BEFORE THE HEARING BOARD

OF THE BAY AREA AIR QUALITY MANAGEMENT DISTRICT

In the matter of the Appeal of CALIFORNIANS FOR RENEWABLE ENERGY, INC. from the renewal of an Authority to Construct for the Russell City Energy Center	Docket No. 3607 ORDER: 1. DENYING FEE WAIVER REQUEST; 2. DENYING APPLICATION FOR LEAVE TO INTERVENE; 3. DENYING MOTION TO STRIKE DOCUMENT AND/OR CONTINUE HEARING; AND 4. DISMISSING APPEAL FOR LACK OF JURISDICTION

The above-captioned matter, involving an appeal of the renewal of an Authority to Construct by the Air Pollution Control Officer ("APCO") of the Bay Area Air Quality Management District ("District"), came on regularly for hearing on February 3, 2011. Four issues were raised for adjudication by the Hearing Board:

(i) A request by appellant Californians for Renewable Energy ("CARE") for a waiver of the Hearing Board's filing fee pursuant to District Regulation 3, schedule A;

(ii) An application by Mr. Robert Sarvey for leave to intervene in this Appeal pursuant to Hearing Board rule 3.6;

(iii) A motion by CARE to strike a letter from the California Energy Commission ("CEC") that was filed in this docket on January 27, 2011, or in the alternative to continue the hearing and provide for further briefing, as well as to deny the CEC leave to intervene; and

(iv) A motion by the APCO to dismiss this Appeal for lack of jurisdiction pursuant to Hearing Board rule 8.1.a.

Mr. Michael Boyd, President of CARE, appeared on behalf of CARE.

Alexander Crockett, Esq., appeared on behalf of the APCO.

Kevin Poloncarz, Esq., appeared on behalf of Intervenor Russell City Energy Company, LLC.

Proposed Intervenor Mr. Robert Sarvey appeared on his own behalf.

The Hearing Board was in receipt of the briefs and supporting materials filed by the parties, as well as materials submitted by third parties that they wished the Hearing Board to consider. The Hearing Board received further oral argument from the parties at the hearing, as well as hearing oral testimony from third-party members of the public. The Hearing Board provided all members of the public with the opportunity to testify on this matter pursuant to Health & Safety Code section 40828. Hearing Board member Mr. Magalhães noted for the record that he has worked in the past as a consultant for the Loma Prieta chapter of the Sierra Club, while a letter regarding this matter was received from the Bay chapter of the Sierra Club. Mr. Magalhães stated that his work for the Sierra Club was unrelated to anything having to do with the Russell City Energy Center or this Appeal. No party or member of the public voiced any objection to Mr. Magalhães participating in the adjudication of this matter.

After considering all of the evidence and argument submitted, the Hearing Board ruled on the matters before it as follows:

(i) The Hearing Board DENIES CARE's request for a fee waiver;

(ii) The Hearing Board DENIES Mr. Sarvey's request for leave to intervene;

(iii) The Hearing Board DENIES CARE's motion to strike and alternative request for a continuance and further briefing, and declines to rule on CARE's motion to deny the CEC leave to intervene because the CEC has not sought to intervene; and

(iv) The Hearing Board GRANTS the motions by the APCO and RCEC to dismiss the Appeal for lack of jurisdiction.

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

FACTUAL AND PROCEDURAL BACKGROUND

This Appeal involves the complex interplay between the Warren-Alquist State Energy Resources Conservation and Development Act ("Warren-Alquist Act" or "Act") and the air quality related provisions of the California Health & Safety Code as these statutes apply to power plant permitting.

The Health & Safety Code provides for a system of air quality regulations adopted by California's air districts, including the Bay Area Air Quality Management District here. The District's Board of Directors has adopted such regulations, which establish permitting requirements for stationary

sources of air pollution (among other requirements). (*See, e.g.*, District Regulation 2, Rule 2.)

The Warren-Alquist Act establishes the process under which these and other important regulatory requirements are implemented for power plant projects of 50 megawatts ("MW") or larger. Under the Warren-Alquist Act, the California Energy Commission has plenary authority for licensing all such power plants, which it does through a single, comprehensive regulatory review and approval process. As the Warren-Alquist Act provides:

> In accordance with the provisions of this division, the commission shall have the exclusive power to certify all sites and related facilities in this state, whether a new site and related facility or a change or addition to an existing facility. The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by an state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.

(Pub. Res. Code § 25500.)

This system in which the Energy Commission has the exclusive power over permitting of new power plants is often referred to as a "one-stop shopping" approach to permitting, as it involves a single, comprehensive permitting process in which all of the various regulatory programs that may apply to a new power plant project are implemented by the CEC through its Warren-Alquist Act certification. This system allows all regulatory issues to be heard and decided at one time in a single forum, rather than in a piecemeal fashion before the myriad specialty agencies whose regulations may be implicated.

As a corollary to this "one-stop shopping" approach to permitting, the Warren-Alquist Act also consolidates the appeals process for new power plants in a single, comprehensive appeal avenue directly to the California Supreme Court. Any person who is dissatisfied with the way any applicable regulatory requirements have been implemented through the CEC process can take a direct appeal of the CEC's licensing decision to the Supreme Court. (*See* Pub. Res. Code § 25531(a).) Beyond this avenue for direct appeal to the Supreme Court, "no court in this state has jurisdiction to hear or determine any case or controversy concerning any matter which was, or could have been, determined in a proceeding before the commission, or to stop or delay the construction or operation of any thermal powerplant except to enforce compliance with the provisions of a decision of the commission." (Pub. Res. Code § 25531(c).) This appeal mechanism consolidates review into a single appeals process in order to avoid a multiplicity

of piecemeal appeals, in the same way that the CEC's exclusive permitting authority consolidates the regulatory approval process into a single licensing proceeding in order to avoid a multiplicity of piecemeal regulatory approvals.

