

STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

DOCKET NO.: 01-AFC-7C
PETITION FOR RECONSIDERATION

In the matter of:
Amendment to the Application)
for Certification of the Russell)
City Energy Center Project)

**Petition for reconsideration of California Energy Commission Business
meeting Agenda Item 3 Russell City Energy Center WEDNESDAY, JULY 30,
2008**

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INTRODUCTION

Rob Simpson, Californians for Renewable Energy (CARE) Hayward Area Planning Association (HAPA) and Citizens Against Pollution (CAP) Hereby petition for reconsideration of the above referenced decision. This matter is of significance in that it addresses a major policy change of the California Energy Commission (CEC) to allow extensions of certifications without Environmental review and the resulting extension of Certification of a project in non-compliance. The results of this change in policy could result in a generation of obsolete facilities, before they are even built. Like Russell City Energy Center which is licensed to operate as a 600 megawatt peaker plant without the current Fast Start technology that would eliminate most emissions.

One reason for construction deadlines must have been to ensure that plants were constructed according to modern standards and current regulations. The CEC website discloses 17 projects approved but not yet built representing 8845 Megawatts that are potentially next affected by this change in policy. This new policy represents a significant departure from precedent, CEQA and has the regulatory process. The CEC also added this policy change to its agenda without public notice.

On July 29, 2008 the petitioner prevailed in his petition (08-01) to The Environmental Appeals Board of the United States Environmental Protection Agency. Pursuant to a violation of the Clean Air Act 40cfr124.10 , the the Federal PSD (Air) Permit for The Russell City Energy Center (planned in the City of Hayward) was Remanded (Exhibitt) On July 30, 2008 In conflict with this decision the California Energy Commission (CEC), made a finding of good cause to grant a petition to extend the projects construction deadline. (Exhibitt) Had the board reviewed the EAD remand order that was in its possession, prior to its decision it may have made a finding consistent with the Federal order and the terms of the Certification.

“Pursuant to its broad mandate, the CEC must make a specific finding that a proposed facility conforms with relevant federal and local law. See Cal. Pub. Res. Code 25523(d)(1). As the Warren-Alquist Act

states, “the [CEC] may not certify a facility * * * when it finds * * * that the facility does not conform with any applicable federal, local, or regional standards, ordinances, or laws” and “[CEC] may not make a finding in conflict with applicable federal law or regulation.” *Id.* 25525.”

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The Syllabus included:

The PSD proceedings that are the subject of this case are embedded in a larger California “certification” or licensing process for power plants conducted by the California Energy Commission (“CEC”), which is responsible for the siting of most power plants in the state. Pursuant to procedures for coordination of District and CEC proceedings, the District delegated to CEC the bulk of its 40 C.F.R. part 124 notice and outreach responsibilities with respect to the draft PSD permit for RCEC.

PSD Appeal No. 08-01 **REMAND ORDER** page 1

If the CEC had processed the petition consistent with Title 20, California Code of Regulations, section 1769(b). (as its public noticed stated) or not lost petitioners application for intervention and objection it may have made a finding consistent with California and Federal regulations.

The CEC's failure to review the Remand order from the United states Environmental Protection Agency resulted in an error in law.

The CEC can no longer rely on the Determination of Compliance from the Air District as it was certainly a part of the permit that was remanded. The Determination of Compliance can not be completed without new public notice and consideration of the comments.

MR. SIMPSON: I'd like to request that
20 you take judicial notice of the EPA appeal and its
21 decision. Thank you.

22 ACTING CHAIRPERSON BOYD: All right
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“This document includes a health risk assessment that estimates the impact of the project emissions on public health and a PSD air quality impact analysis, which shows that the project will not interfere with the attainment or maintenance of

applicable ambient air quality standards.”

page 3 FDOC

http://www.energy.ca.gov/sitingcases/russellcity_amendment/documents/others/2007-07-10_BAY_AREA_AIR_QUALITY_COMPLIANCE.PDF

“As applied to the notice violation, the allegation of error is considered to be the Permit in its entirety. *See In re Chem. Waste Mgmt. of Ind.*, 6 E.A.D. 66, 76 (EAB 1995) (holding that the Board, in accordance with its review powers under 40 C.F.R. ? 124.19, is “authorize[d] * * * to review any condition of a permit decision (or as here, the permit decision in its entirety).”

