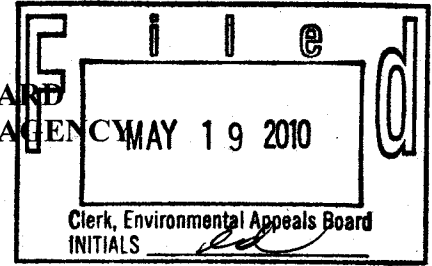


BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.



In re: )

Russell City Energy Center, LLC )

PSD Permit No. 15487 )

PSD Appeal Nos. 10-01, 10-02, 10-03  
10-04 & 10-05

**ORDER GRANTING MOTIONS TO FILE REPLY BRIEFS AND ALLOWING SUR-  
REPLY BRIEFS, DENYING MOTION TO CONDUCT DISCOVERY AND A HEARING,  
AND RESCHEDULING ORAL ARGUMENT**

On May 6, 2010, the Board issued an Order directing any petitioner interested in filing a reply brief in the above-captioned matter to file a motion to that effect by May 14, 2010. A petitioner filing such a motion was further instructed to state with particularity the arguments to which petitioner sought to respond and the reasons petitioner believed it necessary to file a reply to those arguments. The Board also authorized the filing of briefs in opposition to such requests.

The Board received timely motions requesting leave to file a reply brief from the following four petitioners: Mr. Robert Sarvey, PSD Appeal No. 10-04; Citizens Against Pollution ("CAP"), PSD Appeal No. 10-03; Chabot-Las Positas Community College District ("College District"), PSD Appeal No. 10-02; and CALifornians for Renewable Energy, Inc. ("CARE") and Mr. Rob Simpson,<sup>1</sup> PSD Appeal No. 10-05. Both the permit issuer, Bay Area Air Quality Management District (the "BAAQMD"), and the permittee, Russell City Energy Company, LLC ("RCEC"), filed oppositions to these requests.

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<sup>1</sup> Although this petition notes that Mr. Simpson is intended to be one of the petitioners, he did not sign the petition. Notwithstanding this fact, the Board has added him to the service list at his request.

## I. *Motions Filed with the Board*

### A. *Parties' Requests*

As noted above, the Board received four motions requesting leave to file a reply brief in this matter. Each petitioner who filed such a motion indicated the arguments to which it wished to respond and provided a rationale for its request to respond to those arguments.

Mr. Sarvey, in his motion, states that he wishes to provide evidence demonstrating that his petition was not untimely. Motion Requesting Leave to File a Reply Brief at 1. Mr. Sarvey also states that he wishes to respond to several substantive arguments, including the question of whether BAAQMD selected the appropriate BACT limits for start up and shut down for NOx emissions. *Id.*

In its motion, CAP lists five issues to which it wishes to respond, including two it believes to be issues of first impression before the Board. Motion of Petitioner CAP for Leave to File a Brief at 1-2. CAP also requests an opportunity to respond to a claim that it did not raise a particular issue with specificity. *Id.* at 2.

The College District, in its motion, lists six arguments to which it wishes to respond, including several substantive issues. Motion by College District for Permission to File Reply Brief to Responses by BAAQMD and RCEC at 2-6. The College District also states that it wants to respond to claims that it did not preserve certain arguments for review. *Id.* at 2.

The CARE petitioners indicate that they would like to respond to claims concerning the timeliness of the filing of their petition, as well as to address several due process issues. *See* Motion Requesting Leave to File a Reply Brief at 1-4. They also state that they wish to respond to environmental justice issues. *Id.* at 5. The CARE Petitioners further request leave to conduct discovery and a hearing prior to filing their reply brief. *Id.* at 1, 4. CARE also filed a second

motion requesting leave to file a reply. In it, CARE requests the Board take official notice of filings in two cases: (1) a Ninth Circuit case brought by Mr. Simpson against, among others, the EPA Administrator and the BAAQMD, and (2) a case brought by Mr. Boyd, CARE's President and a signatory of the petition, against the EPA before the Department of Labor's Administrative Review Board. *See* Second Motion Requesting Leave to File a Reply Brief at 1.

### B. *Oppositions*

Both BAAQMD and RCEC filed extensive, highly-detailed oppositions to the requests to file reply briefs. *See* Respondent's Consolidated Opposition to Motions Requesting Leave to File Reply Briefs ("BAAQMD Opposition"); RCEC's Opposition to Petitioners' Motion for Leave to File a Reply Brief and Motion for Expedited Consideration ("RCEC Opposition and Motion"). Both provide point-by-point responses to the arguments raised by petitioners in their motions.

## II. *ANALYSIS*

### 1. *Requests for Leave to File Reply Briefs*

The four petitioners who submitted motions for leave to file reply briefs have identified the arguments they would like to address and have provided sufficient reasons explaining why they believe it is necessary for them to file a reply. The Board believes that, at a minimum, several of these points merit further argument from petitioners.

As noted above, BAAQMD and RCEC filed lengthy, detailed oppositions to these requests. In the interests of expediting this matter, rather than taking the considerable time it would take to review the oppositions in detail, thus potentially delaying the completion of briefing, the Board believes it is preferable to grant the requests to file reply briefs and allow

BAAQMD and RCEC to reiterate any objections they still have in the context of sur-reply briefs as discussed below. The Board therefore grants these four petitioners' requests, subject to the limitations set forth below.