In this particular Appeal, CARE seeks to appeal the APCO's renewal of the Authority to Construct for the Russell City Energy Center, a power plant licensed by the CEC that is being built in Hayward, CA. The Authority to Construct is a ministerial permit that the APCO issues after the CEC has licensed a project to incorporate the CEC's license conditions into a District-issued document that the District can enforce under the Health & Safety Code.

The APCO's action that CARE seeks to appeal here is a renewal of the Authority to Construct. The APCO initially issued the Authority to Construct for the Russell City facility to Russell City Energy Company, LLC ("RCEC") on November 1, 2007. Mr. Rob Simpson filed an appeal of the issuance of the Authority to Construct with this Hearing Board, and the Hearing Board dismissed that appeal on March 20, 2008, for lack of jurisdiction under the provisions of the Warren-Alquist Act described above. (*See* Order Dismissing Appeal, *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 (March 20, 2008).)

Mr. Simpson also appealed the APCO's issuance of a federal Prevention of Significant Deterioration ("PSD") permit to the U.S. Environmental Protection Agency's Environmental Appeals Board ("EAB"). The EAB remanded the PSD permit to the APCO for the APCO to provide additional notice and opportunity to comment. (*See* Remand Order, *In re Russell City Energy Center*, PSD Appeal No. 08-01 (EAB Jul. 29, 2008).) The APCO did so, and also undertook additional substantive analysis that resulted in the imposition of more stringent permit conditions in the PSD permit. The APCO re-issued the federal PSD permit with the more stringent conditions on February 3, 2010, and a number of parties again appealed to the EAB. The EAB denied all of the appeals and upheld the federal PSD permit in its entirety in an order dated November 18, 2010. (*See* Order Denying Review, *In Re Russell City Energy Center, LLC*, PSD Appeals No. 10-01 – 10-05 (EAB Nov. 18, 2010).)

Because of the delays associated with this additional work on the federal PSD permit, RCEC was not able to begin construction of the Russell City Energy Center when the Authority to Construct was

issued in 2007. As a result, the initial two-year term of the Authority to Construct expired, and RCEC therefore sought to renew it pursuant to District Regulation 2-1-407. This process required some of the applicable permit conditions to be updated to reflect new developments that came to light during the federal PSD permitting process. RCEC thus applied to the California Energy Commission for an amendment to the CEC license for the Russell City Energy Center to incorporate current permit conditions. RCEC also applied to the District for a renewal of its Authority to Construct under District Regulation 2-1-407.

The CEC processed RCEC's amendment application. CEC staff conducted an analysis of current regulatory requirements to determine whether the project, with the amended conditions, would comply with all applicable law, ordinances, regulations, and standards. The staff analysis also evaluated whether the project, as amended, would cause any significant adverse environmental impacts. The staff analysis found that the project would comply with all applicable regulatory requirements and that it would not cause any significant adverse environmental impacts. (*See* Memorandum from M. Dyas, CEC Compliance Project Manager, to Interested Parties, re "Russell City Energy Center (01-AFC-7C) Staff Analysis of Proposed Project Modifications" (June 28, 2010); Memorandum from M. Dyas, CEC Compliance Project Manager, to Interested Parties, re "Russell City Energy Center (01-AFC-7C) Supplemental Staff Analysis of Proposed Project Modifications" (July 9, 2010).)

The CEC published the staff analysis, and a number of interested parties submitted written comments on it. (Copies of comments submitted to the CEC were provided in Exhibit 7 to the APCO's Motion to Dismiss and Exhibits 17, 19, 20, 22 & 23 of RCEC's Motion to Dismiss.) The CEC then held a public hearing on August 11, 2010, at which it considered whether to approve the amendments. A number of interested parties testified on the matter, and in particular on whether or not the project, with the amendments, would comply with all applicable regulatory requirements. (Copies of the transcript of the CEC business meeting at which the matter was heard were provided in Exhibit 6 to the APCO's Motion to Dismiss and Exhibit 18 to RCEC's Motion to Dismiss.) After considering all of the comments and testimony, the CEC approved the amendment. In doing so, it made specific findings concluding that, among other things, the project as amended would comply with all applicable regulatory requirements and would not cause any significant adverse environmental impacts. (*See* Order

Amending the Energy Commission Decision, Order No. 10-0811-5, *In the matter of Russell City Energy Center Project*, Docket No. 01-AFC-7C, (CEC Aug. 11, 2010).)

The APCO processed RCEC's request for a renewal of the Authority to Construct concurrently with the CEC's license amendment process. The APCO renewed the Authority to Construct on November 18, 2010. (*See* Memorandum from Jack P. Broadbent to Russell City Energy Center Permit File, re "Renewal of Authority to Construct for the Russell City Energy Center" (Nov. 18, 2010).) The APCO noted that it was renewing the Authority to Construct with the updated permit conditions contained in the CEC license. (*Id.*) The APCO noted that the renewal was consistent with the CEC license and also consistent with the requirement of District Regulation 2-1-407.1.2. that the renewed Authority to Construct comply with current Best Available Control Technology ("BACT") and offset requirements. (*Id.*)

CARE then filed its Appeal on December 17, 2010. RCEC applied for leave to intervene under Hearing Board Rule 3.6. Rule 3.6 provides that the permit holder shall be allowed to intervene as a matter of right. As RCEC is the permit holder in this case, the Hearing Board granted RCEC's application.

