

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

In re: Russell City Energy Center)	PSD Appeal No. 10-01 (California Pilots Ass'n, Petitioner) and No. 10-05 (CARE, Rob Simpson & Robert Sarvey, Petitioners)
PSD Permit No. 15487)	[Related to PSD Appeals Nos. 10-02, 10-03, 10-04, 10-06, 10-07, 10-08, 10-09, & 10-10.]

**REQUEST FOR EXTENSION OF TIME TO FILE RESPONSE ON THE MERITS
TO PETITIONS FOR REVIEW**

PSD APPEAL NO. 10-01

PSD APPEAL NO. 10-05

Respondent the Bay Area Air Quality Management District (“District”) respectfully requests that the Environmental Appeals Board grant an extension of the April 23, 2010, deadline for filing a response on the merits to the Petitions for Review filed (i) by the California Pilots Association in PSD Appeal No. 10-01, and (ii) by CALifornians for Renewable Energy (“CARE”), Rob Simpson, and Robert Sarvey in PSD Appeal No. 10-05. The District requests that the time for filing responses be extended from the April 23, 2010, deadline set forth in the Board’s April 14, 2010, Orders until April 29, 2010, which is 15 days from the date of those Orders in keeping with the timetable originally set forth in the Clerk of the Board’s March 25, 2010, scheduling letter. Given the District’s resource constraints and the significant additional work commitments the District faces in addition to responding on the merits to these two Petitions for Review – including but not limited to submitting responses on the merits to other Petitions for Review filed in this matter – the District finds that it needs to request a full 15 days from the Board’s April 14, 2010, Orders to prepare comprehensive responses on the merits to the Petitions for Review in Appeal Nos. 10-01 and 10-05.

GOOD CAUSE EXISTS FOR EXTENDING THE TIME TO FILE RESPONSES ON THE MERITS TO PETITIONS NOS. 10-01 AND 10-05 UNTIL APRIL 29, 2010

For the following reasons, the District submits that good cause exists for extending the time for the District to respond on the merits from April 23, 2010, to April 29, 2010.

In the March 25, 2010, scheduling letter from the Clerk of the Board, the Environmental Appeals Board requested that the District submit a response to the Petitions for Review filed in PSD Appeals Nos. 10-01 (California Pilots Ass'n) and 10-05 (CARE/Simpson/Sarvey) (as well as other petitions filed in this matter). (*See* Letter from E. Durr, Clerk of the Board, to J. Broadbent, Air Pollution Control Officer, Bay Area Air Quality Management District (Mar. 25, 2010) (hereinafter, "March 25, 2010, Scheduling Letter"), at 1-2.) The March 25, 2010, Scheduling Letter stated that if the District contended that the Petitions in their entirety were appropriate for summary disposition, either because the Board lacks jurisdiction to consider them or because the appeals were untimely, Petitioners lack standing to appeal, or none of the issues raised in the Petitions were preserved for review, the District should file a response to that effect by April 8, 2010. The letter stated that if the Board determines that summary disposition is appropriate, it will issue an order to that effect. The letter further stated that if the Board determines that summary disposition is not appropriate, or that the issue of summary disposition should be reserved until after responses to the merits of the petitions are filed, the Board will issue an order directing that a response to the merits of the petitions be filed within 15 days of the Board's order. (*See id.* at 2.)

The District does contend that both Petition No. 10-01 and Petition No. 10-05 should be summarily dismissed, on jurisdictional and timeliness grounds, respectively. The District therefore filed Responses Requesting Summary Dismissal of both Petitions on April 8, 2010, in accordance with the March 25, 2010, Scheduling Letter. With respect to Petition 10-01 (California Pilots Ass'n), the District contends that the Petition raises only issues concerning air traffic safety and airport operations, which are unrelated to the Federal PSD Program and therefore not within the Board's jurisdiction under 40 C.F.R. Section 124.19. (*See* Response

Requesting Summary Dismissal, PSD Appeal No. 10-01 (Apr. 8, 2010).) With respect to Petition 10-05 (CARE/Simpson/Sarvey), the District contends that the Petition was untimely because it was not filed with the Board until March 30, 2010, which was after the March 22, 2010, deadline for filing appeals of this permit. (*See* Response Requesting Summary Dismissal, PSD Appeal No. 10-05 (Apr. 8, 2010).)

Since filing its Responses Requesting Summary Dismissal on April 8, 2010, the District has continued to develop responses to the merits of the arguments that Petitioners have raised in these two Petitions, in order to be prepared for the possibility that the Board might decline to grant summary disposition before considering the merits as contemplated by the March 25, 2010, Scheduling Letter. The District has prioritized its efforts towards preparing its responses on the merits to the other Petitions for Review that were filed in this matter for which summary disposition has not been sought, however. The District has prioritized its efforts in this manner because the March 25, 2010, Scheduling Letter requests responses on the merits to those Petitions by April 23, 2010, and because those Petitions raise a substantial number of issues to which the District must respond. In particular, Petition No. 10-02 filed by Chabot-Las Positas Community College District is 38 pages long, exclusive of exhibits; Petition No. 10-03 filed by Citizens Against Pollution is 29 pages long, exclusive of exhibits, and Petition No. 10-04 filed by Robert Sarvey is 22 pages long. The District has also prioritized its efforts in this manner because the March 25, 2010, Scheduling Letter indicated that if the Board determined that the issue of summary disposition of Petitions 10-01 and 10-05 should be reserved until after a response on the merits, the Board would direct that a response on the merits to these Petitions would be due 15 days after the Board's order. The District therefore concluded that, in the event the Board determined that it would require briefing on the merits before ruling on the District's requests for summary disposition, the District would have 15 days from that determination to complete its responses on the merits. For all of these reasons, the District has devoted the greater part of its efforts towards preparing its responses on the merits to Petitions 10-02, 10-03, and 10-04 by the April 23, 2010, deadline set forth in the March 25, 2010, Scheduling Letter. As a

result, the District's work in preparing responses on the merits to Petitions 10-01 and 10-05 is somewhat less advanced.

