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

	)
In re: Sierra Pacific Industries	)
PSD Permit No. SAC 12-01	)
(Docket Number to be set)	)
	)
Respondent: EPA Region 9	)
	)

2nd Amended Petition by Petitioner Ed W. Coleman to Review a Decision by EPA Region 9 Presiding Administrative Officer Omer Shalev to Deny the citizens of Shasta County a Public Hearing

TABLE OF AUTHORITIES

Cases

· *In Re* KNAUF FIBER GLASS, GMBH PSD Appeal Nos. 983 through 9820, "ORDER DENYING REVIEW IN PART AND REMANDING IN PART," decided February 4,1999
· *In Re* Knauf Fiber Glass, GmbH, 9 E.A.D. 1,5 (EAB 2000)
· *Environmental Defense, et al. v. Duke Energy Corporation, 549 U.S. 561 (2007)*

Statutes:

· Administrative Procedure Act (APA), Pub.L. 79-404, 60 Stat. 237
· 40 C.F.R. § 124.19
· 40 C.F.R. §60.14
· 40 C.F.R. §51.166(b)
· 5 USCS § 702
· 42 U.S.C.§ 7475(a)(2)
· 42 U.S.C.§7411(a)(4)
· CAA § 165(a)(2)

Regulations:

Environmental Justice Guidelines

Executive Orders:

Executive Order # 12898
Executive Order # 13563
Executive Order # 12866

INTRODUCTION

Ed W. Coleman, Co-coordinator of Citizens For Clean Air ("CCA"), appeals a decision by Omer Shalev, the EPA Region 9 ("Region") authorized Presiding Administrative Officer.

Petitioner seeks standing under the Prevention of Significant Deterioration (PSD) permitting process in the hope of obtaining Region review of Best Available Control Technology ("BACT") before construction begins on this facility. Petitioner relief under the Administrative Procedures Act ("APA") and Environmental Justice Guidelines. CCA has met pleading requirements such as timeliness, standing, and issue preservation. See 40 C.F.R.. § 124.19; *In Re* Knauf Fiber Glass, GmbH, 9 E.A.D. 1,5 (EAB 2000).

On October 1, 2012, Omer Shalev issued a final decision which denied all public hearings regarding a Sierra Pacific Industries co-generation/sawmill facility planned for Shasta County. The Presiding Officer Omer Shalev violated Environmental Justice Guidelines by establishing a threshold for public involvement and then refusing to disclose that threshold to the public.

On October 15, 2012, Ed W. Coleman, on behalf of CCA, filed an appeal of the Region's decision denying a request for a public hearing.

CCA purposefully filed an appeal to the Region's final decision to deny CCA's public hearing request within the 30 day statutory deadline, as required under the APA. CCA wished to ensure that it timely appealed that decision so it could be reviewed now.

On February 20, 2013, Presiding Administrative Officer Omer Shalev issued Sierra Pacific Industries a PSD permit modification for their proposed Anderson, CA co-generation/sawmill facility. Although this action is being called a "permit modification," it is not. Rather this is using the existing sawmill's permit for a new factory that will be three times as large. Calling this a modification is deceptive and violates the letter and intent of the Clean Air Act.

42 USC § 7475 states, " No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless … a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations…"

For the reasons stated below, the Presiding Officer Omer Shalev erred when he concluded that the citizens of Shasta County should be penalized for misunderstanding the "non-disclosed threshold" required by Omer Shalev to obtain a public hearing.

It is arbitrary and capricious to create a standard that can not be met.

ISSUES PRESENTED FOR REVIEW

CCA asks that the Board review this permit decision. It can easily be demonstrated that the permit issuer made a "clearly erroneous" finding of fact and legal conclusion. Our appeal concerns an exercise of EPA discretion that was "arbitrary and capricious." The standards for granting a hearing to the public are an important policy consideration that the Board in its discretion should review.