The Hearing Board held a *pro forma* hearing on January 6, 2011. The APCO and RCEC indicated at the *pro forma* hearing that they intended to file motions to dismiss the Appeal for lack of jurisdiction. The Hearing Board therefore established a briefing and hearing schedule for the motions. The Hearing Board also bifurcated this proceeding and determined that it would first consider whether it had jurisdiction to decide the Appeal, and then would adjudicate the merits of the appeal at a later hearing to the extent that the Board concluded it has the jurisdiction to consider them.

The APCO and RCEC then filed their motions to dismiss and the parties submitted their briefs in support of and in opposition to the motions. In addition, the Energy Commission filed a letter in this docket on January 27, 2011, stating that it agreed with the APCO's position on jurisdiction and attaching a copy of an *amicus* brief it filed in a case in Humboldt County Superior Court taking a similar position. On January 31, 2011, CARE filed its motion to strike the CEC's letter or in the alternative to continue the hearing and allow for further briefing, as well as to deny the CEC intervention. Mr. Sarvey then e-mailed his application for leave to intervene to the Clerk and the parties on the evening of February 2,

2011, and brought hard copies with him for filing at the hearing on February 3, 2011.

CARE'S REQUEST FOR FEE WAIVER

CARE has requested that the Hearing Board waive the filing fee in this case, citing financial hardship on its part. Under Schedule A of District Regulation 3, the filing fee for a third-party appeal such as this one is $1204. Footnote 1 to Schedule A provides that the Hearing Board may waive this filing fee if it would cause unreasonable hardship. CARE requests that the filing fee be waived under this provision.

In support of its request, CARE submitted a declaration from Mr. Boyd, its President, stating that "payment of the Appeal fee of $1204.00 called out in Schedule A of Regulation 3 of the BAAQMD that [*sic*] the foregoing fees will cause an unreasonable hardship on CARE . . . ." (Appeal, Attachment 1 ¶ 3.) CARE did not detail the reasons why the fee would cause an unreasonable hardship, and simply stated that "CARE is recognized as an Intervenor with financial hardship by the CEC in the [*sic*] and by the CPUC [California Public Utilities Commission] in their proceedings" (*id.* ¶ 2); and that CARE is a tax-exempt 501(c)(3) non-profit corporation (*id.* ¶ 3). CARE contended that submitting such a declaration stating that paying the fee would cause an unreasonable hardship is all that is required in order to obtain a fee waiver under Schedule A of Regulation 3.

The Hearing Board notes that footnote 1 in Schedule A provides that any person who certifies that payment of the fee would cause an unreasonable hardship "may" be excused from payment of the fee. The use of the term "may" indicates that waiver of the fee is discretionary and depends on the facts and circumstances cited by the requestor as to why payment of the fee would cause an unreasonable hardship. The Hearing Board therefore asked that CARE provide more information to support its request and to explain how payment of the fee would cause an unreasonable hardship in this particular case. In response, CARE submitted a bank statement providing details of its checking account and a draft of its FY 2009 Internal Revenue Service Form 990 federal tax document, among other information.[1]

CARE's documentation showed that CARE had total revenue in its most recent fiscal year of

[1] Mr. Boyd testified that CARE's fiscal year is October 1 through September 30, and that CARE is in the process of finalizing its Form 990 for the most recent fiscal year that ended on September 30, 2010 (FY 2009), which is due by the end of February of 2011.

$101,521. CARE had cash, savings and investments of $37,350 at the beginning of the fiscal year, and $33,596 at the end of the fiscal year. CARE had over $12,000 in cash in its checking account when it filed its appeal on December 17, 2010. CARE made an online transfer of $1,000 on December 21, 2010, to a Mr. R. Lundahl. Mr. Boyd testified that Mr. Lundahl is a filmmaker that CARE paid to produce short films regarding the siting of solar power projects in Southern California. CARE also made out a check for $10,000 on December 24, 2010. Mr. Boyd testified he could not remember what that check was for. Mr. Boyd also testified that CARE gives money to other 501(c)(3) organizations. CARE's Form 990 indicates that CARE spent $14,849 in FY 2009 on transfers to other 501(c)(3) organizations and travel expenses.

Given this information on the state of CARE's finances, the Hearing Board does not find that it would cause an unreasonable hardship for CARE to pay the filing fee for this appeal. CARE has significant revenues as indicated by the Form 990 it submitted, and apparently a substantial portion of these revenues is available for discretionary outlays such as the funding of films about solar power projects and the funding of other 501(c)(3) non-profit corporations. It is not unreasonable to expect that CARE should be required to use a small portion of these funds to pay the Hearing Board's filing fee so that it can pursue its appeal regarding the Russell City Energy Center.

The Hearing Board also notes that the appeal filing fee does not reimburse the District for all of the administrative costs of docketing and adjudicating an appeal. The $1204 filing fee was established at a level that strikes a balance between the need to recover the public funds that are expended in providing the appeal process and the need to avoid prohibitively high fees for third-party appellants. It is not unreasonable for CARE to have to pay this fee in order to pursue its appeal here, given the nature of CARE's financial situation as evidenced by the documentation that CARE submitted.

The Hearing Board therefore DENIES CARE's request for a waiver of the filing fee.

MR. SARVEY'S APPLICATION FOR LEAVE TO INTERVENE

Mr. Sarvey's application for intervention consists of a one-paragraph request followed by a three-page declaration. In the application, Mr. Sarvey states that "[s]everal parties to this proceeding including the APCO and the CEC have presented arguments which are factually incorrect and are related to ongoing litigation and administrative proceedings that are currently being conducted in the

Superior Court of Humboldt County and before the North Coast Air Quality Management District Hearing Board." (R. Sarvey Application for Intervention at p. 1.) Mr. Sarvey states that he is submitting his declaration to "clarif[y] the ongoing litigation and administrative process at the North Coast Unified Air Pollution Control District to clear up any misleading statements that have been made by some parties to this appeal." (*Id.*) Mr. Sarvey then provides an explanation of what occurred before the North Coast district's Hearing Board and in the Humboldt County Superior Court in the litigation he references. (Declaration of Robert Sarvey, pp. 2-4 of Application for Intervention.) Mr. Sarvey also attaches a copy of a "Final Order" issued by the North Coast district's Hearing Board in that case. (*Id.*, Exh. 1.)