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“V. *CONCLUSION*

The Permit for RCEC is hereby remanded to the District. The District is directed to reopen the public comment period on the draft permit, providing public notice fully consistent with the requirements of 40 C.F.R. ? 124.10.32

So ordered.”

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“The PSD proceedings that are the subject of this case are embedded in a larger California “certification” or licensing process for power plants conducted by the California Energy Commission (“CEC”)”

REMAND ORDER 1

The District process for permitting power plants is integrated with the CEC’s certification process to support the latter’s conformity findings, as reflected in the District’s regulations specific to power plant permitting. *See DR, Power Plants Regulation 2 Rule 3 ?? 2-3-100 to 2-3-405* **REMAND ORDER 10**

On July 30, 2008 the CEC Considered the Extension at its business meeting. The item opened with the applicants attorney Greg Wheatland, appearing ignorant of the EAB decision.

Gregg Wheatland attorney for the project owner.

Here the construction deadlines that the

17 project has faced, we have not been able to meet

18 because of litigation that has stayed our ability

19 to commence construction. That litigation is
20 still ongoing, and we are not in a position at
21 this time, until certain matters are resolved,
22 particularly an appeal before the Environmental
23 Appeals Board,
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Upon Query from the Commission Mr. Wheatland acknowledged his awareness of the decision.

ACTING CHAIRPERSON BOYD: Well, I am
10 going to ask a question right now, because one of
11 the reasons this meeting was 15 minutes in getting
12 started is the revelation to we Commissioners of
13 the document that I'm not sure even you have seen,
14 relative to this process before the USEPA. But
15 apparently we received -- we, the Commissioners,
16 and some of the staff in this room, at about five
17 minutes after ten this morning, a document that
18 implies that the USEPA has remanded the permit
19 back to the district to reopen the public comment
20 period on the draft permit.
21 That certainly casts a different light
22 on the issue before us today. Are you aware of
23 this?
24 MR. WHEATLAND: Yes, I am aware of it.

ACTING CHAIRPERSON BOYD:
Would you like to comment on it, therefore --

2 MR. WHEATLAND: I certainly would.
3 ACTING CHAIRPERSON BOYD: -- and its
4 relevance to your petition.
5 MR. WHEATLAND: I certainly would. This
6 remand order was issued by the Environmental
7 Appeals Board of the Environmental Protection
8 Agency just yesterday afternoon...
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Mr. Wheatland described the order as follows:

The Board also realized that in the
12 interest of administrative efficiency it was
13 important that it addressed the substantive issues
14 that were raised by the appeal. And the decision
15 of the Board ruled against the petitioner on all
16 of the substantive claims that he raised. And the
17 Board indicated that if those substantive issues
18 were raised again, the Board would not consider
19 them.

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The Order in fact states:

Because issuance of the draft permit will reopen the public comment period and allow new opportunity for filing public comment, the Board, for reasons of judicial economy, refrains from opining on the substantive arguments raised in Mr. Simpson's appeal, except to the limited extent noted below...

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Because the purpose of this remand order is to remedy the District's flawed public notice of the draft permit and thus allow the public to fully exercise its public participation rights under part 124, the Board has no intention of circumscribing the range of PSD-related issues the public may raise on remand.

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ACTING CHAIRPERSON BOYD:

"We're dealing with an extension that has been
12 requested on the basis of good cause tied to the
13 USEPA receiving and dealing with an appeal of the
14 PSD permit issued by the Bay Area District. And we've heard some of what's
16 transpired on that today. And that the Bay Area
17 District has had the issue remanded back to it
18 strictly with regard to the procedure of
19 noticing of hearing and what-have-you. So, we are pretty far afield.

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While the order is based upon a pending appeal, the petitioner prevailed in this appeal. This can not be basis for an extension as it must be basis for revocation.

