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August 26, 2013

Ted Schade, APCO
Great Basin Unified Air Pollution Control District
157 Short Street
Bishop, CA 93514

Re: Orni 50, LLC Casa Diablo IV Project

Dear Mr. Schade:

As you know, I attended a meeting of the GBUAPCD Board on July 22, 2013, at the District's request, for the purpose of advising the Board regarding its consideration of the Final Environmental Impact Report (FEIR) for the Casa Diablo IV Project. Since I had not previously been involved in the development of the FEIR or the project, my role was simply to advise the Board as to process and legal requirements related to the decision and/or the meeting. Ultimately, the Board did not make any findings with respect to the FEIR, electing to defer its deliberations until its September 16th meeting.

That deferral gave me the opportunity to better familiarize myself with the District's governing statutes and regulations. In doing so, I learned that the Air Pollution Control Officer (APCO), rather than the District Board, is legally charged with issuing the permits requested by Orni 50, LLC for the CD IV Project (i.e., the authority to construct or "ATC" permits). Specifically, Health and Safety Code section 42300 provides for the establishment of a permitting system by district boards, and for that system to require that such permits be obtained from the APCO:

Every district board may establish, by regulation, a permit system that requires . . . that before any person builds, erects, alters, replaces, operates, or uses any article, machine, equipment or other contrivance which may cause the issuance of air contaminants, the person obtain a permit to do so *from the air pollution control officer of the district*. (Cal. Health & Safety Code § 42300, emphasis added.)

Significantly, the authority to issue ATCs is not a delegated power (i.e., a power that otherwise would reside with the District Board itself but, upon the Board's delegation,

could also be exercised by the APCO). There is no statute which authorizes a District Board to issue an ATC – there is only the authority just cited (which provides for issuance by the APCO).

Consistent with section 42300, the GBUAPCD adopted District Rule 200 in 1974. Rule 200 requires that a person performing any of the activities described in the statute (building, altering, operating any article, machine, equipment etc.) obtain an authority to construct permit **from the Air Pollution Control Officer**. (See GBUAPCD Rule 200, subsection A.)

Accordingly, and unquestionably, the ATC permits for CD IV must be issued (if at all) by the APCO. This is significant because, under the California Environmental Quality Act (CEQA), the decision maker may not delegate or otherwise abrogate its responsibility to review and consider the EIR for a project it will approve. In other words, because the APCO is the decision maker as to the ATCs, he must also be the decision maker as to the EIR.

This concept has been discussed and confirmed in a number of cases. For example, in *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, a neighboring property owner challenged a rezoning approved by the city council based, among other things, on the fact that a special board created by city ordinance – rather than the council itself – had reviewed and certified the EIR. The Court agreed with the neighbor, stating that “[t]he EIR cannot serve its informational function unless it is reviewed and considered by the governmental body which takes action having an effect upon the environment.” (*Id.* at p. 779.)

This language was recently reiterated by the Fifth District Appellate Court and applied to facts much like those present here. In *Poet, LLC v. Air Resources Board* (WL 4040057, July 15, 2013), the plaintiff argued that decision making authority had been improperly split between the Air Resources Board and its Executive Officer when the Board adopted a regulation for which the Officer had conducted environmental review. (Note: no EIR was involved, since the approval was subject to a “certified regulatory program” under CEQA.)

Citing *Kleist* and other cases, the *Poet* Court noted that “the principle that prohibits the delegation of authority to a person or entity that is not a decision-making body includes a corollary proposition that CEQA is violated when the authority to approve or disapprove the project is separated from the responsibility to complete the environmental review.” (*Poet, supra*, at p. 9237.) The Court further explained that its conclusion was “based on a fundamental policy of CEQA. For an environmental review document to serve CEQA’s basic purpose of informing governmental decision makers about environmental issues, that document must be reviewed and considered by the same person or group of persons who make the decision to approve or disapprove the project at issue.” (*Id.*)

Finally, I note that I have occasionally encountered the belief that only boards or commissions – and not individuals – may certify an EIR. This is not the case. The term “decision-making body” is used throughout CEQA to describe the decision maker who approves the project or action at issue (and therefore must review and consider the EIR or other environmental document). CEQA defines “decision-making body” as “any *person* or group of people within a public agency permitted by law to approve or disapprove the project at issue.” (14 CCR § 15356, emphasis added.)

For all of the foregoing reasons, it is my conclusion that the APCO (you) must review and consider the FEIR for certification – and not the District Board. If you would like to proceed with the agenda item scheduled for September 16, as an advisory item only (i.e., so that you may gain the advantage of insights and recommendations from the District Board), that is fine. However, ultimately, you must review the environmental documents and determine whether to certify the EIR. The permits may be issued only after such certification.

If you have any questions regarding these issues, please feel free to call me at 760-924-1704 or to email me at ssimon@mono.ca.gov. Thank you for providing the opportunity to assist Great Basin. I look forward to being able to assist the District in the future if needed.

Sincerely yours,



Stacey Simon