

**DOCKET****07-AFC-6**DATE SEP 30 2009RECD OCT 01 2009

**BEFORE THE  
HEARING BOARD OF THE  
SAN DIEGO AIR POLLUTION CONTROL DISTRICT**

**In the Matter of:****CARLSBAD ENERGY CENTER  
PROJECT****SDAPCD Applications 985745, 985746,  
985747, and 985748****(Final Determination of Compliance)**

**CARLSBAD ENERGY CENTER LLC'S ANSWER TO  
APPEAL OF ROB SIMPSON AND CARE**

September 30, 2009

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**In the Matter of:**

**CARLSBAD ENERGY CENTER  
PROJECT**

**SDAPCD Applications 985745, 985746,  
985747, and 985748**

**(Final Determination of Compliance)**

**CARLSBAD ENERGY CENTER LLC'S ANSWER TO  
APPEAL OF FINAL DETERMINATION OF COMPLIANCE FILED BY ROB  
SIMPSON AND CARE**

Pursuant to Rule 16 of the Hearing Board of the San Diego Air Pollution Control District ("District"), Carlsbad Energy Center LLC ("Applicant") submits this Answer to Rob Simpson and CALifornians for Renewable Energy, Inc.'s (collectively, "Appellants") Appeal regarding the District's issuance of a Final Determination of Compliance ("FDOC") for the Carlsbad Energy Center Project ("CECP") (hereinafter "Appeal"). Applicant respectfully requests the Hearing Board deny the Appeal for lack of jurisdiction. Specifically, the Appeal is not ripe since no final action has been taken in this matter. Prior to issuance of an Authority to Construct permit, Mr. Simpson, as an intervenor in the Application for Certification ("AFC") proceedings before the California Energy Commission ("CEC") for CECP, has had and will have ample opportunities to raise the issues set forth in the Appeal before the CEC in upcoming testimony and evidentiary hearings.

**I. BACKGROUND**

On September 14, 2007, Applicant filed an AFC with the CEC, proposing to develop a natural gas-fired facility on a 23-acre parcel located in the City of Carlsbad in San Diego County,

California. The proposed project will be a fast-start, high efficiency combined-cycle facility capable of generating up to 558 megawatts of electricity. In connection with its AFC, Applicant filed an application for a Determination of Compliance for CECP with the District. On November 25, 2008, the District issued a Preliminary Determination of Compliance (“PDOC”) and published notice of the issuance of the same in accordance with District rules. The public comment period for the PDOC ran from November 25, 2008 through December 24, 2008. On December 18, 2008, the District extended the public comment period to January 5, 2009.

Appellant Simpson is an intervenor in the AFC proceeding, is on the CEC service list for the CECP AFC proceeding, and submitted comments regarding the PDOC. CALifornians for Renewable Energy, Inc. (“CARE”), however, is not an intervenor in the AFC proceeding, nor has CARE previously participated in the District permitting process for CECP (as evidenced by the Exhibits attached to the Appeal and the FDOC itself). The District issued an FDOC for CECP on August 4, 2009, which was served on August 6, 2009 to all parties identified on the service list for the CECP AFC proceeding.

On September 4, 2009, Appellants filed their appeal of the FDOC with the District’s Hearing Board claiming, in part, that the District failed to respond to comments, failed to identify comments in the FDOC, and failed to forward comments to the CEC.<sup>1</sup> Appellants also claim they were not informed of the final determination (except by the CEC) and that the District did not allow for a public hearing as requested by commentors. In addition, the Appeal requests the Hearing Board stay the FDOC until the United States Environmental Protection Agency determines if CECP comports with federal Prevention of Significant Deterioration requirements. Finally, the Appeal requests that the FDOC be remanded.

For the reasons set forth below, Applicant respectfully requests the Hearing Board deny the Appeal.

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<sup>1</sup> Applicant’s counsel received a copy of the Appeal via overnight mail on September 8, 2009.