Hearing Board Rule 3.6 provides that a person may apply for intervention if "he or she has an interest relating to the subject of a proceeding, and that the disposition of the proceeding may impair or impede his or her ability to protect that interest." Rule 3.6 further provides that the application must be timely, and that in deciding whether to allow intervention "the Hearing Board shall consider whether intervention would unduly delay or prejudice the adjudication of the rights of the parties." The Hearing Board does not find good cause to grant Mr. Sarvey's application for leave to intervene under this standard.

The Hearing Board has serious concerns as to the timeliness of Mr. Sarvey's application for intervention. Mr. Sarvey appealed the federal PSD permit for the Russell City facility to the EAB, and he participated in the CEC's license amendment proceeding. Yet he did not file an appeal when the APCO renewed the Authority to Construct, and he did not signal any intention to get involved in any such appeal until he filed his application for intervention on the day of the hearing in this matter,[2] nearly two and a half months after the renewal. It is not unreasonable to expect that Mr. Sarvey should take steps to protect any interest he may have in the renewal earlier than this. Moreover, allowing Mr. Sarvey to intervene and to join this proceeding as an appellant would undermine the 30-day time limit for filing appeals set forth in Health & Safety Code section 42302.1 by allowing an appellant to let the 30-day appeal deadline come and go without appealing, but then gain the status of appellant after the deadline by intervening in someone else's appeal. Finally, the Hearing Board finds that allowing

[2] Mr. Sarvey emailed an electronic copy of his filing to the Clerk after the close of business on the evening before the hearing, but he did not file it until the hearing itself and the Hearing Board was not aware of it until the hearing.

intervention would likely delay or prejudice the adjudication of the rights of the parties. CARE did not object to Mr. Sarvey's intervention, but it stated that it would need additional time to brief and prepare its case if Mr. Sarvey were allowed to intervene. Continuing the hearing to provide such additional time would delay or prejudice the adjudication of the rights of the parties. The Hearing Board therefore concludes that Mr. Sarvey's application is not timely.

In addition, the Hearing Board finds that Mr. Sarvey has not demonstrated that he has an interest in the subject of this proceeding – the renewal of the Authority to Construct for the Russell City Energy Center – that may be impaired or impeded if he is not allowed to intervene. Mr. Sarvey did not claim that he had any interest in the Authority to Construct renewal, although he did note that he appealed the federal PSD permit for the facility and that he was involved in litigating a matter concerning a different power plant permit with the North Coast district. Assuming *arguendo* that these interests are sufficiently related to the subject matter of this proceeding, the Hearing Board does not find that Mr. Sarvey's ability to protect his interests will be impaired or impeded if he is not allowed to intervene.

There are two reasons for this conclusion. First, Mr. Sarvey is a member of CARE, which is already a party to this Appeal. Even if Mr. Sarvey is not allowed to intervene, CARE will still be able to prosecute the case and seek to protect its interest in the renewal of the Authority to Construct that Mr. Sarvey may share. Indeed, Mr. Sarvey will be able to participate as a witness on behalf of CARE, and may argue the case as CARE's representative along with Mr. Boyd should they choose to proceed that way. CARE's role in this proceeding will therefore protect any interest in the renewal of the Authority to Construct that Mr. Sarvey may have, even if Mr. Sarvey is not allowed to intervene himself as a party.

Second, in addition to his association with CARE, Mr. Sarvey remains free to participate in this proceeding as a member of the public even if he is not granted intervention and formal party status. Hearing Board proceedings are open to the public, and any member of the public can submit written materials or oral testimony during the public comment period. Mr. Sarvey can have his voice heard in this manner even if the Hearing Board does not allow him to intervene as a party. Indeed, it appears that the substance of Mr. Sarvey's interest in intervening is to play such a role: he wants "to set the record straight as to the facts and events of my ATC appeal to the North Coast Unified Air Quality Management (NCUAQMD) Hearing Board." (Declaration of Robert Sarvey, Application for

Intervention at p. 2.) Mr. Sarvey can do that without having to intervene simply by submitting his written declaration and/or following it up with oral testimony at the hearing. The Hearing Board notes that this is exactly what the CEC has done with its letter expressing its view of the events that have taken place in the North Coast district Hearing Board and the Humboldt County Superior Court. The Hearing Board therefore accepts Mr. Sarvey's filing and statements made at the hearing and will consider Mr. Sarvey's position in deciding this matter. But the Hearing Board declines to grant Mr. Sarvey formal intervenor status because it is not necessary for him to protect any interest he may have in this proceeding.

The Hearing Board therefore DENIES Mr. Sarvey's application for leave to intervene because it does not satisfy the requirements of Hearing Board Rule 3.6. However, the Hearing Board encourages and welcomes his participation in this matter as a member of CARE and/or as a member of the public.

CARE'S MOTION TO STRIKE AND/OR CONTINUE HEARING

The Hearing Board now turns to CARE's motion to strike the CEC's letter or alternatively to continue the hearing to allow for more briefing. As noted above, Hearing Board proceedings are open to the public and any member of the public – including a public agency like the CEC – is entitled to submit written or oral comment for consideration by the Hearing Board. (*See* Health & Safety Code § 40828(a); Hearing Board Rule 9.3.e.) The Hearing Board will therefore accept the CEC's letter and testimony at the hearing and will consider it in deciding this matter, in the same manner that it is accepting Mr. Sarvey's filing and testimony at the hearing and considering it in deciding this matter. Accordingly, the Hearing Board DENIES CARE's motion to strike.