“The project owner's inability to commence construction is due to multiple past appeals related to the Commission's decision and a **pending** appeal of the project's PSD permit, a federal air permit, at the Environmental Appeals Board of the U.S. Environmental Protection Agency.”

ORDER APPROVING a Petition to Extend the Deadline for Commencement of Construction. (emphasis added)

AQ-SC6 The project owner shall provide the CPM copies of all District issued Authority-to-Construct (ATC) and Permit-to-Operate (PTO) for the facility. The project owner shall submit to the CPM for review and approval any modification proposed by the project owner to any project air permit. The project owner shall submit to the CPM any modification to any permit proposed by the District or U.S. EPA, and any revised permit issued by the District or U.S. EPA, for the project. *Commission decision 85*

The EPA remand order absolutely speaks to the CEC licensing of this project. The CEC does not have the authority to ignore this order. It demonstrates that the license is inconsistent with the Clean Air Act and the extension constitutes an override of the EAD.

1752.3. Presiding Member's Proposed Decision; Air Quality Findings.

(a) The presiding member's proposed decision shall include findings and conclusions on conformity with all applicable air quality laws, including required conditions, based upon the determination of compliance submitted by the local air pollution control district.

The CEC's failure to provide public notice of its addition to the agenda was an error of law.

At the hearing the the CEC added 1720.4 to the agenda and removed 1769. This maneuver undermined the open meeting, misinformed the public and prevented public participation.

On June 13, 2008 the California Energy Commission issued public notice of the standard of review and July 30, 2008 meeting:

“A request for a two-year extension of the deadline for the commencement of construction of the Russell City Energy Center (RCEC), signed under penalty of perjury by the project owner, was submitted to the Energy Commission for review and approval as required by Title 20, California Code of Regulations, section 1769(b).”

NOTICE OF RECEIPT PETITION TO EXTEND CONSTRUCTION DEADLINE FOR THE RUSSELL CITY ENERGY CENTER PROJECT (01-AFC-7C)

The notice further stated that “the public may comment on this petition”. Despite the short notice opportunity (June 13 - July 1, 2008) and pursuant to the provisions of 1769 Many parties commented including:

CARE

The County of Alameda,
The National Audubon Society,
The California Native Plant Society,
Chabot-Las Positas Community College District,
Citizens Committee to Complete the Refuge
Local Green Energy Alliance,
Aircraft Owners and Pilots Association
East Bay Regional Park District
Hayward Area Shoreline Planning Agency
San Lorenzo Village Homeowners Association,
Citizens Against Pollution,
Hayward Area Planning Association,
**and approximately 1000 citizens including petitioner Rob Simpson.
All of which are hereby incorporated by reference.**

THE APPROVAL ORDER SUMARIZED PARTICIPATION AS FOLLOWS:

“The Commission received *several* public comments protesting the extension, but there was no evidence refuting the petitioner's statements and reasons supporting its request for the extension.” (emphasis added) ORDER APPROVING a Petition to Extend the Deadline for Commencement of Construction

MR. BELL: Thank you. Good morning,
11 Commissioners. Kevin Bell, Staff Counsel.
12 Staff received a petition for extension

13 for the deadline of construction for the Russell
14 City Energy Center. and analyzed that petition
15 under the appropriate legal standard, which is
16 section 1720.3, which provides for extensions of
17 time to commence construction upon a showing of
18 good cause. July 30, 2008 CEC business meeting page16

“No item shall be added to the agenda subsequent to the provision of this notice,”
GOVERNMENT CODE SECTION 11125(b)

In his preamble to; why none of the objections to the extension had merit, Staff Counsel Kevin Bell expressed that the public had responded to misleading notice and that this proceeding would not be conducted pursuant to their “standard form.” Had the public been given this information in the Public notice they may have responded to 1720.3 and the arbitrary and capricious action of extending this project inconsistent with the Districts “standard form“(1769). The individuality of both notices demonstrates that “standard form” could not have referred to the page layout.

Kevin Bell, Staff Counsel.