Petitioner alleges error in the following :

A. Petitioner alleges Presiding Officer Omer Shalev erred in stating that the Region "had discretion to hold a Public Hearing if we determine there is a significant amount of public interest," but at the same time not providing details on what the threshold for the public to obtain a hearing might be.

B. Petitioner alleges Presiding Officer Omer Shalev erred in his determination that no significant amount of public interest existed.

C. Petitioner alleges that since Shasta County is an Environmental Justice community, the standard for review under Environmental Justice Guidelines in such communities is exceptionally low. Region 9 is the *lead* as well as advisory agency for Executive orders #12898 and #13563.

D. Petitioner alleges that calling the February 20, 2013 decision by Presiding Administrative Officer Omer Shalev to issue Sierra Pacific Industries a "PSD permit modification" for their proposed Anderson, CA co-generation/sawmill facility is erroneous.

It is reasonable to expect higher standards from the Region.

FACTUAL AND PROCEDURAL BACKGROUND

On October 1, 2012, Omer Shalev issued a final decision which denied all public hearings regarding a Sierra Pacific Industries co-generation/sawmill facility planned for Shasta County.

In this October 1, 2012 email, Omer Shalev stated to CCA, "... EPA does not currently plan to hold a public hearing for this proposed action. As stated in the public notice for this proposed action, 'pursuant to 40 CFR 124.12, EPA has discretion to hold a Public Hearing if we determine there is a significant amount of public interest in the proposed permit. Requests for a Public Hearing must state the nature of the issues proposed to be raised in the hearing.' To date, EPA has not received a significant amount of public interest in this project or additional requests for a public hearing. Moreover, your request for a public hearing has not stated 'the nature of the issues proposed to be raised in the hearing.' If you still desire for EPA to hold a public hearing, you must state the issues that you intend to propose at the hearing, and we must receive indications that there is a significant amount of public interest."

Ed W. Coleman, and other members of CCA, including Heidi Strand and Celeste Draisner, fulfilled all the requirements that were given above, as evidenced by the comments document record that has been made available to the public.

Under the APA, Appellants had 30 days from the final decision issued by the Presiding Officer in which to appeal that decision. Since our injury occurs under APA and Environmental Justice Guidelines, we risked losing standing if we failed to exhaust our administrative remedies by not filing before the October 30, 2012 deadline.

On February 20, 2013, Presiding Administrative Officer Omer Shalev issued Sierra Pacific Industries a PSD permit modification for their proposed Anderson, CA facility without providing a public hearing.

Despite CCA having filed an appeal with the Board on October 15, 2013 (requesting a public hearing) and despite receiving numerous and detailed letters from the public, Presiding Administrative Officer Omer Shalev refused to grant the citizens of Shasta County a public hearing.

ARGUMENT

The Presiding Officer erred in his decisions:

A. Presiding Officer Omer Shalev erred in stating that a threshold of "significant public interest" existed that would allow the Region to hold a public hearing, while simultaneously failing to provide to the public a way to obtain a hearing.

The APA requires that in order to set aside agency action not subject to formal trial-like procedures, the court must conclude that the regulation is "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law." The Presiding Officer violated Environmental Justice Guidelines and the intent of the Clean Air Act by establishing a threshold for public involvement and then refusing to disclose that threshold to the public.

It is arbitrary and capricious to conclude that the citizens of Shasta County should be penalized for not meeting the threshold. If the Region sincerely desired public participation, they would have given an accurate explanation of the threshold requirements. Anything less is an abuse of discretion.

According to the Attorney General's Manual on the Administrative Procedure Act (1947), drafted after the 1946 enactment of the APA, the basic purposes of the APA are (1) to require agencies to keep the public informed of their organization, procedures and rules; (2) to provide for public participation in the rule making process; (3) to establish uniform standards for the conduct of formal rule making and adjudication; (4) to define the scope of judicial review.

Here, by denying a public hearing, Presiding Officer Omer Shalev failed to keep the public informed. He failed to provide public participation in the rule making process. He failed to establish uniform standards for the conduct of formal rule making and adjudication.