The Hearing Board also denies CARE's request to continue the hearing to allow for further briefing. CARE requests a continuance to allow it time to prepare further briefing on the issue of what transpired in the case before the North Coast district Hearing Board and the Humboldt County Superior Court – and how that impacts the jurisdictional question before the Hearing Board in this case – which was the issue discussed in the submissions from the CEC and Mr. Sarvey. The Hearing Board is disinclined to grant a continuance in this instance. The Hearing Board notes that it was CARE that first raised the issue of what happened in the North Coast case by suggesting that the reason that the CEC did not intervene here was because "[t]he CEC perhaps understands that this has been settled in the North

Coast proceedings before the Hearing Board and Superior Court." (CARE Answer To Motion To Dismiss For Lack Of Jurisdiction And Memorandum Of Points And Authorities in Opposition Thereof (hereinafter, "CARE Opposition Brief") at p. 15.) CARE also raised the issue at least indirectly by incorporating by reference arguments raised by Mr. Rob Simpson on this issue in his filings in Docket No. 3608, which attached an *amicus* brief filed by the South Coast Air Quality Management District in the Humboldt County Superior Court discussing Warren-Alquist Act preemption in the context of air district permit appeals. (*See In the matter of the Appeal of Rob Simpson from the renewal of an Authority to Construct for the Russell City Energy Center*, Docket No. 3608, Exh. 4.) Given that CARE was clearly aware of the North Coast case and its potential relevance here, it is not unreasonable to expect CARE to brief any points it considers relevant regarding that litigation according to the briefing schedule agreed to at the January 6, 2011, *pro forma* hearing – a briefing schedule to which CARE did not object. The Hearing Board therefore finds that it would not be appropriate to allow further briefing on this issue at this stage, after the close of the briefing schedule agreed to at the *pro forma* hearing. Further delay at this point would be detrimental to the timely resolution of this Appeal. Moreover, the Hearing Board notes that CARE retains the opportunity to raise any further arguments on the issue at the hearing on the motions to dismiss. For all of these reasons, the Hearing Board DENIES CARE's request for a continuance and for further briefing.

Finally, the Hearing Board has determined that it need not rule on CARE's objection to intervention by the CEC. The CEC's letter does not purport to seek intervention, and the CEC's attorney Richard Ratliff, Esq., testified at the hearing that the CEC is not seeking to intervene. The Hearing Board therefore finds that there is no question of intervention by the CEC that has been raised here and no need for the Hearing Board to decide on the appropriateness of such intervention.

APCO AND RCEC MOTIONS TO DISMISS

The APCO and RCEC have moved for dismissal of the appeal on grounds that the Hearing Board does not have jurisdiction to adjudicate it. The motions are based on Section 25531(c) of the Warren-Alquist Act. As noted above, section 25531(c) provides that:

> Subject to the right of judicial review of decisions of the commission, no court in this state has jurisdiction to hear or determine any case or controversy concerning any matter which was, or could have been, determined in a proceeding before the commission, or to stop or delay the construction or operation of any thermal powerplant except to enforce compliance with the provisions of a decision of the commission.

(Pub. Res. Code § 25531(c).) The APCO and RCEC argue that this Appeal falls within this provision of the Warren-Alquist Act because the Appeal claims that the Russell City Energy Center project does not comply with applicable air quality regulations, which are matters that were or could have been determined in the CEC's licensing proceeding for the project. The APCO and RCEC argue that the Hearing Board has no jurisdiction to hear an appeal of the renewal of the Authority to Construct over such issues, and that the Hearing Board must therefore dismiss the Appeal under Rule 8.1.a.

In response, CARE argues that the Warren-Alquist Act applies only to the CEC and not to other agencies such as the District. CARE argues that "[t]he plain language of Section 25531(c) clearly indicates that it refers only to judicial review of decisions of a CEC decision [*sic*]," and that it "does not affect other public agencies such as the BAAQMD which derives its authority from the Health & Safety Code." (CARE Opposition Brief at 5.)

The Hearing Board finds that the plain language of the Warren-Alquist Act indicates that the Act was intended to apply to other agencies and not just to the CEC. Warren-Alquist Act section 25500, which establishes the CEC's plenary authority over power plant permitting, provides that license "shall be in lieu of *any* permit, certificate, or similar document required by *any* state, local, or regional agency, or federal agency to the extent permitted by federal law . . . and shall supercede *any* applicable statute, ordinance, or regulation of *any* state, local or regional agency, or federal agency to the extent permitted by federal law." (Pub. Res. Code § 25550 (emphasis added).) This language – using the expansive term "any" – makes clear that the Legislature intended the Act to apply broadly to other state, local and regional agencies such as the District. The Legislature would not have referred to the CEC's power superseding "any applicable statute, ordinance, or regulation of any state, local or regional agency" if it contemplated that the Act would apply narrowly to the CEC only and not to other agencies such as the District.

Section 25531 is similarly broad in its wording. It establishes in subsection (a) that decisions of the commission are appealable directly to the California Supreme Court, and then establishes in subsection (c) that "subject to the right of judicial review of decisions of the commission [under subsection (a)], no court in this state has jurisdiction to hear or determine *any* case or controversy concerning *any* matter which was, or could have been, determined in a proceeding before the

commission, or to stop or delay the construction or operation of any thermal powerplant . . . ." (*Id.* § 25531(c) (emphasis added).) Again, this language uses the expansive term "any" and makes clear that the Legislature intended the preemption provisions in the Act to apply broadly to include actions by other agencies such as the District. If the Legislature had intended Section 25531(c) simply to bar collateral appeals of the CEC's licensing decisions other than directly to the Supreme Court, as CARE contends, then it would have said "no court in this state has jurisdiction to review decisions of the commission"; it would not have used the broader language barring collateral judicial review of "any case or controversy" concerning "any matter" that could have been raised in the CEC's licensing process.