On April 14, 2010, the Board issued Orders in Appeal Nos. 10-01 and 10-05 deferring adjudication of the issues of summary adjudication until after briefing on the merits. (*See Order Denying Request For Summary Dismissal Of CalPilots Petition And Requesting Response On The Merits*, PSD Appeal No. 10-01, slip. op. at 2 (EAB Apr. 14, 2010); *Order Denying Request For Summary Dismissal Of CARE Petition And Requesting Response On The Merits*, PSD Appeal No. 10-05, slip. op. at 2 (EAB Apr. 14, 2010).) In both cases the Board noted that the District has raised legitimate arguments supporting summary adjudication, but it determined that it would reserve judgment until after it receives responses on the merits. Rather than setting a deadline for filing responses on the merits 15 days from the Board's Orders, however, the Board requested responses by April 23, 2010. (*See id.*)

Completing a response to the merits of these two Petitions for Review by April 23, 2010, will present significant hardship for the District, and it will prevent the District from being able to present a comprehensive and fully-reasoned rebuttal of Petitioners' claims. These two Petitions present a total of 35 pages of argument, and raise a large number of widely varying substantive issues ranging from whether the District adequately considered greenhouse gas emissions from the facility (*see* Petition 10-05 at 9-12) to whether the use of the name "Russell City Energy Center" misled the public regarding the facility's actual location (*see* Petition 10-05 at 19) to whether the District was required to consider the potential for economic impacts to the City of Hayward that could result because of alleged disruptions to air traffic at Hayward Executive Airport (*see* Petition 10-01 at 8), among many others. The District has only a small legal office and only a single staff attorney available to work on all of the District's power plant permitting issues, in addition to other work such as enforcement and regulatory development matters. And the limited resources that the District does have are already being devoted to other important commitments – including completing the District's responses on the merits in Petitions for Review Nos. 10-02, 10-03, and 10-05, which also present extensive substantive issues as

noted above, by the April 23, 2010 deadline, as well as other important District work unrelated to the Russell City Energy Center.

Under the circumstances, the District will not be able to present to the Board a complete and comprehensive response on the merits to Petitions Nos. 10-01 and 10-05 as well by April 23. The District has begun work on its responses to those Petitions and has made substantial progress, but it is not in a position at this time to complete its responses on the merits by April 23, 2010, because it was contemplating that the deadline for any such responses – in the event that the Board declined to grant summary dismissal – would not be until 15 days after the Board’s order to that effect. The District will be in a position to complete its responses on the merits to Petitions Nos. 10-01 and 10-05 by April 29, 2010 (15 days after the Board’s April 14, 2010, order requesting responses on the merits), but regrets to inform the Board that under the circumstances it will not be able to file full and complete responses by April 23, 2010. The District is therefore requesting an extension of time until April 29, 2010, to file its responses on the merits.

The District also notes that the Board has sought responses from the District in part “[t]o assist the Board in deciding whether the matters raised by Petitioners should be reviewed” (March 25, 2010, Scheduling Letter at 1.) The District submits that its responses on the merits will be of far more assistance to the Board in this regard if the Board grants the District the short extension it is requesting so that the District may complete its work and provide comprehensive and well-reasoned responses to the issues raised in these Petitions.

Finally, granting the requested extension of time to file responses on the merits to these two Petitions will not substantially delay the final resolution of this matter, and it will not cause any prejudice to any other parties. An extension from Friday, April 23, 2010, through Thursday, April 29, 2010, constitutes only four additional business days, which is not a substantial amount of time in comparison to the amount of time that has been and will be involved in the District processing and issuing this permit, in the Petitioners preparing their Petitions, in the District and applicant preparing their responses to the Petitions, and in the Board ultimately rendering a decision on the Petitions. Moreover, this short extension is being sought only with respect to two

of the ten Petitions that have been filed in this matter, and so adjudication of the other eight Petitions will not be affected at all by the short extension the District is requesting. Furthermore, there are no other filing deadlines or any other dates that are contingent upon the District's responses on the merits to these two Petitions, and so there will not be any consequential delays in this proceeding from granting the requested extension, nor any possibility of prejudice to any other parties from extending the current deadline from April 23, 2010, to April 29, 2010.

REQUEST FOR EXTENSION OF TIME TO FILE RESPONSES

For the foregoing reasons, the District submits that good cause exists to grant a short extension to the time for filing a response on the merits to Petitions Nos. 10-01 and 10-05. The District therefore respectfully requests that the Environmental Appeals Board extend the time for filing a response on the merits to the Petitions for Review in PSD Appeal Nos. 10-01 and 10-05 until April 29, 2010.

Dated: April 16, 2010

Respectfully Submitted

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

_____/s/_____
By: Alexander G. Crockett Esq.
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PROOF OF SERVICE

I, Mildred Cabato, declare as follows:

I am over the age of 18, not a party to this action, and employed in the City and County of San Francisco, California, at 939 Ellis Street, San Francisco, CA 94109.

On the date set forth below, I served this document, **“Request For Extension Of Time To File Response On The Merits To Petitions For Review, PSD Appeal No. 10-01 & PSD Appeal No. 10-05”**, by placing a copy of it in a sealed envelope, with First Class postage thereon fully paid, and depositing said envelope in the United States Mail at San Francisco, California, addressed to the person set forth below:

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