Omer Shalev failed to define the scope of judicial review to the public he is entrusted to serve.

His failures have created a significant “injury in fact” to the health, civil rights and general welfare of the people who live in Shasta County. Shasta County, along with Los Angeles County, currently suffers from among the worst air quality problems in California.

Why are the citizens of Shasta County being denied a public hearing?

This case presents an excellent opportunity for the Board to define the scope of judicial review, as well as require the Region to keep the public informed of their organization, procedures and rules.

Pursuant to 5 USCS § 702, a person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action, may seek redress of grievances.

While the standing requirements imposed by Article III require a plaintiff to suffer a sufficient injury in fact, § 10 of the Administrative Procedure Act, requires that the plaintiff also demonstrate that he or she has prudential standing. For a plaintiff to have prudential standing under the APA, the interest sought to be protected by the complainant must be arguably within the “zone of interests” to be protected or regulated.

The citizens of Shasta County have suffered an “injury in fact,” since we have been denied a public hearing despite the Clean Air Act, Environmental Justice Guidelines and the APA. We are well within the“zone of interests,” as demonstrated by 42 USC § 7475.

Environmental Justice calls for “early and sustained” involvement of the community. Here, our repeated requests for a single hearing were denied.

B. Presiding Officer Omer Shalev erred in his determination that no significant amount of public interest existed.

Shasta County has already been identified as an Environmental Justice community. *See In Re* KNAUF FIBER GLASS, GMBH PSD Appeal Nos. 983 through 9820, “ORDER DENYING REVIEW IN PART AND REMANDING IN PART,” decided February 4,1999.

The following guidelines under Executive Order # 12898 have been violated by the Region:

1) Region did not "go above and beyond usual protocol to identify, involve and help potentially affected communities."

2) Region did not "provide opportunities for community input in the NEPA process," including identifying potential effects and mitigation measures in consultation with affected communities and improving accessibility of public meetings, official documents and notices to affected communities.

Why has Region failed to improve the accessibility of public meeting, as demonstrated here by Region Representative Omer Shalev?

C. Presiding Officer Omer Shalev erred when he failed to recognize Region is the lead as well as advisory agency for Executive Orders # 12898 and #13563.

Standards under Environmental Justice Guidelines are exceptionally low.

Since Region is the *lead* as well as advisory agency for Executive orders # 12898 and #13563, it is disappointing that a public hearing was denied.

If the Region is not held to higher standards than has been seen here in this case, the Region stands to appear inept or worse. The public will lose faith in the Region if they continue creating arbitrary and capricious standards for public involvement.

On February 11, 1994, President Bill Clinton issued Executive Order # 12898, which encourages to "the greatest extent practicable and permitted by law, and consistent with the principles set forth in the report on the National Performance Review, each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States..."

On January 18, 2011, President Barack Obama issued Executive Order # 13563, which emphasizes the importance of protecting "public health, safety and our environment while promoting economic growth, innovation, competitiveness, and job creation."

CCA advocates on behalf of job creation. It is unfair to force law abiding businesses to compete against businesses that continuously operate with "serious violations."

Air pollution has a real impact on California's economy. Figures related to asthma costs and the valuation of air pollution exposure are significant and staggering. Analyses indicate that the benefits of California's air quality program exceeds the costs by a ratio of about 3 to 1 (CARB 2003c).

An annual value of over $3.5 billion is associated with hospitalizations and the treatment of major and minor illnesses, and about 2.8 million lost workdays each year, are all related to air pollution exposure in California. In addition, the value of premature deaths resulting from exposure to air pollution in excess of the State's PM2.5 standard is $43 billion (CARB 2003a, CARB 2003b, CARB 2002a, U.S. EPA. 1999).

A cost benefit is realized when companies have to comply with community standards. Public health is protected by allowing community hearings to take place.

If Region is going to start denying public involvement now, the Board must clarify how this is

acceptable.