Beyond the plain language of the Warren-Alquist Act, the Hearing Board also notes that the fundamental purpose of the Act in establishing a system of "one-stop shopping" for power plant permitting would be frustrated if the Warren-Alquist Act did not preempt permit requirements at other agencies besides the CEC and collateral appeals outside of direct review to the Supreme Court. Power plants are complicated industrial facilities and are likely to implicate the regulatory requirements of a number of different agencies. If the Warren-Alquist Act did not remove those agencies' permitting authority and consolidate it in the CEC, power plant projects would be permitted piecemeal in multiple permitting actions before myriad different agencies, which would frustrate the legislative intent of streamlining the process. And if the Warren-Alquist Act did not bar collateral appeals outside of direct review of the CEC's license, power plant projects would be subject to piecemeal challenges in multiple appeals filed before myriad different administrative and judicial tribunals. That is the direct opposite of the Legislature's stated intent underlying the Warren-Alquist Act. (*See generally* Pub. Res. Code §§ 25001, 25005, 25006.) This Legislative intent further undermines CARE's position that the Warren-Alquist Act applies only to the procedures of the CEC and has no impact on other agencies such as the District.

CARE also argues that Section 25531(c) is inconsistent with Section 42302.1 of the Health & Safety Code, which provides for appeals of APCO permitting actions to the Hearing Board. CARE claims that it has a "statutory right" under Section 42302.1 to an appeal to the Hearing Board of any APCO permitting action, and that this provision in the Health & Safety Code takes precedence over any

preemption under Warren-Alquist Act section 25531(c). The Hearing Board disagrees. Although Health & Safety Code section 42302.1 creates a general rule that APCO permitting actions are appealable to the Hearing Board, Warren-Alquist Act section 25531(c) creates a specific exception for the power plant context, in which the Hearing Board does not have jurisdiction. It is a well-settled canon of statutory interpretation "that a specific statute prevails over a general one." (*Medical Board of California v. Superior Court* (2001) 88 Cal.App.4th 1001, 1013 (citing *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 478).) That is the case here. Warren-Alquist Act section 25531(c) is a specific statute that applies in the context of power plant permitting, and it prohibits the Hearing Board from hearing appeals to power plant projects involving matters that were or could have been determined by the CEC. It trumps the more general Health & Safety Code section 42302.1, which provides that in the general case an APCO permitting action can be appealed to the Hearing Board.

CARE also points to the case from the North Coast Unified Air Pollution Control District, which was the subject of the submissions from Mr. Sarvey and the CEC. CARE claims that the Hearing Board – and subsequently the Humboldt County Superior Court – rejected the arguments that the APCO and RCEC are making here about the impact of Section 25531(c) on a case like this one. But the Hearing Board has not found any evidence in the record that the North Coast district's Hearing Board or the Humboldt County Superior Court ever considered these issues.

The Hearing Board was in receipt of a "Final Order" from the North Coast Hearing Board, and it does not mention the issue of Warren-Alquist Act preemption or the effect of Section 25531(c) at all. (*See* Final Order, *In the Matter of: Humboldt Bay Generating Station, PG&E*, Appeal of Authority to Construct Permit Number 444-3 (NCUAQMD Hearing Board, March 4, 2010).) It appears that the North Coast Hearing Board simply did not consider or address the issue. No order or decision from the Humboldt County Superior Court was submitted in this matter, and there was conflicting testimony as to what happened there. The Hearing Board therefore finds that it cannot determine with any certainty whether that court actually considered the issue or not. The Hearing Board notes that it is the appellant's burden to establish the basis for its appeal, and CARE has not done so on this issue based upon what is in the record. If CARE seeks to have this Hearing Board decide this issue based upon what it contends the Humboldt County Superior Court did, it is CARE's burden to provide a copy of the

Superior Court decision or opinion to establish with certainty what the Court in fact did. CARE did not do so.

The Hearing Board also notes that no party has identified any other Hearing Board or court that has concluded that Warren-Alquist Act preemption does not apply broadly to an air district authority to construct. To the contrary, the parties submitted two prior decisions by this Hearing Board as well as one decision from the California Court of Appeal finding that Warren-Alquist Act preemption does apply. (*See* Order Dismissing Appeal, *In the matter of the Appeal of the City of Morgan Hill et. al. etc.*, BAAQMD Hearing Board Docket Nos. 3350 & 3552 (Dec. 20, 2001), *aff'd, City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861; Order Dismissing Appeal, *In the Matter of Appeal of Rob Simpson from the issuance of an Authority to Construct for the Russell City Energy Center*, Hearing Board Docket No. 3546 (Mar. 20, 2008).[3]) For all of these reasons, the Hearing Board finds nothing in the example of the North Coast case to suggest that it should exercise jurisdiction here.

The Hearing Board therefore concludes that Warren-Alquist Act preemption does apply to appeals of an Authority to Construct issued (or renewed) by the APCO for power plant projects subject to CEC licensing. Under Warren-Alquist Act section 25531(c), the Hearing Board does not have jurisdiction to hear an appeal of a power plant project involving matters that were or could have been determined in a CEC proceeding. This Appeal falls squarely within that jurisdictional bar because all of the reasons on which CARE seeks to challenge the Authority to Construct renewal were arguments that could have been raised before the CEC, and many of them actually were raised there.