## 2. *Timeliness of the Sarvey and CARE Petitions*

Because several participants in this proceeding, including Mr. Sarvey and the CARE petitioners, asserted that they experienced filing problems with the CDX portal on the evening of March 22, 2010, prior to the 11:59 pm ET filing deadline, the Board investigated this issue. The Board has confirmed with CDX that Mr. Sarvey and CARE both did attempt to electronically file documents on the evening of March 22, 2010, and that there was a problem with the CDX portal that evening.<sup>2</sup>

As the Board explained at length in its Order of May 3, 2010, the Board may relax a filing deadline where special circumstances exist. Order Dismissing Four Petitions for Review as Untimely at 7 (quoting *In re AES Puerto Rico L.P.*, 8 E.A.D. 325, 329 (EAB 1999), *aff'd*, *Sur Contra La Contaminacion v. EPA*, 202 F.3d 443 (1st Cir. 2000)); *accord In re BHP Billiton Navajo Coal Co.*, NPDES Appeal No. 08-06, at 2 (EAB Apr. 24, 2008) (Order Denying Extension of Time to File Petition for Review); *In re Town of Marshfield*, NPDES Appeal No. 07-03, at 4-5 (EAB Mar. 27, 2007) (Order Denying Review)). The Board concludes that special circumstances exist here where petitioners attempted to utilize the Board's electronic filing system, the system was not functioning properly, and they submitted their petitions expeditiously

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<sup>2</sup> Moreover, both petitioners, after experiencing difficulties with CDX, did make conscientious attempts to timely file their documents with the Board by e-mailing copies of their petitions to the Clerk of the Board shortly after midnight. While the Board generally does not accept documents submitted via e-mail, in this case, because of the problems with CDX, the Board did accept these documents.

using another delivery method. Accordingly, the Board will consider those two petitions to be timely filed. Mr. Sarvey and CARE therefore need not submit further evidence supporting their claims that their petitions should be considered timely.

*3. Request for Leave to Conduct Discovery and Conduct a Hearing Prior to Filing a Reply*

The CARE petitioners request leave to conduct discovery and conduct a hearing prior to filing their reply brief. *See* Motion Requesting Leave to File a Reply Brief at 1, 4. Petitioners provide no explanation as to the reason for this request but, in any event, the part 124 regulations do not contemplate discovery and evidentiary hearings during a permit appeal. *See generally* 40 C.F.R. § 124.19. We note that petitioners have not cited any authority providing for such activities in the context of a part 124 permit appeal. CARE does cite to the part 22 regulations, which reference “Presiding Officers,” as well as to cases brought under part 22. *See* Motion Requesting Leave to File a Reply Brief at 3-4. However, because this matter is brought under part 124, the part 22 regulations and cases related to those regulations are not applicable here. For these reasons, the Board denies this request.

*4. CARE’s Request for the Board to Take Official Notice*

The CARE petitioners also request that the Board take official notice issue of filings in two cases: one before the Ninth Circuit and one before the Department of Labor Administrative Review Board. The CARE petitioners have not provided a copy of either filing nor have they provided any explanation of the relevance of these cases to the one currently before the Board. If petitioners wish the Board to take official notice of these filings, they must provide such an

explanation in their reply brief. Accordingly, the Board reserves judgment on this issue at this time.

##### 5. *Oral Argument*

RCEC requests that the Board cancel the oral argument presently scheduled for August 17, 2010. Opposition and Motion at 45. While recognizing that the holding of an oral argument is “entirely within the Board’s discretion,” RCEC suggests that none of the issues in the petitions warrant oral argument and that “the Project has already experienced substantial delay and further delay jeopardizes its continued viability.” *Id.* at 44-45. RCEC further requests that if the Board decides that oral argument is warranted, that it be held no later than June 30, 2010. *Id.* at 45.

The Board does believe that oral argument may assist it in its deliberations and therefore intends to hold argument in this matter. However, the Board understands that passage of time can be a significant factor in PSD appeals and for that reason generally expedites its review of such appeals, as it has done in this case.

More specifically as to oral argument, the August 17 date reflected the earliest date the Board could schedule argument due to various scheduling conflicts. However, recognizing the concerns raised by RCEC, the Board has been able to resolve certain of those conflicts to enable it to move up the argument to July 22, 2010, at 1:00 pm EDT. Argument will now be held on that date. The Board believes this is responsive to RCEC’s request while still allowing all parties adequate time for preparation. Further, since the Board will be reviewing the issues based on the extensive briefing even in advance of the oral argument, the Board does not believe that scheduling argument will delay the ultimate disposition of this matter.

### III. CONCLUSION AND ORDER

For good cause shown, the Board GRANTS each of the motions of petitioners Sarvey, CAP, the School District, and CARE for leave to file a reply brief. The reply briefs may not exceed twenty-five pages and must be received by the Board on or before May 28, 2010. The Board reminds all petitioners that they may not raise any new issues in their reply briefs. The Board DENIES CARE's request for leave to conduct discovery and hold a hearing prior to submitting a reply brief.

The Board also GRANTS BAAQMD and RCEC leave to file sur-reply briefs. The sur-reply briefs may not exceed forty pages and must be received by the Board on or before June 11, 2010. Each party should file one consolidated brief addressing the issues raised by all of the reply briefs.

Finally, the Board has RESCHEDULED oral argument and now intends to hold oral argument on July 22, 2010, at 1 pm EDT. Further details as to the oral argument will be provided in a future order.

So ordered.

ENVIRONMENTAL APPEALS BOARD



Edward E. Reich  
Environmental Appeals Judge

Date:

5/19/10

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing Order Granting Motions to File Reply Briefs, Establishing Page Limits, and Denying Motion to Conduct Discovery and a Hearing in the matter of Russell City Energy Center, PSD Appeal Nos. 10-01, 10-02, 10-03, 10-04, and 10-05, were sent to the following persons in the manner indicated:

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Dated:

**MAY 19 2010**

  
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Secretary