

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

In re Russell City Energy Center)	PSD Appeal No. 10-5 (CALifornians
)	for Renewable Energy, Inc. (CARE)
Russell City Energy Company, LLC)	and Rob Simpson Petitioners
PSD Permit Application No. 15487)	
)	Motion Requesting Leave to
)	File a Reply Brief.

In accordance with the May 6, 2010 Environmental Appeals Board Order Establishing Requirements for Motions to File a Reply Brief Petitioners CALifornians for Renewable Energy, Inc. (CARE) and Rob Simpson respectfully requests leave to conduct discovery and a hearing prior to filing a reply brief in response to the briefs filed by the Bay Area Air Quality Management District (BAAQMD or District) and the project Applicant Russell City Energy Center.

Petitioners where timely

According to the District and the Russell City Energy Center the Board should Summarily Dismiss the Petition unless its untimeliness resulted from problems with the CDX Electronic Filing System. Petitioners wishes to respond to allegations that the petition was untimely. Petitioner Rob Simpson attempted to submit our Petition for Review to the CDX system but the system malfunctioned. Mr. Simpson claimed that he took a lot of time trying to make the the CDX system accept filing. Mr. Simpson encountered other petitioners with the same problem. He contacted Mr. Boyd President of CARE just prior to 9PM Pacific Standard Time to advise him that the CDX was down and that he would attempt to e-mail their Petition to the Clerk of the Board before 9PM California time which is Midnight Washington DC time. Mr. Simpson’s computer crashed just before 9PM¹ so Mr. Boyd e-mailed the Petition to the Clerk of the Board at approximately two minutes past 9PM California time.

Petitioners contend however that the east coast time isn’t the relevant time standard “where the March 22, 2010, deadline was clearly set forth in the documentation

¹ Mr. Simpson did start sending the Petition starting before 9PM to the Clerk of the Board successfully sending several exhibits including a photograph of the District’s records cabinet only before his computer crashed. He couldn’t send more than 10 Mbytes at a time so he had to send the Petition in several e-mails which he started before 9PM.

*the District issued with respect to the Final PSD Permit*² since the District's Notice states "Appeals must be received by the EAB by this date to be timely. This date provides 45 days from permit issuance to file appeals, which is greater than the minimum 30 days required by law."³ Therefore the District waived the east coast time by adopting their own time standards (not the EAB's of 30 days) which we presumed was "45 days from permit issuance" based on a California time standard where the Notice was issued. If the District expected the public to know that Petitions for Review were due no later than 9PM California time they should have so stated this fact on the Notice but they failed to do so.

In any case as demonstrated above Petitioners attempted in good faith to meet the east coast timeline anyways when the EAB's CDX system was down so any argument against using a California based time zone otherwise is moot. Respondent has not demonstrated Harm from any purported late filing and none occurred. Respondent has not successfully filed its response in a timely fashion but petitioner does not wish to waste the Boards time complaining about that. Petitioners request to be excused by the Board for if it determines that the filings were untimely.

Issues of due process

According to the District and the Russell City Energy Center they claim the District did not violate Petitioners' rights under the topic, *The District Provided Ample Opportunities for Meaningful Public Participation*:

A. The District Made All Of The Supporting Administrative Record Documentation On Which The Permit Analysis Was Based Available For Public Review

B. The District Also Duly Responded To Petitioner Rob Simpson's Public Records Act Requests; But Public Records Act Compliance Is Not A Proper Issue For A PSD Permit Review In Any Event

C. The District Made The Permit Application Available For Public Review 19

D. The District Properly Clarified The Permitting History For This Project In Its Additional Statement of Basis and Responses to Public Comments.

² See BAAQMD Motion to Dismiss at page 7 EAB Filing #27 Received via CDX Electronic -- Response to Petition for Review Requesting Summary Dismissal -- PSD 10-05 (04/08/2010)

³ See Notice of Issuance of Final Prevention of Significant Deterioration (PSD) Permit for the Russell City Energy Center #30.01 Declaration of Alexander G. Crockett, Esq. in Support of Responses Requesting Summary Dismissal Exh. 1 (Prevention of Significant Deterioration Permit) (04/08/2010)

E. 40 C.F.R. Section 51.166 Does Not Govern PSD Permitting Under 40 C.F.R. Section 52.21; And In Any Event The District Issued The Permit Within One Year Of The Application.