CARE argues that its Appeal is based on the "administrative requirements" for the renewal of an Authority to Construct, which CARE claims are not something that could have been raised in the CEC's licensing proceedings. (CARE Opposition Brief at 1-5.) But the criterion for Warren-Alquist Act preemption is not whether an applicable regulatory requirement is characterized as "administrative" or "substantive" or otherwise. It is whether the issue involved "was, or could have been, determined in a

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[3] The APCO also noted for the record another Court of Appeal opinion in a related context concerning a water quality permit for a CEC-licensed power plant. (*See Voices of the Wetlands v. California State Water Res. Control Bd.* (2007) 157 Cal. App. 4th 1268, *modified & reh'g denied*, 2008 Cal. App. LEXIS 28 (Cal. App. 6th Dist., Jan 10, 2008), *review granted, depublished*, (2008) 74 Cal. Rptr. 3d 453.) That opinion has been depublished as a result of the Supreme Court's grant of review.

proceeding before the commission" or seeks to stop or delay the construction of a CEC-license power plant. The regulatory requirements on which CARE's Appeal is based all fall within this language, regardless of how one characterizes them.

The regulatory requirements that CARE raises that are most susceptible to being characterized as "administrative" in nature are the requirements in District Regulation 2, Rule 3, regarding the preparation of a Determination of Compliance. These regulations, which incorporate certain requirements from District Regulation 2, Rule 2, require (*inter alia*) that the APCO prepare a Preliminary Determination of Compliance ("PDOC"), publish the PDOC and provide the public with an opportunity to comment on it, and then prepare and submit to the CEC a Final Determination of Compliance ("FDOC") after considering any public comment received. CARE claims that the APCO was required to go back to the beginning of the process under Regulation 2, Rule 3 and prepare a new Determination of Compliance (i) because the Determination of Compliance prepared in 2007 when the Authority to Construct was initially issued is outdated as a result of the passage of time; and alternatively (ii) because the Authority to Construct at issue here expired under Regulation 2-1-407 without being validly renewed in a timely fashion. CARE contends that there is therefore no existing Authority to Construct for the APCO to renew under Regulation 2-1-407, and so the APCO must start the entire process afresh instead of renewing the Authority to Construct issued in 2007.

But these issues could have been raised in the CEC's licensing proceeding and in fact were raised there, regardless of the nomenclature used to describe them. The Determination of Compliance requirements concern how the environmental analysis that ultimately leads to the CEC's licensing of a new power plant is conducted. The Determination of Compliance process provides that the District will provide its input to the CEC on air quality issues, which forms the basis of the CEC's analysis and ultimate decision on those issues. Concerns about how this process leading up to the CEC's decision was conducted are necessarily matters that can be raised before the CEC when it makes its decision. The CEC can then consider such concerns and either hold off on making a decision pending further analysis or disagree and go forward with the decision.

Moreover, the record indicates that this is exactly what happened in this case. A number of members of the public participated in the CEC's amendment proceeding in August of 2010 on which the

APCO's renewal of the Authority to Construct was based. One commenter claimed that

> BAAQMD issued the Authority to Construct on November 1, 2007 . . . an Authority to Construct expires after two years, unless renewed at the request of the permittee (BAAQMD Reg. 2-1-407)" and so the Authority to Construct would appear to have expired. The applicant appears to wish to back load the process and bypass a Preliminary and Final Determination Of Compliance .

(Comments of R. Simpson, undated, Exh. 7-4 to the APCO's Motion to Dismiss & Exh. 19 to RCEC's Motion to Dismiss, at p. 2.) Another commenter claimed that "the June 2007 FDOC [should] be vacated and revisited [to] thoroughly explain how a June 2007 FDOC remains current this August 2010 . . . ." (Comments of Chabot-Las Positas Community College District, Aug. 9, 2010, Exh. 7-2 to the APCO's Motion to Dismiss & Exh. 17 to RCEC's Motion to Dismiss, at p. 7.) Similar statements were also introduced in oral testimony at the CEC hearing. (*See* Hearing Transcript, Exh. 6 to the Volume of Exhibits submitted with the APCO's Motion to Dismiss, at p. 70 ll. 8-11 ("there is no valid authority to construct, there is no F-DOC . . ."), p. 72 ll. 8-9 ("So, the contention that there is some valid ATC, the Air District – ATC has expired.").) Issues regarding whether the APCO should be required to go back through the Determination of Compliance process therefore fall within the language category of "any matter that was, or could have been, determined in a proceeding before the commission" in Section 25531(c) of the Warren-Alquist Act, notwithstanding CARE's characterization of the Determination of Compliance requirements as "administrative" in nature.[4]

The remainder of CARE's claims are that the Authority to Construct does not comply with the District's Best Available Control Technology ("BACT") requirement and other requirements that CARE claims are applicable.[5] These regulatory requirements are clearly matters that could have been raised before the CEC, and are in fact the central focus of much of the analysis that the CEC undertakes in its

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[4] The Hearing Board also notes that the substance of CARE's claims that the APCO should be required to go back and redo the Determination of Compliance from scratch does not appear to have merit. Renewal of an Authority to Construct is governed by District Regulation 2-1-407, not by District Regulation 2, Rule 3. Regulation 2-1-407 does not require preparation of a Determination of Compliance or any public notice and comment opportunity. This may be the reason why the CEC refused to credit these arguments when they were raised there. The Hearing Board does not reach the substance of these claims, however, because it does not have jurisdiction to consider them under the Warren-Alquist Act.

