

FILED

MAR 20 2008

HEARING BOARD
BAY AREA AIR QUALITY
MANAGEMENT DISTRICT

BEFORE THE HEARING BOARD

OF THE BAY AREA AIR QUALITY MANAGEMENT DISTRICT

In the Matter of the Appeal of)
ROB SIMPSON)
from the issuance of an Authority to Construct)
for the Russell City Energy Center)
Application No. 15487)

DOCKET NO. 3546

ORDER DISMISSING APPEAL

Vanessa Johnson
Acting Clerk
Hearing Board
Bay Area Air Quality
Management District

The above-captioned matter, an appeal of a Bay Area Air Quality Management District (“District”) permitting action for the Russell City Energy Center (“Project”), came on regularly for hearing on March 6, 2008.

Appellant Mr. Rob Simpson appeared for himself.

Alexander G. Crockett, Esq., Assistant Counsel, appeared for the Air Pollution Control Officer of the District.

Greggory L. Wheatland, Esq., appeared for Intervenor Russell City Energy Company, LLC.

The Hearing Board was in receipt of the briefs and supporting materials filed by all parties, as well as an amicus brief filed by the California Energy Commission, on the issue of whether the Hearing Board properly has jurisdiction over this Appeal. The Hearing Board received further oral argument from all parties at the hearing on this issue, as well as cross-examination by Appellant of the District’s permit engineer for the proposed facility, Mr. Weyman Lee. The Hearing Board also provided members of the public the opportunity to testify on this matter pursuant to Health & Safety Code Section 40828, but no members of the public came forward to be heard.

THE HEARING BOARD STATES as the reasons for its decision and FINDS as to those matters before it for adjudication as follows:

On its face, this Appeal challenges the Authority to Construct that the Air Pollution Control Officer (hereinafter referred to simply as the “District”) issued for this Project. But Appeals of Authorities to Construct issued for power plants under District Regulation 2-3-405 are limited to the question of whether the District properly carried out its ministerial duty of ascertaining that the California Energy Commission’s “Certificate contains all applicable conditions.” If the District has

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1 properly done so, and all applicable conditions of certification are correctly incorporated into the
2 Authority to Construct, the Hearing Board's inquiry must end there. In this case, Appellant does not
3 allege any failure to properly carry out this ministerial duty, or any impropriety in the incorporation
4 of the conditions of certification into the Authority to Construct. The Appeal therefore fails to raise
5 any issue that would be within the Hearing Board's jurisdiction in such an appeal.

6 In substance, the Appeal seeks to go beyond the ministerial act of issuing the Authority to
7 Construct, and attempts to challenge the permit conditions themselves and the engineering judgment and
8 analysis that resulted in them. But on those issues, the Hearing Board lacks jurisdiction because of the
9 preclusive effect the Warren-Alquist State Energy Resources Conservation and Development Act
10 ("Warren-Alquist Act" or "Act"), Public Resources Code §§ 25000 *et seq.* That Act establishes the
11 California Energy Commission as the sole licensing authority for new thermal power plants with
12 generating capacity over 50 MW. The Act provides for the District to play a supporting role in
13 providing its expertise on air quality matters for using during the Energy Commission's licensing
14 process, but it places the final say over all power plant siting issues in the Energy Commission (Public
15 Resources Code § 25500) with review only by direct appeal to the California Supreme Court (Public
16 Resources Code § 25531(a)). As a corollary, the Warren-Alquist Act expressly preempts any other
17 Court in the state—and by implication, any other administrative tribunal—from hearing "any matter
18 which was, or could have been determined in a proceeding before the commission" (Public
19 Resources Code Section 25531(c).) This preemption extends to the substantive issues that Appellant
20 seeks to raise here, such as whether and how the facility will comply with applicable air quality
21 regulations, and what conditions are necessary and appropriate to ensure that it will do so. These are all
22 issues that could have been and were before the Energy Commission in licensing the Project, and so the
23 Hearing Board lacks jurisdiction to hear an appeal involving them here.

24 Finally, the Appeal also purports to seek review of the federal Prevention of Significant
25 Deterioration ("PSD") permit the District issued for the Project on behalf of Region IX of the United
26 States Environmental Protection Agency. But federal PSD permits are federal permits that are
27 appealable to the Environmental Appeals Board in Washington, D.C., not to this Hearing Board. (*See*
28 *Order Dismissing Appeal, In the matter of the Appeal of the City of Morgan Hill et. al. etc.*, Hearing

1 Board Docket No. 3350 (Hearing Board Dec. 20, 2001), Slip. Op. at p. 7., *aff'd sub. nom.*, *City of*
2 *Morgan Hill v. Bay Area Air Quality Management Dist.*, (2004) 118 Cal. App. 4th 861, 871, 13 Cal.
3 Rptr. 3d 420 (“[T]he District Hearing Board may not review any PSD permit issues raised in these
4 appeals.”).) The record shows that Appellant is pursuing an appeal there. The Hearing Board has no
5 jurisdiction to consider those issues here.

6 For these reasons, the Hearing Board lacks jurisdiction to hear any of the issues that Appellant
7 seeks to raise in this Appeal.¹ With no jurisdiction, the Hearing Board must, and hereby does, dismiss
8 the Appeal.

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10 THEREFORE, THE HEARING BOARD ORDERS:

11 The Appeal as indicated under Docket No. 3546 shall be and hereby is
12 DISMISSED.


13 Moved by: Terry A. Trumbull

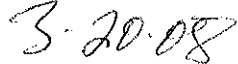
14 Seconded by: Rolf Lindenhayn, Esq.

15 AYES: Christian Colline, P.E.; Rolf Lindenhayn, Esq.; Julio Magalhães, Ph.D; Terry A.
Trumbull, Esq.; Thomas M. Dailey, M.D.

16 NOES: None.

17 NON-PARTICIPATING: None.

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Thomas M. Dailey, M.D., Chair

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¹ The Appeal also purported to appeal the issuance of Emission Reduction Credits (“ERCs”) in connection with the permitting of the proposed facility. The record shows no indication that the District issued any ERCs in connection with this Project, and the Appellant did not pursue any such claim in his briefs or at the hearing.