F. Petitioners Are Wrong That The District Has Contended That The Remand Order Resolved Substantive Issues.

First regarding Russell City Energy Center Petitioners fail to see how the Applicant is in any position to weigh in on this since this is a matter solely between Petitioners and the District. The Applicant Russell City Energy Center would (or should) have no knowledge in regards to this issue; unless of course the BAAQMD advised them and assisted them to file similar arguments, which should be improper since the District would then be admitting to participating in a corrupt organization with Russell City Energy Center regarding our Petition.

The District argues “[t]he main thrust of Petitioners’ argument in this regard is an assertion that the District did not provide an “accessible docket” for the proceeding. *See* Petition 10-05 at 4-5. This claim is completely false.” According to the EAB handbook “A party’s right of appeal to the EAB is “limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction.” 40 C.F.R. § 22.30(c)... The EAB generally reviews both the factual and legal conclusions of the Presiding Officer *de novo*. [4] See 40 C.F.R. § 22.30(f) (The EAB has authority to “adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed”); *In re Billy Yee, TSCA* Appeal No. 00-2, slip op. at 13 (EAB, May 29, 2001), 10 E.A.D. . . . However, the EAB has stated that it will generally give deference to findings of fact based upon the testimony of witnesses because the Presiding Officer is in a position to assess their credibility.[5] Moreover, the EAB has ordinarily not reversed decisions based on minor pleading deficiencies.[6]

⁴ See the Administrative Procedure Act, 5 U.S.C. § 557(b) (“On appeal from or review of the initial decision, the agency has all the power which it would have in making the initial decision except as it may limit the issues on notice or by rule.”). See also *In re H.E.L.P.E.R., Inc.*, 8 E.A.D. 437, 447 (EAB 1999) (stating that “[t]he Board reviews the Presiding Officer’s factual and legal conclusions on a *de novo* basis”).

⁵ “When a Presiding Officer has ‘the opportunity to observe the witnesses testify and to evaluate their credibility, his factual findings are entitled to considerable deference * * *.’” *In re Chempace Corp.*, 9 E.A.D. 119, 134 (EAB 2000), citing *In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994). See also *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998). The EAB has also given deference to presiding officers on decisions regarding the admissibility of

Second as to the evidence in the record presented by Petitioners and other Parties that have filed for the Board's review in *Russell City* we believe the evidence speaks for itself. The EAB applies the "preponderance of the evidence" standard established by 40 C.F.R. § 22.24(b). See *In re The Bullen Companies, Inc.*, 9 E.A.D. 620, 632 (EAB, Feb. 1, 2001)." Pursuant to section 22.24:

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

(b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

The EAB has stated that the "preponderance of the evidence" standard requires that "a fact finder should believe that his factual conclusion is more likely than not." *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998).

Technical issues

The remaining issues are technical issues related to the project that Petitioners believe require adjudication by the Board that will require an opportunity for additional discovery by the Parties prior to filing Briefs. Based on our past experiences with the respondents on A and B above we believe the Board may be required to compel the respondents to reply. Since this is Petitioners first opportunity to carry out discovery on Russell City Energy Center we ask for reasonable period for discovery on the District and Russell City Energy Center, followed by an opportunity for an prehearing conference, evidentiary hearings, and then the reply briefing.

Issues from Prior appeals.

evidence, *In re Great Lakes Div. of Nat. Steel Corp.*, 5 E.A.D. 355, 368 (EAB 1994), and decisions regarding discovery, *In re Billy Yee*, TSCA Appeal No. 00-2, slip op. at 13 (EAB, May 29, 2001), 10 E.A.D.

