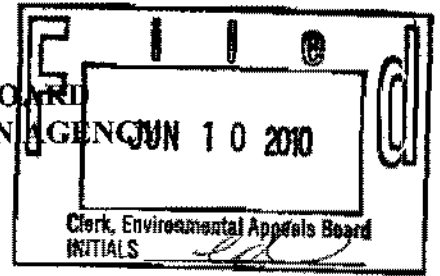


BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.



In re:)
)
Russell City Energy Center, LLC) PSD Appeal Nos. 10-01, 10-02, 10-03,
) 10-04 & 10-05
PSD Permit No. 15487)
)

**ORDER DENYING MOTION FOR LEAVE TO JOIN IN AND SUPPORT
COLLEGE DISTRICT'S PETITION FOR REVIEW AND REQUEST
FOR ADMINISTRATIVE NOTICE**

On February 3, 2010, the Bay Area Air Quality Management District ("BAAQMD") issued a prevention of significant deterioration ("PSD") permit (the "Final Permit"), Permit No. 15487, to Russell City Energy Company, LLC ("RCEC"). A number of individuals or groups filed petitions for review of the Final Permit, including Chabot-Las Positas Community College District ("College District"), PSD Appeal No. 10-02.

On April 16, 2010, the Chabot-Las Positas Faculty Association ("Faculty Association") submitted a motion for leave to "join in and support" the College District's petition for review. In its motion, the Faculty Association¹ also requests the Board take "administrative notice" of the proceedings in a matter before the California State Energy Resources Conservation and Development Commission. Faculty Association's Motion for Leave to Join In and Support the

¹ The Faculty Association is a labor Union "representing nearly 1,000 faculty of the District." Motion at 1.

College District's Petition for Review and Request for Administrative Notice ("Motion") at 3.² For the reasons discussed below, the Board denies the Faculty Association's motion.

I. ANALYSIS

A. Motion for Leave to "Join In and Support" the College District

In its motion "seek[ing] leave to file this Joinder in support of" the College District, the Faculty Association acknowledges that the deadline for filing a petition for review of the Final Permit was March 22, 2010. *Id.* at 2. It states that it missed the deadline because of difficulties with its previous counsel. *Id.* The Faculty Association claims that its joinder will not "create unnecessary delay of the ultimate resolution of this matter, and because the Faculty Association's position mirrors that of the [College] District, no party will suffer any prejudice as a result" of its participation. *Id.*

The Faculty Association asserts that it is in "the interest of justice" that its motion be granted for several reasons. *Id.* The Faculty Association states that it has been a participant in the permit proceedings up until now and that it has "valuable insight into the proceedings up to this point." *Id.* The Faculty Association attaches a copy of its resolution opposing the proposed facility to its motion. It also claims that its presence in this matter "through joinder with the [College District] is imperative to the exercise and protection of th[e] faculty members' health and safety rights." *Id.* at 3. Finally, the Faculty Association states that the College District supports the Association's joinder in this matter. *Id.* at 4.

² Although the Motion contained no pagination, for simplicity, the Board has numbered the five pages in order.

The Board's part 124 regulations do not explicitly provide for motions for "joinder," nor does the Faculty Association point to any statutory or regulatory provision authorizing its request. Indeed, it is not altogether clear what the Faculty Association is requesting here: to be added to the College District's petition as a "co-petitioner" or to be "joined" to the College District in some other way. It is also not clear whether the Faculty Association desires to file a brief or participate in oral argument on its own or in connection with the College District. *See* Motion at 2 (mentioning "participation" and "valuable insight" it can provide, suggesting intention to provide input).

The Board concludes that the Faculty Association's request appears most like a request to participate as either a petitioner or co-petitioner, despite its failure to submit a timely petition. The Board has already dismissed seven petitions because they were untimely filed, including two petitions that were one or two days late. *See* Order Dismissing Four Petitions for Review as Untimely at 8-9 (dismissing PSD appeal number 10-07, which was filed two days late); Order Dismissing Petition for Review as Untimely at 6-7 (dismissing PSD appeal number 10-06, which was filed one day late). The Faculty Association's request was received April 16, 2010, several weeks after March 22, 2010, the deadline for petitions. The Board does not believe it fair to allow this requestor to participate in essence as a petitioner (or co-petitioner) via a motion for joinder where other petitioners who submitted late petitions were dismissed from the proceeding in accordance with the regulations. Accordingly, the Board denies the Faculty Association's request for "joinder."³

³ Similarly, the federal courts, in implementing the permissive joinder rule, Rule 20 of the Federal Rules of Civil Procedure, do not interpret the rule to allow parties to avoid threshold and jurisdictional rule requirements. *E.g., Seay v. McDonnell Douglas Corp.*, 533 F.2d 1126, 1132 (9th Cir.

B. Request for the Board to Take Official Notice

The Faculty Association also requests the Board take official notice issue of the proceedings in another matter: the Matter of Application for Certification for the Eastshore Energy Center, before the California State Energy Resources Conservation and Development Commission, Docket No. 06-AFC-06. Because the Board is hereby denying the Faculty Association's motion to participate by way of joinder with the College District, its request for the Board to take official notice will not be considered.

The Board notes, however, that while the Faculty Association provides a copy of the testimony given by the College District and the Faculty Association in that matter, the Faculty Association does not provide any real explanation of the relevance of this other matter to the one currently before the Board except to state that "[i]ts inclusion in the record will assist th[e] Board in making its final determination." Motion at 3. Nor does the Faculty Association provide copies of any other portions of the proceedings of which it wishes the Board to take notice.

As the Board explained in a previous order in this matter, if persons wish the Board to take official notice of other matters, they must provide an explanation of the relevance of the other matter to the current one, which was not provided here. *See Order Granting Motions to File*

1976) (concluding that district court did not abuse its discretion in denying request for permissive joinder where request was untimely); *Ciaramitaro v. Woods*, 324 F.Supp. 1388, 1389 (D. Mich. 1971) (denying permissive joinder of several plaintiffs where jurisdictional "amount in controversy" was not met for those plaintiffs' claims, noting that the permissive joinder rule "is merely a rule for joinder of parties and is not intended to confer jurisdiction"); *McCormick v. Labelle*, 189 F. Supp. 453, 453 (D. Conn. 1960) (denying permissive joinder where plaintiffs joined to aggregate their claims to meet the requisite jurisdictional amount); *Fechheimer Bros. v. Barnwasser*, 3 F.R.D. 394, 395 (E.D. Ky. 1944) (dismissing case where plaintiff attempted to use permissive joinder rule to join several defendants to avoid jurisdictional amount requirement).

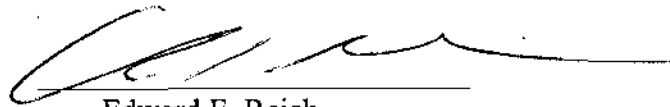
Reply Briefs and Allowing Sur-reply Briefs, Denying Motion to Conduct Discovery and a Hearing, and Rescheduling Oral Argument (May 19, 2010).

II. *CONCLUSION AND ORDER*

For the foregoing reasons, the Board DENIES the Faculty Association's motion.

So ordered.

ENVIRONMENTAL APPEALS BOARD



Edward E. Reich
Environmental Appeals Judge

Date: 6/10/10

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Leave to Join in and Support College District's Petition for Review and Request for Administrative Notice 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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