Executive Order # 13563 points to the need for predictability and for certainty, and for use of the least burdensome tools for achieving regulatory ends. It indicates that agencies "must take into account benefits and costs, both quantitative and qualitative." It reaffirms the principles, structures, and definitions in Executive Order # 12866, which has long governed regulatory review. It also authorizes agencies to consider, and discuss qualitatively, "values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts."

Where is the equity, human dignity and fairness in denying public hearings for an Environmental Justice community?

Executive Order # 13563 elaborates new principles to guide regulatory decision making. First, agencies are directed to promote public participation, in part through making relevant documents available on the regulations.gov to promote transparency and comment.

CCA is still waiting on an important Freedom of Information Act (FOIA) Request. This FOIA Request is for the complete comments document, which remains unavailable to the citizens of Shasta County.

Executive Order # 13563 also directs agencies to engage the public, including affected stakeholders, before rule making is initiated.

The opposite has occurred in this case.

D. Petitioner alleges that calling the February 20, 2013 decision by Presiding Administrative Officer Omer Shalev to issue Sierra Pacific Industries a "PSD permit modification" for their proposed Anderson, CA co-generation/sawmill facility is erroneous.

Although this action is being called a "permit modification," it is not. Rather this is using the existing Sierra Pacific Industries sawmill's permit for a new factory that will be three times as large. Calling this a modification is deceptive and violates the letter and intent of the Clean Air Act.

The Clean Air Act's PSD provisions require a permit when "modifications" are made to a "major emitting facility." "Modification," for the PSD program is defined by reference to the definition of "modification" found in the New Source Performance Standards ("NSPS") section of the Clean Air Act. The NSPS provisions define "modification" as "any physical change . . . which increases the amount of any air pollutant emitted . . . or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. §7411(a)(4). EPA passed regulations in 1975 implementing the statutory definition which construed a "modification" as "any physical change . . . which results in an increase in the emission rate to the atmosphere of any pollutant" 40 C.F.R. §60.14

In 1980, the EPA promulgated rules specific to the PSD program, which did not define "modification" in terms of hourly rate increases of pollutants emitted as it had under the NSPS provisions, but instead in terms of a rate of "tons per year." 40 C.F.R. §51.166(b)

On April 2, 2007 the U.S. Supreme Court ruled that PSD permitting is triggered when facility

modifications result in an increase in the annual amount of pollution emitted even where the hourly rate of emissions is not affected. *Environmental Defense, et al. v. Duke Energy Corporation, 549 U.S. 561 (2007)*

The Court held that when EPA promulgated the PSD regulations in 1980, EPA was authorized to clarify the definition of "modification" for the PSD program so long as the clarifications were "reasonable."

Nowhere in the Clean Air Act is the Region authorized to build new factories under so-called "modification" rules. It is unreasonable to build a factory that is three times as large as an existing factory on the same site and pretend that it does not require a new PSD permitting process.

The Board needs to clarify whether it is acceptable for the Region to deny an authentic PSD permitting process in an Environmental Justice community.

CONCLUSION

CCA asks that the Board direct Region to provide a well-reasoned explanation of why it declined the citizen request for a public hearing in light of the statute and regulations and how it took the Environmental Justice Executive Order into account. See CAA § 165(a)(2), 42 U.S.C. § 7475(a)(2).

It is common practice that Region, the permitting agency, holds a hearing if someone submits a written notice of opposition to the draft permit and a request for a hearing, or if the permitting agency finds a significant degree of interest in the draft permit. The permitting agency may also hold a public hearing at its own discretion.

It is uncommon to deny the public a hearing when one is so clearly desired. Region should be working to promote public participation, not remove it based upon arbitrary and capricious standards.

If the Board feels that Region Representative Omer Shalev acted appropriately and complied with the letter and intent of the Clean Air Act, we are eager to learn how.

Please reverse and remand the Region's decision to deny a public hearing.

People deserve a voice.

This is an important issue which could result in significant and lasting policy change. Environmental Justice Guidelines require meaningful involvement by the very communities the Region seeks to serve.

Respectfully submitted,
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March 30, 2013