⁶ As it stated in *re Port of Oakland*, 4 E.A.D. 170, 205 (EAB 1992), the Board "adheres to the generally accepted legal principle that 'administrative pleadings are liberally construed and easily amended.'" See also *In re Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 525 n.11 (EAB 1993).

Respondents claim that "Unresolved Issues from Prior Appeals Cannot Be Incorporated by Reference" PGE 64 Should the Board consider this a correct interpretation we would like the opportunity to brief the "unresolved issues".

Environmental Justice

We would like the opportunity to respond to these issues

Conclusion

We would like the opportunity to reply to all of the respondents issues.

CAIifornians for Renewable Energy, Inc. (CARE) is a non-profit corporation serving the educational and charitable purposes, and Mr. Simpson is a member of CARE. Mr. Boyd, Brown, and Simpson are unpaid volunteers exercising their lawful rights before the Board without the benefit of legal counsel. The District and Applicant have paid staff and legal counsel too. We ask therefore that the Board accommodate the fact that this could create a barrier to our participation and unfair advantage to the District and Applicant, should the Board or respondents desire clarification of any issue that we present we are happy to provide it.

Therefore CARE and Rob Simpson respectfully requests leave to conduct discovery and a hearing prior to filing a reply brief in response to the briefs filed by the District and the project Applicant Russell City Energy Center.

CARE and Rob Simpson wish to preserve their right to petition jointly and severely and Rob Simpson would like to be added to the service list for this proceeding at the below address.

Rob Simpson
27126 Grandview Avenue
Hayward CA. 94542
rob@redwoodrob.com

Respectfully Submitted,



Michael E. Boyd President
CAIifornians for Renewable Energy, Inc.
(CARE)
5439 Soquel Drive

Soquel, CA 95073
Phone: (408) 891-9677
E-mail: michaelboyd@sbcglobal.net



Mr. Lynne Brown Vice-President
CALifornians for Renewable Energy, Inc.
(CARE)
24 Harbor Road
San Francisco, CA 94124
E-mail: l_brown369@yahoo.com

May 14th, 2010

Verification

I am an officer of the Appellant Corporation herein, and am authorized to make this verification on its behalf. The statements in the foregoing document are true of my own knowledge, except matters, which are therein stated on information and belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.
Executed on this 14th day of May 2010, at San Francisco, California.



Lynne Brown Vice-President
CALifornians for Renewable Energy,
Inc. (CARE)

Certificate of Service

I hereby certify that on May 14, 2010 I sent copies of the foregoing document *CARE and Robert Simpson's Request for Leave to File a Reply Brief in the matter of the Russell City PSD Appeal Nos. 10-01, 10-02, 10-03, 10-04, 10-05, 10-06* were sent to the following persons by first class mail and email where available.



Carol Paramoure
5439 Soquel Drive
Soquel, California 95073

By First Class Mail:

Alexander G. Crockett
Assistant Counsel
Bay Area Air Quality Management District
939 Ellis Street
San Francisco, CA 94109
fax: (415) 749-5103

Andy Wilson
California Pilots Association
P.O. Box 6868
San Carlos, CA 94070-6868

Jewell L. Hargleroad
Law Office of Jewell Hargleroad
1090 B Street, No. 104
Hayward, CA 94541

Helen H. Kang
Kelli Shields
Patrick Sullivan
Lucas Williams
Environmental Law and Justice Clinic
Golden Gate University of Law
536 Mission Street
San Francisco, CA 94105
fax: (415) 896-2450

Nancy Marvel
Office of Regional Counsel
US EPA Region 9
75 Hawthorne St.
San Francisco, Ca. 94105-3901
FAX (415) 947-3571

Robert Sarvey
501 W. Grantline Road
Tracy, CA 95376

Michael E. Boyd, President
CALifornians for Renewable En
5439 Soquel Drive
Soquel, CA 95073

Lynne Brown
CALifornians for Renewable En
24 Harbor Road
San Francisco, CA 94124

Juanita Gutierrez
2236 Occidental Road
Hayward, CA 94545

Kevin Poloncarz
Holly L. Pearson
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111
fax: (415) 262-9201