1 I will note that the notice
2 of receipt mentioned 1769 that was sent out in
3 East Altamont and in this matter was in error.
4 It's a standard form that goes out, and we
5 apologize for any confusion that that may have
6 caused. July 30, 2008 CEC business meeting 25

Notably the referenced “East Altamont” was then processed pursuant to (albeit subsequent) 1769 analysis

MR. BELL:

That's correct, Madam
12 Chairman. Mr. Sarvey and other concerned members
13 of the public have filed comments, and they've
14 raised some very valid issues. But those are the
15 types of issues that will be handled in staff's
16 subsequent analysis under 1769(a) once the project
17 owner files, in a timely manner, a petition to
18 amend this project. Then staff will get a chance

19 to look at those areas.

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This additional demonstration of failed notice was certainly not a harmless error and Mr. Bell's apology did not correct the defect.

11120. It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed. In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly. The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

11125.7. (a) Except as otherwise provided in this section, the state body shall provide an opportunity for members of the public to directly address the state body on each agenda item before or during the state body's discussion or consideration of the item.

At the hearing the Commission ignored its published public notice and rules. 1769(B) would have caused environmental review consistent with preceding applications, and objections would have been heard. They also apologized for an "error" in their public notice but did not correct the mistake and in fact dismissed all objections based upon the objectors response to the "error"

The Public was further misled by the Public Advisors notice:

“Post-Certification

FREQUENTLY ASKED QUESTIONS

What happens when a power plant applicant wants to modify a project that has already been approved?

Once a final decision has been made in the certification process for approval of a

power plant project, an applicant must file a petition with the energy commission for any modification it proposes to the initial project design, operation or performance requirements.

What must be included in this petition?

The applicant must indicate:

- The proposed modifications and its necessity.
- If the modification is based on information that was known to petitioner at time of certification proceeding, an explanation as to why issue wasn't raised at the time of application.
- If modification is based on new information, an explanation as to why the change should be permitted if it changes or undermines the assumptions upon which was the basis of the original decision.
- A listing of any environmental impacts and proposed measures to mitigate them.
- The modification's impact on the facility's compliance with laws, ordinance and regulations.
- A listing of possible impacts to the public and nearby property owners. What factors will the Commission assess when making a determination of whether the modification is significant?

A modification is not considered significant and the modification can be made without further commission approval when the Commission finds that:

- The modification will have no significant effect on the environment;
- that the change would not affect a condition adopted by the commission in the final decision;
- the changes will not affect a plant's compliance with laws, ordinances, regulations, or standards; and
- There are no objections to staff's determination that the project change is insignificant.

The CEC's failure to provide public notice has been an ongoing aspect of this proceeding. It has been appealed by the County of Alameda Chabot College, and group petitioners. It is demonstrated again in this business meeting. Petitioner has repeatedly requested from the Docket unit, The Compliance manager and the Public Advisors confirmation of a post-certification mailing list, because there is no compliance docket posted on the website and no evidence that the CEC sent notice to anyone regarding this petition. Many members of the public have

commented on these proceedings yet have not been provided notice.

The Federal Decision clearly validated the county's position about notice that it had appealed to the California Supreme Court and CEC. The Federal statute is very specific that this particular notice be provided to the "Supervisors" This notice would serve as the Executive Summary, that would have given the supervisors the vital information that they needed to comment on the polluter.

The District's almost complete reliance upon CEC's certification related outreach procedures to satisfy the District's notice obligations regarding the draft permit resulted in a fundamentally flawed notice process.

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Additional evidence offered by Mr. Simpson regarding the District's notice to third persons fortifies our view that the District's reliance upon CEC's certification procedures resulted in a flawed notice process. For example, it appears that CEC's outreach efforts did not satisfy the obligation to "inform the chief executive[] of the * * * county where the major stationary source is located" with respect to the RCEC project. *See supra* Part IV.C.; 40 C.F.R. ? 124.10(c)(1)(vii); Pet. For Review at 2. In this regard, the District has not disputed the assertion by Gail Steele, of the Alameda County Board of Supervisors (whose jurisdiction includes Hayward), that she did not receive notice of the PSD permitting for the RCEC project. *See Steele* Dec 1.

