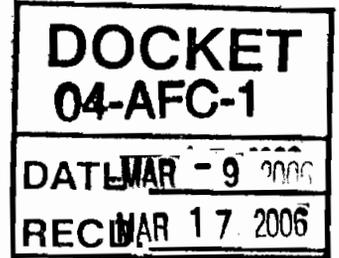


BEFORE THE HEARING BOARD
OF THE
BAY AREA AIR QUALITY MANAGEMENT DISTRICT

APPEAL

In the Matter of the Appeal of)
Californians for Renewable Energy)
)
from the City and County of San Francisco)
San Francisco Electrical Reliability Project)
Application 12344)
_____)

Docket No. 3511



MOTION TO DISMISS FOR LACK OF JURISDICTION

Pursuant to § 8.1a of the Hearing Board Rules, the City and County of San Francisco (City or CCSF) respectfully files this motion to dismiss for lack of jurisdiction. The appeal filed by Californians for Renewable Energy (CARE) is moot since the Bay Area Air Quality Management District (BAAQMD or District) has issued a revised Final Determination of Compliance (FDOC) in this matter upon review of CARE's comments. In addition, CARE's appeal is not yet ripe since there is no final agency action in this matter. Prior to issuance of an Authority to Construct, CARE will have ample opportunity to raise the concerns it has expressed in its appeal before the California Energy Commission in upcoming testimony and evidentiary hearings.

I. Background.

The City filed an application for certification (AFC) with the California Energy Commission (CEC) for a small, simple-cycle combustion turbine plant in San Francisco, the San Francisco Electric Reliability Project (SFERP). In connection with its AFC, the City filed an application for a Determination of Compliance for the SFERP with the BAAQMD. On July 26, 2005, the District issued a Preliminary Determination of Compliance (PDOC) which was served on the service list in the AFC proceeding for



the SFERP on July 27, 2005. CARE is on that service list. According to CARE, it filed comments on the PDOC with the District on August 31, 2005. The District issued a Final Determination of Compliance (FDOC) on December 15, 2005, which was served on the service list in the AFC proceeding for the SFERP on the same date.

On January 11, 2006, CARE filed an appeal of the FDOC with this Hearing Board, claiming that its comments were not considered. CARE's appeal also contends that the FDOC fails to 1) require a dust control plan, 2) address environmental justice issues raised by CARE, 3) limit startups and shutdown, 4) identify all possible control alternatives that would reduce environmental impacts as mitigation for PM2.5 impacts. CARE's appeal requests that the PDOC be re-issued and an appropriate public comment period held. On January 25, 2006, the District issued a revised FDOC. By letter dated February 1, 2006, the District responded to CARE's comments in detail.

II. CARE's Appeal Is Moot In Light of the Issuance of a Revised FDOC.

CARE's allegation that its comments were not considered is moot in light of issuance of the revised FDOC. Moreover, in light of the background described above, the relief requested by CARE is unwarranted. Irrespective of whether CARE's comments were adequately considered in advance of the issuance of the FDOC on December 15, 2005, any potential procedural defect has been corrected by the issuance of a revised FDOC on January 25, 2006, subsequent to consideration of CARE's comments.

CARE's request for reissuance of the PDOC and an additional public comment period is not warranted. Regulation 2, Rule 3-404 requires that a PDOC be noticed and subjected to public comment in advance of issuance of an FDOC. CARE and all participants in the AFC proceeding had notice of issuance of the PDOC and CARE in fact submitted comments on August 31, 2005. Thus, CARE's only legitimate concern

with regards to the requirements of Regulation 2, Rule 3-404, is whether its comments were considered in the preparation and issuance of the FDOC. Regardless of whether or not this occurred with regards to the FDOC issued on December 15, 2006, the District did consider CARE's comments in preparation and issuance of the revised FDOC on January 25, 2006. Hence any procedural defect has been cured.

III. CARE's Appeal is Not Ripe Because the Authority to Construct is the Final Agency Action in this Matter and CARE Will Have an Opportunity to Present its Concerns Before the California Energy Commission.

Even if CARE's appeal were not moot, the Hearing Board lacks jurisdiction to hear CARE's appeal because the appeal is not ripe. It is hornbook law that "an agency action is not reviewable until it is final." *Board of Med. Quality Assur. v. Superior Court* 73 C.A.3d 860, 862 (1977); see also 9 Witkin, Cal. Proc. 4th (1997), Admin Proc § 107, p.1152.

The BAAQMD will not issue its final action, the Authority to Construct, until after the CEC has issued a license for the SFERP with the appropriate conditions. The Hearing Board itself recognized in a prior case that

non-PSD portions of [an] FDOC become final only if and when all of the conditions required by the air district are included in the CEC's final licensing decision. Bay Area AQMD Rule 2-3-405 *et seq.* In developing the PDOC and FDOC, Bay Area AQMD staff work with CEC staff on the CEC staff's preliminary and final staff assessments . . . and participate in public workshops and public hearings/evidentiary hearings held by the CEC."

In the Matter of the Appeal of the City of Morgan Hill et. al., Docket No. 3350, Order Dismissing Appeal at 5, December 21, 2001.¹

The CEC AFC process is only now entering the phase of testimony and evidentiary hearings. A notice has been issued establishing a prehearing conference on

¹ The Hearing Board also recognized in that case that because parties have ample opportunities to address concerns before the CEC, the issues in any appeal of the issuance of an Authority to Construct by the District would be very limited. *Id.* at 9, footnote 8.

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE
STATE OF CALIFORNIA

APPLICATION FOR CERTIFICATION
FOR THE SAN FRANCISCO ELECTRIC
RELIABILITY PROJECT

Docket No. 04-AFC-01
PROOF OF SERVICE
**Revised 2/17/06*

DOCKET UNIT

Instructions: Send an original signed document plus 12 copies or an electronic copy plus one original paper copy to the address below:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 04-AFC-01
DOCKET UNIT, MS-4
1516 Ninth Street
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Also send a printed or electronic copy of all documents to each of the following:

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DECLARATION OF SERVICE

I, **Laura J. Murphy**, declare that on **March 17, 2006**, I deposited copies of the attached **Appeal on Motion to Dismiss for Lack of Jurisdiction of the City and County of San Francisco** in the United States mail at **Sacramento, California** with first class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above. Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. I declare under penalty of perjury that the foregoing is true and correct.


[signature]

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