[5] Notably, BACT is the only regulatory requirement mentioned in any of CARE's papers that is implicated in a renewal of an Authority to Construct. Renewals are governed by District Regulation 2-1-407, which provides for an Authority to Construct to be renewed based on satisfying current BACT requirements and current offsets requirements. A renewal does not implicate any of the other regulatory requirements that CARE seeks to raise in its appeal, such as a requirement that the applicant certify that its facilities are in compliance, a requirement for an environmental justice analysis, a requirement for an analysis of $PM_{2.5}$ impacts, *etc.* But the Hearing Board does not address the merits of these issues because it lacks jurisdiction to hear them under Section 25531(c) of the Warren-Alquist Act.

licensing process. As the APCO and RCEC have demonstrated in their briefs, and as they have documented in the record, most of these issues were actually raised and addressed by the CEC. The Hearing Board therefore concludes that it is barred from hearing any appeal on these issued under Section 25531(c) of the Warren-Alquist Act.

The one argument that CARE makes in this area that deserves more specific discussion is that it is seeking to appeal based on "the promulgation of new rules that occurred after the CEC approved RCEC's amendment on August 11th, 2010." (CARE Opposition Brief at 4.) CARE claims that these "new rules" were not something that could be considered by the CEC since they occurred after the CEC made its decision. (*See also id.* at 8.) CARE is referring to the requirement that a facility such as this one use BACT to control air emissions. CARE claims that the state of BACT technology advanced on October 29, 2010, after the CEC concluded its proceedings but before the APCO renewed the Authority to Construct. The October 29, 2010, event that CARE cites as changing the BACT requirement for this facility was the publication of a Preliminary Determination of Compliance for another proposed power plant, the Oakley Generating Station. (*See id.* at p. 8 and fn. 9.) The Oakley Generating Station is proposing to use a technology known as "fast-start", which can reduce emissions associated with startups of the plant's combustion turbines. (*Id.*) CARE claims that this "fast-start" technology is now BACT, and that it was not something that the CEC could have considered because the information was not available when the CEC concluded its licensing proceeding on August 11, 2011.

But the proposed Oakley facility and the startup technology it is proposing to use had been known for some time when the CEC made its determination on August 11, 2011. CARE's own brief acknowledges this point, noting that issues surrounding whether this type of technology should be required as BACT have been the subject of debate "for the last couple of years . . ." (Care Opposition Brief at 10); and that they were in fact raised in the 2007 CEC licensing proceeding (*id.* at 9-10). Furthermore, the APCO specifically evaluated that facility and how it impacts the BACT analysis for the Russell City facility when it issued the PSD permit for Russell City, and the CEC specifically referenced and incorporated that analysis in its licensing determination. (*See* Bay Area Air Quality Management District, Responses to Public Comments, Federal "Prevention of Significant Deterioration" Permit, Russell City Energy Center (Feb. 3, 2010), at pp. 110-113; J. Leyva & M. Layton, *Russell City Energy*

Center (01-AFC-7C) Air Quality, attached to Memorandum from M. Dyas, CEC Compliance Project Manager, to Interested Parties, re "Russell City Energy Center (01-AFC-7C) Staff Analysis of Proposed Project Modifications" (June 28, 2010).) CARE now cites the fact that the APCO issued a Preliminary Determination of Compliance for the Oakley facility on October 29, 2010, but CARE does not point to any way in which the nature of the proposed facility or the startup technology it is proposing to use have changed from what was considered by the APCO and CEC in the licensing process. The Hearing Board therefore finds that CARE has not demonstrated that this issue is a matter that was not and could not have been raised in the CEC proceeding. To the contrary, the evidence in the record suggests that the issue of the Oakley project and the control technology it will use was raised and fully considered there.

In conclusion, the Hearing Board concludes that Section 25531(c) of the Warren-Alquist Act precludes the Hearing Board from hearing any appeal of the issuance or renewal of an Authority to Construct based on any matter that was or could have been determined in a licensing proceeding before the CEC. The Hearing Board further concludes that all of the issues on which CARE seeks to appeal the APCO's renewal of the Authority to Construct for the Russell City Energy Center are matters that were or could have been raised before the CEC. Any concerns that CARE may have had regarding these issues could and should have been properly raised with the California Supreme Court under Section 25531(a) of the Warren-Alquist Act. CARE may not seek to collaterally challenge the construction or operation of the Russell City Energy Center now by appealing to this Hearing Board. The Hearing Board therefore DISMISSES CARE's Appeal for lack of jurisdiction.

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THEREFORE, FOR ALL OF THE FOREGOING REASONS, THE HEARING BOARD ORDERS:

Appellant CARE's request for a waiver of filing fees in Docket No. 3607 shall be and hereby is DENIED.

Moved by: Rolf Lindenhayn, Esq.

Seconded by: Terry A. Trumbull, Esq.

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

NOES: None.

NON-PARTICIPATING: None.

THE HEARING BOARD FURTHER ORDERS:

Mr. Robert Sarvey's Application to Intervene as a party in the Appeal Docket No. 3607 shall be and hereby is DENIED.

Moved by: Terry A. Trumbull, Esq.

Seconded by: Rolf Lindenhayn, Esq.

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

NOES: None.

NON-PARTICIPATING: None.

THE HEARING BOARD FURTHER ORDERS:

CARE's motion to strike the letter from the California Energy Commission filed in this matter on January 27, 2011, in Docket No. 3607 shall be and hereby is DENIED; and CARE's alternative request for a continuance and further briefing shall be and hereby is DENIED.

Moved by: Rolf Lindenhayn, Esq.

Seconded by: Terry A. Trumbull, Esq.

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

NOES: None.

NON-PARTICIPATING: None.

THE HEARING BOARD FURTHER ORDERS:

Appeal No. 3607 shall be and hereby is DISMISSED for lack of jurisdiction.

Moved by: Christian Colline, P.E.

Seconded by: Terry A. Trumbull, Esq.

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

NOES: None.

NON-PARTICIPATING: None.

Thomas M. Dailey, M.D., Chair

Date 3-3-11