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11130. (a) The Attorney General, the district attorney, or any interested person may commence an action by mandamus, injunction, or declaratory relief for the purpose of stopping or preventing violations or threatened violations of this article or to determine the applicability of this article to past actions or threatened future action by members of the state body

The CEC losing the petitioners objection and application for intervention precluded petitioner from participating.

Had the CEC reviewed the objection that included the EAB appeal they may have come to the same conclusion that the EAB did

On July 29, 2008 having no response to the application for intervention and finding no docketed record of the bulk of the his Objection which included his Environmental Protection Agency(EPA) Appeal and over 900 objections from the public, Mr. Simpson contacted the CEC.

The documents were purportedly lost. Mary Dyas the Compliance officer confirmed by Email “no one has seen the binder of information you are mentioning.”

Kevin Bell, Staff Counsel confirmed by email:

“I have not received this information.”

And then later in the day the documents were found

Mr. Bell:

“I have not seen the request, but I was told that it was found. Any decision on a request to intervene will be made by the Commission, and at this time, absent additional information, I have no plans to file a response before tomorrow's business meeting.”

MR. SIMPSON:

I filed a timely application for
14 intervention into this proceeding with hopes that
15 I'd get a ruling on that before this hearing.
16 Apparently it was lost by the CEC docket unit and
17 found yesterday.

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MR. BELL: All I'll say at this point is
that I found out about this application for
2 intervention yesterday at the end of the day. And
3 that's -- I haven't had a chance to respond to it
4 in these proceedings.

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Mary Dyas, Compliance Project Manager.

I would like to just make one
6 comment as Mr. Simpson had stated, the bulk of his
7 comments were lost, so to speak, in dockets. But
8 you did receive the original 30 pages that did get
9 filed. But I just wanted to make sure that you

10 were aware of that, that there were the first 30
11 pages, it was the remainder of the binder that he
12 filed.

13 ACTING CHAIRPERSON BOYD: Yes, we have
14 seen that material.

15 MR. SIMPSON: But what you didn't
16 receive was the bulk of the EPA appeal, which is
17 the basis of what's wrong with this project. The
18 EPA has, I don't know how this could be ignored at
19 this point, the EPA has said that this permit is
20 remanded. 21 So, do you approve projects without a
22 valid air permit?

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The CEC's loss of petitioners application should not prejudice the petitioner. The Commission did not consider intervention relevant. This should not be construed to prevent standing for petitioning for review. It must be seen to confirm petitioners standing as being a party to the Business meeting or the petition for intervention should be granted.

ACTING CHAIRPERSON BOYD:

I think we're
9 struggling with the relevance or even the
10 appropriateness of a petition to intervene in this
11 hearing where by presenting yourself today as
12 somebody who wanted to speak to this issue, and
13 whose testimony would be taken into consideration,
14 you are afforded the opportunity to present to us
15 what your views on the issue before us today

The project is not in compliance with the terms of the Certification.

Because the new, start of construction, deadline date Sept 10, 2010 is past the previous Operation deadline “summer 2010”. The Extension of the Construction deadline is inherently a modification of the operation deadline and subject to review under 1769(a)(1). Or it is in non-compliance with the final Commission Decision.

“After the final decision is effective under section 1720.4, the applicant shall file with the commission a petition for any modifications it proposes to the project design, operation, or performance requirements.”

1769(a)(1)

Construction and Operation

The Applicant proposes beginning construction of the project in the second quarter of 2008 and take approximately 25 months to complete it. Commercial operation is expected to begin by the summer of 2010.

Final commission Decision Oct 2, 2007 page 15

Ignorance of 1769 in extension proceedings undermines any reason for time limits on permits.

COMMISSION ADOPTION ORDER 07-0926-04

1. The petition meets all the filing criteria of Title 20, California Code of Regulations, section 1769(a), concerning post-certification project modifications;
2. The project will remain in compliance with all applicable laws, ordinances, regulations, and standards;
- 3.

Conclusion

The CEC exceeded its authority in approving the Extension petition. This has resulted in a certificate granted in conflict with state and Federal Laws. It is requested that the CEC reconsider this decision and reject the petition or process it consistent with the legal requirements.

Respectfully submitted on August 27, 2008

By Rob Simpson
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