Dismiss, Calpine/Bechtel maintain that CRE lacks standing to petition for review of the Final Permit under the regulations at 40 C.F.R. Part 124 governing issuance of PSD permits. EPA Region IX and EPA's Office of Air and Radiation ("EPA") adopted the same position and filed a motion on December 29, 1999, requesting leave to file as *amici* in support of the Motion to Dismiss. EPA Motion for Leave to File and Memorandum in Support of Expedited Motion to Dismiss Petition for Review ("EPA's Motion"). BAAQMD also subsequently concurred in the Motion to Dismiss and incorporated it by reference in its "Response Brief of the Bay Air Quality Management District," dated January 14, 2000 ("BAAQMD"). CRE objected to granting the Motion to Dismiss by filing its Response to the Applicant's Motion for Leave to File and Expedited Motion to Dismiss ("CRE's Response") on January 4, 2000. We grant Calpine/Bechtel and EPA leave to file their motions, and after considering the above filings as well as the petition for review, grant the Motion to Dismiss, as explained below.

We agree with Calpine/Bechtel's arguments that CRE failed to meet the standing requirements necessary for obtaining review of PSD permits as set forth in 40 C.F.R. Part 124.

Under 40 C.F.R. § 124.19(a), parties may satisfy standing in one of two ways: (1) by submitting comments on a draft permit or participating in public hearings on a draft permit or (2) failing this, by challenging the draft permit "only to the extent of changes from the draft to the final permit decision." Failure to fulfill either of these two requirements disqualifies the petitioner from appealing the issuance of the final PSD permit determination.¹

CRE meets neither standing test. Neither the petition for review nor CRE's Response alleges or demonstrates that CGE either participated in a public hearing on the draft permit (issued August 18, 1999) or submitted comments on it.² Nor

¹See *In re Sutter Power Plant*, PSD Appeal Nos. 99-6 & 99-73, slip op. at 16 (EAB, Dec. 2, 1999), 8 E.A.D. ____; see also *In re Rockgen Energy Center*, PSD Appeal No. 99-1, slip op. at 7-8 (EAB, Aug. 25, 1999), 8 E.A.D. _____. These decisions are distinguishable from the situation where a petitioner who independently satisfied the standing requirement may include within a petition for review issues that had been raised by a different commenter. See *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 127 n.27 (EAB 1997)(citing *In Re Masonite Corp.*, 5 E.A.D. 551, 559 n.9 (EAB 1994)).

²See *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 120 (EAB 1997) ("The purpose of requiring all reasonably ascertainable issues to be raised *during* the public comment period is so that the permit issuer can address potential problems with the draft permit before the permit becomes final." [Emphasis in original; citations omitted]).

does CRE purport in any way to limit its request for administrative review to changes from the draft to the final permit. CRE's lack of standing is confirmed by a letter from BAAQMD to Calpine/Bechtel's counsel in which BAAQMD relates that "[BAAQMD] did not receive written or oral comment from the petitioner." Motion to Dismiss, Exhibit 2, Letter from Robert N. Kwong, District Counsel, BAAQMD, to Jeff Harris, Ellison & Schneider (Dec. 22, 1999). The letter also lists changes from the draft to the Final Permit. We agree with Calpine/Bechtel that the changes are "technical," and that CRE did not address them in its petition for review. Motion to Dismiss at 6. Rather, the broad ranging objections to the Final Permit that CRE makes in its petition for review are ones that CRE could have but failed to raise during the public comment period. See 40 C.F.R. § 124.13 ("All persons * * * who believe any condition of a draft permit is inappropriate * * * must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period * * *").

In response to the Motion to Dismiss, CRE suggests that its participation in a hearing before the California Energy

Commission ("CEC") invests CRE with the necessary standing to petition for review of the final permit. CEC possesses special licensing authority for power plants of 50 megawatts or greater, and the issuance of a federal PSD permit by a local air pollution control district such as the BAAQMD is a predicate step in the CEC's state siting and licensing process. See BAAQMD Response at 4-8. Nonetheless, CRE's appearance before the CEC is irrelevant to a determination of standing to challenge BAAQMD's permit decision. BAAQMD, not CEC, issued the PSD permit and is the state agency to which EPA, under 40 C.F.R. § 52.21(u), delegated its authority to implement the PSD program, including implementation of the public notice and comment procedures set forth in 40 C.F.R. Part 124. See EPA's Motion at 2 (stating that BAAQMD was EPA's delegate to operate the PSD program). Highlighting the separate roles performed by the two entities is the fact that BAAQMD identified CEC as one of five commenters³ having submitted written comments on the draft PSD permit. Nor was

³The BAAQMD identified the commenters as "(1) U.S. Environmental Protection Agency; (2) California Air Resources Board; (3) Sierra Research for Calpine; (4) the California Energy Commission ("CEC"); and (5) Jim MacDonald, a resident of Pittsburg, CA." Motion to Dismiss, Exhibit 2, Letter from Robert N. Kwong, District Counsel, BAAQMD, to Jeff Harris, Ellison & Schneider (Dec. 22, 1999).