## II. DISCUSSION

### A. The Hearing Board Lacks Jurisdiction to Hear the Appeal Because The District Has Not Taken a Final Agency Action

The Hearing Board lacks jurisdiction to hear the appeal because the FDOC is not an appealable agency action and, thus, the Appeal is not ripe. Rule 25 of the District rules governs appeals, and provides as follows:

Within 30 days of any decision or action pertaining to the issuance of a Permit or Certificate or within 30 days after mailing of the Notice of Issuance of the Permit or Certificate, an aggrieved person who, in person or through a representative, appeared, submitted written testimony, or otherwise participated in the action before the District, may request the Hearing Board to hold a hearing to determine whether the Permit or Certificate was properly issued.

(District Rule 25(b)(1).) Although Rule 25 notes that an appeal can be made of “any decision or action pertaining to the issuance of a Permit or Certificate,” based on the language of the remainder of Rule 25, the Rule clearly requires that the District have actually issued a Permit or Certificate before there is an “action” that is ripe for appeal.

The FDOC is not a Permit or Certificate contemplated by Rule 25. In fact, the District’s rules indicate that an FDOC is not an Authority to Construct. Specifically, the FDOC “shall confer the same rights and privileges as an Authority to Construct only when and if the Commission approves the AFC, and the Commission certificate includes all conditions of the Determination of Compliance as proposed by the Air Pollution Control Officer.” (District Rule 20.5(h) (emphasis added); *see also* FDOC at 63.) Hence, the District will not and cannot issue its final action – the Authority to Construct – until after the CEC has issued a Final Decision (a license) for CECP with the appropriate conditions.

### B. The Appeal’s Request for Stay is Procedurally Defective

Notwithstanding the fact that the Hearing Board lacks jurisdiction to consider the Appeal, Appellants also failed to properly request a stay of the FDOC according to District Rule 25(c). The Appeal seeks a stay of the FDOC, yet Appellants failed to adhere to the requirements of District Rule 25(c)(iii). Specifically, Appellants did not personally serve Carlsbad Energy Center

LLC with the Appeal, nor did a proof of service accompany the filing of the Appeal with the Hearing Board. (District Rule 25(c)(iii).)

Based on the foregoing, Appellants request for a stay should be denied.

**C. Appellant CARE Lacks Standing for the Appeal**

CARE failed to participate in the PDOC/FDOC process as required by District Rule 25. Therefore, CARE lacks standing to appeal. (District Rule 25(b)(1).)

**III. CONCLUSION**

For the reasons set forth herein, the District's issuance of the FDOC is not an appealable action. Accordingly, the Appeal should be denied.

Date: September 30, 2009

Stoel Rives LLP



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## DECLARATION OF SERVICE

I declare that I am over the age of eighteen years and not a party to this action. I am employed in the City and County of Sacramento and my business address is 980 Ninth Street, 19th Floor, Sacramento, California 95814.

On September 30, 2009, at Sacramento, California, I served the attached document(s):

### CARLSBAD ENERGY CENTER LLC'S ANSWER TO APPEAL OF ROB SIMPSON AND CARE

on the following parties:

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San Diego Air Pollution Control District Hearing Board  
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California Energy Commission  
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Mr. Rob Simpson  
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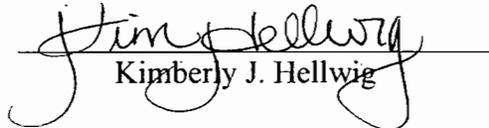
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- BY OVERNIGHT MAIL:** I am readily familiar with my employer's practice for the collection and processing of correspondence for overnight delivery. In the ordinary course of business, correspondence would be deposited in a box or other facility regularly maintained by the express service carrier or delivered to it by the carrier's authorized courier on the day on which it is collected. On the date written above, following ordinary business practices, I placed for collection and overnight delivery at the offices of Stoel Rives LLP, 980 Ninth Street, 19th Floor, Sacramento, California 95814, a copy of the attached document in a sealed envelope, with delivery fees prepaid or provided for, addressed as shown on the service list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this document was executed on September 30, 2009, at Sacramento, California.

  
Kimberly J. Hellwig