BAAQMD's role hidden from the public. Among other things, it published notice in the *Contra Costa Times* on August 24, 1999, announcing that it was providing interested persons with the opportunity to submit written comments on the draft PSD permit for a 30-day period. Administrative Record at 2579. CRE did not take advantage of this opportunity, and thus cannot contend that it has satisfied standing requirements.

We also find without merit CRE's argument, first raised in response to the Motion to Dismiss, that the submission of comments to BAAQMD by Mr. James B. MacDonald, described as a "corporate member" of CRE, established CRE's standing to petition for review. The administrative record and the facts asserted by CRE simply do not support the requisite common participation between CRE and Mr. MacDonald in the BAAQMD permit proceedings. For example, Mr. MacDonald did not hold himself out as a representative of CRE in his comments on the draft permit; CRE's petition did not identify Mr. MacDonald's comments as those upon which CRE was relying to demonstrate that it had raised issues during the public comment period; and a written request by Mr. MacDonald for CRE's assistance, produced by CRE in response to the Motion to Dismiss, was made after the public comment period had expired. See CRE's

Response, Exhibit A, Letter from James B. MacDonald to Michael E. Boyd, Director of CRE (Nov. 1, 1999). Moreover, the specific assistance sought by Mr. MacDonald made no reference to an appeal of the PSD Permit or an appeal to the EAB; instead, the assistance sought referred to a class action against BAAQMD and others.⁴

Finally, CRE, citing its lack of legal expertise and funds to hire counsel, asserts that it is entitled to a more deferential standard of permit review, one which the Board has often accorded petitioners unrepresented by legal counsel. See, e.g., *In re KnauF Fiber Glass, GmbH*, PSD Appeal Nos. 98-3 to 98-20, slip op. at 9 (EAB, Feb. 4, 1999), 8 E.A.D. ____ (“Despite the strict standard for review, the Board tries to construe petitions filed by persons unrepresented by legal counsel broadly.”); accord *In re Envotech, L.P.*, 6 E.A.D. 260, 268 (EAB 1996). The Board finds CRE’s claim without merit, for CRE is not the type of *pro se* petitioner we have accorded deferential treatment in the past. Unlike the other *pro se*

⁴In his letter to CRE, Mr. MacDonald requests “legal assistance in a class action suit against the City of Pittsburg, BAAQMD and CEC concerning the approval [of Delta Energy Center].”

petitioners, CRE holds itself out to be a purveyor of expert legal assistance in regard to new energy projects in California. CGE's articles of incorporation expressly identify the "specific purposes" of the corporation as "supply[ing] * * * legal assistance to planning, conservation * * * and neighborhood groups in regards to new energy projects in the state of California," "giving legal advice," and "employ[ing] legal counsel." Motion to Dismiss, Exhibit 3, Articles of Incorporation for Petitioner Californians for Renewable Energy (Aug. 30, 1999). In sum, as an organization claiming access to legal expertise in matters directly related to this type of proceeding (even if financial constraints made obtaining such access difficult), CRE is distinguishable from, and does not merit the same deferential treatment as, an unrepresented petitioner not expected to be minimally versed in the applicable law.⁵

For the foregoing reasons, we find that CRE lacks standing to file a petition for review of the Final Permit,

⁵By ruling that CRE is not entitled to such deference, we do not mean to imply that giving deference in this case would necessarily affect the outcome, for we do not reach that issue.

and accordingly grant Calpine/Bechtel's Motion to Dismiss.⁶

So ordered.

ENVIRONMENTAL APPEALS BOARD

By: _____ /s/_____
Ronald L. McCallum
Environmental Appeals Judge

Dated: 02/09/00

⁶Several submissions were received from a number of individuals and entities in addition to those submitted in the ordinary course of this appeal. Since we are dismissing the sole petition for review on grounds of lack of standing, we see no reason to burden the record with those additional submissions. Accordingly, all submissions that either were not requested in writing by the Board's Clerk or are not cited in this decision are officially stricken from the record.

CERTIFICATE OF SERVICE

I hereby certify that copies of the forgoing Order Granting Motion to Dismiss in the matter of Delta Energy Center, PSD Appeal No. 99-76, were sent to the following persons in the manner indicated:

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_____/s/
Annette Duncan
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